

**THE JURISPRUDENCE OF STEVE BIKO: A STUDY IN
RACE, LAW AND POWER IN THE "AFTERLIFE" OF
COLONIAL-APARTHEID**

by

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Declaration of Originality

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Summary

The Jurisprudence of Steve Biko: A Study in Race, Law and Power in the "Afterlife" of Colonial-apartheid

This study contemplates the development of a South African critical race theory (CRT) with reference to the thought of Steve Biko. From a long view, the aim of this research is to bring the insights of the Black Radical Tradition to bear on the study of law and jurisprudence with particular focus on the problem of "post-apartheid South Africa". Working from the scene of the "afterlife" of colonial-apartheid and situated at the intersection of critical race theory (CRT) and Black Consciousness (BC), this study aims to develop an alternative approach to law and jurisprudence that could respond to the persistence of race and racism as the deep and fundamental fault-lines of post-1994 South Africa.

The transition to a "new" South Africa, undergirded by the discourses of human rights, nation-building and reconciliation and underwritten by a liberal and Western constitution followed a path of change and transformation which has resulted in the reproduction of colonial-apartheid power relations. Settler-colonial white supremacy as both a structure of power and a symbolic order continues to determine, shape and organise the South African socio-economic, cultural, political, psychic and juridical landscape. This foregoing problem has remained largely unthought in the South African legal academy and therefore this research takes up the task of recalling the thought, memory and politics of Steve Biko in search of a critical and

liberatory perspective that could counter dominant theoretical and jurisprudential accounts of the past and present.

The study therefore explores Biko's historical interpretation of the South African reality and his theorisation of concepts such race, identity and liberation and retrieves these in order to critique and contest both post-1994 law, society and jurisprudence as well as the faulty epistemological, historical, and ideological terms on which they are based. In the end, the study proposes to read Biko's thought as standing in the guise of a jurisprudence of liberation or post-conquest jurisprudence which unsettles the very foundations of "post"-apartheid law and reason.

KEYWORDS: Steve Biko; Black Consciousness; jurisprudence; critical race theory; racism; "post-"apartheid South Africa; decolonisation

Dedication

This thesis is dedicated to the memory of my beloved Mother

Lebogang Nyembe (nee Modiri)

(1966 - 2006)

No doubt a worthy ancestor, she joined her parents, my grandmother **Ruth Lefelwana Snr** and grandfather **Molefi Ishmael Modiri**, her brother, Uncle **Zaccheus Modiri**, my brother **Ishmael Maniki Modiri** and my Uncle-in-Law **Judah Lethole**. I write this thesis in honour of their memory as well.

Robalang ka kgotso bakwena

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Table of Contents

<i>Declaration of Originality</i>	i
<i>Summary</i>	iii
<i>Dedication</i>	v
<i>Acknowledgements</i>	vi
1 <i>Introduction</i>	1
1.1 Problem statement	1
1.2 Motivation and background	4
1.3 Research questions	15
1.4 Overarching theoretical framework: race, time and the “afterlife”	17
1.5 A note on approach, politics and method	27
1.6 Chapter overview	34
2 <i>Race, Law and the ‘Incomplete’ Transition</i>	39
2.1 Introduction	39
2.2 Current approaches to race and law in the post-1994 context	41
2.2.1 <i>The legalist/constitutionalist approach</i>	42
2.2.2 <i>The critical political/leftist approach</i>	45
2.3 “Race trouble”: living in strange places while lost in transformation	48
2.4 (Blocked) passages to freedom and reconciliation: a denial of justice	53
2.5 Sovereignty, historical justice and “the constitutionalisation	

	of injustice"	67
2.6	Conclusion: the impossibility of being "post-"apartheid	79
3	<i>Biko as a Critical Theorist of Race: Reading Black Consciousness as Social and Political Philosophy</i>	82
3.1	Introduction	82
3.2	Biko as theorist and philosopher	84
3.3	Black Consciousness: the history of an Idea	87
3.4	The philosophy of Black Consciousness: themes and concepts	130
	<i>3.4.1 Race and racism</i>	131
	<i>3.4.2 Identity</i>	158
	<i>3.4.3 Liberation</i>	169
3.5	Locating Biko: reclaiming the rebel tradition	179
3.6	Conclusion	186
4	<i>"Who's Afraid of Critical Race Theory": Blackness, Revolt and the African Diaspora</i>	193
4.1	Introduction: bridging and breaching divides	193
4.2	Cutting the border, crossing the Atlantic: notes on the "Ties that Bind"	201
4.3	Africa as memory and symbol of black radicalism	215
4.4	Critical Race Theory today	225
4.5	Critical Race Theory and beyond: South African (re)visions	246
4.6	Conclusion	273
5	<i>Reading Biko Jurisprudentially (or, Towards a Jurisprudence of Liberation)</i>	279
5.1	Introduction	279
5.2	Black Consciousness and "general jurisprudence": race,	

	(in)justice and the social	284
5.3	"A subjectivity against the law": Biko in the courtroom	294
5.4	Towards a critique of "post"-apartheid reason	330
5.5	Critique, liberation and reimagining jurisprudence: Biko's prophecy	357
5.6	In place of a conclusion: on the possibility conditions for a jurisprudence of liberation	365
6	<i>Coda: Black Consciousness and the "Counter-aesthetics" of "Post"-apartheid Law</i>	371
6.1	Beginning, ending: in the time of Biko	371
6.2	Retracing the "jurisprudence of Steve Biko"	377
6.3	Black Consciousness as/and the counter-aesthetic	381
6.4	Ending, beginning: Biko's last word?	387
	<i>Bibliography</i>	389

"The dialectic that brings necessity into the foundation of my freedom drives me out of myself. It shatters my unreflected position. Still in terms of consciousness, black consciousness is immanent in its own eyes. I am not a potentiality of something; I am wholly what I am"

- Frantz Fanon

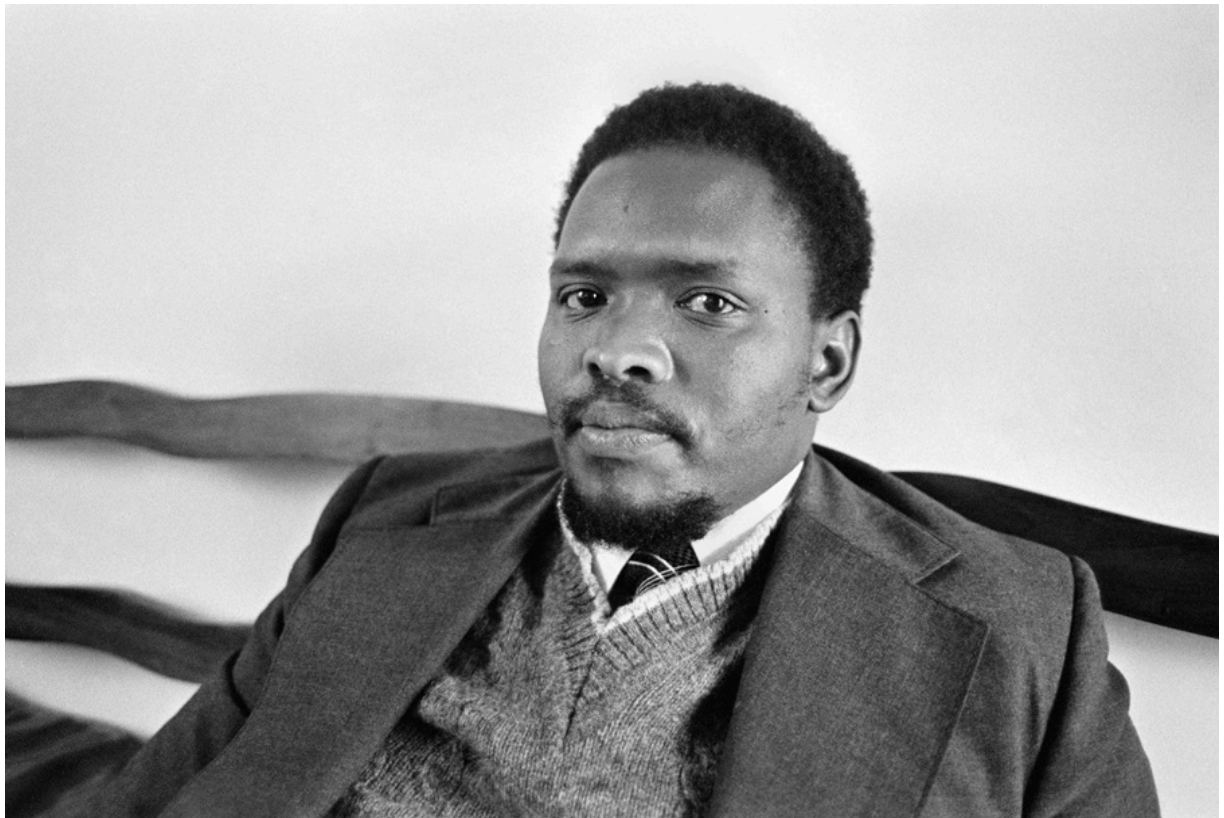


Image: Steve Biko in King William's Town (3 September 1976). Source: John F Burns/New York Times.

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1

Introduction

Things have changed, and things have not changed in South Africa.¹

1.1 Problem statement

This study contemplates the development of an indigenous South African critical race theory (CRT) with reference to the thought of Steve Biko. In particular, this study seeks to open an investigation into how both critical race theory and Black Consciousness (BC) could offer critical interventions into the fundamental paradox of “post”-apartheid South Africa, namely the continuation and escalation of racial inequalities and social hierarchies produced through over 350 years of white colonial domination in a “new” constitutional order that espouses non-racial and egalitarian ideals.² It will be argued that Biko’s political and intellectual project (encapsulated in the theory and practice of Black Consciousness) could be read as offering powerful insights on understanding and transforming the relationship between race, law and power and thus could be seen as an anti-racist critique of law³ within the framework of a “general jurisprudence”.⁴ Accordingly, in this study, Biko’s writings on black identity, liberation, racism and white power, and apartheid will be brought into

¹ A van Blerk “Critical Legal Studies in South Africa” (1996) 113 *SALJ* 87.

² See S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002), K Durrheim *et al* *Race Trouble: Race, Identity and Inequality in Post-apartheid South Africa* (2011) and S Terreblanche *Lost in Transformation* (2012).

³ K Crenshaw *et al* “Introduction” in *Critical Race Theory: Key Writings that Formed the Movement* (1995) xiii – xxxii.

⁴ C Douzinas and A Gearey *Critical Jurisprudence: The Political Philosophy of Justice* (2005) 10.

conversation with, and read through the lens of, critical race theory in order to develop a critical legal theory of race suited to the present South African context.

The aim of the study is not for Biko to be fitted “neatly” into the discipline of law or the canons of mainstream legal theory but rather the precise opposite – to disrupt and expand the terms of legal theory and open up new vistas of critical thought. I propose to engage with the life and thought of Biko by way of a number of thinkers in exploring the possibilities of critical jurisprudence in the context of the afterlife of colonial-apartheid. Despite the formal transition from apartheid to a “non-racial” constitutional democracy, the question of what authentic liberation from white colonial domination entails remains and is being recast repeatedly in academic discourse and public spaces.⁵ The persistence, continuation and reproduction of colonial-apartheid power relations, practices and mindsets continually subvert and expose the falsity of the dominant narrative of racial progress in “post-”apartheid South Africa.⁶ To the extent that the discourses of human rights, transformation, social cohesion, law reform and constitutionalism have been the dominant currents of thought and debate on matters pertaining to race and racial inequality in South Africa, my aim in this study is to seek out a dissenting and radical black perspective. I contend that Black Consciousness as both a critique of dominant racial (and racist) powers, practices and discourses and as an emancipatory political vision and praxis offers an alternative way of framing, understanding and responding to pressing

⁵ S Motha and K van Marle “Introduction” in K van Marle and S Motha (eds) *Genres of Critique. Law, Aesthetics and Liminality* (2013) 19.

⁶ See *Chapter 2* of this thesis for references. I shall use the formulation “colonial-apartheid” (which others have phrased as “colonial/apartheid”) as a description of the amalgam of the historical formations of colonialism and apartheid to highlight the continuity between them, and their inseparability from each other.

issues of history and memory, race, racial identity and racism, power, equality, justice and freedom in the present context.

Black Consciousness as a social and political philosophy provides a conceptual framework to diagnose, theorise and transform the existential and experiential situation of Black people in racially unequal, white-dominated and symbolically anti-black societies. Insofar as race and racism continue to shape relationships, institutions and subjectivities in South Africa and insofar as the terrors and tremors of white supremacy still define and structure the psyche and social reality of all South Africans in different ways, Black Consciousness remains an instructive tool of analysis. I will argue that because the society that Biko subjects to such scathing criticism for its racism and Eurocentrism, its devaluation of black life and its unethical value systems and institutions is largely coterminous with the one we live in today, the recollection of his prescient critical insights in the present context arms Black Consciousness with an added critical edge. In this instance, recalling Black Consciousness in this racialised time and space usefully disrupts the temporal borders between the past and present and draws our attention to the repetitions and reverberations of colonial-apartheid and the failures of the limited emancipation achieved in the constitutional transition of the early 1990s in South Africa.

Thus, the central political and intellectual thematic underlying and animating this entire study concerns the disruptive and critical potential of Black Radical thought especially in its exposure of the serious tensions that exist between the anti-colonial and black liberation politics of Biko's Black Consciousness and the moderate politics of liberal non-racialism that structures political and legal institutions, shapes mainstream public discourse and informs present-day constitutional jurisprudence.

1.2 Motivation and background

The central problem provoking this study is the lack of serious theoretical engagement with issues of race and racism in South African legal scholarship. This paucity in race-critical scholarship reflects a failure to recognise the significance of race as a category of analysis and as a symbolic and material reality that is fundamental to the ways in which law, justice, power, freedom and transformation are lived, understood and theorised.⁷ To be more precise, while South Africa's history of colonialism, racial oppression and racial conflict frequently informs the *background* of most scholarship on "post"-apartheid law and jurisprudence and also regularly features in the opening paragraphs of Constitutional Court judgements, these are merely perfunctory gestures that do not seem to yield any greater theoretical insight on the place of race and racism in the law and in the ongoing process of "constitutional transformation".

While the *words* "race" and "racism" appear frequently in legal scholarship and a certain well-documented narration of our history of colonialism and apartheid is recited in the pages of law journals and court judgements, the implications of this history (and specifically its *continuation* into the present) and the effects of race and racism on law are left (under)theorised and taken for granted as though it is either a settled or insignificant matter. In both cases, race is minimised and cast as a mere relic of the past that warrants no further (serious) attention.

I suggest that this inattention to and marginalisation of race in South African legal theory can to a large degree be traced to the demographic *and conceptual*

⁷ See JM Modiri "Towards a (Post-)apartheid Critical Race Jurisprudence: 'Divining our Racial Themes'" (2012) 27 *SA Public Law* 255-256. See also C Mills *Blackness Visible: Essays on Philosophy and Race* (1998) 98.

whiteness of jurisprudence; that is, to the fact that legal theory as a discipline in the South African legal academy remains numerically, logically and methodologically led and structured by whites in general.⁸ Since critical investigations into the sociology and politics of knowledge have definitively refuted the very notion of an objective, neutral and perspective-less researcher and thereby dissolved the distinction or distance between the researcher and her research techniques and findings, it is no longer controversial to argue that race and whiteness (and of course class, gender and other significant markers of social positioning) are not merely objects of analysis and investigation but also structural factors that shape the approach, methods, conceptual vision, style and conclusions of the researcher.⁹

Because whites constitute the socially dominant group in South Africa and because this social dominance then manifests in white demographic overrepresentation in the legal academy, it is inevitable that a “white ideological methodology”, a set of “white logic[s] and white methods”, came to dominate and shape the “canon” of jurisprudence and legal theory.¹⁰ This white ideological methodology – because it represents the worldview(s), perspectives and background of whites – also corresponds to the actual racial interests of whites; interests undoubtedly threatened by radical calls for racial justice, decolonisation and black liberation as typified by the struggle tradition of Black Consciousness. It colours their

⁸ See Modiri (2012) *SA Public Law* 231.

⁹ T Zuberi and E Bonilla-Silva “Toward a Definition of White Logic and White Methods” in T Zuberi and E Bonilla-Silva (eds) *White Logic, White Methods: Racism and Methodology* (2008) 18.

¹⁰ Zuberi and Bonilla-Silva “Toward a Definition of White Logic and White Methods” 15 – 17. See also C Mills “Non-Cartesian Sums: Philosophy and the African-American Experience” (1994) 17 *Teaching Philosophy* 223 – 243 and “An illuminating Blackness” (2013) 43 *The Black Scholar* 32-37 for the view that the racial identity of the philosopher/theorist/scholar affects “the array of concepts found useful, the set of paradigmatic dilemmas, the range of concerns” that shape one’s intellectual and political work. For Mills, racial identity (understood here as subject positioning and socialisation as a raced person) also affects how one interprets particular theories and the political and ideological position(s) one adopts.

analysis and imports “white common sense” into the theoretical enterprise.¹¹ The white ideological methodology that I attribute here to South African jurisprudence is structured internally by what Charles Mills calls an “epistemology of ignorance”, “a non-knowing specifically grounded in white racial privilege”¹², reminding us that what makes such ignorance “white” is not the phenotypical appearance (skin colour) nor even the socio-cultural background of the scholar *but its routine analytic elision of race, racism and black lived experience*.¹³

One effect of the permeation of this “white ideological methodology” in legal scholarship is that it blinds and limits legal theorists – including the avowedly “critical” ones – from fully apprehending the significance of racism and coloniality in and to (the) law. Consequent to the well-documented operation of whiteness as an invisible, neutral (colourless) and universal norm, as a kind of racelessness or araciality, white scholars tend to see themselves as unmarked by race.¹⁴ I would speculate that it is the invisibility and normativity of whiteness, alloyed to the sociological fact that racialisation and racism are not fundamental impediments in the lives and worlds inhabited by white scholars, that results in the conceptual relegation – if not total omission – of race as a serious area of study in law and jurisprudence.¹⁵

¹¹ Zuberi and Bonilla-Silva “Toward a Definition of White Logic and White Methods” in Zuberi and Bonilla-Silva (eds) *White Logic, White Methods* 19; 21.

¹² C Mills “Global White Ignorance” in M Gross and L McGoey (ed) *Routledge Handbook of Ignorance Studies* (2015) 217.

¹³ C Mills “White Ignorance” in S Sullivan and N Tuana (ed) *Race and Epistemologies of Ignorance* (2007) 11 – 38.

¹⁴ See T Morrison *Playing in the Dark: Whiteness and the Literary imagination* (1992) and R Dyer *White* (1997).

¹⁵ S Ahmed “Declarations of Whiteness: The Non-Performativity of Anti-Racism” (2004) *Borderlands e-journal* <www.borderlands.net.au/vol5no3_2006/ahmed_nonperform.htm>: “whiteness is unseen, and this invisibility is how whiteness gets reproduced as the unmarked mark of the human”.

This has led to the production of scholarly knowledge that at best sidesteps the issue of race in law and at worst, reproduces and fails to challenge the racial *status quo* through reaching conclusions that have racially conservative implications. The whiteness of the South African legal academy is evident as well in its epistemological and conceptual resources emanating largely from Germany, France, the United Kingdom and the United States. A brief survey of the existing literature would show that – aside from a few minute exceptions – as wide an array of sources as Hannah Arendt, Immanuel Kant, Jacques Derrida, Michel Foucault, queer theory, Jean-Luc Nancy, Slavoj Zizek, Giorgio Agamben, Giles Deleuze, Emmanuel Levinas, Drucilla Cornell, US and Euro-Brit Critical Legal Studies, Karl Klare, Costas Douzinas, Jurgen Habermas, US civic republicanism, Ronald Dworkin, systems theory, Iris Marion Young, Martha Nussbaum, law and literature/aesthetics, German legal theory, Frank Michelman, the venerated judgements of Emeritus Justices Albie Sachs and Laurie Ackermann, and the wide corpus of especially Afrikaans literature forms the core source of legal theorising in South Africa.¹⁶ It is puzzling that in this extensive importation and coverage of foreign and mostly white European theories, other traditions such as African philosophy, critical race theory, Cultural Studies, black feminism, postcolonial studies, Latin American decoloniality, the Black Arts movement and Afro-Caribbean thought to name a few did not make it into the definitive “canon” of post-1994 legal theory. This despite the fact that race was *the*

¹⁶ For representative writings, see the various chapters and authors collected in: W Le Roux and K van Marle (eds) *Post-apartheid Fragments: Law, Politics and Critique* (2007); H Botha *et al* (eds) *Rights and Democracy in a Transformative Constitution* (2003); K van Marle (ed) *Refusal, Transition and Post-apartheid Law* (2007); AJ Barnard-Naude *et al* (eds) *Dignity, Freedom and the Post-apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* (2008); S Woolman and M Bishop (eds) *Constitutional Conversations* (2008); J de Ville (ed) *Memory and Meaning: Lourens du Plessis and the Haunting of Justice* (2015). See also J van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2006); D Cornell and N Friedman *The Mandate of Dignity: Ronald Dworkin, Revolutionary Constitutionalism and the Claims of Justice* (2016).

central logic in the emergence and constitution of the modern world,¹⁷ and even more so in the making and installation of colonialism, racial capitalism and apartheid in South Africa.¹⁸ Not to mention the fact that conquest, oppression and race-making were centrally legal praxes: Throughout South African history, law, legal rules and political institutions have been expressly co-opted for the purpose of institutionalising racial hierarchies between whites and Blacks, as well as maintaining and perpetuating them.¹⁹ Yet, despite the extent of law's instrumental role in facilitating and authorising racial oppression and human bondage under colonial-apartheid, dominant approaches to legal theory rooted in liberalism, Marxism and postmodernism are yet to reckon seriously with South Africa's racial history.

This problem can hardly be overstated, and it should be distinguished as well from the generally unproductive claim that such white scholars are "racist" for their glaring omission of African, Black and other non-European perspectives. As it turns out, many of these scholars very ardently self-identify as politically progressive and anti-racist. How then are we to understand the fact that the dominant and hegemonic perspective in South African legal scholarship has been defined by a view of reality that privileges whites and their deep identification and affinity with the European world and worldview? Scholars in the field that has come to be called "whiteness studies" would locate part of the answer in the relentlessly racialised but unexamined premises of whiteness and "whiteness".

¹⁷ See C Mills *The Racial Contract* (1997) and DT Goldberg *The Racial State* (2002).

¹⁸ See A Marx *Making Race and Nation: A Comparison of South Africa, the United States and Brazil* (1998) chapter 1 for the view that the consolidation of the South African nation-state proceeded primarily through the enactment of formal rules of domination according to racial categories. See also B Magubane *The Making of a Racist State: British Imperialism and Union of South Africa 1875-1910* (1996) and T Keegan *Colonial South Africa and the Origins of the Racial Order* (1996).

¹⁹ For an overview, see N Rubin "Law, Race and Color in South Africa" (1974) 4 *Issue: A Journal of Opinion* 6-11.

Whiteness in this context is to be understood not merely as a generic skin colour or ethno-racial identity but as more significantly connoting an unreflexive social location of structural racial privilege, economic advantage and cultural dominance.²⁰ This location in turn then produces an epistemic standpoint in which the world is seen “whitely” – that is, in which the way whites *see* the world becomes the way the world *is*. Whiteness thus involves “a commitment to the centrality of white people and their perspectives”.²¹ This is why much of the writings and debates that constitute the canon of South African legal theory and constitutional law scholarship take the form of a sectarian, intra-mural, self-referential conversation between white scholars, about other European and white scholars reflecting on and disagreeing over the concerns and anxieties of white people in general. In addition to fabricating a *faux* white scholarly universe in which one can be forgiven for believing that there are no Black legal theorists and political philosophers that exist or are relevant to contemporary debates, the excessive Eurocentrism and whiteness of South African legal theory is symptomatic of what has been called a “Northbound gaze”.²²

The Northbound gaze, where the gaze of the scholar is fixed to the North is a supplicating gesture, seeking the validation of and assimilation into the terms and protocols of Western epistemological paradigms: “The Northbound gaze looks to the North, to Europe for theoretical approval of its assumptions”.²³ Furthermore, the Northbound character of knowledge production and scholarly pursuits in the legal

²⁰ P Taylor “Silence and Sympathy: Dewey’s Whiteness” in G Yancy (ed) *What White Looks Like: African-American Philosophers on the Whiteness Question* (2004) 229.

²¹ Taylor “Silence and Sympathy” in Yancy (ed) *What White Looks Like* 230.

²² M Ramose “‘African Renaissance’: A Northbound Gaze” (2000) 19 *Politeia* 47 – 61.

²³ A Zegeye and M Vambe *Close to the Source: Essays on Contemporary African Culture, Politics and Academy* (2011) 98.

academy is consistent with the original intentions of the European settler-colonialists who created the University in South Africa with the purpose of ensuring that their ideal descendants (the white population in South Africa) would remain intimately connected to, and appraised of, the trends and developments occurring in the imperial homeland or mother country of the coloniser.²⁴

The express colonial intent of creating universities in South Africa was to preserve and glorify Western cultural values in the colonies and to arm white settlers with the knowledge and skills needed to rule over and civilise African people.²⁵ As a result, the South African University and therefore also the South African Scholar (particularly in the historically white universities) developed a peculiar detachment from the lived experiences and intellectual heritages of the place in which they were situated. This detachment, and the cultural chauvinism and coloniality that informs it, is what makes possible the superimposition of European and white knowledges on an African reality in an overwhelmingly black-majority African country. Where African perspectives and Black voices are included or mentioned, this is only because they are marked as secondary to, subsumed by or derivative of some larger European theory, approach, doctrine or explanatory frame. The combination of a self-centered and unreflective whiteness (in which anything not white is rendered invisible) and a deep attachment to Northern epistemologies and Euro-American theorists (taken to be universal and bearing superior explanatory and conceptual power) is what generates the scholarly and political indifference to the reality of dispossession,

²⁴ N Dladla "Decolonising the University in South Africa - A Precondition for Justice" in AISA (ed) *Peace and Security for African Development* (2012) 160 – 174.

²⁵ Dladla "Decolonising the University in South Africa" in AISA (ed) *Peace and Security for African Development* 160 – 174 and the sources cited there.

structural violence and historical injustice and to the voices and experiences of those whose lives are still structured by that reality.

This lack of serious theoretical rigour and scholarly attention in relation to race, the problem of the Northbound and socially white epistemological gaze of South African legal theory as well as the need for a critical legal theory of race grounded in the concrete experience of Black South Africans are all addressed by taking Steve Biko's political and social thought as a point of departure.

*

This endeavour to contemplate and construct a homegrown South African critical race theory through Black Consciousness responds directly to two legitimate criticisms levelled by David Goldberg and Philomena Essed against CRT – especially that as developed in the United States legal academy by a cohort of Black, Latino, Indian-American and Asian-American scholars.²⁶ Their first criticism alleges that CRT is marked by an American parochialism and the second claims that CRT unnecessarily restricts the reach of its theoretical examination and conceptual disposition to law, legal structures and State institutions without fully considering the applicability of its themes and ideas in other disciplinary contexts and fields.²⁷ Goldberg and Essed suggest rather that CRT should identify with and take place

²⁶ For representative writings see Crenshaw et al *Critical Race Theory: Key Writings*.

²⁷ DT Goldberg & P Essed "Introduction: From Racial Demarcations to Multiple Identifications" in P Essed & DT Goldberg (eds) *Race Critical Theories: Text and Context* (2002) 4. Lewis Gordon has also identified the "focus on law" as a major limitation of CRT. This limitation is augmented also by the tendency of the "structure of interpretive legal argumentation" to permit only those criticisms of the law and the legal system that call for adjustments or reforms with the result that more radical approaches to questions of law are undermined and limited. In a similar vein, he also situates CRT within its broader heritage of critical theorising on race whose key figures include W.E.B Du Bois and Frantz Fanon (LR Gordon "A Short Note on the History of the 'Critical' in Critical Race Theory" (1999) 98 *APA Newsletter on Philosophy, Law and the Black Experience* 23-26).

within the broader framework of critical theorising on race across disciplines and traditions.

I do agree that scholars from other parts of the world need to formulate and expand critical race theory in their own vernacular, with a strong attentiveness to their own historical and social context rather than merely transposing the ideas developed in the late twentieth century United States academy. I also agree that CRT should go beyond the domain of law, legal reform and legal justice in order to embrace the social, political, historical and even the literary. However, it should be noted that circa 2002 when Goldberg and Essed issued those criticisms, variations of CRT were already beginning to develop in Canada,²⁸ Britain,²⁹ Australia,³⁰ and Brazil.³¹ Furthermore, CRT as a theoretical paradigm had long matured from its "legal" roots, having branched out into the disciplines of philosophy,³² sociology,³³ education³⁴ and history.³⁵ This branching out of CRT into other disciplines has been so expansive that when one speaks of critical race theory today, they are rarely – if ever – speaking of its 'legal' variant.

²⁸ See C Aylward *Canadian Critical Race Theory: Racism and the Law* (1999).

²⁹ See P Fitzpatrick "Racism and the Innocence of Law" (1987) 14 *J of Law and Society* 119 – 132. Outside of the legal academy, critical approaches to race had already been well-established in Britain, most notably by the work of Black Cultural Studies scholars most notably Stuart Hall, Kobena Mercer and Paul Gilroy as well as the Marxist scholars associated with the London-based Institute for Race Relations and its in-house journal *Race & Class*.

³⁰ See A Lentin "Race, Racism and Anti-Racism: Challenging Contemporary Classifications" (2001) 6 *Social Identities* 91 – 106.

³¹ See T Skidmore *Black into White: Race and Nationality in Brazilian Thought* (1993).

³² See Mills *Racial Contract; Blackness Visible: Essays on Philosophy and Race* (1998); L Outlaw "Toward a Critical Theory of Race" in DT Goldberg (ed) *Anatomy of Racism* (1990) 58 – 82.

³³ See E Bonilla-Silva "Rethinking Racism: Toward a Structural Interpretation" (1997) 62 *American Sociological Review* 465 – 480.

³⁴ See G Ladson-Billings and WF Tate "Toward a Critical Race Theory of Education" (1995) 97 *Teachers College Record* 47 – 68; DG Solorzano "Images and Words that Wound: Critical Race Theory, Racial Stereotyping and Teacher Education" (1997) *Teacher Education Quarterly* 5 – 19.

³⁵ See G Lipsitz "'Swing Low, Sweet Cadillac': White Supremacy, Antiblack Racism and the New Historicism" (1995) 7 *American Literary History* 700 – 725.

Even when the concerns about the “Americanness” and legalism of CRT have been addressed and overcome in this way, the argument may still persist that reliance on “critical race theory” as a frame of analysis in the (South) African context is problematic for historical, political and epistemological reasons. It may very well be argued that because of its development in the United States legal academy, its fundamental orientation, the conceptology it employs and its emancipatory vision is rooted in the historical consciousness and political realities of African Americans and other racial minorities which renders it paradigmatically incongruent with the African and South African worldview and experience.

I explore this argument in more detail in Chapter 4, where the pitfalls and benefits of critical race theory for South African legal scholarship are examined. Suffice it to say for now that I accept Charles Mills’ rejoinder that CRT does not refer to a monolithic and singular theoretical approach or method. Rather, Mills suggests that CRT should be conceived of as an umbrella term for a variety of theoretical approaches whose only common trait would be their comprehension of white supremacy and Western colonial domination as central to the making and functioning of the modern world.³⁶ The diagnosis and framing of white supremacy, the tracing of its origins and historical signal points, the analysis of its operations and effects as well as the mapping of its intersections with or inseparability from other forms of social power and subject formation would then differ significantly – at the level of analytic register and ideological content – depending on the political, ideological or theoretical frame one adopts (feminism, Marxism, post-structuralism, pan-Africanism, existentialism), which particular cause or problem one focuses on

³⁶ C Mills “Critical Race Theory – A Reply to Mike Cole” (2009) 9 *Ethnicities* 270 – 271.

(environmentalism, sexuality, knowledge production, whiteness, land ownership) or which disciplinary formation one works from (literary criticism, visual arts, psychology, history, theology or law).

This definition of CRT creates considerable room for diverse and even conflicting theoretical approaches and political positions sharing only a minimal understanding of their given field or object of analysis as thoroughly racialised, as being implicated within the dynamics of racial power and histories of white supremacy, and as being relentlessly structured by racial meanings and symbols.

In any event, an exploration of Biko's contribution to a post-1994 critical jurisprudence in my view unavoidably necessitates an engagement with CRT to the extent that it was the first serious endeavour by Black legal scholars to insist on the theoretical relevance of race to legal inquiry; to make sense of black suffering and alienation in/under the law and to develop a "racial analytics" with which to study, critique and transform law. The pioneering scholars of CRT provided a critical vocabulary, a theoretical agenda and an entry point for an anti-racist critique of law at a time when such a project was maligned as unscientific, non-legal, and destructive.³⁷ The reconceptualisation of a South African critical race theory involves both investigating the possibilities disclosed by the large pantheon of CRT knowledge for a critical engagement with "post"-apartheid law and constitutionalism and also asking to what extent Biko's Africanist and Black Consciousness thought enables the expansion, rethinking, and contextualisation of the original terms of CRT analysis to the South African historical and social experience.

³⁷ See among others, D Bell "Who's Afraid of Critical Race Theory" (1995) *University of Illinois LR* 893 – 910 and D Roithmayr "Guerrillas in Our Midst: The Assault on Radicals in American Law" (1998) 96 *Michigan LR* 1658 – 1684.

1.3 Research questions

The problem that will occupy this study involves reading Biko's philosophical thought as a starting point for the development of a post-1994 critical race theory, tied to the specific context and realities of South Africa, as well as illustrating the jurisprudential significance of such a theory. Although the study calls attention to the need for a critical race-conscious perspective in legal reasoning, legal theory and jurisprudence, it is not limited to law and legal enquiry and thus hopes to contribute broadly to interdisciplinary thinking on the impact of race on society, knowledge and politics. It aims to draw on the Black Radical Tradition, which in South Africa takes the form of the Africanist political tradition of Black Consciousness and Pan-Africanism, to develop lines of legal, social, cultural and political critique that could problematize and disrupt the present "post-"apartheid constitutional dispensation.

Since I do not intend to offer a complete, systematised and comprehensive account of what could one day be called "the jurisprudence of Steve Biko", this project aims only to draw the outlines of a South African critical race theory grounded in Black Consciousness that could also disclose alternative approaches and readings of jurisprudence. The following research questions flow from the problem statement of this research and will guide the focus of this study:

1.3.1 What are the prevailing conditions in the present-day South African context in relation to race, racism and racial power that necessitates the development of a critical race theory?

I argue that the problems of race, racism and racial inequality are not only still relevant in the post-apartheid context but that they are persistent and enduring and

require continued theoretical analysis and critical engagement. As such, a post-1994 critical race theory should be primarily concerned with showing how the conditions, relations and practices that shaped colonial-apartheid and which sustain white supremacy were not abolished by the advent of a new constitutional dispensation but were rather concealed and reconfigured in another form.

1.3.2 In what ways can Steve Biko be read as a critical theorist of race, identity and liberation and thus, to what extent can Black Consciousness be treated as a critical theory or philosophy of race? And furthermore, in what sense can his thought be said to be relevant to and significant for jurisprudence?

I will argue for a reading of Biko's writings (as principally collected in the book *I Write What I Like*³⁸) that locates him within the Africana theoretical and philosophical tradition. From that view, I will seek to illustrate that Biko's thought is premised on a complex amalgamation of ideas about racism, identity, consciousness, power, freedom and justice.³⁹ Some of the prominent themes in Biko's thought that I will elaborate upon include: (1) the understanding of race as being based on a social rather than biological ontology, (2) the understanding of racism as a manifestation white group power and linked to the total structure and organisation of a society, (3) a critique of liberalism, (4) an abiding commitment to black liberation and decolonisation and (5) an emphasis on the centrality of black experiences, histories and voices in the formation of a counter-hegemonic legal and political consciousness. I shall thereafter show that Biko's thought – given his concern with

³⁸ S Biko *I Write What I Like* (1978).

³⁹ M More "Biko: Africana Existential Philosopher" in A Mngxitama *et al* (eds) *Biko Lives! Contesting the Legacies of Steve Biko* (2008) 49. See also A Mngxitama *et al* 'Biko Lives' in Mngxitama *et al* (eds) *Biko Lives!* 1-20 where the editors place Biko within the tradition of African anti-colonial and anti-racist liberation thought.

the role of race in South African social life – could be read from a jurisprudential angle only if traditional notions of law and jurisprudence as developed in legal modernity are displaced in favour of a more expansive and critical conception of what constitutes jurisprudence.

1.3.3 What is the relation between Biko's elaboration of Black Consciousness and the tradition of critical race theory and how does Biko's thought enable a reconceptualization of critical race theory for the present South African context? Put another way, what critical-theoretical and emancipatory political possibilities are revealed by an engagement with the theory and politics of Black Consciousness?

I argue that Black Consciousness and CRT – because they can be located within the history of African responses to Western civilisation – share a number of intellectual influences and conceptual convergences in relation to law, power and knowledge that should be made more explicit as part of building the scholarship on Biko. However I also argue that while traditional CRT scholarship holds immense potential for the development of a South African critical race jurisprudence, it is also limited in some ways. Biko's specific contribution to jurisprudence then not only expands the terms of CRT analysis but it also goes beyond them and discloses new lines of enquiry and new political visions.

1.4 Overarching theoretical framework: race, time and the "afterlife"

The imperatives of this study are informed by my underlying premise that racism (white supremacy) is central to the history, present and future of South African life

and law.⁴⁰ Not only has race historically functioned as a marker of social status and group power, as a determinant for the distribution of opportunities/benefits and burdens/disadvantages and as a proxy for legal citizenship during apartheid, but inequality, poverty and social suffering in South Africa persists along decidedly racial lines.⁴¹ It is my contention then that the racial hegemony of whites which was constructed through over 350 years of colonisation, dispossession, racial subjugation and apartheid has remained largely intact despite the promises of the new legal order underwritten by a liberal Constitution and a justiciable Bill of Rights. In order to fully apprehend this continuation of white racial power and black racial subordination and come to terms with the limits of law in eradicating the effects generated by the installation of white supremacy and European imperial domination in South Africa, we would need to fashion an alternative theoretical apparatus that problematizes and upends the now conventional description of South Africa as “post”-apartheid.

Such an apparatus, I suggest, is to be found in the temporal metaphor of the “afterlife” of colonial-apartheid in contrast to the more popular casting of colonial-apartheid in terms of the notion of an “aftermath”. Whereas the notion of aftermath subscribes to a historical periodization in which there is a discernible “before” and “after”, suggesting that we are only dealing with the residual legacies, leftovers or remnants of colonialism and apartheid, the notion of afterlife challenges this periodization by tracing the uninterrupted continuities of – and not *between* –

⁴⁰ G Fredrickson *White Supremacy: A Comparative Study of American and South African History* (1982).

⁴¹ See A Rycroft *A Race and the Law in South Africa* (1987); J Seekings & N Natrass *Class, Race and Inequality in South Africa* (2005); S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002); S Terreblanche *Lost in Transformation* (2012).

colonialism, apartheid and constitutional democracy. The distinction between an “afterlife” and an “aftermath” is more than a semantic one. It has conceptual, analytical and political implications for how we conceive of, and relate to, our history, present and future and also for what modes of political discourse and action we take to be possible, legitimate and necessary.

The notion of an afterlife describes “a type of living on that survives after a type of death”.⁴² It connotes a realm in which an essential part of a subject’s identity or consciousness continues to reside after the apparent death of the body of that subject. Conversely, the notion of aftermath speaks more moderately of *what remains* after the final death. Those within the “aftermath” paradigm would therefore concede that the new constitutional dispensation represents a radical break with the past but acknowledge that the full recovery from the legacy of the past will be a progressive process that will only materialise over time. By contrast those within the “afterlife” paradigm impute little significance to the signifier “post-apartheid” and recognise 1994 as just another fleeting moment in the almost four centuries of the life of white supremacy in South Africa. To put it another way, an understanding of South Africa as mired in the “aftermath” of colonialism and apartheid takes for granted that the old order is crumbling or has crumbled with the difficult work being only the clearing of the rubble and the settling of the dust. However those who conceive of post-1994 South Africa as representing the “afterlife” of colonialism and apartheid presume the solidity and entrenchment of the old order and view any legal and political transformation as a mutation in the *form* –

⁴² J Sexton “Ante-Anti-Blackness: Afterthoughts” (2012) 1 *Lateral*
<<http://lateral.culturalstudiesassociation.org/issue1/content/sexton.html>>.

but not the *force* – of white supremacy. On this view, what comes after apartheid *is* apartheid; the “post” in postcolonial is colonialism again.

This would seem to resonate with Michel Foucault’s insight that economies of power reinvent themselves (rather than disappear) in temporal and political shifts. As Foucault wrote: “[p]ower is tolerable only on condition that it masks a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms.”⁴³ It is also in Foucault that we may also draw an important methodological argument against the deeply-entrenched dogma – disseminated in law, socio-political discourse, mass media, and dominant arenas of public and cultural life – that the year 1994, in particular the 1994 general elections and the inauguration of Nelson Mandela as President of the Republic of South Africa, marks the teleological fulfilment of the liberation struggle.⁴⁴ For Foucault, the tendency to think of history in terms of radical breaks that produce “aftermaths” is problematic and fails to account precisely for the incompleteness or unfinished business of the “past”. In his words:

One of the most harmful habits in contemporary thought ... [is] the analysis of the present as being precisely, in history, a present of rupture, or of high point, or of completion. I think we should have the modesty to say to ourselves that on the one hand, the time we live in is not the fundamental or interruptive point in history where everything is completed ... We must also have the modesty to say on the other hand the time we live in is very interesting; it needs to be analysed and broken down...⁴⁵

The conception of our racialised past and present in terms of the notion of “afterlife” rather than “aftermath” counters the widespread belief that the end of formal

⁴³ M Foucault *The History of Sexuality Volume 1: An Introduction* (1978) 86.

⁴⁴ This dogma is expressed most vividly in the popular description of South Africans born during and after 1994 as the “born-free generation” or “born-frees”.

⁴⁵ G Raulet and M Foucault “Critical Theory/ intellectual History” M Foucault (LD Kritzman, ed) *Politics, Philosophy, Culture: Interviews and Other Writings, 1977 – 1984* (1988) 35 - 36.

juridical apartheid in 1994 marked the end of white supremacy's reign in South Africa and thereby also signalled the completion of the struggle against racism. The continuation of racial inequality in South Africa and the horrific material conditions in which Blacks continue to live however illustrates clearly that the legal, social, economic, political, cultural, affective, symbolic, psychic and aesthetic structures of colonial-apartheid persist and are being constantly re-inscribed throughout our allegedly "post-"apartheid society.

Developed initially by Saidiya Hartman in the context of racial slavery in the United States,⁴⁶ and further elaborated upon by Jared Sexton,⁴⁷ the notion of the "afterlife" was prompted by the need for new conceptions of time, historicity, memory and power in relationship to the life and rule of colonial racism and white supremacy – particularly in light of the ascendancy of discourses of post-racialism and human rights triumphalism. As Sexton argues, following Hartman, living under white supremacy is an experience for which "there is no intercession".⁴⁸

In place of the interval, or the break, or the mark of punctuation, there is a tenacious continuity, a historical continuum ... not cessation or interruption of historical flow but persistence of historical force, *persistence in and as permutation*.⁴⁹

The shifts from colonialism to apartheid to "post-"apartheid, rather than being historical ruptures, represent only transfigurations and maturations in the formation and operation of white supremacy as a system. The years 1652, 1814, 1910, 1948,

⁴⁶ Hartman *Scenes of Subjection*. See also S Hartman *Lose Your Mother: A Journey Along the Atlantic Slave Route* (2007).

⁴⁷ See S Martinot and J Sexton "The Avant-Garde of White Supremacy" (2003) 9 *Social Identities: Journal for the Study of Race, Nation and Culture* 169 – 181; J Sexton "The Curtain of the Sky': An Introduction" (2010) 36 *Critical Sociology* 11- 24; J Sexton "People-of-Colour-Blindness. Notes on the Afterlife of Slavery" (2010) 28 *Social Text* 31 – 56; J Sexton "The Social Life of Social Death: On Afro-Pessimism and Black Optimism" (2011) 5 *InTensions* 1- 47.

⁴⁸ Sexton (2011) *InTensions* 5.

⁴⁹ Sexton (2011) *InTensions* 5-6. My emphasis.

1983 and 1994 among a host of other historical flashpoints can thus only represent *iterations* of white supremacy – its formation, self-revision, preservation and reconfiguration.

This is not to say in an unqualified way that nothing *at all* has changed, nor is it to say that the post-1994 reconstruction of South Africa did not effect any *visible* changes. It is rather to say that the constitutional transformation of South Africa effected change in every area of society *except* where it really matters most. Names of streets and buildings were changed, new faces occupied the seat of government power, official publications were published in a plethora of African languages, a new national flag was designed and a new national anthem composed, a number of old apartheid-era laws were repealed, and the ubiquitous “whites only” signs were taken down. But consider that in contrast to these spectacular “changes”, actual arrangements of economic power, land and property ownership, spatial segregation, epistemic violence, Western imperialism, psychic trauma and labour exploitation were all left untouched and now enjoy legal affirmation and protection in the new constitutional dispensation. This study therefore contests a reading of “post-apartheid” as signifying a break with the past or as suggesting that the reality of black racial subordination is being undone. Insofar as the essentials of that “past” remain virtually intact, the “post” in post-apartheid (and postcolonial as well) could be read more critically – as representing precisely the *failure* of a radical break with the past, as underscoring the haunting of the unresolved past and as a description of a “nervous (temporal) condition”.⁵⁰ As Wendy Brown explains:

⁵⁰ I take this phrase from T Dangarembga *Nervous Conditions* (1988).

[T]he prefix “post” signifies a formation that is *temporally after but not over* that to which it is affixed. “Post” indicates a very particular condition of afterness in which what is past is not left behind, but, on the contrary, relentlessly conditions, even dominates a present that nevertheless also breaks in some way with this past. In other words, we use the term “post” only for a present whose past continues to capture and structure it.⁵¹

Yet, this reading notwithstanding, “post-apartheid” remains a limited formulation of historical time insofar as it signals a crisis in the notion of linear historical progress prominent in Western Enlightenment historicism while ultimately reifying it.⁵² Oft-heard descriptions of the present South Africa as “neo-apartheid South Africa” or “post-apartheid, apartheid South Africa”⁵³ as well as frequent encasings of the “new” of “new South Africa” in inverted commas clearly register a rejection on the part of many Black South Africans of the idea that post-1994 South Africa represents a triumph or overcoming of colonialism and apartheid. They render as myth and ruse, the distinctly post-racial conceit that racism is a thing of a distant and dark past, no longer a *fundamental* impediment and existential threat to the life chances of Black people. As this study will show, particularly in chapter 2, this scepticism about the “newness” of the “new South Africa” is neither flippant nor unfounded.

Indeed, to the extent that that the constitutional reforms and political transformations that have taken place since the 1990s in South Africa can be called “change”; they should be thought of as changes which are “*important but ultimately inessential*”.⁵⁴ Important in the sense of their far-reaching effacement of the institutional paraphernalia and *de jure* practices of colonialism and apartheid but still

⁵¹ W Brown *Walled States, Waning Sovereignty* (2010) 21.

⁵² A McClintock *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (1995) 10-13.

⁵³ MP More “Locating Frantz Fanon in Post-apartheid South Africa” (2014) 49 *J of Asian and African Studies* 127.

⁵⁴ F Wilderson “The Black Liberation Army and the Paradox of Political Engagement” in S Broeck and C Junker (eds) *Postcoloniality – Decoloniality – Black Critique: Joints and Fissures* (2014) 176.

ultimately inessential because of how the deeper, underlying and structural workings of white supremacy have been left intact. To read post-1994 South Africa through the prism of the “afterlife of colonial-apartheid” is thus not to claim that South Africa is exactly the same as it was under the colonial and apartheid rule of centuries or decades ago but rather to observe that colonial and apartheid relations, inequalities, logics, values, representations, practices and identities have endured, continued and persisted – despite all legal, political and institutional reform – at the level of the foundational structures and dynamics of South African society.

To speak of the “afterlife” of colonial-apartheid therefore is to attend to the problem that the constitutive and constituent elements of colonialism and apartheid failed to be abolished by the incorporation of Blacks into the frame of human rights, constitutional citizenship and legal equality. Colonialism and apartheid persist in South African life not because Blacks are unduly obsessed with the past but because Black people as a group are still “imperilled and devalued”, to use Hartman’s words, by a “racial calculus and a political arithmetic that were entrenched centuries ago”.⁵⁵ The afterlife of colonial-apartheid describes those multiple forms of precarity and vulnerability, poverty, landlessness, neglect, indignity, powerlessness, skewed life chances, dilapidated infrastructure, exploitation and marginalisation, incarceration, limited access to basic healthcare and quality education, spatial dislocation and psychic alienation that endure in the wake of the formal abolition of apartheid. In direct contradistinction to a sanguine and cheerful vision of post-1994 South Africa as heralding the arrival of better days than those in the past, the prism of the

⁵⁵ Hartman *Lose Your Mother* 6.

afterlife of colonial-apartheid traces the resonances and continuances between life “then” and life “now” in a way that troubles the easy distinction between the two.

More to the point, the basic project of colonialism and apartheid, which was to consolidate white domination in South Africa through making Blacks feel inferior to, envious of and dependent upon whiteness, white people and European culture has in many ways been perfected through the ascendancy of liberal democracy and neoliberal capitalism. For the most part, Blacks live in this country as foreigners and as a cultural and racial minority: English language and European culture forms the primary mode of being (communicating) in society; formal legal, political and economic institutions (courts, parliament, government administration, the workplace) are ordered according to Western paradigms of Statecraft, political economy, jurisprudence and governance; entry into middle-class life for Blacks not only involves incurring massive debt but also leaves many in an endless and futile spiral of mimicking whiteness; mainstream society uncritically glorifies suburban life, “white weddings”, mastery of European languages, cuisine and aesthetics and thereby reiterates the colonial conceit of Europe as the apex of civilization; religion, education and morality themselves conform to Eurocentric, capitalist and Christian value-systems imposed through conquest of African peoples; Manual, unskilled/servile and exploited labour continues to be occupied almost exclusively by Blacks who guard cars they do not own, clean homes they do not live in, take care of children who are not theirs and serve people in places where they themselves cannot afford to be serviced. Spatial segregation as well continues to persist with overcrowded townships and rural villages being reserved for Blacks who continue to experience massive violence, squalor, poor social mobility, pollution, exposure to

drug and alcohol abuse and other deprivations, pathologies and violations.

Colonisation, slavery and apartheid jointly constructed a figure of blackness as morally inferior, undeserving of social and economic advancement, arational and unintelligent, fungible to the needs, desires and mercies of white people, criminal and uncivil in nature and incapable of violation. That figure persists today and the hierarchy of the Human that was established through it is also yet to be undone.⁵⁶ On this view, white supremacy constitutes the possibility condition for the very idea of "South Africa". The colonial-apartheid that Biko theorised as "the totality of white power" therefore *continues to live on*, and it is because of this living-on that we might revisit and recall Biko.

Biko developed the philosophy of Black Consciousness as a response to the effects of white racism in South Africa, and as a means of struggling for racial justice, black liberation, human dignity and for more radical democratic and ethical forms of co-existence.⁵⁷ It will be suggested that because of law's central role in the system of racial oppression against which Steve Biko's thinking and activism was directed, Black Consciousness as he develops it should also be read as a critical race theory in the sense that his thought aims to (1) understand the ways in which a regime of white supremacy and its subordination of Blacks have been constructed and represented in South Africa;⁵⁸ (2) intervene in the ideological and political debates about race in South Africa and to offer oppositional and radical accounts of race and racism (in contrast to Marxist, liberal and conservative ones);⁵⁹ (3) draw

⁵⁶ Hartman *Lose Your Mother* 6.

⁵⁷ R Fatton *Black Consciousness in South Africa: The Dialectics of Ideological Resistance to White Supremacy* (1986).

⁵⁸ Crenshaw *et al* (eds) *Critical Race Theory: Key Writings* xiii.

⁵⁹ Crenshaw *et al* (eds) *Critical Race Theory: Key Writings* xii – xiv.

from the experiences and voices of Blacks in articulating conceptions of racial justice, liberation, equality and transformation and (4) assert an anti-colonial epistemological and cultural stance that challenges Western legal modernity, its notions of progress, development, and science, and its endorsement of individualism and capitalism. In this sense then, Biko's call for consciousness is also a call that "confronts law's complicity in the perpetuation of a racially defined economic and social order".⁶⁰

1.5 A note on approach, politics and method

My approach or method is heavily influenced by the political and intellectual urgencies that animate this study. There is a substantive connection between how this study shall be conducted and the motivations and aims of this study as elaborated above and I wish to make that connection slightly more transparent in what follows.

I subscribe to critical problematisations of the idea of a fixed or categorical method. These problematisations include challenges to the purity, solidity and boundedness of academic disciplines. I also do not conceive of the work of theory as either objective scientific analysis or disengaged contemplation. To theorize, or at least to think theoretically and engage with conceptual and aesthetic ideas, in my view entails illuminating, exploring and experimenting with ideas and bringing them to bear on a particular problematic in contemporary social and political life. As Brown explains in her account of critical theory, the subversive power of theory lies in its ability to "contest settled accounts" and official narratives and "to grasp the times by thinking against the times".⁶¹ The understanding of theory that will inform the spirit,

⁶⁰ Douzinas and Gearey *Critical Jurisprudence* 259.

⁶¹ W Brown *Edgework: Critical Essays on Knowledge and Politics* (2005) 4.

text and method of this study is captured aptly by Brown:

Theory is not simply different from description; rather, it is incommensurate with description. Theory is not simply the opposite of application but carries the impossibility of application ... Theory does not simply decipher the meanings of the world but recodes and rearranges them in order to reveal something about the meanings and incoherencies that we live with. To do this revelatory and speculative work, theory must work to one side of direct referents, or at least it must disregard the conventional meanings and locations of those referents. Theory violates the self-representation of things in order to represent those things and their relation—the world—differently. Thus, theory is never “accurate” or “wrong”; it is only more or less illuminating, more or less provocative, more or less of an incitement to thought, imagination, desire, possibilities for renewal.⁶²

This study is grounded in a critical understanding of theory and should be distinguished from understandings of theory rooted in empirical description, application, policymaking and problem-solving.⁶³

This theoretical project in turn is also situated within the political and intellectual universe of African and Black thought and aims to think with and beyond Biko to attend to the ethical and political concreteness of the problem of racism in South Africa and its continued subjection of Black lives. In offering a jurisprudential and theoretical counter-reading of the present, I will mostly work to one side of what I take to be the dominant currents of white legal scholarship in South Africa and its close attachment to Euro-American paradigms in order to recover the experiences and intellectual traditions of the racially oppressed. As this study is a work of activist scholarship that nevertheless maintains the dream of rigour, it is unavoidable that strong normative positions and general claims about social life and social patterns (race, identity, power, history and lived experiences) will be put

⁶² Brown *Edgework* 80.

⁶³ Brown *Edgework* 81.

forward. I however do not pretend these arguments and claims are always foolproof, exhaustive, or universal. I accept the presence of contingency, heterogeneity, and agency in all human phenomena but would argue that these must be contextualised and understood within the concrete, structural and material historical forces that operate with generality across human life while also shaping and constraining concomitant socio-political and cultural subjectivities, relations and systems.

Pertaining to Biko, this study pursues what Derek Hook has advocated as a “retrieval” of Biko.⁶⁴ This retrieval as described by Hook, following Edward Said, entails a method of reading early critical texts from another time or era in a way that illuminates the present and disrupts current orders of knowledge, understanding and common sense. In this way, the classic text is released from its exclusive ties to its original context in order to speak to a new time or problem. The idea behind this method of reading is, in Hook’s words, to

... hear Biko not only in terms of the time, the place and the context in which he wrote, but also as if what he wrote was directed at the post-apartheid and post-colonial present.⁶⁵

This method of reading will inform how Biko is read in this study in two senses: First, I will attempt to cast Biko’s thought as haunting the entire “post”-apartheid legal, social and political order in the way that it still has not yet resolved the injustice of colonialism and apartheid and thus not yet fulfilled the desire for black liberation for which Biko thought, fought and ultimately, died. Secondly, I will attempt to bring that thought to bear on a disciplinary formation – law and legal theory – which was

⁶⁴ D Hook (*Post-)apartheid Conditions: Psychoanalysis and Social Formation* (2013) chapter 3.

⁶⁵ Hook (*Post-)apartheid Conditions* 79.

never a direct or explicit concern of Biko. This is supported as well by Said's recognition of the "fact" of travelling theory or theory's travelling; that is, the way in which "ideas and theories travel – from person to person, from situation to situation, from one period to another".⁶⁶ As Said further states: "cultural and intellectual life are usually nourished and often sustained by this circulation of ideas".⁶⁷

Of course, "retrieval" always suggests a search for or a re-discovery of something that has been lost or taken away. On another view, it suggests a certain romanticisation or idealisation of the object in question and also involves a drive to (re-)possess that object. As Hook points out, Biko operates as "master signifier" for a wide array of referents and associations:⁶⁸ Black Consciousness; anti-apartheid struggle; black identity; black desires for upward mobility; the search for an African modern; yearnings and agitations for an authentic Africanity and most centrally, evocations of a past that is not yet behind us. His name is eponymous with songs written by Afro-soul South African musician Simphiwe Dana and British singer-songwriter Peter Gabriel, it hangs on a street corner in Pretoria and his face is emblazoned on t-shirts, fabrics and handbags. While I do not claim that there is only one, self-evident and incontrovertibly correct way of reading and remembering Biko and while it is not my primary interest here to reconcile or play up the tensions between different readings of him, one animating impulse of this study is the desire to challenge readings of, and discourses on, Biko that work to either sanitize (de-radicalise), commodify, trivialise or domesticate (by simplifying) his life and his ideas. In short, this theoretical and jurisprudential reading of Biko attempts not only

⁶⁶ E Said *The World, The Text, The Critic* (1983) 226.

⁶⁷ Said *The World, The Text, The Critic* 226.

⁶⁸ Hook *(Post-)apartheid Conditions* 74.

to disclose the radicalism, depth and indispensability of Biko's ideas but it aims to highlight the enduring legacy and evocative quality of his memory to intellectual, political, social and legal life in the present.

As a young Black male leftist academic and law teacher with a complicated relationship to (my) blackness – a complication produced in part by my relative insulation from at least the harshest (material and economic) effects of colonialism and apartheid – I have grown deeply disturbed by what James Baldwin long ago called “the horror of the black condition”⁶⁹ as it is lived, seen, documented, talked about, explained (and explained away), minimized and ignored in this putatively “new” South Africa. Throughout all my law studies, and despite the romantic story of a peaceful constitutional transition, a democratic society based on the rule of law, equality and dignity that was being communicated in my legal education, I have always been haunted by a sense of a country, this country, that at all levels continues to be structured by a view of Black life as absent or valueless, as something less than human.

I embark upon this study with a view to articulating theoretically my abiding impression that the state of Black people's lives – economically, culturally and psychologically – remains the fundamental ethical and political emergency of our time. The combined insights of critical race theory, African philosophy, critical legal studies, Black Radical and Pan-Africanist Thought including black feminism, decoloniality, radical democratic political theory, cultural studies and South African historiography have been central to such an articulation, and have been instructive in the development of a critical theoretical apparatus that could perform a radical

⁶⁹ J Baldwin *No Name in the Street* (1972) 97.

epistemic and political challenge to “post-”apartheid law, constitutionalism and human rights discourse.

At least two problematic currents of thought and discourse could be targeted as part of this challenge. I shall briefly discuss each in turn:

1. *The pre-eminence of law, legal language and legal methods, and the undue faith in the protocols and remedies provided by the law as a panacea for social problems.* The framing of racial politics and injustice in the terms and institutions of the law reduces the complexity and depth of the problem by converting a ceaseless and centuries-long process of economic subjugation, cultural and spiritual alienation and ontological debasement into a problem of civil and political rights. The centering of the Constitution – which it will turn out is instrumental to the problem itself – and the attendant politics of “transformation” constructs a narrow, assimilationist and rights-based vision of what freedom from a history of racial oppression entails for Blacks⁷⁰ and eclipses a more radical politics of decolonisation and liberation. Because such a politics construes racism as the denial of the full benefits of legal citizenship and completely ignores the problem of cultural, spatial, epistemological and psychological oppression produced by white supremacy, it posits civil inclusion, political rights, job creation/economic development and anti-

⁷⁰ Throughout this study, I shall use the term “Black/s”, as Biko did, to include groups traditionally labelled as Africans, Indians and Coloureds unless where context indicates otherwise in which case “Black/s” denotes only “Africans”. Throughout the text, I capitalise reference to Blacks as a group, not only because as a specific political and socio-cultural group, they require denotation as a proper noun but also to adhere to the conventions of CRT literature and in order to discursively resist the racist diminution and negation of blackness in general and to effect a reversal of racial hierarchies in which blackness is cast as inferior, deviant or lacking. It is for this reason that I do not capitalise “whites”. Where I use “black” in small caps it is in reference to a descriptive social category. See K Crenshaw ‘Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Colour’ (1991) 43 *Stanford LR* 1244.

discrimination as solutions – which all amount to no more than a democratisation of white entitlements.⁷¹

2. *The false optimism of the dominant discourse and narrative of "rainbowism"*⁷² that idealises post-1994 South Africa as a triumph over colonialism and apartheid despite considerable evidence that such optimism may be premature or even wrongheaded. Alloyed to a deep sentimentalisation of South African history and moralistic discourse, where former enemies have become friends, this narrative is also symptomatic of what has been called a "child's view of history and politics",⁷³ replete with heroes, bad guys and happy endings. My concern is that this is not simply a false optimism but also a cruel and fatalistic optimism⁷⁴ – not only because of its unselfconscious insensitivity to the lives lived outside of its sanguine narrative but also because of its presumption that the black freedom struggle has come to an end and that any voices in tension with the mainstream mythologies of "post-apartheid" are simply politically anachronistic and suffering from an undue obsession with race. Ideologically, this rampant idealization of the new dispensation as representing liberation and justice, far from simply being false and conservative also functions to silence dissent.

Together these two currents cumulate into a post-racial, elitist and liberal grammar that deftly eclipses, erases or distorts the reality of continuing inequality and thereby

⁷¹ SV Hartman *Scenes of Subjection: Terror, Slavery and Self-making in Nineteenth Century America* (1997) 118.

⁷² See Dladla "Decolonising the University in South Africa" 160 – 174 and P Gqola "Defining People: Analysing Power, Language and Representation in Metaphors of the New South Africa" (2001) 47 *Transformation* 98-99 for complementary definitions of "rainbowism" or "rainbow nation ideology".

⁷³ W Brown *Regulating Aversion: Tolerance in the Age of Identity and Empire* (2006) 18.

⁷⁴ See L Berlant *Cruel Optimism* (2011).

also aids in the collective and institutional evasion of the urgent question of historical justice in South Africa. How the dire material conditions of the majority – over 90% – of the population could so easily disappear from social perception and political discourse certainly attests to the hegemony of whites and white interests and to the almost complete normalization of the historical results of settler-colonialism. Despite volumes upon volumes of scholarly and political interventions on ending poverty and inequality in South Africa, the most fundamental injury of colonial-apartheid – the violent estrangement of Africans from the land of their birth and being through socio-economic subjugation and cultural and psychic disorientation – remains unaddressed, even unnoticed.

Given the complexity of the problem that I seek to map out, this study eschews the idea of a single method and approach altogether. Different and multiple intellectual traditions, political voices and scholarly styles come into play and these will influence parts of the text differently and unpredictably.

1.6 Chapter overview

This thesis is divided into six (6) chapters. It comprises this introduction in which I outlined the objects, aims and premises of this study, a conclusion in which I will offer reflections on the argument developed throughout the study as well as four (4) substantive chapters, which are structured as follows:

In **Chapter 2**, I establish the relevance of Biko's thought for legal and social discourse on race by making the argument that the society he wrote about (colonised apartheid South Africa) is continuous with the one we currently live in ("post"-apartheid). In support of this argument, I will draw on critical political, sociological and philosophical accounts of the persistence and reproduction of racism

and inequality in post-1994 South Africa as well as perspectives that identify a substantive incompleteness, or even *non-beginning*, in South Africa's transition from colonial-apartheid to "post"-apartheid.

In **Chapter 3**, I make the case for a reading of Biko as a theorist and philosopher of race, identity and liberation through a close reading of his writings. Beginning with an intellectual biography of Biko, I trace the development of his thought and politics from his early days as a youth to the maturation of his theorisation of Black Consciousness during his years as a medical student at the University of Natal and then later as a full-time activist and organiser of the Black Consciousness Movement. It was during the critical period from 1968 until his death in 1977 that Black Consciousness as a movement, a form of community pedagogy and an intellectual tradition unfolds. Biko's encounters with a diverse range of political formations and individuals and his explicit engagement in reading and debate would lead him to posit an alternative historical and social interpretation of South Africa that contrasted radically to the one proffered by Afrikaner nationalists, liberals, Marxists, and Charterists. It would also shape his understanding of issues relating to African independence, the global economy, religion, and the spatial organisation of South Africa among other topics. Through a dialogic and concrete practice of philosophising, Biko also worked out conceptually deep and theoretically sophisticated formulations of race, identity, liberation and associated concepts such as power, and culture. I shall rely on Mabogo More's portrait of Biko as an African existential philosopher and thinker in the tradition of African anti-colonial and anti-

racist liberation thought⁷⁵ to examine and deepen Biko's theorisation of these concepts. In particular, Biko's emphasis on both the material, physical and economic as well as the psychological, symbolic and ontological dimensions of the South African social reality will be highlighted. A reading of Biko's understanding of the racialised nature of South African society and his adoption of a broadly Africanist conception of liberation places him in the "rebel" tradition of black political thought as opposed to the "realist" tradition. The chapter defends the need to reclaim the rebel tradition in order to contest the dominance of the more moderate realist perspective.

After studying Biko's thinking as a form of social and political philosophy, **Chapter 4** turns to examine this philosophy in relationship to critical race theory. It begins by taking seriously – but later contesting – the view that consequent to their development in different parts of the world and under different geopolitical conditions, critical race theory and Black Consciousness are incommensurable analytic paradigms. A close examination of select historical and political studies however suggests a deep contextual homology between the life-worlds of Black South Africans and African Americans. Furthermore, a deeper genealogy and alternative political geography of the Black Radical Tradition shows critical race theory and Black Consciousness as emanating from the same root of African resistance and its critique of Western civilisation. The latter half of the chapter discusses the theoretical themes of critical race theory, and their significance for jurisprudence. This discussion will be narrated in terms of the move in critical race theory from a view of anti-blackness as constitutive and foundational to the modern

⁷⁵ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 45 – 68.

world to a largely reformist and legalist praxis. It then identifies this move as the source of a set of practical, conceptual and political limitations in critical race theory and suggests that they could be productively rethought for the South African context by drawing on the insights of Black Consciousness, particularly as these pertain to the numerical majority status of Blacks and the inseparable connection between decolonisation and liberation. In this regard, I argue for a shift from CRT's reconstructive jurisprudential ambitions to a post-conquest jurisprudence of liberation.

Having placed this call for a local South African critical race jurisprudence at the intersection of Black Consciousness and critical race theory, **Chapter 5** continues to elaborate on Black Consciousness as a critique of post-1994 law, constitutionalism and jurisprudence. Beginning with an illustration of how Biko's concern with social life and social being in South Africa discloses traces of a "general jurisprudence",⁷⁶ I trace Biko's own counter-hegemonic orientation towards the law, both under the apartheid regime and the subsequent "post-"apartheid dispensation. Relying on notions of the counter-archive and epistemic resistance, and on a structural and historically-grounded understanding of race and racism, I critically examine particular episodes of contemporary legal and constitutional discourse and their role in constructing dominant historical narratives, theoretical approaches and forms of reason and politics. In search of an alternative and oppositional jurisprudence, I interrupt and counterpose these against the combined insights of Black Consciousness and critical race theory and argue that there exists a fundamental

⁷⁶ C Douzinas and A Gearey *Critical Jurisprudence: The Political Philosophy of Justice* (2005) 3-17.

opposition between the values and ideals of post-1994 South African society and the memory and politics of Biko and Black Consciousness.

Chapter 6 closes the thesis with a substantive reflection on Black Consciousness as the “counter-aesthetic” of the “post”-apartheid legal order.

*

Having set out the aims and premises of this study, I now proceed in the chapter that follows to address the place and time (context) for which Biko is being invoked.

2

Race, Law and the 'Incomplete' Transition

Just because everything is different
doesn't mean anything has changed.¹

The emancipation did not take place. Legal emancipation is not emancipation. Legal emancipation is only the perfection of slavery. Legal emancipation is the repetition and intensification of the original appropriation that created the masters and the slaves, the haves and the have nots, the propertied and the helpless. Slaves, being legal property, know that emancipation requires emancipation *from* property and *from* legality. Emancipation is a red and black tomorrow.²

2.1 Introduction

This chapter offers an account of the afterlife of colonialism and apartheid. It is a survey of the current social, political and legal landscape of post-1994 South Africa, and specifically of the extent to which race, racial politics and racism are *still* definitive of that landscape. The central aim here is to set up the context in which Biko's thought will be employed to intervene in the discourse on race in South Africa. I contend that Biko's thought finds application in the present South Africa in large part because the society he wrote of and spoke against is continuous with the one we live in today. The official institutional shift from colonial-apartheid to the "new

¹ Irene Peter cited in J Demakis (ed) *The Ultimate Book of Quotations* (2012) 50.

² AP Farley "Johnnie Cochran's Panther: An Essay on Time and Law" (2008) 33 *Thurgood Marshall LR* 52. See also AP Farley "Perfecting Slavery" (2004) 36 *Loyola University Chicago LJ* 221 – 251.

South Africa” has not been conterminous with the economic, political and social situation of the majority of South Africans.³

Part of the blindspot in South African race discourses (which in turn undergird human rights law and equality jurisprudence) is an insistence on the belief that since the *de jure* end of apartheid in 1994, whites and Blacks now equally enjoy formal legal rights and that, therefore, the law is no longer instrumental in the marginalisation and exclusion of Blacks and in perpetuating deep racial inequalities. This is evidenced by the popular use of the phrase “*previously* disadvantaged group” to refer, among others, to Blacks. The erasure implied in describing historical racial disadvantage in such terms as “previous” (as if it is something of the past) stems from a failure to see that racism is so deeply embedded in society that racist practices engendered by law and legal institutions can exist long after the abolishment of the laws or the replacement of the government that enacted those laws.⁴ For the purposes of this chapter, I suggest that a post-1994 critical race theory grounded in the philosophy of Black Consciousness should problematise these discourses, which are heavily informed by legal liberalism and also by a reluctance to fully account for the racist brutality and structural violence of colonial-apartheid.

This chapter is structured as follows: I shall first sketch out in broad terms two dominant approaches to race and law in contemporary “post”-apartheid discourse, namely the liberal legalist and critical political approach, with the aim of setting out the theoretical and political background that informs this study. Having argued in favour of the critical political approach, I shall draw on literature confirming the

³ South African National Planning Commission *Diagnostic Overview* (2011) 26: “[W]e remain a divided society and the major dividing line is *still* race.” My emphasis.

⁴ D Cornell *Moral Images of Freedom* (2008) 129.

veracity of such an approach by pointing out the continuing inequalities and injustices of colonial-apartheid that have persisted into the so-called “post”-apartheid era.

While the accounts I will refer to below harbour quite different attachments to the post-1994 dispensation – ranging from critical optimism to outright rejection – they underscore the continuity of settler-colonial white supremacy at the level of the underlying “structuring dynamics” of South African society.⁵ This is in line with the temporal metaphor of the afterlife and highlights that the institutional and legal shifts that transformed apartheid South Africa into a constitutional democracy have not translated into substantive socio-economic, cultural and existential change. It is furthermore most sharply along the axis of race, though always subtended by a multiplicity of other social categories, that colonial-apartheid power relations, material conditions and mindsets have endured and persisted. Under these conditions of stasis and inertia, South Africans remain racialised in terms of the political ontology that evolved out of conquest, colonial rule and apartheid. The utilisation of law (human rights, constitutionalism and transitional justice) as the central medium and technology of change has turned out to be incapable of fully grappling with and responding to the nature and depth of historical injustice. As Black lives have not yet experienced the transcendence of the dehumanising social realities of suffering, inequality, violence and exclusion, they remain in radical exteriority to the hegemonic society that celebrates itself as “post-apartheid”.

2.2 Current approaches to race and law in the post-1994 context

⁵ L Veracini “Facing the Settler-Colonial Present” in S Madison, T Clark and R de Costa (eds) *The Limits of Settler Reconciliation: Non-Indigenous People and the Responsibility to Engage* (2016) 38.

Aside from some nuances and variations, there are broadly two jurisprudential strands or approaches that inform current engagements with the relationship between race and law in South Africa. These are the “liberal legalist” or “constitutionalist” approach – which is the approach I take to be the dominant, mainstream or traditional one – and the “critical political” or “leftist” approach. Since my own theoretical methodology in this study proceeds from the “critical political” approach and argues explicitly against the “liberal legalist/constitutionalist” one, some delineation of their underlying assumptions and meaning, and illustration of the core ideological and practical divergences between them is necessary.

2.2.1 The liberal legalist/constitutionalist approach

As the name suggests, the liberal legalist approach to race and law is rooted in a traditionally liberal jurisprudence. Liberal jurisprudence presumes the legitimacy of a state in which we are all guaranteed equal protection before the law, and in which rights are said to facilitate individual freedom. In the liberal imagination, the law and the state are figured as technically neutral to competing social and moral interests and claims, and this technical neutrality is evidenced both by the liberal state’s protection of free-market capitalism and private property rights and its exaltation of the rational, willing, self-possessed autonomous individual as the basic social unit.⁶ Power, in the liberal conception, is mostly limited to the lawful exercise of state authority. To be sure, legal liberalism marks the “legal” and the “political” as the exclusive if not primary sites of power, completely eliding (and often naturalising and treating as personal) the workings of domination and the production of subjects in

⁶ W Brown and J Halley “Introduction” in W Brown and J Halley (eds) *Left Legalism/Left Critique* (2001) 5-6.

the spaces designated as cultural, social, economic or private.⁷ Colonialism and apartheid in this approach come to appear mostly as a deprivation of basic civil and political rights and a violation of Black people's claims to equality and liberty – with the restoration of those abstract rights posited as the solution.⁸ Cultural, epistemological and psychological domination as well as the decimation of familial and affective ties caused by labour migration and forced displacement for example would not figure prominently into the picture, and certainly not as requiring legal and political redress.

At the level of its social ontology, liberalism centers on the individual subject – framed as self-made, self-possessing, fully agentic and bearing complete responsibility for itself. This translates into a conception of personhood, citizenship and identity as neutral. The autonomous subject of liberalism – consequent to her capacity for self-making – can choose her *identity* and need not be categorised or straitjacketed into identity categories not of her choosing.⁹ That these identities are historical and political productions appears to be irrelevant in the liberal imagination as it does not discriminate between identities imposed for purposes of domination and those articulated in the name of liberation. Nor does liberalism appear to distinguish consistently between identity categories with deep social materiality and visibility (such as race, class, gender and sexuality) and those which, although not completely apolitical, are formed through subjective desire, interpersonal relations,

⁷ W Brown *Regulating Aversion: Tolerance in the Age of Identity and Empire* (2007) 17.

⁸ Brown and Halley "Introduction" in Brown and Halley (eds) *Left Legalism/Left Critique* 6.

⁹ C Heyes "Identity Politics" *Stanford Encyclopedia of Philosophy* <<https://plato.stanford.edu/entries/identity-politics/>> (accessed 22 August 2017).

voluntary association, recreational preferences and affect and are not primary sites of power and resistance.¹⁰

Applied to race, the liberal approach would insist on law following a largely colour-blind or race-neutral approach presumably because recognition of race categories or racial groups would stand in tension with the canonical principle of individual autonomy and harm individual dignity. When it does recognise race, it expresses serious ambivalence over the deployment of race categories in a way that weakens the clarity and power of anti-racist politics. In this approach, the constitutional guarantee of formal equal rights and the promulgation of anti-discrimination laws is seen as levelling the playing the field. This approach thus exhibits a deep faith in law and law reform which it regards as the most effective tool for eliminating race-based discrimination.¹¹ In the liberal view, racism, although formally prohibited by law, is defined in abstract or ahistorical terms (in which anybody can be a racist) and is understood to emanate mainly from a hateful, ignorant and aberrant individuals' actions or speech.¹² Thus, the standard liberal terminology of racism would describe it in such terms as discrimination, prejudice, stereotyping and stigma or as lack of opportunities.

Philosophically, it also represents what Joshua Glasgow refers to as the "racial eliminativist" position which argues for the elimination of the concept of race from people's thoughts, identifications and from official political and legal processes and

¹⁰ Heyes "identity Politics" *Stanford Encyclopedia of Philosophy*.

¹¹ On the CRT critique of liberalism, see R Delgado and J Stefancic *Critical Race Theory: An Introduction* (2001) 21 – 25.

¹² E Bonilla-Silva *Racism Without Racists: Colour-blind Racism and the Persistence of Racial Inequality in the United States* (2010) 28.

documents.¹³ Racial eliminativist positions vary but in general they would call for the removal of racial categories from State policies, processes, documents, and institutions and would argue further that race should be eliminated not only from the sphere of 'politics' but also in public life and social discourse such that race is neither recognised, asserted or used in any way that will advantage or disadvantage any group of people.¹⁴ Its political orientation could thus be described as egalitarian non-racialism. I identify this liberal legalist approach to race to be the one also embodied in the Constitution and in popular public discourse. It is also exemplified by post-racial declarations of "post"-apartheid South Africa as a "rainbow nation".

2.2.2 The critical political/ leftist approach

In contrast, a critical political or leftist approach to race and law takes its bearing from what it conceives of as deficiencies in the liberal approach, from that which liberalism elides. A critical political or left understanding of race thus begins with a critique of liberalism – both as an ideology and as a social order – and attempts to map and expose the social powers (other than law) which produce, govern, and stratify subjects.¹⁵ Of these social powers, white supremacy, capitalism and heteropatriarchy stand central. The critical political orientation, in contrast to liberalism, conceives of law and the State as productive of, invested and complicit in, the multiple injuries produced by those social powers. Indeed it is liberalism's own historical association with domination and stratification that is the core target of the critical political approach.¹⁶ As such the liberal state's promise of equality is

¹³ J Glasgow *A Theory of Race* (2009) 1-2.

¹⁴ Glasgow *A Theory of Race* 1-2.

¹⁵ Brown and Halley "Introduction" in Brown and Halley (eds) *Left Legalism/Left Critique* 6.

¹⁶ Brown and Halley "Introduction" in Brown and Halley (eds) *Left Legalism/Left Critique* 7.

understood from the left perspective at worst as a ruse, and at best, too abstract to produce substantive equality and freedom.¹⁷

Rather than uncritically accepting and waiting for liberalism to deliver on its promise of formal legal equality, this approach attends to the concrete and substantive reality of inequality and injustice, often exposing the limits and failures of formalist attempts to legislate equality. In contrast to law reform, the leftist approach calls for a radical socio-economic, political and cultural re-structuring of society. It also seeks to directly confront, transform and democratise – even decolonise – the social powers that produce inequality. This approach does not restrict itself to a juridical account of power and is therefore able to apprehend the multiple sites of power as well as the capacity of oppressive powers to reconfigure themselves, to reappear in disguise despite their seeming legal or formal abolition.

When applied to race, the critical political approach to race and law would define racism in concrete historical terms, where racism is synonymous with white supremacy.¹⁸ Racism on this definition is not – or not merely – an interpersonal encounter between individuals or the hateful words and actions of a bigoted individual. It is a structural and institutional problem, a socio-political system that generates and normalises deep-rooted racial hierarchies.¹⁹ Racism here would be understood as a form of group-based power and privilege rather than as a series of individual actions. Thus, a critical political perspective would describe racism in such terms as abjection, systemic dehumanisation, powerlessness and deprivation,

¹⁷ Brown and Halley "Introduction" in Brown and Halley (eds) *Left Legalism/Left Critique* 7.

¹⁸ See C Mills "White Supremacy as a Socio-political System" in AW Doane and E Bonilla-Silva (eds) *White Out: The Continuing Significance of Racism* (2003) 35 – 48.

¹⁹ Mills "White Supremacy as a Socio-political System" in Doane and Bonilla-Silva (eds) *White Out* 35 – 48.

subordination and oppression.²⁰ As such it would call for law to follow a race-conscious approach to racism, and to address the specific reality of racial inequality and black suffering rather than to begin from the premise of an ideal or abstract notion of equality.

Rather than viewing identity as a choice, as primarily associational and voluntary, the critical political approach would view identity as a complex historical, social and political production with material effects which cannot simply be overcome through the subject's personal choice. Here identity is grasped variously as (1) a site of regulation and domination; (2) an affirmative and empowering basis for collective solidarity and political action against subordination and (3) a group-based social location produced by entangled histories of oppression and resistance.²¹ Unlike the liberal conception, this understanding of identity accepts first that members of socially marked groups experience their membership as largely involuntary and secondly that there is materiality and power to how those members are positioned – that is, interpellated – into their group identity.

Philosophically, the critical political approach is based not on eliminativism but on what Glasgow calls "reconstructionism".²² Racial *reconstructionism* entails that while race is a socially-constructed concept, there still exists a pressing need to talk, think, write and speak about race and make sense of its implications in our social, political and legal lives. Consequently race discourses must be employed but in such a way that we desist from referring to race as a biological or scientific fact but rather

²⁰ See IM Young *Justice and the Politics of Difference* (1990) 33.

²¹ Brown and Halley "Introduction" in Brown and Halley (eds) *Left Legalism/Left Critique* 7.

²² Glasgow *A Theory of Race* 152-153,

as an entirely social phenomenon with contingent and varying meanings and value.²³ In the reconstructionist view, the recognition of race is crucial for addressing the legacies and ramifications of racialised histories – the ways in which racial groups have been subordinated or privileged through the medium of racial discourse and practice. The orientation of the critical political approach to law could then be described as pluralist anti-racism. I identify the critical political approach as the approach that is more aligned with Steve Biko’s theorisation of Black Consciousness and the jurisprudential tradition of critical race theory.

In the remainder of this chapter, I rely on literature and theories in support of the theses that (1) race continues to matter deeply in South African life and law and (2) that it is the critical political or leftist approach rather than the liberal legalist one that should inform how we address and respond to issues of race, racism and racial inequality in “post”-apartheid South Africa.

2.3 “Race trouble”: living in strange places while lost in transformation

Each of our lives has been irrevocably shaped by race and apartheid.²⁴

South Africa is still living an apartheid narrative, and even, in perverse ways, recreating it.²⁵

In a recent extensive study on race, apartheid and social change in South Africa by Kevin Durrheim, Xoliswa Mtose and Lyndsay Brown, the authors point out that the state of race in “post”-apartheid South Africa remains “troubled”.²⁶ Not only does the “legacy of racism [continue] to infiltrate and unsettle South African society”, its

²³ C Mills *The Racial Contract* (1997) 126: “[r]ace is socio-political rather than biological but it is nonetheless real”.

²⁴ K Durrheim *et al Race Trouble: Race, Identity and Inequality in Post-apartheid South Africa* (2011) vii.

²⁵ M Morris *Apartheid: An Illustrated History* (2011) 1.

²⁶ Durrheim *et al Race Trouble* 1.

continuing effects affect South Africans both personally and politically, at the level of inter-personal encounters and also at the level of social structure. As Samantha Vice has also argued, it is one of the core effects of over 350 years of colonial oppression and systemic racism that South African society is characterised by racial division and suspicion.²⁷ South Africa remains caught up in the moral and political entanglements of its histories of oppression and privilege, of black subordination and white supremacy, of brutal injustice and illegitimate power. The remnants of these histories are felt in media and public discourse, in the high rates of crime, unemployment and poverty that in some way affects all South Africans, in antagonistic social relations based on race and class (i.e. hate speech, hate crimes and other forms of racial abuse and marginalisation) and in the segregated social spaces (such as residential areas, shopping malls, and schools) that we inhabit with, *and without*, each other. This, for Vice, makes South Africa a rather “strange” place to live in.²⁸

For Durrheim, Mtose, and Brown, this race trouble is troubling because its persistence occurs in a context where racism has been legally outlawed, and where the white minority apartheid government has been replaced by a multiracial majority government that has introduced many laws and policies to redress past injustices and disadvantages.²⁹ They therefore argue that “race trouble” must be analysed

²⁷ S Vice “How do I Live in This Strange Place” (2010) 41 *J of Social Philosophy* 323. Vice’s essay has, apart from its recognition of the deep fractures of racialised existence in South Africa, a number of blindspots, not least of which is its obfuscation of the structural dimension of racism, its individualistic and moralistic treatment of racial politics and its minimisation of white people’s active investment in ongoing racial stratification. The emphasis on guilt and shame that appears later in her paper can also be read as a way of reinforcing white racial narcissism in another mode. It is however beyond the scope of this study to address this paper specifically.

²⁸ Vice (2010) *J of Social Philosophy* 323.

²⁹ Durrheim *et al Race Trouble* 1.

against the backdrop of the failures and successes of the social transformation processes in South Africa. They raise the specific question of whether the laws and policies designed and implemented to achieve an equal, "integrated" non-racial society have culminated in their intended changes.³⁰ It becomes clear in the discussion that follows that their answer to this question is in the negative. As they indicate, "post"-apartheid South Africa "remains one of the most socio-economically unequal countries in the world".³¹

Durrheim, Mtose, and Brown indicate further that this inequality, being the direct outcome of colonial-apartheid, has a pronounced racial character. They gather from the existing data that although inequality has been partly deracialised, it has also deepened, with the Black population carrying the greatest burden of poverty and unemployment.³² They also argue that aside from a few exceptions, residential neighbourhoods and workplaces in South Africa also remain physically and symbolically segregated along racial lines.³³ Although most public spaces now feature frequent interracial interaction between Blacks and whites, most Blacks, other than those in the middle-to-upper classes, remain a racial underclass that enters white spaces only as labourers, servants or subordinates. This segregation, they tell us, is exacerbated by the slow pace of transformation in the corporate and education sectors. They add that the spatial inequality produced by dispossession and segregation is problematic not only because it reflects hostile and non-integrated race relations but also because segregation keeps poverty and inequality

³⁰ Durrheim *et al Race Trouble* 16.

³¹ Durrheim *et al Race Trouble* 16.

³² Durrheim *et al Race Trouble* 16-17.

³³ Durrheim *et al Race Trouble* 20.

contained in specific spaces only, creating and maintaining a racial underclass that is excluded from certain benefits and opportunities. In other words, it keeps the Black poor trapped in an intergenerational cycle of poverty and precarity.³⁴

The authors conclude with the paradox that was introduced in the introductory chapter as being central to a “post”-1994 critical race theory, namely the co-existence of a far-reaching process of political and legislative reform with the persistent continuation of structures and relations of racism established under colonialism and apartheid. Although South African society is attempting to move towards non-racialism and racial equality, they remain worried that “old patterns of inequality and segregation persist and new patterns have emerged that continue to be structured around race”.³⁵

And yet despite all these changes, social life continues to ring with troubling echoes from the past.³⁶

Sampie Terreblanche has described this paradox or this sense of the past’s lingering in the present, as a case of being “lost in transformation”.³⁷ Updating his original thesis developed ten years earlier in *The History of Inequality*³⁸, Terreblanche argues that it is not necessarily that the democratic transition of the early 1990s was “incomplete” in the sense that only the political and juridical dimensions of the apartheid system have been transformed. Rather, he suggests that the incompleteness of the transition to a “post”-apartheid society lies in the defects of the changes to the South African politico-economic system that were made in the

³⁴ Durrheim *et al Race Trouble* 20 – 21.

³⁵ Durrheim *et al Race Trouble* 21.

³⁶ Durrheim *et al Race Trouble* 22.

³⁷ Terreblanche *Lost in Transformation*.

³⁸ Terreblanche *A History of Inequality in South Africa 1965 – 2002* (2002).

1990s.³⁹ The central defect for Terreblanche lay in how the transition was built upon a Western neoliberal capitalist paradigm “that systematically excludes the poorest part of the population from participating in the global economy”.⁴⁰ This, according to Terreblanche, is further compounded by the fact that the political and legal institutions of “our new politico-economic system” appear to be weak in comparison to global economic stakeholders and local corporate powers.⁴¹ But this comes as no surprise to Terreblanche, who was among the first to argue that behind the public negotiations for a new South Africa, there were more powerful secret negotiations taking place between political elites and corporate giants.⁴² Terreblanche is of the view that these secret negotiations were the real negotiations because they determined what could be decided in the public negotiations and they also pre-empted how (economic) power was to be distributed in the “new” South Africa.

What is particularly problematic for purposes of this study, is how the turn to a global neoliberal capitalist, market fundamentalist, free-enterprise economy that relies heavily on foreign investment also resulted in the negation of the need for reparations, substantive redress and extensive redistribution of land and resources, and also detracted from a focus on white privilege. Hence Terreblanche’s remark

³⁹ Terreblanche *Lost in Transformation 2*. Lungisile Ntsebeza (“What Can We Learn from Archie Mafeje about the Road to Democracy in South Africa” (2016) 47 *Development and Change* 918 - 936) reaches the same conclusion through an excursion into the work and politics of Archie Mafeje that post-1990s South Africa did not undergo substantive decolonisation as the path of the transition was diverted into the direction of serving imperial capitalist powers and protecting the economic interests of whites and Black elites. The flaws in South Africa’s transition are most evident in the ceaseless waves of community uprisings and labour unrest involving Black communities, activists and social movements protesting against increasingly unlivable work conditions, poor infrastructure, worsening levels of poverty, unemployment and inequality and systemic neglect by the state to fulfil service delivery and socio-economic rights needs of impoverished Black communities. See also J Saul “On Taming a Revolution: The South African Case” (2013) 49 *Socialist Register* 212 – 240.

⁴⁰ Terreblanche *Lost in Transformation 2*.

⁴¹ Terreblanche *Lost in Transformation 2*.

⁴² Terreblanche *Lost in Transformation* 17-36; 59 – 90. See also P Bond *Elite Transition: From Apartheid to Neoliberalism in South Africa* (2000).

that the most outstanding characteristic of post-1994 South Africa is the intensification of the problems of poverty, unemployment and inequality among the Black majority.⁴³ This implies that, for Terreblanche, we are not only witnessing a *continuation* of the socio-economic structure and power relations entrenched during colonial-apartheid into the “post”-apartheid era. Rather, we are also witnessing rapidly *worsening* conditions for the Black majority. In his view, the transition to a new South Africa is incomplete or perhaps has not actually begun, because the juridical and political abolition of apartheid did not give rise to a more moral and humane society.⁴⁴ The privileges and gains accrued by whites under colonial-apartheid remained virtually intact and the suffering and misery of the Black population is either being ignored or denied – both with the effect of normalising the *status quo*. On his analysis, therefore, no such thing as a “rainbow nation” ever emerged from the ruins of the apartheid regime.⁴⁵

2.4 (Blocked) passages to freedom and reconciliation: a denial of justice

Reconciliation and forgiveness are beyond the power of the law.⁴⁶

Reconciliation has all too readily manifested itself through the verb ‘to be reconciled’ – for indigenous people to be reconciled to their domination.⁴⁷

In a paper published in *Public Culture*, Achille Mbembe discusses what he calls the “post”-apartheid South African experiment at creating “the first credible non-racial society on the planet”.⁴⁸ He notes that despite the *formal* end of apartheid, the

⁴³ Terreblanche *Lost in Transformation* ix.

⁴⁴ Terreblanche *Lost in Transformation* 124 – 129.

⁴⁵ Terreblanche *Lost in Transformation* 125.

⁴⁶ P Langa “Transformative Constitutionalism” (2006) *Stellenbosch LR* 358.

⁴⁷ S Motha “Reconciliation as Domination” in S Veitch (ed) *Law and the Politics of Reconciliation* (2007) 69 – 71.

⁴⁸ A Mbembe “Passages to Freedom: the Politics of Racial Reconciliation in South Africa” (2008) 20 *Public Culture* 5.

struggle for racial equality has not ended. In general, whites still control the commanding heights of the national economy and top management positions and the distribution of wealth, income and opportunities remains racially skewed.⁴⁹ He argues that “[the] moment when South Africa will be able to recognize itself and be recognized as a truly non-racial community is still far away”.⁵⁰ He bases his argument mainly on the continuation of racist prejudices in the private sphere which keep breaking wide open, often in the guise of matters that at first glance have nothing to do with race (such as crime, corruption, language rights, sports, cultural pluralism, and the renaming of streets and buildings). He writes that white racism and the operation of white privilege have had to change in *modus operandi*, and become more subtle, covert and unconsciously practiced. He also notes that although most whites generally purport to support racial equality in principle, they often later reject policies designed to implement it and continue to hold on to the privileges of white skin, constantly attempting to restore their normalcy.⁵¹

The standard meaning of reconciliation by “former beneficiaries of past racial atrocities”, writes Mbembe, is that racism is dead and “blacks should forget about the past and move on”.⁵² Most whites have retreated to a comfortable position of personal nonculpability for past misdeeds by ignoring the enormous nature of their social and economic advantage as a group. In other words, whites have cast themselves as “non-responsible rather than irresponsible”.⁵³ As Carol Clarkson explains, “to be irresponsible is to affirm a responsibility has been breached. To be

⁴⁹ Mbembe (2008) *Public Culture* 6; Durrheim *et al Race Trouble* 16 – 24.

⁵⁰ Mbembe (2008) *Public Culture* 6.

⁵¹ Mbembe (2008) *Public Culture* 10.

⁵² Mbembe (2008) *Public Culture* 9.

⁵³ C Clarkson “The Time of Address” in S Veitch (ed) *Law and the Politics of Reconciliation* (2007) 234.

non-responsible is to deny that one falls within the ambit of a responsible field. In fact it amounts to a denial that such a field exists at all".⁵⁴ Mbembe connects this mentality of non-responsibility to the uncritical acceptance of the liberal conservative notion of the autonomous self-made and self-reliant subject. He argues that it is a false pretence to believe that racism is not or is no longer the main cause of Black poverty and the troubling gaps in life chances experienced by Blacks in comparison to their white counterparts.⁵⁵ Another source of race denialism which he identifies is the overreliance on the constitutional promise of formal legal equality which creates the impression that no further action is needed once the law has granted such equality.

Mbembe adds that such race-denialism also leads to the erroneous assumption that racial disparities are either the result of corruption, maladministration and poor economic planning or simply a manifestation of the moral failure of Blacks (who are accused of not working hard enough, of feeling over-entitled, not living an ethical life and being prone to crime, corruption, baseness and illness). Measures aimed at achieving transformation are also rebuked by advocates of liberal capitalism for interfering with market rationality, discouraging foreign investment and acting as a form of reverse discrimination.⁵⁶ By others, they are tarred as racist.

Mbembe then connects this to the urgent questions social justice, democracy, and political stability by arguing that these will not be achieved for so long as whites still cling to "the rule of property" and maintain a monopoly over land ownership, capital, access to schools and universities, corporate boardrooms and earning, on

⁵⁴ Clarkson "The Time of Address" in Veitch (ed) *Law and the Politics of Reconciliation* 234.

⁵⁵ Mbembe (2008) *Public Culture* 9.

⁵⁶ Mbembe (2008) *Public Culture* 10.

average, wages six times more than Blacks doing the same labour.⁵⁷ He warns that "a radical revision of South Africa's white supremacist ideology is therefore taking place".⁵⁸ It has shifted from asserting the natural inferiority of Blacks and denying their humanity to questioning the moral legitimacy and political appropriateness of racially-based redress measures. He also warns that the apologetics for racial inequalities and the maintenance of unjust systems of power and social hierarchies may come in the language of rights, fairness and equal opportunity but mentions that they will actually be an "effort to institutionalise a racial privilege that is trying to mask its racial nature".⁵⁹ In essence, then, the denial of the fact that past racial injustices can (to a limited extent) and should be rectified through a legal and political project of corrective justice has the effect of protecting and preserving existing distributive injustices, power differentials and inequalities and thus also of postponing the imperative of justice and reparations indefinitely.⁶⁰

Mahmood Mamdani has also raised concerns regarding the compromises and negotiation process that led up to the post-1994 constitutional dispensation which converges with Mbembe and Terreblanche's analysis. As a critic of the TRC, Mamdani is perhaps most memorable for his analysis and characterisation of South Africa's transition as one of "reconciliation without justice".⁶¹ Central to his enquiry was the manner in which the need for reconciliation was framed to the exclusion of

⁵⁷ Mbembe (2008) *Public Culture* 17.

⁵⁸ Mbembe (2008) *Public Culture* 10.

⁵⁹ Mbembe (2008) *Public Culture* 10.

⁶⁰ Mbembe (2008) *Public Culture* 11.

⁶¹ M Mamdani "Reconciliation without Justice" (1996) 46 *SA Review of Books* 3-5. See also M Mamdani "Amnesty or impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)" (2002) 32 *Diacritics* 33 – 59; "The Truth According to the TRC" in I Amadiume and A An-Na'im (eds) *The Politics of Memory: Truth, Healing and Social Justice* (2000) 176 - 183; "A Diminished Truth" in W James and L Van de Vivjer (eds) *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2000) 58 – 62.

a concern for justice.⁶² Mamdani here is writing out of his unspoken but acute suspicion that the post-1994 settlement prioritised the rights, interests, fears and needs of the white minority over the dignity and historical justice claims of Blacks. Such a paradigm of reconciliation in Mamdani's view diminishes the nature of the evil of apartheid and suppresses the agency and voices of the oppressed majority.

In Mamdani's view, not only did the terms of the TRC redefine and reduce the injustice of apartheid to spectacular acts of state violence and abuse such as murder, torture and detention instead of the "everyday terrors" of dispossession, forced removals, the humiliating pass laws, broken and displaced families, but the search for "Truth" that characterised the TRC hearings replaced the pursuit of justice, reparation and redistribution. One consequence of the Truth's displacement of Justice in the post-1994 reconciliation process, was that justice came to be discursively and almost exclusively associated with revenge or "victor's justice", thus producing a political logic dictating that justice had to be the price of reconciliation. Indeed part of the lack of reparations is linked to the false assumption promoted by the CODESA negotiators as well as the Constitutional Assembly that the call for justice and reparations after the end of legislated apartheid is *necessarily* based on a desire for vengeance and punishment and thereby stands in contrast to nation-building, unity and healing.⁶³

The ascendancy of reconciliation as *the* primary category ordering South Africa's process of national reconstruction and postcolonial recovery to the extent of

⁶² M Mamdani "When Does Reconciliation Turn into a Denial of Justice?" in *Sam Nolutshungu Memorial Lecture Series* (1998) 1.

⁶³ This faulty assumption is promoted in the famed epilogue of the Interim Constitution of the Republic of South Africa (Act 200 of 1993) which declared that "there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization".

even superseding and then erasing justice constitutes depoliticisation in several remarkable ways as illustrated by Wendy Brown in her critique of the rise of tolerance in Western political discourse.⁶⁴

Firstly, when reconciliation is accorded primacy as the method of overcoming injustice, the result is that the inequality, subordination, marginalisation and social conflict produced by colonialism and apartheid are cast as personal and individual issues.⁶⁵ Apartheid on this view is reduced to being a cumulation of the bad acts and decisions of immoral politicians and cruel police officers.

Secondly, the language of reconciliation, and its attendant associations with peace, healing and friendship, effects a widespread replacement of political vocabularies in favour of personal, emotional and therapeutic ones. This translates into a political discourse and climate which places emphasis on forgiveness and apology rather than redistribution; repairing interpersonal relationships rather than transforming power relations; indicting actions, people and behaviours rather than structures, powers and systems; respect for difference rather than redress for oppression, comforting feelings and allaying fears rather than giving up privileges; prioritising the symbolic rather than the material dimensions of social change. In the end, as Brown puts it, “[a] justice project is replaced with a therapeutic or behavioural one”,⁶⁶ ethics marks a retreat from politics.

This second problem is aggravated by the generally theological, familial, sentimental and moralistic grammar of the TRC, its leadership and of the post-1994

⁶⁴ W Brown *Regulating Aversion: Tolerance on the Age of Identity and Empire* (2006).

⁶⁵ Brown *Regulating Aversion* 15.

⁶⁶ Brown *Regulating Aversion* 16

transformation process in general.⁶⁷ Consider here how deeply saturated the discourse of reconciliation is in notions of miracle, confession, evil, repentance, sacrifice, guilt, forgiveness, shame, and atonement. Consider too how our civic bonds are said to be held together through our unification by Nelson Mandela, named the Father of the nation and how this unity is promulgated through our christening by Archbishop Desmond Tutu as “the rainbow children of God”. To be sure, the TRC and the post-1994 discourses of reconciliation, non-racialism and unity are not simply problematic because of the type of language they use, but because of their broader substantive political effect of personifying history and thereby ignoring the larger structural, political and economic dimensions of injustice. Ideologically, these discourses function as a ruse, disseminated in the name of change but functioning to maintain a permanent sense of changelessness – exhorting Black people to surrender the authority of their historical experience in the name of an empty future.

According to Brown, the “common mechanics” that makes this kind of depoliticisation possible lies in its tendency to “[remove] a political phenomenon from comprehension of its *historical* emergence and from a recognition of the powers that produce and contour it”.⁶⁸ From this we can discern three further problems with the TRC:

First, in its focus on “human rights abuses” – and its reliance on an international law lexicon – the TRC failed to locate apartheid within the history of

⁶⁷ For a theological critique of the TRC’s emphasis on forgiveness rather than justice, see T Lephakga “Radical Reconciliation: The TRC should have allowed Zacchaeus to testify?” (2016) 72 *HTS Theologiese Studies/ Theological Studies* <<http://www.hts.org.za/index.php/HTS/article/view/3120>>.

⁶⁸ Brown *Regulating Aversion* 15.

European colonialism in Africa, effectively redefining the problem as one of human rights abuse by the apartheid state beginning in 1960 and ending in 1994 without addressing the much longer history of white colonial domination of which apartheid was only a spectacular juridical instantiation.⁶⁹ Allen Feldman opines that the “technologies of memory” deployed by the TRC, which he describes as being underpinned by a “liberal-rationalist historiography” and a “juridical positivist” approach to history, were built on an artificial separation between performed violence (extreme acts of physical violence performed on individual bodies) and structural violence (everyday socio-economic violence and symbolic decimation of entire communities and populations).⁷⁰ As a result, atrocity was individualized and the focus on exceptionally “extreme” and “gross” acts of human rights violation ultimately backgrounded and normalized the everyday structural violence and terror of colonial-apartheid.⁷¹

Secondly, the TRC followed what Ramose calls a “bookkeeping model” of reconciliation.⁷² In such a model – where facticity and technicality are central – reconciliation is an instrumental process, concerned with “balancing the books”, with recording and collecting testimonies and hoping they balance out at the end of the

⁶⁹ Mamdani (1996) *SA Review of Books* 3-5.

⁷⁰ A Feldman “Strange Fruit: The South African Truth Commission and the Demonic Economies of Violence” in B Kapferer (ed) *Beyond Rationalism: Rethinking Magic, Witchcraft and Sorcery* (2002) 234 – 265. On a similar note, see Thiven Reddy’s critique of the dominant historical narrative of the democratic transition in South Africa (what he calls “transitology”) and the narrow conceptions of history (positivist-empirical), democracy (procedural and minimalist) and politics (elite-centered) it employs. Reddy takes issue with how a certain framework and narrative became the uncontested framework for writing and thinking about the transition “from apartheid to democracy” and excluded alternative meanings and narratives. T Reddy “From Apartheid to Democracy in South Africa: A Reading of Dominant Discourses of Democratic Transition” in HE Stolten (ed) *History Making and Present Day Politics: The Meaning of Collective Memory in South Africa* (2007) 148 – 164.

⁷¹ Feldman “Strange Fruit” in Kapferer (ed) *Beyond Rationalism* 259.

⁷² M Ramose “In Memoriam: Sovereignty and the ‘New’ South Africa” (2007) 16 *Griffith LR* 318-319; “Reconciliation and Reconciliation in South Africa” (2012) *J of African Philosophy* 33.

fixed period set for the TRC. In the end result, reconciliation – that is, “legal reconciliation” – comes to connote a “once-off settlement” focused on a narrowly defined past.⁷³ Implied in the bookkeeping model of reconciliation is the drive towards the codification of a seamless and unified truth and a singular narrative of our history – resulting in many exclusions. Alejandro Castijello-Cuellar has observed that state-led and state-authored projects of national reconciliation are interminably imbued with the power to name, define and demarcate.⁷⁴ In reference to the TRC in South Africa, he argues that the casting of history into law and legal processes results in the occlusion and unintelligibility of certain memories that do not fit within the “conceptual [and institutional] architecture” of the Commission which comprises its definitions of, and approaches to, violence, injustice, time, responsibility, victim and perpetrator and reparation to name a few.⁷⁵ As such, he concludes, following Feldman, that laws of national unity and reconciliation institute official forms of “structural forgetfulness”.⁷⁶

The third problem of the TRC converges with the first two in so far as it questions both the pre-eminence of reconciliation in the post-1994 transition as well as its political, historical and conceptual appropriateness. It is brought to light by Jeremy Cronin in his observation that *re*-conciliation tacitly presumes and idealises a prior (pre-apartheid) state of peace, a Golden Age, that is now being restored through laws and government programmes on national unity and reconciliation.

⁷³ Ramose (2007) 16 *Griffith LR* 318-319; (2012) *J of African Philosophy* 33.

⁷⁴ A Castijello-Cuellar “Historical Injuries, Temporality and the Law: Articulations of a Violent Past in Two Transitional Scenarios” (2014) 25 *Law and Critique* 47 – 66.

⁷⁵ Castijello-Cuellar (2014) *Law and Critique* 53.

⁷⁶ Castijello-Cuellar (2014) *Law and Critique* 49. See also E Christodoulidis “Law’s Immemorial” in E Christodoulidis and S Veitch (eds) *Lethe’s Law: Justice, Law and Ethics in Reconciliation* (2001) 207 – 227.

This modernist teleology – in which progress is inevitably realized over time – is however rebutted by the simple fact that such a Golden Age never existed: the history of South Africa is a history *and reality* of conquest, dispossession, suffering, anti-black racism, cultural decimation, violence and domination.⁷⁷ Put simply, there is now, and there was then, *nothing* to be re-conciled.

Another modernist ploy of the TRC process inheres in its employment of tropes such as Truth, redemption and progress. Mamdani for example has challenged the presumption that truth-telling, confession and remorse automatically leads to reconciliation by pointing out that the revelation of the brutalities and injuries of apartheid that were carried out by functionaries of the regime could in fact lead to national outrage, and revive the demand for justice which the truth-telling process had, albeit erroneously, intended to displace in the first place. It may also lead to fear of retaliation that could lead to a demand for separation.⁷⁸

Mamdani calls instead for a focus on apartheid as a system of power, and for reconciliation to be thought of in terms of the relation between (racialised) power and (racialised) privilege and between victims and beneficiaries.⁷⁹ In order for reconciliation to be durable, for it not to turn into an embrace of evil and a denial justice, attention must be paid not only to (narrow) political reconciliation but to

⁷⁷ J Cronin "The Bigger the Cake? Growth, Jobs and Equality" *Keynote Address at the Social Equality Conference, University of Cape Town, 15 August 2014* <<https://www.youtube.com/watch?v=5-PEHcRQjpY>>. For an earlier expression of this sentiment, see A Krog *Country of My Skull* (1998) 109:

The dictionary definition of 'reconciliation' has an underlay of restoration, of re-establishing things in their original state. The Oxford says to make friendly again after an estrangement; make resigned; harmonize; make compatible, able to coexist... But in this country there is nothing to go back to, no previous state or relationship one would wish to restore. In these stark circumstances, 'reconciliation' does not even seem like the right word, but rather 'conciliation'.

⁷⁸ Mamdani (1996) *SA Review of Books* 3-5.

⁷⁹ Mamdani "When Does Reconciliation Turn Into a Denial of Justice?" in *Sam Nolutshungu Memorial Lecture Series 3*; Mamdani (2002) *Diacritics* 33-59.

(broad) social reconciliation.⁸⁰ Political reconciliation in Mamdani's words is "limited to the political elite ... and state agents" whereas social reconciliation "reaches out to ordinary members of society, those who benefitted or got victimized as part of the logic" of the apartheid system.⁸¹ He argues that this shift in focus will help to prevent the racial privileges accrued under colonisation and apartheid from being entrenched as constitutional rights and will, in turn, give way to social justice.⁸²

Makau wa Mutua however has decried as a "mistake" the utilisation of human rights as the central idiom for the post-1994 legal and political reconstruction of South Africa, what he refers to as the "virtually exclusive reliance on rights discourse as the engine of change".⁸³ As he argues, "the new constitutional rights framework has frozen the hierarchies of apartheid by preserving the social and economic *status quo*".⁸⁴ This stems, on Mutua's analysis, from the inherent limitations of rights discourse as a tool for social transformation. Mutua points out the frequently acknowledged "double-edged" nature of rights – that is, the fact that rights can easily protect powerful and vested rights and interests as much as they can advance – to some limited degree – the needs and claims of the powerless and marginalised.⁸⁵ But this double-edged nature of rights, when placed in the context of a capitalist economic system and a liberal political system, frequently tends to yield to the protection of the wealthy and socially-privileged more than it ever produces

⁸⁰ Mamdani "When Does Reconciliation Turn Into a Denial of Justice?" in *Sam Nolutshungu Memorial Lecture Series 4*

⁸¹ Mamdani "When Does Reconciliation Turn Into a Denial of Justice?" in *Sam Nolutshungu Memorial Lecture Series*; Mamdani (2002) *Diacritics* 33–59.

⁸² Mamdani "When Does Reconciliation Turn Into a Denial of Justice?" in *Sam Nolutshungu Memorial Lecture Series 6*.

⁸³ M Mutua "Hope and Despair for a New South Africa: The Limits of Rights Discourse" (1997) 10 *Harvard Human Rights J* 68.

⁸⁴ Mutua (1997) *Harvard Human Rights J* 68.

⁸⁵ Mutua (1997) *Harvard Human Rights J* 68–69.

long-lasting change in the lives of the poor and excluded. For Mutua, rights discourse, by default and design, tend to follow a slow and gradualist approach to change, which ends up stabilising existing social arrangements – hence his description of rights as “traditional and conservative”.⁸⁶

Mutua traces the adoption of a constitutional rights framework for South Africa’s reconstruction to the African National Congress’s (ANC) commitment to non-racialism and liberalism. Armed with these commitments, the ANC entered the “negotiations” from a position of weakness and ended up agreeing to compromises with the National Party (NP) which resulted in the protection and consolidation of white minority interests, shielding their massive privileges and preventing large-scale redistribution of resources along more egalitarian lines.⁸⁷ Each major concession the ANC made in the constitutional negotiations with regards to land, property, the power of the judiciary and the structure of the state ensured the survival of the old order into the new dispensation and legitimised the results of apartheid.⁸⁸ These concessions then formed the basis for a Constitution and Bill of Rights which cemented black powerlessness and left the fundamentals of colonial-apartheid intact. As Mutua writes:

Although a predominantly black government is ostensibly in power, and blacks have been granted abstract legal entitlements, many blacks remain in the same station they occupied under apartheid: excluded and at the margins.⁸⁹

The above statement, although written in 1997, continues to ring true today. How then, despite overwhelming evidence of the inertia of apartheid inequalities and

⁸⁶ Mutua (1997) *Harvard Human Rights J* 69. See also W Brown “Suffering the Paradoxes of Rights” in Brown and Halley *Left Legalism/Left Critique* 420 – 434.

⁸⁷ Mutua (1997) *Harvard Human Rights J* 76.

⁸⁸ Mutua (1997) *Harvard Human Rights J* 81-83.

⁸⁹ Mutua (1997) *Harvard Human Rights J* 70.

colonial power relations, does South African legal scholarship in the fields of constitutional law and jurisprudence continue to maintain such deep faith in constitutionalism, human rights and law reform? While a commitment to liberalism and the problem of the conceptual whiteness of South African legal scholars play a large role, I would argue that a certain “constitutional theodicy” explains the scholarly disinclination to foreground continuing racial inequality (or what Tuitt calls “the insistent presence of the colonial”⁹⁰) as a fundamental constitutional contradiction and political and analytical priority in addressing issues of equality and justice. I am using the term “theodicy” in Lewis Gordon’s sense of the term.⁹¹ Gordon famously argued that theodicy – that age-old practice of attempting to account for the existence of a supremely benevolent, omniscient and omnipresent god in the face of worldly imperfection, evil and human suffering – has become secularised and now extends to certain political systems and regimes.⁹² Less concerned now with justifying the notion of a perfect god in the face of evil, theodicy in its secular form works to justify, legitimate and rationalise dominant social orders against criticisms of their hidden cruelties and socio-economic asymmetries and imbalances.

Much of South African legal scholarship on equality, justice and constitutionalism simply overlooks the deep racial fault lines in the country or treats

⁹⁰ P Tuitt “Used Up and Misused: The Nation State, the European Union and the Insistent Presence of the Colonial” (2012) *Columbia Journal of Race and Law* 490 – 498.

⁹¹ The theme of theodicy is a recurring theme in Gordon’s body of scholarship. However, see most recently L Gordon “Race, Theodicy and the Normative Emancipatory Challenge of Blackness” (2013) 112 *South Atlantic Quarterly* 725 – 736. See also *Existentialia Africana: Understanding Africana Existential Thought* (2000) 149; “Some Thoughts on Philosophy and Scripture in an Age of Secularism” (2003) *Philosophy and Scripture* 18 – 19; “African-American Philosophy, Race and the Geography of Reason” in L Gordon and JA Gordon (eds) *Not Only the Master’s Tools: African-American Studies in Theory and Practice* (2006) 85 – 106.

⁹² L Gordon *An Introduction to Africana Philosophy* (2008) 76.

them either as mere historical hangovers or minor aberrations that can be remedied by laws and policies giving effect to the Constitution. In such scholarship, the Constitution assumes a deity-like status with much of the scholarship attempting in one way or another to account for an intrinsically just, good and progressive Constitution and constitutional order co-existing with unresolved historical injustices and massive racial inequalities. This theodicean bent in the scholarship works to suppress a certain “cognitive dissonance” and therefore also has the character of self-deception in the face of the obvious realities of entrenched racial hierarchies in South Africa – a self-deception that Gordon – following Jean-Paul Sartre – would call “bad faith”.⁹³ To sharpen the argument further: the constitutional-theodicean grammar of South African legal scholarship is not simply ideologically conservative or a form of false consciousness. It also invisibilises black suffering and renders racial injustice and subordination illegible and it epistemically usurps the power to name and define the South African racial reality from a white point of view that completely negates Black people’s own experiences and understandings of these problems. It is, in the end, a theodicy that rationalizes anti-black racism.⁹⁴

Having jettisoned solutions and explanations rooted in constitutional optimism and human rights, how are we to interpret the paradox that a transitional justice process intended to produce significant social change managed to so permanently hinder any real or serious change? The work of Mogobe B. Ramose to be discussed below is instructive in exploring these questions.

⁹³ L Gordon *Bad Faith and Antiracist Racism* (1995).

⁹⁴ L Gordon “Black Existentialism” in MK Asante and A Mazama (eds) *Encyclopedia of Black Studies* (2005) 124.

2.5 Sovereignty, historical justice and “the constitutionalisation of injustice”

If the views of Durrheim *et al*, Vice, Mbembe, Terreblanche, Mamdani and Mutua could all cohere into one single argument it would be the argument, relying on the work of Ramose, that the incompleteness of the transition and the persistence of racism can be summed up as the failure – if not the refusal – of the new constitutional dispensation to address the question of historical justice and to restore sovereignty, land, and dignity to the indigenous people of South Africa.⁹⁵

Ramose analyses the constitutional negotiations for a “new” South Africa in terms of the two contending paradigms that were at play during that time, namely the democratisation paradigm versus the decolonisation paradigm.⁹⁶

The democratisation paradigm proceeds from the premise that the major problem of apartheid was one of racial disenfranchisement and denial of basic civil rights to Blacks. In this paradigm, a key fundament of achieving a new democratic dispensation would have to be the inclusion of Blacks into the existing legal, political and economic regime and the promulgation of democracy and non-racialism.⁹⁷ Because of the excessive focus on apartheid – a fleeting event (from 1948 – 1994) in the now almost four (4) centuries of white supremacy’s reign in South Africa – the

⁹⁵ M Ramose “An African Perspective on Justice and Race” (2001) *Polylog* <<http://them.polylog.org/3/frm-en.htm>>; “Historic Titles in Law” in PH Coetzee and APJ Roux (eds) *The African Philosophy Reader* (2 ed, 2003) 541 - 543; “I Conquer, Therefore I am the Sovereign: Reflections Upon Sovereignty, Constitutionalism and Democracy in Zimbabwe and South Africa” in Coetzee and Roux (eds) *The African Philosophy Reader* 543 – 589; “Ubuntu: Affirming a Right and Seeking Remedies in South Africa” in L Praeg and S Magadla (eds) *Ubuntu: Curating the Archive* (2014) 130; 2007 16 *Griffith LR* 310 - 329; 2012 *J of African Philosophy* 20 -39.

⁹⁶ Ramose “I Conquer, Therefore I am the Sovereign” in Coetzee and Roux (eds) *The African Philosophy Reader* 570.

⁹⁷ Ramose “I Conquer, Therefore I am the Sovereign” in Coetzee and Roux (eds) *The African Philosophy Reader* 570.

democratisation paradigm entirely lost sight of the question of land which is a problem that predates the formal institutionalisation of apartheid.⁹⁸ Already in 1993, Ramose, together with Lesiba Teffo, had hypothesised that a core ideological constituent of the democratisation paradigm was “the illusion of freedom” through which Blacks would be inserted into a new order of racial domination “not by coercion as in the past, but by consent.”⁹⁹ This illusion of freedom according to Ramose and Teffo involves among other things:¹⁰⁰ (1) the surrender by Blacks of the desire and struggle for lost freedom; (2) the renunciation of the political will to recover land that was dispossessed through conquest and (3) acceptance by the newly elected government of the debt incurred by the apartheid government (which would also be a legitimisation of the activities of the apartheid state). Democratisation thus results in the moral and political maintenance of the racist foundations of South Africa and the continuation of racially oppressive conditions in the guise of a liberal democratic state where the exigency of restoring parity and equality would remain forever deferred. As such, Ramose concludes that the democratisation paradigm is perfectly “consistent with the conqueror’s claims” to land, property, power and wealth unjustly acquired through conquest and violence.¹⁰¹ The democratisation paradigm is thus fundamentally preservative of the colonial-apartheid social fabric; it maintains the accumulated inequalities through the new legal order and permits

⁹⁸ Ramose “I Conquer, Therefore I am the Sovereign” in Coetzee and Roux (eds) *The African Philosophy Reader* 570. See also Ramose “Historic Titles in Law” in Coetzee and Roux (eds) *The African Philosophy Reader* 541 – 543.

⁹⁹ LJ Teffo and MB Ramose “Steve Biko and the Interpreters of Black Consciousness: a response to Lotter” (1993) 25 *Acta Academica* 11.

¹⁰⁰ Teffo and Ramose (1993) *Acta Academica* 11-12.

¹⁰¹ Ramose “I Conquer, Therefore I am the Sovereign” in Coetzee and Roux (eds) *The African Philosophy Reader* 570.

equal participation of all members of a society – the conquered and conqueror populations – in a *still* unjust and unethical polity.

On the extreme opposite, the decolonisation paradigm involves precisely the “dissolution of the conqueror’s South Africa” through the restoration of title to territory and sovereignty over it to its indigenous people.¹⁰² Decolonisation seeks to effect a fundamental alteration in the power relations, and the epistemological and ontological framework, of South African society. It aspires not merely to the enfranchisement and inclusion of the “oppressed” into the existing framework but a decolonial reorganisation and repair of the polity. It abolishes the polity as imagined and instantiated by the European colonialist and dissolves the very categories of coloniser and colonised; settler and native; and Black and white as material social realities and not merely nominal juridical labels. Decolonisation, then, marks the true end of the white settler State. Despite the fact that the decolonisation paradigm represents a deeper and more expansive conception of justice that is true to the experience of the indigenous conquered peoples of South Africa, it was of course the rights-based democratisation paradigm and its illusory freedom that carried the day in the constitution-making and nation-building process, resulting in what Ramose calls “the constitutionalisation of injustice”¹⁰³ or what he elsewhere describes as the “forced transmutation of injustice into justice”.¹⁰⁴

¹⁰² Ramose “I Conquer, Therefore I am the Sovereign” in Coetzee and Roux (eds) *The African Philosophy Reader* 570.

¹⁰³ Ramose “I Conquer, Therefore I am the Sovereign” in Coetzee and Roux (eds) *The African Philosophy Reader* 570.

¹⁰⁴ Ramose “I Conquer, Therefore I am the Sovereign” in Coetzee and Roux (eds) *The African Philosophy Reader* 560.

The ultimate choice for the democratisation paradigm is also epistemological for Ramose, as it is linked to the adoption of a Western legal paradigm and discourse that is neither autochthonous nor democratically legitimate since the majority of the population had no say in its adoption.¹⁰⁵ This reinforces the epistemicide that was central to the original injustice of colonialism and apartheid. By annihilating and dismissing the experiences and knowledges of the indigenous people and replacing it with the coloniser's own unilaterally defined meanings of truth, knowledge and experience, the epistemological structure of the "new" constitutional dispensation tacitly legitimises the colonial assumption that African people by virtue of their presumed lack of civilisation and rationality are incapable of producing knowledge with which to govern themselves and to make sense of the(ir) world.¹⁰⁶

Accordingly, the "transformation" brought about by the Constitution could be described as profoundly *"non-constitutive"* in the sense that the formal abolishment of apartheid was followed only by a general reform of constitutional law and the processes, systems and rules of South African law *but not by a fundamental reorganisation of the way in which South Africa is economically, socially and politically constituted or organised*. Put differently, the transition to constitutional democracy in South Africa was non-constitutive in the sense that it did not bring about *radically new* values and social relations. In a vein not entirely different to Ramose, Karl Von Holdt suggests that this failure to reconstitute a new South Africa

¹⁰⁵ Ramose (2007) *Griffith LR* 320. See also M Ramose "The King as Memory and Symbol of African Customary Law" in MO Hinz (ed) *The Shade of New Leaves. Governance in Traditional Authority: A Southern African Perspective* (2006) 353 – 355.

¹⁰⁶ See M Ramose *African Philosophy Through uBuntu* (1999) 5-28. See also E Eze *On Reason: Rationality in a World of Cultural Conflict and Racism* (2008).

(which is to say, Azania¹⁰⁷) can largely be attributed to the legal architecture of the present constitution which, together with “local and international structures of power and ANC policy choices, [has] placed powerful constraints in the way of overcoming the legacies of apartheid”.¹⁰⁸

For Von Holdt, the shift from parliamentary sovereignty to constitutional supremacy, while celebrated as resistance to totalitarianism through the rule of law and emboldened powers of judicial review, also effected a dramatic amputation of the constituent power of the black majority, thereby foreclosing the revolutionary possibilities of a black majority government – through weakening its potential ability to implement radical programmes of redistribution, redress and reparations to overcome the socio-economic imbalances created by colonial-apartheid.¹⁰⁹ To the extent that land and property are superordinate markers of social status and economic power in a society – especially one with a history of settler colonialism – Von Holdt also identifies the current property clause in the South African constitution as another feature of the constitutional architecture that impairs the realisation of historical justice and the undoing of colonial violence. The constitutional preservation and naturalisation of property rights acquired through colonial land dispossession and through (racialised and gendered) economic deprivation is telling for its protection of rights acquired through the deployment of racism in what is a

¹⁰⁷ The term “Azania” is the anti-colonial name given to the territory belonging to the indigenous conquered peoples of South Africa by adherents of African and Black nationalism such as the Pan Africanist Congress (PAC), Black Consciousness Movement and the Azanian People’s Organisation (AZAPO). Redefined from its earlier, ancient, meanings, it is taken to mean “The Land of Black people” and is argued by these organisations to be the liberated name for the place currently known as South Africa. For purposes of convenience and constancy, I will use the appellation “South Africa” but pause to note in this footnote that the name of this country – like Africa itself – are contested terms and are used provisionally and under protest.

¹⁰⁸ K von Holdt “South Africa: The Transition to Violent Democracy” (2013) 40 *Review of African Political Economy* 592.

¹⁰⁹ Von Holdt (2013) *Review of African Political Economy* 592.

purportedly “non-racial” constitution as well as for its erasure of the *moral* and political history of conquest in South Africa:

It is important to note that in recognising and protecting property rights *the constitution ratifies the outcome of over three centuries of colonial and apartheid violence* – conquest, dispossession, and the Land Acts of 1913 and 1936, as well as the successive labour regimes of slavery, forced labour, migrant labour and cheap rightless labour on the basis of which capital accumulation took place. Not only was the constitution born in violence, in this sense it obscures the founding violence of South African society. More perhaps than in most societies this constitution is a ‘founding fiction designed to disguise the act of lawless violence which is the basis for the establishment of law’.¹¹⁰

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The coloniality of the constitutional dispensation – an argument central to Ramose’s work – can be further examined through a (literary) reading of the Constitution as an “act of invention”.¹¹¹ To the extent that the Constitution represents an act of writing, of marking and occupying a text, and to the extent that it does so without the democratic legitimacy conferrable only by the indigenous Black majority population, it can be likened in mode and operation to what Patricia Tuitt calls a colonial act of “invention”¹¹² and a “[practice] of colonial imposition”¹¹³ – an act and practice necessarily underpinned by appropriation, arrogation and erasure. By “invention”, Tuitt refers to impositions of Truth and Power, which claim to be the supervening source or grounding of a polity. For Tuitt, the impulse toward invention

¹¹⁰ Von Holdt (2013) *Review of African Political Economy* 593. My emphasis.

¹¹¹ P Tuitt “Literature, Invention and Law in South Africa’s Constitutional Transformation” in Van Marle and Motha (eds) *Genres of Critique: Law, Aesthetics and Liminality* (2013) 75 – 89.

¹¹² Tuitt “Literature, Invention and Law in South Africa’s Constitutional Transformation” in Van Marle and Motha (eds) *Genres of Critique* 84.

¹¹³ Tuitt “Literature, Invention and Law in South Africa’s Constitutional Transformation” in Van Marle and Motha (eds) *Genres of Critique* 86.

is what enabled and justified European colonialism and land appropriation.¹¹⁴ This is because “invention” – even when it travels under the banner of “discovery”, “Christianization” and “civilization” – involves imbuing living beings and spaces with the value of nothingness. It requires the erasure and annihilation of what exists in order to clear the way for the conqueror to remake it in his own Image:

Just as during the age of colonial land acquisitions European settlers never encountered an expanse of land they could not occupy or seize.¹¹⁵

Here Tuitt is citing the European fiction of *terra nullius* – by which fully populated, governed and inhabited spaces were imagined as empty, desolate and deserted – as performing precisely such an act of invention.¹¹⁶ She illustrates as well that central to acts of invention is the ruse of discovery and renewal, where whole lands are deemed to be empty and uninhabited and therefore in need of invention and civilization – when what is actually at work is imposition and domination.

In a strikingly similar vein, the constitution *in* South Africa (since, as I am suggesting, it is not truly the constitution *of* South Africa) – and its claim to heralding a new, transformed society together with its casting as the *Grundnorm* of the new legal and political order – constitutes an act of invention. It too clears away the history that precedes it and creates the fiction of a *terra nullius* by imagining the *absence* of an indigenous people, with laws, customs, Kings and Queens, with a history, knowledge and an autochthonous moral and ethical grounding for social relations between people, nature, and the cosmological order. Such a clearing away

¹¹⁴ Tuitt “Literature, Invention and Law in South Africa’s Constitutional Transformation” in Van Marle and Motha (eds) *Genres of Critique* 85.

¹¹⁵ Tuitt “Literature, Invention and Law in South Africa’s Constitutional Transformation” in Van Marle and Motha (eds) *Genres of Critique* 85.

¹¹⁶ Tuitt “Literature, Invention and Law in South Africa’s Constitutional Transformation” in Van Marle and Motha (eds) *Genres of Critique* 85-87.

– what Ramose would designate as “epistemicide” – is of course necessary in order for the Constitution to install itself as supreme above all else and to inaugurate its own hegemonic sense of “The People”.

But as Angela Harris has argued, constitutional invocations of “We, The People” by the “mainstream legal voice” necessarily rely on a fictional and fabricated consensus amounting to no more than a constellation of elite political interests constituting themselves as a unity in the face of many disparate and colliding voices.¹¹⁷ In a sharp critique of Antjie Krog’s 2009 *Begging to be Black*, Tuitt argues that one important strategy employed by the European colonialist is to reduce the complexity and depth of the world it enters so that after occupying that world, it can claim and represent it as *new*, that is, as invented.

The Constitution then is simply a contemporary enunciation and unfolding of an age-old colonial conceit that it can serve as the constitutive, originary and foundational predicate of social existence. Much like the European ego which imagines itself as the primordial source of Being and the foundation of history itself,¹¹⁸ the Constitution presumes itself to be self-authorizing and sovereign: hence why it can constitute a whole new epoch named “post-apartheid” which exists on a linear plane following from and essentially wiping away “apartheid”. In particular, the idea of the Constitution as epoch-making or epochal (whether as transformative, *Grundnorm*, basic law or founding law) is undoubtedly the product and reiteration of the well-worn colonial gesture by which the colonial ego constituted Europe as the foundation of history itself. This is why for Georg Hegel, Africa has no history to

¹¹⁷ A Harris “Race and Essentialism in Feminist Legal Theory” (1990) 42 *Stanford LR* 581.

¹¹⁸ T Serequeberhan “The Critique of Eurocentrism and the Practice of African Philosophy” in Coetzee and Roux (ed) *The African Philosophy Reader* 75.

speak of at least until the arrival of the European on African shores.¹¹⁹ In this way, the African comes to be included as a subject of universal history through conquest since time and therefore subjectivity only begins when the coloniser arrives. History is also said to end when the coloniser recedes as in claims that Africa would be cast into darkness, chaos, violence, and civil war should the White Man leave the Continent.¹²⁰

Triumphalist accounts of the Constitution also rely on an irredeemably colonial temporal logic in which the Constitution is discursively represented as the equivalent of the “Discovery” of a new nation, the invention of a *civilized* world on the ruins of one which was once in darkness. This is a colonial gesture in another, and I think simpler, sense: the Constitution’s characterization as the *Grundnorm* – or as the “basic law” or a “transformative document” - views it as grounding and sustaining the social and moral relations of the “new” nation it has purportedly brought into being.¹²¹ But this characterization must also admit that it does so in strict accordance with the moral values, social ontology, cultural assumptions and legal and political institutions of Western civilization. It therefore perfects the European conqueror’s dream of turning South Africa into a “white man’s country”.¹²² As a “modernist,

¹¹⁹ GWF Hegel (trans J Sibree) *The Philosophy of History* (1956) 99: “At this point we leave Africa, not to mention it again. For it is no historical part of the World; it has no movement or development to exhibit. Historical movements in it ... belong to the Asiatic or European World”.

¹²⁰ For an analysis of the “temporal imaginary” that associates Africa and blackness with regression, see C Mills “White Time: The Chronic Injustice of Ideal Theory” (2014) 11 *Du Bois Review* 31.

¹²¹ This is a view put forward in the works of Drucilla Cornell and Stu Woolman – who both derive this claim from the jurisprudence of Emeritus Constitutional Court Justice Laurie Ackermann. See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (2013) and D Cornell *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation* (2014).

¹²² See B Schwarz *Memories of Empire Volume 1: The White Man’s World* (2011) 292 who traces the assertion of South Africa as a “white man’s country” to Jan Smuts.

Eurocentric and liberal”¹²³ text, it reiterates exactly the fiction of *terra nullius* through its evacuation of an African presence or subjectivity and its replacement with a decidedly Western script. It effects a colonial superimposition, most vividly reflected in the Constitution’s supremacy over the African law of the indigenous people.

Hence Ramose’s assertion that the Constitution represents a “second conquest” not only in its legitimation of the results of colonial land dispossession and exploitation, but also in its codification of the Constitution’s supremacy over the sovereign will of the people and its subordination of indigenous law and African jurisprudence.¹²⁴ He thus reads the Constitution as a form of reiterative violence in the sense that the fundamental injustice of the “old” order was preserved in the making of the putatively “new” order. In his words:

[T]he injustice of conquest ungoverned by law, morality and humanity was constitutionalised. This *constitutionalisation of injustice* places the final constitution on a precarious footing because of its failure to respond to the exigencies of natural and fundamental justice [that is] due to the indigenous conquered peoples.¹²⁵

As such, the foundations of the South African constitutional order will continue to be unstable, overwrought, and lacking the grounds for universal legitimacy.¹²⁶ Its attempts at closure and consensus will always be haunted by the demand for justice. And in this instance, justice entails firstly, the restoration of territorial and political sovereignty to the “indigenous conquered peoples” of South Africa; secondly,

¹²³ J Comaroff and J Comaroff “Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa” (2004) 29 *Law & Social Inquiry* 521.

¹²⁴ Ramose 2007 16 *Griffith LR* 310 – 329. For the analysis of the paradox (between the preservation and disavowal of the colonial order) at the heart of national aspirations to a postcolonial polity, see Motha “Reconciliation as Domination” in Veitch (ed) *Law and the Politics of Reconciliation* 69 – 71.

¹²⁵ Ramose “I Conquer, Therefore I am the Sovereign” in Coetzee and Roux (eds) *The African Philosophy Reader* 572. My emphasis.

¹²⁶ M Ramose “The Philosophy of the Anglo-Boer War” in I Snyman *et al* (eds) *A Century is a Short Time: New Perspectives on the Anglo-Boer War* (2005) 22- 23.

restitution and reparation in the form of economic and social justice and thirdly, the full rehabilitation of African cultural, spiritual and epistemological integrity.¹²⁷ This unfulfilled dream of a liberated, *post-conquest* Azania is what beckons the search for a critical race jurisprudence and it is also what brings Biko so sharply into memory.

Evoking again the notion of the afterlife of colonial-apartheid discussed in chapter 1, I take the force of Ramose's argument (when read in conjunction with the other authors related above) to be that the transition from apartheid to "post"-apartheid represents a reorganisation and hence, consolidation, of white racial power – not its abolition. On this view, the maintenance of racial hierarchy and the elision of Black people's historical justice claims are *inherent* to rather than *incidental* in the making of the "new" nation. Thus, the gap related above between the egalitarian ideals and values of the "new" nation and the substantive practices of racial subordination and domination that continue to subsist in the lives of Black South Africans calls for a different interpretation. Not only does this gap indicate the impossibility of any attempts to legislate freedom and equality into being but, more provocatively, it might reveal the extent to which the continuation and intensification of racial inequality and black suffering in South Africa is *constitutive* of the new legal and political order and central to its stability.

On this view, the "new" South Africa that was said to be born in 1994 and later baptized through the adoption of what is perceived as the "best" or "most progressive" Constitution in the world, far from being the teleological fulfillment of the liberation struggle, turns out to be not so new at all as the dominant narrative of

¹²⁷ M Ramose "African Philosophy and the Quest for Authentic Liberation of Africa" (1995) 5 *Dialogue and Universalism* 72-73.

a united and equal South Africa is unraveled by the stark empirical reality of continuing racial subordination, of a black majority still powerless, poor, dispossessed and vulnerable and a white minority still living comfortably in the lap of privilege largely uninterrupted by the impetus for redress and repair.

This aforementioned formulation is significant for shifting the temperature of critique from the timid argument that the Constitution and its liberal legal framework is practically incapable of delivering substantial change to the more devastating indictment of the Constitution itself and the social order it inaugurates as a continuation of colonial power relations and an impediment to the authentic liberation of Black people. It therefore also moves away from the argument that the provisions of the Constitution are in need of improved interpretation and better enforcement to the argument that the Constitution is fundamentally flawed not only on account of its Eurocentricity and undemocratic imposition on the indigenous people of South Africa but also because, as the outcome of a faulty pact between Black and white political elites, it is central to the maintenance of a social order predicated on racial subordination and the simultaneous concealment and legitimation of historical injustice.¹²⁸

This comports with, and also puts an Africanist twist on, the primary theoretical endeavour of CRT which is to investigate the paradox of how conditions of racism and racial inequality can persist despite being morally condemned or even legally abolished.¹²⁹ As Harris further points out, CRT proceeds through this investigation centrally by challenging the conventional liberal belief that racism survives merely as

¹²⁸ N Gibson "The Pitfalls of South Africa's 'Liberation'" (2001) 23 *New Political Science* 373.

¹²⁹ AP Harris "Critical Race Theory" in J Wright (ed) *The International Encyclopaedia of the Social and Behavioural Sciences* (2012) 266 - 270.

a relic of the past and instead posits the view that racism and racial power may undergo cosmetic reconfigurations but remain ordinary, routine and central to the practices and institutions of a society and have a significant impact on all areas and domains of human activity (law, politics, war, economics, education, epistemology, religion, culture and mass media, and sexuality).¹³⁰

2.6 Conclusion: the impossibility of being “post-”apartheid

The arguments put forward by the authors above each indicate the deep and complex ways in which the legal, political and social transition of South Africa that began in the 1990s (perhaps even the late 1980s) remains incomplete and unresolved. The picture they draw is of a South Africa that is still fundamentally unequal, unreconciled and unsettled. They indicate too that race and racism are not merely relics of our legal past. To the contrary, questions of race, racial ideology and racial identity and power are deeply embedded in the cracks and on the surfaces of the South African socio-political landscape. The studies conducted by Durrheim, Mtose and Brown, as well as Terreblanche and Mutua point out the continuance of economic and social inequalities generated by the racial distributions of power of colonialism and apartheid. These inequalities are not only being left untreated under the constitutional dispensation but they are being further entrenched.¹³¹ The

¹³⁰ See R Delgado and J Stefancic *Critical Race Theory: An Introduction* (2001) 7. For a critique of the prevalent view that racism functions like a “coat of paint” on social relations, in other words that racism is something that exists “on” the surface of social relations rather than something that constitutes and determines those social relations, see F Cress-Welsing *The Isis Papers: The Key to the Colours* (1990); D Bell *Faces at the Bottom of the Well: The Permanence of Racism* (1992) and G Kilomba *Plantation Memories. Episodes of Everyday Racism* (2010).

¹³¹ T Madlingozi ‘Post-apartheid Social Movements and the Quest for the Elusive “New” South Africa’ (2007) 34 *J of Law and Society* 77. See also S Sibanda ‘Not Purpose Made! Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty’ (2012) 23 *Stellenbosch LR* 482 and P Bond ‘Constitutionalism as a Barrier to the Resolution of Widespread Community Rebellions in South Africa’ (2014) 41 *Politikon* 461-482.

contributions by Mbembe, Vice, and Mamdani points out the deep contradictions that underlie our reconciliation process by pointing out how the transition has not eliminated existing racial antagonisms, mindsets and discomforts and by showing how the dominant understanding of reconciliation and memory in South Africa is haunted by its own post-racial denials of the need for justice, redress and reparations.

The role and place of the South African Constitution cannot be ignored and an examination to that effect was incorporated through Ramose's critical treatment of post-1994 constitutionalism. There I argued for an argumentative shift from the view that the Constitution represents a practically false promise of an equal and liberated South Africa (this much in any case being empirically verifiable) to the view that it also, and more importantly, represents an unjust and unethical vision of social life which perpetuates colonial power relations and knowledges. This confirms both Tshepo Madlingozi's description of the quest for a post-apartheid South Africa as "elusive"¹³² (if not impossible) and Van Marle's assertion that the search for a *post-apartheid* jurisprudence "might forever be postponed"; that the "post" in "post-apartheid" might forever be delayed.¹³³

It is to be concluded from the above that a major source of the incompleteness, falsity and fragility of the post-1994 transition identified throughout this chapter is the ideologically faulty set of predicates on which the terms of South Africa's path of transitional justice, legal transformation and postcolonial recovery were organised and based, namely: depoliticisation; the subordination of justice to

¹³² Madlingozi (2007) *J of Law and Society* 77.

¹³³ K van Marle "Jurisprudence, Friendship and the University as Heterogeneous Public Space" (2010) 127 *SALJ* 628.

truth and reconciliation; a liberal view of racism; a reductive historical narrative that centers apartheid as an exceptional moment in the much longer history of colonial racism; a triumphalist account of social change; the fetishisation and worship of the Constitution; a modernist teleology of time and history as well as a Eurocentric and legalistic paradigm of justice. Taken together, these coalesce to obscure and minimise the nature, depth and devastation of colonial violence and racist terror in South Africa, and thereby invisibilise the continuance of coloniality and white supremacy in their different legal, political, psychic, symbolic, cultural and social disguises. The conceptual and political disorientation engendered by this repertoire of distortive discourses and concepts has as its primary outcome, the erasure of the exigency of historical justice and decolonisation.

The project of reconceptualising Biko's thought for the development of a South African critical race theory emanate from these continuances and failures in the transition to a "post"-apartheid South Africa. In short, the central argument to be pursued throughout this study is that the relevance and theoretic power of Biko's thought – which I will discuss in the chapter that follows – inheres in the fact that bar a few cosmetic changes, the society that Biko robustly criticised and mobilised against is coterminous with the one we live in today.

3

Biko as a Critical Theorist of Race: Reading Black Consciousness as Social and Political Philosophy

Steve Biko is one of the few people who continue to speak after having been consigned to eternal silence by death.¹

3.1 Introduction

The purpose of this chapter is to locate Steve Biko's thought and politics within the larger terrain of intellectual traditions of African resistance to colonialism, imperialism and racism. I aim to defend the thesis that Biko's writings principally collected in the book *I Write What I Like*² – together with other published interviews and court transcripts – emerge from the Africana theoretical and philosophical tradition and are composed of a complex amalgamation of ideas about racism, power, identity, blackness, consciousness, resistance, justice and freedom.³ I shall therefore pursue a reading of Black Consciousness as social and political philosophy with a view to illustrating its relevance to post-1994 legal critique and jurisprudence in later chapters. This chapter provides an extensive analytical treatment of the main focus of this thesis – Steve Biko and Black Consciousness – and thus will offer a broad historical and theoretical interpretation of the major themes, ideas, debates and concepts in Black Consciousness philosophy.

¹ LJ Teffo and MB Ramose "Steve Biko and the Interpreters of Black Consciousness: a response to Lotter" (1993) 25 *Acta Academica* 2.

² S Biko (A Stubbs, ed) *I Write What I Like: A Selection of His Writings* (2012 [1978]).

³ M More "Biko: Africana Existential Philosopher" in A Mngxitama *et al* (eds) *Biko Lives! Contesting the Legacies of Steve Biko* (2008) 49.

The chapter begins in the section that follows with a discussion of Biko's status as a philosopher. Such a discussion proceeds as a departure away from a biographical rendering of Biko – focused on personalities, events, places, organisations and relationships – to one which situates him within an intellectual terrain – focused on ideas, concepts, debates and theoretical frameworks. Essentially, Biko's reflections on Black life in the anti-black, white supremacist social order of colonial-apartheid places him within a "long-line of a discursive field predicated on the lived experiences of African and African-descended people in [the] diaspora".⁴ Following this, I will then trace the political and historical origins of Black Consciousness tracking its maturation over time through an intellectual biography of Steve Biko – from his early days as a school pupil in the Eastern Cape and Natal where his embryonic insights into white racial power begin to germinate, to his time as a medical student where Black Consciousness as a movement and philosophy took full form, through to his later life as an activist and intellectual of the Black Consciousness Movement up until his untimely death. Although aspects of his biography, his life and times, will be discussed, they will be referred to only insofar as they are relevant to the development of his thought and politics. In the final section of this chapter, I explore, outline and engage with the central philosophical themes and lines of social criticism that emerge in Biko's thought by way of an exegesis of his own writings together with other thinkers and scholarly traditions that have bearing on the three categories of analysis in Black Consciousness that will be explored, namely: (1) race, racism and white supremacy; (2) identity (and its relevance to politics) and (3) liberation and decolonisation. By the end of this

⁴ M More "The Intellectual Foundations of the Black Consciousness Movement" in P Vale et al (eds) *Intellectual Traditions in South Africa: Ideas, Individuals and Institutions* (2014) 173.

chapter, I hope to have set out as fully as possible, the thought and politics of Steve Biko and Black Consciousness.

3.2 Biko as theorist and philosopher

This effort to apprehend Biko not only as a radical activist, freedom fighter and intellectual but also a social theorist and philosopher takes its cue from Mabogo More's figuring of Biko as an Africana existential philosopher and critical theorist.⁵ More explains that his endeavour to situate Biko in the tradition of Africana philosophy emanates from his frustration with the contemporary tendency to lock Biko and his work "in the biographical moment and political activism" – a tendency he identifies in popular treatments of other African thinkers.⁶ Lewis Gordon has expressed similar concerns regarding the reduction of intellectuals of African descent to their biographies.⁷ He comments that this subordination of their theoretical identity is "as if to say white thinkers provide theory and black thinkers provide experience".⁸ Read together, both More and Gordon insist on reading African intellectuals primarily from the perspective of the *ideas* they produced. Of course

⁵ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 45 – 68. See also M More "Biko and Gordon and Biko: Africana Existential Conversation" (2011) 13 *Philosophia Africana* 71 – 88; "Black Consciousness Movement's Ontology: The Politics of Being" (2012) 14 *Philosophia Africana* 23 – 40; "Biko and Douglass: Existential Concept of Death and Freedom" (2015) 17 *Philosophia Africana* 101 – 118. The creation of the category of "Africana philosophy" by Lucius Outlaw and its elaboration by Lewis Gordon (see n 12 below), as well as Biko's designation within it is of course not unproblematic. It is contested by many philosophers from the African continent on the grounds that such a designation performs an epistemological colonisation of African philosophy and unnecessarily subsumes it under the banner of the amorphous category of "Africana". Following debates over the existence of an African philosophy (rather than simply a philosophy from Africa), the designation, by reducing African philosophy (thought emanating directly from the continent of Africa) to simply being a part of something else, is also said to depict African philosophy as incapable of independence and devoid of distinct identity. See A Nzegwu and M Ramose "Interview with Mogobe Ramose" (2016) 14 *J of African Philosophy* 95. While this raises serious theoretical, political and epistemological questions about where to place and how to read not just Biko but other thinkers in Africa and the diaspora, I accept for the most part More's reading of Biko as an "Africana philosopher" as a descriptive matter.

⁶ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 46.

⁷ LR Gordon *What Fanon Said: A Philosophical Introduction to His Life and Thought* (2015) 5.

⁸ Gordon *What Fanon Said* 5.

this is not to say that biography is entirely unimportant. To the contrary, the biographical, together with the geo-political and temporal, provides texture, insight and context into the development of a thinker's ideas and therefore constitutes a significant part of that thinker's locus of enunciation – the standpoint from which they speak, write and think. The point however is not to reduce the thinker to their biographical life story in a manner that precludes rigorous examination of their ideas. To defend an account of Biko as primarily a philosopher and not merely an anti-apartheid activist and political leader then is to acknowledge More's contention that Biko "defies the simple reduction to a politician or activist by assuming other equally important identities. He also combines the cultural, the political and the philosophical in the same person".⁹ More notes the paradox that while Biko and other commentators described Black Consciousness as a "philosophy", very few people referred to Biko himself as a philosopher.¹⁰

It is from this starting point that he seeks to situate Biko within the tradition of Africana existential philosophy. Africana existential philosophy falls under the broader tradition of "Africana philosophy", a term coined by Lucius Outlaw to denote:

[A] "gathering" notion under which to situate the articulations (writings, speeches, etc.), and traditions of the same, of African and peoples of African descent collectively, as well as the sub-discipline—or field-forming, tradition-defining, tradition-organizing—reconstructive efforts which are (to be) regarded as philosophy.¹¹

Africana philosophy is thus an umbrella term for the literature, traditional practices, poetry, music, political writings and speeches produced by Africans on the continent

⁹ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 46.

¹⁰ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 46.

¹¹ L Outlaw *On Race and Philosophy* (1996) 76.

and in the Diaspora.¹² As Gordon describes it, Africana philosophy “involves theoretical questions raised by critical engagements with ideas in Africana cultures and their hybrid, mixed, or creolized forms worldwide”.¹³ At a much deeper level, Africana existential philosophy seeks to investigate the meaning, character and value of human existence in the face of cruelty and catastrophe. It aims to think the (non-)human in the midst of dehumanisation and racial terror.

Its specificity as a large collection of centuries of black intellectual production is not insignificant as it also functions as a body of work that seeks to address a wide range of social, economic, cultural and philosophical problems relevant to Africans and people of African descent – central among them being slavery, imperialism, colonialism and racism. Africana existential philosophy then raises even more specific questions regarding the identity and liberation of African people, and their existence, human Be-ing or essence.

It raises, that is, “the ontological question about black identity in an antiblack world”.¹⁴ This concern with formulating a philosophy that is attentive to, and based on, the specific historical condition of Africans necessarily entails an engagement with identity, culture, epistemology and most importantly, liberation. In other words, by being a product of its particular social milieu, Africana philosophy draws a close connection between the theories it produces and the lived experiences of Africans so that their concerns and experiences frame the thematic of the philosophical/theoretical production of African thinkers at any particular time.

¹² L Gordon *An Introduction to Africana Philosophy* (2008) 1. See also L Gordon *Existential Africana: Understanding Africana Thought* (2000).

¹³ L Gordon *An Introduction to Africana Philosophy* 1.

¹⁴ More “Biko: Africana Existential Philosopher” in Mngxitama *et al* (eds) *Biko Lives!* 47.

In its black existential mode, the broad tradition of Africana philosophy concerns itself with the “lived experience of blackness in an intrinsically anti-black world”.¹⁵ The Africana existential themes that we will discern in Biko’s *oeuvre* will include issues of “black self-hood, black suffering, embodied agency, freedom ... racism and liberation”.¹⁶ For this reason because much of the latter history of the African world is one of a struggle against anti-black racism and hegemonic Eurocentric definitions of the Human and the world, Africana philosophy is inherently oppositional and liberatory.¹⁷ As we will see in the section that follows, Africana philosophy and by extension, Black Consciousness philosophy reads very much as a “philosophy born of struggle”.¹⁸

3.3. Black Consciousness: The history of an Idea

Without denying the rich history of pre-colonial African life,¹⁹ the intellectual and political history of Black Consciousness could perhaps be said to properly begin in the moments of the first encounter between the indigenous African peoples and the European colonialists as the former consistently and relentlessly revolted against the latter’s invasion and plunder of African lands and violation of African bodies. African resistance to colonialism and imperialism in defence of the humanity, sovereignty, dignity and cultural integrity of African peoples must be understood as the central backdrop for the emergence of black radical intellectual and political traditions in Africa and her diaspora – from slave rebellions and escapes, to civil rights and

¹⁵ More (2011) *Philosophia Africana* 73.

¹⁶ More (2011) *Philosophia Africana* 76.

¹⁷ More “Biko: Africana Existential Philosopher” in Mngxitama *et al* (eds) *Biko Lives!* 63.

¹⁸ See L Harris (ed) *Philosophy Born of Struggle: Anthology of Afro-American Philosophy from 1917* (1983).

¹⁹ See for example, CA Diop (M Cook trans) *African Origins of Civilization: Myth of Reality* (1974); (HJ Salemsen trans) *Precolonial Black Africa: A Study of the Political and Social Systems of Europe and Black Africa, from Antiquity to the Formation of Modern States* (1987).

antiracism campaigns, anti-colonial revolutions, armed resistance and revolutionary politics as well as oppositional artistic practices and political spiritualities.²⁰ I turn now to the history of the idea of Black Consciousness as seen through the words and world of Steve Biko.

*

Although an ordinary day by the account of any standard calendar, 18 December 1946 bears the special markings of the birth of Bantu Stephen Biko. What will concern us here though is what the event of his birth sets in motion by way of a world-historical activity on these South African shores. This resonates very much with Lindy Wilson's biographical account of Biko in which she begins with a recollection of the facts and scene of Biko's death but insists strongly that readers focus less on his death and more on his life – what she calls his "life-giving force".²¹

It could perhaps be said that a life becomes legible, given shape and meaning, through its naming and both Wilson²² and Themba Sono²³ point out the prophetic quality of Biko's first and middle names: "Bantu" and "Stephen". Bantu (as shorthand for the more accurate "Abantu") refers generally to "people" which bears close semantic affinities to terms such as "community", "humanity" and "solidarity", terms which would come to be central to the corpus of Black Consciousness philosophy. It is said that Biko jokingly linked this name ("Bantu") to Jesus Christ of Nazareth and referred to himself as the "son of man".²⁴ Some interpret this as more

²⁰ See in this regard CLR James *A History of Pan-African Revolt* ([1969] 2012).

²¹ L Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 16. Later republished as a book in L Wilson *Steve Biko* (2011).

²² Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 17-18.

²³ T Sono *Reflections on the Origins of Black Consciousness in South Africa* (1993) 100 - 101

²⁴ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 17-18.

than a tongue-in-cheek gesture, but as signalling Biko's awareness of how his humanity is actualised through his relation with others.²⁵ That Jesus Christ was the archetypical martyr of the Christian faith is not insignificant in view of how Biko himself would also die. This relates also to his second name "Stephen" which is also the name of a biblical figure, St. Stephen, the first recorded martyr in the Christian religion. St Stephen is remembered in the canon for his sympathy and service to the poor and marginalised and was stoned to death for blasphemy, for spreading views that went against the dominant powers of his time.²⁶

As his names intimate, Biko was born into a Christian family which had settled in King William's Town in a house in the closely-knit community of Ginsberg township.²⁷ Having lost his father to illness at a young age, Biko spent much of his life as a youth with his single mother and his three siblings (the elder Bukelwa and Khaya and the younger Nobandile). Despite struggling to make ends meet, Biko's mother Mamcete is said to have insisted on the value of an education. The teenage Biko's talents earned him a bursary to study at Lovedale Missionary Institute to complete his secondary education.²⁸ Only sixteen at this point, it was there that Biko would encounter the violence of the apartheid state – a moment that would be formative in the development of his political consciousness and his oppositional orientation towards State power and white domination. Just three months after arriving at Lovedale, Biko and his brother Khaya were arrested for suspected

²⁵ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 17-18. See also the chapter "Bantu Biko and Bantocracy" in M Ramose *African Philosophy through uBuntu* (1999) 102 – 104 for a philosophical musing on the interrelation between Biko's name, Ubuntu and African democracy.

²⁶ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 18.

²⁷ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 18.

²⁸ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 19. Biko had attended Charles Morgan Elementary School and Forbes Grant High School prior to this.

affiliation with the activities of the military wing of the Pan-Africanist Congress (PAC), POQO (which means "We Stand Alone"²⁹). There they were interrogated by the police in what Biko described as a "heavy grilling".³⁰ An experience that Biko says made him "bitter", the arrest and interrogation he and his brother were subjected to also prompted him to develop, as he puts it, "an attitude which was more directed at authority than at anything else". "I hated authority like hell", Biko exclaimed.³¹

Biko was later expelled from Lovedale and thereafter moved to St Francis College, a Catholic School in what was then known as Natal. Biko credits his time at St Francis for helping him in the "formulation of [his] ideas in a slow sense".³² He began to see in the school authorities what he would later call "the totality of white power". As Biko says of these authorities: "[t]hese were liberals, presumably, who were enunciating a solution for us".³³ Confrontations and political debates, challenges to school discipline and authority, probing questions concerning the practices in the Church and most of all a deep interest in the wave of African states gaining independence on the continent preoccupied Biko's time intellectually.

By the time nineteen-year old Biko graduates in 1965, many critical and historic political events had already taken place in 1960s South Africa: the 1960 Sharpeville Massacre; the banning of the two major black political organisations, the PAC and the African National Congress (ANC) with leaders of both movements imprisoned or

²⁹ R Fattouh *Black Consciousness in South Africa: the Dialectics of Ideological Resistance to White Supremacy* (1986) 24.

³⁰ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 19.

³¹ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 19.

³² Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 20.

³³ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 20.

driven into exile; the POQO insurgencies and subsequent trials and the 1963/64 Rivonia Trial, among others. These events had left a serious gap – what Siphon Buthelezi calls “a political vacuum”³⁴ and Sono “a deathly silence”³⁵ – in terms of black political opposition to the apartheid regime.³⁶ Indeed, Biko’s major political awakening emerged in this context with him expressing to Gail Gerhart that he became seriously concerned at this point with what he saw as “the appalling silence on the part of Africans and this tendency to hide behind the skirts of white liberals who were speaking for them”.³⁷ Already at this point, the founding constructs of Biko’s philosophy are taking shape in his understanding of Blacks as a distinct political and social class – “the oppressed” – and his insistence on black political self-determination, the need for Blacks to claim the agency and political confidence to speak for and define themselves and their situation.

Biko’s disquiet about the disappearance and silence of a Black political voice and subjectivity was itself a critique of anti-black racism as the central normative structure of apartheid and the pathologies it produces in its victims. This is so because life under anti-black racism imposes onto Blacks the status and value of nothingness or non-Being, which is then expressed in the projection of an overall directionless and meaningless life. Under these conditions, lack of self-confidence, fear of the system, excessive idolisation of whites and foreign Western ideologies and a sense of defeat set in – producing a sense of inferiority which naturally

³⁴ S Buthelezi “The Emergence of Black Consciousness: A Historical Appraisal” in Pityana et al (eds) *Bounds of Possibility* 111.

³⁵ Sono *Reflections on the Origins of Black Consciousness* 12-20.

³⁶ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 21; Fatton *Black Consciousness in South Africa* 31; D Hirschmann “The Black Consciousness Movement in South Africa” (1990) 28 *Journal of Modern African Studies* 14.

³⁷ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 21-22.

translates into silence and timidity. Biko here echoes Anton Lembede in identifying the political silence of the 1960s as a case of “moral and spiritual degeneration” in Black communities.³⁸ For Biko, the challenge was for Blacks to overcome this degeneration and attain radical political consciousness.

It is noteworthy that Biko’s first choice for University studies was Law. However, given its association with subversive political activity (which would attract the surveillance of the apartheid state), he ultimately opted to enrol for what was considered the safer route of Medicine in the Non-European section of the University of Natal.³⁹ It was while at University that Biko entered the most definitive political phase in what would later turn out to be a short 30-year life. Immediately gravitating to student politics, it was in Biko’s confrontation with the largely white, liberal National Union of South African Students (NUSAS) where a number of his key political and philosophical positions would crystallize and shape the trajectory and tonality of his thought and politics. These are: the critique of (the Charterist conception of) non-racialism, the denunciation of white liberals and the problems of multiracial collaboration and his insights into the social and psychological impact of white dominance.

After being elected as a Students Representative Council (SRC) representative of the Black medical students at Natal University, Biko attended a NUSAS Congress hosted at Rhodes University. Rhodes University decided on maintaining segregated accommodation and eating facilities. Biko, seeing this as complicity with and extension of racist apartheid ideology, railed strongly against it and challenged

³⁸ A Lembede (R Edgar and L Msumza (eds)) *Freedom in Our Lifetime: The Collected Writings of Anton Muziwakhe Lembede* (2015) 139.

³⁹ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 22.

NUSAS leaders and members at the Congress to rebuke the segregation imposed by the University. Although the NUSAS Executive had brought forward a strongly worded resolution condemning the University's refusal to allow Blacks into the main campus residences, Biko went a step further and proposed a motion for the adjournment of the Congress until a non-racial, mixed venue could be found.⁴⁰ This incident was telling for Biko. He is quoted by Donald Woods as saying:

I realised that for a long time I was holding onto the whole dogma of non-racism almost like a religion, feeling that it was sacrilegious to question ... I began feeling there was a lot lacking in the proponents of the non-racist idea, that much as they were adhering to this impressive idea they were in fact subject to their own experience back home. *They had this problem you know, of superiority, and they tended to take us for granted and wanted us to accept things that were second-class.*⁴¹

Biko grew deeply disenchanted with the white liberal position on race.⁴² In addition to the experience with NUSAS revealing the falsity of liberal values of inclusivity and universality, it also revealed to him the alienation Blacks experience in white and English political spaces. As he also notes in Woods' record, the predominance of English culture and language disempowered many Blacks and disabled them from articulating their own experience or thinking from their own standpoint.⁴³ This resulted in a situation in which whites would become authorities on a reality (racial oppression) of which they had no actual experience solely on account of being well-educated, English mother-tongue speakers. The equation of proficiency in the English language with superior intelligence produced a profound sense of

⁴⁰ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 22.

⁴¹ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 22-23; D Woods *Biko* (1978) 153 – 154. My emphasis.

⁴² Sono *Reflections on the Origins of Black Consciousness* 35-36; 128.

⁴³ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 23.

inadequacy among Blacks. Biko would later diagnose this “inferiority complex” that he witnessed as the central social and psychological affliction that hindered effective struggle against white domination.

According to Sono, Biko took serious issue with white minority usurpation of a Black majority’s political voice by speaking on behalf of Blacks⁴⁴ and refused to accept the relegation of Blacks to the background of white political schemes and schemas.⁴⁵ Biko and other black radicals at the time lifted the progressive veneer of white liberals by exposing the routine condescension, paternalism and racial prejudice of the white liberals as well as their proclivity for assuming the role of guardians and gatekeepers of African political opinions.⁴⁶ Biko was unequivocal in the conviction that the form of “white vanguardism” he had experienced in NUSAS and other similar white liberal anti-apartheid organisations reinforced white supremacy insofar as it affirmed the myth of white cultural and epistemic superiority. This played into what Biko referred to as “the superior-inferior white-black stratification that makes the white a perpetual teacher and the black a perpetual pupil”.⁴⁷ It was therefore necessary for Biko that Blacks break away from this white vanguardism and take full ownership of the struggle to reclaim their humanity. This was what Biko referred to when he exclaimed that:

The blacks are tired of standing at the touchlines to witness a game they should be playing. They want to do things for themselves and by themselves.⁴⁸

It is important to note that Biko reads incidents such as the NUSAS Congress not in

⁴⁴ Sono *Reflections on the Origins of Black Consciousness* 25 – 27.

⁴⁵ Sono *Reflections on the Origins of Black Consciousness* 91.

⁴⁶ Sono *Reflections on the Origins of Black Consciousness* 27.

⁴⁷ Biko *I Write What I Like* 26.

⁴⁸ Biko *I Write What I Like* 17.

terms of personalities and behaviours but ideologically. In other words, he reads those incidents of white liberal invasion and presumptuous leadership in what are properly Black issues as symptomatic of a deeper fault-line in the white political imagination and the liberal worldview and as being systemically embedded in the historical biases and exclusionary character of the Western liberal tradition itself. This is vindicated by the still unredeemed European history of liberalism (which actively and passively affirmed slavery and colonialism) and the expanding critical race intelligence concerning the forms and permutations of white supremacy. For Biko, it was almost impossible to miss the anomaly that whites could simultaneously be the main participants in, and beneficiaries of, the oppression of Blacks and also play the central role in opposing apartheid.⁴⁹ Aside from Biko's acute awareness of the fact that all whites bore "metaphysical guilt" for colonial racism, they also lacked the experience to truly understand black suffering. Moreover, their tendency to dominate ideas and strategies of anti-apartheid resistance was highly problematic for Biko.⁵⁰

It is to be remembered that Biko's definition of "white liberal" did not only

⁴⁹ Sono *Reflections on the Origins of Black Consciousness* 90.

⁵⁰ Hirschmann (1990) *Journal of Modern of African Studies* 5; G Budlender "Black Consciousness and the Liberal Tradition: Then and Now" in Pityana et al (eds) *Bounds of Possibility* 228 - 237; R Turner "Black Consciousness and White Liberals" (1972) 4 *Reality* 20-22; Fatton *Black Consciousness in South Africa* 66; Gerhart *Black Power in South Africa. The Evolution of an Ideology* (1978) 263 - 268. The relationship between the Black Consciousness Movement and the white liberals was complex to be sure. White liberals and white liberal organizations and institutions also became indispensable to the welfare and maintenance of Black Consciousness – in terms of financial and other resources and general support – in times of need and difficulty especially as the apartheid state began to intensify its forces against key figures in the Black Consciousness Movement. For more on this, see MR Maimela "Black Consciousness and White Liberals in South Africa: Paradoxical Anti-apartheid Politics" Unpublished DLitt et Phil thesis, UNISA (1999) and I Macqueen "Re-Imagining South Africa: Black Consciousness, Radical Christianity and the New Left, 1967-1877" Unpublished DPhil thesis, University of Sussex (2011). While the Black Consciousness Movement maintained an ideological hostility to white liberals and "white liberalism", they continued to have a productive, friendly and somewhat symbiotic relationship at the personal and organizational level.

include those adherents of the philosophy of liberalism – whether economic, social or political liberalism – in South Africa but any white South African who opposed, to some degree, the racially inegalitarian structure and practices of apartheid in its juridical and political form.⁵¹ This should not be taken to mean that Biko underestimates or misunderstands the important theoretical and ideological differences between conservatism, liberalism, communism, Afrikaner nationalism, and Christian anti-apartheid activism nor should it be taken to mean that Biko did not wish for whites to participate in the anti-apartheid struggle *at all* (to the contrary, Biko believed that progressive and anti-racist whites would be most effective in educating and conscientising their own community of white South Africans). Rather, Biko's exceptionally acute insight was ultimately that even whites who were against apartheid on legal, moral or political grounds were generally moderate in what they envisaged as a replacement for the system (indeed what they sought was a Western-style democracy that incorporated Blacks) so that the most radical political position whites could take on matters of racism and apartheid is a *liberal* one.⁵² Biko explains his critique of white liberals as a divergence in political vision:

We believe that the white liberals do not really understand what they are talking about. We believe that they are not really fighting for the kind of emancipation that we are envisaging. They might be genuinely motivated in thinking they are fighting for freedom, but we do not believe that their freedom is our freedom, and that the type of freedom they are fighting for is not necessarily the same as what we are fighting for.⁵³

⁵¹ Maimela "Black Consciousness and White Liberals in South Africa" 9.

⁵² See G Gerhart "Interview with Steve Biko" in Mngxitama et al (eds) *Biko Lives* 34.

⁵³ S Biko and G Lanning "Steve Biko Interviewed by Greg Lanning, 5 June 1971" in D Hook (ed) *Steve Biko – Voices of Liberation* (2014) 142 - 143.

Indeed, it was becoming more and more apparent to Biko that white liberals (viewed as progressive and even radical) were working in the same epistemic, discursive and perceptual field (i.e. anti-blackness) as white conservatives (viewed as racial supremacists). It was to be expected that white liberals, much like all other whites in South Africa, would be "inextricably mired in the unquestioned assumptions of their own racial and imperialist experience"⁵⁴ and that their sympathy with the black anti-apartheid struggle would be based on their "white experience of how indigenous people felt and thought and lived and dreamed".⁵⁵

This foregoing fact is what prompted Biko to collapse the distinction between white liberals (including not only the moderate liberals but also the so-called white radicals and communists)⁵⁶ and white conservatives by locating them all within the same hegemonic project of whiteness and Eurocentrism. Whereas the white conservative tradition upheld the racist theory that Blacks are biologically and culturally inferior according to the standards of Europeans and European ways of life and viewed this inferiority as generally irredeemable, the white liberals differed from this position only insofar as they regarded Blacks as capable of overcoming their inferiority through Western education, civilisation and refinement.⁵⁷ From this view,

⁵⁴ Maimela "Black Consciousness and White Liberals in South Africa" 5.

⁵⁵ Maimela "Black Consciousness and White Liberals in South Africa" 6.

⁵⁶ Maimela "Black Consciousness and White Liberals in South Africa" 9.

⁵⁷ G Fredrickson *White Supremacy. A Comparative Study in American and South African History* (1981) 189 – 190 explains this as the distinction between "teleological racism" (the theory generally held by the Afrikaner Nationalists that blacks are inherently and naturally inferior and thus had been created to serve, and be enslaved by, their white masters) and "evolutionary racism" (a view informed by the post-Enlightenment liberalism of the English which accepted blacks' ontological inferiority as a starting point but argued that this was not immutable and that it was possible for uncivilized and underdeveloped peoples to be gradually elevated into civilization). Similarly, DT Goldberg *The Racial State* (2002) 74 – 80 develops the corresponding distinction between "racial naturalism" (positing the irretrievable inferiority of the non-European) and "racial historicism" (promising racial inclusion into European definitions of the human as a remedy for the civilisational immaturity of the non-European).

the white liberal tradition came to be seen as itself another iteration of white supremacy insofar as it shared with the white conservatives the belief that Blacks lacked the full qualities of civilisation and certain essential human capacities necessary for self-governance and thus required white supervision, direction and leadership. This will become clearer later in the discussion of Biko's critical insight that the concept of non-racialism as formulated by white liberals entailed mere incorporation of Blacks into a still white-dominated polity. The recognition of the ideological homology between white liberals and white conservatives as two sides of the same coin, namely, "the totality of white power", remains one of the most important theoretical breakthroughs of Black Consciousness.

Biko's rupture of the precepts and politics of white liberalism can be taken to be the decisive moment of germination of the world-historical idea and theory that is Black Consciousness – a term with a long lineage in the works of German philosopher Georg Wilhelm Friedrich Hegel, African American sociologist W.E.B Du Bois, Afro-Caribbean psychiatrist Frantz Fanon, Black Theologian James H Cone, Black feminist and cultural critic bell hooks and even international civil rights icon Jesse Jackson. As More defines it pithily, "Black Consciousness is the black person's coming to consciousness of herself as black".⁵⁸ It entails, in Cone's words:

The black community focusing on its Blackness in order that black people may know not only why they are oppressed but also what they must do about that oppression.⁵⁹

Black Consciousness thus contains both an analytic ("why they are oppressed...") and a programmatic ("what they must do...") dimension, and aims first to

⁵⁸ More "Intellectual Foundations of the Black Consciousness Movement" in Vale *et al* (eds) *Intellectual Traditions* 177.

⁵⁹ JH Cone "Black Consciousness and the Black Church" (January 1970) *The ANNALS* 49 – 55.

understand conceptually and theoretically the workings of racial oppression and the modes of its operation and from that basis, develop a liberatory praxis to struggle against and overthrow that oppression. In Biko's own words:

Black Consciousness is in essence the realisation by the black man of the need to rally together with his brothers around the cause of their oppression - the blackness of their skin - and to operate as a group in order to rid themselves of the shackles that bind them to perpetual servitude. It seeks to demonstrate the lie that black is an aberration from the "normal" which is white. It is a manifestation of a new realisation that by seeking to run away from themselves and to emulate the white man, blacks are insulting the intelligence of whoever created them black ... It seeks to infuse the black community with a new-found pride in themselves, their efforts, their value systems, their culture, their religion and their outlook to life.⁶⁰

A number of important philosophical themes emerge from this passage and these include: the centrality of the oppressed groups' perspective as the basis for critique and liberation; the challenge to white normativity as part of a broader effort at debunking of the violent myths of white superiority and black inferiority; claiming political agency through self-reliance and re-asserting African cultural ways of life.

The underlying core premise of Black Consciousness revolves around the relationship between consciousness and revolutionary possibility or as Biko puts it "the interrelationship between consciousness of self and the emancipatory programme..."⁶¹ Put simply, a system of domination can only be overthrown when its immorality and injustice is made visible (i.e. when the oppressed view it as wrong and thereby refuse to abide by its laws, values and practices) and when there are prospects for replacing it and redressing its harms. For this to be possible, the oppressed must have the right mental attitude – they must *see themselves as*

⁶⁰ Biko *I Write What I Like* 53.

⁶¹ Biko *I Write What I Like* 53.

people who can claim freedom and revolt against injustice – which can only come from a mature political awareness of one’s reality and situation. Long articulated in Marxist theory as the “sharpening of contradictions”, Biko understood that the historical possibility of revolutionary social change emerges only when the system and social structure of domination becomes unendurable and intolerable to those it oppresses and degrades.⁶² Such “sharpening of contradictions” occurs when the tensions between the material conditions of the oppressed, their political consciousness of their reality and the dominant ideology (white supremacy and racial capitalism) are exposed and heightened.⁶³ Biko understood that all social powers, including those of racism and capitalism, are not static and immutable but contain a dynamic of transformation, and are therefore open to a different future.⁶⁴ But for such a future to be a legible aspiration for the oppressed, a shift in consciousness is required, one in which white supremacy will no longer seem “invincible” or permanent.⁶⁵ This is what is sometimes referred to as the “prefigurative politics” of Black Consciousness in that it is in the awakened political consciousness of Blacks that a liberated Azanian future is to be prefigured.⁶⁶

Biko’s emphasis on consciousness or “the psycho-social dimensions of black political life”⁶⁷ together with his emphasis on the need for Blacks to adopt a “new consciousness” was therefore crucial. It was not merely a cultural and psychological

⁶² Fatton *Black Consciousness in South Africa* 40; 97.

⁶³ W Brown *States of Injury: Power and Freedom in Late Modernity* (1995) 92 - 93.

⁶⁴ Brown *States of Injury* 92 - 93.

⁶⁵ S Biko and B Zylstra “Steve Biko Interviewed by Bernard Zylstra, July 1977” in Hook (ed) *Steve Biko – Voices of Liberation* 88.

⁶⁶ CRD Halisi “Biko and Black Consciousness: An Interpretation” in Pityana et al (eds) *Bounds of Possibility* 101.

⁶⁷ Halisi “Biko and Black Consciousness: An Interpretation” in Pityana et al (eds) *Bounds of Possibility* 100. See also CDT Sibisi “The Psychology of Liberation” in Pityana et al (eds) *Bounds of Possibility* 130 - 136.

project of introspection, self-love and self-esteem disconnected from the materiality and political economy of oppression as some commentators suggest.⁶⁸ In Biko's theory, racism is not only a material system of power but also one that psychologically incapacitates and devalues its victims – enslaving not only the body but the mind and soul as well.⁶⁹ As he puts it: "...white systems have produced through [*sic*] the world a number of people who are not aware that they too are people."⁷⁰ The true power of racism on this view lies in how it conditions the mindset of the oppressed and delimits their view of themselves and their possibilities, producing a perverse surrender to its hierarchical constructs and logics (what Biko speaks of as an inferiority complex) and suppressing resistance to its effects and operations. The "mental insurrection"⁷¹ called for by Black Consciousness in the form a decolonial intellectual and cultural revolution constitutes a necessary and indispensable precondition for a revolutionary struggle to overthrow and replace material structures of oppression.⁷²

We recall that the main impetus for the Black Consciousness Movement was

⁶⁸ Fatton *Black Consciousness in South Africa* 56; G Fredrickson *Black Liberation. A Comparative History of Black Ideologies in the United States and South Africa* (1995) 308 – 309; M Lobban *White Man's Justice: South African Political Trials in the Black Consciousness Era* (1996) 28; 29-31.

⁶⁹ See A Mama *Beyond the Masks: Race, Gender and Subjectivity* (1995) chapter 2.

⁷⁰ Biko *I Write What I Like* 55 – 56.

⁷¹ Fatton *Black Consciousness in South Africa* 78.

⁷² Fatton *Black Consciousness in South Africa* 79; Halisi "Biko and Black Consciousness: An Interpretation" in Pityana et al (eds) *Bounds of Possibility* 100; G Martin *African Political Thought* (2012) 105 – 127; Gerhart *Black Power in South Africa* 271; 285-286. Ramose and Teffo (1993) *Acta Academia* 4-8 also dispute the supposition that Biko was opposed to revolutionary violence by also highlighting the interrelation between the psychological and the political (or "physical") dimensions of Biko's thinking. Even if inchoate by some standards, Ramose and Teffo argue that Biko's Black Consciousness always anticipated a programme of economic and political freedom that was to be achieved through the necessary and available means, including armed confrontation. Where Biko does appear to espouse non-violence, this is for reasons of tactics (ensuring that the BCM remains legally above-board in order to continue its activities) and not reasons of moral principle. The view of Biko as a pacifist is also rejected by M More "Albert Luthuli, Steve Biko, and Nelson Mandela: The Philosophical Basis of their Thought and Practice" in K Wiredu (ed) *A Companion to African Philosophy* (2004) 213 – 214.

the dramatic lull in African opposition to apartheid that followed the banning of the ANC and the PAC. Under such conditions of “political emasculation”, self-negation, silence and seeming acquiescence to the inevitability of white minority rule, resistance – not to mention revolution – could not be possible in Biko’s estimation.⁷³ There had to be a synchronic alignment between the mind, consciousness and psyche of the oppressed and their revolutionary political aims. And so, what was needed was a “cultural and political revival” of the consciousness, desire and vision of the oppressed⁷⁴ – what Biko phrased as a “reawakening of the sleeping masses”.⁷⁵

There is a link here between Biko’s theory of black political consciousness and his repudiation of white liberal involvement in the black freedom struggle as Blacks could not come to consciousness, could not become fully politicised, if their struggles were in any way led, influenced or directed by whites (who in Black Consciousness theory constituted the “oppressor group” without exception).⁷⁶ The pedagogy of Black Consciousness takes its central cues – self-reliance, unity and liberation – from Paulo Freire:

No pedagogy which is truly liberating can remain distant from the oppressed by treating them as unfortunates and by presenting for their emulation models from among the oppressors. *The oppressed must be their own example in the struggle for their redemption.*⁷⁷

Thus, the primary task the Black Consciousness Movement set for itself was the

⁷³ CRD Halisi “Biko and Black Consciousness: An Interpretation” in Pityana et al (eds) *Bounds of Possibility* 100.

⁷⁴ Biko and Zylstra “Steve Biko Interviewed by Bernard Zylstra, July 1977” in Hook (ed) *Steve Biko – Voices of Liberation* 88.

⁷⁵ Biko *I Write What I Like* 34.

⁷⁶ Biko *I Write What I Like* 24; Fatton *Black Consciousness in South Africa* 58; 66.

⁷⁷ Freire *Pedagogy of the Oppressed* (1970) 54.

politicisation of Black communities so that they could critically apprehend their *own* condition, confront their complicity with and passivity to white domination and internalized racism and begin to undertake the work of self-recovery and liberation.⁷⁸

In his own words:

The call for Black Consciousness is the most positive call to come from any group in the black world for a long time. It is more than just a reactionary rejection of whites by blacks. The quintessence of it is the realisation by the blacks that, in order to feature well in this game of power politics, they have to use the concept of group power and to build a strong foundation for this. Being an [*sic*] historically, politically, socially and economically disinherited and dispossessed group, they have the strongest foundation from which to operate. The philosophy of Black Consciousness, therefore, expresses group pride and the determination by the blacks to rise and attain the envisaged self. *At the heart of this kind of thinking is the realisation by the blacks that the most potent weapon in the hands of the oppressor is the mind of the oppressed.* Once the latter has been so effectively manipulated and controlled by the oppressor as to make the oppressed believe that he is a liability to the white man, then there will be nothing the oppressed can do that will really scare the powerful masters. Hence thinking along lines of Black Consciousness makes the black man see himself as a being, entire in himself...⁷⁹

Black Consciousness sought to “disarticulate” the ideology of the white ruling class by making the current state of things under apartheid unlivable and intolerable in the minds of the oppressed. For Biko, this disarticulation entailed a radical questioning of the present order: seeing and exposing its violence; re-writing histories that have erased the African experience and bringing other historical possibilities into view. In this way, Black Consciousness does not seek a simple inversion in power relations but is rather a struggle to redefine social relations altogether. This, according to Lou Turner and John Alan, is one of Biko’s most

⁷⁸ b hooks *Killing Rage: Ending Racism* (1995) 189.

⁷⁹ Biko *I Write What I Like* 74.

theoretically innovative contributions to the Black Radical Tradition:

What is powerful and new about Biko's ideas is that he always centers the possibility for change *within the subject of the oppressed*, and not simply within the South African economy or hierarchy within the system.⁸⁰

The shift in consciousness or "outlook" of the oppressed was therefore the key to radical transformation for, as Biko wrote, "we cannot be conscious of ourselves and yet remain in bondage. We want to attain the envisioned self which is a free self."⁸¹

Black Consciousness was thus premised on the need for Blacks to analyze their own socio-political condition, and to claim the historical and political agency of being their own liberators through a radical shift in consciousness.⁸² As noted above, a core feature of Black Consciousness was a rejection of "ruling-class ideology".⁸³ This radicalizing impulse of Black Consciousness was furthermore energized by the global political milieu of the late 1960s: the European student revolts in 1968, the formal end of colonial rule in a number of African states; and the emergence of the Black Power movement in the United States. As Buthelezi notes, the apartheid system – its brutalities, its laws and its hubris – also created a hostile and antagonistic climate that produced the very political rage that would seek to challenge and dismantle it.⁸⁴

In this context, and following agreement at a caucus of Black students that there was a need for an *exclusively* Black student organisation, the South African Students Organisation (SASO) was formed with Biko as its founding President.⁸⁵

⁸⁰ L Turner and J Alan *Frantz Fanon, Soweto and Black Thought* (1986) 22.

⁸¹ Biko *I Write What I Like* 53.

⁸² Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 23.

⁸³ Buthelezi "The Emergence of Black Consciousness: A Historical Appraisal" in Pityana et al (eds) *Bounds of Possibility* 113.

⁸⁴ Buthelezi "The Emergence of Black Consciousness: A Historical Appraisal" in Pityana et al (eds) *Bounds of Possibility* 113

⁸⁵ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 25.

Finally launched at its inaugural conference in 1969 at Turfloop (now the University of Limpopo), SASO was a response to Biko and his comrades' frustration with white paternalism – not only as encountered in NUSAS but also at the University Christian Movement (UCM) Conference where the white members (who made up a large part of the leadership despite a largely Black membership) also attempted to dissuade the Black student caucus from going ahead with their planned defiance of the Group Areas Act 41 of 1950 which restricted Blacks to only 72 hours in a white area without a permit. This penchant of whites for instructing and guiding Blacks – quite simply, telling them what to do, how and when – is noted as a repeated annoyance to Biko. But at this point another dimension of white liberalism – the gradualism and moderate politics whose function is to suppress the radical overhaul of the present legal, political and economic system – became apparent and further cemented Biko's certainty that co-operation and collaboration with white liberals would be unhelpful to the struggle.⁸⁶ The strategic reason for Biko's stance on non-collaboration with white liberals concerned the fact that he regarded them as constituting a small fringe in the white community and therefore irrelevant to the broader struggle. In any case, the mere presence of white liberals in the political affairs of Blacks could potentially constrain the development of a disalienated and autonomous self-consciousness of Blacks.

But there was a deeper political rationale for the Black Consciousness

⁸⁶ Sono *Reflections on the Origins of Black Consciousness* 8-9 makes the point forcefully that it was ultimately the poverty and whiteness of liberalism that galvanized the Black Consciousness Movement. For Sono as well, although white liberals maintained a critical posture against apartheid and engaged and collaborated with African intellectuals, elites and businesspeople, white anti-apartheid liberalism never seriously "addressed the need for fundamental and radical transformation of society" – adding that if it did, it would not be liberalism. In his analysis, white political liberalism assumed and worked towards a political future in which South Africa remained "largely in white hands" but where Blacks (especially the more educated and Westernised) would be accommodated.

Movement's political distance from white liberals which was mentioned above namely that whites had exclusive access to the privileges of racial capitalism, secured through the subordination and exploitation of Blacks. Their sympathies with the struggles of Blacks could not – for reasons of their racial privilege – transform their position as "white".⁸⁷ This practically meant that the white liberal critique of apartheid could only go as far as not jeopardizing whites' own self-interest which required the maintenance of the "right of conquest" that is the very basis of white presence in South Africa. Thus, Fatton argues that white liberals had the propensity to suppress the revolutionary zeal and political rage of Blacks in the direction of more moderate and controlled forms of social change.⁸⁸ It is necessary to quote Biko at length when he argued:

[T]he liberals are playing their old game. They are claiming a "monopoly on intelligence and moral judgement" and setting the pattern and pace for the realisation of the black man's aspirations. They want to remain in good books with both the black and white worlds. They want to shy away from all forms of "extremisms", condemning "white supremacy" as being just as bad as "Black Power!". They vacillate between the two worlds, verbalising all the complaints of the blacks beautifully while skillfully extracting what suits them from the exclusive pool of white privileges. But ask them for a moment to give a concrete meaningful programme that they intend adopting, then you will see on whose side they really are. Their protests are directed at and appeal to white conscience, everything they do is directed at finally convincing the white electorate that the black man is also a man and that at some future date he should be given a place at the white man's table.⁸⁹

He continues to point out incisively that white liberals, like all other whites in South Africa, had an interest in maintaining the basic social structure of apartheid which

⁸⁷ Fatton *Black Consciousness in South Africa* 58.

⁸⁸ Fatton *Black Consciousness in South Africa* 84, 127; Sono *Reflections on the Origins of Black Consciousness* 8-9.

⁸⁹ Biko *I Write What I Like* 22-23.

secures their dominant position so that the politics and values of white liberals as it pertained to the racial struggles of Black South Africans appeared quite inauthentic and conflicted:

First the black-white circles are almost always a creation of white liberals. As a testimony to their claim of complete identification with the blacks, they call a few "intelligent and articulate" blacks to "come around for tea at home", where all present ask each other the same old hackneyed question "how can we bring about change in South Africa?" The more such tea-parties one calls the more of a liberal he is and the freer he shall feel from the guilt that harnesses and binds his conscience. Hence he moves around his white circles - whites-only hotels, beaches, restaurants and cinemas - with a lighter load, feeling that he is not like the rest of the others. Yet at the back of his mind is a constant reminder that he is quite comfortable as things stand and therefore should not bother about change. Although he does not vote for the Nats (now that they are in the majority anyway), he feels quite secure under the protection offered by the Nats and subconsciously shuns the idea of a change. ... This is why blacks speak with a greater sense of urgency than whites.⁹⁰

For all of these reasons and true to the Black Consciousness mantra of the time "*Black man, you are on your own!*",⁹¹ Biko was of the firm view that any genuine and substantive change in South Africa would be the outcome of independent Black political thought and activism and would emanate from the historical and cultural imagination of Blacks *themselves*. The core aim of Black Consciousness was after all for "Black people to articulate their own struggle".⁹²

And throughout the period of its development, the primary term of Black Consciousness – namely, blackness – undergoes several important political and

⁹⁰ Biko *I Write What I Like* 23-34.

⁹¹ Biko *I Write What I Like* 100; 108.

⁹² South African History Online "The Formation of SASO and the Black People's Convention" <<http://www.sahistory.org.za/article/formation-saso-and-black-peoples-convention>> (accessed 28 July 2016).

theoretical clarifications:⁹³

(a) First and foremost, to denote resistance against the term “non-white” / “non-European”.⁹⁴ Viewed as a negation of the Being of Africans, the terms “non-white” and “non-European” maintained and idealized whiteness and “European-ness” as the norm of existence below which Others could be defined and measured. They valorize whiteness as the ideal that Africans could aspire to but not fully attain. The first step of Black Consciousness philosophy therefore entailed a rejection by Blacks of this status of “non-personhood” and non-existence.⁹⁵ Claiming blackness therefore was to positively name and affirm oneself in the world, to refuse an imposed meaning. As Biko is famously quoted: “Merely by describing yourself as Black you have started on a road towards emancipation”.⁹⁶ In Biko then, the resignification of blackness from a mark of absence to one of presence constituted a radical break with the racist scheme of valuation which places Blacks at the nadir end of an ontological hierarchy which has whites at its zenith. The transvaluation of blackness in this way was itself a transformative and emancipatory gesture. In Mongane Wally Serote’s words:

Black Consciousness transformed the word ‘black’ and made it synonymous with freedom. This definition, which imbued followers of Black Consciousness with spiritual power which is otherwise absent among the apathetic, while transforming objects into initiators, inferior beings into equals among peoples and claiming a country and a right to be in the world ...⁹⁷

⁹³ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 26.

⁹⁴ Sono *Reflections on the Origins of Black Consciousness* 46, 51, 53; More “The Intellectual Foundations of Black Consciousness” in Vale et al (eds) *Intellectual Traditions* 176.

⁹⁵ Buthelezi “The Emergence of Black Consciousness: A Historical Appraisal” in Pityana et al (eds) *Bounds of Possibility* 121.

⁹⁶ Biko *I Write What I Like* 52.

⁹⁷ Pityana et al “Introduction” in Pityana et al (eds) *Bounds of Possibility* 9.

(b) As a political signifier that includes those classified not only as African or Bantu-speaking but also Indian, Coloured and even Asian.⁹⁸ This redefinition was intended to displace the racial categories propagated by the apartheid regime.⁹⁹ It also served to name blackness as a unifying political category for racially oppressed groups in South Africa in order to strengthen collective resistance against colonial-apartheid racism which although operating materially (in the realms of law, social organization, political power and the economy), installed itself most deeply through imposing its own meanings and categories on the oppressed. In Biko's own words, Blacks were defined as:

[T]hose who are by law or tradition politically, economically and socially discriminated against as a group in the South African society and identifying themselves as a unit in the struggle towards the realization of their aspirations.¹⁰⁰

Blackness in this way functioned as a signifier for political status (i.e. to be racially oppressed in white South Africa) more than a generic skin colour or ethnicity. However, membership in this category is internally qualified as follows:

Being black is not a matter of pigmentation – being black is a reflection of a mental attitude.¹⁰¹

Biko continues a few lines later:

[T]he term black is not necessarily all-inclusive; i.e. the fact that we are not all not white does not necessarily mean that we are all black. Non-whites do exist and will continue to exist for quite a long time. If one's aspiration is whiteness but his

⁹⁸ Fatton *Black Consciousness in South Africa* 32.

⁹⁹ LR Gordon "A Phenomenology of Biko's Black Consciousness" in Mngxitama *et al* (eds) *Biko Lives!* 84.

¹⁰⁰ Biko *I Write What I Like* 52.

¹⁰¹ Biko *I Write What I Like* 52.

pigmentation makes attainment of this impossible, then that person is a non-white.¹⁰²

What his elucidation highlights is that although those marked within the colonial racist imaginary of apartheid as “non-white” would in theory belong to the category “Black” (and it is important here that *only* those who experience *discrimination as part of a subordinated racial group* can belong to this category), the completion of one’s self-realization as Black *proper* requires the adoption of a black radical subjectivity and consciousness, the “mental attitude” that consciously refuses white supremacy in all its forms.¹⁰³ While the category of “non-whiteness” has some ambiguous status in relation to Biko’s expanded notion of blackness, whiteness is more clearly delineated. When read together with Biko’s policy of non-collaboration with whites, it becomes even clearer that he conceives of blackness as an experiential and symbolic universe that is inaccessible and closed out to whites.¹⁰⁴

(c) To counter tribalism and ethnic-based politics engineered by the apartheid state through Bantustans.¹⁰⁵ The Black Consciousness Movement harboured a marked hostility towards the Bantustans or homelands, which divided Africans into multiple ethnic groups, which were then separated into distinct territorial areas.¹⁰⁶ As Biko explains:

One of the basic tenets of Black Consciousness is totality of involvement. This means that blacks must sit as one big unit, and no fragmentation and distraction from the

¹⁰² Biko *I Write What I Like* 52.

¹⁰³ K Moodley “The Continued Impact of Black Consciousness” in Pityana et al (eds) *Bounds of Possibility* 145.

¹⁰⁴ For reasons of both logic and politics, Xolela Mangcu’s reliance on Biko to justify the assertion that “whites can be Blacks” is an erroneous misinterpretation. See X Mangcu “Whites can be Blacks” *City Press* <<http://city-press.news24.com/Voices/Whites-can-be-blacks-20150703>> (accessed 09-12-2016).

¹⁰⁵ Halisi “Biko and Black Consciousness Philosophy: An Interpretation” in Pityana et al (eds) *Bounds of Possibility* 103; Buthelezi “The Emergence of Black Consciousness: A Historical Appraisal” in Pityana et al (eds) *Bounds of Possibility* 116; 120-121.

¹⁰⁶ See Fatton *Black Consciousness in South Africa* 58-59.

mainstream of events be allowed. Hence we must resist the attempts by protagonists of the Bantustan theory to fragment our approach. We are oppressed not as individuals, not as Zulus, Xhosas, Vendas or Indians. We are oppressed because we are black...¹⁰⁷

This was a rejection of the apartheid regime's ethnic essentialism – its belief that people of different cultures and languages were invested with a unique essence that thereby demanded separation from those who were different. It was also a circumvention of the political effect of the apartheid regime's homeland policy which was the fragmentation of black unity as well as its production of intra-Black cultural and ethnic conflicts.

(d) As a logical response to the consolidation of whiteness and white identity as a racial group identity. Closely related to the repudiation of the homeland policy was the construction of blackness as an oppositional category to whiteness. In place of a previously conflictual relationship between the English (British imperialists) and the Afrikaners (Boers), the unification of South Africa in the early 1900s resulted in the consolidation of white people and whiteness into a hegemonic settler-colonial group identity and a national identity with shared interests and civic bonds. Although not without internal fractures, whiteness emerged in this period as an overarching unity that displaced to some extent prior stark divisions of ethnicity, language and ideology.¹⁰⁸ The reconciliation of the two European conquering powers that gave rise to the Union of South Africa was

¹⁰⁷ Biko *I Write What I Like* 107 – 108.

¹⁰⁸ As B Henkes ("Shifting Identifications in Dutch-South Africa Migration Policies (1910 - 1961)" (2016) 68 *SA Historical J* 641 – 669) writes of this period (at 645): "whiteness was always defined against blackness. The absence of blacks [from the 1921 census and other State policies] shows that white supremacy was thought essential, despite internal frictions amongst the white population."

underwritten by a pact – a “racial contract”¹⁰⁹ – which prescribed white dominance and rule over Africans and African lands and the legal sanctioning of racial inequality and the political marginalization of Blacks.¹¹⁰

Historically, this racial contract in turn produced a racial bond among whites in which they are socialised to view their interests as fundamentally irreconcilable with the advancement of political rights and economic opportunities for Blacks. Put another way, the formation of whiteness and white identity in 20th century South Africa was inextricably bound up to the fact and *necessity* of black subordination. It only made sense under these conditions that the dilution of Blacks into ethnic groups would make opposition to such a formidable unified group impossible and so blackness crystallized as well into a category with a shared experience and a common desire to overthrow the settler-created and white-dominated social and economic system of South Africa.

(e) Finally, the deployment of the category ‘Black’ was consequent to Black Consciousness philosophy’s analysis of what Biko referred to as “the Black-White relationship” in South Africa.¹¹¹ As noted in Biko’s understanding that the source of racial oppression in colonial-apartheid South Africa emanates from the fact of being Black and not from one’s ethnic origin or individual situation, Black Consciousness conceived of the fundamental problem in society to be white racism.¹¹² The fact of living in a white racist society, in which the oppressed are

¹⁰⁹ C Mills *The Racial Contract* (1997).

¹¹⁰ Fredrickson *White Supremacy* 179 – 198; A Marx *Making Race and Nation: A Comparison of the United States, South Africa and Brazil* (1998) 81 – 119; J Saul and P Bond *South Africa – The Present as History: From Mrs Ples to Mandela & Marikana* (2014) 36.

¹¹¹ Biko *I Write What I Like* 102.

¹¹² Sono *Reflections on the Origins of Black Consciousness in South Africa* 34-35.

racialised as Black and subjected to an overall inhumane existence was for Biko the central problem to be addressed through Black Consciousness.

Possible criticisms of Biko's thought as culturally or racially essentialist or as fetishising and romanticising black identity cannot be sustained if one comprehends that the transvaluation and redefinition of blackness that Biko performs is a primarily political rather than representational (or identitarian) gesture.¹¹³ Biko makes clear that race – and the Black-white spectrum (not binary) through which it operates – is not merely an issue of identities with particular essential qualities but is rather an index and reflection of a particular historico-political reality in South Africa.¹¹⁴ The political reclamation and assertion of blackness that he counsels is a way of re-situating the (colonised and racialised) Black subject in opposition to the norms of racial subjugation and injustice. In this way, blackness comes into confrontation with, and implicates, whites and whiteness (in all its forms) as equally mired in the social and psychic dynamics of domination and terror. He thus disconnects blackness from skin colour and phenotype as such and locates it within the domains of the historical and the political, while also highlighting the *mutual production* of whiteness and blackness through the racialising technologies of settler-colonialism and conquest. Biko's multi-layered postulation of blackness highlights that, for him, there is no *a priori* blackness outside of the historical process of racialization (or blackening).¹¹⁵

¹¹³ See Gordon "A Phenomenology of Biko's Black Consciousness" in Mngxitama *et al* (eds) *Biko Lives!* 84.

¹¹⁴ M MacDonald *Why Race Matters in South Africa* (2006) 119: "Biko's blacks arises politically and historically, not naturally and culturally...". See also N Gibson "Upright and free: Fanon in South Africa, from Biko to the Shackdwellers' Movement (Abahlali baseMjondolo)" (2008) 14 *Social Identities* 691.

¹¹⁵ See MacDonald *Why Race Matters in South Africa* (2006) 118 – 121.

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By 1970, much of the basic outlines of BC philosophy had been developing. Biko had been replaced as President of SASO after his one-year term had expired and he had moved to the editorship of the *SASO Newsletter* in which he began his now-famous column entitled "I Write What I Like" under the pseudonym "Frank Talk". Through the *SASO Newsletter*, the philosophy of Black Consciousness developed further. It became a platform for Black political thinking, debate and dialogue. By expanding its field of interlocution and opening up theoretical engagement to more voices and perspectives, a democratic ethos was also installed within Black Consciousness and black radicalism in South Africa.¹¹⁶

Now more invested in the intellectual dimensions of Black Consciousness, Biko himself was not writing as an academic philosopher proper but as an activist-intellectual thinking through and struggling with ideas and concepts circulating within revolutionary political discourses. We see this most clearly in the broad topics (SASO organizational structure, religion, African history and culture, white society, Bantustans, the social and psychological condition of Blacks, international relations, fear) that Biko covered through short occasional papers, opinion pieces, speeches and interviews. This is significant for reading Biko politically especially when one detects inconsistencies and clumsy formulations and word choices or when one notes oscillations between a recognizable black radical vocabulary to social-democratic egalitarian (we could say "liberal") language. To properly understand Biko, one must read his works comprehensively and with an awareness of the philosophical ideas that shaped his analysis and vision. More explains that because

¹¹⁶ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 26 – 27.

Biko died at a young age, he was unable to fashion a “systematically developed philosophical theory” and so it is to be expected that some of his insights will be fragmentary.¹¹⁷ Through a philosophical archeology that places Biko in the canon of African nationalist, Africana and black radical thought, it is possible to bring his thoughts into coherent articulation.

There are numerous accounts of the major intellectual and political influences in the making of Black Consciousness with some common names emerging.¹¹⁸ Collated together they represent a vast and rich archive of Africanist, black radical and Global South thinking. Beginning at “home”, Biko’s thought could be seen as following on the African Nationalist or Pan-Africanist thought of Anton Muziwakhe Lembede¹¹⁹ and Robert Mangaliso Sobukwe¹²⁰ who theorise the South African situation in terms of “the national question”, and frame liberation in terms of the return of land, sovereignty and dignity to the African people. On a more continental scale, Black Consciousness philosophy was also influenced by anti-colonial African political thought, particularly Kwame Nkrumah’s vision for African unity and his notion of African personality, Julius Nyerere’s African socialism (or Ujaama) and Kenneth Kaunda’s African humanism.¹²¹ The tradition of *Negritude* in the works of the francophone African intellectuals and poets, Aime Cesaire and Leopold Senghor, was also influential, more so in Biko’s reformulation of the category of blackness and

¹¹⁷ More (2011) *Philosophia Africana* 85.

¹¹⁸ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 27; MV Mzamane, B Maaba and N Biko “The Black Consciousness Movement” in SADET (ed) *The Road to Democracy, Volume 2* (2006) 125. See sources cited in nn 119 - 127 below.

¹¹⁹ Buthelezi “The Emergence of Black Consciousness: A Historical Appraisal” in Pityana et al (eds) *Bounds of Possibility* 119.

¹²⁰ Halisi “Biko and Black Consciousness Philosophy: An Interpretation” in Pityana et al (eds) *Bounds of Possibility* 104.

¹²¹ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 27; Hirschmann (1990) *Journal of Modern of African Studies* 3; Gerhart *Black Power in South Africa* 273.

his reflections on African culture. But it was the Martiniquan philosopher and psychiatrist Frantz Omar Fanon in his two best-known works, *Black Skin, White Masks* (1952) and *The Wretched of the Earth* (1961), who was crucial to Black Consciousness philosophy for his analysis of the colonial situation and for his psycho-social understanding of anti-Black racism.¹²² Through Fanon, the works of Jean-Paul Sartre and Hegel also made an impression on Biko especially on the question of consciousness.¹²³ Even more significant was the Black Power tradition that developed in the United States, especially the works of Malcolm X as well as Kwame Toure (nee Stokely Carmichael) who – together with Charles V. Hamilton – developed an incisive critique of white supremacy (its effects, modes of operation and techniques of concealment), provided a political definition of racism and elaborated upon the social and political position of Blacks.¹²⁴ Black Power provided Black Consciousness thinkers with a language to mobilise and politicize the black experience. Black Theology, especially in the works of its chief theoretician James H Cone, was also influential in deepening the analysis of the spiritual and psychological dimensions of racism and the role of the Christian faith within black existence.¹²⁵ Not too far away in the Global South, the Brazilian educationist Paulo Freire, his theory of critical pedagogy and emphasis on conscientisation was also an important

¹²² Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 29; Hirschmann (1990) *Journal of Modern of African Studies* 3; Sono *Reflections on the Origins of Black Consciousness* 53-54; Gerhart *Black Power in South Africa* 273 - 274. See the view of Xolela Mangcu (*Biko: A Life* (2014) 14; 33-79) who counters what he views as a commonplace "reduction of Biko's thinking to the influence of Frantz Fanon" by recalling, and situating Biko within, 19th century Eastern Cape intellectual history, in particular the tradition of anti-colonial Xhosa chiefs and prophet-intellectuals.

¹²³ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 29.

¹²⁴ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 27; 29; Sono *Reflections on the Origins of Black Consciousness* 40-46; Hirschmann (1990) *Journal of Modern of African Studies* 3; Fatton *Black Consciousness in South Africa* 75; Gerhart *Black Power in South Africa* 274-276.

¹²⁵ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 29.

influence.¹²⁶

The thinkers and intellectual traditions listed and described above stand out as the most significant influences in the formulation, development and refinement of Black Consciousness ideology but there were others: the Father of the New Left, Herbert Marcuse, canonical works in African Literature as represented in the "African Writers Series" and South African intellectuals such as Es'kia Mphahlele, Lewis Nkosi, Nat Nakasa, Can Themba, Bloke Modisane are all counted as contributing to ideas and debates within Black Consciousness politics.¹²⁷ I will return to only some of these thinkers and perspectives in the remainder of this chapter and in later chapters, as they constitute a key part of the intellectual universe of Black Consciousness.¹²⁸

It suffices to state for now that Biko – ever in search of an alternative analytic paradigm – carefully read and debated these texts, ideas and thinkers from the location of apartheid South Africa (which adherents of the Black Consciousness Movement had come to call "occupied Azania") and always with the South African context in mind. He read and thought, as it were, from his own time and space. But eschewing the narrow parochialism of being trapped too deeply in the "local", he read widely and broadly with intellectual passion, an inquiring mind and a global imagination. Hence Sono speaks of Biko as someone who valued "the life of the mind"¹²⁹ and as being more a "man of theory"¹³⁰ than anything else. In this way,

¹²⁶ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 27; Sono *Reflections on the Origins of Black Consciousness* 72.

¹²⁷ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 29.

¹²⁸ Due to the constraints of time, space and focus, I will mainly limit my references in later discussions to Fanon, Black Power and to a lesser extent Lembede, Sobukwe, Freire and Cesaire.

¹²⁹ Sono *Reflections on the Origins of Black Consciousness* 101.

¹³⁰ Sono *Reflections on the Origins of Black Consciousness* 102

Biko's intellectual practice, his way of reading, resonates strongly with the classical Greek meaning of the term "philosopher" as a "lover of wisdom". Biko sought to cultivate Black Consciousness as a "way of life"¹³¹ predicated on critical reflection and awareness of the character, meaning and history of (black) existence within the broader human condition.

In this way, Biko restores philosophy to what Pierre Hadot has argued is its ancient foundation. In the book *Philosophy as Way of Life*, Hadot admonishes academic philosophy for its derogation from a conception of philosophy as a set of spiritual and ethical practices, a way of life or *bios*, based on dialogue, meditation and reflection between human beings concerning "the nature of humanity and its place in the cosmos".¹³² Hadot explains that above all, philosophy concerns the cultivation of a specific attitude towards existence, a way of seeing and being in the world. Quite profoundly, Biko revives this ancient conception of philosophy in his theorization of Black Consciousness by practicing a mode of reading, writing, thinking and acting politically that is connected to the material reality and experiences of Blacks and to the ethical and political crisis of racial oppression. As Biko himself avers, when he writes, he does so

not from a detached point of view but from the point of view of the black man, conscious of the urgent need for an understanding of what is involved in the new approach – black consciousness.¹³³

Wilson corroborates this as well in her reference to Black Consciousness as a "lived

¹³¹ Pityana et al "Introduction" in Pityana et al (eds) *Bounds of Possibility* 9.

¹³² P Hadot *Philosophy as a Way of Life: Spiritual Exercises from Socrates to Foucault* (1995); M Sharpe "Pierre Hadot (1922 - 2010)" *Internet Encyclopedia of Philosophy* <<http://www.iep.utm.edu/hadot/>> (accessed 6 October 2016).

¹³³ Biko *I Write What I Like* 29. Mark Sanders (in *Complicities: The Intellectual and Apartheid* (2002) 164 – 165) similarly reads Biko as a thinker who, through a concern with complicity, responsibility, political agency and the psyche, resists a disembodied and abstract conception of the intellectual.

experience”, and as the path to a “new identity” for Blacks.¹³⁴ In her discussion of Biko’s style of leadership, she intimates that through Biko, the philosophy of Black Consciousness developed precisely as a “lived philosophy” through the creation of a shared space of vocal and rigorous debate, participatory democracy, listening and questioning.¹³⁵ Indeed, it was the vision of Biko and his SASO comrades that Black Consciousness as a “style of life should filter into the lives of the oppressed”.¹³⁶ Following Hadot, Black Consciousness is to be understood as an “existential attitude”.¹³⁷ Biko’s own words confirms this reading when he states: “Black Consciousness is an attitude of mind and a way of life...”¹³⁸

Reading and writing – that is, philosophical activity – was embedded in the culture of Black Consciousness and it housed within its ranks people from fields as varied as theatre, poetry and the arts, literature, law, theology, politics, psychology and medicine.¹³⁹ Together they sought what they referred to as a “global understanding” of the problems in the country.¹⁴⁰ Biko and his comrades associated their politics with the oppositional intellectual traditions across the world that sought to resist, critique and uproot colonialism, capitalism, imperialism, Eurocentrism, and racism which together amalgamated into the dominant social, cultural and political order and episteme of the world. This amalgam of powers that some scholars refer to as “global coloniality”¹⁴¹ came to be seen as the source of unfreedom and antagonism in the modern world and the Black Consciousness Movement identified

¹³⁴ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 27

¹³⁵ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 27-28

¹³⁶ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 27.

¹³⁷ Hadot *Philosophy as a Way of Life* 3.

¹³⁸ Biko *I Write What I Like* 101.

¹³⁹ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 28.

¹⁴⁰ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 28.

¹⁴¹ See S Gatsheni-Ndlovu *Empire, Global Coloniality and African Subjectivity* (2013).

itself with the currents of thought and politics that sought to work against this.

The growth of Black Consciousness was not without its internal upheavals as seen in 1972 with the expulsion of the sitting SASO President Themba Sono on account of his perceived deviation from the organizational policy concerning strategic collaboration with government and state institutions.¹⁴² This incident itself reflected a deep ideological and tactical conflict concerning how SASO – as a self-conceived radical organization – ought to operate in the context of the apartheid government's institutions (the homelands, white progressives, universities, the legal system etc). In conjecture to a motion that SASO withdraw from University campuses and urge all Black students not to attend Bantu Education institutions, Biko argued that it would not be possible to sustain the political activities of SASO if such a withdrawal were implemented. He also believed that it was in the long-term interests of the Black community for Blacks to remain in Universities and struggle within those institutions so as to build the resources and capacity necessary to realize the ideals of the struggle. What at first reads as pragmatism reveals Biko to have been a thoughtful revolutionary, with a long-term vision of the future, insisting on sound political analysis as opposed to emotional rhetoric.

We are still in 1972, five years away from the "end". At this point, the political presence of Black Consciousness would expand further and move out of the University context and into the national scene and community spaces with the launch of the Black People's Convention (BPC) in December of 1972. The BPC set out to unite all Black South Africans into a political movement to struggle for the

¹⁴² Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 31-32.

liberation from psychological and physical oppression.¹⁴³ Biko, now a married man and father, and no longer in medical school, was working full-time as the youth coordinator of the BPC and also joined the staff of the Black Community Projects (BCP) which had been set up in early 1972 to drive Black Consciousness-led community activities.¹⁴⁴ In the main, the BCP aimed to develop skills and raise consciousness in Black communities – a kind of political regeneration, with a strong focus on youths. Through the BCP, “issues of empowerment, the development of the ability to decide; the ability to be critical” were foregrounded and while the focus was on the practical everyday needs of the community, these were driven with a strong political-intellectual focus.¹⁴⁵

In this regard, Biko drew heavily from Freire’s pedagogy as elaborated in *Pedagogy of Oppressed*.¹⁴⁶ In particular Freire’s understanding of education as an inherently political act, his insistence that teachers (or in this case, leaders) should also be learning and his view of communities as sites of critical, emancipatory politics.¹⁴⁷ Freirean pedagogy proved immensely useful in shaping the Movement’s training programmes, community programmes and curricula.¹⁴⁸ Following Freire’s ideas on the centrality of critical literacy in the production of emancipatory possibility, Biko also spearheaded the publication of the *Black Review*, touted as a “state-of-the-black nation annual review” “written, researched and produced by

¹⁴³ South African History Online “Stephen Bantu Biko” <<http://www.sahistory.org.za/people/stephen-bantu-biko>> (accessed 28 July 2016).

¹⁴⁴ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 34.

¹⁴⁵ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 34.

¹⁴⁶ P Freire *Pedagogy of the Oppressed*.

¹⁴⁷ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 35.

¹⁴⁸ See LA Hadfield *Liberation and Development: Black Consciousness Community Programs in South Africa* (2016) Chapter 2.

Blacks".¹⁴⁹ Both the community projects and the publications served as natural extensions of the Black Consciousness vision of black political self-determination. Put another way, it was important to create spaces for black intellectual engagement and contestation that were not guided by whites or produced primarily for a white public. In this way, Biko affirms thinking as a vital component in politics and thereby assuages the exclusive focus on "action" and "bread-and-butter politics" for the oppressed. The fact that Black Consciousness created a space for art, literature and theory as part of its political praxis also avoided the reduction of Blacks into merely hungry, beaten and fearful bodies.

The apartheid state's crackdown on Black Consciousness resulted in Biko's banning in 1973 and it was around this time that Biko opted once more to study law by correspondence through UNISA – although he would ultimately not complete his studies. It is not possible on the historical record to yield much insight into Biko's decision to study law. His father had apparently also dreamt of studying law. It is however more reasonable to surmise, given his context, that it is the politics of apartheid law and Biko's oft-stated apprehension of law as productive of the injustices he was combatting that motivated his decision to study law. This small and inconclusive fact of Biko's life will be enlarged in chapter 5 when I explore more fully the relevance of Biko's thought to jurisprudence.

Biko's disappearance from the public and political stage that was the result of his banning to his mother's home in Ginsberg brought him into contact with one Anglican priest David Russell and led him on a deep contemplation of religion,

¹⁴⁹ L Wilson *Steve Biko* 60.

Christianity and Black Theology.¹⁵⁰ Through this encounter, Biko came to clarify the connections between spirituality and politics, illustrating the Black Theological understanding of revolutionary politics as the highest act of obedience of God's basic laws. The biblical call for man to offer herself to the eradication of evil translated concretely for Biko into a radical position against colonial racism. Biko honoured the deeply religious character of a large portion of the Black community and their rootedness in the Christian faith. Therefore, rather than denounce Christianity, Biko sought to distinguish his own faith from white, racist and conservative Christian traditions and from a type of theological practice that engenders passivity or adopts an apolitical stance. This is to say that he opted to retool Christianity in the service of black liberation. Obviously, Biko writes, "... the only path for us now is to redefine the message in the bible and make it relevant to the struggling masses".¹⁵¹ His understanding of apartheid and its educational, legal and political State institutions was that they embodied the very antithesis of God's basic laws.¹⁵²

Biko ardently advocated for Black Theology as a way of diagnosing and overcoming what he saw as the "spiritual poverty ... of black people".¹⁵³ Here again Black Consciousness is associated with awakening as the path to freedom. And for Biko, it is the obligatory responsibility of Blacks – as subjects and not objects of history – to collectively realize this freedom. Famously, Biko is quoted as saying: "...

¹⁵⁰ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 43-44. See DR Magaziner *The Law and the Prophets: Black Consciousness in South Africa, 1968 – 1977* (2010).

¹⁵¹ Biko *I Write What I Like* 34. For a contrasting perspective suspending Christian theism and insisting on the return to African spirituality as a basis for black spiritual practice, see M Ramose "Towards Black Theology without God" (2005) 29 *Journal of Theology and Religion* 105-132.

¹⁵² Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 44.

¹⁵³ Biko *I Write What I Like* 34.

it is a sin to allow yourself to be oppressed".¹⁵⁴

The bannings generally created logistical problems for Black Consciousness Movement leaders and activists and made communication and travel difficult but Biko is reported to have found his way around some technical loopholes in the banning orders that allowed some minimal but effective subversions of their purpose.¹⁵⁵ Interestingly, Biko and other banned Black Consciousness Movement comrades generally did not trust lawyers on account of their view that lawyers were legally "conservative".¹⁵⁶ Wilson cites those close to Biko recalling how his use of his argumentation skills and general intelligence to challenge the police force's interpretation of the banning orders generally confounded the police: "They found it extremely difficult to handle his style, his intelligence, his statements...".¹⁵⁷ Banning – or more generally, the violent power of the law – therefore did not succeed in destroying the "spirit and development of Black Consciousness Movement" as people gravitated in and out of Biko's home, the publication of the *Black Review* went ahead, training of new cadres carried on and community programmes, bursaries and fundraising initiatives continued.¹⁵⁸

Over time however, state repression intensified and reached its most dramatic heights in 1974 with the arrest of the leadership of SASO and the BPC.¹⁵⁹ SASO had planned rallies in celebration of the victory of FRELIMO in Mozambique. The apartheid government got word of this and promptly banned such a gathering. The

¹⁵⁴ Biko *I Write What I Like* 34.

¹⁵⁵ Wilson "Bantu Stephen Biko: A Life" in Pityana *et al* (eds) *Bounds of Possibility* 45-46.

¹⁵⁶ Wilson "Bantu Stephen Biko: A Life" in Pityana *et al* (eds) *Bounds of Possibility* 46.

¹⁵⁷ Wilson "Bantu Stephen Biko: A Life" in Pityana *et al* (eds) *Bounds of Possibility* 46.

¹⁵⁸ Wilson "Bantu Stephen Biko: A Life" in Pityana *et al* (eds) *Bounds of Possibility* 48.

¹⁵⁹ Wilson "Bantu Stephen Biko: A Life" in Pityana *et al* (eds) *Bounds of Possibility* 50.

SASO-BPC leadership however decided to go ahead with the rally. This then set the stage for the famous BPC-SASO Trial in which Biko was subpoenaed to give evidence in Pretoria. The trial was historically significant in the history of Black Consciousness in two interlinked senses: first, because as some suggested, beneath the trial of the BPC-SASO leaders was much larger trial of Black Consciousness ideology itself.¹⁶⁰ It is noteworthy that the charge in the trial was one of terrorism but no actual acts of terrorism were alleged. The question in the trial was therefore really whether the tenets of Black Consciousness themselves amounted to terrorism. In sentencing the accused to imprisonment on the charge of terrorism, the judgment by extension convicted Black Consciousness as well. Black Consciousness would henceforth be regarded as terrorism in the legal imagination of apartheid law, as presenting a crisis to white supremacy.¹⁶¹ It has been written about the outcome of the BPC-SASO Trial that:

A precedent had thus been created. Terrorism may now be committed not only through physical violence, but also through the expression of thoughts, ideas and desires for liberation. And to characterize the white power system as one of murder, oppression, fascism, robbery, or plunder is now an 'act of terrorism'.¹⁶²

The second sense in which the trial was significant was how it exhibited the conversion or politicization of the courtroom space as a platform for the dissemination of Black Consciousness ideology.¹⁶³ Given that Biko's banning order also prohibited publication of material of any kind, the court record itself would

¹⁶⁰ For a full outline of the trial and its political, historical and legal implications see Lobban *White Man's Justice*.

¹⁶¹ South African History Online "III – Black Consciousness" <<http://www.sahistory.org.za/archive/iii-black-consciousness>> (accessed 28 July 2016).

¹⁶² South African History Online "III – Black Consciousness" <<http://www.sahistory.org.za/archive/iii-black-consciousness>> (accessed 28 July 2016).

¹⁶³ For a comprehensive transcript of Biko's testimony, see M Arnold (ed) *Steve Biko: Black Consciousness in South Africa* (1978).

become a political text in these trials. Through Biko's artful enunciation of Black Consciousness philosophy, the ideas of Black Consciousness would remain inked onto the records of the court, and the memory of the law.

The trial thus inadvertently returned Biko's voice to the public-political stage. It was the first time since his banning in early 1973 that his voice was heard directly.¹⁶⁴ Some commentators correctly caution against relying solely on the testimony Biko gave in the BPC-SASO trial for understanding black Consciousness philosophy as Biko had to balance the expression of the radical philosophical tenets of Black Consciousness with the quite practical risk of not incriminating his fellow comrades – which required him to blunt and reframe some of his actual views. That notwithstanding, the record of the trial reads more like a history lesson or political treatise than as a legal trial *per se* – traversing into issues such as armed struggle, African independence, global political economy, South African state institutions, black political rights and intellectual foundations and tenets of Black Consciousness – and so serves as an instructive source into Biko's jurisprudential imagination; his appropriation of law, the legal space and legal categories to stage a broader political and moral dissent against white power.

The cross-examination of Biko lasted four and a half days, generating a voluminous record that partly helped to present Black Consciousness in the eyes of the international community as a formidable political voice of and for Black South Africans.¹⁶⁵

Less than one month after Biko's giving evidence in the trial, the famed Soweto

¹⁶⁴ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 56-59.

¹⁶⁵ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 59.

uprisings took place on June 16th 1976 in protest against the imposition of Afrikaans as a medium of instruction in secondary schools. And while hotly contested, and Biko himself is reluctant to take credit on this score, the influence on the uprisings of the Black Consciousness Movement's community work with township youths over the years is undeniable.¹⁶⁶ Following the June 16 Uprisings, state repression continued and escalated with many Black Consciousness activists including Biko being arrested, and some even being killed while in police detention, during the period after July 1976.

In parallel to these developments, the changing political climate at the time led to a re-examination of Black Consciousness analysis, with some advocating a shift from the predominantly cultural and psychological framing of black liberation to a more tactical-political and economic framing. As Wilson reports, Biko realized the need to "understand the nature of economic forces" and examine the validity of class analysis (that is, Marxism).¹⁶⁷ In addition to the question of class and political economy, it also became clear to Biko that the Black Consciousness perspective needed to move beyond the borders of South Africa. And so by the end of December 1976, Biko had integrated an anti-imperialist international outlook into Black

¹⁶⁶ See Gerhart *Black Power in South Africa 2* (argues that Black Consciousness ideology was a major catalyst of the Uprisings and accounts for "the determination and resilience of the youthful militants"); Fredrickson *Black Liberation* 309 (argues that the activities and ideas of the Black Consciousness Movement "set off the revolt of June 1976"); Buthelezi "The Emergence of Black Consciousness: A Historical Appraisal" in Pityana et al (eds) *Bounds of Possibility* 113 (argues that initial planning of uprisings took place at Morris Isaacson High School where SASO national organizer Onkgopotse Tiro was a teacher of history); Hirschmann (1990) *Journal of Modern of African Studies* 8-9 (argues that Black Consciousness motivated the uprisings); R Davies *et al The Struggle for South Africa: a Reference Guide to Movements, Organizations and Institutions Volume 2* (1984) 306 (argues that the Black Consciousness Movement played a "crucial role in pushing forward" the uprisings); MacDonald *Why Race Matters in South Africa* 115 - 116 (describes the Black Consciousness Movement as the "central ideological influence" on the 1976 Soweto rebellion).

¹⁶⁷ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 55; Fatton *Black Consciousness in South Africa* 82.

Consciousness analysis – starting with a critique of the failure of the United States government to constructively act against the apartheid regime.¹⁶⁸ So steadfast was Biko that he refused to accept an invitation to the United States until its government had adopted a radically different approach to South Africa.¹⁶⁹ This was a position generally held by African liberation movements that viewed Western nations as imperialist and driven more by a concern for economic stability than justice. Nevertheless, Biko recognized the need to keep the international world informed about the brutal repression of Black struggle movements in South Africa and the massive violence of the apartheid state.¹⁷⁰

The increasing death in detention of political detainees under mysterious circumstances weighed heavily on Biko. Within the context of many activists being detained and large numbers moving into exile, Biko would in fact concede to the merits of armed struggle and called for the formation of one Black liberation group to ensure effective resistance against settler-colonial white minority rule in South Africa.¹⁷¹ In August 1977, death looms. Biko would take an important journey to the Western Cape in defiance of his banning order reportedly to address organizational matters and to explore further the benefits of incorporating a Marxist class-analysis. In particular, Biko had intended to meet with Neville Alexander, a former member of the Non-European Unity Movement and an important proponent of class analysis and critic of race-consciousness.¹⁷² Alexander had however unbeknownst to Biko

¹⁶⁸ See the essay "American Policy Towards Azania" in Biko *I Write What I Like* 157 – 161.

¹⁶⁹ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 64-65.

¹⁷⁰ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 65.

¹⁷¹ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 66.

¹⁷² Alexander wrote under the pen name "No Sizwe" and is probably best known for the book *One Azania, One Nation: The National Question in South Africa* (1979). In the post-1994 era, Alexander would also come to be known as a fierce left critic of race-based categorisation and redress measures

communicated his unwillingness to meet Biko not only due to the risk of attracting the ire of the police (as Alexander himself was banned and confined to house arrest) but because Alexander maintained that he was not officially mandated to meet with Biko until the local BPC structures had addressed conflicts they were experiencing.¹⁷³ What would follow from this miscommunication would be a tragic set of events.

Upon arriving, Biko waited for three whole hours outside Alexander's home, hoping that Alexander would reconsider his initial decision not to meet with him. Apparently notorious for his political discipline, Alexander did not cave into this demand and so Biko and his travel companion ultimately decided to abort the trip and drive back to the Eastern Cape. "Nearing the end of a long journey", while driving into Grahamstown, they ran into a roadblock that had been set up by Security Police. After brief exchanges with the police officers, Biko – in disguise – was arrested and moved to police headquarters in Port Elizabeth. This was the last time Biko was to be seen alive.¹⁷⁴ It is only in the account of Peter Jones, Biko's travel companion, that we have a glimpse of the vicious and humiliating torture that Biko must have suffered. Much of the details of his detention and later, death, remain shrouded in state secrecy and bureaucratic lies. What we do know is that on 12 September 1977, Bantu Stephen Biko was killed and died a devastating death, shortly before his 31st birthday.¹⁷⁵ In the midst of national and international mourning, Biko's mother reaffirms the prophetic quality of his name when she said:

such as affirmative action on much the same basis he was critical of the theory of Black Consciousness.

¹⁷³ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 67.

¹⁷⁴ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 67.

¹⁷⁵ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 67.

“In truth he was not my child. He was the son of the people”.¹⁷⁶

This historical background is necessary for understanding Biko and tracing the development of his ideas and especially underscoring the complexity and shifts in his political thinking. The history and emergence of Black Consciousness in the political abyss of the 1960s and its maturation in the 1970s (and thereafter) ensures its (and his) survival in the political memory of South Africa and in what Biko himself referred to as “the black world”.

3.4 The philosophy of Black Consciousness: themes and concepts

To return to More and his treatment of Biko as an Africana philosopher. We should begin by heeding More’s counsel that Biko’s thought must be understood partly in the context of his intellectual inheritances. And here More makes clear that Biko’s relation to the thinkers who have influenced him is not merely one of applied philosophy but rather one in which Biko innovates, appropriates and extends their insights for the specific local South African apartheid context in which he lived. He did not merely uncritically transpose or parachute ideas and concepts from elsewhere but creatively reworked and reconstructed those ideas, bringing to the fore what More describes as “unique and original discursive formulations”.¹⁷⁷

More identifies three central “categories of existential thought” in Biko which also disclose the rigorous philosophical and theoretical quality of Biko’s writings. Each of them are also central to what I am exploring as Biko’s critical-theoretical intervention into law and jurisprudence. These are the concepts of (1) racism (2)

¹⁷⁶ Wilson “Bantu Stephen Biko: A Life” in Pityana et al (eds) *Bounds of Possibility* 73 – 74.

¹⁷⁷ More “The Intellectual Foundations of the Black Consciousness Movement” in Vale *et al* (eds) *Intellectual Traditions* 193.

identity and (3) liberation. I shall discuss each of them in turn and at some length in order to illuminate the full implications and complexity of his ideas.

3.4.1 Race and racism

According to More, Biko's understanding of racism begins with his recognition of the existence of a dualistic ontology in an anti-Black society (such as apartheid South Africa) that is divided between a white consciousness ("Being-white-in-the world") and a black consciousness ("Being-black-in-the-world").¹⁷⁸ These two modes of existence are further in a dialectical relation or tension with one another even as they are co-constitutive and co-dependent. White consciousness requires the existence of an Other, an 'ontological outside' to itself, a black consciousness upon which it bases its self-identification and recognition but also upon whose degradation and abjection it bases its assertion of supremacy. Put differently, through the installation of a regime of economic, religious, cultural, social, legal and epistemological domination, white consciousness subjugates and controls black (self-)consciousness "thus denying blacks their existential freedom".¹⁷⁹ When Biko writes that "the most potent weapon in the hands of the oppressor is the mind of the oppressed", he is in fact rehearsing the Sartrean insight that "human reality *qua* consciousness is by definition free; that is, consciousness is freedom".¹⁸⁰ More continues:

The emergence of Black Consciousness was therefore a response to a white consciousness that sought to appropriate and dominate the consciousness and thus

¹⁷⁸ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 49-50. Here Biko is indebted to Fanon's formulation in F Fanon (trans. R Philcox) *The Wretched of the Earth* (1963) 3-5 of the Manichean dichotomy that is foundational to colonialism.

¹⁷⁹ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 50.

¹⁸⁰ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 50.

the freedom of black people. It was and still is a struggle for a new consciousness, a reawakening of a self-consciousness, a re-appropriation of black self-consciousness from the clutches of an appropriative and dominating white consciousness, a rediscovery of the black self which lay buried beneath white consciousness imposed on blacks by cultural, political, economic, linguistic and religious domination.¹⁸¹

Biko defines racism as "discrimination by a group against another for the purpose of subjugation or maintaining subjugation".¹⁸² In this formulation, racism involves the wielding of collective power by a dominant group and the will to subjugate its racial others. Taken in the context of apartheid South Africa, and read together with Biko's continued references to whites as a group that "wields power"¹⁸³ as well as his reference to the "totality of white power"¹⁸⁴ and the "white power structure",¹⁸⁵ this definition of racism restricts all acts and expressions of racism as both prejudice and structural power to white people as a social group. Put plainly, for Biko *Blacks cannot be racist* – not because they lack the human capacity to commit morally wrong actions or to hold morally repugnant beliefs about other humans but because such a possibility would be ethically and empirically incongruous with the history and reality of social injustice in South Africa – an injustice unilaterally directed against Blacks. And here I want to suggest that this restriction of racism to whites is the result not of a sectarian bias on Biko's part but rather of his attentiveness to social and historical context and his conceptual fidelity to the Black Radical Tradition.

¹⁸¹ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 50.

¹⁸² Biko *I Write What I Like* 27.

¹⁸³ Biko *I Write What I Like* 65.

¹⁸⁴ Biko *I Write What I Like* 66.

¹⁸⁵ Biko *I Write What I Like* 30; 70; 98.

Biko is in good company as Kwame Ture and Charles V. Hamilton argued along similar lines in one of the classic tomes of black radicalism, *Black Power: The Politics of Liberation*, that:

Racism is not merely exclusion on the basis of race but exclusion for the purpose of subjugating or maintaining subjugation. The goal of racists is to keep black people on the bottom, arbitrarily and dictatorially...¹⁸⁶

Ture and Hamilton developed this argument mainly in response to those labelling Black Power and Pan-Africanist-oriented politics and activism as "racist". Ture and Hamilton aimed to show that unlike white racism which centres on domination and exploitation of racially subordinated peoples, the aim of black radical politics is justice and the "effective share in the total power of society".¹⁸⁷ More than this however, this definition sheds light more generally on the black radical understanding that racism must be defined in terms of its geographical and historical unfoldment (in our context, rooted in the oppression of Blacks) and its larger systemic operation and structural ramifications (as a mode of maintaining the privilege and social status of whites and perpetuating the subordinate status of Blacks).

On this view, racism in South Africa must be located and defined according to the history of dispossession, enslavement and exploitation of Africans and linked further to the process of cultural and psychological decimation which resulted in the hegemony of white norms, cultures, languages and epistemologies. Thus, while Blacks can express hatred, distrust and other forms of aversion which may be hurtful to individual whites (this being a quite predictable reaction of political rage against

¹⁸⁶ K Ture and CV Hamilton *Black Power: The Politics of Liberation* (1967) 47.

¹⁸⁷ Ture and Hamilton *Black Power* 47.

those who embody a system of oppression), the absence of a centuries-old system of racialised subordination and discrimination against whites by Blacks that excluded or excludes whites from full participation in the rights, privileges and benefits of society vitiates the very possibility of so-called "black racism" or "reverse-racism". This seems to be lost on a number of commentators including Wilson¹⁸⁸ and George Hull¹⁸⁹ who ardently but unnecessarily insist that neither Biko the man nor Black Consciousness the philosophy can be considered or labelled as "racist". This defense of Biko and Black Consciousness as "not [a] racist" incorrectly presupposes that such racism on Biko's (or any oppressed Black person's) part is a logical *possibility* in the first place but simply exempts Biko from such a category. A close reading of Biko himself would show that there are no grounds on which any Black person – and certainly one resisting white minority rule in apartheid South Africa – could be classified as "racist" in any sense.

bell hooks sharpens this argument further by distinguishing between interpersonal prejudice and "institutionalized white supremacist domination" so as to move away from a language of racism centred on individual behaviours, feelings, and prejudices to a focus on broader institutions, systems and structures, which unlike the former significantly determines one's life-chances and standard of living.¹⁹⁰ As she writes:

A vision of cultural homogeneity that seeks to deflect attention away from or even excuse the oppressive, dehumanizing impact of white supremacy on the lives of black people by suggesting black people are racist too indicates that the culture remains

¹⁸⁸ Wilson "Bantu Stephen Biko: A Life" in Pityana et al (eds) *Bounds of Possibility* 17.

¹⁸⁹ G Hull "Black Consciousness as Overcoming Hermeneutical Injustice" (2016) *Journal of Applied Psychology* 12-14.

¹⁹⁰ hooks *Killing Rage* 195.

ignorant of what racism really is and how it works. It shows that people are in denial. Why is it so difficult for many white folks to understand that racism is oppressive not because white folks have prejudicial feelings about blacks (they could have such feelings and leave us alone) but because it is a system that promotes domination and subjugation? The prejudicial feelings some blacks may express about whites are in no way linked to a system of domination that affords us any power to coercively control the lives and well-being of white folks.¹⁹¹

Biko defines power not as abstract and anonymous but rather as operating through state apparatuses and through cultural, social and economic systems.¹⁹² We should not lose sight at this point of the fact that Biko's theorisation of racism as a system of structural power remains wedded to an understanding of racism as generative of profound psychological damage. An important insight that Biko inherits from the work of Fanon as well as the cultural strain of African nationalism is that racist ideology and practices also infiltrate the psychological experience of Blacks and disfigures the psyche of the colonised and, when internalised, produce a number of psychosocial pathologies: alienation, estrangement, depersonalisation, self-negation, dysfunction and passivity.¹⁹³

The singular location of racism within white culture recalls what was discussed above, namely how the entire edifice of colonialism and apartheid was built on a binary or dualism that not only separated whites from Blacks but also established a hierarchy between them that privileges whites and devalues Blacks.¹⁹⁴ Having

¹⁹¹ hooks *Killing Rage* 154.

¹⁹² More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 51.

¹⁹³ See D Hook "Frantz Fanon, Steve Biko, 'Psychopolitics' and Critical Psychology" in D Hook (ed) *Critical Psychology* (2004) 84 – 114; *A Critical Psychology of the Postcolonial – The Mind of Apartheid* (2012); "Sobukwe and the Psychosocial" (2015) 50 *PINS: Psychology in Society* 9 – 34.

¹⁹⁴ This resembles what Jacques Derrida in the *Margins of Philosophy* (1982) 195 – 196 refers to as the "metaphysics of presence" in the way that it "installs hierarchies and orders of subordination in the various dualisms it encounters" and "privileges one side of an opposition, and ignores or marginalises the alternative terms of the opposition".

'Otherised' blackness in this way, the racist consciousness of apartheid constructed Blacks as simultaneously inferior and as dangerous and threatening. For Biko, this is what renders racism, at least in the South African context, "necessarily and unalterably" white in character,¹⁹⁵ hence his preferred term "white racism".¹⁹⁶ Like Albert Memmi and Fanon before him, he thus maintains the historical and semiotic unity between racism and white supremacy – and this is a unity that turns on the problem of conquest (or colonisation) and not merely discrimination.

In an essay specifically reflecting on racism in South Africa and the United States, bell hooks makes the case for the concept of "white supremacy" to replace "racism" altogether as a description of the social antagonism between whites and Blacks in colonial or racialised contexts. She argues from the premise that the term "white supremacy" is explanatorily superior to racism because it is not prone to the same plasticity, misconstrual, and ambiguity that racism is – as we saw above in the historically and theoretically petty controversy concerning whether Blacks can be racist or not.¹⁹⁷ Her reasons for this argument are instructive in gaining a better understanding of Biko's concept of racism. For hooks, white supremacy denotes a social structure and symbolic order in which that which is marked as "white" embodies unquestioned superiority and dominance over that which is marked as "Black"; it is a social order in which white lives, needs, interests, ways of life and perspectives are centred and valued above those of Blacks; it is a system of violence, subjugation and dehumanisation of Blacks that ensures the undisturbed

¹⁹⁵ MacDonald *Why Race Matters in South Africa* 122.

¹⁹⁶ Biko *I Write What I Like* 25, 54; 55; 66; 81.

¹⁹⁷ hooks *Killing Rage* 184.

enjoyment of privilege and advantage for whites. Anti-blackness and imperialism are also central constituents of white supremacy in her account.

hooks then goes on to relate her discovery that the term white supremacy is more useful than racism on two important grounds:

(a) When confronting white liberal and white feminist attitudes, which although not “racist” in the traditional sense of outright hatred of Blacks, still wished to “exercise control over [the] bodies and thoughts [of Blacks]”.¹⁹⁸

Much like their more overtly racist ancestors, white liberals had internalised the values and attitudes of white supremacy – a sense of whites as rightfully dominant over others – even though they openly associated with Blacks and sympathised – sometimes deeply so – with the struggles of Blacks against racism. The conceptual and analytic power of “white supremacy” lies in deepening the problem of race by showing that even whites who opposed anti-black racist prejudice and overt racial domination nevertheless could affirm and participate in structures of racial domination and oppression. For hooks, anti-racism involves an outright rejection of the assumption that whites and European culture are naturally or culturally superior. This assumption was in her experience still present in whites who claimed an anti-racist position insofar as they, implicitly or explicitly, seemed to tolerate and support Blacks only on the condition of their willingness to assimilate into the norms of whiteness and white culture and to adopt a mode of racial critique that did not disturb whites’ sense of comfort and privilege. This exposure of “liberal

¹⁹⁸ hooks *Killing Rage* 184-185.

racist white supremacy” underscores the fact that racial domination can take putatively benevolent or benign forms.¹⁹⁹

(b) White supremacy as a term also better captures the complicity of Blacks and their role in upholding and maintaining racial hierarchies produced by white supremacy.²⁰⁰ Not only can Blacks participate in the wielding of “white supremacist control” over other Blacks (by, for example, supporting regimes of white domination as well as enforcing the policies, practices and beliefs of white supremacist institutions in public, professional and private life), many Blacks are socialised to internalise the idea that whites are superior and deserving of emulation – which would shape both how they view themselves and how they treat other Blacks.

hooks’ arguments above align sharply with Biko since it was after all the case that both the assumption of racial superiority by white liberals as well as the internalisation of racism by Blacks were the primary impetus for the creation and development of Black Consciousness philosophy. hooks’ formulation when read with Charles Mills’ theorisation of “white supremacy as a socio-political system”²⁰¹ goes beyond mere individual subjects and political actors but suggests a deeper structural critique that would explain the persistence of white supremacist ideologies, practices and outcomes in ostensibly benign, non-racial, liberal spaces and polities. Such a formulation also explains how the elevation of individual Blacks to positions of power

¹⁹⁹ R Rabaka *Forms of Fanonism: Fanon’s Critical Theory and the Dialectics of Decolonization* (2010) 65.

²⁰⁰ hooks *Killing Rage* 186.

²⁰¹ C Mills “White Supremacy as Sociopolitical System: A Philosophical Perspective” in AW Doane and EB Da Silva (eds) *White Out: The Continuing Significance of Racism* (2003) 35 – 48.

(including the ascendancy of Blacks and Black-led political parties to government power) does not by itself transform the racial order of things.²⁰²

Indeed for Mills, the benefit of casting white supremacy as a socio-political system is that it approaches and contextualises racism in "socio-systemic terms" as opposed to focusing on racism as a set of prejudicial feelings, cruel words and bad actions.²⁰³ And as he explains, white supremacy denotes more than simply the formal juridico-political arrangement of legally sanctioned racial discrimination (such as apartheid South Africa or Jim Crow USA).²⁰⁴ Rather, since relations of power and domination can survive the dismantling of their more overt legal supports, white supremacy must be understood more broadly as a political, economic and cultural system in which: (1) whites overwhelmingly control and have access to power and material resources; (2) conscious and unconscious notions of white superiority ("whites are better than the rest") and white entitlement ("whites deserve better than the rest") are widespread, held mostly by whites but also by Blacks and (3) relations and images of white domination and Black subordination are re-enacted daily across a wide array of institutions, spaces, platforms, media and social settings – both private and public, intersubjective and structural.²⁰⁵

White supremacy is also global for Mills as the history of European domination – through colonisation, slavery and imperialism – has shaped the entire modern

²⁰² For the closely related theorization of "racialised social systems" which emphasizes a structural interpretation of racism in contrast to idealist, institutionalist, internal colonialism, Marxist and racial formation perspectives on racism, see EB Da Silva "Rethinking Racism: Toward a Structural Interpretation" (1997) 62 *American Sociological Review* 465 – 480.

²⁰³ Mills "White Supremacy as Sociopolitical System" in Doane and Da Silva (eds) *White Out* 35. See also Mills *Blackness Visible: Essays on Philosophy and Race* (1997) chapter 3.

²⁰⁴ Mills "White Supremacy as Sociopolitical System" in Doane and Da Silva (eds) *White Out* 36.

²⁰⁵ Mills "White Supremacy as Sociopolitical System" in Doane and Da Silva (eds) *White Out* 37. This definition is adapted from FL Ansley "White Supremacy (And What We Should Do About It)" in R Delgado and J Stefancic (eds) *Critical White Studies: Looking Beyond the Mirror* (1997) 592.

world, resulting in a political geography in which white Europe and its progeny continue to maintain a dominant position over much of the rest of the world in terms of its military, economic and cultural capital.²⁰⁶ Thus, an added conceptual benefit of the term “white supremacy” is that it provides a tool for analysing and critiquing racial oppression even in the absence of overt state-sanctioned racism.

Mills remarks that employing white supremacy as a concept “disrupts traditional framings [and] conceptualisations”²⁰⁷ and “registers a commitment to a radically different understanding of the political order, pointing us theoretically toward the centrality of racial domination and subordination...”.²⁰⁸ It is to insist that race is “central, political and primarily a system of oppression”.²⁰⁹ On this view, race and racism cannot be understood outside of the context, history and materiality of white supremacy – which in South Africa, takes the form of European rule through colonial invasion and settlement on indigenous lands and the violent conversion of Africans into the political, legal and economic subjects of first Dutch-, then British- and then finally white sovereign rule.

Mills defines white supremacy then as a “multidimensional system of domination” encompassing not merely the formal juridical realm but also extending to white domination, overrepresentation and influence in economic, cultural, cognitive-evaluative, somatic and even the metaphysical realms. As a system, it skews economic distribution and opportunities in favour of whites, denies and destroys the culture, history and ways of knowing of Blacks, affects how we perceive

²⁰⁶ Mills “White Supremacy as Sociopolitical System” in Doane and Da Silva (eds) *White Out* 37 - 38. On Mills’ theorization of “global white supremacy”, see Mills *Blackness Visible* 99-105.

²⁰⁷ Mills “White Supremacy as Sociopolitical System” in Doane and Da Silva (eds) *White Out* 40.

²⁰⁸ Mills “White Supremacy as Sociopolitical System” in Doane and Da Silva (eds) *White Out* 40.

²⁰⁹ Mills “White Supremacy as Sociopolitical System” in Doane and Da Silva (eds) *White Out* 41.

and see ourselves and our reality, holds up whiteness as the corporeal ideal while stigmatising blackness as ugly, grotesque and dark and ultimately generates a bipolar racist political ontology in which whites, seen as full persons, are above the line of the Human and Blacks, seen as less than fully human, are below it.

Mills' description of white supremacy as "*multidimensional*" and David Gillborn's definition of it as "a *comprehensive* condition whereby the interests and perceptions of white subjects are continually placed centre stage and assumed as normal"²¹⁰ evokes Biko's use of the term "the totality of white power". Through this term, Biko also treats white racism as ubiquitous in the social fabric of South Africa, located not only in the State but also in the economy, in religious doctrines, in white liberal spaces, in the minds of Blacks, and in the socialisation of white people. White racism is "total" as well in the sense of its comprehensive and deep ramifications for every sphere of Black life – legal and political standing, moral status, self-perception and identity formation, mental and physical health, consciousness, existential plight, degree of inclusion, acceptance and respect, sexual, familial and gender relations, aesthetic worth, the quality of epistemic judgement and the entire metaphysics that underlie social life.²¹¹

Thus, the term white supremacy rather than racism is more all-encompassing in its focus on the larger ideology and social structure of white domination in all spaces – including in ostensibly non-racial spaces. When Biko speaks of "white racism" it should be understood as a reference to white supremacy in the comprehensive sense outlined above.

²¹⁰ D Gillborn "Rethinking White Supremacy. Who Counts in 'WhiteWorld'" (2006) 6 *Ethnicities* 318.

²¹¹ See C Mills "Non-Cartesian Sums: Philosophy and the African-American Experience" (1994) 17 *Teaching Philosophy* 228.

A core thematic that runs throughout Biko's theorisation of Black Consciousness and his analysis of South Africa is the analytic and political centrality accorded to race, racism and white supremacy. As he writes:

In terms of the Black Consciousness approach, we recognise the existence of one major force in South Africa. This is White Racism. It is the one force against which all of us are pitted. It works with unnerving totality...²¹²

The above statement, together with Biko's statement that "the cardinal point [in Black Consciousness thought] is the existence in our society of white racism which has been institutionalised...";²¹³ his references to "white racism" as "*the problem*"²¹⁴ and "the real evil in our society"²¹⁵ as well as his claim that colour is "the greatest determinant" of politics,²¹⁶ suggests that Biko treats racism as the primary antagonism or foundational oppression in the South African context.²¹⁷ An oft-quoted and popular slogan of the Black Consciousness Movement in the heydays of SASO was "*We are Black students, not black Students!*", positing race/blackness as a category that overrides other categories and subject positions, needing to be emphasised.²¹⁸

This follows from the historical fact that racial distinctions were (and in many ways, still are) the central basis for social and cognitive organisation, spatial demarcation, economic distribution, legal and political governance in South Africa and much of the modern world. Indeed, following Mills, the very definitions of

²¹² Biko *I Write What I Like* 54.

²¹³ Biko *I Write What I Like* 149.

²¹⁴ Biko *I Write What I Like* 25.

²¹⁵ Biko *I Write What I Like* 25.

²¹⁶ Biko *I Write What I Like* 54.

²¹⁷ Hirschmann (1990) *Journal of Modern African Studies* 4.

²¹⁸ Buthelezi "The Emergence of Black Consciousness: A Historical Appraisal" in Pityana et al (eds) *Bounds of Possibility* 114. See also S Badat *Black Man, You are On Your Own* (2009).

personhood and Humanity have since the advent of European domination in Africa been racially stratified and restricted categories – with whiteness seen as synonymous with humanity and civilisation and whites themselves recognised as the only people entitled to normal human treatment and Blacks conversely viewed as sub- or non-persons, denied both moral standing and social recognition as Human, and thus seen as inviolable (even when violated) and ungrievable (even when dead).²¹⁹ This distinguishes racism (white supremacy) from gender oppression (patriarchy) and also from economic exploitation, alienation and deprivation (capitalism) as neither of these latter two modalities of oppression *consistently* involved a doubt concerning the humanity either of women and homosexuals or of the proletariat, the worker or the poor.²²⁰ Hence Ramon Grosfoguel's instructive definition of racism as [a hierarchy] "of superiority and inferiority along the line of the human that have [*sic*] been politically, culturally and economically produced and reproduced for centuries...".²²¹ In the worlds that have experienced the racialisation of Euro-social domination, it has been Blacks – variously marked as natives, Negroes, Bantu, the colonised, the enslaved, "people of colour" – who come to occupy the position below the line of the human, generally deprived of basic rights and material resources for a prosperous life and denied recognition of their subjectivities, identities, spiritualities and epistemologies.²²²

To be sure, oppression along the lines of gender and class constitute what Mills sociologically describes as "intra-Human" forms of social stratification and status

²¹⁹ C Mills "Materializing Race" in ES Lee (ed) *Living Alterities: Phenomenology, Embodiment and Race* (2014) 33.

²²⁰ Mills "Materializing Race" in Lee (ed) *Living Alterities* 34

²²¹ R Grosfoguel "What is Racism?" (2016) 22 *Journal of World-System Research* 10.

²²² Grosfoguel 2016 *J of World-System Research* 10.

distinction where populations or groups are divided by class inequality or gender hierarchy but are nonetheless socially and ethically recognised as equally human.²²³ They surely involved a tragic and far-reaching violation of the full humanity of victims of class and gender oppression but unlike racial oppression, that humanity was still presumed.²²⁴ In Lewis Gordon's work, this distinction is explained in politico-ontological terms as a difference between "the Other" as the quintessential figure of oppression in contrast to Blacks who are produced as "below even the Other".²²⁵ For Gordon, racism operates as a form of dehumanisation, or better yet; as the denial of black Humanity or even better yet; the construction of blackness as antithetical to Humanity. The divide racism constructs through the line of the Human is, as Gordon explains, "not one of being and less-Being, but instead one of Being and no-Being. Its divide is absolute. It is a divide between Being and Nothingness."²²⁶

As a result of how thoroughly and dramatically the racialised political economy of personhood came to structure socio-political life in South Africa, Biko's privileging of race is hardly surprising but still not uncontroversial since Black Consciousness faced the Marxist objection that colonial-apartheid ought to be understood as a

²²³ Mills "Materializing Race" in Lee (ed) *Living Alterities* 35. On a related theorisation of the contrast between the ontological position of the Black vis-à-vis that of the Human subaltern, see F Wilderson "The Vengeance of Vertigo: Apashia and Abjection in the Political Trial of Black Insurgent" (2011) 5 *InTensions* <<http://www.yorku.ca/intent/issue5/articles/frankbwildersoniii.php>> (accessed 6 May 2017).

²²⁴ Mills "Materializing Race" in Lee (ed) *Living Alterities* 33-34.

²²⁵ L Gordon "Below Even the Other: Colonialism's Violent Legacy and Challenge, with Respects to Fanon" (2012) *TransEuropeennes: International Journal of Critical Thought* <<http://www.transuropeennes.eu/en/articles/358>> (accessed 25 September 2016). See also L Gordon *Existentia Africana: Understanding Africana Existential Thought* (2000) 61, 85; "Through the Hellish Zone of Nonbeing: Thinking through Fanon, Disaster, and the Damned of the Earth" (2007) 5 *Human Architecture: Journal of the Sociology of Self-Knowledge* 11.

²²⁶ L Gordon *Her Majesty's Other Children: Sketches of Racism from a Neocolonial Age* (1997) 28. See also F Wilderson *Red, White and Black: Cinema and the Structure of US Antagonisms* (2010) 65 - 66: "As such, not only is Blackness (Slaveness), outside the terrain of the White (Master), it is outside the terrain of the subaltern".

function of European imperialist-capitalist expansion (with the bogus construct of race merely being instrumentalised as an ideological proxy or “superstructural rationale”). It would also later be haunted by feminist criticisms of its lack of a gendered analysis and politics (with race here seen to be functioning as a category that partially erases or overwhelms the particularity of Black women’s experiences under apartheid as well as eclipses the more generally gendered nature of colonial-apartheid). It is thus necessary to tease out the relationship between race and class on the one hand, and race and gender on the other, as they have been formulated within the theoretical frame of Black Consciousness.

Class

The “race versus class” debate has historically been a recurring theoretical problematic that also permeated the milieu in which Black Consciousness developed. This debate concerns the question of whether it is race or class that is the primary determinant, variable or organising principle of social and economic inequality in the South African context. In other words, whether the nature of the social conflict in South Africa is a national-racial struggle (between indigenous Blacks and white settlers) or a class struggle (between workers and the ruling economic class). This debate is significant because its outcome would determine the emancipatory path one would follow in carrying out the struggle (means) and mapping out the envisaged liberated society (ends).

The debate has taken many forms,²²⁷ but of particular interest is the black nationalist response to Marxist and neo-Marxist arguments proffering class and class struggle as primary, with race being relegated to the domain of the epiphenomenal, viewed as secondary to the class structure of society.

To briefly recapitulate the traditional Marxist background to this position:²²⁸ Marxist theory is grounded in a materialist theory of history (referred to as “historical materialism”) in terms of which the material conditions of our existence, how and what we produce in order to survive, is what drives and determines the nature and development of human society. Consequently, the forces of production (raw materials, tools, labour and technology) and the relations of production (relations involving people and control of the forces of production such as that between workers and bosses) together form the “mode of production”. The mode of production then constitutes the “economic structure” of society which in turn constitutes the “base” of society, which Marx refers to as the “real foundation” on which other noneconomic factors and phenomena (law, the state, morality, the family, education, culture, religion, mass media etc) are formed.

These non-economic factors are designated as belonging to the “superstructure”, as being “ideal” or ideological rather than “material”. As a result, the base governs, shapes and determines the superstructure. Even when this position was later relaxed to recognise the mutually influencing or dialectical

²²⁷ For earlier iterations of this debate, see D Posel “Rethinking the ‘Race-Class Debate’ in South African Historiography” (1983) 9 *Social Dynamics* 50 – 66; R Nengwekhulu “Race, Class and Ethnicity in South Africa” (1986) 1 *African Journal of Political Economy* 29-39. On the evolution of the race-class debate in the discourses of the Black Consciousness movement, see N Ally and S Ally “Critical Intellectualism: The Role of Black Consciousness in Reconfiguring the Race-Class Problematic in South Africa” in Mngxitama et al (eds) *Biko Lives!* 171 – 188.

²²⁸ See E Fromm *Marx’s Concept of Man* (1961) 8-19; GA Cohen *Karl Marx’s Theory of History: A Defense* (1978); P Singer *Marx: A Very Short Introduction* (2000) 48-49.

relationship between the base and the superstructure, the base still maintained overriding influence over the superstructure – that is, the economic structure and mode of production determines all else in society. This is how class, because it was understood as one’s relationship to the modes of production, emerged in classical Marxism “as a more fundamental category than other social group memberships”.²²⁹

Where incorporated into Marxist political economic analysis, race and gender are generally relegated to the superstructural or ideological domains – as secondary to the category of class, as merely aggravating the effects of class domination and working to conceal the true nature of society as defined by its economic structure. Accordingly, for the orthodox or classical Marxist, it was therefore class struggle that was the true and definitive struggle against domination since it was class struggle that could overthrow the economic base of society which was the driving force of history and society.

Consequent to his casting of race as the primary social conflict, Biko departs from, and reworks, this framework considerably. In his formulation, the workings of racial domination are imbricated with capitalism. He expresses this as follows:

I think there is no running away from the fact that now in South Africa there is such an ill distribution of wealth that any form of political freedom which does not touch on the proper distribution of wealth will be meaningless. The whites have locked up within a small minority of themselves the greater proportion of the country's wealth.²³⁰

Biko treats the “ill-distribution of wealth” and “economic discrimination” as central to the “totality of white power”. Elsewhere he describes Blacks as an “economically

²²⁹ Mills “Materializing Race” in Lee (ed) *Living Alterities* 22.

²³⁰ Biko *I Write What I Like* 169.

disinherited and dispossessed group"²³¹ and diagnoses global white supremacy as emanating from the "exploitative nature of the white man".²³² He even goes further to integrate an anti-imperialist internationalist outlook in linking Black Consciousness to the global struggle between "the Third World against the rich nations".²³³ As he writes:

The black-white power-struggle in South Africa is but a microcosm of the global confrontation between the Third World and the rich white nations of the world...²³⁴

Thus, Biko is keenly aware of the economic dimension of racial oppression and the politically and historically close bond between Empire and capital. For him, race and class are interlocking sites of domination or put another way, the apartheid regime's system of racial classification and its production of raced subjects is co-extensive with its economic project.²³⁵ It is necessary to quote him at length when he illustrates how racist ideologies and state apparatuses produce and sustain unequal patterns of economic distribution thus suggesting that Black people's economic disadvantage is a function of racial domination and segregation:

Being part of an exploitative society in which we are often the direct objects of exploitation, we need to evolve a strategy towards our economic situation. We are aware that the blacks are still colonised even within the borders of South Africa. Their cheap labour has helped to make South Africa what it is today. Our money from the townships takes a one-way journey to white shops and white banks, and all we do in our lives is pay the white man either with labour or in coin. Capitalistic exploitative tendencies, coupled with the overt arrogance of white racism, have conspired against us. Thus in South Africa now it is very expensive to be poor. It is the poor people who

²³¹ Biko *I Write What I Like* 74.

²³² Biko *I Write What I Like* 53.

²³³ Biko *I Write What I Like* 78; Gerhart "Interview with Steve Biko" in Mngxitama *et al* (eds) *Biko Lives!* 34.

²³⁴ Biko *I Write What I Like* 78.

²³⁵ Hirschmann (1990) *Journal of Modern of African Studies* 6.

stay furthest from town and therefore have to spend more money on transport to come and work for white people; it is the poor people who use uneconomic and inconvenient fuel like paraffin and coal because of the refusal of the white man to install electricity in black areas; it is the poor people who are governed by many ill-defined restrictive laws and therefore have to spend money on fines for "technical" offences; it is the poor people who have no hospitals and are therefore exposed to exorbitant charges by private doctors ... *It does not need to be said that it is the black people who are poor.*²³⁶

Biko in this instance is interested in the class dimensions inherent to racial domination in South Africa rather than the racial dimension of capitalism. This is an important distinction and flows from his refusal of the reduction of race to class and the treatment of race as a mere epiphenomenon of the capitalist structure.²³⁷ In the first place, for Biko, white supremacy (racism) is largely autonomous of the capitalist economic structure so that it generates its own effects and has its own modalities of operation. He writes that:

[I]n South Africa, after generations of exploitation, white people on the whole have come to believe in the inferiority of the black man, so much so that while the race problem started as an offshoot of the economic greed exhibited by white people, it has now become a serious problem on its own. White people now despise black people, not because they need to reinforce their attitude and so justify their position of privilege but simply because they actually believe that black is inferior and bad. This is the basis upon which whites are working in South Africa, and it is what makes South African society racist.²³⁸

Biko is thus adamant that South Africa is first and foremost a colonial-racist social formation, organized by the ideological imperatives of white supremacy, without

²³⁶ Biko *I Write What I Like* 106 – 107.

²³⁷ Fattou *Black Consciousness in South Africa* 42-43.

²³⁸ Biko *I Write What I Like* 97.

downplaying the significance of class and the economic mode of production in producing the subordinate status of Blacks.²³⁹ He continues:

[W]e are forced, therefore, to believe that it is a case of haves against have-nots where whites have been deliberately made haves and blacks have-nots. There is for instance no worker in the classical sense among whites in South Africa, for even the most down-trodden white worker still has a lot to lose if the system is changed. He is protected by several laws against competition at work from the majority. He has a vote and he uses it to return the Nationalist Government to power because he sees them as the only people who, through job reservation laws, are bent on looking after his interests against competition with the "Natives". It should therefore be accepted that an analysis of our situation in terms of one's colour at once takes care of the greatest single determinant for political action – i.e. colour – while also validly describing the blacks as the only real workers in South Africa.²⁴⁰

As Ambalavaner Sivanandan has written of apartheid South Africa, the racist ideology of the white settlers was so deeply etched into the economic make-up of the country that "class is race, [and] race [is] class – and the race struggle is the class struggle".²⁴¹ Sivanandan reiterates this insight in another way, by remarking that in the South African context, "[t]he colour line is the power line is the poverty line".²⁴² On this view, rather than viewing race and class as discrete and conflicting categories, one should see them as interlocked from their very inception such that it makes better sense to speak of a "racial capitalism" or even "white supremacist capitalism". Along these lines, Biko on a few occasions expresses his theoretical

²³⁹ Fatton *Black Consciousness in South Africa* 50. In this regard, the resonance with Fanon is undeniable. Recall in Fanon *Wretched of the Earth* 5: "In the colonies the economic infrastructure is also a superstructure. The cause is effect: You are rich because you are white, you are white because you are rich. *This is why Marxist analysis should always be slightly stretched when it comes to addressing the colonial issue.*" My emphasis.

²⁴⁰ Biko *I Write What I Like* 54.

²⁴¹ A Sivanandan "Race, Class and Caste in South Africa – An Open Letter to No Sizwe" (1981) 22 *Race & Class* 300.

²⁴² Sivanandan (1981) *Race & Class* 300.

hostility to orthodox Marxist reduction of race to class, viewing it as arising out of a failure, by whites in particular, to fully apprehend the force of white supremacy.²⁴³ Indeed, Biko describes the idea that class supersedes race in the South African context as “a twisted logic”.²⁴⁴ For Biko, although the system of capitalism cannot be ignored – more so because of its deeply racialised nature – there are aspects of black subjugation that cannot be reduced to the economic. Race, as Biko puts it, is “a terrible complication on its own”.²⁴⁵ In defending his racial analysis of the South African reality, he remarks:

[I]t is not only capitalism that is involved; it is also the whole gamut of white value systems which has been adopted as standard by South Africa, both whites and blacks so far. And that will need attention, even in a post-revolutionary society. Values relating to all the fields—education, religion, culture and so on. So your problems are not solved completely when you alter the economic pattern, to a socialist pattern. You still don’t become what you ought to be. There’s still a lot of dust to be swept off ... from the kind of slate we got from white society.²⁴⁶

Aside from the fact that even working class whites were generally better paid than their Black counterparts, there is also the fact that irrespective of their class position, whites benefitted from white supremacy in a number of other ways, such as differential political input (the ability to vote and be represented as a citizen in political and legal institutions); somatic normativity (white physical appearance and features are considered the aesthetic norm of humanity); and cultural hegemony

²⁴³ See Biko *I Write What I Like* 99; Gerhart “Interview with Steve Biko” in Mngxitama *et al* (eds) *Biko Lives!* 34.

²⁴⁴ Biko *I Write What I Like* 54. Biko’s aversion to economic determinism is evidenced further in his essay “Some African Cultural Concepts” (*I Write What I Like* 44-51) where he develops a cultural and even moral critique of capitalism as a reflection of the egoistic, exploitative, materialistic and socially alien(ating) values of Western culture.

²⁴⁵ Biko and Lanning “Steve Biko Interviewed by Greg Lanning, 5 June 1971” in Hook (ed) *Steve Biko – Voices of Liberation* 146.

²⁴⁶ Gerhart “Interview with Steve Biko” in Mngxitama *et al* (eds) *Biko Lives!* 34.

(white European culture, knowledges, religions and languages still predominate and determine the basic workings of society).²⁴⁷ In sum, under conditions of racial domination, whites – both wealthy and working-class – benefit psychologically, socially and culturally from racism at the expense of Blacks. These are forms of social power that are unaccounted for in a Marxist framework but which are readily accommodated in a framework that views white supremacy as a socio-political system in its own right as elaborated above.

Read properly, Biko's reconfiguration of the race-class debate takes the form of an exposure of the limitations of an unreconstructed Marxist paradigm to fully apprehend the colonial condition and the autonomous workings of race – limitations which may owe to Marxism's avowedly European origins and therefore its inability to grapple with the "other face of modernity" (namely, colonialism, racism and slavery) as well as to Marx's (and Friedrich Engels') own Eurocentrism and racism.²⁴⁸

Gender

If Biko explicitly develops an account of class within a race-centered theoretical framework, his thinking on gender emerges paradoxically through a curious silence. Biko's analysis of race has the drawback not simply of lacking a gendered lens but of exhibiting an overtly masculine character. Biko's language and political orientation is nakedly masculine – even phallogentric – both literally and symbolically as evidenced in the rallying cry and central mantra of the Black Consciousness Movement: "Black

²⁴⁷ Mills "Materializing Race" in Lee (ed) *Living Alterities* 27.

²⁴⁸ See the essay "European Specters" in C Mills *From Class to Race: Essays in White Marxism and Black Radicalism* (2003) 150 – 154; 158-159. See also C Robinson *Black Marxism: The Making of the Black Radical Tradition* (1983) and T Serequeberhan "Karl Marx and African Emancipatory Thought: A Critique of Marx's Euro-centric Metaphysics" (1990) 10 *Praxis International* 161-181.

man, you are on your own".²⁴⁹ He not only figures the oppressed Black subject in the form of the male gender but he appears to imagine politics – the politics of resistance and oppression – as a masculine activity and endeavour, as something men do to, and with, other men; indeed as a struggle for manhood.

In Biko's writings, manhood appears as a highly prized virtue and quality.²⁵⁰ Not only is the loss of one's sense of *manhood* a constituent part of Black psychological degradation under apartheid but part of the emancipatory brief for Black Consciousness is the recovery and expression of *manhood*: a liberated Black subject is envisaged as one who would, among many other things, assert their *manhood* and refuse its diminution by white racial emasculation.²⁵¹ Biko's quite problematic gender politics resulted from a historically constrained imagination since the privileging of race as the primary social antagonism need not necessarily entail a complete ignorance about patriarchy and the powers of gender – especially those embedded within the workings of racism and capitalism in South Africa and those which affect the identity and experience of Black people.

Pumla Gqola attributes this "largely uninterrogated masculine bias" in Black Consciousness and in all Black emancipatory thought at the time to the paramountcy placed on Black unity and solidarity.²⁵² For Gqola, the accent placed on unity, on avoiding differences within the Black community in order to focus on the common enemy that is white racism, reified blackness along monolithic lines of sameness.²⁵³

²⁴⁹ Biko *I Write What I Like* 100.

²⁵⁰ On the historical and philosophical relation between masculinity and politics, see W Brown *Manhood and Politics: A Feminist Reading in Political Theory* (1988).

²⁵¹ Biko *I Write What I Like* 30, 74, 83, 102.

²⁵² PD Gqola "'... As if This Burden Disguised as Honour Did Not Weigh Heavily on Her Heart': Blackwomen, Struggle Iconography and Nation in South African Literature" (2004) 11 *Alternation* 46.

²⁵³ PD Gqola "Contradictory Locations: Blackwomen and the Discourse of the Black Consciousness

In Gqola's estimation, Black Consciousness advanced a political worldview that was monological and unitary in character: it spoke of a "common enemy"; a singular "black experience" informed by middle class Black masculinity; and invoked an idyllic African past. The result of this in Gqola's analysis was that at least on the question of gender and differences of class, sexuality, age, and geographical location between Black people, Black Consciousness was unable to fully grapple with "social contradictions".²⁵⁴ By suppressing difference in this way, the Black Consciousness Movement inadvertently prioritised and privileged "the Black male experiential situation", centrally that of the university-educated, Black male leaders of the Black Consciousness Movement.²⁵⁵

In Gqola's view, the "Black man" of Black Consciousness discourse came to be seen as a generic and universal signifier for Black society and thereby "worked to occlude patriarchal and other stratifications".²⁵⁶ This masculine language was not merely a matter of semantics but shaped, and was shaped by, the nature of Black Consciousness as a theoretical and political enterprise. Indeed for Gqola, Black Consciousness was "sexist in its discourse and operation".²⁵⁷ It reproduced the male as the norm (active and present) and the woman as Other (passive and silent).²⁵⁸

Historical accounts on gender in the Black Consciousness Movement confirm the generally relegated status of Black women in the Movement itself.²⁵⁹ Not only

Movement (BCM) in South Africa" (2001) 2 *Meridians: Feminism, Race, Transnationalism* 135; Gqola (2004) *Alternation* 46-47.

²⁵⁴ Gqola (2001) *Meridians* 140.

²⁵⁵ Gqola (2004) *Alternation* 47.

²⁵⁶ Gqola (2004) *Alternation* 47.

²⁵⁷ Gqola (2001) *Meridians* 138.

²⁵⁸ Gqola (2001) *Meridians* 142.

²⁵⁹ Gqola (2004) *Alternation* 47; M Ramphela "The Dynamics of Gender Within Black Consciousness Organisations: A Personal View" in Pityana et al (eds) *Bounds of Possibility* 214; MJO Mangena "The

was there a paucity in women leaders of the Movement, the gender politics of the Movement was considered thoroughly conservative: women were politicised mainly through their domestic, sexual and familial relations with male leaders and activists; those women who were in the Movement were expected to be docile and subservient, fitting into stereotypical roles of mother and nurturer. In general, aside from the election of a woman, Winnie Kgwane, as the first president of the Black People's Convention in 1972,²⁶⁰ women were peripheral and ancillary to the male-dominated politics and cultural circles of the Movement – and this would also be reflected in the later memorialisation of the Movement itself which foregrounded male intellectuals and activists. There was thus no serious space for the development of a feminist politics within the Black Consciousness Movement, which in concrete terms meant that Black women's political subjectivity was partly denied, the full texture of their experiences left unpoliticised.²⁶¹

These critiques should be read as a necessary feminist challenge to Black Consciousness to expand its political and intellectual horizon towards incorporating the multiple realities, locations and choreographies of blackness. We might still ask the question of what role categories such as gender, sexuality and class play causally and symbolically under the generalised social death that all Blacks experience under white racist settler-colonial domination. If Gqola articulates an important albeit commonplace feminist criticism of Black Consciousness and black

Black Consciousness Philosophy and the Woman's Question in South Africa" in Mngxitama *et al* (eds) *Biko Lives!* 253; Wilson "Bantu Stephen Biko: A Life" in Pityana *et al* (eds) *Bounds of Possibility* 36; Sono *Reflections on the Origins of Black Consciousness in South Africa* 87-88; 94; DR Magaziner "Pieces of a (Wo)man: Feminism, Gender and Adulthood in Black Consciousness, 1968-1977" (2011) 37 *J of Southern African Studies* 45 – 61.

²⁶⁰ Mangena "The Black Consciousness Philosophy and the Woman's Question in South Africa" in Mngxitama *et al* (eds) *Biko Lives!* 258.

²⁶¹ Gqola (2001) *Meridians* 147.

nationalism in general, the picture she draws encounters considerable disruption and unresolved puzzles if the following complexities were also introduced:

(1) the vulnerability to gratuitous violence, trauma and death of Black males occasioned by their historical *sexualisation* under colonial and slavocratic orders of anti-blackness;²⁶²

(2) the longstanding cultural and social exclusion of colonised and enslaved Black communities (as well as blackness as a social identity) from the traditional markings, arrangements and symbolics of gender and gender difference: patriarchal masculinity (mastery) and femininity (innocence), motherhood, embodiment, recognition, intimacy, personhood, family, the private sphere – insofar as these remain the privileged territory of white people;²⁶³ and

(3) the operation of race and blackness in the modern world and within the Western social system as the central ontological inscription and division that fractures and destabilises all other modes, and epistemes, of difference including gender and feminism.²⁶⁴

For our purposes, it suffices to say that black feminist thought has pointed out the problems of a vision of black liberation concerned with Black men assuming their place in patriarchal authority. Indeed, the vision of revolutionary black liberation properly understood ought to question the assumed universality and givenness of

²⁶² See T Curry "Michael Brown and the Need for a Genre Study of Black Male Death and Dying" (2014) 17 *Theory & Event* <<https://muse.jhu.edu/article/559369/summary>>.

²⁶³ See the chapters "Interstices: A Small Drama of Words" (152 - 175) and "Mama's Baby, Papa's Maybe: An American Grammar Book" (203 - 229) in H Spillers *Black, White and in Color: Essays on American Literature and Culture* (2003).

²⁶⁴ See S Wynter "Beyond Miranda's Meanings: Unsilencing the 'Demonic Ground' of Caliban's Women" in CB Davies and ES Fido (eds) *Out of the Kumbia: Caribbean Women and Literature* (1990) 355 - 372.

gender categories and hierarchies – more so given their colonial and imperial heritage. To briefly take this one step further: If it is the case that the racialising technologies of colonisation and apartheid also played a role in constituting the political economy as well as the libidinal and sexual order of South African society, it would follow that the contemplation of a liberated society through Black Consciousness must already and of necessity also be the contemplation of an anti-capitalist and non-patriarchal social order.

However, to say that race is central in Biko's thought is not license to ignore or compartmentalize gender, sexuality and class among other social identities nor is it to deny the internal collisions within black identity and the differences in the cultural and political imaginaries of Black people. Rather it is to say, following Mills, that in South Africa's historical trajectory, race appears to have been consistently the most primary contradiction and dominant mode of Othering and for Biko, it was the central identity that shaped the public and private lives of people in South Africa; the central pivot of systems of power and violence, and thus the most stable reference point for demarcating "us" and "them".²⁶⁵ Thus his emphasis on black solidarity in the liberation struggle is the outcome of a historical analysis of South African society and not simply the product of his masculinist sensibilities. In this way race in the South African context is both the originating antagonism and the fundamental social division with "the greatest causal significance than others in shaping [society's] overall dynamics".²⁶⁶ This is not to deny the intersection of the social powers of race, class, and gender (as well as sexuality, (dis)ability, age, geographical location and

²⁶⁵ Mills *From Class to Race* 157.

²⁶⁶ Mills *From Class to Race* 163.

religion among others) and the different forms or layers of disadvantage these produce. It is rather to clarify that the recognition of intersecting, or relational, orders of power as well as the equal immorality of all forms of oppression should not be reduced to the ahistorical claim that they are equivalent, analogical or symmetrical in determinant force.²⁶⁷

3.4.2 Identity

Biko understands the concept of identity in terms of the complex interplay between position and identification as formulated most clearly by Drucilla Cornell.²⁶⁸ For Cornell, "position" describes how one is placed within a specific social, legal and symbolic order – that is, it signifies one's location in the multiple hierarchies of race, class, gender, sexuality and so forth. "Identification" on the other hand describes how one sees and represents themselves, how one wishes to be seen and represented, and also how one understands and interprets one's experiences, reality and personal and political history.²⁶⁹ By way of example, Cornell explains, in the context of the United States, that even though she *identifies* as Scots-Irish, and probably also as an anti-racist, anti-imperialist feminist, she is *positioned* as a white Anglo woman and professor and as such, certain benefits accrue to her and certain privileges are afforded to her as a result (such as being able to cross some borders without eliciting suspicion on the part of the immigration officials).²⁷⁰ Cornell explains that whereas identifications are "fluid because we internalize them and ... reinterpret

²⁶⁷ Mills *From Class to Race* 161. For a recent restatement of this position, see C Mills "Intersectional Meditations: A Reply to Kathryn Gines and Shannon Sullivan" (2017) 5 *Critical Philosophy of Race* 47: "Race overrides, swamps, these other identities in a way that gender and class do not override and swamp race. Asymmetry rules."

²⁶⁸ D Cornell *Between Women and Generations: Legacies of Dignity* (2005) 98 – 100.

²⁶⁹ Cornell *Between Women and Generations* 98.

²⁷⁰ Cornell *Between Women and Generations* 98.

their meanings and make them our own”, a [position] “is harder to change because it immediately involves us in the social and symbolic networks that make up our social, cultural and material world”.²⁷¹ She notes that although they are related in the sense that they both form parts of one’s identity, “positions cannot always be dissolved though acts of identification”.²⁷² As she explains further:

To change our positions and the privileges or oppressions that come along with them often demands political, ethical and material transformation beyond what any one of us can do alone. Yet, even by ourselves, we can still take small steps in that direction. We can acknowledge our own identifications since these allow us to assume privileges for ourselves on the basis of race, class, and ethnic position. But the effort to acknowledge our identifications and to change the meaning they have for us does not mean we can simply step out of our position. ²⁷³

As More shows us, Biko’s complex definition of blackness straddles along this distinction as well. Biko defines Blacks “as those who are by law or tradition politically, economically and socially discriminated against as a group in the South African society and identifying themselves as a unit in the struggle towards their aspiration”.²⁷⁴ This definition simultaneously acknowledges blackness as a social, economic and political position within the racial hierarchy generated by apartheid and also calls for Blacks to explicitly identify with the struggle to transform that position, centrally, as we will see through the affirmation of blackness and a collective struggle to overthrow the white supremacist social order. To be clear, When Biko describes blackness and specifically the possession Black skin as the “cause of [black people’s] oppression” and as a stamp “that marks [them] out as a

²⁷¹ Cornell *Between Women and Generations* 98.

²⁷² Cornell *Between Women and Generations* 99.

²⁷³ Cornell *Between Women and Generations* 99.

²⁷⁴ More “Biko: Africana Existential Philosopher” in Mngxitama *et al* (eds) *Biko Lives!* 52.

subservient being”,²⁷⁵ he is invoking the notion of position. When he refers to being black as a “reflection of a mental attitude” and when he posits describing oneself as black as a necessary step “on [the] road towards emancipation”²⁷⁶, he is invoking identification.

Biko repeatedly underscores that life under apartheid produces an objective material reality of subjugation, alienation and exploitation for Blacks that cannot simply be willed away by being positive about your identity or having a healthy racial self-esteem.²⁷⁷ Put differently, for Biko, identification with blackness does not as such alter one’s position but such identification is necessary in recognising that position, acknowledging the social powers, forces and ideologies that constitute it and for mobilising a struggle to overthrow those powers and forces.²⁷⁸ Here is Biko describing the struggle against apartheid from a Black Consciousness perspective:

What blacks are doing is merely respond to a situation in which they find themselves the objects of white racism. We are in the *position* in which we are because of our skin. We are collectively segregated against – what can be more logical than for us to responds as a group.²⁷⁹

This distinction between position and identification is replayed again in Biko’s understanding of whiteness and white privilege which comes to light most strongly in his famed rejection of white liberals or more generally of white involvement in the anti-apartheid struggle and in anti-racist political movements and organisations. Biko

²⁷⁵ More “Biko: Africana Existential Philosopher” in Mngxitama *et al* (eds) *Biko Lives!* 52.

²⁷⁶ More “Biko: Africana Existential Philosopher” in Mngxitama *et al* (eds) *Biko Lives!* 52.

²⁷⁷ More “Biko: Africana Existential Philosopher” in Mngxitama *et al* (eds) *Biko Lives!* 56-57.

²⁷⁸ It is this slippage between black positionality and identification with one’s blackness that allows Biko to also suggest that it is possible as well for Blacks to identify with whiteness. For Biko, Blacks’ identification with or aspiration to whiteness produces what he calls a “non-white” subjectivity, which is different to a black subjectivity. Through the term “non-white”, Biko points out that Black people’s identification with whiteness cannot alter their position; it merely leaves them in a deeper state of anonymity, disorientation and invisibility. See Biko *I Write What I Like* 52-53.

²⁷⁹ Biko *I Write What I Like* 27. My italics.

describes white liberals, with seeming derision, as that “curious bunch of non-conformists [and] do-gooders”.²⁸⁰ Writing in a tone that expresses doubt, Biko further describes them also as white people who deny responsibility for the atrocities committed by the apartheid government, and “claim that they too feel the oppression just as acutely as the blacks and therefore should be jointly involved in the black man’s struggle”.²⁸¹ “In short”, Biko tells us, “these are the people who say that they have black souls wrapped in white skins”.²⁸²

Biko questions firstly to what extent the white people involved in the anti-apartheid struggle are motivated by guilt rather than genuine political and moral concern. He also questions whether it is possible for whites to fully identify with the struggles of Black people without severing all ties with white society or put in more radical terms, without experiencing a symbolic and epistemological catastrophe in white identity itself so as to cease to be socially, experientially and ontologically “white”. Biko argues that their being positioned as white provides them access to the “exclusive pool of white privileges from which [they do] not hesitate to extract whatever suits [them]”.²⁸³ But because of their supposed identification with Blacks, such whites can simultaneously claim opposition to apartheid while moving around in white circles (including spaces legally reserved for “whites-only”) and enjoying white privileges but this time “with a lighter load, feeling that [they are] not like the rest”.²⁸⁴

²⁸⁰ Biko *I Write What I Like* 69.

²⁸¹ Biko *I Write What I Like* 69.

²⁸² Biko *I Write What I Like* 69.

²⁸³ Biko *I Write What I Like* 71.

²⁸⁴ Biko *I Write What I Like* 71.

In saying this, Biko clarified that he is neither mocking whites' political convictions nor suggesting that white liberals are entirely to blame for racial oppression in colonial-apartheid South Africa. Rather he is "illustrating the fundamental fact that total identification with an oppressed group in a system that forces one group to enjoy privilege and live on the sweat of another is impossible".²⁸⁵ In other words, white group position prevents the possibility that any white person can fully identify with Blacks, and thereby escape "the blanket condemnation [of white society] that must come from the black world".²⁸⁶ As he writes:

It is not as if whites are allowed to enjoy privilege only when they declare their solidarity with the ruling [National] party. They are born into privilege and are nourished by and nurtured in the system of ruthless exploitation of black energy.²⁸⁷

In a society based on the subjugation of one race by another, therefore, the tension between identification and position, specifically as it relates to whites identifying with (or as) Blacks, and vice versa is even more pronounced. In such a context, our positions in society are so deeply rooted that we are structurally locked into them. Such positioning in turn subverts any identification we may have with the struggles and values of the opposite race. Here is Biko again:

[No] matter what a white man does, the colour of his skin – his passport to privilege – will always put him miles ahead of the black man. Thus, in the ultimate analysis no white person can escape being part of the oppressor camp.²⁸⁸

²⁸⁵ Biko *I Write What I Like* 71.

²⁸⁶ Biko *I Write What I Like* 71.

²⁸⁷ Biko *I Write What I Like* 71.

²⁸⁸ Biko *I Write What I Like* 24.

Thus for Biko, identity is, strictly speaking, not a choice.²⁸⁹ We cannot simply choose to be who we want to be not only because our identity precedes, and sometimes determines, our agency to choose but also because our position, and thus a property of our identity, produces material effects and certainly more so in societies structured by racial and other hierarchies. That is to say that there are ways in which the world sees and treats us that are so deep (historically and culturally) and so real (politically and socio-economically) that we cannot simply change them through altering our identifications.

These ideas comprehend the fact that a part of ourselves is beyond the control of pure physical will and resides in the sanctuary of those around us; a fundamental part of ourselves and of our dignity depends on the uncontrollable, powerful, external observers who make up society.²⁹⁰

In Biko's writings, we find what could be called a "materialist" or "realist" account of social identity – in contrast to a discursive or idealist account. Most fully elaborated in the work of Linda Martin Alcoff, a materialist or realist conception of identity proceeds from the belief that the social identities of humans have "constitutive power"²⁹¹ and are "epistemically salient and ontologically real".²⁹² This is in contrast to discursive accounts of identity most prominent in postmodernism and cultural studies which view social identities as cultural and linguistic fabrications and therefore objects to be viewed with political and theoretical suspicion.

²⁸⁹ See also WE Connolly *Identity/Difference: Democratic Negotiations of Political Paradox* (1991) 64 and L Alcoff *Visible Identities: Race, Gender and the Self* (2006) 84.

²⁹⁰ P Williams *The Alchemy of Race and Rights* (1991) 73.

²⁹¹ Alcoff *Visible Identities* 5.

²⁹² Alcoff *Visible Identities* 5.

For proponents of this materialist or realist account of identity, our identities have phenomenological and hermeneutical substance and are not merely illusions created through discourse and representation.²⁹³ They function as historically deep markers of our place in the world and our relationship to others. When further entrenched in legal and political structures and in the dominant psychological and cognitive frames of the world, identities become strong predictors for how certain groups are seen and treated and also play a crucial role in determining those groups' life options and expectations. On this account, identity is a marker of status and social location and tends to correlate with one's economic, social, political and cultural positioning.²⁹⁴ Identities link subjects and groups to structures of power and even provide a filter for how we experience and interpret the social world.²⁹⁵ This latter point is significant from the materialist/realist perspective, in that our identities are also seen to have "epistemic implications".²⁹⁶ Where we are located within social hierarchies, both local and global, shapes human consciousness, meaning-making practices and epistemic judgments. Our social identities are also standpoints from which we see, understand, interpret and critique the world in different ways.²⁹⁷

One central source for the materiality of identity inheres through its visibility and embodiment. Being racialised as Black on the (arbitrary) basis of skin colour determines the status one is accorded (in the case of Blacks, it has been a status of sub-personhood, non-humanity, deviance and abnormality). These visible markers on the body then set in motion the makings of our identity and the formation of our

²⁹³ Alcoff *Visible Identities* 121.

²⁹⁴ Alcoff *Visible Identities* 87-88.

²⁹⁵ Alcoff *Visible Identities* 87-88.

²⁹⁶ Alcoff *Visible Identities* 43.

²⁹⁷ Alcoff *Visible Identities* 43.

subjectivity and consciousness – not to mention, the determination of our place within social, economic and political structures and hierarchies. This is so because being racialised as Black or non-white on the basis of how we look and are embodied “profoundly affects how we are seen and interacted with by others”²⁹⁸ and it also “affects our relations in the world, which in turn affects our interior life”.²⁹⁹ It is precisely because of this dimension of visibility and embodiment, our inescapable bodily markers, that identities cannot merely be dismissed as completely illusory or fluid. Even though socially constructed (and therefore partly indeterminate), our being seen in a certain way within the social world produces a matrix of social and political arrangements and hierarchies, which in turn attaches a certain “realness” or “materiality” – perhaps “depth” – to our identities. This is what makes them significant sites of individual and political articulation – not least because they explain our very different relationships to the impact and workings of power structures and ideologies.

Biko’s theorization of whiteness and blackness under apartheid gestures toward a materialist understanding of identity in how he views race as operating through the visible and the visual (skin colour) to generate a social and historical condition (oppression).³⁰⁰ We recall that the central rationale for Black Consciousness was essentially the need, as Biko put it, for Black people to “rally together” and unite “around the cause of their oppression – the blackness of their skin” in order to

²⁹⁸ Alcoff *Visible Identities* 90.

²⁹⁹ Alcoff *Visible Identities* 92.

³⁰⁰ Certainly, mixed-race or “coloured” identities and the phenomenon of passing poses challenges to this schema by presenting cases where phenotypical skin colour does not straightforwardly correlate to racial identity and social positioning.

launch a resistance against white domination.³⁰¹ This is consistent with Biko's view that irrespective of white people's ideological and political commitments, "the colour of [their] skin", which he refers to as "[their] passport to privilege", will not only give them a greater advantage in life over Blacks but will actually prevent them from escaping in Biko's words "being part of the oppressor camp".³⁰² This indicates that for Biko, our identities are "fundamental rather than peripheral to the Self" insofar as they determine the horizon of possibilities and limitations of our social being.³⁰³

As Alcoff explains, a central feature of the materialist/realist conception of identity then is the understanding that there is no authentic, rational or True self that is prior to the construction of social and political identities. Identity and difference are themselves manifest through constitutive historical, social and political events of construction, reification, performance and contestation.³⁰⁴ Thus affirmative invocations of identity politics – of claiming that one's identity is relevant to politics and the political – are not necessarily pathological (as in permanently attached to victimisation) or essentialist (as in claiming inherent, fixed and immutable characteristics) but can be politically and intellectually dynamic and productive.³⁰⁵

More has elsewhere defended the salience of identity politics from a complementary African philosophical standpoint.³⁰⁶ In his view, the insistence on African and black difference registers a rejection of the imperial and universalist discourse of Western humanisms. For More, the valorisation of African and Black

³⁰¹ Biko *I Write What I Like* 53.

³⁰² Biko *I Write What I Like* 24.

³⁰³ Alcoff *Visible Identities* 6.

³⁰⁴ Alcoff *Visible Identities* 111.

³⁰⁵ Alcoff *Visible Identities* 22.

³⁰⁶ M More "What Difference does Difference Make?" (1999) 6 *Alternation* 332-333.

identity, of the particular against the universal, operates as a defence against erasure and self-alienation and is also a way of making one's humanity legible.³⁰⁷ As he argues further, identity politics (or the politics of difference) performs "a critique of existing power relations"³⁰⁸ and forms part of a "project of self-empowerment for marginalised groups. It is a weapon of those whose voices were silenced, whose histories were subsumed under the dominant outlook."³⁰⁹ Following Oyekan Owomoyela,³¹⁰ More also asserts that it is possible to make claims about African and black identity (cultures, languages, relations and ways of life) without suggesting "monolithic uniformity" or "eternal fixity".³¹¹ There are for More, certain fundamental commonalities between Africans (on the continent and in the diaspora), that "constitute Africans as Africans, different from others", and these differences form the basis of African and black radical opposition to assimilation, sameness and invisibilisation.³¹²

As we see in Biko, blackness as an identity is not posited as an innate, ahistorical trait or *a priori* Truth but as the expression of a shared group experience, of a common relationship to social power, certain cultural forms and specific histories of domination and resistance. By claiming blackness as against the category of "non-white", Biko demonstrates that an identity is not completely circumscribed by the dominant powers and imaginaries that constructed it; but can be fashioned on the terms of the oppressed into a tool of political resistance and cultural

³⁰⁷ More (1999) *Alternation* 335.

³⁰⁸ More (1999) *Alternation* 335.

³⁰⁹ More (1999) *Alternation* 335.

³¹⁰ O Owomoyela *The African Difference: Discourse on Africanity and the Relativity of Cultures* (1996) 167.

³¹¹ More (1999) *Alternation* 336.

³¹² More (1999) *Alternation* 335-339.

affirmation. Because the symbolic degradation of blackness as “negative”, “bad”, “dark”, “inferior” and “unwanted” is the primary symbolic and psychic vector of racism,³¹³ there can be no serious revolutionary struggle against the racial ideology of white supremacy without the concomitant cultural, aesthetic, and epistemological affirmation of blackness and Africanity. Such an affirmative identity politics – a revolutionary affirmation of Be-ing – requires that identity be viewed as a “meaningful political category”.³¹⁴ It requires the naming and defining of these identities, excavating them and giving them content even while recognising their socially constructed and contested nature, the heterogeneity and possibility of agency within identity categories, and the risks of fetishising and reductive approaches to “difference”. Put another way, the recognition of the fluidity and complexity of identity must be counterbalanced by grounding them in the context of the historical and structural forces that produce, constrain and condition their expression and actualisation. In Alcoff’s words:

Although meanings are made and remade, the “internal” agency of the individual to judge, to choose, or to act operates within and in relation to a specific horizon, and thus one is open to an indeterminacy but from a specifiable position. Recognizing the openness of identity and historical experience to interpretation must be tempered, however. There remains a certain amount of uniformity of experience within an identity group, though only in regard to a more or less small sector of their experience, for example, that sector involving being treated in the society as a certain identity, or having a common relationship to social power and specific historical events.³¹⁵

From this view, Biko’s black nationalist, Africanist and materialist understanding of identity – also in terms of the distinction between identification and position –

³¹³ Biko *I Write What I Like* 114-115.

³¹⁴ Alcoff *Visible Identities* 43.

³¹⁵ Alcoff *Visible Identities* 43.

merges with the notion of race as socio-historically and politically constructed and of racism as a structural and institutional rather than individual and behavioural phenomenon.

3.4.3 Liberation

Following on racism and identity, the third and final of the categories of existential thought in Biko which More identifies is the concept of liberation. More explains that Biko's vision for black liberation derives partly from Hegelian dialectics and was initially formulated as a critical response to the way in which the white liberal establishment had defined the problems of apartheid and the solutions they offered to those problems.³¹⁶ He refers to the following quote by Biko:

For the liberals, the *thesis* is apartheid, the *antithesis* is non-racialism, but the *synthesis* is very feebly defined. They want to tell the blacks that they see integration as the ideal solution.³¹⁷

More explains that Biko's critique of the liberals is that they confuse the antithetical moment of the dialectical progression with the synthetic moment. Theoretically, More makes the point that to the extent that non-racialism and integration are synonymous with one another, non-racialism cannot be both the antithesis and the synthesis of the dialectical process.³¹⁸ The synthesis is "a product of and therefore must also be a higher expression of the thetical and antithetical moments".³¹⁹ Collapsing the antithesis into the synthesis thus arrests the process of change and reproduces the status quo. Here More reiterates Biko's concern that the non-racial integration envisaged by the liberals would amount to assimilation in which white

³¹⁶ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 57.

³¹⁷ Biko *I Write What I Like* 99.

³¹⁸ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 57.

³¹⁹ More "Biko: Africana Existential Philosopher" in Mngxitama *et al* (eds) *Biko Lives!* 57.

culture, norms and values would be imposed on Blacks. For Biko, the liberal valorisation of non-racial integration is “artificial” in that it is not a genuine solution to the crisis of colonial-apartheid, and thus cannot amount to freedom. It also conflates the actual with the ideal by prematurely disavowing racial solidarity and race consciousness even within a relentlessly racist social arrangement. Biko warns that the integrated society suggested by the liberals would be one which would perpetuate “... the in-built complexes of superiority and inferiority ... even in the ‘non-racial’ setup of the integrated complex”.³²⁰ That is to say that, for Biko, integration does not abolish the conditions of psychological damage done to Blacks and the hierarchical power relations in which whites exercise power over and enjoy privilege at the expense of Blacks. As Biko writes of liberal integration:

It had to be artificial because it was being foisted on two parties whose entire upbringing had been to support the lie that one race was superior and the others inferior. *One has to overhaul the whole system in South Africa before hoping to get black and white walking hand in hand...*³²¹

In fact for Biko such integration is simply a ruse by which Blacks will be absorbed into the already established norms, culture, practices, and way of life in white South Africa. For More, this form of integration or assimilation is central to the liberal worldview.³²² As he tells us, following Sartre, “[t]he liberal is as a matter of fact an assimilationist, who wants blacks to be full members of humanity only if they renounce their blackness”.³²³ For the liberal therefore, black liberation, or liberation from a racist society, would mean the phenomenological disappearance of the Black

³²⁰ Biko *I Write What I Like* 21.

³²¹ Biko *I Write What I Like* 70.

³²² On the connection between integration and liberal humanism, see IM Young *Justice and the Politics of Difference* chapter 6.

³²³ More “Biko: Africana Existential Philosopher” in Mngxitama *et al* (eds) *Biko Lives!* 58.

race; it would mean the negation of racial difference; it would imply that access to full humanity for Blacks is conditional upon the denial of their blackness and their assumption of a universal humanity, which Biko reminds us, is actually whiteness parading as the neutral and universal way of being human. The central liberal tropes of integration, namely colour-blindness, tolerance and multiculturalism need to be critically viewed from this angle.

The deficiencies of integration as a mode of post-conflict national reconstruction and social reharmonisation are well-documented in political theory.³²⁴ These deficiencies relate principally to the distinctly unemancipatory character of integration, its inherent predisposition towards the resubordination of the oppressed and marginalised group. Many of these deficiencies take on particular acuteness in the context of a settler-colonial situation such as in South Africa.

Firstly, integration occurs on already existing terms on the basis of which the excluded group is integrated (that is, added) into an untransformed polity. This is Biko's major problem with integration mentioned above: its tendency to leave the racist social structure relatively undisturbed. From this perspective, integration confers legitimacy upon the political and legal order created by the White Colonial Settler. Rather than refusing the world of the coloniser, integration admits the colonised Black majority into its fold.

Secondly, integration is a process imbricated with unequal power; it depends on the stability of the dominant group and its power to admit a marginalised or powerless group into the polity. In this regard, Biko worries that it is the colonised,

³²⁴ See generally IM Young *Inclusion and Democracy* (2000); D Allman "The Sociology of Social Inclusion" (2013) *SAGE Open* 1-16.

oppressed Black majority that is the candidate for integration. Integration as a solution to colonial-apartheid is logically untenable in the South African instance as it is Blacks who are both indigenous to South Africa and constitute a demographic majority. To follow the path of integration would be to entrench the problem of Blacks being made “foreigners in the country of their birth”,³²⁵ having to seek recognition from, and inclusion in, a cruel, racist society.

Third, and linked to the above two points, integration fails to abolish or dissolve the line between the Human and the non-Human that is erected by colonial racism and maintains inequalities and stratifications created by colonisation. Put another way, integration perpetuates the denigration and social death of Blacks – their non-being –, moving them “from one way of life to another, but not from one life to another”.³²⁶

In Biko’s view, the problems of integration outlined above are a symptom of the misdiagnosis of the nature of the fundamental contradiction in South Africa. In contrast to the liberals, Biko argues that in terms of the philosophy of Black Consciousness, the *thesis* is white racism or white supremacy (with apartheid as being only one form of its institutional manifestation and socio-political implementation) and the *anti-thesis* must be a strong black consciousness-based grass-roots solidarity and mobilisation among Blacks who are the common targets of this system.³²⁷ Out of the thesis and the anti-thesis emerges the synthesis which he names “a true humanity” where a politics based on unequal power relations will

³²⁵ South African Students’ Organisation “SASO Policy Manifesto” (1971) reproduced in Badat *Black Man, You are On Your Own* 125 – 126.

³²⁶ F Fanon *Black Skin, White Masks* 171.

³²⁷ Biko *I Write What I Like* 99 .

have no place.³²⁸ In other words, Biko's "non-racial egalitarianism"³²⁹ *presupposes* the complete dismantling of white supremacy and coloniality.

I pause here to note that Biko's reliance on Hegelian dialectics can be read as a problematic rehearsal of a largely Western temporal paradigm that expresses historical change as the function of a universal, uniform and linear teleology.³³⁰ Another reading however explains the centrality and fecundity of dialectics in Biko's theory of liberation: For Biko, liberation is inherently "revolutionary" because it is achieved through a confrontation and overcoming of historical contradictions and oppressive powers – *and not by means of a compromise with them*. To phrase this in the language of dialectics, Biko understood that in order to approach the Universal (non-racialism), one must pass through and inhabit the Particular (black consciousness). It would be a failure of dialectics, and therefore of revolutionary historical movement, to simply assert universality as a fact when one did not arrive there through a rupture and conflict between black consciousness and white racism.³³¹ To the extent that the end-point of the dialectic, namely, the synthetic moment that gives rise to a "true humanity", presupposes a *resolution* of domination and injustice, the creation of a substantively new social arrangement, it contrasts sharply with non-dialectical modes of emancipation based on the accommodation of competing social forces or integration into an unreconstructed polity.

³²⁸ Biko *I Write What I Like* 99.

³²⁹ Biko *I Write What I Like* 170.

³³⁰ Compare MJ Lamola "Biko, Hegel and the End of Black Consciousness: A Historico-Philosophical Discourse on South African Racism" (2016) 42 *J of Southern African Studies* 183-194 and JNJ Kritzinger "Liberating Whiteness: Engaging with the Anti-racist Dialectics of Steve Biko" (2008) Unpublished Conference Paper <<http://uir.unisa.ac.za/bitstream/handle/10500/4326/Kritzinger.pdf>> (accessed 1 May 2017).

³³¹ G Ciccariello-Maher "'So Much the Worse for the Whites': Dialectics of the Haitian Revolution" (2014) 22 *J of French and Francophone Philosophy* 35.

Indeed, it can be argued that Biko's deployment of the dialectic gestures toward a view of liberation as an absolute negation of the values and ways of life of the old colonial order; a break with conquest. On this score, Biko echoes strongly Fanon's theory of decolonisation.³³² Fanon wrote that:

The oppressed peoples know today that national liberation is a part of the process of historic development but they also know that this liberation must be the work of the oppressed people. It is the colonial peoples who must liberate themselves from colonialist domination. True liberation is not ... pseudo-independence ... with an economy dominated by the colonial pact. *Liberation is the total destruction of the colonial system ...*³³³

Fanon treats liberation and decolonisation as simultaneous and correlational. For Fanon, decolonisation is a revolutionary ethical and political project *of the colonised* to bring about a change in "the order of the world".³³⁴ It is both a destructive and creative act in that it seeks to destroy the Manichean structure of colonial society in which the world is divided, perhaps even violently torn, into two: the world of the coloniser (the zone of Being) and the world of the colonised (the zone of non-Being). Aside from the restoration of the nation (land and sovereignty) to the colonised people,³³⁵ decolonisation for Fanon also "fundamentally alters being" and results in "the creation of new men".³³⁶ The very process of liberation itself is crucial to Fanon because it is in the liberation struggle that the colonised self-actualises as a free people, which in turn also abolishes the psycho-social dynamics of inferiority, despair and envy created by colonialism. As Fanon writes: "the 'thing' which has been

³³² See P Ahluwalia and A Zegeye "Frantz Fanon and Steve Biko: Towards Liberation" (2001) 7 *Social Identities* 455 – 469 and TK Ranuga "Frantz Fanon and Black Consciousness in Azania (South Africa)" (1986) 47 *Phylon* 182-191.

³³³ F Fanon (trans. H Chevalier) *Toward the African Revolution. Political Essays* ([1964] 1967) 105.

³³⁴ Fanon *Wretched of the Earth* 2.

³³⁵ Fanon *Wretched of the Earth* 1, 9.

³³⁶ Fanon *Wretched of the Earth* 2.

colonized becomes man during the same process by which it frees itself."³³⁷

Even in Biko's thought we see the inseparability of liberation and decolonisation. Having exposed non-racial integration and liberal humanist inclusion as counter to decolonisation, Biko sets out to explain his conception of a liberated and decolonised South Africa. Repeatedly utilising the metaphor of the "table", Biko makes clear that decolonisation is neither a mere inversion in power relations nor a simple "turning of tables".³³⁸ It also does not amount to acceding to white power and seeking a "place at the white man's table".³³⁹ Instead he writes:

We knew he had no right to be there; we wanted to remove him from our table, strip the table of all trappings put on it by him, decorate it in true African style, settle down and then ask him to join us on our own terms if he liked.³⁴⁰

Thus both the extreme opposites of vengeful expulsion of the settler population and acquiescent submission to the extant colonial order are ruled out in Biko's liberatory vision. Biko instead envisions the reclamation of sovereignty by the indigenous conquered peoples and the reconstitution of a *pluralistic* society on *African* terms. European South Africans, having relinquished title to territory, disavowed European supremacy and renounced white privilege, can *only at this point* be incorporated into a decolonised, non-racial Azania on condition that they accept democratic African political rule. It is necessary to quote Biko at length:

If by integration you understand a breakthrough into white society by blacks, an assimilation and acceptance into an already established set of norms and code of behaviour set up and maintained by whites, then YES I am against it. ... I am against

³³⁷ Fanon *Wretched of the Earth* 2. As Robert Birt ("Existence, Identity and Liberation" in L Gordon (ed) *Existence in Black: An Anthology of Black Existential Philosophy* (1997) 205) writes: "every struggle for human liberation is invariably a struggle for a liberated identity".

³³⁸ Biko *I Write What I Like* 108.

³³⁹ Biko *I Write What I Like* 23.

³⁴⁰ Biko *I Write What I Like* 75.

the fact that a settler minority should impose a system of values on an indigenous people. If on the other hand by integration you mean there shall be free participation by all members of a society, catering for the full expression of self in a freely changing society as determined by the will of the people, then I am with you. For one cannot escape that the culture shared by the majority group in any given society must ultimately determine the broad direction taken by the joint culture of that society. *This need not cramp the style of those who feel differently but on the whole, a country in Africa in which the majority of people are African must inevitably exhibit African values and be truly African in style.*³⁴¹

Thus Biko's "pluralist integration" as More calls it is a decolonised and African-centred one that recognises and privileges African culture and the democratic will of the African majority. It is also one in which African experiences, knowledges and paradigms predominate and determine the organisation of society and its national culture. The ethical valence of Biko's vision of decolonisation is not only its promise of a world unburdened by the oppressive social reality of white supremacy, but also its desire to transform the subject positions of Blacks and whites, to abolish colonial identities and relations of power:

So, as a prelude, whites must be made to realise that they are *only* human, not superior. Same with blacks. They must be made to realise that they are *also* human, not inferior. For all of us this means that South Africa is not European, but African.³⁴²

It is worth recalling the classic Black Consciousness dual formulation of liberation in terms of the "psychological" and the "physical".³⁴³ Freedom from psychological oppression entails "emancipation from mental slavery" and from an inferiority

³⁴¹ Biko *I Write What I Like* 26. My emphasis.

³⁴² Biko and Zylstra "Steve Biko Interviewed by Bernard Zylstra, July 1977" in Hook (ed) *Steve Biko – Voices of Liberation* 90. This is a particularly important formulation and links to the earlier discussion on whether Blacks – and in particular Black Consciousness as a theory and politics – is or can be racist. For Biko, the claim to racial superiority (upon which whiteness is predicated) is itself a defective ontological position because it is a departure from humanness. The struggle of Black Consciousness is for the restoration of the *oneness* of humanity and not the reversal of colonial-apartheid racial hierarchies.

³⁴³ Halisi "Biko and Black Consciousness: An Interpretation" in Pityana et al (eds) *Bounds of Possibility* 109.

complex. It extends also to epistemological and cultural liberation. On the other hand, "physical" liberation from the material oppression suffered by Blacks in a racist society includes freedom from economic deprivation, social death, political disenfranchisement and legally-sanctioned discrimination. It is only once Blacks are liberated in this manner, that a truly non-racial post-colonial nation can come into being. That is to say that for Biko, liberation must entail both respect for plurality and difference as well as the restoration of material and symbolic parity between whites and Blacks such that those categories cease to be of any meaning or value. But such parity must occur on the basis of the recognition of South Africa as a black-majority, African country.

In an interview with Greg Lanning, the above analysis bears out pithily in Biko's own words – combining his theorisation of non-racialism as an end and not a means, his critique of Eurocentrism as a form of racial domination, his rejection of reform in favour of radical and fundamental overhaul, his defence of African culture as a basis for the refounding and reorganisation of South African society, his coupling of blackness and indigeneity and his pre-figurative notion of liberation as a re-orientation towards an African self:

I think what we want is a nonracial society. That is non-racial *within the context of the country and peoples where we are*. First of all, I think if you go to any particular country anywhere in the world - in Germany you become a citizen within the German makeup. In Australia you become Australian within the Australian make-up. But strangely enough in this country, you know, you find that there is an extension of Europe into Africa, where indigenous people are expected to live according to values and attitudes as determined back home in Europe. Now if one is fighting for integration, then one would have to accept [that it] would be integration into the European system which we have at the moment. By rejecting white values and opting

for a revival of a black, a real black approach, what you are really doing is to offset a wrong which has been in operation for a long time. It does not mean simply because whites have been living in this country that you cannot give this country back to itself. We believe that we have to reject their economic system, their political system, and values that govern human relationships, in order to establish the kind of society that we as indigenous people want here. And that kind of society is not exclusively for us. It is for everybody who is here - but it has trappings which (*sic*) are obviously indigenous. To get to that stage we have to be properly orientated to being ourselves, into a proper force to know what the alternative is about, to live it within ourselves.³⁴⁴

Thus in the final analysis, Biko's articulation of the Black Consciousness conception of liberation involves both the affirmation of the self and the adoption of an emancipated consciousness as well as the radical transformation and decolonisation of the social structure and the organising value systems upon which that structure is built. This latter dimension is significant: the object of liberation for Biko is not protection *from* power through the institutional safeguards of liberal democracy (rights, rule of law, courts) nor is it an appeal *to* power through forms of accommodation and inclusion for racial and sexual minorities (affirmative action, welfare). Rather liberation in Biko's sense entails the claiming and sharing of power, the radical reunion of "*demos*" (people) and "*kratia*" (rule).³⁴⁵ Let us listen to Biko:

The interrelationship between the consciousness of the self and the emancipatory programme is of paramount importance. Blacks no longer seek to reform the system because doing so implies acceptance of the major points around which the system revolves. Blacks are out to completely transform the system and to make it what they wish ... Liberation therefore is of paramount importance in the concept of Black

³⁴⁴ Biko and Lanning "Steve Biko Interviewed by Greg Lanning, 5 June 1971" in Hook (ed) *Steve Biko – Voices of Liberation* 147 – 148.

³⁴⁵ On the conception of radical democracy as sharing in power, see generally Wendy Brown's *States of Injury* and her "Sovereign Hesitations" in P Cheah and S Guerlac (eds) *Derrida and the Time of the Political* (2009) 114-132.

Consciousness, for we cannot be conscious of ourselves and yet remain in bondage. We want to attain the envisioned self which a free self.³⁴⁶

3.5 Locating Biko: reclaiming the “rebel” tradition

The above exposition of the content of Biko’s thought gives us a better understanding of the overall political orientation of Black Consciousness and in particular of Biko’s location in the ideological tension within African liberation and Black political thought between those who would seek civil rights, inclusion and the full benefits of democratic citizenship in the white-dominated polity and those who would insist on more radical changes in the social order so as to fundamentally alter the polity itself. We might refer to this tension, or schism, as the classic and enduring debate in black political thought. George Fredrickson expresses this as the differing goals of “equitable incorporation into a common society with whites” (non-racialism, accomodationism or integration) versus “the creation of a self-determining black nation” (Africanism or black nationalism).³⁴⁷

This debate or tension within black thought is of decisive significance because it also determines what means of struggle to employ (regarding for example, collaboration with whites, reliance on State and legal institutions and appeal to foreign nations); what tactics to engage in (violence or civil disobedience) as well as the nature and structure of the social and economic order and mode of law that will result from the freedom struggle. Undoubtedly, the very existence of this tension underscores that there is nothing at all self-evident or inevitable about the dominant social vision that informs the present legal, political and social arrangement in South Africa. There are in fact other competing visions and worldviews that could have

³⁴⁶ Biko *I Write What I Like* 53.

³⁴⁷ Fredrickson *Black Liberation* 12.

shaped, and still can shape, the transition to a "new South Africa" differently.

In her study of oppositional black politics in South Africans, Gail Gerhart has described this tension as that between the "rebels" on the one hand and the "realists" on the other.³⁴⁸

The realists are the inheritors of the missionary-educated elite natives and those Africans who (were) converted to Christianity and Western culture, who fully embraced European modernity and collaborated in different ways with colonial administrations and missionaries. The realists opposed only the *excesses* of colonial-apartheid rather than its basic structure and racist foundations. Indeed, the realists not only did not challenge their colonial subjugation but also had assented to their colonial status, petitioning only for the extension of the full scheme of rights and privileges enunciated in the colonial legal and political system. In their view, the struggle was one for humanistic reform of South African society through gradual and progressive change. They not only valued moral suasion of, and collaboration with, whites and white institutions as the most realistic strategy of change, but framed their struggle as one of simultaneity and sameness with whiteness: Blacks, in the realists' imagination, were *or had the potential to be*, the moral equals of whites who therefore deserved the same rights and opportunities available in white society.

As such, the realists tended to view progress in terms of acculturation to white norms, values and ways of life. Grounded in a Christian-liberal humanism, the realists generally ruled out violent or revolutionary change, believing racism to be a blight on otherwise fair, noble and universal Western values of enlightenment and civilization. The realists, in other words, were politically moderate and pragmatic,

³⁴⁸ Gerhart *Black Power in South Africa* 39 – 44; Fatton *Black Consciousness in South Africa* 3-8; CRD Halisi *Black Political Thought in the Making of South African Democracy* (1999) 4 – 8; 110 - 131.

rejecting any talk of revolution or African nationalism as “extremist”, “anti-white”, “narrow-minded” and regarding “radicalism” as prejudicial to the small gains made in building towards the democratisation of South Africa. The fears and anxieties of whites exerted a powerful restraining influence on the realists and impelled them to articulate their politics in ways that were consistent with white interests and sensibilities. The realists, then, accept fully the colonial *telos* and episteme, viewing submission or negotiation as the only workable paths for change. The African National Congress, from its inception in 1912 but certainly after its adoption of the Freedom Charter in 1955, is the most recognized proponent of this position in the South African context.

On the opposite end of the black ideological spectrum are the rebels. Inheritors of the legacy of African chiefs and warriors who consistently waged wars of resistance in rebellion against colonial rule, refusing economic subjection and cultural assimilation, the rebels sought national liberation and self-determination. In seeking to overthrow white political, cultural and economic hegemony and to dismantle the settler-created world, the rebels generally rejected collaboration with whites and white political institutions. The rebels focused on the conscientisation and mobilisation of African masses to reclaim their humanity through struggle. In their view, only Africans had the ability *and responsibility* to liberate themselves from cultural inferiority, material deprivation and social humiliation. They thus eschewed European paradigms of understanding the South African situation and actively privileged African and Black perspectives and voices.

The rebels actively struggled for decolonisation and national liberation, and derided integration and assimilation as principles grounded in the acceptance of

white supremacy. Rather than the realists who desperately struggled to belong to and in South Africa, the rebels believed that South Africa belongs to its indigenous African population. As such, they called for the dissolution of "South Africa" and the creation of "Azania". Accordingly, the rebels exhibited a political temperament that could resist the white gaze. Anton Lembede's ANC Youth League, the Pan Africanist Congress and the Black Consciousness Movement would fall into this particular category.

It is worth reinforcing the argument that Biko's thought places him firmly in the rebel tradition. For Biko, "the totality of white power"; the "absolute evil" of the South African society lies not only in the juridical form of *apartheid* but in colonial conquest which spans a much wider historical time-span and also evokes a much deeper historical injury. That is to say that European colonial domination – not merely racial discrimination and segregation – constitutes for Biko the fundamental injustice facing Blacks. This why Biko identifies 1652 – the recorded date of the arrival of the Dutch settler colonists – as setting in motion an onslaught of unprecedented violence against indigenous peoples – from massive land dispossession, enslavement and forced labour to impairment of legal and political status as well as cultural erasure and social dehumanisation.³⁴⁹ In this sense, Biko is not only a Black radical in general terms but also an Africanist in his understanding of the racial struggle in South Africa as also a national struggle that is connected to the land question.³⁵⁰

In his writings, Biko speaks of white "Anglo-Boer" culture as having "all the

³⁴⁹ Biko *I Write What I Like* 44.

³⁵⁰ Halisi *Black Political Thought* 128; Fredrickson *Black Liberation* 300 – 301; More "The Intellectual Foundations of the Black Consciousness Movement" in Vale et al (eds) *Intellectual Traditions* 191.

trappings of a colonialist culture” that stands in contrast to indigenous African values³⁵¹ and refers, in the same vein, to the white population in South Africa as “foreigners”³⁵² which suggests again that he understands “South Africa” as a settler-colonial formation that is inherently and not merely contingently founded on racist principles. Properly conceived then, what Biko names the “Black-white relationship” in South Africa describes an antagonism between the conquered and the conqueror, colonised and coloniser, native and settler. This by implication distances Biko even further from the political ideology of the African National Congress and its principal text, the Freedom Charter, which famously anointed Blacks and whites as the “People of South Africa” and declared *automatically* that South Africa belongs to “all who live in it, black and white”. The Freedom Charter, which substantially prefigured the present constitution (indeed one might say it was the first “post-apartheid constitution”) effectively repudiated the principles of African nationalism and converted the national struggle into a struggle for civil rights, for equality *within* white South Africa – for democratisation and not decolonisation.³⁵³

Part of the purpose of the philosophical reading of Biko put forward in this chapter is also to defend the rebel tradition in black thought as a critical and timely articulation of alternative notions of humanity, politics, freedom, knowledge and justice. The ascendancy of liberalism and human rights as the new religions of the world, and the negotiated settlement of the early 1990s resulted in the triumph of the realist tradition in South Africa. No doubt because it posited what Biko called a “comfortable politics” that did not fundamentally threaten the modern world

³⁵¹ Biko *I Write What I Like* 45; 105.

³⁵² Biko *I Write What I Like* 29.

³⁵³ Fredrickson *Black Liberation* 282; Gerhart *Black Power in South Africa* 157 – 159; 178.

order,³⁵⁴ it is well-documented that it was the political ideology of the realists, in the form of the Mandela-led ANC, that gained international prominence and ultimately determined the path of the transition to the “new South Africa”.³⁵⁵ It is the realist (hi)story as well that represents the dominant mythology of “post”-apartheid South African history, politics and law. Recalling the rebel tradition thus challenges the most deeply held conceits of the prevailing order and promises to disclose an alternative political imaginary for thinking and unthinking that order. For my purposes in this study, the rebel tradition is also the one that opens up generative intellectual and political vistas for an alternative approach to jurisprudence, one that would unsettle law, legality and liberal forms of politics and justice.

Another way to stress this antinomy between the realists and rebels might be to identify a much deeper distinguishing political ideological temperament in these divergent strains of black thought. The realist tradition appears to value life for its own sake and purports to preserve life and ward off death and chaos through accommodating and enduring colonial oppression. The unreasoned valuation of a life

³⁵⁴ Gerhart “Interview with Steve Biko” in Mngxitama *et al* (eds) *Biko Lives!* 29: “There is in South Africa an over-riding idea to move towards “comfortable” politics, between leaders. And they hold discussions among themselves about this. *Comfortable politics in the sense that we must move at a pace that doesn't rock the boat.* In other words people are shaped by the system even in their consideration of approaches against the system ... [S]haped in the sense of working out an approach that won't lead them into any confrontation with the system. So they tend to accommodate the system, to censure themselves, in a much stronger way than the system would probably censure them.” My emphasis

³⁵⁵ The historical evolution of the ANC's intellectual and political position is complex to be sure. Throughout its organizational life, the ANC has always featured a complex negotiation between radical Africanist and communist elements and more liberal, non-racial, social-democratic elements within the same movement. Its overall ideological development thus has to be understood in terms of its many contradictory influences (Christianity, missionary education, communism and anti-colonialism) as well as its responses to fluctuating historical conditions and the demands of political strategy and tactics. Despite this complexity however, the liberal non-racialist strand of the ANC and its more accommodationist and intergrationist posture seems to have remained its most consistent and definitive political identity, evidenced by the regular conflicts, departures and expulsion of the more radical voices within it. For a more developed elaboration of this point, see P Walshe *The Rise of African Nationalism in South Africa* (1970).

in servitude as better than death – which I take to be the source of the realists' surrender to white domination – results in consent to live under oppressive, inhumane and negative conditions without resistance. This is an attachment not only to unlivable life but an attachment to the present, the *status quo*, that betokens radical despair or fatalism about future emancipatory possibilities. This willingness to exist under the closed and unjust strictures of the present (which define what is real and possible at this moment) tends to produce a false image of freedom and democracy even under subjection. The realists, in seeking settlement and compromise, perform a closure not only of a tragic chapter in history but also of the *future* itself.

The rebel tradition on the other hand understands unfreedom itself to be a form of death or dying – social and spiritual death to be precise. Recall Biko's phenomenological account of the relationship between freedom, self-awareness, life and death in his famous interview, "On Death":

You are either alive and proud or you are dead, and when you are dead, you can't care anyway. And your method of death can itself be a politicizing thing. ... So if you can overcome the personal fear for death, which is a highly irrational thing, you know, then you're on the way.³⁵⁶

Where the realists are impelled by prudence and rationality to work within the terms of the dominant order to achieve their aims, the rebels critique given and conventional frameworks and refuse to adhere to the logics and values imposed by the colonial order. For the rebels, the present is itself an ideological configuration, aligned to dominant powers, that delimits the horizon of possibility. The legacy of the rebels therefore is of an insistence on the impossible and the incalculable, an

³⁵⁶ Biko *I Write What I Like* 173.

unflinching refusal to concede to injustice. Here is Biko again:

[W]hat we want is a total accommodation of our interests in the total country, not in some portion of it. So we don't have a side programme, we don't have any alternative. We believe ultimately in the righteousness of our strength, that we are going to get to the eventual accommodation of our interests within the country.³⁵⁷

As an ethics and a politics, the rebel tradition evinces a refusal to abandon the struggle for *complete* emancipation. The rejection by the rebels of liberal solutions and "easy victories" then is a reminder of the canonical principle of anti-colonial resistance most recognisably associated with the abolitionist Frederick Douglass that "freedom is something that can only be taken, not given".³⁵⁸ In Biko's own words:

We must learn to accept that no group, however benevolent, can ever hand power to the vanquished on a plate. We must accept that the limits of tyrants are prescribed by the endurance of those whom they oppress. As long as we go to Whitey begging cap in hand for our own emancipation, we are giving him further sanction to continue with his racist and oppressive system. We must realise that our situation is not a mistake on the part of whites but a deliberate act, and that no amount moral lecturing will persuade the white man to 'correct' the situation. The system concedes nothing without demand...³⁵⁹

3.6 Conclusion

Although she was writing about the black existentialist novelist Ralph Ellison, Hortense Spillers could easily have also been referring to Biko when she invokes the figure of a Black thinker who revises "blackness" into a critical posture" – "a *strategy* [and] *process* of culture critique" – and harnesses it to "a symbolic program of

³⁵⁷ Biko *I Write What I Like* 152.

³⁵⁸ L Gordon "Foreword" in S Biko *I Write What I Like* (2002) xi cited in More (2011) *Philosophia Africana* 75.

³⁵⁹ Biko *I Write What I Like* 100. See also F Douglass "West India Emancipation" [1857] in F Douglass (PS Foner, ed) *Frederick Douglass: Selected Speeches and Writings* (1999) 367.

philosophical 'disobedience'" understood as "systematic scepticism and refusal".³⁶⁰ The treatment of blackness as a site for the emergence of disruptive "critico-theoretical practices" – a place from which knowledge can also begin – recasts Black Consciousness into a form of philosophical critique in its own right. This rendering of Biko and Black Consciousness in philosophical terms overturns a set of distortions and commodifications that would reduce him to empty catchphrases and quotations, exploit his image on T-shirts, falsely associate him with "post"-apartheid rainbowism, and consign him to a deserted past.

Biko's search for a liberated future that could turn the tide of racial history begins as a philosophical contestation over the historical interpretation of South Africa's social reality. Where the dominant analytical and political technologies of the time operated from the premise of juridical and economic apartheid as the central problem, Biko from a long view of history identified white supremacy itself as the much deeper problem.³⁶¹ In so doing, he recenters the contradictions of race, conquest and white power as key terms in the theoretical lexicon of South African politics. From this interpretive divergence, Biko develops Black Consciousness as a theory and politics of black liberation composed principally of three acts: (1) Black people's social awareness of the foundational anti-blackness of the modern world; (2) a psychological recognition and situating of oneself as proudly Black and (3) the

³⁶⁰ H Spillers "Peter's Pans": Eating in the Diaspora" in *Black, White and in Color: Essays on American Literature and Culture* (2003) 5.

³⁶¹ In Biko and Lanning "Steve Biko Interviewed by Greg Lanning, 5 June 1971" in Hook (ed) *Steve Biko – Voices of Liberation* 140, Biko responds as follows: "My attitude to the South African set-up is that I think for a long time we have been involved in attempts at constructing some response to the provocation along very wrong lines. [The assumption has been] ... that you had apartheid as your problem and that in order to oppose this from a strong position you had to get very strong non-racialism. ...Now I believe that essentially the real assessment and real analysis should be that we have in fact a totality of white power in this country, definite white racism. And what we need in fact is a strong black response to this white racism..."

re-symbolisation of blackness as a building-block towards the annulment of the anti-black world and the creation of new social reality, a "true humanity" informed by the history, experience and worldview of African peoples.

The politicisation of the black condition under colonial-apartheid required Blacks to construct their own universe of experience tied to their own culture and history. This recentering of the black experience constitutes part of the struggle by the oppressed to reclaim their humanity and political subjectivity – to be people who can speak, think and act for and by themselves. Crucially, this process of disalienation mandated the complete repudiation of white influence and involvement of any kind in Black political struggles. Far from its popular depiction as anti-white racial exclusivism, this process has the two-fold implication of eliminating the scorching power of the white gaze and tasking of progressive whites with the political responsibility to educate and proselytise their own families and communities into anti-racism and democracy. Biko's attentiveness to the interior life of the Black subject served as a bridge connecting the need for cultural, psychological and intellectual transformation of Black communities to the fashioning of a revolutionary politics of national liberation. South Africa, Biko suggests, will not return to itself and to the African people to whom it belongs, if the concept of reality, knowledge and reason imposed by the white settler-colonialist was not dislodged from epistemic legitimacy and authority.

At the same time as it attends to the psycho-social reorientation of the Black subject, Black Consciousness supplies us with an alternative theory of the South African situation derived from the ontological situation of being-black-in-the-world.

We followed and deepened the topology of Black Consciousness as an “Africana existentialist” social theory by examining its formulation through the categories racism, identity and liberation.

In Biko’s analysis, the source of racism is traced back to the colonial conquest of South Africa which introduced a Manichean political ontology meant to secure the material and symbolic interests of whites and to radically expel Blacks from the very definition of humanity. Through land dispossession, labour exploitation, unequal spatial distribution, economic deprivation, state violence, cultural decimation and psycho-social conditioning, a now almost four-centuries long system of white supremacy was created and reified in South Africa. This “totality of white power” then entrenches itself into both the physical world (as social structure) and in the psychic world (as ideology and consciousness) and then splits the world into two – the white world of the colonial settler and the black world of the indigenous Africans.

So historically deep are the markers of race that none can escape or will away the effects of its positionings and the identifications it engenders. In white supremacist South Africa, race as a social identity comes to carry inordinate weight – materially locating us within relations of power as well as shaping how we perceive and understand the world. Blackness and whiteness on this view are not only products of discourse, ideology and representation but also more significantly the outcome of constitutive historical processes. This makes identity a “real” phenomenon of the social world and thus a site of struggle and contestation. In Black Consciousness, the rejection of the worldview of the oppressor necessitated the epistemological, cultural and aesthetic affirmation of African and black identity.

This puts an end to the negation of blackness which drives it into disappearance through assimilation and mimesis of whites and instead claims Africanity as a source of difference and resistance.

The nexus between Biko's understanding of race and identity revolves around what he deems as the fundamental lack of mutuality that white racism produces between Blacks and whites. The introduction by Europeans of a racial metaphysics based on domination and stratification has, according to Biko, produced such a profound fissure in the moral and political landscape as to threaten the very possibility of a more just and ethical future:

The whites in this country have placed themselves on a path of no return. So blatantly exploitative in terms of the mind and body is the practice of white racism that one wonders if the interests of blacks and whites in this country have not become so mutually exclusive as to exclude the possibility of there being "room for all of us at the rendezvous of victory". The white man's quest for power has led him to destroy with utter ruthlessness whatever has stood in his way.³⁶²

Biko's central protest against settler-colonialism and white racism was after all that it forces Blacks to live in a world that is not of their making, a world designed by their conquerors, and hence a world opposed to their very existence. That world – "South Africa" – must therefore come to an end in order to open the horizon towards a liberatory future. What Biko designates as a two-pronged physical and psychological liberation is a movement to effectively annul relations of conquest and undo the psychological, cultural and social effects of colonial-apartheid. This is a political aspiration not to be post-apartheid or even post-colonial but to be *post-conquest*.

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³⁶² Biko *I Write What I Like* 66.

The aim of the fairly lengthy exercise undertaken in this chapter is to present Biko's theory of Black Consciousness in a systematic theoretical frame that would counter its popular (and reductive) image as either a sentimental and inward-looking therapeutic of blackness or a punishing resentment against white domination. Black Consciousness represents an intellectually and politically coherent, rigorous and well-grounded analysis of the South African social context that combines political economy, social psychology and cultural studies in understanding issues of identity, power, and freedom.

The above reading of Biko's theorization of Black Consciousness has also revealed his philosophical character to be one that is counter-discursive; resistant to hegemonic narratives; and always in conversation with the larger political universe of black radicalism and Pan-Africanism around the world. Not only does he perform a constructive and intellectually creative synthesis of disparate theories and materials, he also grounds them deftly in the political, social and historical scene of South Africa and brings them into resonance with the existential predicament of Black people. This further suggests a heightened epistemic sensitivity in two ways: First, Biko's writings evince a continual revolt against political and intellectual orthodoxies (apartheid; liberalism; Congress doctrines of multiracial integration, non-racialism and Charterism; Marxist class theory; Christian theology) and secondly, he refuses to treat unmodified Western critical theories (Marxism, psychoanalysis, Sartrean existentialism) as universally applicable. The robustness of his vision shows Biko to be a thinker of the otherwise, who gestures towards the (im)possibility of another world and another way of being. This radical and dissenting intellectualism, the philosophical spirit of talking back, that permeates Biko's life and writings is

suggestive for a critical jurisprudence (to be further explored in Chapters 4 and 5) that would map out and enact an alternative political orientation to hegemonic knowledges.

4

"Who's Afraid of Critical Race Theory?"¹: Blackness, Revolt and the African Diaspora

In the Diaspora, as in bad dreams, you are constantly overwhelmed by the persistence of the spectre of captivity. The door of dreams.²

4.1 Introduction: bridging and breaching divides

The purpose of this chapter is to set the groundwork for linking the philosophy of Black Consciousness as expounded upon in the previous chapter to the canon of critical race theory (CRT) and to simultaneously radicalise CRT by locating it within the much wider archive of the Black Radical Tradition. The effort being attempted here is to restore and reanimate the black radical political underpinnings of CRT to its theoretical project of legal, social, political and cultural critique. This chapter thus serves as a bridge between the previous chapter and the next one, and aims to span the much wider spatial and symbolic divide between Black and Africanist thought developed on the African continent itself and that developed in the rest of the black world, or diaspora. It poses an extended meditation on the problem of whether the experiences and horizons of Blacks in Africa, and Blacks in the diaspora (especially the United States and the Caribbean) are so incommensurable as to foreclose political and intellectual crossing between different traditions of Black Thought. Put more concretely, this entails an exploration of an oft-noted but rarely theorised

¹ D Bell "Who's Afraid of Critical Race Theory" (1995) *University of Illinois LR* 893 – 910.

² D Brand *A Map to the Door of No Return: Notes on Belonging* (2001) 29.

contention that is raised when speaking of critical race theory and Black Consciousness in the same breath, namely that critical race theory is a largely American import that is, for reasons of history, incompatible with the South African situation that is the object of Black Consciousness. On this argument, critical race theory, its methods, assumptions and overall procedures of analysis and writing are a product of the American historical experience of race relations and its emancipatory horizons are a function of the limitations of that experience.

The prolific social scientist Archie Mafeje may be the most vocal Africanist proponent of the “incommensurability thesis” as discussed above. In his view, there is a fundamental disjunction between the social realities of continental Africans and diasporic Africans so significant as to vitiate the assumption of a “common African identity”.³ In Mafeje’s estimation, “[c]ulturally, socially, and historically the African Americans ... have long ceased to be Africans.”⁴ They are, according to Mafeje, “first Americans and second anything else they choose...”⁵ As evidence, Mafeje cites two instances in which African scholars “on home ground” interrogated and critiqued Black American scholars for what the former deemed to be inaccurate, exoticising, and imperial misappropriations of African culture and knowledge on the part of the latter. Olufemi Taiwo’s critique of Henry Louis Gates Jr. and Kwesi Prah’s critique of Anthony Appiah are taken by Mafeje to signal a “rupture between black American notions of Africa and those of indigenous Africans”.⁶

³ A Mafeje “Africanity: A Combative Ontology” in R Devisch and FB Nyamnjoh (eds) *The Postcolonial Turn: Reimagining Anthropology and Africa* (2011) 39

⁴ Mafeje “Africanity: A Combative Ontology” in Devisch and Nyamnjoh (eds) *The Postcolonial Turn* 37.

⁵ Mafeje “Africanity: A Combative Ontology” in Devisch and Nyamnjoh (eds) *The Postcolonial Turn* 37.

⁶ Mafeje “Africanity: A Combative Ontology” in Devisch and Nyamnjoh (eds) *The Postcolonial Turn* 37.

Extending this analysis, Mafeje recalls further examples of Black American arrogance towards Africa, stating plainly his discovery that continental Africans he had encountered “complained that black Americans behaved like whites”.⁷ Accordingly, Mafeje concludes that there can be no shared epistemic project between Africans and African Americans. Mafeje is characteristically uncompromising in cordoning off American Blacks from the larger project of “Africanity” and although his claims may have instinctive appeal, they are problematic for a number of reasons – not the least of which is that they are made without sufficient evidence and lack any rigorous engagement with contending historical and theoretical materials. Indeed, Mafeje states these claims as incontrovertible truth and appears to be unaware of the unintended implication of according to Europeans born on the African continent a status of indigeneity or African-ness greater than that of African-descended peoples in other parts of the world. Although I will later dispute Mafeje’s account insofar as it concerns the political, historical and intellectual relationship between Black South Africans and African Americans, there is great value in heeding his warning that drawing *unmodified* transcontinental analogies in social analysis may be misleading.⁸

One might even overlook Mafeje’s overstated distinction between continental Africans and diasporic Africans in favour of an appreciation of the methodological and epistemological orientation that underlies it. Mafeje has throughout his work been vocal in his insistence on “endogeneity”, which denotes the centering of local

⁷ Mafeje “Africanity: A Combative Ontology” in Devisch and Nyamnjoh (eds) *The Postcolonial Turn* 38.

⁸ A Mafeje “The Agrarian Question, Access to Land, and Peasant Responses in Sub-Saharan Africa” in UNSRID *Civil Society and Social Movements Programme* Paper No 6. (2003) 17 (Although in this instance, Mafeje was referring to comparisons between Russia (Eurasia) and Africa).

African ontological experiences and African conditions in the work of theory-building. For Mafeje, Africans should resist the “discursive alterity” imposed by Western and foreign conceptions of Africa and African realities by developing an “authentic interlocution” or “grounded theory”⁹ of our own situation rather than subjecting local histories and contexts to what Mafeje scholar Jimi Adesina calls “the tyranny of received paradigms”.¹⁰ Mafeje’s privileging of ideographic inquiry (which emphasises the local and the particular) over “nomothetic inquiry” (which aspires to universality and generality)¹¹ as well as his scholarly counsel that Africans “should learn from their own experiences”¹² and study local social phenomena *on their own terms* takes concrete form in Nkiru Nzegwu’s opposition to analyses of colonial racism that “sweep out Africa using mother Europe’s broom”.¹³

In her essay, Nzegwu warns against importing into Africa theorizations and conceptions of race developed in the United States. For her, the differences in experiences of European racism in Africa and the United States produce different “ontological and epistemological framework[s] of racialization”.¹⁴ Therefore, reducing the African encounter with race and racial domination to the American historical experience and grammar of race constitutes a violation of the “African conceptual scheme” and elides important contrasts between “the socio-cultural realities of the

⁹ B Nyoka “Mafeje and ‘Authentic Interlocutors’: An Appraisal of his Epistemology” (2012) 16 *African Sociological Review* 6.

¹⁰ J Adesina “Archie Mafeje and the Pursuit of Endogeny: Against Alterity and Extraversion” (2008) 33 *Africa Development* 134. See also D Nabudere *Archie Mafeje: Scholar, Activist, Thinker* (2011) 7-13; 14- 18; 51 – 56; 94 – 99.

¹¹ A Mafeje “On the Articulation of Modes of Production” (1981) 8 *J of Southern African Studies* 123 – 138.

¹² A Mafeje “African Socio-cultural Formations in the 21st Century” (1995) 7 *African Development Review* 154.

¹³ N Nzegwu “Colonial Racism: Sweeping out Africa with Mother Europe’s Broom” in S Babbit and S Campbell (eds) *Racism and Philosophy* (1999) 124 – 156.

¹⁴ Nzegwu “Colonial Racism: Sweeping out Africa with Mother Europe’s Broom” in Babbit and Campbell (eds) *Racism and Philosophy* 126.

two geographical locations [namely, Africa and the New World]”.¹⁵ Although she speaks of Africa as a monolith, Nzegwu makes plain that she means to draw a distinction between the racial experience in West Africa and that in the New World (The Americas, including the Caribbean).¹⁶ And for her the primary distinction lies in the modes of racism and racialisation, that obtained in the two contexts: whereas racism in the United States was organised around the pathologisation of blackness and the Black body (“body-racism”), racism in West Africa – where there did not reside a significant white settler population – targeted the culture, language, facial markings and modes of dress of Africans as a basis for racial dehumanization and oppression (“culture-racism”).¹⁷ Notably, Nzegwu *concedes* that *the South African case does not conform to this West African variant of racism and is probably closer to the structure and ideology of American racism*.¹⁸ Indeed, white racism in South Africa combines both “body-racism” and “culture-racism”. In this respect, Nzegwu differs from Mafeje in that she regards the black experience of racism in South Africa and the United States to bear important resonances worth studying. Her acknowledgement that different variants, modalities and ideological expressions of racism may exist in the same continental space (such as in the case of West Africa and South Africa) does raise questions concerning the durability and solidity of the transcontinental divide she draws between the socio-political experiences of

¹⁵ Nzegwu “Colonial Racism: Sweeping out Africa with Mother Europe’s Broom” in Babbit and Campbell (eds) *Racism and Philosophy* 131-132.

¹⁶ Nzegwu “Colonial Racism: Sweeping out Africa with Mother Europe’s Broom” in Babbit and Campbell (eds) *Racism and Philosophy* 135.

¹⁷ Nzegwu “Colonial Racism: Sweeping out Africa with Mother Europe’s Broom” in Babbit and Campbell (eds) *Racism and Philosophy* 130 – 131.

¹⁸ Nzegwu “Colonial Racism: Sweeping out Africa with Mother Europe’s Broom” in Babbit and Campbell (eds) *Racism and Philosophy* 128;132.

continental Africans and diasporic Africans since it clearly does not exhaust differences in the context and operation of racial politics and ideologies.

It is more the methodological notes that Nzegwu offers that are instructive. Nzegwu argues that in order to produce “textured socio-historical understanding” of colonial racism, the concepts and vocabulary we employ to describe it must possess a degree of “empirical and historical specificity as well as geographical accuracy”.¹⁹ There is thus a clear danger that aspects of the South African social reality of blackness, race and white supremacy may get lost if one works from the entirely *unreconstructed* theoretical frames from other times and places.

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Finding our way out of this particular problem requires reflexive engagement. Attentiveness to historical and social context, grounding one’s thinking in local realities and perspectives, is a crucial scholarly imperative. Although it is the hallmark of scholarly endeavour for concepts to travel to and from different times and spaces in order to illuminate new and different contexts, and to enrich and complexify contemporary debates, the transplant of any theories, concepts and paradigms must be historically sensitive and responsive to the particular context and character of their new site of application.

Because of the historical marginalisation of knowledge produced by Africans in South Africa’s still highly Eurocentric and northbound academy, these worries about the importation of critical race theory as developed in the United States cannot be merely dismissed as epistemically parochial, nativist and isolationist. To my mind,

¹⁹ Nzegwu “Colonial Racism: Sweeping out Africa with Mother Europe’s Broom” in Babbit and Campbell (eds) *Racism and Philosophy* 126.

there is a very real sense in which the continual flight to Black (and quite recently, Latin) America may generate theoretical blindness to African and in particular Black South African intellectual traditions, or more problematically may produce a distorted analysis of South African histories and social realities by imposing ready-made, foreign conceptual frames and vocabularies. The project of recentering Black Consciousness in critical race theoretical analysis and critique emanates from these worries. Rather than jettisoning CRT as a political project within the academy, the present challenge to be grappled with is how to “retool” critical race theory for the South African context, to “change the letters” of critical race theory as Hortense Spillers would put it.²⁰

The singular view of CRT as an American import is itself too reductive and simplistic. Although critical race theory as an analytic (and as with all knowledge) emerges from a particular context, it is not entirely reducible to its context as it mostly develops general, bendable and contextually permeable concepts and frames of analysis that can travel to other contexts. What might be harder to transpose however may be the reconstructive dimension of the theory, the type of emancipation envisaged as a remedy for the political injustices of racism and attendant forms of political action chosen since these are more immediately circumscribed by their context. To the extent that “critical race theory” is an umbrella term for multiple critical approaches that at minimum figure race as the central socio-political construct in the making and functioning of the modern world, it

²⁰ HJ Spillers “Changing the Letter: The Yokes, the Jokes of Discourse, or, Mrs. Row, Mr. Reed” in *Black, White and in Color: Essays on American Literature and Culture* (2003) 176. For one attempt from the perspective of the philosophy of existentialism to link critical race theory and Black Consciousness in South African academic scholarship, see R Maart “When Black Consciousness Walks Arm-in-Arm with Critical Race Theory to Meet Racism and White Consciousness in the Humanities” (2014) 21 *Alternation* 54-82.

anticipates and makes room for such important differences at the level of geographical location, disciplinary context, and philosophical traditions among others.²¹ Ultimately, I expect to contest this “fear” of critical race theory – which derives from the claim of rupture and incommensurability between the continent the diaspora – through an appeal to a much deeper historical archaeology of the Black Radical Tradition. This archaeology suggests deep symbolic, political and ideological ties between African peoples emanating from their shared historical and cultural origins and critical encounters with western civilisation in the modern world. It will turn out that a global system of white supremacy and a concomitant political ontology of race orders the modern world in ways that sustain diasporic ties between Blacks in South Africa and in the United States – ties not easily erased even in the face of sociological and empirical variations between the two contexts.

Following this, the second half of the Chapter proceeds on the basis that the African genealogy of the Black Radical Tradition underwrites the conceptual unity and historical affinity between Black Consciousness and CRT. I shall first draw out the main themes and tenets of CRT, with specific emphasis on how it aids us in examining the relationship between race, law, power and society in the South African context. The persistence of a white colonial power structure, the centrality of racism in the social and symbolic landscape of South Africa as well as the paucity of critical accounts of race grounded in Black intellectual traditions and historical experiences has left dominant conservative liberal accounts and official histories uninterrogated. CRT enters this void and introduces a number of generative disruptions and reframings to the public, social and intellectual imagination of South

²¹ C Mills “Critical Race Theory – A Reply to Mike Cole” (2009) 9 *Ethnicities* 270 – 271.

Africa. To further ground the insights of CRT to the South African context, I shall thereafter draw on Biko's own formulations of race and liberation in South Africa to reflect on some of the more limited and limiting features of CRT and to suggest points of theoretical reconstruction and refiguring. Central among these is the shift from CRT's constructive and pragmatic attachment to the Enlightenment values of modern law to an Africanist critical theory untied from the strictures of legalism.

4.2 Cutting the border, crossing the Atlantic: notes on the "Ties That Bind"

In a sequel to his comparative study of the development, structure and ideology of white supremacy in American and South African history,²² the historian George Fredrickson registers an important shift in his position from that previous study to the subsequent one on a comparative history of black resistance movements in both countries.²³ In the earlier study, Fredrickson placed the analytic accent on variations and differences between the regimes of racial domination in South Africa and the United States. His discoveries on the nature of racial attitudes and policies in the two countries, Fredrickson noted at the time, led him "away from common cultural influences and toward differing environmental circumstances and political contingencies".²⁴ The three major variations that he highlighted as setting the racial histories of the two societies widely apart include:

²² G Fredrickson *White Supremacy: A Comparative Study in American and South African History* (1981).

²³ G Fredrickson *Black Liberation: A Comparative History of Black Ideologies in the United States and South Africa* (1995).

²⁴ Fredrickson *White Supremacy* xvii.

(a) Demography.²⁵ Blacks in South Africa constituted then and still constitute an overwhelming indigenous majority while African Americans are a relatively small numerical and social minority in the United States. Blacks in the United States are descendants of enslaved Africans who were forcibly removed from mostly Central and West Africa. Whereas ethnic and linguistic diversity was not a problem for African Americans stripped from their roots, Blacks in South Africa were further subdivided into ethnic, linguistic and cultural groups which impacted their national consciousness, their sense of political blackness and racial unity. In addition, the composition of each society's population groups naturally resulted in layered modes of racial classification and categorisation which generated differently complicated meanings and constructions of race.

(b) Physical and geographical environment and their impact on economic development.²⁶ Unlike North America, the physical make-up of South Africa did not initially provide white settlers with as much opportunity to accumulate and exploit natural resources. Not only is South Africa just about a sixth of the size of the United States, it is also a largely arid or semi-arid country. White South Africa, and its economic, military and social dominance, thus developed much slower during the first two centuries of settlement whereas the system of white supremacy in the United States was emerging as the most developed given its reliance on a large slave economy. It was only after the Mineral Revolution and the installation of a system of cheap black labour in the late 1800s in South Africa that whites began to definitively consolidate power. These environmental differences affected the rates of

²⁵ Fredrickson *White Supremacy* xxi.

²⁶ Fredrickson *White Supremacy* xxii.

economic and industrial development – and hence the racial state formation – in both countries.

(c) The modes of government and politics that structured each country.²⁷

Both settler-colonies or racial states were initially under the sovereign control of a European metropole. This considerably impacted the degree to which “natives” in South Africa and “slaves” in the United States could be controlled, and thus the legal mechanisms that were put in place. The internal conflicts between whites (such as the American Revolution and Civil War and the Great Trek and the Anglo-Boer Wars) also impacted the role and status of Blacks in both countries. In other words, the forms of white nationalism that emerged in these countries determined the modes of Statecraft and the attendant legal architecture of citizenship, civil rights and political power.

These demographic, environmental and structural differences are crucial to the historical dynamics that unfold in the process of racialisation and impact not only how the regimes of white domination are structured and develop over time but also shapes the emergent forms of black opposition to those regimes. Owing to what he viewed as “*fundamental differences*” in the two situations, Fredrickson concluded by insisting on a radical incongruence, on the impossibility of a shared or at least comparative model for analysis and emancipation between the two countries.²⁸

It was only in his study of black resistance against white supremacy, that is, it was only when he entered the imagination of black opposition to white domination, that Fredrickson noted “remarkable similarities” that cast doubt on his earlier

²⁷ Fredrickson *White Supremacy* xxiii.

²⁸ Fredrickson *White Supremacy* xxv.

conclusions concerning a deep transatlantic gulf between the racial histories of the United States and South Africa respectively.²⁹ In his own words, Fredrickson confesses to being “forced to retreat” from his earlier position.³⁰ While not claiming that the situations in both societies are identical, Fredrickson notes an important set of commonalities between the two contexts which suggest important ideological and political parallels. We might describe the shift in Fredrickson’s conclusion as also a shift in historical perspective. Because he is now reading the racial histories of both countries from the perspective of the oppressed, he is able to see more clearly an underlying logic of racial terror, ontological degradation and epistemicide that lies beneath the more obvious geographical differences. Although he lists them as four, Fredrickson in the updated study identifies five sources of “ideological parrallelism” and “discursive congruence” between the racial experiences in South Africa and the United States:

(a) *Similar modalities and rationalisations of white supremacy.*³¹ In both countries, Black people were constructed as intellectually and morally inferior, lacking in the critical faculty of reason/rationality and thus pre-destined to live under white rule and to serve white people and their interests. Because rationality in particular was a predicate for humanity proper, this construction of Blacks as inferior performed their expulsion from Humanity itself. Closely related to this was the fact that the white conquerors of both South Africa and the Americas in differing waves and numbers originated from the same or close parts of Europe (especially the British, the Dutch, Germans, the French, the Portugese, and the Spanish). This

²⁹ Fredrickson *Black Liberation* 5.

³⁰ Fredrickson *Black Liberation* 6.

³¹ Fredrickson *Black Liberation* 5.

meant that they operated on the basis of a similar cultural code of a Christian-infused vision of European capitalism and ethnocentrism. Blacks in both societies thus encountered whites with quite similar beliefs, values, social mores, civilisational reflexes, ideological orientations, behaviours and sensibilities.³² In sum, the regimes of white supremacy that were fabricated and installed in both societies emanated from a uniform European racial consciousness and thus contained identical logics.

(b) A shared sense of minority status.³³ Irrespective of their numerical majority status, Black South Africans were treated and experienced life as social, cultural and political minorities, non-citizens, powerless and marginalised in a manner not entirely different from African Americans. It is on the premise that power in and over society overrides the numerical composition of racial groups that the black condition in both countries becomes indistinguishable. In both contexts, Blacks experienced their status as one of non-belonging, non-being and wretchedness.

(c) A Pan-African or black internationalist frame of reference.³⁴ Because of Africa's place as the original site of the antagonism between Western and African civilisation which is the basis of the conflictual black-white race relations in both countries, the struggles against white supremacy by Black South Africans and Black Americans proceeded, and were conceived in terms of, a much larger "global" struggle of Africans and African people against the efforts of Europeans to enslave, colonise and subjugate them.

³² Fredrickson *White Supremacy* xviii.

³³ Fredrickson *Black Liberation* 6.

³⁴ Fredrickson *Black Liberation* 5-6.

(d) The fact of interracial co-existence.³⁵ Both countries are notable for very pronounced divisions and social stratifications between their Black and white populations, with all other racial groups falling somewhere in between on a continuum that determines their relative status.³⁶ Importantly, the fact that whites and Blacks lived together (or perhaps “together-apart”) in the same local and national space and would probably do so for the foreseeable future resulted in very similar modes of racial-social ordering (anti-miscegenation laws, black labour exploitation, valorisation of whiteness and legalised segregation) – owing to a heightened conflict over resources, entitlements and interests – and produced similar modes of resistance and disobedience to those social orders. The imagined future liberation postulated by Blacks in both countries had to also factor in the white segment of the population which raised difficulties on coalition and collaboration as well as complications for what freedom from white supremacy, and in some ways, from white people as a group, entails.

(e) The comparable social and cultural position within Black communities of the intellectual and political leaders of liberation movements and organisations.³⁷ In both cases, especially after the 19th century, these struggles were led and articulated by literate, educated, middle-class or “elite” Blacks. Their absorption of aspects of European and Euro-American cultures, life-styles and

³⁵ Fredrickson *Black Liberation* 5.

³⁶ The one complication in the American situation may be that European settlement and the installation of white supremacy there was made possible through the genocide and mass extermination of the native Indian-American nations, whereas in South Africa, land dispossession and labor exploitation were the primary modes of consolidating white settlement. Thus, unlike in the South African situation, Blacks in the United States must reconcile their political demand for historical justice and reparations with the politics of settler-decolonisation and indigenous sovereignty mobilised by Native Americans. For a discussion of this, compare J Sexton “The *Vel* of Slavery: Tracking the Figure of the Unsovereign” (2014) *Critical Sociology* 5 and I Day “Being or Nothingness: Indigeneity, Antirackness and Settler Colonial Critique” (2015) 1 *Critical Ethnic Studies* 102-121.

³⁷ Fredrickson *Black Liberation* 7.

languages (such as French and English) shaped the type of thought and action formed but also posed problems for negotiating and building solidarities with working-class and illiterate Black communities. In South Africa, the language barrier was even more significant in a country where most Blacks are not first-language English speakers and thus unfamiliar with the central cluster of radical political keywords that make up the pantheon of black political thought. Ideological and cultural tensions also emerged between the leaders (elites) and followers (masses) of these movements.

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Because of these fundamental parallels, the thought and politics that developed from Black communities and intellectuals in the racial politics of the United States and South Africa came to revolve around similar themes, and made border-crossing between those traditions possible. This was more so given that Black South Africans and African Americans had mutual awareness of each other's struggles and accordingly influenced each other through political, intellectual and artistic interactions and exchanges.³⁸ A shared historical consciousness and existential reality of "being-black-in-the-world"³⁹ generated deep resonances and linkages between Blacks in South Africa and in the United States to such a degree as to vitiate any argument of total incommensurability and incongruence between Black America and Black South Africa. Both the Black Consciousness Movement and CRT emanate from this consciousness and reality.

³⁸ Fredrickson *Black Liberation* 6; 9.

³⁹ NC Manganyi *Being-Black in the World* (1973).

Bernard Magubane phrases this deep but no less complicated connection between the life-worlds and struggles of African Americans and Black South Africans as the “*ties that bind*”.⁴⁰ In a book with the same name, Magubane proposes to examine the “African consciousness” that underlies the struggles and politics of American Blacks. His central thesis is that the social rejection and non-belonging that Black Americans experience as a result of their alienation from the Western and largely Judaeo-Christian culture of the United States as well as their violent and forced dislocation from the African continent prompts in them a “search for roots” that leads to a symbolic (re)connection to Africa.⁴¹ The subjugation and suffering they have had to (and still) endure is attached to the blackness that bears the trace of their African origins and so reanimated an “ethnic and spiritual consciousness of Africa”⁴² and activated a deep-rooted solidarity with the struggles of Africans against European colonisation and racial oppression.⁴³ As Magubane writes:

The denial of social equality placed the American black in the same status position as his putative brother in colonized Africa.⁴⁴

The “hegemonic dominance of the white world over the non-white world” thus placed the realities and experiences of Blacks in the United States and on the African continent on the same political and ideological plane.⁴⁵ Charles Mills terms this fact of “European domination over the planet” as “global white supremacy” which he defines as *the* socio-political system that orders the modern world as a whole.⁴⁶ It

⁴⁰ B Magubane *The Ties that Bind: Afro-American Consciousness of Africa* (1987).

⁴¹ Magubane *Ties that Bind* 1-3.

⁴² Magubane *Ties that Bind* 3.

⁴³ Magubane *Ties that Bind* 4.

⁴⁴ Magubane *Ties that Bind* 4.

⁴⁵ Magubane *Ties that Bind* 5-7.

⁴⁶ C Mills *Blackness Visible: Essays on Philosophy and Race* (1998) 98-99; *The Racial Contract* (1997) 3; 20 – 30; “Race and Global Justice” in B Buckinx, J Treyo-Mathys and T Waligore (eds) *Domination*

has its historical basis in European conquest and expansionism – expropriation, genocide, slavery, colonialism and settlement – which thereby “[brought] race into existence as a global social reality”, with the most significant stratification being that between white and Black (or more broadly “non-white”), light and dark. Magubane and Mills here are not unique in their view that European modernity ushered in a worldwide racial system as their arguments are an echo of W.E.B Du Bois’ historically modest prediction that “the problem of the twentieth century is the problem of the color-line, – the relation between the darker to lighter races of men in Asia, and Africa, in America and the islands of the sea”⁴⁷ (modest because all indications are that this problem has persisted into the twenty-first century). This also dovetails with Frantz Fanon’s insight that “what parcels out this world is to begin with the fact of belonging to or not belonging to a given race, a given species”.⁴⁸

Within this global racial hierarchy, those marked as white generally acquire a civil, moral and juridical standing that elevates them above the Other racial groups such that wherever there is a *Manichean* divide or racial hierarchy, whites are at the top of the social pyramid and those racialised as Black or as not-white at the bottom. Under global white supremacy, this pattern of hierarchy and domination reproduces

and Global Justice: Conceptual, Historical and Institutional Perspectives (2015) 181 - 205. To be clear, Mills is not arguing that race is the foundational political category from which others emerge; only that it is central to global history and to the political structure of the modern world. His theory of global white supremacy is not intended to be exhaustive of the political universe either. Rather, its aim is to supplement – not replace – other theoretical paradigms and political categories. He means to use the term as a way of registering and making visible the usually ignored but massively significant “racial dimension” of the global political order.

⁴⁷ W.E.B Du Bois *The Souls of Black Folk* ([1903] 2005) 17 -18.

⁴⁸ F Fanon (trans. C Farrington) *The Wretched of the Earth* (1963) 39.

itself globally, taking different forms and evolving across time and space.⁴⁹ Blacks in South Africa and the United States therefore have had to confront different (national) iterations of the same (larger and global) structure and ideology of white domination which has its roots in European racism.⁵⁰ From this reading, the thematic of *global* white supremacy implies more than that the struggles Blacks in different parts of the world face against racism are the same or similar, but that they are “transnational and interconnected”.⁵¹

Consequently, the forms of Black struggle that emerged in both the United States and on the African continent (especially South Africa) imagined, theorised and understood these struggles as historically and symbolically (if not symbiotically) linked such that the emancipation of Blacks in the United States was joined to the liberation of Africans on the continent and other Third World peoples who were subjects of colonialism and imperialism.⁵² Insofar as African peoples were arrayed against this system of global white supremacy and viewed it as having introduced a deep trauma in their identity *as Africans*, a certain desire for restoration of, and to, Africa, if not physically but spiritually and culturally, was at the heart of the internationalist emphasis in Black nationalist movements.⁵³ On this score, Magubane makes repeated reference to Malcolm X – a canonical figure in Black radical political thought and one among the primary intellectual influences of Biko and Black

⁴⁹ Mills *Blackness Visible* xiv; 101.

⁵⁰ M More “Biko and Douglass: Existential Conception of Death and Freedom” (2015) 17 *Philosophia Africana* 106: “Plantation slavery and Apartheid are the same form of racial violence”.

⁵¹ T Fleming “Binding the Ties Together: A Reflection on Bernard Magubane and the Transnational Nature of South African Studies” (2015) *Safundi: The Journal on South African and American Studies* (2015) 236.

⁵² Magubane *Ties that Bind* 10.

⁵³ Magubane *Ties that Bind* 10.

Consciousness.⁵⁴ Malcolm X argued that racism was not “an American problem, but a world problem”⁵⁵ and that “the black revolution [is] international in nature”.⁵⁶ Malcolm X cited the rise of African nationalism on the continent in the 1960s as a major impetus and inspiration for the emergence of US Black Nationalism. As he intimated, the gaining of independence by African states in the 1960s “affected the [political] mood of Black people in the Western Hemisphere”⁵⁷ and inspired Blacks in the Americas and the Caribbean to take a stand against the political oppression, economic exploitation and social degradation they experienced “at the hands of the white man”.⁵⁸ The spirit of African revolution did not remain on the African continent, as according to Malcolm X,

it slipped into the Western Hemisphere and got into the heart and the mind and the soul of the Black man in the Western Hemisphere *who supposedly had been separate from the African continent for almost 400 years*.⁵⁹

And true to Magubane’s analysis, Malcolm X theorises the disconnection of Blacks in the diaspora from their African roots as a crucial source of their subjugation and psychological suffering,⁶⁰ hence his oft-stated injunction that American Blacks should realise that “being born here in America doesn't make [them] an American”⁶¹ and that they are instead Africans: “Africans who are in America. *Nothing but Africans*”.⁶²

The decolonisation of Africa and the liberation of Blacks in the New World were

⁵⁴ Magubane *Ties that Bind* 238. Another notable influence of Biko who would shift from Black Power to Pan-Africanism, or from nationalism to internationalism, is Stokely Carmichael (Kwame Ture) in *Stokely Speaks: From Black Power to Pan-Africanism* ([1971] 2007).

⁵⁵ Malcolm X (B Perry, ed) *Malcolm X: The Last Speeches* (1989) 151-181.

⁵⁶ Malcolm X (IB Karim, ed) *The End of White World Supremacy: Four Speeches* (2011) 138.

⁵⁷ Malcolm X *The Last Speeches* 168.

⁵⁸ Malcolm X (G Breitman, ed) *Malcolm X Speaks: Selected Speeches and Statements* (1965) 34.

⁵⁹ Malcolm X *The Last Speeches* 168. My emphasis. See also Biko *I Write What I Like* 75.

⁶⁰ Malcolm X *Malcolm X Speaks* 168.

⁶¹ Malcolm X *Malcolm X Speaks* 26.

⁶² Malcolm X *Malcolm X Speaks* 36.

therefore bound together into a singular emancipatory impulse that Malcolm X himself named “the end of white-world supremacy”.⁶³

A reading of Magubane’s text suggests that he regards his analysis of the “ties that bind” as especially true of the relationship between Black South Africans and African Americans.⁶⁴ He reads both as carrying the special markings of having bore the brunt of 17th century European expansionism in which comparable systems of “total subjugation” were imposed by means of conquest in the South African case and enslavement in the United States. In this regard, Magubane is in the company of not only Fredrickson discussed above but also John Cell who also selects the racial regimes of South Africa and the United States for having reached “the highest stage of white supremacy”.⁶⁵ A spectacular array of colonisation and enslavement, super-exploitation of labour, cultural decimation through Christianity and Western (mis)education, economic deprivation, social invisibilisation, psychological warfare through among other things notorious racial slurs (“nigger” and “kaffir” respectively), spatial segregation, inferior public services, denial of basic human rights, massive state repression and anti-Communist propaganda, police brutality, and repeated rituals of humiliation and cruelty unfolded from the 1600s to the present and cemented the status of the United States and South Africa as two of the most powerful white supremacist states in the world. Since “center and periphery need not be *literally* located”,⁶⁶ a possible conclusion to be drawn at this point is that Black America although literally located in the Global North or Euro-Atlantic West is

⁶³ Malcolm X *The End of White World Supremacy*.

⁶⁴ Magubane *Ties that Bind* 207-228.

⁶⁵ JW Cell *Segregation: The Highest Stage of White Supremacy* (1982).

⁶⁶ DT Goldberg *Racist Culture: Philosophy and the Politics of Meaning* (1993) 203.

very much experientially and politically part of the Global South or more precisely what Biko calls "the black world".⁶⁷

The "diasporic affinity", solidarity campaigns and collaborative efforts between Black South Africans and African Americans emanates from this shared historical experience of social life and social death within the matrix of anti-blackness.⁶⁸ The singularity of racial blackness bound them together in ways that exceed the boundaries and strictures of geographical distance into a group that Lewis Gordon calls "*the blacks of everywhere, the black blacks, the blackest blacks*".⁶⁹ Gordon's evocation of the "everywhere" suggests an additional reading of "diaspora" itself as an ontological condition – activated by the colonisation of Africa and the transatlantic slave trade – that names the displacement and dislocation of all Africans. Along these lines, Wilderson writes:

[Even] Africans who were not captured [during the Asian and European trade in Africans as slaves] are nonetheless repositioned as Slaves in relation to the rest of the world, the absence of chains and the distance from the middle passage notwithstanding. Though these "free" Africans may indeed still know themselves through coherent cultural accoutrements unavailable to the Black American, they are known by other positions within the global structure as beings unable to "attain to immanent differentiation or to the clarity of self-knowledge". They are recast as objects in a world of subjects.⁷⁰

Magubane's notion of "the ties that bind" is an instructive historical metaphor for the diasporic connection that holds together, or binds, African Americans and Black South Africans and provides a compelling basis on which to ground the travelling of intellectual and theoretical ideas between them. The relationship between Africa and

⁶⁷ Biko *I Write What I Like* 74.

⁶⁸ Magubane *Ties that Bind* 211 – 221.

⁶⁹ L Gordon *Her Majesty's Other Children: Sketches of Racism from a Neocolonial Age* (1997) 53.

⁷⁰ F Wilderson *Red, White & Black: Cinema and the Structure of US Antagonisms* (2010) 95-96.

the African diaspora is therefore built as much on affinity, solidarity and connection as it is on difference, distance and loss. As Paul Zeleza writes, diaspora – more than a spatio-temporal geographical marker – denotes a “culture and a consciousness ... a “there” that is invoked as a rhetoric of self-affirmation, of belonging to “here” differently”.⁷¹ On the ruins of the spatial and geographic dispersal of Africans, a deeper symbolic kinship *is retained*, making possible multidirectional political, cultural and ideological flows of Pan-African transnational solidarities, of spiritual and aesthetic forms, and of ideas and ideologies.⁷² This is also the premise on which I will be reading Black Consciousness and critical race theory together as belonging to a much larger trajectory of the Black Radical Tradition.

To be sure, I am not positing a universal synthesis of Black political movements and ideologies or an eternal unity between African-descended peoples. I do acknowledge that the possibilities of such synthesis or unity is afflicted by spatio-temporal ruptures and dispersals of Africans across the world.⁷³ Rather the argument is that the African roots of Blacks across the world appears to have been central to their social identities and political outlook in important ways that cannot be overlooked. African diasporic encounters, such as the one being staged here between Black Consciousness philosophy and critical race theory, cannot be

⁷¹ PT Zeleza “Diaspora Dialogues: Engagements Between Africa and its Diasporas” in I Okpewho and N Nzegwu (eds) *The New African Diaspora* (2009) 32.

⁷² Zeleza “Diaspora Dialogues: Engagements Between Africa and its Diasporas” in Okpewho and Nzegwu (eds) *New African Diaspora* 46.

⁷³ On the construction and theorisation of the African diaspora, and debates concerning questions of race, nation and history, see among others, I Okpewho, C Boyce Davies and A Mazrui (eds) *The African Diaspora: African Origins and New World Identities* (1999); M Wright *Becoming Black: Creating Identity in the African Diaspora* (2003); B Edwards *The Practice of Diaspora: Literature, Translation and the Rise of Black Internationalism* (2003).

understood outside of the Pan-Africanist and internationalist conception of black liberation as a collective, dialogic and global project.⁷⁴

4.3 Africa as memory and symbol of black radicalism

This historical frame for understanding the diasporic ties that bind Blacks in South Africa and in the United States that has been sketched so far turns on three impression points around which the intellectual and political impulse of black radicalism revolves, and from which anti-colonial and anti-racist black thought and praxis emerges, namely (1) the global character of white supremacy; (2) the shared existential reality and ontological status of blackness and (3) the African genealogy of Blacks in the United States and blackness in general.

This third point can be rendered with more depth through Cedric Robinson's historical archaeology of the Black Radical Tradition, thus resisting the spatial and ideological separation of continental Africa from Black America and in this way problematising the view of CRT as an entirely foreign paradigm to the Black South African experience. Indeed, I would argue that the very sense of separateness between Black Consciousness and critical race theory is called into question when they are placed into a much larger genealogy, namely the Black Radical Tradition. These two traditions can be thought together in developing a critique of post-1994 law, society and politics in part because while they take vastly different socio-discursive forms and belong to different sites of locution, they belong to the same tradition of political thought which can be traced back to the African continent itself.

⁷⁴ P Zeleza "The Challenges of Studying the African Diasporas" (2008) 12 *African Sociological Review* 4.

In his magisterial text on the historical and intellectual relationship between Marxism and black radicalism, Cedric Robinson locates the revolutionary impulse of the Black Radical Tradition in the history of African peoples against European domination, and the specific cultural meanings that formed the basis of African resistance.⁷⁵ Robinson sets out to draw out the “ideological connective” between the Armistad slave rebellion and other slave ship uprisings, the maroons who escaped slavery and formed independent settlements, the Haitian Revolution, African anti-colonial wars of resistance, slave insurrections in the Caribbean and the Americas, the freed slaves who emigrated back to Africa and the successive movements of national liberation, black power, self-determination, anti-apartheid and civil rights.⁷⁶ Robinson notes that such a connection cannot be comprehended or anticipated within the Western historical imagination which typically treats this wide array of struggles as “geographically and historically bounded” and connected only by the similarity of their sociological elements (i.e. being slave and colonial societies). Rarely if ever are they linked as part of a larger political current, movement, social ideology or historical experience.⁷⁷

In order to overturn this major historical oversight which he attributes to two historicist tendencies, namely the “diminution of diaspora”⁷⁸ and the “destruction of the African past”,⁷⁹ Robinson proceeds to eschew the view that black radicalism is merely a variant of Western radicalism (such as Marxism or anarchism) whose

⁷⁵ C Robinson *Black Marxism: The Making of the Black Radical Tradition* (1983) 5.

⁷⁶ Robinson *Black Marxism* 72.

⁷⁷ Robinson *Black Marxism* 72.

⁷⁸ Robinson *Black Marxism* 72.

⁷⁹ Robinson *Black Marxism* 81.

proponents happen to be Black.⁸⁰ Indeed, Robinson intends to theorise black radicalism as a revolutionary tradition that cannot be fully contained within a Marxian imaginary of liberation. For Robinson, the epistemology of Marxism is a Western construction – by which he means a “conceptualisation of human affairs and historical developments” that emanates from the particular experiences of European peoples mediated by their civilisational outlook, their social orders and their cultural perspectives.⁸¹ Robinson argues that while its encounters with Western society is the cauldron from which black radicalism emerged, Western society is not in itself the source of its ideological and political inspiration. The Black Radical Tradition proper takes its foundational task to be a critique of, and struggle against, Western civilisation. As he writes, black radicalism is

A specifically African response to an oppression emergent from the immediate determinants of European development in the modern era and framed by orders of human exploitation woven into the interstices of European social life from the inception of Western civilisation.⁸²

Thus in Robinson’s historical archaeology, Africa is the “material, social and ideological foundation” of the Black Radical Tradition.⁸³ As he illustrates, African persons forcibly shipped from Africa to be enslaved in the New World “also contained African cultures, critical mixtures and admixtures of language and thought, of cosmology and metaphysics, of habits, beliefs and morality”.⁸⁴ Thus Blacks who arrived in the United States as slaves were not completely decultured or intellectually bereft. The memory and symbol of Africa as their prior *episteme* gave

⁸⁰ Robinson *Black Marxism* 73.

⁸¹ Robinson *Black Marxism* 2.

⁸² Robinson *Black Marxism* 73. My emphasis.

⁸³ Robinson *Black Marxism* 112; also see 169.

⁸⁴ Robinson *Black Marxism* 121-122.

them “a knowledge of freedom” and defined the terms of their humanity.⁸⁵ Robinson painstakingly highlights two important historical details: firstly that the Middle Passage did not produce a complete rupture in enslaved Africans with the previous African onto-episteme and universe they inhabited and secondly, that this African onto-episteme was the collective unconscious that activated black radicalism and confounded their European captors and colonisers.⁸⁶

In this regard, the analytic arc of Robinson’s arguments moves in an opposite direction to, among others, (1) Saidiya Hartman’s reading of the Middle Passage as the scene of an irreversible estrangement of American Blacks from Africa,⁸⁷ a “loss of the mother” which Jared Sexton augments further as the “loss of any self that could experience such loss”;⁸⁸ (2) Paul Gilroy’s celebration of a post-African, hybridised blackness, or a modern Black Atlantic culture *in the wake* of Africa, where Africa freezes into a conceptually irrelevant historical relic;⁸⁹ (3) Kwame Anthony Appiah’s liberal-cosmopolitan critique of racial nationalism as regressive⁹⁰ and (4) Achille Mbembe’s aversion to African-centered historical discourses which he derides as nativist racial mythologies steeped in essentialist notions of authenticity and victimhood.⁹¹ In contrast to these thinkers, Robinson refuses to adopt a postmodern

⁸⁵ Robinson *Black Marxism* 121-122.

⁸⁶ Robinson *Black Marxism* 122.

⁸⁷ S Hartman *Lose Your Mother: A Journey Along the Atlantic Slave Route* (2007).

⁸⁸ Sexton (2014) *Critical Sociology* 9.

⁸⁹ P Gilroy *The Black Atlantic: Modernity and Double Consciousness* (1995).

⁹⁰ KA Appiah *In My Father’s House: Africa in the Philosophy of Culture* (1992).

⁹¹ A Mbembe “African Modes of Self-Writing” (2002) 14 *Public Culture* 239 – 273; “On the Power of the False” (2002) 14 *Public Culture* 629 – 641; “Ways of Seeing: Beyond the New Nativism” (2001) 44 *African Studies Review* 1–14.

attitude of ambivalence and disavowal in relation to the African heritage that is the root *and route* of modern black culture, politics and theory.⁹²

As he remarks, following Amilcar Cabral, the transport of African bodies to the mines and plantations of the Americas and the Caribbean also meant:

⁹² Robinson's treatment of the relationship between Africa and black identity is bound to be caught up in the polarity between on the one hand, postmodern, post-structural and postcolonial theoretical projects aimed at decentering knowledge and language and deconstructing unities, foundations and grand narratives and on the other hand pan-Africanist, Marxist and nationalist endeavours to recuperate African history and culture and to recompose African identity, agency and subjectivity. Whereas the former position takes its cue from a moment in European scholarship which announced the death of the Subject and performed a theoretical fragmentation of epistemic and ontological positions such as "Truth", the latter sought to assert African difference against colonial and imperial distortions, and defined its core mission as the recovery of epistemological and ontological integrity and presence for the African subject. To the extent that they are driven by divergent impulses – *decomposition* of fixed essences and group identities on the one hand, and *rebirth* of the African self and assertion of African difference on the other – these two trends were always bound to clash on how to theorize Africa, African history and culture, black identity and race in modernity. The ascendancy of the "posts" (postmodernism, post-structuralism and postcolonialism) in African and Black studies introduced a language – cosmopolitanism, Afropolitanism, hybridity, mimicry, invention – that was hostile to any perceived postulations of a genetic *unity* of African people, a singular *essential* understanding of the world held by all Africans, racial blackness as a marker of national (or transnational) belonging and the fundamental alterity of Africanity as against Western and other identities. The charge from proponents of the "posts" in African and Black studies (most notably represented by, among others, Achille Mbembe, Paul Gilroy, Kwame Anthony Appiah, David Scott, Homi Bhabha and Valentin Mudimbe) is that such postulations tend to generate nostalgic romanticisations of pre-colonial Africa; essentialist, rigid and purist constructions of African and Black identity and nativist renderings of African history and culture. Although I do not read Robinson to be vulnerable to such critics given his insistence on African *agency* and the rich historical evidence he provides (See R Kelley "Foreword" in Robinson *Black Marxism* xx), the methodological and scholarly weaknesses of the cultural postmodern critiques adumbrated above should be noted. These critiques are in the first place patently Eurocentric in their theorization of race, blackness and Africa through the philosophical instruments of white, Western thinkers (notably Michel Foucault, Jacques Derrida, Giles Deleuze, Jacques Lacan, Roland Barthes, Mikhail Bakhtin, and Walter Benjamin) – thinkers for whom Africa and black existence were not primary objects of analysis. Secondly, such critiques tend to display a reductive and generalising grasp of the African scholarship they charge with cultural essentialism, nativism and regressive nationalism. Thirdly, since they mostly emanate from literary and cultural studies, they tend to fixate on the discursive and the cultural side of life to the almost complete neglect of material and political realities (especially violence and power). Finally, and most disturbingly, such critiques often evince an apologist orientation towards colonial oppression and its neocolonial persistence – and tend instead to insist on a notion of "agency" centered on highlighting the complicity of Africans in their own political and economic malaise. Indeed, it appears that sympathy with the Western archive and intimacy with the West and with white subjects – even if this is phrased in terms of a resistance against singular origins and purity and affirmation of common humanity – is an underlying motivation of much of the postmodern and postcolonial critique of African nationalist, Pan-Africanist and Marxist theories of Africanity and blackness. A voluminous amount of ink has been spilled in debates across many disciplines on this issue and this very strained footnote could not settle those debates. For a short roadmap into these debates, see S Marzagora "The Humanism of Reconstruction: African Intellectuals, Decolonial Critical Theory and the Opposition to the 'Posts' (Postmodernism, Poststructuralism, Postcolonialism)" (2016) 28 *Journal of African Cultural Studies* 161-178 and G Murunga "African Cultural Identity and Self-Writing" (2004) *African Review of Books* 15-16.

the transfer of African ontological and cosmological systems, African presumptions of the organisation and significance of the social structure, African codes embodying historical consciousness and social experience, and African ideological and behavioural constructions.⁹³

It is generally within this material everyday culture derived from Africa that the seeds of black opposition to white supremacy are to be found as these displaced Africans conducted and imagined themselves in accordance with forms of life incomprehensible to the European master class.⁹⁴ And so, from the moment of their arrival in the New World, rebellion came instinctively to Black slaves and labourers. Countering dominant accounts, Robinson also points out that the docility purportedly displayed by enslaved Africans was a mask that concealed a deeply felt political rage against what they clearly understood as the unnatural, which is to say unethical, social system and structure of bondage.⁹⁵ This is evidenced by historical surveys and accounts of slave resistance against domination which range from small acts of disobedience to major threats of rebellion such as among other things, the breaking of tools, burning of crops, work slowdowns, assisting and protecting runaway slaves, stealing, escapes and maroonage, revolts and killing of European “masters” and general insurrections against slavery.⁹⁶ A less overt but powerful source of resistance was the turn by the enslaved Africans to spiritual and cosmological resources (voodoo, African ancestral veneration, black Christianity) which again kept alive their sense of themselves as human and African against the overwhelming force of racial terror, displacement and dehumansation.

⁹³ Robinson *Black Marxism* 122.

⁹⁴ Robinson *Black Marxism* 122.

⁹⁵ Robinson *Black Marxism* 123.

⁹⁶ Robinson *Black Marxism* 123. See also CLR James *A History of Pan-African Revolt* (2012 [1938]).

Robinson's account thus refutes any possibility that enslaved Africans (the ancestors of African Americans) ever accepted the terms of slavery or submitted to white supremacy. Put another way, Africans in the New World always regarded their enslavement as a condition to be overcome. Thus, African people remained ontologically animate: "Slavery altered the conditions of their being, but it could not negate their being".⁹⁷ A core feature of the struggles of colonised and enslaved people in Africa, the Americas and the Caribbean that prefigured black radicalism was the battle of African peoples to preserve their "collective identity as African people".⁹⁸ It was as African people and not as slaves that Black women and men fought against the disruption of their material and spiritual being.⁹⁹

The sense of Africanity, of Africa as a memory and symbol of life-affirming freedom, is thus lodged deeply at the epistemological and ontological sub-stratum of the Black Radical Tradition. Robinson goes further to record the unique feature of the Black Radical Tradition that significantly departs from Western Marxism namely the emphasis on "structures of the mind": the privileging, that is, of the metaphysical over the material and the stress placed on the "mind, metaphysics, ideology and consciousness" and on the "supernatural, sacred and poetic" elements of human life.¹⁰⁰ The novelty and enduring legacy of Robinson's work is its restoration of black radicalism to its interminable African roots. The consciousness and history of African civilisation which was never fully ruptured by the interdictions of European invasions and violence thus formed the basis of black radicalism as a

⁹⁷ Robinson *Black Marxism* 125.

⁹⁸ Robinson *Black Marxism* 132.

⁹⁹ Robinson *Black Marxism* 146; 170 -171.

¹⁰⁰ Robinson *Black Marxism* 169.

world-historical revolutionary tradition. It also enlivens the deep historical and symbolic link – those ties that bind – between black rebellions across the modern world in earlier centuries and the articulations of a theory and movement of black radicalism in the 20th and 21st centuries. The powerful trace of Africa that suffused struggles for black liberation could not be accounted for in a Marxian paradigm precisely because it was outside of the signposts and markers of Western experience. Robinson writes that the political “outrage” expressed by the Black Radical Tradition against the racism of European society:

was most certainly informed by the Africanity of our consciousness - some epistemological measure culturally embedded in our minds that deemed that the racial capitalism we have been witness to was an unacceptable standard of human conduct ... The depths to which racist behavior has fouled Western agencies transgressed against a world-consciousness rooted in our African past. Nevertheless, the sense of deep sadness at the spectacle of Western racial oppression is shared with other non-Western peoples.¹⁰¹

Robinson interprets black radicalism as a fundamentally oppositional and utopian structure of feeling, a struggle by enslaved and colonized Africans who were extracted and displaced from their African social formations to recreate their lives:

[I]t was the ability to conserve their native consciousness of the world from alien intrusion, the ability to imaginatively re-create a precedent metaphysic while being subjected to enslavement, racial domination, and repression. This was the raw material of the Black radical tradition, the values, ideas, conceptions, and constructions of reality from which resistance was manufactured. And in each instance of resistance, the social and psychological dynamics that are shared by human communities in long-term crises resolved for the rebels the particular moment, the collective and personal chemistries that congealed into social movement. But it was the materials constructed from a shared philosophy developed in the African past and

¹⁰¹ Robinson *Black Marxism* 308.

transmitted as culture, from which revolutionary consciousness was realized and the ideology of struggle formed.¹⁰²

More than the revolutionary transformation of Westernised, capitalist society, the object of black radicalism was and remains the preservation of the historical and social consciousness formed and evolved from the African past and the reconstitution of bonds of community and personhood assaulted by the racialism of Western society. This focus on the interior life, on de-linking from the European symbolic order and refusing its protocols of racial capitalism, domination, and cruelty was therefore vital.¹⁰³ Black radicalism from this view engages in a dialectical confrontation and total opposition to racial social orders and to the European imaginary that created and rationalises those orders.¹⁰⁴ Near the closing of his book, Robinson also returns to the notion of diaspora, with the exhortation that Blacks “must be as one”.¹⁰⁵ These are among his final prophetic and instructive musings:

The Black radical tradition suggests a more complete contradiction. In social and political practice, it has acquired its immediate momentum from the necessity to respond to the persisting threats to African peoples characteristic of the modern world system. Over the many generations, the specificity of resistance-at best securing only a momentary respite-has given way to the imperatives of broader collectivities. Particular languages, cultures, and social sensibilities have evolved into world-historical consciousness. *The distinctions of political space and historical time have fallen away so that the making of one Black collective identity suffuses nationalisms.* Harbored in the African diaspora there is a single historical identity that is in opposition to the systemic privations of racial capitalism ... The resoluteness of the Black radical

¹⁰² Robinson *Black Marxism* 309.

¹⁰³ Robinson *Black Marxism* 310 – 311.

¹⁰⁴ One critical implication of this conception of black radicalism is that African rebels forcibly transported to Africa resisted their Americanisation (the erasure of their Africanity) and constructed and imagined themselves as part of the Third World and Global South. Not doing otherwise would risk aligning American Blacks with the racial metaphysics of Western civilization which resulted in among other things the genocidal clearing of Native Americans from their indigenous lands.

¹⁰⁵ Robinson *Black Marxism* 318.

tradition advances as each generation assembles the data of its experience to an ideology of liberation. The experimentation with Western political inventories of change, specifically nationalism and class struggle, is coming to a close. Black radicalism is transcending those traditions in order to adhere to its own authority. It will arrive as points of resistance here, rebellion there, and mass revolutionary movements still elsewhere. ... Molded by a long and brutal experience and rooted in a specifically African development, the tradition will provide for no compromise between liberation and annihilation.¹⁰⁶

Robinson can be recalled here for his definitive dismissal of the claim that there exists an impenetrable wall between Black South Africa and Black America since they are part of one world in the much deeper historical, cosmological, and ontological sense he outlines. Such claims may themselves be the products of a Western historiographical imagination whose spatial boundaries and temporal periodisations also neglect to view black radicalism through its longer and deeper African heritage. The fracturing and distance between Black traditions in South Africa and the United States may also result from the failure to self-consciously archive black radicalism as a "tradition" of African people. It is plain that Robinson is not indulging a pre-colonial African romanticism (or a "nativist" mode of self-writing as Mbembe might describe it). Rather he treats Africa as a historical consciousness and a repertoire of living cosmologies, epistemologies and ontologies that is the symbolic and memorial inheritance of Blacks who generations after the first colonial encounters drew on this consciousness – directly and indirectly – as the raw material from which to fashion forms of resistance and critique appropriate to their time and space.

Through Robinson's intellectual cartography of the Black Radical Tradition, we may conclude that the dismissals, doubts and ambivalences concerning critical race

¹⁰⁶ Robinson *Black Marxism* 317.

theory as an entirely foreign, North American, imported discourse are untenably simplistic when judged from a black internationalist standpoint and in view of the existential status of blackness under global white supremacy. As I will argue below, when inflected through the specific historical context and social conditions of South Africa, critical race theory as an analytic paradigm is eminently applicable to the South African context. Rather than merely “cutting and pasting” the theory for South Africa, the aim is to allow the context itself to speak back to and reconfigure the terms of critical race theoretical analysis.

4.4 Critical Race Theory Today

Properly construed, critical race theory is a grammar of critique that takes up the historical burden or vocation of the Black Radical Tradition that Robinson identified as the negation and critique of Western civilisation. In all its disciplinary instantiations, CRT aims to contend – theoretically and politically – with the historical results and afterlife of Western racialism and its productions of racial hierarchy from the standpoint of the black experience. Costas Douzinas and Adam Gearey frame CRT as an approach to law, society, politics and discourse that repeatedly stages a confrontation between “Black power” and “white law”.¹⁰⁷ As a field of theory, it seeks to reckon with the history of Black people’s “encounters with western law” and its entangled properties of enlightenment and exclusion, rationality and brutality, universalism and ethnocentrism, formality and indeterminacy.¹⁰⁸ As such, CRT presents itself as an instructive mode of analysis in contexts such as South Africa where race – especially as organised via the conflictual dynamics of blackness and

¹⁰⁷ C Douzinas and A Gearey *Critical Jurisprudence: The Political Philosophy of Justice* (2005) 259.

¹⁰⁸ Douzinas and Gearey *Critical Jurisprudence* 259.

whiteness – signifies the predominant social contradiction. In Douzinas and Gearey's words:

CRT provides a critical thinking that is *not limited to a historical time and place* but confronts law's complicity in the perpetuation of a racially defined economic and social order...¹⁰⁹

The critical dimension of CRT inheres in its search for "opponent accounts of race" or "counter-accounts of social reality"¹¹⁰ that challenge mainstream legal-liberal and racial-optimist understandings of race, law, power, equality and justice. In contrast to these aforementioned approaches – which would see the formal abolition of legally-sanctioned racial discrimination and the promulgation of equality legislation and human rights instruments as signs of racial progress – critical race theorists concern themselves with the role of law and legal knowledge in both concealing and sustaining white social power.¹¹¹ Law, legal categories and the political ideals of Enlightenment that are their cultural source are viewed as structurally distorted in relation to the Black subject and to the subject of race in general. Far from neutral and containing a normative aspiration towards the equality of all persons, law is seen to embed and reflect particular racial ideologies and racial interests.¹¹²

Of central importance to the intellectual genealogy of CRT is the fact of its emergence in the wake of the failures of the civil rights movement and the legislation and discourses it inspired to substantively improve the lives of Blacks in

¹⁰⁹ Douzinas and Gearey *Critical Jurisprudence* 259.

¹¹⁰ K Crenshaw *et al* "Introduction" in K Crenshaw *et al* (eds) *Critical Race Theory: Key Writings that Formed the Movement* (1995) xiv.

¹¹¹ Crenshaw *et al* "Introduction" in Crenshaw *et al* (eds) *Critical Race Theory: Key Writings* xii, xxv; Douzinas and Gearey *Critical Jurisprudence* 267; G Minda *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995) 167.

¹¹² Minda *Postmodern Legal Movements* 178.

the United States.¹¹³ Thus CRT provides a critical vocabulary that is specifically aimed at apprehending the lives and afterlives of racist legal and political orders and in particular the elusiveness of social transformation and racial justice even once the *de jure* structures of racial inequality and discrimination have been eliminated. To put it another way, CRT is what arises from the ashes of the limits of law and civil/human rights. Tragedy and dissonance, paradox and contradiction define its intellectual scene as the central inquiry for critical race theorists is the question of why racial hierarchy and inequality persists and even intensifies in societies which declare themselves as formally non-racial.¹¹⁴ How and why, in other words, can formal racial equality, non-racial constitutionalism and a nominal legal commitment to equality of all citizens co-exist with actual structures of systemic racial inequality, black subordination and white privilege?

To understand this paradox, CRT scholars generally begin by exploring the ways in which dominant legal and political discourse – shaped as it is by colourblind legalism, civil rights politics of assimilation and recognition and liberal individualism – constructs and disseminates a narrow and conservative conception of race, racism, racial power and racial justice.¹¹⁵ Such a conception tends to treat race as peripheral or aberrational, thereby ignoring the historical, political-economic and sociological centrality of race in constituting the identity of both the individual and society. It also tends to relegate race to being a consequence of individual actions rather than

¹¹³ Crenshaw et al "Introduction" in Crenshaw *et al* (eds) *Critical Race Theory: Key Writings* xiv; Douzinas and Gearey *Critical Jurisprudence* 260-261; A Harris "Critical Race Theory" in R Banaker and M Travers (eds) *Law and Social Theory* (2 ed, 2013) 147.

¹¹⁴ Harris "Critical Race Theory" in Banaker and Travers (eds) *Law and Social Theory* 148, 153; A Harris "Critical Race Theory" in J Wright (ed) *The International Encyclopaedia of The Social and Behavioural Sciences* (2012) 266 – 270.

¹¹⁵ Crenshaw et al "Introduction" in Crenshaw *et al* (eds) *Critical Race Theory: Key Writings* xvi.

treat it as an ingrained *structural* phenomenon and it is also law-centred and thus regards racism to be incompatible with modern law and also accepts the end of racism to be when it is officially declared so by a law which in turn denies the fact of the continuance of racism through law and other spheres of social existence.¹¹⁶ These misconstruals of salient features of the social problem of race considerably weaken the possibility of understanding and diagnosing racism correctly and therefore also combatting and dismantling it. Such problematic understandings of racism have the double effect of legitimising and obscuring racism and of preventing the realisation of black liberation and racial equality.¹¹⁷

To correct this misconception of race and racism, CRT seeks to develop an alternative epistemology of law grounded in the black experience. As a form of “theory from below”, CRT extracts theoretical insight from the historical and cultural experiences of those victims of racial oppression who live on the underside of modern law on the basis that such experiences can improve our understanding of law in its social context and introduce radically new concepts in legal and social thought that better illuminate the social reality.¹¹⁸ This epistemic standpoint itself presumes that law generally represents a view of the world that accords with the white social and cultural experience and that this concord is not accidental but historically and socio-politically constructed. To deconstruct the whiteness of legal knowledge, “a black point of view”, imbued with the distinct lived experience of the

¹¹⁶ P Fitzpatrick “Racism and the Innocence of Law” (1987) 14 *J of Law and Society* 119 – 132.

¹¹⁷ Crenshaw et al “Introduction” in Crenshaw *et al* (eds) *Critical Race Theory: Key Writings xv*; Minda *Postmodern Legal Movements* 170.

¹¹⁸ Minda *Postmodern Legal Movements* 172; M Matsuda “Looking to the Bottom: Critical Legal Studies and Reparations” (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323; Mills *Blackness Visible* 21 - 40; J Calmore “Critical Race Theory, Archie Shepp and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World” (1992) 62 *Southern California LR* 2129 – 2231.

racially oppressed, would be needed.¹¹⁹ In particular, it is the black *radical* voice of the Black Power and Black Consciousness movements, believed to have been eclipsed and depoliticised by civil rights reformism, that CRT seeks to recall and reinsert into legal consciousness and public memory.¹²⁰ For CRT scholars, these black radical social movements articulate a vision of liberation that strongly challenges the more dominant discourses of liberal legal reform, integration, and assimilation.

CRT treats law as itself an artefact of Western civilisation and an embodiment of the fantasies, desires and ideals of white society that is invested to a large degree in the discursive and material reproduction and maintenance of racial inequality and white supremacy. Law's "blindness" to the problem of racial injustice and its silencing of the experiences of Blacks on this view must be understood in terms of the moral economy of personhood authorised within the European political and philosophical imaginary which reserved Humanity proper "for whites only" and therefore tolerated and ignored violence against Blacks. Consequently, the typical modes of legal analysis adopted by conservative, liberal and even critical white scholars are unable to fully account for the unrelenting persistence and perhaps permanence of anti-black racism, the fragility of avowedly "post"-racial societies and the limits of emancipation achieved through law, rights and constitutionalism.¹²¹

¹¹⁹ P Williams *The Alchemy of Race and Rights* (1991) 51.

¹²⁰ Crenshaw et al "Introduction" in Crenshaw *et al* (eds) *Critical Race Theory: Key Writings* xiv. In the introduction to this edited collection of foundational CRT texts, the editors (at xx) confess that it is the ideological orientation of the Black Power movement – and not the civil rights movement – that many of them, as among the founding theorists of CRT, "actually identified with". See also G Peller "Race Consciousness" (1990) *Duke Law Journal* 758 – 847 (associates the emergence and critical orientation of CRT with the ideology of black nationalism).

¹²¹ Minda *Postmodern Legal Movements* 168; Crenshaw *et al* "Introduction" in Crenshaw *et al* (eds) *Critical Race Theory: Key Writings* xvi - xix.

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The theoretical itinerary of CRT, its programme of critique and the questions it aims to investigate, acquire resonance and even urgency in the post-1994 context where as we saw in Chapter 2, anti-black racial sentiments, racial inequalities and overwhelming white social power continue to persist and escalate within a purportedly non-racial constitutional order that is explicitly committed to eradicating the effects of “past” racial disadvantage. The present South African conjuncture appears to characterise precisely the paradox at the heart of CRT, namely the paradox between (the promise of) freedom and (the reality of) subjugation where Blacks remain at the basement of the social pyramid in a society that has abolished *de jure* racial discrimination and even universally condemns racism.¹²² Racism and white supremacy in South Africa appear further than ever from being long-forgotten relics of the legal and political past. While no longer backed by official racist policy sanctioned explicitly by the law and government, the inherited patterns of racial inequality and exclusion and the vestiges of white cultural and economic power appear virtually self-perpetuating, sustained by among other dynamics, “cultural lag, institutional momentum, accumulated wealth and attitudinal inertia”.¹²³

In a more practical application of CRT to the South African and US context, Daria Roithmayr proposes a “lock-in” model of inequality to illustrate how racial discrimination and inequality can persist even in the absence of intentional or formal

¹²² Harris “Critical Race Theory” in Wright (ed) *International Encyclopaedia of the Social and Behavioural Sciences* 266 – 270.

¹²³ Mills *Blackness Visible* 76; 102.

discrimination.¹²⁴ According to Roithmayr, when whites as the dominant racial group monopolise access to jobs, property, wealth, quality education and other resources and opportunities during the formal period of colonial-apartheid (i.e. before 1994), this monopoly becomes self-reinforcing because it gets “locked” into institutional structures and becomes almost impossible to transform through law and policy due to the high “prohibitive switching costs” (massive increase in budget allocation; perceived risk of white flight; global economic backlash and so forth) of creating a more redistributive, inclusive and egalitarian arrangement.¹²⁵ In the case of “locked-in” inequality, no overt discrimination or even continued enforcement of racist policies is required since the advantages whites acquired through the unfair manipulation of law and social institutions become self-perpetuating and impose a “path dependency” that constrains the new government’s ability to eradicate racial stratification by forcing it to operate within the terms and processes of the past system to ensure stability.¹²⁶ The conclusion of Roithmayr’s analysis for the South African context might be that the legal and political institutions of liberal capitalist, and increasingly neoliberal, polities have a significantly attenuated capacity to deliver on corrective historical justice – not to mention basic distributive justice – because they are structurally constrained by vested interests and global power structures tied to the imperial hegemony of the Global North.

The historical weight of this paradox is deep in that it makes legible the problem that the systemic underpinnings and machinations of the problem that Biko

¹²⁴ D Roithmayr “Locked In Inequality: The Persistence of Discrimination” (2003) 9 *Michigan J of Race & Law* 31 – 75. See also D Roithmayr *Reproducing Racism: How Everyday Choices Lock in White Advantage* (2014).

¹²⁵ Roithmayr (2003) *Michigan J of Race & Law* 33.

¹²⁶ Roithmayr (2003) *Michigan J of Race & Law* 61-66.

variously named as "the black-white power-struggle",¹²⁷ "the totality of white power"¹²⁸ or more simply "the colour question"¹²⁹ in South Africa are still in vigorous motion. Blacks have been subsumed by a structure of violence so comprehensive and enduring as to stall the very movement of time and history. As Hortense Spillers writes:

Even though the captive flesh/body has been "liberated," and no one need pretend that even the quotation marks do not matter, dominant symbolic activity, the ruling episteme that releases the dynamics of naming and valuation, remains grounded in the originating metaphors of captivity and mutilation so that it is as if neither time nor history, nor historiography and its topics, shows movement, as the human subject is "murdered" over and over again by the passions of a bloodless and anonymous archaism, showing itself *in endless disguise*'.¹³⁰

If Spillers is to be taken seriously, the nominal legal conferral of freedom and equality onto Blacks must always be prefaced by disclaimer ("...*even though...*") or placed in "*quotation marks*" to signify its contradictory relationship to the actual material realities. Authentic political liberation, economic freedom and cultural integrity for Africans remains unrealised in post-1994 South Africa, a fact barely visible to the eyes of the law. The now centuries-old African encounter with European colonialists on these shores persistently echoes out into the present ("...*over and over again...*") and lands its blows on the bodies and minds of this living

¹²⁷ S Biko *I Write What I Like* (2012 [1978]) 78.

¹²⁸ Biko *I Write What I Like* 66.

¹²⁹ Biko *I Write What I Like* 96.

¹³⁰ H Spillers "Mama's Baby, Papa's Maybe: An American Grammar Book" (1987) 17 *Diacritics* 68. On the view that the injuries of colonial racism are "timeless", see also AP Farley "Law as Trauma & Repetition" (2007) 31 *NYU Review of Law & Social Change* 620 ("Emancipation seems to be the end of the affair, but the affair never ends ... [The] injury, the fatal injury of slavery, perfects itself through law") and G Kilomba *Plantation Memories: Episodes of Everyday Racism* (2008) 95 ("The wound of the present is still the wound of the past, and vice versa; the past and present become interlocked as a result.")

generation as it did departed generations with no signs that it will spare those yet to come.

Adopting a critical race lens in this instance seems apposite since CRT speaks with striking clarity to our present situation where it is no exaggeration to claim that the most pressing ethical and political emergencies in South Africa – poverty and inequality, homelessness and spatial injustice, crime, cultural and spiritual alienation, social disharmony and non-belonging, and violence – revolve around the troubled axis of race. Dominant scholarly approaches to law, society and transformation in South Africa – informed by varieties of liberal thought, Western critical or Marxist frameworks as well as postmodern and post-structural intellectual currents – exhibit a conceptual indifference, even hostility, to race that disables their potential to explain or reflect on the paradox set out above namely, that racism has been legally abolished but is continuing and escalating.¹³¹ Because of its concerns with the continuity of racial power, CRT stands out among the many legal and social theories as particularly equal to the task of constructing a counter-reading – already anticipated in Chapters 1 and 2 – of the “post-apartheid” order as itself a rearticulation or reconfiguration of the colonial form and a reproduction of racialised social hierarchies.

By its own assumptive logics and theoretical protocol, CRT reinscribes the problem of race into legal, political and public memory and consciousness – thereby disrupting law’s tendency to forget and imagine away the historical roots and material conditions that produce particular legal and political problems and to operate from the starting premise of legal subjects as formally equal and legal rules

¹³¹ See sections 5.4 (a) and (c) below.

as universal, fair and neutral. As Patricia Tuitt phrases it, CRT is animated by a desire to see how hegemonic concepts, principles, histories, narratives and theories “read’ from an interpretative standpoint that places race as a central organising theme in their construction”.¹³² The conceptual radicalism of CRT thus inheres in its challenge to the conceptualizations of orthodox theory and its provision of a “revisionary theoretical cartography” and a “redrawing of the map of the political” so that which had formerly been minimised or occluded – in this case, race – is recentered in political and philosophical discourse.¹³³ This epistemic revisioning of the social through centering “race, normative whiteness and white supremacy”¹³⁴ as central organising categories of analysis is crucial to the recollection of Biko’s thinking for post-1994 South Africa since these were central to his own time and to his thinking.

In the remainder of this chapter, I shall give an account of CRT’s core theoretical and methodological tenets – particularly as developed in the early seminal works in the field of legal theory – and thereafter offer a brief evaluation of CRT’s application and revision in the South African context and in light of Black Consciousness. In neither case will I offer a comprehensive survey. I intend to draw attention to those aspects of the theory most germane to the question posed in the present study, namely how it could contribute to a challenging dominant framing of “post”-apartheid law with alternative theorisations of race, law and power – thereby widening the intellectual space in which Biko can be made audible to the present moment.

¹³² P Tuitt *Race, Law, Resistance* (2004) xiv.

¹³³ Mills *Blackness Visible* 121.

¹³⁴ Mills *Blackness Visible* 119.

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The central analytic device throughout the corpus of critical race theory that links up its many themes, tenets and topics is its “race-conscious” mode of legal and social criticism.¹³⁵ Race-consciousness as a mode of legal criticism is, as the word suggests, an approach to legal analysis that is *conscious* of race and racism and open to considering the effects of racial identities and histories of racial domination. It places the “racial subject” – both the realities of racialised subjects and the subject of race – at the centre of legal theory.¹³⁶ As a frame of analysis, race-consciousness explicitly undermines the formalist and technicist tendency of modern law to flatten difference and elide asymmetries of power in its aspiration towards formality, “perspectivelessness”¹³⁷ and an “aesthetics of uniformity”.¹³⁸ To be sure, CRT advances this race-conscious posture in legal, political and public discourse in a climate that is both hostile to, and fatigued by, any invocations of the unbearable spectre of race. Both during the period of CRT’s emergence in the United States and even presently in the South African legal academy, the dominant ways of thinking and writing about race frequently involve denial, silence and evasion. Post-racial, race-neutral and colour-blind paradigms of scholarship – in their different conservative, liberal and even Marxist iterations – argue variously that race should be an irrelevant social determinant and “label” for individual identities and social relations; that law and the State are or should be neutral in respect of racial conflict

¹³⁵ Minda *Postmodern Legal Movements* 167; Crenshaw et al “Introduction” in Crenshaw *et al* (eds) *Critical Race theory: Key Writings* xiv; Harris “Critical Race Theory” in Banker and Travers (eds) *Law and Social Theory* 150.

¹³⁶ S Foster and RA Leinhardt “The Racial Subject in Legal Theory” in KE Whittington *et al* (eds) *Oxford Handbook of Law and Politics* (2008) 451 – 465.

¹³⁷ K Crenshaw “Toward a Race-Conscious Pedagogy in Legal Education” (1988) 11 *National Black Law Journal* 2.

¹³⁸ Williams *Alchemy* 48.

and interests; that in any case, race has declined in significance and ceased to be the central social cleavage; that class – together with a deficient education system and a corrupt government – has transcended race as the primary contradiction in society.

Easily parried with reference to the empirical reality that access to resources, opportunities and quality of life remains racially skewed, such approaches even when adopted in good faith leave untouched the existing racial ordering of society and produce a misdiagnosis of the problems in society.¹³⁹ In quite radical contrast, critical race theorists begin from the premise that anti-black racism is ordinary, banal, endemic and even *integral* to the social practices, individual mindsets and political institutions of historically racialised societies – pervasive not aberrational.¹⁴⁰ And although accepted to be a social construct, race is understood in material rather than ideational terms – that is, as a structurally embedded and hierarchically organised power relation rather than an amalgam of words, discourses, actions and behaviours based on racial difference.¹⁴¹ Understood in this way, race thus defines the normative order of a society and bears superior explanatory power in understanding inequality, conflict and violence. Importantly for especially critical race legal theory, race also shapes and determines legal outcomes – not only in the instrumental sense of reflecting racialised histories and power relations but also the

¹³⁹ A Mutua “The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship” (2006) 84 *Denver University LR* 336.

¹⁴⁰ R Delgado and J Stefancic *Critical Race Theory: An Introduction* (2001) 7; Mutua (2006) *Denver University LR* 333, 353; Harris “Critical Race Theory” in Wright (ed) *International Encyclopaedia of the Social and Behavioural Sciences* 266 – 270.

¹⁴¹ K Crenshaw “Twenty Years of Critical Race Theory: Looking Back to Move Forward” (2011) 42 *Connecticut Law Review* 1324; R Delgado “Crossroads and Blind Alleys: A Critical Examination of Recent Writings About Race” (2003) 82 *Texas Law Review* 121-152; Delgado and Stefancic *Critical Race Theory: Introduction* 17.

more complex sense that law, lawyers, legal institutions and the State participate in the (re)production of particular meanings of race allied to dominant powers and hegemonic interests.¹⁴²

Because they operate in a social context not simply impacted but foundationally constituted by white supremacy, even ordinary legal rules and values ostensibly unrelated to race and racial politics tend to produce racial disparities and affirm the social privileges of whiteness. The foundational asymmetries generated by the history of racial oppression – and the accumulated and sedimented effects of this history – skews the operation of even apparently race-neutral arrangements. Given its ubiquity and banality, race need not be explicitly invoked in order to be present in law. Race-consciousness is an attempt to bring race into view so as to address and eradicate the pernicious effects and after-effects of race, racism and racialisation. Because it is constantly being reproduced, obscured and fortified, race is viewed in CRT as an ongoing material reality and not merely a residual leftover from a distant racist past.¹⁴³

This theorisation of race comports with the understanding of race and racial power presented by thinkers within the Black Radical Tradition, including Biko and signals the epistemic desire by Black scholars and activists to “name their own reality”.¹⁴⁴ Its contemporary valence inheres in its problematisation of approaches that de-historicise race and proclaim “the end of racial history” by highlighting that, both substantively and empirically, no such rupture between the contemporary

¹⁴² Mutua (2006) *Denver University LR* 343-344; Minda *Postmodern Legal Movements* 167; Crenshaw et al “Introduction” in Crenshaw et al (eds) *Critical Race theory: Key Writings* xxv.

¹⁴³ Crenshaw (2011) *Connecticut LR* 1326.

¹⁴⁴ Crenshaw (2011) *Connecticut LR* 1347.

period and the past has happened.¹⁴⁵ If anything the racial present is but a “variation” of the racial past.¹⁴⁶

To pre-empt charges that CRT is unduly pessimistic about law and racial progress and overlooks the real human rights gains achieved through law and activism which have dramatically improved the life chances of Blacks since the formal period of racial rule (Jim Crow or segregation in the United States and apartheid in South Africa), three explanations are offered. The first is that while law and human rights are able to address overt and vulgar forms of racism and racial discrimination, they are generally unable to dislodge the larger structural, socio-economic inequalities based on race.¹⁴⁷ The second closely related argument is that even when it occasionally produces fair, just and progressive outcomes for racially disadvantaged people and groups, law’s systemic reflex is to legitimise and stabilise the larger structure of white supremacy. Put another way, law and rights may attenuate and censure violence, inequality and discrimination but they do so without affecting or disturbing the structural source that produces those injustices.¹⁴⁸ The third, most damning, rejoinder – developed by Derrick Bell as the “interest convergence thesis” – suggests that insofar as racial progress reflects an adjustment rather than abolition of “the totality of white power”, positive gains and advances in racial equality and justice will only occur to the degree that they converge or coincide with the material and psychological interests of whites.¹⁴⁹ Put more

¹⁴⁵ Crenshaw (2011) *Connecticut LR* 1314.

¹⁴⁶ Crenshaw (2011) *Connecticut LR* 1314.

¹⁴⁷ Delgado and Stefancic *Critical Race Theory: Introduction* 22.

¹⁴⁸ Mutua (2006) *Denver University LR* 343- 344. See also J Modiri “Law’s Poverty” (2015) 18 *Potchefstroom Electronic Law Journal* 224-273.

¹⁴⁹ D Bell “Brown v Board of Education and the Interest-Convergence Dilemma” (1980) 93 *Harvard Law Review* 518 – 533.

generally, it is the claim that those in power will only tolerate changes from which they also stand to benefit.

CRT's radical intellectual orientation – its critique of liberalism, its examination of the legal production of race and its theory of structural determinism – is profoundly indebted to the work of Derrick Bell and in particular his notion of “racial realism”.¹⁵⁰ Bell introduced the concept of racial realism by claiming that it is to race relations what Legal Realism, in its most radical moment, was to legal theory. The specific aspect that Bell draws on as the link between racial realism and legal realism is the rejection of the assumption that law is logically self-evident, determinate, objective, internally stable and consistent.¹⁵¹ The objective of the legal realists was to show how law actually worked in reality, what interests, policies and ideologies it reinforced and protected. They stressed the function and social operation of law rather than the formal or abstract conceptualisation of it.¹⁵² Bell adds though that the work of the legal realists can be refined by “viewing the law ... as [an instrument] for preserving the *status quo* and only periodically and unpredictably serving as a refuge of oppressed people...”.¹⁵³ Thus racial realism is an approach that is historically and socially attentive to the complex realities of racism in society and one that is also realistic about law's limits in relation to the struggle for racial justice and equality especially in liberal orders. Rather than focusing on the abstract principles and formal language of law, it looks at the social questions of race and the

¹⁵⁰ D Bell “Racial Realism” (1992) 24 *Connecticut Law Review* 364. See also D Bell “Racism is Here to Stay: Now What?” (1991) 35 *Howard Law Journal* 79-93; *Faces at the Bottom of the Well: The Permanence of Racism* (1992); (1995) *University of Illinois Law Review* 893 – 910.

¹⁵¹ Bell (1992) *Connecticut LR* 365.

¹⁵² Bell (1992) *Connecticut LR* 366.

¹⁵³ Bell (1992) *Connecticut LR* 365.

historical patterns that produce it – seeking to expose race and racism as a hidden but recurring premise in legal reasoning and social organisation.¹⁵⁴

Bell makes clear that his call for racial realism emanated from his frustration at the failure and erosion of the gains achieved in the struggle for civil rights to meaningfully change the lives and socio-economic status of Blacks.¹⁵⁵ He laments the fact that many people have so heavily relied on the promises of law (civil rights reforms, desegregation court decisions and racial remedies such as affirmative action) that they failed to realise that abstract legal rights such as equality “could do little more than bring about the cessation of one form of discriminatory conduct that soon appeared in a more subtle though no less discriminatory form...”¹⁵⁶ He calls for Blacks to re-examine the goal of racial equality through a “hard-headed reflection” on whether it has effected any real change. In his assessment, this re-examination is necessary given that although “contemporary colour barriers and racial disparities are less visible”, they are “neither less real nor less oppressive”.¹⁵⁷ For Bell, the very goal of racial equality through litigation and legislation is impeded both by law’s abstract and formalist logic and also by its own structural and institutional complicity with, and calculated unresponsiveness to, the problems of racial domination, inequality and black suffering. Accordingly, Bell calls for a continued struggle against racism in contrast to a complacent faith in the promises of legal equality:

The Racial Realism that we must seek is simply a hard-eyed view of racism as it is and our subordinate role within it. We must realise that the struggle for freedom is ... a

¹⁵⁴ Bell (1992) *Connecticut LR* 369.

¹⁵⁵ Bell (1992) *Connecticut LR* 370.

¹⁵⁶ Bell (1992) *Connecticut LR* 373.

¹⁵⁷ Bell (1992) *Connecticut LR* 374.

manifestation of our humanity that survives and grows stronger through resistance to oppression...¹⁵⁸

Through Bell's notion of racial realism, we may be able to look beyond charges of CRT as pessimistic and nihilist and rather appreciate the depth of its "revisionist" interpretation of the social reality. Even in the South African context, there is the risk that the over-investment in symbolic and sentimental advances for Blacks may conceal the still low social standing of Blacks and induce a false faith that the law may serve as a tool for transformation and justice. When read together with his thesis on the "permanence of racism", Bell's most enduring contribution to CRT has been his threefold illustration of (1) racism as the structuring dynamic of modern law; (2) the resilience of historically deep social structures of domination and (3) the role of race neutrality and liberal racial reform in ultimately sustaining white supremacy.¹⁵⁹

The radical conclusions of racial realism came to be significantly tempered if not attenuated by a strong strain of results-oriented activism, pragmatism and legal optimism within American CRT scholarship and activism.¹⁶⁰ The shift from a racial realist view of racism as constitutive of the modern world and of black liberation as beyond the confines of the juridical sphere to an interest in doctrinal law and policy reform, legally-driven social transformation and the reconstruction of legal argument and reasoning to facilitate racial remedies and racial justice captures a tension or

¹⁵⁸ Bell (1992) *Connecticut LR* 378.

¹⁵⁹ See T Curry "Saved by the Bell: Derrick Bell's Racial Realism as Pedagogy" (2008) 39 *Philosophical Studies in Education* 35-46; "Shut Your Mouth When You're Talking to Me: Silencing the Idealist School of Critical Race Theory through a Culturalogical turn in Jurisprudence" (2012) 3 *Georgetown J of Law & Modern Critical Race Perspectives* 1-2.

¹⁶⁰ Delgado and Stefancic *Critical Race Theory: Introduction* 23; Douzinas and Gearey *Critical Jurisprudence* 265; Harris "Critical Race Theory" in Banakar and Travers (eds) *Law and Social Theory* 157.

duality at the heart of CRT, namely between “deconstruction and reconstruction”¹⁶¹ or between the critique of law’s violence and limits and the ideal of a “liberating law”.¹⁶²

This dual consciousness or ideological schizophrenia signifies again an unresolved confrontation between “white law” and “black power” in that the legal training of CRT scholars imposes analytic and political limitations on the project of CRT. Presented as the desire not only to understand and critique the relationship between race, law and power but also to *transform* it,¹⁶³ this reformist moment in CRT works to provide legal analyses and strategies to generate egalitarian outcomes and policies to benefit Blacks and other racially oppressed groups. The introduction of concepts such as intersectionality and unconscious racism, the proposals for historically contextualised hate speech and anti-discrimination legislation and for the reform of the criminal justice and education systems, the defence of affirmative action and other racially-based remedies, the development of a discourse of racial “minority rights”, the legal arguments for reparations as well as the method of storytelling and narrative all came about as a result of CRT’s *reconstructive* ambitions.

Through these devices, the racial experience of Blacks is made legible to law, which in turn can be instrumentalised as a tool for the realisation of social change and justice. CRT scholars – having departed from Bell’s more damning triadic

¹⁶¹ DL Hutchinson “Critical Race Histories: In and Out” (2004) 53 *American University LR* 1190, 1193; Crenshaw (2011) *Connecticut Law Review* 1351. See A Harris “The Jurisprudence of Reconstruction” (1994) 82 *California LR* 741 – 785.

¹⁶² Matsuda (1987) *Harvard Civil Rights-Civil Liberties LR* 341.

¹⁶³ Crenshaw et al “Introduction” in Crenshaw *et al* (eds) *Critical Race Theory: Key Writings* xii; Delgado and Stefancic *Critical Race Theory: Introduction 2*.

critique of law based on racial realism, the permanence of racism and interest convergence – now exhibit a deep commitment to law, its modernist values and its scheme of legal and moral rights. In their view, law has played a role in advancing the material needs and social status of Blacks and given the socially and economically precarious position of Blacks, remains a potentially useful vehicle for justice.¹⁶⁴ Moreover, the argument goes, insofar as law and rights confer value on its objects, they carry significant symbolic, historical and psychic significance to marginalised communities whose past is one of constant devaluation and dehumanisation.¹⁶⁵ This redefines and limits the goals of CRT to egalitarian social inclusion of Blacks into the American polity or put another way, to overcoming the hyphen in “African-American” which is taken to signify the second-class status of everyone other than white Americans who are simply referred to as “American”. Under the hydraulic pressures of law – its logic, language and institutional framework – the historic demand for black liberation as a revolutionary ideal is invariably transformed, perhaps inverted, into a struggle for inclusion and equality, the normalisation of Blacks into unimpaired American citizenship and the sublimation of the stigmata of blackness.

On this reading, CRT comes to be conflicted by the divergence or inconsistency between its theory and its politics – the former reflecting an analytically Black nationalist, revolutionary and critical stance and the latter adopting a civil rights-oriented pragmatist and reformist approach. CRT moves from being theoretically

¹⁶⁴ Hutchinson (2004) *American University LR* 1192; Crenshaw “Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law” (1988) 101 *Harvard LR* 1331 - 1387; Crenshaw *et al* “Introduction” in Crenshaw *et al* (eds) *Critical Race Theory: Key Writings* xxiii – xxiv.

¹⁶⁵ See generally, Williams *Alchemy*.

radical (reflecting the “rebel” tradition in Black thought explained in Chapter 3) to seeking racial progress through law and reason (and thereby regressing into the moderate “realist” tradition also discussed in Chapter 3). This turn from a radical anti-racist critique to a critical race “legalism” has rendered CRT vulnerable to criticisms reiterating Audre Lorde’s famous dictum that “that the master’s tools will never dismantle the master’s house”,¹⁶⁶ that only the most “narrow parameters of change”¹⁶⁷ are achievable through law.

Saidiya Hartman for example has expressed the worry that CRT’s focus on race through the prism of exclusion and marginalisation and the concomitant remedies it proposes “do not ultimately challenge the economy of racial production or its truth claims or interrogate the exclusion constitutive of the norm but instead seek equality, liberation, and redress within its confines”.¹⁶⁸ The inescapable bind here is that while law may facilitate incremental social change to ameliorate – at the empirical level – the treatment and position of Blacks, it cannot rearrange or annul the very world whose political ontology, definitions of humanity and conceptions of time and space are the root cause of the oppression of Blacks in the first place.

Put another way, the reliance on the instrumental and universalist discourse and structure of law has prevented critical race legal theorists from asking much deeper questions concerning the irresolvable contradiction of seeking to redress the historical experience of ontological nullity singularly ascribed to Blacks by seeking access to categories – human, subject, individual, citizen, property, autonomy –

¹⁶⁶ A Lorde *Sister Outsider: Essays and Speeches* (1984) 112.

¹⁶⁷ Lorde *Sister Outsider* 111.

¹⁶⁸ SV Hartman *Scenes of Subjection: Terror, Slavery and Self-Making in Nineteenth-Century American* (1997) 234.

which have gained their symbolic coherence through racial exclusion. The pitfall of CRT's reformist dimension then is that it must consciously undermine its own understanding of the modern world, the state and society as fundamentally unethical and unjust formations in order to work within the very paradigms – law, reason and civil society – that secure the existence of those formations. Insofar as the racial state is racist not primarily because of its actions or policies but because it is *constituted – foundationally structured* – by anti-blackness (that is, by a world constructed upon the mutually exclusive relation between blackness and Humanity), law reform implies a recomposition – and not abolition – of this constitutive problematic, a negotiation rather than confrontation with white power.¹⁶⁹

The normative and strategic merits of law reform are not what is of interest in this consideration. It is rather the conflation of normative goals with structural possibilities in the legalist praxis of CRT that is the problem. The move to inscribe the political desire for justice, freedom and equality into law comes at the expense of grappling with the potential irresolvability of the antagonism between blackness and the modern world as well as the apparent irreparability of the damage wrought upon Black life since its encounters with the racial violence of Western civilisation. Because the turn to law reform signals a surrender to existent and hegemonic political grammars, conceptual frameworks and cognitive maps that cannot fully name or account for the suffering, violation and dispossession of Blacks, we will

¹⁶⁹ See F Wilderson "Biko and the Problematic of Presence" in A Mngxitama *et al* (eds) *Biko Lives! Contesting the Legacies of Steve Biko* (2008) 95 – 114.

remain with reductive and distorted visions that re-create the problem of unfreedom in other ways.¹⁷⁰

It is not entirely convincing to claim that the limited emancipatory vision reflected in the legal optimism of CRT scholars can be fully attributed to either the American location of its development or to the fact that Blacks in the United States are a historically landless, non-indigenous racial minority descended from enslaved Africans and cut off from their African cultural roots. The history of black struggles in the United States does show that alternative radical political possibilities (such as secession or separatism, repatriation, armed struggle, and revolution) which refuse incorporation into American Empire have been voiced before. While not denying that reform and inclusion may be the most predictable eventuality for African-Americans in view of their minority status and lack of indigeneity, it is most likely the global triumph of liberalism, the constraining influence of legalism and the moderate politics of civil rights contoured by the fall in the West of the Berlin Wall, and the attendant collapse of the promises of revolutionary history, that accounts for the turn in CRT to pragmatic, strategic use of law as a tool for political activism and social transformation. Nonetheless, Biko's defence of African culture and experience as the basis for liberation and for the refounding of a post-conquest society, nation and polity represents a specifically local response to the regime of white supremacy in South Africa and is thus central to the refiguring of a South African critical race theory. More on this follows in the next section.

4.5 Critical Race Theory and Beyond: South African (re)visions

¹⁷⁰ See F Wilderson "The Black Liberation Army and the Paradox of Political Engagement" in S Broeck and C Junker (eds) *Postcoloniality-Decoloniality-Black Critique* (2014) 176 – 177.

The dispossessed may come to understand the repetitions and that they already know that their emancipation is beyond the juridical horizon.¹⁷¹

When we are talking about a structure as deeply embedded as race, radical measures are required. 'Everything must change at once', otherwise the system merely swallows up the small improvement one has made, and everything remains the same.¹⁷²

In its now matured and expanded articulation, CRT has left the borders of the United States and has migrated beyond the discipline of law, moving past the focus on State law to examine other social texts and disciplinary knowledges.¹⁷³ Today, CRT is often deployed as shorthand for a radical, race-conscious method of critique and analysis¹⁷⁴ – signifying left-oriented, black-centred accounts of race and racism which emphasise their continuity and persistence in multiple and diffuse forms and sites; their structural and institutional nature; their inseparability from the history and structure of white supremacy; their socially constructed but materially and symbolically deep character; their autonomous determinant force and context-specific modalities. The central intellectual mission that now characterises CRT is the exhumation of race, racism and racial power from the "buried order of politics".¹⁷⁵ This exhumation often entails insisting on the particularity of the social experience of those racialised as Black as well as countervailing conventional liberal and conservative theories which ignore, minimise, and/or downplay the historical legacy and social centrality of race, racism and racial power. In simple terms then, CRT is the elaboration of an alternative interpretation of the social reality.

¹⁷¹ Farley (2007) *NYU Review of Law & Social Change* 626.

¹⁷² Delgado and Stefancic *Critical Race Theory: Introduction* 57.

¹⁷³ Harris "Critical Race Theory" in Banaker and Travers (eds) *Law and Social Theory* 160; Crenshaw (2011) *Connecticut LR* 1256; Delgado and Stefancic *Critical Race Theory: Introduction* 3.

¹⁷⁴ K Crenshaw "The First Decade: Critical Reflections, or a Foot in the Closing Door" (2002) 49 *UCLA LR* 1342.

¹⁷⁵ I take this phrase from W Brown *Regulating Aversion: Tolerance in the Age of Identity and Empire* (2006) 14.

It does not however restrain itself to interpretation for interpretation's sake in the sense of abstract philosophical reflection but rather treats such interpretation as the first step towards a much larger political struggle. In moving from the analytic or theoretical dimension of the theory to the reconstructive or emancipatory dimension, salient historical and contextual features of our society need to be foregrounded. In this regard, the historical experiences of Blacks in the United States and South Africa would be determined by differently-shaped horizons of possibility. This is a fact well-recognised in the history of Black Consciousness and answers for my argument that Biko's theory discloses a divergent emancipatory path from the one (of law reform, rights protection and social inclusion) that appears to currently define CRT.

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Gail Gerhart reports that although the US Black Power Movement was one of the pivotal intellectual and political influences on the philosophy of Black Consciousness – particularly in developing the theoretical tools and vocabulary to analyse the black condition and theorise race and racism – Biko and his comrades maintained a keen appreciation of the “contrasting factors in American and South African society”.¹⁷⁶ She cites in particular discussions from a SASO seminar held in September 1970 in which the SASO Executive debated the applicability and feasibility, for the South African context, of an aspect of the manifesto for black

¹⁷⁶ G Gerhart *Black Power in South Africa* (1978) 275 – 276. See also K Moodley “The Continued Impact of Black Consciousness” in Hook (ed) *Steve Biko – Voices of Liberation* 182: “Leaders made a clear distinction between their focus on Black Consciousness and the development of Black Power in the United States.”

liberation set out by Stokely Carmichael and Charles Hamilton in *Black Power*. In that text, the authors write as follows:

The concept of Black Power rests on a fundamental premise: *Before a group can enter the open society, it must first close ranks*. By this we mean that group solidarity is necessary before a group can operate effectively from a bargaining position of strength in a pluralistic society.¹⁷⁷

It was the phrase "...enter the open society..." that came into contention during the seminar. In the memorandum Gerhart uncovered from the SASO seminar, it is noted that Black Consciousness is not a movement to "enter" the white South African polity but to (re)create it and "establish a completely new system...".¹⁷⁸ It was further noted that the choice of the word "enter" indexed the minority status of African Americans, and their aspirations to cultivate group solidarity in order to protect themselves from racism, improve their socio-economic status and empower themselves as a minority community. Their goal in other words would be to join the American polity but to do so "from a position of strength".¹⁷⁹ In contrast, since Black Consciousness worked from the Africanist conception of South Africa as a country *belonging to* Blacks from time immemorial and not one to which Blacks should plead for belonging, it followed logically that it is the collective Black majority who should set the terms for the envisaged liberated society.¹⁸⁰ The SASO seminar group thus finally amended the Carmichael and Hamilton statement to read: "... before *creating* an open society...".¹⁸¹ According to Fredrickson, this illustrates in the case of Black

¹⁷⁷ S Carmichael and CV Hamilton *Black Power: The Politics of Liberation* (1967) 44.

¹⁷⁸ Gerhart *Black Power* 276.

¹⁷⁹ Gerhart *Black Power* 276.

¹⁸⁰ The memorandum cited by Gerhart *Black Power* 276 reads: "[It] is we who must be allowing others to participate in our system. We must not be the ones to be invited to participate in somebody else's system in our own private yard".

¹⁸¹ Gerhart *Black Power* 276.

Consciousness philosophy that it is possible to be influenced by political traditions developed in different but analogous situations without slavishly imitating them.¹⁸²

If the struggle of African Americans as framed in Black Power and later by CRT is to *enter into* the full benefits of American citizenship determined and framed by a white majority public-sphere while also retaining some semblance of cultural difference, the struggle of Black South Africans would in contrast be one to actualise the majority power of Africans and to insist on the centrality – not alterity – of African modes of life. Biko himself would later clarify the fundamental distinction between African-American and Black South African visions of self-determination in similar terms. He argues that unlike Black Consciousness in South Africa, Black Power ultimately operates as a “minority philosophy” for Blacks who, although having roots in Africa, have been interpellated into accepting “American-ness” and seeking participation in an “already established society”.¹⁸³ The implication then is that Black Consciousness is a “majority philosophy”. Apart from illustrating that the relationship between race and place is not transhistorical, this is a significant departure point for the construction of a critical jurisprudence of race grounded in the South African reality.

In his assertion that the “end result” of the struggles of Blacks in North America differ from those of Blacks in South Africa based on the differential demographic and historical make-up of each society,¹⁸⁴ Biko counsels against an erroneous transposition and implantation of a method of historical redress which originates from a different historical situation. As he suggests, the experience of

¹⁸² Fredrickson *Black Liberation* 306.

¹⁸³ Biko cited in Fredrickson *Black Liberation* 307-308.

¹⁸⁴ Fredrickson *Black Liberation* 307.

Blacks in the North America who over many generations have undergone progressive absorption into the largely white polity of the United States as a result of both their minority status and the relative comprehensiveness of their epistemicide (ensured in part by their displacement from their indigenous home) stands in some contrast to the situation of Black South Africans who were conquered but remained in the territory they have called home since time immemorial. In the latter case, social change and transformation cannot mean the absorption of historically excluded groups and individuals into the institutions and practices of hegemonic society but rather the cultural, political and epistemological transfiguration of those very institutions and practices followed by the "re-inclusion" of the white settler population on the terms of a Black majority society.

Implicit in Biko's lamentation concerning the reduction of Blacks into "foreigners in the country of their birth"¹⁸⁵ is his understanding that a core source of Black people's socio-cultural alienation, political voicelessness and economic exclusion is our forced "minoritisation"; the unrelenting subjugation of an indigenous people with overwhelming numerical majority status in virtually all spheres of life by a white settler minority.¹⁸⁶ His metaphoric formulation of liberation in terms of a reclaiming and clearing of "the table" (referring to South Africa as territory and polity) and its redecoration/remaking "in African style" is meant to correct precisely this anomalous imbalance in power relations as well as to undo the unethical and

¹⁸⁵ South African Students Organisation "SASO Policy Manifesto" (1971) reproduced in Badat *Black Man, You are On Your Own* 125 – 126.

¹⁸⁶ He states this explicitly in Biko *I Write What I Like* 26 when he exclaims: "I am against the fact that a white settler minority should impose an entire system of values on an indigenous people".

unjust foundations of conquest that enable those relations.¹⁸⁷ Thus, although the critical analysis of the “race problem” proffered in CRT is more or less consistent with the South African situation, its programmatic and strategic engagement with law would for reasons of history and context require radical modification. This is again not a complete disavowal of legal mobilisation as a way of mitigating violence and ameliorating suffering; only a problematisation of its utility as an instrument of liberation and struggle in the South African context. As I will elaborate below, it is not only that the law is too limited and conservative a structure and discourse to deliver the far-reaching demands of Biko’s conception of liberation, but that reliance on the South African and international legal order *as presently constituted* to achieve justice would not only risk reinscribing the hegemonic social powers of race and class in another guise; it could also amount to a redemption of colonial law.

(a) Decentering law, recalling politics

Law presents the social order as if resting upon itself. This loses sight of the fact that the law manufactures its own conditions of legitimacy and then attempts to legislate them as *a priori* universals that have a legitimizing effect through their appeal to reason.¹⁸⁸

When we speak of “law” in the present South African context, we are speaking largely of State law, which follows the Western construction of modern law that treats “law” as a separate and autonomous social field, to the diminution of other normative structures and practices.¹⁸⁹ The political problems of such law, its limiting

¹⁸⁷ To quote Biko (*I Write What I Like* 75) again: “We knew he had no right to be there; we wanted to remove him from our table, strip the table of all trappings put on it by him, decorate it in true African style, settle down and then ask him to join us on our own terms if he liked.”

¹⁸⁸ C Douzinas “Foreword” in R Manko *et al* (eds) *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (2016) xv.

¹⁸⁹ B de Sousa Santos *Towards a New Legal Common Sense: Law, Globalization and Emancipation* (2 ed, 2002) 443-444.

attachment to Western legal liberalism and its incapacity to deliver revolutionary forms of social emancipation, have been repeatedly highlighted by its left critics.¹⁹⁰ Of particular relevance are those critiques which – akin to Bell’s racial realism – picture law and the State as themselves invested in crystallising and deepening dominant interests and ideologies in addition to decrying the ways in which an overinvestment in law reform, human rights and litigation closes out the space for deliberating and creating alternative political imaginaries and vocabularies of justice and freedom. Law, on this view, is structurally predisposed to the maintenance of the *status quo* and thus institutionally incapable of confronting and upending structurally embedded powers (such as, racial capitalism, normative whiteness and coloniality). One of the effects of this predisposition are evident in its transmutation of wide-ranging historical and political contestations into legal and procedural questions, driven by legal experts in a top-down fashion.

It is hardly obvious where Biko himself would have stood *politically* in relation to these critiques, more so if attention is paid to Boaventura de Sousa Santos’ affirmation of subaltern legalities which engage in law and rights for “counter-hegemonic purposes” as part of a larger political struggle in which law is neither viewed as autonomous nor valued as the exclusive or primary site of politics.¹⁹¹ The transformative power of such “legalities from below” in Santos’ view lies not in the legal outcomes they generate but the public, political and democratic challenges they pose to power. Yet Biko’s Black Consciousness does appear to unsettle the

¹⁹⁰ For a sample of the literature, see D Bell “Racial Remediation: An Historical Perspective on Current Conditions” (1976) 52 *Notre Dame LR* 5 – 29; Brown *States of Injury* 96 - 134; C Douzinas *The End of Human Rights* (2000); M Mutua *Human Rights: A Political and Cultural Critique* (2002); D Kennedy “The Critique of Rights in Critical Legal Studies” in W Brown and J Halley (eds) *Left Legalism/Left Critique* (2002) 178-228.

¹⁹¹ Santos *Towards a New Legal Common Sense* 466 – 471.

centrality of law and rights in that he places the recovery of Black people's political voice, agency and cultural self-knowledge at the centre of his conception of liberation. The primary features of the revolutionary political praxis of Black Consciousness – self-determination, community-centred political action, non-collaboration with elite powers, rejection of white tutelage – urge something closer to a democratic revitalisation of the very grounds of political community itself. From this perspective, the effort to realise justice and freedom is best redirected away from law and the State towards the cultivation of richly agonistic and “nonlegalistic” political practices and idioms. This is even more pertinent when the law, legal system and legal culture themselves are the object of ideological and political contestation – such as in the case of legal systems imposed by colonial sovereignties and then secured through faulty postcolonial political settlements and elite-centred transitional justice processes. In such instances, the call for a race-sensitive interpretation and application of that same law rescues it from the political struggle over its very defining terms.

A crucial entailment of Biko's idea of revolutionary transformation is precisely that Blacks *themselves* must enact and actualise their own liberation. The idea of liberation primarily through law – that is, liberation *from without* rather than *from within* – is untenable from a Black Consciousness point of view because it maintains the disempowered political subjectivity of Blacks. Over-dependence on law and rights in this case suppresses the emergence of Black people as political subjects at the centre of their own liberation. If their freedom is gained mainly through the promulgation of new laws or through court orders, they still remain people upon whom the world acts and decides rather than people with the power to act in and on

the world. Such freedom achieves a nominal and abstract rather than existential transformation in social relations and subjectivities. As Mabogo More explains with reference to Fanon and Biko, freedom from without (external liberation) must be simultaneous with, indeed activated by, freedom from within (internal freedom).¹⁹² I take this to mean that when freedom is achieved through or defined by the law, as when the Master declares to the Slave “from now on you are free”,¹⁹³ this cannot lead to genuine liberation since it signifies the abolition of neither the Master-Slave relation nor the slavish consciousness of Blacks that accompanies it.¹⁹⁴ To be true to its name, freedom must have inscribed into its memory the cost of freedom, of struggle and – these are Fanon’s words – “blood”.¹⁹⁵

If CRT scholars advocate an adherence to legal and moral rights in order to fulfil material needs or repair psychic wounds, this may itself be a counterintuitive gesture of asking for what cannot be given, of enunciating a desire not yet realisable. This is certainly the case with Biko for whom the demand for Black liberation turns not only on the material or physical dimension but also encompasses the social, spiritual, cultural and psychological dimensions. These are demands which are outside of and beyond the law. The call for a thoroughgoing and fundamental reorganisation of society implied in Biko’s demand for liberation is one that also calls the limits of modern law into view. No sovereign act – or *performance* – of law-

¹⁹² M More “Fanon and the Land Question in (Post)Apartheid South Africa” in N Gibson (ed) *Living Fanon: Global Perspectives* (2011) 175.

¹⁹³ F Fanon *Black Skin, White Masks* (2008 [1967]) 172.

¹⁹⁴ More “Fanon and the Land Question in (Post)Apartheid South Africa” in Gibson (ed) *Living Fanon* 174 – 175; Fanon *Black Skin, White Masks* 171 – 172.

¹⁹⁵ Fanon *Black Skin, White Masks* 171: “The upheaval reached the Negroes from without. The black man was acted upon. Values that had not been created by his actions, values that had not been born of the systolic tide of his blood, danced in a hued whirl around him. The upheaval did not make a difference to the Negro”.

making and law-giving could possibly deliver the dream of a “true humanity” which can only be fashioned in the domains of politics and the political through critical literacy, grassroots community-building, democratisation of public spaces and institutions, dissident artistic and creative production and “subaltern illegality”.¹⁹⁶ In so decentering the modern legal form, Black Consciousness turns us toward a radical democratic revival of what Santos calls the “emancipatory everyday practices”¹⁹⁷ lived and made in the spaces inhabited by Black people.

(b) Liberation from equality

[P]olitics conceived and practiced legalistically bears a certain hostility to discursively open-ended, multigenre, and polyvocal political conversations about how we should live, what we should value and what we should prohibit, and what is possible in collective life.¹⁹⁸

If we accept that legalism in any given context deploys legal knowledge in a way that brings overtly social and political questions into its discursive fold, translating them into the formal categories and technical language of law and thereby disqualifying other forms of knowledge, then it is also the case that law and rights are flawed vehicles for the comprehension and articulation of the black historical experience. One particularly striking feature of this flaw is evident in the way in which the relationship between race and law has been frequently reduced to, and encased within, the overarching rubric of equality.¹⁹⁹ This emphasis on equality in

¹⁹⁶ Santos *Towards a New Legal Common Sense* 467.

¹⁹⁷ B de Sousa Santos “The Postmodern Transition: Law and Politics” in A Sarat and T Kearns (ed) *The Fate of Law* (1991) 102.

¹⁹⁸ W Brown and J Halley “Introduction” in W Brown and J Halley (eds) *Left Legalism/Left Critique* (2002) 19.

¹⁹⁹ See AP Harris “Equality Trouble” Sameness and Difference in Twentieth-Century Race Law” (2002) 88 *California LR* 1927 (arguing that “the reduction of race law to equality law immediately shifts some pertinent issues out of sight ... [such as the fact that] “not all racialized groups have primarily organized their struggles around equality.”).

“race law” represents an erroneous reframing of the *entire* black liberation struggle as a struggle for equality as conceived within a liberal rights framework. Even if equality can be counted among the values guiding Black people’s normative aspirations for freedom, it was not necessarily the primary term of the anti-colonial liberation struggle and certainly not the banner under which the Black Consciousness Movement theorised and waged the struggle against “the totality of white power” which manifested in the successive regimes of colonial racist terror in South Africa. It was rather liberation, self-determination and decolonisation that defined the struggles of the African “rebel” tradition discussed in the previous chapter.

When law defines the problem of race as a problem of “equality” between whites and Blacks, the first immediately problematic effect of this redefinition is its normalisation – in the double sense of making normal *and normative* – of the presence and position of whites in South Africa as well as the foundationally unjust settler-colonial situation out of which these arise. This conflicts with Biko’s assertion that the dissolution of South Africa as created and imagined by the colonialist is a precondition for non-racial and egalitarian co-existence. Mogobe Ramose provides a definition of “authentic liberation” that pointedly casts doubt on “equality” as an appropriate and adequate designation for freedom from colonial racism. His definition of authentic liberation is composed of what he refers to as a “two-fold exigency”, namely: (1) the release of “colonised people’s conceptions of reality, knowledge and truth” from the dominance of the “European epistemological paradigm”²⁰⁰ and (2) the realisation of the “rational demands of justice to the

²⁰⁰ M Ramose *African Philosophy through Ubuntu* (1999) 33.

colonised”, comprising of the “restoration of territory to its rightful indigenous owners” as well as reparations to them.²⁰¹

The political struggle for liberation exceeds the demand for equality precisely because in revolting against the conqueror’s concepts of time, space, meaning and reality, it seeks to redefine the very terms, norms, and standards by which equality itself could be measured. This understanding of liberation also spans a wider expanse of spheres and areas of human life: structures of institutional, legal and political governance; land, work and economy; language, culture and epistemology; architecture, spatialities and media; intersubjective relations, belonging and identity; being, knowing, feeling, loving and living. Liberation here is not conceived as a singular monumental event but as a series of *liberations*, always in the making, alive to the need for their own continuous renewal in face of power’s ceaseless encroachments and corruptions.

Equality – even when travelling under the particularist banners of diversity, multiculturalism, antidiscrimination, rights, inclusion, welfare or protection – appears to be an appeal for admission into an already existing universal frame of experience defined by class advancement, possessive individualism and the acquisition of particular social goods. The desire for “equivalence”, “equal (same) treatment” and even “equal regard for specific needs” tends to appeal to a stable referent as its comparator, the object against which it hinges its demand. But when it is precisely the destabilisation of existing positions of power that should be sought, demands for equality of this kind tend to provide power with the opportunity to adapt to and

²⁰¹ Ramose *African Philosophy through Ubuntu* 33.

shield itself from protestations against its vulgarities, often leaving the structural and institutional backdrop of the injustice or inequality concerned intact.

In this respect, the discourse of racial equality risks partaking in a certain “relegitimisation of capitalism” due to its “formulation of [a notion of] justice that reinscribes a bourgeois [and socially white] ideal as its measure”.²⁰² When distributive equality becomes the supervening marker of social justice and transformation, racial progress becomes increasingly defined by (1) access to spaces still coded as culturally and demographically white (corporate workplace, private and former model-C schools, universities, suburban residential areas, malls and restaurants); (2) the complementary production of a “black middle class” comprising of Black entrepreneurs and high-income earning Black professionals²⁰³ and (3) a tangible change in lifestyle and status ranging from relative material comfort to hyper-visible luxury indexed by credit, consumption, technology, fashion, possession and ownership of assets (particularly motor vehicles and property).²⁰⁴ As the present South Africa aptly illustrates, this compression of the political demands and desires of Black people into a distributive model of justice and equality results in a quite spectacular “renaturalization of [racial] capitalism”²⁰⁵ together with its thoroughgoing commodification of human and non-human life.

Iris Marion Young has argued that a major defect of distributive models of equality is that they fail to interrogate, indeed presume as given, the structural background conditions (i.e. institutional contexts, power relations, social structure

²⁰² W Brown *States of Injury: Power and Freedom in Late Modernity* (1995) 59.

²⁰³ For a recent study, see R Southall *The New Black Middle Class in South Africa* (2016).

²⁰⁴ See D Posel “Races to Consume: Revisiting South Africa’s History of Race, Consumption and the Struggle for Freedom” (2010) 33 *Ethnic and Racial Studies* 157 – 175.

²⁰⁵ Brown *States of Injury* 60.

and ideological underpinnings) that shape inegalitarian distributive patterns in the first place. That is to say that distributive approaches tend to presuppose the very contestable features of the society in which the justice claim is being made, such as the capitalist economic system, the individualistic social ontology, the sexual division of labour, the Eurocentric cultural framework and so forth.²⁰⁶ To reiterate this critique in a Black Consciousness register, a distributive model of racial equality as distinct from a decolonial and anti-capitalist notion of liberation represents at the socio-economic level at least the form of integration that Biko decried as preservative of colonial-apartheid power relations and value systems. This is not only because it generally does not address *wealth* inequality as well as the question of control of land and the attendant ownership of the means of production but also because it readily accepts the Eurocentric and white (mostly English) cultural frame that predominates the workings of society's institutions and practices. Biko describes it as follows:

This is white man's integration - an integration based on exploitative values. It is an integration in which black will compete with black, using each other as rungs up a step ladder leading them to white values. It is an integration in which the black man will have to prove himself in terms of these values before meriting acceptance and ultimate assimilation, and in which the poor will grow poorer and the rich richer in a country where the poor have always been black.²⁰⁷

To seek a form of equality that is not wedded to a larger liberatory project (which as we saw involves the recreation of "South African" society and culture and not simply entry into the coloniser's world) is therefore to reinscribe the inferiority complex and racial alienation that Biko named as the main effect of colonial racism. This is related

²⁰⁶ IM Young *Justice and the Politics of Difference* (1990) 15-16.

²⁰⁷ Biko *I Write What I Like* 101.

in some ways to Biko's warning that "you cannot, in pursuing the aspirations of black people, achieve them from a platform which is meant for the oppression of black people".²⁰⁸

Because the struggle for racial equality does not abolish the racial order of things, its two pernicious anti-black outcomes are the idealisation of white suburban upper-middle class life as the definitive *telos* of what it means to be free as well as the invisibilisation and subordination of non-elite and underprivileged Blacks against whose labour the pleasures of freedom for the few are purchased. Yet Biko's recognition of *both* racial inferiority and racial superiority as ethically defective ontological positions which detract from the humanness of Black and white people renders the reliance on whiteness as a standard or norm against which to measure equality untenable. To seek equality with white people is to problematically turn whiteness into a sublimated object of desire. It is to redraw whiteness as an aspirational ideal and model for how human beings should live. But as Gordon explains:

[S]imply asserting the equality of blacks to whites and demanding recognition of that exemplifies failure by virtue of affirming whites as the initial standard of human assessment. That whiteness was predicated on racism should jeopardize its legitimacy as a standard. It is, in other words, at least in moral terms, a low and regrettable measure of humanity.²⁰⁹

This ties in with the more general point made by Saidiya Hartman that insofar as whiteness has historically functioned as "the undisclosed, but always assumed [norm]" of liberal equality, equality discourse plays an "instrumental role in

²⁰⁸ Biko *I Write What I Like* 166.

²⁰⁹ LR Gordon "Africana Philosophy and Philosophy in Black" (2013) 43 *The Black Scholar* 49.

constructing a measure of man ... that [legitimizes] and [naturalises] subordination".²¹⁰ Thus "racial equality" – the apparently central aspiration in CRT – represents an impoverished conception of freedom, and we lose much of the potency and extravagance of Black radical visions of liberation when we accept, or try to work within, the confines of law's reductive language and categories.

(c) Against the margin

[P]eripheral space may at once prove liberating *and alienating*, free *and enclosed*, open *but empty*.²¹¹

The search in critical legal theory for alternative approaches and theories of law is based on the twin critiques that law, legal rules and legal institutions harbour a historical and political investment in the powers producing and reifying the *status quo* and that law carries an epistemic attachment to a particular, hegemonic, account of the world. Thus, alongside the problems of law's limits and law's violence we may add the problem of law's epistemic imperialism which is most evident in how law's self-presentation as a closed logical system results in the expulsion of voices and perspectives deemed as outside of "the dominant, objective version of Legal Truth".²¹² CRT's response to this legal-epistemic injustice has taken the form of oppositionist methods of theorising and legal writing that include storytelling, counter-storytelling, narratives, parables and chronicles.²¹³ Richard Delgado explains that CRT scholars produce such "legal stories" with the explicit aim of subverting the

²¹⁰ Hartman *Scenes of Subjection* 118; 121.

²¹¹ DT Goldberg *Racist Culture: Philosophy and the Politics of Meaning* (1993) 186. My emphases.

²¹² N Bohler Muller "Western Legal Liberalism and its Discontents: A Perspective from Post-apartheid South Africa" (2007) 3 *Socio-Legal Review* < http://www.sociolegalreview.com/wp-content/uploads/2014/11/Western-Liberal-Legalism-and-its-Discontents_Narnia-Bohler-Muller.pdf> (accessed 15 January 2016). On law as a structurally exclusionary enterprise, see also M Davies "Exclusion and the Identity of the Law" (2005) 5 *Macquarie LJ* 5-30.

²¹³ See R Delgado and J Stefancic (eds) *Critical Race Theory: The Cutting Edge* (2000) 41 – 91.

dominant groups' conception of reality, highlighting the constructed nature of social, moral and legal reality, and overcoming silencing. As narratives emanating from "outgroups" and "underdogs" who carry "marginal status" as a result of the suppression, devaluation and abnormalisation of their perspective, such counter-stories are meant to deconstruct legal concepts, expose social contradictions and contemplate alternative political possibilities.²¹⁴

This project of "looking to the bottom"²¹⁵ to amplify the voices of the oppressed resonates with the pedagogy of Black Consciousness as informed by the work of Paulo Freire. But insofar as the liberatory imagination of Black Consciousness looks forward to the reclamation and actualisation of black majority power rather than insulation from or incorporation into power, it certainly disavows a mode of oppositional scholarship whose narratological aesthetic and structure of feeling is centered on marginality and peripherality. Although a marginal standpoint may at times serve as a critical counter-hegemonic standpoint,²¹⁶ the one anti-emancipatory side-effect of fetishising marginality may be that it claims relevance and visibility on the premise of its injured and excluded status rather than on its ability to contest dominant configurations and narratives of political life. In so doing, marginality secures politicised identities on the basis of their subordination – a move that paradoxically requires the suspension or foreclosure of the desire for freedom.²¹⁷ The refusal of marginality and minority ("being-minor") as political and epistemic locations is one of the principal implications of Biko's demanding assertion

²¹⁴ R Delgado "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87 *Michigan LR* 2412.

²¹⁵ Matsuda (1987) *Harvard Civil Rights-Civil Liberties LR* 323.

²¹⁶ See bell hooks' famous essay "Choosing the Margin as a Space of Radical Openness" in *Yearning: Race, Gender and Cultural Politics* (1990) 144-154.

²¹⁷ This is an argument central to Brown *States of Injury*.

that: “[W]hat we [the Black Consciousness Movement] want is a total accommodation of our interests in the total country, not in some portion of it.”²¹⁸ An alternative, more apposite, standpoint or orientation can be found in the work of Linda Tuhiwai Smith who has developed a methodology for the decolonisation of knowledge production, storytelling and theory-building that is centred on the recovery of an indigenous perspective and an overturning of the Western gaze.²¹⁹

Tuhiwai Smith delineates a series of “indigenous projects” which she advances as tools for contesting the social reality that sustains (legal) knowledge. The most pertinent among these for our purposes are: (1) *Storytelling*: grounding the narratives and theories we develop in the cultural inheritances of indigenous peoples, particularly oral histories and the perspectives of elders and of women in indigenous communities;²²⁰ (2) *Indigenising*: proceeding from the assumption that self-determination and self-representation are inherently connected, indigenising involves centering the “landscapes, images, languages, themes, metaphors and stories” derived from the life-world of indigenous peoples as well as grounding one’s thinking, analysis and critique in the “conceptions of world view and value systems” of indigenous African peoples;²²¹ (3) *Reframing*: linked to indigenising is the technique of reframing, which involves “taking greater control over the ways in which ... social problems are discussed and handled”.²²² Reframing among other things requires foregrounding imperialism, racism and coloniality in explaining legal, social and political phenomena as well as excavating conceptions derived from

²¹⁸ Biko *I Write What I Like* 152.

²¹⁹ L Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (1999).

²²⁰ Tuhiwai Smith *Decolonizing Methodologies* 144-145.

²²¹ Tuhiwai Smith *Decolonizing Methodologies* 146.

²²² Tuhiwai Smith *Decolonizing Methodologies* 153.

African cosmological systems in order to explain and understand legal, political and social issues normally addressed from the prism of Western epistemologies;²²³ (4) *Naming*: engaging in a process of renaming the spatial, conceptual and human landscape by taking into account erased and subjugated knowledges;²²⁴ and (5) *Creating*: Combining the other indigenous projects, creating denotes transcending the modes of survival and reaction in order to dream and actualise “new visions”.²²⁵

Tuhiwai Smith’s formulation of these indigenous projects in the grammatical form of the verb (*-ing*) expresses agency, motion and futurity. Accordingly, the concepts of indigeneity and Africanity are not construed here to be pure, mythical, eternal and perfectly coherent and virtuous but rather as concrete, lived, dynamic as well as historically situated epistemic and cultural formations, having developed from their precolonial traditional roots to their transformations during the colonial and anti-colonial moments through to their contemporary “post-”colonial and globalising hybrid iterations. The call for decolonising dominant methodologies of thinking, writing and speaking through a reconnection to indigenous African cosmologies and epistemologies aims to claim Africa as a subject, place and Spirit that resists the impositions, appropriations and erasures of colonial modernity. The point therefore is precisely not to repeat the familiar patterns of essentialism and parochialism but rather to restore and creatively reconstruct the cultural and epistemic integrity of Africa as a symbol of resistance against Western universalism, a site of meaning and a standpoint from which to engage the world(s).

²²³ Tuhiwai Smith *Decolonizing Methodologies* 153-154.

²²⁴ Tuhiwai Smith *Decolonizing Methodologies* 157.

²²⁵ Tuhiwai Smith *Decolonizing Methodologies* 158-159.

We could further associate Tuhiwai Smith's notion of "indigenisation" with two related notions. The first is Amilcar Cabral's notion of "re-Africanisation" or "return to the source" which calls for a *rebuilding* and re-entry into the African cultural archive to overcome the psychological and mental effects of colonial socialisation and education.²²⁶ And the second is Ngugi wa Thiongo's formulation of decolonisation as a "re-centering" of Africa: placing Africa "at the centre of things" (and not as an "appendix or satellite of other countries [and cultures]") and then treating the centrality of Africa as a basis from which to read, interpret and engage with other contexts, topics, worlds and peoples.²²⁷ In this sense, a truly critical engagement with legal and other hegemonic knowledges involves not simply disrupting the mythology of modern law and its claims of objectivity and neutrality but reconfiguring the very scene (the categories, logics, and framework) within which language, speech, authorship, narration, voice and audibility takes place.

(d) (Un)knowing South African law

The settler makes history and is conscious of making it. And because he constantly refers to the history of his mother country, he clearly indicates that he himself is the extension of that mother country. Thus the history which he writes is not the history of the country which he plunders but the history of his own nation in regard to all that she skims off, all that she violates and starves.²²⁸

To be sure, the disjuncture between the Black historical experience and modern law – law's inability to fully grasp, represent and respond to this experience – does not transpire only at the political, ideological and discursive levels adumbrated above. Instead, it transpires most acutely at the cultural and epistemological levels, as

²²⁶ See in particular A Cabral "National Liberation and Culture" in *Unity and Struggle: Speeches and Writings of Amilcar Cabral* (1978) 146.

²²⁷ N wa Thiongo's *Decolonising the Mind: The Politics of Language in African Literature* (1986) 94.

²²⁸ F Fanon *Wretched of the Earth* 50.

symptoms of the colonial history and identity of South African law itself. An argument present in indigenous Native American as well as Afrocentric strains of CRT that would need to be amplified by a South African race critical jurisprudence concerns the relationship between modern (Western) law and Europe's conquest of the Earth.

Robert A. Williams has argued that the Western colonising nations of Europe and their derivative settler-colonial states (such as South Africa, the United States, Australia, and Canada) have been sustained by the civilisational conceit that the cultures, religions and practices of Western civilisation are far superior to those of non-Western peoples.²²⁹ It is an almost trite point of anticolonial, decolonial and postcolonial critique that it was this idea of European civilizational superiority that consecrated the "West's mandate to conquer the earth".²³⁰ But what Williams adds to this account is the role of law in this regard. Williams explains that in the Western imagination, the law is valued as "a respected and cherished instrument of civilisation" and has served historically as "the West's most vital and effective instrument of empire", as a way of authoritatively "imposing [Europe's] particular vision of truth" on indigenous conquered peoples across the world.²³¹

For this reason, colonial conquest in all its guises has been an unambiguously "legal enterprise" as a profusion of laws, legal doctrines and regulations are introduced not only to install and legitimise the colonial power but also to manage the problem of colonial difference (or the "native question") which revolves around

²²⁹ RA Williams *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990) 6.

²³⁰ Williams *The American Indian in Western Legal Thought* 6.

²³¹ Williams *The American Indian in Western Legal Thought* 6. See also K Nunn "Law as a Eurocentric Enterprise" (1997) 15 *Law & Inequality* 323 – 371.

determining the status of the colonised peoples under European colonial law. The first sovereign act of the conquering power is to violently transplant Western colonial law and legal traditions on indigenous soil and thereby supplant the law of the indigenous conquered peoples of those territories. In South Africa, as in the rest of the colonised world, this has involved the ethnocentric denigration of indigenous African laws due to their perceived failure to adhere to a European logic, structure and value system.²³² Let us quote two passages from Biko where this point is made most forcefully. Here is the first:

In an effort to completely destroy the structures that had been built up in African society and to impose their imperialism with an unnerving totality, the colonialists were not satisfied merely with holding a people in their grip and emptying the Native's brain of all form and content; they turned the past of the oppressed people and distorted, disfigured and destroyed it. No longer was reference made to African culture, it became barbarism. Africa ... the History of African society was reduced to tribal battles and internecine wars.²³³

And the second:

[W]henver colonialism sets in with its dominant culture, it devours the native culture and leaves behind a bastardized culture that can only thrive at the rate and pace allowed it by the dominant culture.²³⁴

Euro-Western law and jurisprudence is inseparable from colonial racism, dispossession and violence.²³⁵ To fast-forward to a contemporary angle, both the memory of this violence and the historical assumptions concerning the savagery, primitiveness, arationality, brutishness and childlike-nature of the African remain

²³² D Kuwali "Decoding Afrocentrism: Decolonising Legal Theory" in O Onazi (ed) *African Legal Theory and Contemporary Problems: Critical Essays* (2014) 72.

²³³ Biko *I Write What I Like* 31.

²³⁴ Biko *I Write What I Like* 46.

²³⁵ J Murungi "The Question of an African Jurisprudence: Some Hermeneutic Reflections" in K Wiredu (ed) *A Companion to African Philosophy* (2005) 521.

operative for as long as the laws of the conqueror are in force. Thus, if for no other reason at all, the reliance on law and rights as a tool to address the Black condition is made untenable by the ethical problem of relying on a legal paradigm which presupposes the inferiority and non-being of the African. In this context, we have moved from the dilemma of “radical lawyering” posed as the question of whether law can be used pragmatically and creatively as a tool for emancipation to the *aporia* of how it would be possible to actualise a post-conquest world using the laws and languages of the conqueror. The shift from the former to the latter question reveals the limits of Euro-American critical legal theory for addressing the South African situation in which white supremacy, Eurocentrism, capitalist relations of production and settler-colonialism must be thought together. Critical legal theory limits itself to the question of politics and ideology – of which interests, values and powers the law serves – whereas a jurisprudence emergent from the experience of settler-colonialism and racial subjugation may ask the deeper question of whose law and legal tradition, drawn from whose historical, cultural and epistemological experience, is operative and accorded legitimacy in the first place.

The concept of “colonial unknowing” stands out as an apposite description of the South African legal mind and legal culture. Recently introduced to settler-colonial studies by Manu Vimalassery, Juliana Hu Pegues and Alyosha Goldstein, “colonial unknowing” denotes an epistemological orientation that “renders unintelligible the entanglements of racialization and colonization, occluding the mutable historicity of colonial structures and attributing finality to events of conquest and

dispossession".²³⁶ In other words, colonial unknowing erases and overlooks the immoral and unjust historical foundations of settler-colonialism, treating it instead as an immutable, unproblematic and naturalized social fact – as something that happened and can no longer be reversed or challenged. When "colonial unknowing" is operative, the possibilities for reversing the colonial order are silenced even before they can be spoken and the exigency of complete justice – what Biko calls "total accommodation" – is undermined even before it can be demanded. It is through colonial unknowing that the afterlife of colonial-apartheid can at once remain pervasive but not be "comprehended as an extensive and constitutive living formation".²³⁷ It operates centrally through the ignorance, disavowal, dissociation and normalisation of the history *and horror* of colonialism, land dispossession, white domination and racism. By making settler-colonialism illegible as a historical, political and moral problem, colonial unknowing normalises white hegemony in South Africa, enforces the expiry of colonised people's right to historical justice and structures the field of sense, knowledge, perception and imagination in such a way as to make substantive decolonisation appear "unreasonable and unrealistic".²³⁸

Often forgotten yet painfully obvious in legal education and legal study is the fact that South African law today is composed largely of Western traditions of liberal constitutionalism combined with the law of the colonial settler imposed through the Dutch and British conquest of South Africa. The vaunted plurality of laws in the present constitutional dispensation conceals the marginalization and denigration of

²³⁶ M Vimalassery *et al* "On Colonial Unknowing" (2016) 19 *Theory & Event* <<https://muse.jhu.edu/article/633283>> (accessed 11 February 2016).

²³⁷ Vimalassery *et al* (2016) *Theory & Event* <<https://muse.jhu.edu/article/633283>>.

²³⁸ Vimalassery *et al* (2016) *Theory & Event* <<https://muse.jhu.edu/article/633283>>.

indigenous African law – which is marked as particular and frequently cast in a civilizational narrative as being in tension with progress, development and rights, being relegated and distorted from history into the present.²³⁹ Martin Chanock further points out that the South African common law was central to the “creation of white memory and [the] racial and national identity” of European settlers. When this is compounded with the demographic whiteness of the legal academy and the Eurocentrism of South African jurisprudence scholars, it can be said that South African law is in fact “white law”.²⁴⁰

South African law’s historical unfoldment as part a larger project of a “dark modernity” comprising European supremacy, racial capitalism and sexism and its development – substantively and procedurally – in the cauldron of slavery, colonisation and apartheid, has considerable bearing on how its operative concepts are understood and actualised, such as for example how and by whom disputes are adjudicated; what constitutes a family; the meaning and character of personhood; how relations of property (affecting contract and succession) are established and enforced; how obligations are formed and discharged; what modes of Statecraft and governance are employed; how tensions between law and cultural traditions ought to be reconciled; how transgressions of the law and community values are addressed and penalised; how the division between the public and private is formulated and so on. To draw on law, rights and courts as tools for the achievement of equality and justice is to ignore the historical and cultural

²³⁹ M Chanock “Race and Nation in South African Common Law” in P Fitzpatrick (ed) *Racism, Nationalism and the Rule of Law* (1995) 198 – 199.

²⁴⁰ Chanock “Race and Nation in South African Common Law” in Fitzpatrick (ed) *Racism, Nationalism and the Rule of Law* 208.

problematicity of this law – the fact that it embeds a cultural framework rooted in racism – and to thereby deepen the problem of colonial unknowing. Legal reform in this case requires the objectionable suspension of the demand for epistemic justice, for African law to assume its proper place as “law equal to any law anywhere on our planet Earth”.²⁴¹

*

Before arriving to the conclusion of this Chapter, three important final reflections stand out as particularly desperate for restatement:

First, while it is true that race and blackness must be understood in their cultural, geographical and historical context, this disposition towards local grounding must not lose sight both of Africa as the historical root of the black experience and of the greater world-historical generality and experiential consistency in the Black condition, particularly in South Africa and the United States.

Secondly, CRT attempts to grapple with the historical results as well as contemporary persistence of western racialisation and racial hierarchy particularly as manifested in the nexus between law, society and politics. As such, it is not an immobile and inflexible paradigm but precisely one that seeks out and critiques racial orders in their particular local and contextual inflections.

Thirdly, insofar as CRT as developed in the racial situation of North America provides a limited emancipatory path for the South African situation, Biko’s theorisation of this latter situation supplies essential and far-reaching correctives that serve to reconnect CRT to the Black Radical Tradition, update and expand its

²⁴¹ M Ramose “In Memoriam: Sovereignty and the New South Africa” (2007) 16 *Griffith LR* 327.

field of articulation and most importantly ground its terms firmly within the South African racial context.

4.6 Conclusion

This chapter sought to navigate the conundrum of race, place and displacement in relation to the intellectual relationship between Black Consciousness and critical race theory. The aim in particular was to establish an intellectual basis for developing a South African critical race jurisprudence that is "black conscious" by among other things allaying the widespread but mostly unspoken, felt but unreasoned, insistence that critical race theory as an academic, intellectual and political enterprise is irredeemably "North American" and that this North American character renders it incommensurate with and irrelevant to the South African experience. Quite the contrary, the assertion defended throughout the Chapter was that far from being a foreign paradigm, critical race theory is intimately tied to the Black South African experience.

We took our cue in this regard from Biko's own philosophical "method" which is distinctly non-dogmatic and anti-parochial, influenced by a confluence of traditions and thinkers emanating from South Africa into the rest of the African continent, spreading into the Diaspora through the Caribbean and Black America and down into Brazil, and reaching even into Europe. Committed more to the political struggles of Black people than melancholically attached to maintaining fidelity to a theory or analysis, Biko's thinking engages Pan-Africanism, black nationalism, existentialism, Marxism, modern psychology, critical pedagogy, liberation theology, and anticolonial

history. This philosophical method treats all concepts and ideas as living objects which can travel and speak to different contexts.

The most immediate associations I can draw to this type of unbounded, non-dogmatic thinking is in the realm of music, jazz and the arts. In his biography *Still Grazing*, Hugh Masekela describes his musical journey and that of his comrade and contemporary Fela Anikulapo Kuti as one of African diasporic encounters, resonances and the blending of sounds, voices and styles.²⁴² Of Fela, he briefly narrates the story of an African child of professional parents who wished for him to study medicine. Arriving in London, the young Fela switched from medicine to music – and apparently attains self-consciousness at the moment he breaks from European classical music and develops a “hybrid of Nigerian folk and urban dance music with a touch of jazz”.²⁴³ Fela’s sound is composed of what Masekela describes as a “diaspora’s worth of influences”: Ghanaian dance groove, Big-Band swing music, Afro-Caribbean calypso, Jamaican ska and South African township mbhaqanga. From these musical elements, Fela created his distinct “Afro-Beat” style, partly – Masekela intimates – as a critique of African performers who had completely “turned their back on their musical roots in order to emulate American pop music trends”.²⁴⁴

For both Fela and Masekela, every encounter with the world was shaped by their “Africanism”.²⁴⁵ Indeed, even while living in the United States and experimenting with African-American artistic forms, Masekela insisted on texturing his music with the “chants of [his] father’s clan” and connecting this to “the suffering

²⁴² H Masekela and DM Cheers *Still Grazing: The Musical Journey of Hugh Masekela* (2015 [2004]).

²⁴³ Masekela and Cheers *Still Grazing* 242.

²⁴⁴ Masekela and Cheers *Still Grazing* 242.

²⁴⁵ Masekela and Cheers *Still Grazing* 243.

of impoverished or misplaced people of African origin all around the world".²⁴⁶ Both Hugh Masekela and Fela Kuti's musical styles underscore the centrality of Africa as a grounding of the black historical and aesthetic experience, a source for diasporic affinity and resistance against purity. This is largely the path I have attempted to chart in this background contemplation of a South African critical race theory.

The comparative historical studies of Fredrickson and Magubane illustrate a linkage between the deep structural homologies in the history, sociology and political economy of race in South Africa and the United States and the ideological and political affinities that emerged from across the Atlantic which enabled a thinking-together of the problem of black existence under white supremacy. We may understand these as the binding ties in the lived experience of race and blackness between the two spaces. Robinson and Malcolm X added to this an appreciation of Africa – its ways of knowing and its cultures of resistance – as the ontological root of critical traditions of Black political thought and creative expression. Robinson's extensive genealogy of the emergence of the Black Radical Tradition as emanating out of revolts and rebellion based on the memory of Africa, its confrontation with the racialism of Western culture and the inheritance of African epistemologies and cosmologies works against the tendency to associate critique exclusively with Western radical traditions. It also helps to resituate critical race thinking in South Africa within an African intellectual and political universe.

We can see the trace of the Black Radical Tradition in the driving impulse of CRT which in effect concerns itself with studying the world, and the word of law, its intersections with power and (in)justice from the vantage point of the critique of

²⁴⁶ Masekela and Cheers *Still Grazing* 243.

western civilisation. Through its radical race-conscious social critique and analysis, CRT postulates a revisionist (as in counter-orthodoxy) narrative of law, modernity and society that locates racial violence, coloniality and Eurocentrism to be central to their development and functioning. It was mined in its early stages from a particular moment in the racial and political history of the United States where the promise of justice embodied in the 1964 Civil Rights Act turned out not only to be hollow but created a legal, political and social atmosphere in which the material and social significance of racism was being denied or ignored – celebrated as having been overcome – even while it was being reproduced. Law's paradoxical rejection and affirmation of racism turns out not to be a paradox at all. The historical imbrications of Western legal modernity and its role in the process of European expansion that installed white racial domination in the United States and South Africa produced as well a moral economy in which the only true measure of humanity is the white European subject.

When this moral economy is superimposed materially and psychologically on a society, racism becomes a "structural flaw" of that society, shaping its institutions and practices, and reproducing social patterns that mirror its ideology. Racism on this view becomes deeply embedded in all spheres of life at the same time that this embeddedness becomes invisible – through ignorance, denial, erasure and distortion. CRT aims to make race visible as a constitutive underpinning of social relations, to bring it to the surface through writing and activism as a reality to be confronted and overthrown. But the choice of law, legal doctrine and policy as key sites for such a confrontation marks a dramatic departure from the insights of black radicalism which depict the modern world as foundationally racist and incapable of

redemption. If this startling recession of the emancipatory vision of CRT has anything to do with its disconnection from the black radical archive or with the numerical and socio-economic precarity of African Americans, a South African critical race theory conceived through Biko's Black Consciousness would need to modify itself in accordance with the conceptual problematics and analytic vernacular developed by Biko in his thinking of the South African race problem. In particular, questions of land, language, epistemology and culture and a closer engagement with African philosophy would need to be foregrounded in CRT's South African iteration. Moreover, the very specific problems facing the African continent and the conditions in the postcolony need to be attended to.

The political struggle for decolonisation and liberation over equality and reform; for politics from below over legalism from above; the critique of the Eurocentrism of law and society; and the view of South African law as a product of conquest are some of the conceptual problematics required in order to refigure the terms of CRT analysis so that it speaks to the South African reality. In this regard, Biko's thinking provokes a transformation of CRT from a "jurisprudence of reconstruction" still entangled in modernist precepts²⁴⁷ to a *jurisprudence of liberation* centred on the revival of the Africanist political tradition. This is a jurisprudence which, having eschewed the "comfortable politics" of law reform and litigation, directs its labours to the termination of the coloniser's world with the urgency of Fanon's exclamation

²⁴⁷ See Harris (1994) *California LR* 751 (associates the legal optimist moment in CRT with political modernism, and (at 754) avers that the political goal of CRT is *not* to topple but to "make real" the promises of the Enlightenment). This is also associated with the notion of a "jurisprudence of transformation" articulated by Charles Lawrence in "Race, Multiculturalism and the Jurisprudence of Transformation" (1995) 47 *Stanford LR* 819 – 847.

that: “[*But*] for God’s sake let’s decolonize, let’s decolonize.”²⁴⁸ It is the work of the next chapter to set out a jurisprudential reading of Black Consciousness that would perform disruptive interventions in the dominant ways in which race, law and power are understood and theorised in the South African context.

²⁴⁸ F Fanon (trans. R Philcox) *The Wretched of the Earth* (2004 [1963]) 31.

5

Reading Biko Jurisprudentially (or, Towards a Jurisprudence of Liberation)

Law's complicity with political oppression, violence and racism has to be faced before it is possible to speak of a new beginning for legal thought, which in turn is the necessary precondition for a theory of justice.¹

5.1 Introduction

In this chapter, we approach the culmination of this investigation through a close delineation of Black Consciousness through the lens of critical jurisprudence. The previous two chapters have been tracking Biko as a towering figure in Black politics without whom we cannot think South Africa's present racial contradictions and its future possibilities. This chapter draws on those theoretical insights to contemplate traces of a critical jurisprudence and political critique of post-1994 South Africa from the lens of Biko's thought. By reading Biko jurisprudentially, I aim to illustrate the contribution from Africanist, black radical and critical race perspectives of an alternative vocabulary and a radically different historical, political, and cultural vantage point from which to engage in critical jurisprudence. In particular, I shall underscore the relevance and significance of a contemporary articulation of Black Consciousness and its critique of post-1994 South Africa for law, legal theory and jurisprudence. In so doing, the Eurocentrism and whiteness of South African legal

¹ C Douzinas and A Gearey *Critical Jurisprudence: The Political Philosophy of Justice* (2005) 1.

theory may be disrupted and its omission of race and racism as central analytic categories and markers of social life corrected.

The central premise of this chapter takes flight from Costas Douzinas and Adam Gearey's reading of Biko as a revolutionary who embodies a "subjectivity against the law".² They argue that Biko signifies the kind of counter-hegemonic legal consciousness embodied in the radical intellectual politics of critical jurisprudence. He represents for them a desire for a "new form of politics"³ that cannot be contained by the law and its surrounding constellations of colonial sovereignty, Western modernity, violence, force, legitimation and myth-making. For Douzinas and Gearey, Biko's critical politics takes the form of an "agonistics" – a persistent troubling of, and dissenting against, dominant political, institutional and epistemic frameworks. Utilising Biko's own phrase "*I write what I like*" which he used when he penned articles under the pseudonym "Frank Talk", they take his thought to represent a form of writing that counters law's borders and definitions, writing that does not acknowledge the prohibitions of the law as a point at which a political project stalls or comes to a halt.⁴

This chapter shall begin by connecting Douzinas and Gearey's notion of a "general jurisprudence" to the thinking and politics of Biko. They develop the notion of general jurisprudence as a critical approach to law and legality centred on (in)justice, sociality, ontology, identity and existence in response to the more dominant modality of "restricted jurisprudence" centred on technical and

² Douzinas and Gearey *Critical Jurisprudence* 331.

³ Douzinas and Gearey *Critical Jurisprudence* 331.

⁴ Douzinas and Gearey *Critical Jurisprudence* 332.

professional concerns. They formulate the notion of general jurisprudence through the prism of critique and rename it a “political philosophy of justice”. The frame of general jurisprudence – understood as a philosophy of justice and I would add liberation – discloses a path through which we could theoretically locate Biko in the domain of jurisprudence and legal theory.

For the purposes of this study, I identify the critical impulse of Biko’s thought to entail the politicisation not only of the problem of race and South African law through a critical race intervention but a politicisation and historicisation that locates the racial antagonism as scripted into the very making of South African law and society. The casting of racism and coloniality as internal and foundational (not merely as historical background) to the present legal system and socio-political order would in turn reveal systemic limits in the capacity of law, rights and constitutionalism to substantively redress a reality and condition of subordination, inequality and degradation that is so deeply inscribed into their very identity. As a result, new forms of politics and theory are needed. Recalling Biko’s memory and thought provides a political orientation and consciousness to law and legality hitherto unexplored that I will describe as counter-hegemonic, counter-archival and in the next concluding chapter, counter-aesthetic, in the sense of questioning and disturbing law’s epistemic and sovereign grounds as manifested in its institutionalisation of particular, socially and historically constructed, truths. The provision of an expanded vocabulary from the standpoint of black existence – the histories of oppression and conquest as well as the resistant reimaginings working

against those histories – may disclose ways of speaking back to law’s limited terms and categories.

The appeal to Biko in this instance looks forward to a jurisprudential critique that undermines the central terms of post-1994 law, constitutionalism and jurisprudence – the ahistorical and depoliticised renderings of race that operate through a disavowal of conquest and white supremacy – by upending the widespread doxa that the ascendancy of constitutional democracy represents a “transformative” or “revolutionary” break with the colonial-apartheid “past”. Insofar as the present pursuit of “transformation”, “redress” and “social justice” takes place on faulty foundations, they stand as representations of the failure to annul the colonial symbolic order and power structure of white supremacy through which the being and worldview of the African was negated – a negation that is the principal source of the very production of blackness as a subjectivity and social identity.

As such, the jurisprudence being contemplated here refuses instrumentalisation and the pressure to be converted into a form of “applied jurisprudence” that involves the application or demonstration of its theoretical principles to particular fields or areas of law. This is also a jurisprudence that would rather not partake in the legitimation and redemption of “post-apartheid” law and constitutionalism through the search for transformative interpretations and readings. Biko’s “jurisprudence” takes us to the limit, to the root, to the originating and underlying disorders, histories and knowledges embedded in our past and present.

Following the next section expounding on the relation between Biko’s thought and the notion of a general jurisprudence, this chapter proceeds from the view of

Biko as a “subjectivity against the law” who confounds the mythologies of post-1994 law and unsettles South African legal culture. Through a close reading of Biko’s presence before (and against) the law first in the 1976 BPC-SASO Trial and then again later in the Constitutional Court in the cases of *AZAPO* (1996) and *City of Tshwane* (2016), I trace continuities in Biko’s counter-hegemonic and counter-archival politics from his historico-existential moment to ours. I thereafter turn my attention to a particularly pervasive “rationality” in South African public, political and academic discourse that I have provisionally named “post-apartheid reason”. In that section, I focus on three sites of the production of “post-apartheid reason”, namely the constitution, the legal academy and the history classroom to illustrate their role in constructing and legitimising the present legal, political and social order, and to attempt a deconstruction or disruption of each from a critical race and Black Consciousness angle.

Finally, I then develop a set of background thoughts on the becoming of a critical race jurisprudence that could begin to make sense of the liberatory longing to be post-conquest – and not simply post-apartheid. In particular, I revisit Biko’s critique of integration in which he presaged with startling accuracy the problems and contradictions of an unfree, racially unequal and still colonial post-1994 society. Biko’s prophetic claim that the formal end of apartheid would only re-elaborate Black people’s precarious material, psychological and ontological condition if not accompanied by radical changes in the fundamental structure of society will be taken as the central analytical problematic around which a new thinking of jurisprudence can begin in our time.

5.2 Black Consciousness and “general jurisprudence”: race, (in)justice and the social

There is, in today’s climate of what travels under the signs of “interdisciplinarity” and “theory”, little difficulty in establishing the relevance of Biko’s critical philosophy of race to law, legal philosophy and jurisprudence. Although probably still marginal or treated as an exotic and idiosyncratic field of study in South African law faculties, it is hardly alien to speak of race, identity, society, critique, narrative, and power in legal discourse and it is certainly not as unwelcome or illegitimate as it once was. Aptly captured in Joe Singer’s announcement that “we are all legal realists now”,⁵ most legal scholarship (aside from a small conservative fringe element) reflects that the formalist divide between the “properly legal” and the “non-legal” has been significantly undermined. A growing proportion of legal scholars work from varying levels of recognition of law’s imbrication in political and social processes and view legal reasoning as a scene of interpretive contestation and choice – and not simply a domain of mechanically-induced outcomes of logic and science. It is also now fairly uncontroversial across a wide variety of legal-academic postures from law and policy and socio-legal studies to law and literature, philosophy of law and critical legal theory to invoke the historical, economic, social, moral, literary and political aspects of law and legal enquiry.

But what I have in mind goes beyond the “law and...” coupling (as in racism *and the law*, *law and politics*, *law and society*) which ultimately maintains the coherence and identity of law and its fixed position of Truth and Knowledge. This is

⁵ JW Singer “Legal Realism Now” (1988) 76 *California LR* 465 – 544.

to avoid a situation in which critical theories of law centred on politicised identities and histories of oppression are treated as optional, a nice-to-have afterthought, but not as central and indispensable to a proper, accurate and comprehensive understanding of law in their own right. In this section, I aim to question this by reclaiming a different story and definition of jurisprudence. This is the story narrated by Douzinas and Gearey as a call for a “general jurisprudence” in contrast to a “restricted jurisprudence”. The location of Biko’s thought within the frame of general jurisprudence suggests that the questions that form Biko’s philosophical corpus – race, identity, culture, existence, consciousness, power, oppression, history, politics, justice, liberation – are also questions that should be central to jurisprudential and legal inquiry. To the extent that race and racism are deeply embedded in all facets of life and in social systems and circulate within the very structure of legal history, doctrine and reasoning, even the underlying legal ideals of truth, universalism, rationality, equality and justice are open to interrogations that reveal their historical relation to and contemporary complicity with white racial power and Eurocentrism.⁶

There can be no definition and understanding of law and jurisprudence in a historically and presently racialised settler-colonial society such as South Africa that does not require a simultaneous investigation into what Biko called “the color problem” and “the totality of white power”. One cannot for example theorise the nature of law and the legal system, the relationship between law, justice and morality as well as the social function of law without associating this to the reproduction of racial hierarchy and the perpetuation of colonial-apartheid values. One also cannot reflect on the legal culture and legal tradition in South Africa and

⁶ A Harris “Foreword: The Jurisprudence of Reconstruction” (1994) 82 *California LR* 743.

internationally without also seeing how these are intricately tied to a European cultural imaginary and to the eclipsing of African paradigms and perspectives. And it is quite inconceivable from this perspective to interrogate, understand and solve legal problems without appreciating the deeply racialised dynamics that influence the working of law as well as the differential access to, and impact of, law and legal instruments for social groups with different racial histories of advantage and disadvantage.

Accordingly, Biko's thought is to be figured here as a philosophy or social theory of race, identity and liberation that at the same time should deeply inform any theory of law or jurisprudence in the present South African context. Douzinas and Gearey define jurisprudence as "the prudence, the *phronesis* of *jus* (law), law's consciousness and conscience".⁷ They insist that it is not only the wisdom, knowledge and consciousness of law that should be central to jurisprudential enquiry but also "the conscience of law, the exploration of law's justice and of an ideal law" against which the positive law is to be judged.⁸ A general jurisprudence in this vein would attend to both meanings of jurisprudence as the consciousness and conscience of law.

They lament however the shift in modern Western legal theory from this general jurisprudence (where juristic issues were central to philosophical concerns) to a restricted jurisprudence (where technical, functionalist and professional concerns became central).⁹ The rise of restricted jurisprudence, Douzinas and Gearey explain, is the outcome of the cognitive and moral poverty that accompanied

⁷ Douzinas and Gearey *Critical Jurisprudence* 3.

⁸ Douzinas and Gearey *Critical Jurisprudence* 3.

⁹ Douzinas and Gearey *Critical Jurisprudence* 4.

modern legal theory, and is thus characteristic of the development of legal modernity and Western jurisprudence. The cognitive poverty of legal theory resulted in the study of law being treated as an “entomology of rules, a guidebook to technocratic legalism, [and] a science of what legally-exists...”.¹⁰ This cognitive impoverishment of jurisprudence is linked to the rise and dominance of rationalism and rule-formalism within legal scholarship. As they write, “[r]ationalism and positivism, doctrine and dogma replaced the humanistic immersion in the legal text”.¹¹ Consequently, jurisprudence was transformed into an obsession with the question “what is law?” and with accounting for the history of the meanings of the word “law” – which for Douzinas and Gearey reflects an anxiety to delimit or fix the proper domain of jurisprudence.¹²

The moral poverty of jurisprudence on the other hand was facilitated in large part by legal positivism. Legal positivism grounds law’s legitimacy in formal reason and procedure and completely excluded ethical and social considerations. A signal feature of legal positivism is the epistemological recasting of law as a science or as a ‘pure’ discipline as well the construction of a discursive opposition between the legal and the non-legal. In the process, moral values and principles are minimised, and the abstract is placed above the substantive.¹³

Indeed, the rule of law is presented as the law of rules, the main achievement of which is to rid the law of ethical considerations.¹⁴

¹⁰ Douzinas and Gearey *Critical Jurisprudence* 4.

¹¹ Douzinas and Gearey *Critical Jurisprudence* 4.

¹² Douzinas and Gearey *Critical Jurisprudence* 5.

¹³ Douzinas and Gearey *Critical Jurisprudence* 6.

¹⁴ Douzinas and Gearey *Critical Jurisprudence* 7.

Douzinas and Gearey bring to light the political consequences of this double impoverishment of jurisprudence, of this reduction of law into a technical set of rules and the attempt to isolate law from morality. These include the technicalisation of social conflict by private law rules, the promotion of neutral, non-ideological problem-solving in the public law, the denial of law's racism and sexism and its disconnection from the social reality.¹⁵

Douzinas and Gearey call for a return to a general jurisprudence that would respond to this "gradual diminution of scope and the replacement of thinking about the law of law".¹⁶ They relate the notion of general jurisprudence to critique and rename critical jurisprudence as a "political philosophy of justice". As critique, general jurisprudence operates by exposing how the values of any given legal system represents the dominant ideology of the powerful and unearthing the violent and coercive content of legal rules. This is because "power relations and practices proliferate deeply into the social, often taking a ... legal form".¹⁷ Unlike approaches grounded in restricted jurisprudence, a general jurisprudence would directly confront the problem of social and political power and thereby upend the process by which law became rooted in a "metaphysics of truth" rather than in the "politics and ethics of justice".¹⁸

Douzinas and Gearey make much of the fact that the task of jurisprudence is to uncover "the truth" about law – not only in the traditional sense of law's validity, sovereignty, and "rights answers" but in the critical sense of law's role in the process

¹⁵ Douzinas and Gearey *Critical Jurisprudence* 7.

¹⁶ Douzinas and Gearey *Critical Jurisprudence* 5.

¹⁷ Douzinas and Gearey *Critical Jurisprudence* 9.

¹⁸ Douzinas and Gearey *Critical Jurisprudence* 8-9.

of social reproduction.¹⁹ In the same vein, general jurisprudence marks a return to the classical concerns of legal philosophy, specifically as they pertain to the organisation of society and the constitution of the social bond. It adopts a wider concept of legality beyond state law and broadens the scope of what is relevant *in* and *as* jurisprudential inquiry, concerning itself not only with the posited law but also the *law of law*.²⁰

A general jurisprudence is thus a jurisprudence that is, to use Judith Butler's phrase, "against proper objects".²¹ To be against proper objects in this case is to refuse the methodological distinction between law and its others which works to delineate a proper domain for jurisprudence – making "arbitrary territorial claims" as to what is properly legal and jurisprudential and *what is not*. From a critical perspective, the problem with the formalist project of formulating a "proper" province of jurisprudence (Austin)²² or a "pure" theory of law (Kelsen)²³ is that it shields the law and jurisprudence from internal fractures and indeterminacies and forecloses a contestation over their boundaries and borders. This has the effect of minimising and leaving out terms, categories, questions and perspectives coming from other political locations, disciplines and historical experiences. For our purposes, the questions that Biko repeatedly poses concerning (1) the ethical and political quality of black life in a society, country and world founded on conquest and racial domination; (2) the interplay between the psychological devastation of racism and the material suffering it engenders; (3) the demands and meaning of freedom,

¹⁹ Douzinas and Gearey *Critical Jurisprudence* 5; 9.

²⁰ Douzinas and Gearey *Critical Jurisprudence* 10.

²¹ J Butler "Against Proper Objects" (1994) 6 *differences: A Journal of Feminist Cultural Studies* 1.

²² J Austin *The Province of Jurisprudence Determined* (1832).

²³ H Kelsen (trans M Knight) *Pure Theory of Law* (1967)

humanity and social co-existence beyond the deathly markers of race, would be relegated to the domain of the non-legal, the political and historical, even as the social and symbolic conditions they address are contoured and shaped by legal practices and ideologies. Without reclaiming a general jurisprudence, Biko's questions would go unanswered by lawyers, judges, activists, scholars and citizens. When Douzinas and Gearey describe the task of critical / general jurisprudence as the deconstruction of the "*logonomocentrism*" of law, they echo Butler's argument *against proper objects* and her insistence on "the kind of thinking that calls into question the settled grounds of analysis".²⁴ In calling into question the settled grounds of law, a general jurisprudence extends its analytic reach into "legal aspects of the economic, political, emotional and physical mode of production and reproduction".²⁵

Further, according to Douzinas and Gearey, the questions that classical philosophy traditionally examined under the banner of law and justice stand central to a general jurisprudence.²⁶ They note however that although general jurisprudence takes its bearing from classical philosophers from Plato and Aristotle, to Thomas Hobbes, Kant, Hume, Hegel, Marx, and Nietzsche, its archive is now even wider and encompasses figures such as Freud, Lacan, Foucault and Derrida and their various concerns with desire and the unconscious, with the workings of disciplinary power and the denaturalisation of historical truth through genealogy as well as with undermining the Western metaphysics embedded in legal and linguistic categories. A major limitation in Douzinas and Gearey's account of general jurisprudence is their

²⁴ Butler (1994) *differences* 6.

²⁵ Douzinas and Gearey *Critical Jurisprudence* 10.

²⁶ Douzinas and Gearey *Critical Jurisprudence* 10.

omission of non-Western traditions of philosophy – in particular African philosophy of law – which presume the interconnectedness between law, justice and the social bond and always already treat law and morality as inseparable.²⁷ It appears that both their location (London) and their theoretical apparatus (Euro-British critical legal studies) are grounded in a white male and Western historical and cultural frame that predictably maintains an imperial distance and indifference to other places, and operates through a closed, self-referential Western outlook that is inclined to universalise its own self-image. Indeed the Eurocentrism and whiteness of critical legal theory in general exercises a profound restriction on its imagination. We shall – in the spirit of “provincializing Europe”²⁸ – read Douzinas and Gearey against themselves in order to wrest from them the subversive power and critical edge of general jurisprudence.

A general jurisprudence brings back to the centre the aesthetic, ethical and material aspects of legality. It reminds us that poets and artists have legislated, while philosophers and lawyers operate an aesthetics of life in order to bring together the main ingredients of life, the biological, the social, the unconscious. General jurisprudence includes the political economy of law; the legal constructions of subjectivity; and the ways in which gender, race or sexuality create forms of identity, both disciplining bodies and offering sites of resistance.²⁹

In yet other terms we could say that a general jurisprudence is defined by its attentiveness to the “ontology of social life”.³⁰ It follows a contextual understanding of law and “reads legal texts and legal history as aspects of social being in which

²⁷ See J Murungi *An Introduction to African Legal Philosophy* (2013).

²⁸ D Chakrabarty *Provincializing Europe: Postcolonial Thought and Historical Difference* (2000).

²⁹ C Douzinas “A Short History of the British Critical Legal Conference or, the Responsibility of the Critic” (2014) 25 *Law & Critique* 189.

³⁰ Douzinas and Gearey *Critical Jurisprudence* 11.

other expressions of sociality, like politics, economics or ethics, will be reflected".³¹ For our purposes this means that to the extent that race is definitive of the South African social landscape, race and racism, racial identity and consciousness and liberation from racism are undoubtedly categories of general jurisprudence. The lived experience of blackness and the historical struggles against racial violence and injustice are also central to a general jurisprudence. Because legality also operates at the level of social being and social existence, "a general jurisprudence examines ways in which subjectivity is created as a site of freedom and subjection".³²

In sum then, a general in contrast to a restricted jurisprudence reads legal texts "not only for their normative coherence but also for their omissions, repressions and distortions, for signs of the oppressive and symptoms of the traumas created" by law.³³ But it goes beyond the texts and into the world as well to explore how law is organised at the textual and institutional level, as a "pillar of the symbolic order" and as foundational to the "imaginary constitution of self and society".³⁴

*

This study is animated throughout by Douzinas and Gearey's call for a reconnection to a general jurisprudence and further aims to situate Biko within this general jurisprudence. Indeed, to the extent that Biko presents race – "the totality of white power" to be specific – as the central component of the social in apartheid South Africa and to the extent that he recognises law's role in rationalising a

³¹ Douzinas and Gearey *Critical Jurisprudence* 17.

³² Douzinas and Gearey *Critical Jurisprudence* 10.

³³ Douzinas and Gearey *Critical Jurisprudence* 17.

³⁴ Douzinas and Gearey *Critical Jurisprudence* 17.

racialised social order, his work could itself be regarded as resembling the classical jurisprudential concern with the relation between law and the social. This is most evident when Biko expounds on law's role as part of the broader institutional machinery that legitimates and normalises the racist social and economic order of colonial-apartheid and in his account of how this system not only materially restricts, exploits and deprives Blacks but also generates an alienated subjectivity and damaged psyche.³⁵ In the process, Biko also traces the complex ways in which this system of oppression and this process of subjection begins from birth and childhood and continues well into adulthood and ultimately, death. This, Biko indicates, is how the system of apartheid, and its legal and political institutions, worked to make racism a way of public and private life in South Africa.³⁶

In deploying an analysis that merges the social, historical and psychological and the legal, and specifically in offering a stinging condemnation of apartheid which inescapably also probes law's conscience by enquiring into the conditions of injustice, unfreedom and inequality that characterise black life in South Africa, Biko engages in precisely the general jurisprudence that Douzinas and Gearey argue for. But Biko also prompts an extension of the conceptual itinerary of general jurisprudence to encompass as well a reading of histories of resistance against colonial and racist subjugation as expressions of an alternative jurisprudence. A general jurisprudence in our context would proceed from a critique of law itself as an artefact of colonial power and thus would have to incorporate a strong cultural and epistemic resistance against the undue hegemony of Euro-Western paradigms. From

³⁵ Biko *I Write What I Like* 110-111.

³⁶ Biko *I Write What I Like* 97.

this critique, questions relating to the postcolonial and neo-colonial condition and the failures of liberal democracy to redress the violent contradictions of settler-colonialism would have to be posed alongside philosophical, political and literary reflections on anti-blackness and racial suffering.

5.3 “A subjectivity against the law”: Biko in the courtroom

It makes sense to begin this account of Black Consciousness as a “subjectivity against the law” with Biko’s own appearance in May 1976 before the courts of the apartheid regime in the longest and most historic political trial of the 1970s, the BPC/SASO Trial. As we will see in the case of Biko below, “a subjectivity against the law” is one that unmasks law and reveals it to be axiomatically implicated in injustice and oppression. It decentres legal authorisations and logics, performs a critique of law from the racial underside of modernity and introduces a notion of justice rooted in the experience of subjugated bodies, traditions and perspectives. In such instances, law as a system and an episteme is forced to encounter both its violent origins as well as its radical limits. Biko instigates such an encounter through his maintenance of a black radical subjectivity in the apartheid courtroom – an act that is instructive, among other things, for undermining the centrality of the juridical sphere as an institution of social, political and moral ordering and for thinking outside of its categories and representations.

In the BPC/SASO Trial, nine student leaders (not including Biko) of the Black People’s Convention (BPC) and the South African Students’ Organisation (SASO) were charged with violations of the infamous apartheid-era Terrorism Act 83 of 1967 after organising a rally to celebrate the independence of Mozambique and the

installation of FRELIMO as the new government in power. Despite the planned rally being banned by apartheid authorities, the gathering went ahead and led to arrests, police raids and the placing of the student leaders in detention. The defendants were charged with endangering the maintenance of law and order, conspiring to transform the state by unconstitutional, revolutionary or violent means, fostering feelings of racial hatred towards whites and publishing material which discouraged or prevented foreign investment in South Africa.³⁷

As Michael Lobban reports, the trial reflected the State's "concern over the growth of Black Consciousness" which it saw as "a serious and potentially revolutionary threat".³⁸ As he explains further, "[i]n its espousal of an alternative vision of society, the authorities saw [in Black Consciousness] a concrete threat to the status quo" and drew the conclusion that "the line between challenging the ideologies of the State and challenging the state structures themselves in a physical way was a thin one".³⁹ Thus, a remarkable feature of the political trials of 1970s which Lobban dubs "the Black Consciousness era" was that it was philosophies, ideas and ideologies themselves that would be targeted rather than actual actions *per se*.⁴⁰ The legal onslaught against the Black Consciousness Movement (BCM) involved the use of the law, the security apparatus (police and intelligence) as well as the courts to respond to *intellectual* challenges to apartheid racial ideology.

³⁷ R Christenson *Political Trials in History: From Antiquity to the Present* (1991) 85; S Biko (M Arnold, ed) *Black Consciousness in South Africa* (1978) xiii.

³⁸ M Lobban *White Man's Justice: South African Political Trials in the Black Consciousness Era* (1996) 22.

³⁹ Lobban *White Man's Justice* 22.

⁴⁰ Lobban *White Man's Justice* 251.

The trial therefore set the stage for the historical antagonism between Black Consciousness and apartheid ideology to play out and remain etched in South African legal memory and history. Because the Black Consciousness insurgents viewed the courts and the legal system as “part of the apparatus of oppression” and as instruments of white supremacy,⁴¹ they were under no illusions: not only were courts structurally incapable of producing fair and neutral outcomes, they played an active role in the political repression of dissent and anti-apartheid activism.⁴² Thus, they elected to subvert the logic of the court and convert it into a space to make “their own political points”.⁴³ Records from the trial indicate that it got off to a dramatic start, as the defendants entered the courtroom chanting liberation songs and raising their fists in the Black Power Salute. “Amandla!” (“(The) Power”) they exclaimed, to which the Black spectators in the courtroom responded, “Ngawethu!” (“Is Ours!”).⁴⁴

When the trial began, one of the defendants Saths Copper refused to plead, whereafter the judge refused to allow him to read a statement from the dock and entered a plea of not guilty on his behalf.⁴⁵ Cooper later followed up his refusal to plead with the following explanatory statement: “We the innocent are being arraigned before the court for the crimes perpetrated by the white superstructure.”⁴⁶ The refusal to plead, the re-description of the accused as “the innocent” and the

⁴¹ Lobban *White Man's Justice* 10-11.

⁴² Lobban *White Man's Justice* 10-11.

⁴³ Lobban *White Man's Justice* 11.

⁴⁴ Study Commission on US Policy towards Southern Africa *South Africa - Time is Running Out: The Report of the Study Commission* (1981) 180.

⁴⁵ Christenson *Political Trials in History* 84.

⁴⁶ Lobban *White Man's Justice* 11.

insistence on naming the “white superstructure” as the true culprit all register the BCM activists’ rejection of

the terms of jurisprudential engagement by refusing the hermeneutics of individual guilt or innocence ... In short they sought to short-circuit the courts disciplinary logic by exploiting their trial ... as an opportunity to shift the terms of adjudication from moral questions of guilt and innocence to ethical questions of state power and political legitimacy.⁴⁷

Biko enters the scene here as a witness for the defence and would spend four and a half days under examination and cross-examination.⁴⁸ (He himself was never a defendant in a major political trial though he was tried four times, twice for defying his banning order in 1974 and 1976, once for failing to observe a stop sign also in 1976 and once more in 1977 for “obstructing justice” for coaching school pupils to give false evidence in their trial for setting a school on fire.)⁴⁹ What would unfold in Biko’s testimony would be a definitive elaboration of the philosophy and political praxis of Black Consciousness. Throughout his testimony, Biko maintains a relentlessly *political* tenor, substituting the legal truths of apartheid law with the political and existential truths of black life under conditions of racial oppression. It appeared clear to Biko and his BCM comrades that the nature of this trial was “political rather than juridical”.⁵⁰

Biko’s testimony reads as a wide-ranging exploration of a number of topics, including African history, global politics, economics, and social psychology. Biko’s most transgressive but also theoretically innovative moments in the trial can be

⁴⁷ F Wilderson “The Vengeance of Vertigo: Aphasia and Abjection in the Political Trials of Black Insurgents” (2011) 5 *InTensions* 7.

⁴⁸ Biko *Black Consciousness in South Africa* xiv.

⁴⁹ Lobban *White Man’s Justice* 13.

⁵⁰ Wilderson (2011) *InTensions* 6.

found in the way in which he repeatedly challenges from the inside, the very configurations of power that the courtroom in his time (and ours) symbolised, namely the law and whiteness. His transgressive sensibilities are reflected in his own personal irreverence for the authority of the courts. Recall for example his exchange with Judge Boshoff on the question of the precise meaning of the term "Black" in Black Consciousness philosophy. After Biko offers a comprehensive explanation of the negative symbolic connotations attached to "blackness" and the choice of the BCM, following the Negritude thinkers, to affirm and signify blackness as a political identity and mark of pride and resistance, the judge sarcastically asks him: "But now why do you refer to you people as blacks? Why not brown people? I mean you people are more brown than black".⁵¹ Biko, seemingly unfazed by the ignorance and racism in that question, calmly replies: "In the same way I think white people are more pink and yellow than pale and white".⁵²

Biko's counter-hegemonic legal consciousness and his insistence on a political rather than legal orientation to law and the courtroom space can be seen in his description of black existence under colonial-apartheid as unlivable, precarious and dehumanising. He speaks for example about the fact that from childhood to adulthood, Blacks are plagued with the feeling "that there is something incomplete in [their] humanity, and that completeness goes with whiteness".⁵³ Biko relates this to the fact that Black people are "oppressed by an external world through an institutionalised machinery, through laws that restrict[s] [them] from doing certain things, through heavy work conditions, through poor pay, through very difficult living

⁵¹ Biko *I Write What I Like* 115.

⁵² Biko *I Write What I Like* 115.

⁵³ Biko *Black Consciousness in South Africa* 19.

conditions, through poor education..."⁵⁴ When asked during the trial to explain what he meant when he wrote that "[t]ownship life alone makes it a miracle for anyone to live up to adulthood", Biko elaborates that "this refers to the degree of violence that one gets in townships, which tends to introduce a measure of uncertainty about what tomorrow will bring".⁵⁵

Biko's invocation of black lived experience and his identification of law's instrumental role in fortifying the infrastructure of colonial-apartheid constitutes what Awol Allo, in his study of courtrooms as spaces of resistance, has theorised as an "act of epistemic resistance" – a reopening of "epistemic negotiations".⁵⁶ In Allo's analysis, epistemic resistance in the courtroom takes place when the political insurgent effects a performative resignification of legal discourse into political

⁵⁴ Biko *Black Consciousness in South Africa* 19.

⁵⁵ Biko *Black Consciousness in South Africa* 25.

⁵⁶ A Allo "The Courtroom as a Site of Epistemic Resistance: Mandela at Rivonia" (2016) 12 *Law, Culture and the Humanities* 1. It is noteworthy that Allo relies on Nelson Mandela's famous speech at the Rivonia Trial as an exemplar of his theorisation of epistemic resistance in the courtroom. Yet there appears to be speculation that much of the speech may have been written or considerably co-authored and edited by Mandela's defence attorney and Afrikaner communist Bram Fischer. According to the journalist RW Johnson in his review of Joel Joffe's book on the Trial, not only is Fischer "credited by many as having written much of Mandela's speech", it was quite common for "whites to 'ghost' speeches for blacks in that era...". As an example, he cites the better-known fact that it was also mainly white anti-apartheid activists such as Alan Lipman, Ruth First and Lionel Bernstein who drafted and formulated the wording in the final version of the Freedom Charter – a document which presumably captured the political aspirations of oppressed Black people for a free and democratic society. For obvious reasons, the dependence on whites of any political affiliation to formulate and express black political statements and speeches was simply untenable from a Black Consciousness perspective, since this would be a continuation of the white trusteeship and "ventriloquism" which the BCM so clearly repudiated. It was a central part of the Black Consciousness critique of liberal non-racialism and multiracial collaboration to refuse to submit black political struggles to the political and intellectual leadership or influence of whites. If there is any truth to this historical gossip, it certainly raises questions concerning Mandela's testimony as an authentic act of political voice and subaltern speech reflecting what Allo (at 1) calls "the lived experiences and memories of Africans", since the words themselves emerged instead from the imagination, experience and thought of Afrikaans-speaking and Jewish whites who, it could not be denied, were beneficiaries of precisely the system that the liberation movement sought to resist and overthrow. Johnson's account is however disputed by two members of Mandela's legal defense team in that trial, Arthur Chaskalson and George Bizos. Compare RW Johnson "Rivonia Days" (2007) 19 *London R of Books* 21 – 23 and H Kaplan "Apartheid on Trial: Mandela's Rivonia Speech from the Dock, Half a Century Later" (2014) 78 *Social Education* 66.

discourse by producing a counter-hegemonic narrative that overturns the moral economy of truth, meaning, representation and interpretation being postulated by the juridical powers of colonial-apartheid.⁵⁷ The insertion of politics and lived experience into the grammar of the courtroom space gestures towards such an epistemic resistance in that it expands the terms and questions applicable in any given legal dispute, refusing the State's right to unilaterally convene the terms of the dispute and determine the questions at issue.

When presented with statements and policy documents of SASO and the BPC, some written by him, which could serve the prosecution's case, Biko does not rely on legal technicalities. When asked to explain a phrase in one of the SASO resolution documents in which whites are depicted as "part of the problem", Biko fearlessly restates the position with greater clarity:

Again I think this speaks for itself. Generally speaking it is White society who vote at election time, it is they who return a government into power – be it Nationalists ... the United Party, the Progressive Party. And it is that government which maintains legal provisions that creates problems for Black people – problems of oppression, problems of poverty, problems of deprivation, problems of self-alienation [...] It is White society on the whole. Some may vote one way, some may vote another, but all of them belong to an electoral college, if one may speak in those terms, of the whole society, which is jointly responsible for the government that does all these things, or that makes these provisions applying to Black people. And in this sense therefore they lose the natural right to speak as co-planners with us in our way of determining our future. This is what the resolution is saying. They define themselves in other words as the enemy.⁵⁸

In this stinging critique of "white society", Biko calls attention to the utter moral corruption of white minority rule and its paradoxical alignment of law and order with

⁵⁷ Allo (2016) *Law, Culture and the Humanities* 1.

⁵⁸ Biko *Black Consciousness in South Africa* 41 – 42.

violence and racism. He underscores as well the racial terror and conditions of subjugation and suffering that permeate black life in South Africa. Insofar as these conditions are sustained by white power and privilege, Biko asserts the absolute non-symmetry and non-equivalence between the brutal violence of the regime and the insurrectionary agitations of the oppressed.⁵⁹ This is most clearly highlighted in his repudiation of the charge of terrorism against his comrades:

I was referring to the meaning of the word "terrorism". I was saying that in the minds of Blacks, and people like myself, what happens to Black society at the receiving end of the system of oppression ... constitutes much more definitive terrorism than what these men here are accused of.⁶⁰

In these passages, Biko calls into question the very normative legitimacy and authority of the juridico-political order under which his comrades are being tried. His act of epistemic resistance takes the form of "an ethical refusal of the legal system itself, as opposed to a moral objection to legal excesses".⁶¹ His entire testimony reads as a stinging condemnation of "the totality of white power" and of the legal and political institutions that are complicit in its perpetuation. To use Allo's words, we might say that Biko's testimony represents "counter-perspectives that fights (*sic*) off official history and invalidates normative attitudes and expectations imposed by dominant ideologies...".⁶² These acts of epistemic and political resistance that we witness in Biko's testimony involve more than a mere disruption of decorum or circumvention of legal logics. They are animated by more than a desire to heckle, mock or annoy power, and they indicate more than Biko's predilection for mischief

⁵⁹ Allo (2016) *Law, Culture and the Humanities* 10.

⁶⁰ Biko *Black Consciousness in South Africa* 256.

⁶¹ Wilderson (2011) *InTensions* 8.

⁶² Allo (2016) *Law, Culture and the Humanities* 6.

and irreverence. Instead, they reveal deeply sophisticated conceptual insights about law and power. Rather than being a mere theatrical ploy, Biko's testimony issues instead from a searing challenge to law's epistemological and moral foundations.

This challenge takes the form of what Stewart Motha and Honni van Rijswyk have named a "counter-archival sense".⁶³ If the archive designates the "site from which the law is drawn, and manifests the space of law's authority", the counter-archive marks both its limit and its refusal.⁶⁴ To refuse law's archive, Motha and Van Rijswyk appear to suggest, is to subvert law's claims to authority and singularity by confronting it with alternative authorities and sovereignties, histories and experiences. They propose to engage with the notion of the archive and the counter-archive as a way of approaching "law's failures in judging and responding to historical and contemporary violence".⁶⁵ If, under formal apartheid, Biko's counter-archival sense emerged most dramatically in his decentering of the juridical logic that legitimates the racial terror of apartheid violence while casting resistance to white domination as "terrorism", what could be the form of its post-1994 iteration? With particular attention to transitional justice and postcolonialism, Motha and Van Rijswyk direct us to a resistance of the temporal boundaries drawn by the law between its sovereign present and a violent and oppressive past.⁶⁶ As an instance of "archival violence", the reconstitution of law's archive in the wake of conflict, violence and oppression and the codification of official histories and narrations raises

⁶³ S Motha and H van Rijswyk "Introduction: A Counter-archival Sense" in S Motha and H van Rijswyk (eds) *Law, Memory, Violence: Uncovering the Counter-archive* (2016) 1.

⁶⁴ Motha and van Rijswyk "Introduction: A Counter-archival Sense" in Motha and van Rijswyk (eds) *Law, Memory, Violence* 1-2.

⁶⁵ Motha and van Rijswyk "Introduction: A Counter-archival Sense" in Motha and van Rijswyk (eds) *Law, Memory, Violence* 1.

⁶⁶ Motha and van Rijswyk "Introduction: A Counter-archival Sense" in Motha and van Rijswyk (eds) *Law, Memory, Violence* 1.

problems “of time, audience, ways of seeing, hearing and listening”.⁶⁷ Attentiveness to what has been forgotten and excluded – in other words, discontinuity – in the consolidation of post-conflict settlements and transitional justice processes stands central to a counter-archival sense of the present. By treating our time as Biko’s time, that is, by linking the “past” to the present, we may introduce a narrative discontinuity in law’s representations and categories, which include its archival and memorial practices, and thereby highlight the unfinished business of South African law and constitutionalism.

A counter-archival sense fosters new proximities to violence and its aftermath – attentive to the space of being in memory and proximity to violence.⁶⁸

Although the BPC/SASO Trial would ultimately be Biko’s last public appearance before his untimely passing,⁶⁹ it would not be the last time he troubles the law and questions the legitimacy of its authorisations. The name and memory of Biko, last seen in the legal archive in the inquest into his death, would twice return to the highest court of post-1994 South Africa as a reminder of what remains unfinished and unfree in the “new” constitutional dispensation – a reminder that prompts an endless probing of the silences and crises embedded within the new legal and political order. In both of the cases I read below, my aim is explicitly not to propose an alternative outcome nor to place on courts the responsibility to address the hauntings of the past. Rather I aim to highlight the tension between the limited archive of law and constitutionalism reflected in the reasoning deployed in these

⁶⁷ Motha and van Rijswyk “Introduction: A Counter-archival Sense” in Motha and van Rijswyk (eds) *Law, Memory, Violence* 8.

⁶⁸ Motha and van Rijswyk “Introduction: A Counter-archival Sense” in Motha and van Rijswyk (eds) *Law, Memory, Violence* 14.

⁶⁹ Biko *Black Consciousness in South Africa* xiii.

chosen judgements and the counter-archive exemplified in the memory and critical race thinking of Biko. The discussion below should therefore be read in conjunction with the concerns expressed in the previous chapter (section 4.5) concerning the limits (and impossibilities) of law, rights and courts as sites of political justice. In *AZAPO*, law's archive of violence encounters alternative memories/forms of remembering as well as alternative claims to justice and authority while in *City of Tshwane*, the location of "post"-apartheid law's archive within constitutionalism is unsettled by the possibility of irresolution and fragility embodied in the afterlife of colonial-apartheid.

AZAPO: The Haunting-In-Justice

Justification of impunity, one should be reminded, is what the *AZAPO* case was all about.⁷⁰

In *AZAPO*,⁷¹ Biko's widow, Nonstikelelo, and the Azanian People's Organisation (AZAPO) (a Black Consciousness organisation formed after Biko's passing) together with the families of anti-apartheid doctor Fabian Ribeiro and struggle lawyers Victoria and Griffiths Mxenge challenged the constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995. This section permits the Truth and Reconciliation Commission's (TRC) Committee on Amnesty to grant amnesty to perpetrators of gross human rights violations. Once granted, such amnesty extinguished the criminal and civil liability of the perpetrator as well as that of the state – effectively leaving the victims of these violations without legal

⁷⁰ L du Plessis "AZAPO: Monument, Memorial ... or Mistake?" in W Le Roux and K van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years After AZAPO v President of South Africa* (2007) 52.

⁷¹ *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 672.

redress.⁷² The applicants argued that the amnesty provision together with its wide scope of exemption constituted an unjustifiable infringement of the constitutional right of access to courts. The larger point of contestation however was that the Act's separation of the imperative of healing and reconciliation from the exigency of natural and historical justice was morally and politically dubious.

It was not co-incidental that the challenge itself emerged from the memory of Biko and from the ideological perspective of Black Consciousness as they both harbour philosophical instincts that run counter to the discursive and historical terms that gave rise to the negotiated settlement in the first place. Although litigating within the terms of "post"-apartheid constitutionalism and rights discourse, the applicants were raising a much deeper crisis at the heart of the new legal order, namely that the process of transitional justice embarked upon in South Africa after the formal abolition of apartheid primarily served elite political and economic powers and firmly secured the interests of beneficiaries and agents of colonial-apartheid. This was largely a consequence of the reductive conception of history – the misdiagnosis of the fundamental injustice in South Africa – relied upon in framing the legal and political transformation of South Africa in the early 1990s. The applicants' case underscored the problem that the institutional hydraulics of nation-building and the privileging of stability and vested interests that was at heart of the making of the post-1994 South African state and society risked foreclosing, for the nation, a deep reckoning with the past that could enable the transformation of subject positions and social relations. By placing "compromise" at the heart of social,

⁷² W Le Roux and K van Marle "The Unmentioned Names that Remain" in Le Roux and Van Marle (eds) *Law, Memory and the Legacy of Apartheid* v.

legal and political change, the advent of constitutional democracy would paradoxically mutate into a stubborn and frustrating “changelessness” since the fundamentals – and thus the fractures – of colonial-apartheid would be left intact. Thus, *AZAPO* must be read principally as concerning the archival violence that is foundational to the reconstitution of post-conflict societies and the making of new legal orders.

The Constitutional Court ultimately upheld the constitutionality of the impugned sections of the Promotion of National Unity and Reconciliation Act. It could not have been otherwise given that both the Constitutional Court and the Truth and Reconciliation Commission originate from the same source, as products of a faulty negotiated political settlement whose very *raison d'être* was the institutional and public legitimation of the then still “new”, “post”-apartheid constitutional dispensation. But it is in the reasoning of the judgement’s author Mohamed DP that we shall identify a tension with Biko’s memory.

Mohamed DP, writing for a unanimous court, begins the judgement with a rehearsal of South African history, noting that “[f]or decades, South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority that sought to resist that domination”.⁷³ This first passage in the judgement is remarkable for its puzzling double-reduction of the historical record of South Africa’s racial antagonism – first, to a period of decades rather than centuries and then second, to white minority control of State power rather than complete settler-colonial usurpation of

⁷³ *AZAPO v President of the Republic of South Africa* para 1.

sovereign and territorial control over South Africa, stretching from land, economy and the legal system to culture, knowledge and language. The problem continues in the next sentence when “fundamental human rights” are represented by the judge as *the* “major casualty of this conflict”.⁷⁴ Already in the first paragraph of the judgement, an entirely new mythology of South African political history has been reconstituted in the legal archive, deftly erasing the problem of colonial conquest and land dispossession and converting struggles for self-determination and national liberation into primarily struggles for human rights. Though it is the discursive and ideological work that the judgement performs and not necessarily its historical precision that is of concern here, the unreflective, banal and at times plainly inaccurate treatment of history in this case certainly suggests that it is authority and not truth that animates and structures law’s archive.

In the judge’s view, the “negotiations” which led to the adoption of the interim Constitution Act 200 of 1993 “mercifully rescued” the country from an impending disaster of civil strife. He writes that the installation of the post-1994 constitutional-democratic order “could not be achieved without a firm and generous commitment to reconciliation and national unity”.⁷⁵ In what reads as an ominous affirmation, the judge elaborates:

It was realised that much of the unjust consequences of the past could not ever be fully reversed. *It might be necessary in crucial areas to close the book on the past.*⁷⁶

These pronouncements so early on in the judgement are telling for their open admission that the construction of a new South Africa mandates and depends upon

⁷⁴ *AZAPO v President of the Republic of South Africa* para 1.

⁷⁵ *AZAPO v President of the Republic of South Africa* para 2.

⁷⁶ *AZAPO v President of the Republic of South Africa* para 2.

an erasure of “crucial” aspects of the historical injustice of European conquest and racial subjugation. Since it can never be fully reversed, the weight and degree of what was done – and is being done – to Blacks *must* be forgotten, the book on that past *must* be closed. The judge’s affirmation of the epistemic and symbolic violence that is required to bring about constitutional democracy, and the effective silencing of the possibility of complete justice, evokes Robert Cover’s insights on the relationship between violence and legal interpretation:

Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.⁷⁷

Mohamed DP finds authority for his interpretive moves in the Epilogue of the interim Constitution which authorises the promulgation of the Promotion of National Unity and Reconciliation Act which is the object of the *AZAPO* case.⁷⁸ The Act is the empowering legislation through which the TRC was established for the purpose of promoting national unity and reconciliation by among other things, (1) fully establishing “as complete a picture as possible of the causes, nature and extent of the gross violations of human rights committed during the period 1 March 1960 to 10 May 1994 and (2) facilitating the granting of amnesty to perpetrators who make a full disclosure of all the relevant facts relating to acts of gross human rights violation (such as murder, torture, maiming) associated with a political objective. To fulfil these and other objectives of the TRC, three committees were created: one on Human Rights Violation, another on Reparation and Rehabilitation and a third on

⁷⁷ R Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601.

⁷⁸ *AZAPO v President of the Republic of South Africa* para 3-4.

Amnesty. It was to the work of this third committee that the legal and political challenge in *AZAPO* was directed.

The Amnesty Committee had elaborate powers to consider applications for amnesty. It could grant amnesty for any act, omission or offence related to the application on the condition that the applicant concerned makes a full disclosure of all the relevant facts and shows that the act or omission took place in the course of the "conflicts of the past".⁷⁹ The effect of amnesty was absolute: no person granted amnesty could thereafter be held criminally or civilly liable for the act or omission in question and moreover, no organ of State could be held liable nor could anybody be held vicariously liable in respect of such acts or omissions. Amnesty of this kind enforces the expiry of a victim's right to demand justice for the brutal and inhumane killing, torture, abduction, maiming and abuse of their loved ones.

It imposes a disappearance of the injustice from the sphere of legal justiciability and renders it unspeakable as a crime. It was this untenable consequence of amnesty that led the applicants to argue for the right to insist on the proper prosecution and punishment of perpetrators of racist violence and for the compensation of victims. Hence their argument that the amnesty provision in the Act conflicts with the constitutional right to have justiciable disputes settled by a court of law or an independent and impartial forum or tribunal. Politically, the applicants' claim signifies a refusal to allow the "post"-apartheid state to unilaterally define how a good victim behaves, to adjudicate which truths must be privileged and to prescribe the proper mode of healing and unity to be followed. In their challenge to

⁷⁹ *AZAPO v President of the Republic of South Africa* para 5.

the amnesty provision, they urge a confrontation with the memory of cruelty and terror through a demand for concrete justice, exposing how the appeal in the Act to the indirect, broad and abstract political goal of reconciliation and national unity was skewed in favour of perpetrators and beneficiaries of apartheid, rather than victims, survivors and anti-apartheid dissidents.⁸⁰

The judge has little difficulty in following this logic and so quickly accepts that the amnesty provision does indeed constitute a limitation of the right of access to courts. Indeed, Mohamed DP writes in much stronger terms that “an amnesty to the wrongdoer effectively *obliterates* [the rights of aggrieved parties to seek redress in the courts of law]”.⁸¹ There is nothing to doubt the judge’s own personal empathy and understanding of why the applicants would insist that the agents of what Jacques Derrida once called “the ultimate racism in the world”⁸² should be prosecuted. However, the present circumstances, Mohamed DP reasons, required a suspension of this empathy and understanding and an appreciation of the historical circumstances justifying the granting of amnesty. As he explains these circumstances: acts of brutality, violence and torture under apartheid took place in an age of authoritarianism and secrecy that was not open to public investigation and scrutiny. Most of what transpired during those dark days cannot be objectively demonstrated and the records and evidence are not easily accessible.

The Act aims to remedy this fact of the elusiveness of the truth about our apartheid history. According to Mohamed DP, through the TRC victims will be able

⁸⁰ N Mogale “Ten Years of Democracy in South Africa: Revising the *AZAPO* Decision” in Le Roux and Van Marle (eds) *Law, Memory and the Legacy of Apartheid* 128.

⁸¹ *AZAPO v President of the Republic of South Africa* para 9.

⁸² J Derrida “Racism’s Last Word” (1985) 12 *Critical Inquiry* 291.

to “unburden their grief publicly”, “receive recognition of a new nation that they were wronged” and they will also discover the truth about what happened to their loved ones.⁸³ This truth can only surface if perpetrators are incentivised to disclose the whole truth. The judge points out that if the alternative route were to be followed, that is, of not granting amnesty and instead prosecuting and suing perpetrators of apartheid-era human rights violations, there would likely be insufficient evidence in most of the cases for successful prosecution. In such a case, the applicants would also find no resolution to their pain.⁸⁴ It does not occur to the judge in this line of reasoning that as active political subjects in their own right, the applicants may have preferred that choice or consideration to be a matter of democratic public deliberation rather than to have it imposed on them from the top-down.

But the crux of Mohamed DP’s judgement is that the creation of a mechanism to grant amnesty is inherent to the terms of the negotiated settlement in South Africa which require the consent of not only those who were victimised and oppressed “but also those threatened by the transition to a democratic society based on freedom and society”.⁸⁵ He continues:

If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.⁸⁶

⁸³ *AZAPO v President of the Republic of South Africa* para 17.

⁸⁴ *AZAPO v President of the Republic of South Africa* para 18.

⁸⁵ *AZAPO v President of the Republic of South Africa* para 19.

⁸⁶ *AZAPO v President of the Republic of South Africa* para 19.

The rhetorical strategies employed in the judgement most acutely present in the above passage function to rehearse the false conflation of the demand for justice with a desire for vengeance and retaliation as well as to advance a philosophically dubious reliance on the indigenous African principle of ubuntu.

We should remember that by posing the aspiration for a "true humanity" against the racialism of colonial-apartheid, Biko points not only to the devastation wreaked on the lives of Blacks but also to the concomitant brokenness in the humanity and humanness of white people evidenced by their historically-sanctioned indifference to the racial suffering of others and misrecognition of how their social position and cultural power has been secured through centuries of violence and subjugation. Biko puts to rest the widespread caricature of demands for historical redress as "vengeance" or "retaliation" (or even as "reverse-racism") because it is, for him, to the psychological, historical and social benefit of whites as beneficiaries of racial oppression and as descendants of European colonisers that equilibrium be restored so that the hierarchically-entwined social categories of conqueror and conquered, settler and native, white and Black can be substantively abolished. The assumption (or allocation) of direct personal but also collective moral and political responsibility on the part of white South Africans would on this view be the only thing that could reconcile them to their unredeemed history and enable an active and thoughtful reckoning with the racist past and present. Another way to express this is in its inverse: More than just a ruse, the post-1994 negotiated settlement, its politics of reconciliation, forgiveness and empty symbolism, its absolution of white South Africans from the debt of reparation, and its maintenance of colonial-apartheid power relations must be seen as unethical insofar as it prolongs, expands and

worsens the racial conflict, social disharmony and historical trauma that define the South African reality. In the result, notwithstanding the granting of amnesty and the official completion of the TRC's work, white people would continue to carry the stigmatic markings of "oppressor" and thus remain unfree as well.

This can be related to the perfunctory and philosophically superficial invocation of ubuntu to license impunity for past crimes when this is in fact in direct contravention of the ubuntu conception of law whose primary principle "*molato ga o bole*" ("a dispute does not expire") prohibits precisely the automatic cancellation of a historical debt or injury, since neither time nor law can change the truth of what has happened.⁸⁷ The one implication of the African philosophical understanding of justice as the restoration of equilibrium and harmony is that an injustice, feud, injury or crime cannot be extinguished until such equilibrium or harmony is restored, even if several generations and long periods of time elapse.⁸⁸ Western legal devices such as statutes of limitations, prescription and for our purposes, amnesty are untenable from this African perspective. One must wonder exactly what conception of ubuntu philosophy was operative in the Epilogue to the interim Constitution and in the judge's affirmative reference to it.

Mohamed DP reasons that in adjudicating a dispute so central to the course of the negotiated settlement and transition to a new democratic society, one must be sensitive to the competing interests between victims and survivors of oppressive systems and the perpetrators and beneficiaries thereof. Despite his recognition of

⁸⁷ M Ramose "An African Perspective on Justice and Race" (2001) *Polylog* <<http://them.polylog.org/3/frm-en.htm>>; "Reconciliation and Reconciliation in South Africa" (2012) *J of African Philosophy* 23]

⁸⁸ K M'Baye "The African Conception of Law" in K Zweigert and U Drobnig (ed) *International Encyclopedia of Comparative Law*, Volume 2 (1975) 138.

the politically and morally contested nature of such a dispute, he nevertheless proceeds to insist that the final word on amnesty will come down to its legality. To quote him at length:

The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations. It is an act calling for a judgment falling substantially within the domain of those entrusted with lawmaking in the era preceding and during the transition period. The results may well often be imperfect There can be legitimate debate about the methods and the mechanisms chosen by the lawmaker to give effect to the difficult duty entrusted upon it in terms of the epilogue. We are not concerned with that debate or the wisdom of its choice of mechanisms but only with its constitutionality. That, for us, is *the only relevant standard*.⁸⁹

This paragraph illustrates precisely how law establishes its authority through claiming singularity, and privileging legality as “the only relevant standard”. In its insistence on singularity, law displaces those counter-archival voices – such as those of Biko, Biko’s family and AZAPO – that would call for the imperatives of political justice, moral rightness and historical sensitivity to also be considered. The logic of this displacement could be described as sacrificial. Dissenting voices and alternative perspectives must be suppressed not only in order to give effect to the law but because amnesty represents the sacrifice required to consolidate a new democratic society. But the judge does not end there. He adds that in exchange for this sacrifice of comprehensive amnesty for apartheid-era perpetrators, the new constitutional

⁸⁹ *AZAPO v President of the Republic of South Africa* para 21. My emphasis.

state would embark upon a programme of reconstruction to ameliorate poverty and improve access to education, housing and healthcare. The flip-side of amnesty in this regard is reparations – also envisaged by the drafters of the interim Constitution. In the judge’s words: “the recognition of the need for reparation balanced out the amnesty provision”.⁹⁰ For all the reasons set out above, Mohamed DP concludes that the Epilogue authorises a comprehensive meaning of amnesty so as to “[facilitate] the constitutional journey from the shame of the past to the promise of the future”.⁹¹ He accordingly upholds the constitutionality of section 20(7) of the Act and dismisses the applicants’ claim.

*

AZAPO is both remarkable and disturbing for its politically and rhetorically self-conscious engagement in the authoring of national myths. Its deployment of a combination of an instrumental legal rationality, determined constitutional optimism and tight attachment to official histories made it inhospitable to the invocation of the memory of Biko. The semantic and symbolic homology between *amnesty* and *amnesia* reveals *AZAPO* to be the highest official juridical expression of the pressure to forgive and forget, to let bygones be bygones, which as I noted earlier forecloses a deep reckoning with the past and a mending of the wounds of a history that it paradoxically refuses to face. This is the paradox of non-performativity at the heart of *AZAPO*: the promise of a truly new and just society, a postcolonial future, cannot come about since the granting of amnesty was part of a larger transitional justice process that was designed to protect and accommodate, and therefore preserve, old

⁹⁰ *AZAPO v President of the Republic of South Africa* para 47.

⁹¹ *AZAPO v President of the Republic of South Africa* para 50.

positions of power rather than to transform social relations anew through the annulment of colonial sovereignty. If the granting of amnesty to perpetrators of apartheid-era gross human rights violations also functioned to exonerate the ordinary beneficiaries of colonial-apartheid (i.e. white South Africa), the raw deal served to victims and survivors becomes even more problematic and seems starkly reminiscent of Biko's frustration with those white liberals who wanted Blacks "to accept things that are second class".⁹²

While whites would be putatively unburdened from the memory of the colonial disasters through which their massive social power was engendered, Blacks – now unarmed of the right to demand justice from the legal institutions of the post-1994 state – would continue to live an "encumbered existence"⁹³ where their status as free and equal citizens would be burdened by ongoing structural violence, inequality, cultural marginalisation and the social humiliation of dependence on social welfare, NGOs, charities, service delivery, and affirmative action. We know now that the promise of future reparation against which the judge defended the provision of comprehensive amnesty and ultimately justified the sacrifice of Black people's natural right to justice finally has not really materialised.⁹⁴ And it is an open question whether the depth of the truth about the atrocities committed by the apartheid regime in the name of all white South Africans was eventually fully unearthed by the work of the TRC.

⁹² L Wilson "Bantu Stephen Biko: A Life" in Pityana *et al* (eds) *Bounds of Possibility: The Legacy of Steve Biko and Black Consciousness* 22-23.

⁹³ SV Hartman *Scenes of Subjection: Terror, Slavery and Self-making in Nineteenth-Century America* (1997) 121.

⁹⁴ See chapter 2 of this thesis.

Ultimately however, Biko's counter-archival sense cannot be received within the logic and framework of the judgement since *AZAPO* looks forward to a free and democratic South Africa whereas Biko's more thoroughgoing political vision urges a struggle for a liberated and decolonised *Azania*. And this difference in political imagination turns also on divergences in historical interpretation as well. While Biko identifies the arrival of European colonists in 1652 as the proper beginning of conflict and violence, the Act in this case begins from the arbitrary date of 1960 (the year of the Sharpeville Massacre, twelve (12) years after the formal institutionalisation of apartheid by the National Party). The reduction of a centuries-long and deep history of colonial subjugation to 34 years of largely spectacular acts of state violence and brutality shows the *AZAPO* decision, the TRC as well as the Constitution at the time to be afflicted by a structural incommensurability between the narrow memory of the law and the much longer memory of the indigenous conquered peoples that is the basis of Biko's critique of colonial-apartheid. The counter-archive that is the living memory of colonial oppression and racial terror was what underlay the applicants' desire to make the violation and suffering of their loved ones, which is to say all Black people, legible in public and legal memory. The dismissal of their argument in the Constitutional Court is an effect of law's aversion to the counter-archive and signalled the drive within the governing legal episteme to disqualify alternative knowledges, memories and imaginings.

Because the social and political – and not only legal – outcome of *AZAPO* was its role in the construction of a new legal order founded on political *irresponsibility* and sanctioned impunity, the emergent forms of national unity, reconciliation,

transition and healing that resulted from this outcome surely remain defective and incomplete and therefore open to future refigurings and political struggles over land, life, justice, memory and truth. Biko's memorial appearance in the Constitutional Court constituted a critical challenge to the ways in which hegemonic projects of transitional justice induce an obfuscation of historical dynamics. It thereby also registered what remains unresolved in the political settlement that suspended revolutionary decolonisation in exchange for constitutional democracy. This irresolution runs so deep into the socio-economic, legal, political and psychic landscape of South Africa that it provokes the quite devastating thought that the Constitution and constitutionalism as presently articulated are themselves inconsistent with, perhaps even hostile to, Black people's demands for justice, redress and restoration of their land, being and culture.

City of Tshwane: History Beside itself

The postcolony, however hard it may try, sees the persistence of an infinite colonial sovereign imposition – that is, colonial sovereignty is rendered finite by adjusting, archiving, transforming the social and juridical order through a national liberation struggle, but to the extent that colonial juridical, economic, and social orders persist, the colonial usurpation has an infinite reach.⁹⁵

AZAPO would not be the last time that the work of the Constitutional Court would encounter the spectre of Biko. His name would return again in *City of Tshwane*,⁹⁶ a case concerning a high court order granted in favour of Afriforum against the Tshwane Metropolitan Municipality in which the Council of the Municipality was ordered to stop removing the old street signs of Pretoria and to return those that

⁹⁵ S Motha "Archiving Colonial Sovereignty: From Ubuntu to a Jurisprudence of Sacrifice" (2009) 27 *SA Public Law* 300.

⁹⁶ *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC).

had already been removed.⁹⁷ The Council had passed a resolution to implement changes to the street names in Pretoria/Tshwane to reflect the “shared heritage” of the South African people.⁹⁸ The name of Biko was among the new street names to be put up, replacing the street name formerly known as Beatrix.

As has become standard in racially and historically contentious cases, Mogoeng CJ begins the judgement with a narration of the history of South Africa that led to the dispute over street names. Although he opens with a rehearsal of the problematic doxa of South Africa as a country now liberated from a system of institutionalised racial oppression, he does tie this to a recognition that “colonialism or apartheid is a system so stubborn that its harmful effects continue to plague us and retard our progress as a nation...”.⁹⁹ In the context of the case at hand, Mogoeng CJ notes that this continuing plague of the past is evidenced by the fact that almost all major cities, towns and street names in South Africa still bear references to figures of the colonial and apartheid “past”. He takes issue with the fact that when attempts are made to progressively change these names, they are repeatedly faced with legal challenges.¹⁰⁰

For Mogoeng CJ, the “all-inclusive constitutional project” that was formally embarked upon in the early 1990s in pursuit of national unity and reconciliation requires that injustices of the past “not be pampered ... [and] the immeasurable damage racism or cultural monopoly has caused requires strict measures be taken to

⁹⁷ *City of Tshwane v Afriforum* para 1.

⁹⁸ *City of Tshwane v Afriforum* para 1.

⁹⁹ *City of Tshwane v Afriforum* para 2.

¹⁰⁰ *City of Tshwane v Afriforum* para 4.

undo it.”¹⁰¹ In markedly combative language, the judge argues that maintaining symbols that resonate with our oppressive “past” and which venerate the heroes and heroines of a single racial group perpetuates the historical denigration of African people and constitutes racial domination. The fact that South Africa “still looks very much like Europe away from Europe”¹⁰² is, in the judge’s view, anathema to the “constitutional reality” and “constitutional vision in South Africa”.¹⁰³ The work of the Constitution for Mogoeng CJ is to contain political community through its promulgation of a singular rationality and mindset and a sameness of vision – what he calls “shared values”.¹⁰⁴ In his own words:

All peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision must embrace the African philosophy of “ubuntu”. “Motho ke motho ka batho ba bangwe” or “umuntu ngumuntu ngabantu” (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must also enjoy prominence in our approach and attitudes to all matters of importance in this country, including name-changing. White South Africans must enjoy a sense of belonging. But unlike before, that cannot and should never again be allowed to override all other people’s interests. South Africa no longer “belongs” to white people only. It belongs to all of us who live in it, united in our diversity. Any indirect or even inadvertent display of an attitude of racial intolerance, racial marginalisation and insensitivity, by white or black people, must be resoundingly rejected by all South Africans in line with the Preamble and our values, if our constitutional aspirations are to be realized.¹⁰⁵

Within the judge’s non-racial constitutionalism, the old nation-building tropes of “inclusivity”, “reconciliation”, “unity”, “transformation” and “social cohesion” stand

¹⁰¹ *City of Tshwane v Afriforum* para 6.

¹⁰² *City of Tshwane v Afriforum* para 12.

¹⁰³ *City of Tshwane v Afriforum* paraw 7, 9, 11 and 14.

¹⁰⁴ *City of Tshwane v Afriforum* para 9.

¹⁰⁵ *City of Tshwane v Afriforum* para 11.

central. He is at pains to invoke and affirm a “oneness”, however elusive, between South African citizens and so argues that the Constitution militates against the respondent’s (Afriforum) “never-ending determination to oppose change to city, town and street names”.¹⁰⁶ Indeed, according to the judge, the Constitution places on all of “us” a “duty to transform”.¹⁰⁷ It is thus impermissible under the Constitution to adopt an attitude that impels Blacks to tolerate the traumas induced by symbols of colonialism and apartheid and to perpetuate the remnants of racial oppression by defending the permanent display those names, signs and symbols.¹⁰⁸

Mogoeng CJ is clearly unsympathetic to Afriforum’s application. For him, as a matter of both law and political morality, the preservation of colonial-apartheid era street names and the promotion of sectarian white interests through the use of legal technicalities is fundamentally irreconcilable with the constitutional project.¹⁰⁹ Afriforum’s claim that the old street names are a core part of their right to culture and that their removal threatens their very sense of belonging as South Africans was firmly rejected.¹¹⁰

Mogoeng CJ’s decision, with the support of all the Black judges of the Constitutional Court, is on a first reading a decisively anti-racist one, refusing to entertain discourses of white victimhood and reverse racism upon which the respondents’ claim is based. In a very real sense, Mogoeng CJ is speaking back to Mohamed DP’s more optimistic and conciliatory tone in *AZAPO*, showing that *AZAPO’s promise of a reconciled and united society* has not materialised. The South

¹⁰⁶ *City of Tshwane v Afriforum* para 14.

¹⁰⁷ *City of Tshwane v Afriforum* para 14.

¹⁰⁸ *City of Tshwane v Afriforum* paras 15-16.

¹⁰⁹ *City of Tshwane v Afriforum* paras 18-19.

¹¹⁰ *City of Tshwane v Afriforum* para 26-27.

Africa that is the scene of *City of Tshwane* appears still profoundly unsettled by race and it is evident that through his unambiguous language, the judge is also responding to the climate of increased race-consciousness in public discourse and vocal doubts concerning the transformative capacity of the Constitution. But the judgement also works within a set of unresolved tensions or paradoxes which if pressed can reveal contradictions and instabilities within the constitutional archive itself. These tensions include: the articulation of a strong, even radical politics of race mediated through a moderate and liberal constitution; a critique of the colonial legal past relying on a largely Western legal paradigm; the (Africanist) claim that South Africa is home of indigenous African peoples but also (the Charterist assertion) that it belongs to all who live in it; and a non-racial constitutionalism tied to the compulsive naming of racial groups as "Black" and "white".

The irresolution that results from these tensions suggests among other things that the Constitution by design restrains the becoming of a black radical politics, since it compels the co-existence rather than resolution of historically opposed forces. There is an obvious irreconcilability between the histories and cultures of the conqueror and the conquered – since the former exists through the subjugation and annihilation of the latter or put differently, since the two can only exist in Manichean opposition. The point is precisely for white South Africans to disavow (but not necessarily to forget) their heritage in the world of European conquest and white supremacy in order to be reconciled to this place and to its people. The expression of Biko's theory of liberation and revolutionary non-racialism in the form of a removal of the European coloniser and all his trappings from "the table" followed by the redecoration of that table in "African style" and then the invitation to the

European coloniser to join the table on African terms,¹¹¹ is a metaphoric gesture for the transformation *and not accommodation* of colonial-apartheid subject positions and identities. Mogoeng CJ's emphasis on inclusion, diversity and recognition of the previously excluded thus ultimately continues the problem of *AZAPO* and of the entire constitutional order namely, license for whites' moral and historical irresponsibility.

The tension in *City of Tshwane* would nevertheless deepen in the dissenting judgement by the only two white judges of the Court – justices Johan Froneman and Edwin Cameron. In a way, the divergence in opinion between Mogoeng CJ and the Black judges who support his majority decision and Froneman and Cameron JJ is a metaphor for the persistence of race as a critical fault-line in society and a reflection of the still “unsettled” character of South Africa. The central ground of Froneman and Cameron JJ's dissent concerns their interpretation that the majority judgement is effectively suggesting that “reliance by white South Africans, particularly white Afrikaner people, on a cultural tradition founded in history finds no recognition in the Constitution because that history is inevitably rooted in oppression”.¹¹² (I say “their interpretation” because as may be evident in the discussion of the majority judgement above, nothing written by Mogoeng CJ gives this reader such an impression). For Froneman and Cameron JJ, this apparent “constitutional discountenancing” of white cultural history – irrespective of its roots in the genocidal and brutal oppression of African peoples – has “momentous implications for a

¹¹¹ Biko *I Write What I Like* 75.

¹¹² *City of Tshwane v Afriforum* para 81.

substantial portion of our population".¹¹³ (Statistically, whites make up less than 10% of the South African population).

Although they also raise a procedural or technical quarrel regarding the issue of leave to appeal against interim interdicts, the more fundamental question they address themselves to is the question of whether the cultural heritage of white South Africans is inevitably tainted by historical injustice, to which their answer is a strained but resounding no. For Froneman and Cameron JJ, the white community in South Africa, in this case Afrikaans-speaking whites, do have a real claim to their culture and this should be recognised by the Constitution. This is a point they believe is being denied by the majority judgement of their Black counterparts.¹¹⁴ They continue to argue that cultural diversity and the legal right to culture are a legitimate part of our "constitutional society" and need to be safeguarded. To this reader, the dissenting judgement is at once defensive and anxious to make a case not only for white South Africans but for a historically neutral approach to race, culture and identity. They do not address the contention for example that the very content of European culture is inseparable from colonialism, civilizational superiority, racial purity, violence and ethnocentrism and is thus inherently tied to the immoral and unjust legacy of white supremacy in South Africa and across the globe.¹¹⁵

For the two judges, the richness and complexity of South African history undermines any attempt to wipe away cultural traditions of white South Africa. As illustrations, they cite the controversial legacies of King Shaka Zulu and his

¹¹³ *City of Tshwane v Afriforum* para 81.

¹¹⁴ *City of Tshwane v Afriforum* para 125.

¹¹⁵ See for example H Banerji *Thinking Through: Essays on Feminism, Marxism and Anti-racism* (1995) 46 and M Ani *Yurugu: An African-Centered Critique of European Cultural Thought and Behavior* (1994).

purported role in the deadly *Difaqane* and Mahatma Ghandi's odious anti-black racism. The presumed tainting of white culture as rooted in oppression and the implicit assumption of Afriforum as a "racist" organisation goes against what the judges see as the need for "longer, gentler and more accommodating debate".¹¹⁶ In other words, according to Froneman and Cameron JJ, the majority judgement is insensitive to the feelings of white South Africans. There is an insistence in their judgement on judicial restraint or jurisprudential discipline, the clear function of which is to prescribe a particular way in which the law should approach racially-contested cases. This suggested way entails racial neutrality, politically-tempered language, a judicial voice discipline by the law, tolerance of radically different views and opinions (presumably including those of white nationalist organisations) and in this case, sensitivity to white people's feelings and anxieties. They move however to deny the politically and historically contested nature of the issue of street names – resurfacing as they do contestations on land, race and colonialism in South Africa – by claiming that beyond the issue of street names, this case raises "an issue of the rule of law".¹¹⁷

In any case, the judges tell us, "the historical past of white people also includes much to not be ashamed of".¹¹⁸ They do not enumerate what this "much" is and nor do they show which of the old colonial-apartheid street names in Pretoria or elsewhere for that matter were not placed there as part of the violent process of making South Africa a "white man's country". We could ask to what extent this dissenting judgement demonstrates the problem Biko identified with white liberals –

¹¹⁶ *City of Tshwane v Afriforum* para 131-132.

¹¹⁷ *City of Tshwane v Afriforum* para 152.

¹¹⁸ *City of Tshwane v Afriforum* para 158.

their paternalistic desire to control and guide Black political opinion and their own commitment to moderate, unthreatening and non-disruptive positions on race and racism. When he wrote of the white liberals that “they are not really fighting for the kind of emancipation that we are envisaging. They might be genuinely motivated in thinking they are fighting for freedom, but we do not believe that their freedom is our freedom”,¹¹⁹ Biko was pointing out precisely the incommensurability of the historical and political experiences of Blacks and whites that played out in *City of Tshwane*. Froneman and Cameron JJ’s ambivalent vindication of the cultural interests purportedly being defended by Afriforum dramatizes as well the acuity of Biko’s regrouping of all whites under one banner of fundamentally united interests in preserving their privilege and comfort.

The schism in the judgement would be furthered by Jafta J’s reply to the dissenting white judges, in which he appears troubled by their suggestion that historically oppressive cultural traditions which are “racist to the core” do in fact have a place under the Constitution.¹²⁰ In contrast to Froneman and Cameron JJ’s call for a “gentle” constitutionalism, Jafta J articulates an aggressive constitution – one which instantiates a “clean break from our ugly past of racial oppression”.¹²¹ He affirms in stark terms the majority judgement’s constitutional repudiation of the “shameful” racial past:

How can that unquestionably transformative Constitution be expected to recognise cultural traditions rooted in the racist past? The answer must be, if there is such expectation, that it is misplaced. The fact that the oppressive racist history exists at

¹¹⁹ Biko and Lanning “Steve Biko Interviewed by Greg Lanning, 5 June 1971” in Hook (ed) *Steve Biko – Voices of Liberation* 142 - 143.

¹²⁰ *City of Tshwane v Afriforum* para 163.

¹²¹ *City of Tshwane v Afriforum* para 164.

the level of fact does not mean that it deserves any recognition in the Constitution. Therefore, the implication which the second judgment says may be drawn from the first judgment, would be the correct one ... It was the shameful racist past properly described in the first judgment which led to streets and buildings in every town in this country, including Pretoria, reflecting exclusively the names of white people. Black people were precluded from residing in these areas which constituted nearly 90% of the entire country. They were forced to live in segregated townships designed exclusively for black people and usually far from towns and cities in which they were regarded as providers of labour and nothing more.¹²²

For Jafta J, the transformative path prescribed by the Constitution is correctly reflected in the first judgement. He thus disagrees with the dissenting judgement's construal of the majority decision as a deviation from the rule of law. He concludes on this score that Froneman and Cameron JJ's interpretation that the Constitution creates scope for the recognition of a legal right or interest based on a sense of belonging tied to a culture rooted in a racist past is untenable: "It does not conform with the clean break from the history characterized by discrimination, humiliation and indignity suffered by black people and which the Constitution loudly rejects."¹²³

*

Clearly the dispute in *City of Tshwane* is highly racialised and supports the view held by critical race theorists that law is embedded within the racial politics of a society and partakes in ideologically producing and contesting meanings of race. The unprecedented division of judges according to their particular racial identities shows that no outcome in this instance could have been racially neutral since the judges were faced with an unresolved racial past that exposed deep fissures in the

¹²² *City of Tshwane v Afriforum* paras 165, 167.

¹²³ *City of Tshwane v Afriforum* para 176.

constitutional order upon which they all base their judgements. In this sense, although the judgements are composed of significant differences in the opinion and political worldview of the judges, all the judges remain within the same constitutional paradigm of integration, assimilation and of placing reconciliation and unity above justice. This stands in contrast to Biko's insight that the refounding of the polity after colonial conflict must involve a recentering and not mere inclusion of African culture and experience. Recall Biko in the following passages:

For one cannot escape that the culture shared by the majority group in any given society must ultimately determine the broad direction taken by the joint culture of that society. *This need not cramp the style of those who feel differently but on the whole, a country in Africa in which the majority of people are African must inevitably exhibit African values and be truly African in style.*¹²⁴

And:

By rejecting white values and opting for a revival of a black, a real black approach, what you are really doing is to offset a wrong which has been in operation for a long time. It does not mean simply because whites have been living in this country that you cannot give this country back to itself. We believe that we have to reject their economic system, their political system, and values that govern human relationship, in order to establish the kind of society that we as indigenous people want here. And that kind of society is not exclusively for us. *It is for everybody who is here - but it has trappings which (sic) are obviously indigenous.*¹²⁵

On first reading, the orientation of Mogoeng CJ's majority and Jafta J's separate concurring judgement is most consistent with some Black Consciousness insights but they are both limited or undercut by their failure to see that the explosive social contradictions of race cannot be resolved within the extant constitutional frame. A

¹²⁴ Biko *I Write What I Like* 26. My emphasis.

¹²⁵ Biko and Lanning "Steve Biko Interviewed by Greg Lanning, 5 June 1971" in Hook (ed) *Steve Biko – Voices of Liberation* 148. My emphasis.

feature of law's archive that becomes apparent here is how its claim to singularity also imposes a governing logic or rationality that forces the subjects of law (litigants, lawyers and judges) to work within its own parameters. In the end, all the judges submit to the "democratisation" logic of the Constitution, foreclosing again the decolonisation logic. The impulse towards democratising the naming of streets and other public spaces to reflect the diversity of South African racial and cultural groups neglects the historically deep hierarchies between Black and white South Africans. The appeal to a common South African identity, suffused by the Constitution and marked by an equal sense of belonging of all who live in South Africa, functions to conceal and render normal the structural power and historical violence embedded within the cultural heritage of white South Africans.

Biko's reappearance in the Constitutional Court as among the struggle heroes to be honoured in the renaming of Tshwane's streets introduces a counter-archival disturbance to law's depoliticising reflexes. We recall that it was precisely the Black Consciousness Movement's uncompromising stance towards white power and Eurocentric values that led to their branding as "terrorists" by the apartheid state.¹²⁶ Black Consciousness returns in post-1994 South Africa as a reminder of unpaid debts, raising the question of what is at stake in remembering the past, when that past cannot be mourned because it is ongoing. The repeated references in the judgment to colonial-apartheid in the *past tense* shows the Court to be blind to the intransigence of intersubjective and structural racism in South Africa. The fracture between the judges reflects a deeper fracture across post-1994 South African society and it is not too early to suggest that the chain from *AZAPO* to *City of Tshwane* is far

¹²⁶ Lobban *White Man's Justice* 22.

from ending. As the product of a faulty negotiated settlement centered on compromise and the protection of white social, economic and cultural interests rather than justice, the Constitution will always only inadequately contend with these fractures, leaving us with an incomplete and unsustainable experience of (un)freedom.

5.4 Towards a critique of “post”-apartheid reason

This jurisprudential reading of Biko does not intend to deploy Black Consciousness only as a critique or analysis of particular legal rules and judicial decisions in specific fields or areas of law. What I have in mind is a critical engagement with the social and epistemic arrangements that shape our experiences of “post”-apartheid law and legal culture under the new constitutional order – the forms of desire, memory, political action, subjectivity and speech enabled or disabled and the particular configurations of knowing and being that are privileged or suppressed. In other words, the present-day invocation of Black Consciousness as a critical theory of race, and a living politics, is primarily a gesture towards what might be tentatively described as a critique of “post-apartheid reason”.¹²⁷

By “post-apartheid reason”, I mean to denote an order of meanings, conceptualisations, historical and political interpretations, theoretical protocols, social assumptions but also affective intuitions, symbolic attachments, senses and perceptions which have come to congeal into everyday “common-sense” notions and mythologies that structure how we understand and inhabit the present South African

¹²⁷ This formulation is a riff on a set of canonical philosophical texts beginning with Immanuel Kant’s *Critique of Pure Reason* (1989 [1781]), followed by Jean-Paul Sartre’s *Critique of Dialectical Reason* (2004 [1960]) and later Gayatri Spivak’s *Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (1997) and ending with Achille Mbembe’s *Critique of Black Reason* (2017).

reality. Features of “post”-apartheid reason include the attachment to liberal democratic formulations of constitutionalism, rule of law and human rights; the evasion of race, white supremacy and conquest as constitutive and material historical formations; and the consecration of a dominant narrative of history that regards the *telos* of the liberation struggle to have been realised in the 1990s through the election of Nelson Mandela as President and with the adoption of the 1996 Constitution. Underlying this form of reason is the reduction of South Africa’s political past to the juridical moment of apartheid, effectively minimising the prior and much longer settler-colonial period and reducing the historical antagonism to a conflict over civil and political rights. This historiographic privileging of apartheid is most evident in the systematic theoretical pursuit and commitment by South African critical legal scholars to the making, or becoming, of a transformative “post-apartheid” (which is to say not post-colonial and not post-conquest) theory of law or jurisprudence.¹²⁸

Although an exhaustive account is not possible, I shall map only three of the many logics that constitute and reproduce “post”-apartheid reason which could be revealed and countered through the critical idiom and Africanist praxis of Black Consciousness, namely (1) the widespread public and scholarly worship of the

¹²⁸ For representative writings, see among others AJ van der Walt “Dancing with Codes - Protecting, Developing and Deconstructing Property Rights in a Constitutional State” (2001) 118 *SALJ* 258; J van der Walt *Law and Sacrifice: Towards a Post-apartheid Theory of Law* (2005); W Le Roux “The Aesthetic Turn in Post-Apartheid Constitutional Rights Discourse” (2006) *TSAR* 101-120; H Botha “Refusal, Post-apartheid Constitutionalism and the *Cry of Winnie Mandela*” in K van Marle (ed) *Refusal, Transition and Post-apartheid Law* (2007) 29 – 38; D Cornell “Ubuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa” (2009) 20 *Law & Critique* 43 – 58; K van Marle “Jurisprudence, Friendship and the University as Heterogenous Public Space” (2010) 127 *SALJ* 635 – 638; K van Marle “Reflections on Post-apartheid Being and Becoming in the Aftermath of Amnesty” (2010) 3 *Constitutional Court Review* 347 – 366; J Barnard-Naude “The Greatest Enemy of Authority – Arendt, Honig and the Authority of Post-apartheid Jurisprudence” (2013) 10 *No Foundations* 120 – 137. See also the writings collected in K van Marle and W Le Roux (eds) *Post-apartheid Fragments: Law, Politics and Critique* (2007).

Constitution; (2) the lack of serious race analysis in South African critical legal scholarship and (3) the problems of historical imagination in South African classrooms.

(a) *Constitutional worship and its discontents*

Over a series of publications, the anthropologist couple Jean and John Comaroff have described South Africa as a country in the grip of a pervasive culture of constitutionalism, legality and rights.¹²⁹ This culture, they explain, is characterised by an excessive faith in the South African Constitution – which they refer to as an “[e]mpirically modernist, Eurocentric, and liberal”¹³⁰ text – to solve social problems – a faith they describe as bordering on fetishism. John Comaroff describes this fetishisation of law and constitutionality as being associated with, among other things, the judicialisation of politics; the global hegemony of human rights; the increasing tendency of subjects of class, race, sex, gender, and cultural difference to turn to law and courts as a means of constructing and representing themselves; and excessive litigiousness in society.¹³¹ According to the Comaroffs, this fetishism of law and constitutionalism is a peculiar feature of the postcolonial condition in South Africa¹³² and is linked to the governing ANC’s aspiration towards a “Eurocentric ideal of the nation-state”.¹³³

¹²⁹ J Comaroff and JL Comaroff “Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa” (2004) 29 *Law & Social Inquiry* 521.

¹³⁰ Comaroff and Comaroff (2004) *Law & Social Inquiry* 521.

¹³¹ JL Comaroff “Reflections on the Rise of Legal Theology” (2009) 53 *Social Analysis* 195.

¹³² JL Comaroff and J Comaroff “Law and Disorder in the Postcolony: An Introduction” in J Comaroff and JL Comaroff (eds) *Law and Disorder in the Postcolony* (2006) 22.

¹³³ Comaroff and Comaroff (2004) *Law & Social Inquiry* 522.

Another source of the fetish, indeed even worship, of the Constitution is a legal and political theology that views the promulgation of a new national constitution after conflict as a substantive and symbolic break with the past. As such, the culture of legality in “constitution-obsessed South Africa”¹³⁴ is central to the production of a particular political culture as well as particular conceptions of nationhood and subjectivity and a particular vision of civil society. This is to say that the Constitution in our case functions not only as a supreme law but also a governing rationality that orders space and time according to its own parameters. But as Stacy Douglas has pointed out in a paper entitled “Constitutions are not enough”, this centering of constitutions as the central instruments for the production and reconstruction of political community after conflict always comes at the expense of alternative “imaginings of political community”¹³⁵ and also denies “the messy realities of subjectivities, and glosses over persistent issues of inequality”.¹³⁶

Because a post-conflict constitution signals “particular kinds of cultural shifts” and “articulates aspirations for renewal”,¹³⁷ it often contains a false teleological conceit that casts the social, political and legal order as being on a progressive move from a dark and conflictual past to a democratic future. It is precisely monumental historicisations, reflected in claims of renewal, transition and stability, that deny the occurrence of repetitions in the colonial-apartheid order. This fetishistic overinvestment and overreliance on constitutions is problematic given that constitutions

¹³⁴ Comaroff and Comaroff “Law and Disorder in the Postcolony: An Introduction” in Comaroff and Comaroff (eds) *Law and Disorder in the Postcolony* 26.

¹³⁵ S Douglas “Constitutions are not Enough: Museums as Law’s Counter-archive” in Motha and van Rijswyk (eds) *Law, Memory, Violence* 140.

¹³⁶ Douglas “Constitutions are not Enough: Museums as Law’s Counter-archive” in Motha and van Rijswyk (eds) *Law, Memory, Violence* 142.

¹³⁷ Douglas “Constitutions are not Enough: Museums as Law’s Counter-archive” in Motha and van Rijswyk (eds) *Law, Memory, Violence* 141.

and constitutionalism are incapable of providing a reflexive politics and are thus also unable to understand that the terrors and conflicts of colonial-apartheid resulted in unstable conceptions of political community – particularly in the context of land, race and culture. Defining the social and political life of a polity mainly through constitutions, constitutionalism and constitutionality represents a closure of politics, rather than its opening – since in binding a political community together through its sovereign devices, a constitution must also be blind to its own failures and exclusions. The Comaroffs' use of the term *fetish* – with its etymological links to deification and worship – to describe the prevailing South African fixation and attachment to the Constitution, goes beyond signalling a law-abiding commitment but highlights the necessarily theological and ideological function of a postconflict constitution. Not only does a new constitution ground a new polity and define its values and ideals, it holds together the always-already *fragile* civic bonds of that nation. In so doing, the constitution and the discourses and subjects it produces, must repress the difficult issue of the unrealised promises of the new legal and political order. It must also monopolise the sphere of public and political engagement unless actively countered by a different, more radical, politics.

Although Douglas presents museums as an alternative site for the production of political community, aspects of the Black Consciousness Movement's praxis and pedagogy of black solidarity, self-reliance and community projects could also be taken as instances of decentering the monumental sovereignty represented by constitutionalism. The Black Community Programmes (BCP) were formulated by Biko and his comrades in response to the sense of defeat and alienation that had set into

the Black community and to restore dignity to black existence through asserting the self-sufficiency of Black people.¹³⁸ The BCP engaged in a number of projects, namely the publication of journals and newspapers; youth training in community development and creative leadership, health centres, literacy programmes, vegetable gardens and the building of schools, clinics and day-care centres, among others.¹³⁹ To my mind, the rationale behind the BCP projects – practical self-determination and independence – reflected alternative notions of political subjectivity and political community that do not rely on law and constitutions for self-definition but instead operate through the activation of literate, democratic and publically-oriented and politically conscious subjects. By decentering statist institutions and overcoming dependence on dominant institutional structures, the Black Consciousness Movement discloses examples for other ways of living – perhaps not under, but with – the law.

This enactment of a politics from below has been taken up in the post-1994 period by a number of social movements, most notably Abahlali baseMjondolo, the Shackdwellers Movement. In his book on “Fanonian Practices”, Nigel Gibson traces Biko’s recreation of Frantz Fanon’s philosophy of liberation and places Abahlali at the tail end of this lineage as inheritors of the radical anti-racist and anti-capitalist humanism of Fanon and the Black Consciousness Movement.¹⁴⁰ Abahlali emerged circa 2005 in response to a growing discontent within poor communities over the

¹³⁸ South African History Online “Black Community Programmes” <<http://www.sahistory.org.za/topic/black-community-programmes-bcp>> (last accessed 14 March 2017)

¹³⁹ South African History Online “Black Community Programmes” <<http://www.sahistory.org.za/topic/black-community-programmes-bcp>> (last accessed 14 March 2017)

¹⁴⁰ N Gibson *Fanonian Practices in South Africa: From Steve Biko to Abahlali baseMjondolo* (2011).

lack of housing and service delivery in informal settlements. It was formed after communities decided to mobilise against their omission from the agenda of “post-apartheid” transformation.¹⁴¹ Gibson points out that the very existence of Abahlali is a sign that the struggle for human freedom, dignity and justice for the racially oppressed Black population remains unfinished. Despite the formal end of apartheid, the colonial state order and racial capitalism in its neoliberal and imperial form are still the major determinants of South African society and have resulted in the worsening of Black people’s living conditions.¹⁴²

In the foreword to Gibson’s book, the founding president of Abahlali, S’bu Zikode, claims Biko as among their ancestors in the struggle to “humanise the world”.¹⁴³ In Zikode’s description of the movement, he invokes a notion of life and politics as intertwined and in motion, evoking for us Biko’s description of Black Consciousness as a way of life. Zikode explains that the movement is premised on the insistence on autonomy, on the right to be self-representing political subjects, which is in turn undergirded by the radical democratic assertion that “everyone can think” about their own situation and struggle.¹⁴⁴ In always insisting that lawyers, policymakers, government officials and university academics “speak *to* [them] and not *about* [them]”,¹⁴⁵ the shack intellectuals and activists define and negotiate freedom on their own terms, not only keeping open but inhabiting the space for the appearance of non-institutional forms of politics, ways of being political, that are not

¹⁴¹ See Abahlali baseMjondolo “A Short History of Abahlali baseMjondolo, the Durban Shackdweller’s Movement” < <http://abahlali.org/a-short-history-of-abahlali-basemjondolo-the-durban-shack-dwellers-movement/> > (accessed 23 March 2016).

¹⁴² Gibson *Fanonian Practices* 7.

¹⁴³ Zikode “Foreword” in Gibson *Fanonian Practices* v.

¹⁴⁴ Zikode “Foreword” in Gibson *Fanonian Practices* vii.

¹⁴⁵ Zikode “Foreword” in Gibson *Fanonian Practices* vx.

primarily framed in terms of constitutional patriotism, rights discourse and liberal legalism.

In the foreword, Zikode highlights three central features of Abahlali's politics, namely (1) a *grassroots and participatory model of direct democracy* where all decisions are made by the shackdwellers themselves and where elected delegates and representatives are rotated frequently to avoid reducing the movement to individuals and to aid all members in developing leadership skills;¹⁴⁶ (2) a programme of *political education and critical literacy* in which the dialectics of praxis and theory are reflected upon by the shackdwellers through reading classical leftist and Global South texts from a range of thinkers including Marx, Fanon, Biko and Freire among others;¹⁴⁷ and (3) a "*culture of collectivity*" grounded in an African cultural recognition of the importance of families, neighbourhoods, and communities.¹⁴⁸ What unites these features is the assertion of Black people's capacity to make and bring things into the world – to act and speak as political beings. Zikode elaborates:

The power of organising comes when we reject this individualist understanding of liberation and accept collective responsibility for society from the level of families, to neighbourhoods, cities and the entire society. A progressive democratic and just society in which everyone can participate in decision-making and in which the land and the wealth are shared cannot be built by individual endeavour.¹⁴⁹

¹⁴⁶ Zikode "Foreword" in Gibson *Fanonian Practices* ix.

¹⁴⁷ Zikode "Foreword" in Gibson *Fanonian Practices* v.

¹⁴⁸ Zikode "Foreword" in Gibson *Fanonian Practices* vii – ix.

¹⁴⁹ Zikode "Foreword" in Gibson *Fanonian Practices* vii.

For Abahlali, equality and liberation stand as absolute political principles that cannot be “compromised”.¹⁵⁰ Against legalist, technicist and institutional modes of public engagement, Zikode names duty and responsibility as fundamental values of political struggle: “This culture of collectivity helps to build a responsible society – a society where none of us will enjoy life until everyone is free.”¹⁵¹

(b) Critical legal silences

One fertile site where the constitutional worship or fetishism problematized above coincides with the theoretical invisibilisation and evasion of racism, white supremacy, and settler-colonialism as central categories of analysis is the work of South African legal theorists. As I noted in chapter 1, race barely appears in South African legal scholarship as a *constitutive* and *foundational* problematic, which is to say it is rarely apprehended as a historical formation that has shaped the very fabric, structure and nature of society such that it is, as a result, deeply embedded in its symbolic and material unfoldment. But in the very few instances in which legal scholars have grappled with race as a conceptual and political reality, they have simply repeated familiar patterns of depoliticising, misconstruing and undermining the centrality and specificity of race, and the history of racism, in South Africa. And as I also noted in chapter 1, this problem is in no small part an outcome of the monochromatic nature of the discipline of jurisprudence, and the silencing of the black experience in legal theory.

¹⁵⁰ Zikode “Foreword” in Gibson *Fanonian Practices* vii.

¹⁵¹ Zikode “Foreword” in Gibson *Fanonian Practices* ix.

One of the most theoretically sophisticated illustrations of this particular tendency is to be found in Johan van der Walt's discussion of the South African constitution-making process. In an article reflecting on the process of constitution-making through the lens of the work of Hungarian political theorist Andrew Arato, Van der Walt defends the process of horizontal constitution-making that was followed in the South African negotiated settlement.¹⁵² A horizontal constitution-making process occurred in our historical instance when the recognised "liberation" movement, representing the oppressed Black population, enters into constitutional negotiations with the white minority government on an equal moral and political footing. Van der Walt poses this against the vertical model of constitution-making in which the liberation movement(s) representing the formerly oppressed unilaterally institute the foundations for a new polity, society and state. His basic claim is that a horizontal process of constitution-making unlike the vertical model preserves what he takes to be the fundamental condition of politics, namely the plurality of human existence. It is also truer to Hans Kelsen's counsel that the very possibility of law, and of a new law, depends upon a faithful adherence to fictions and requires the presupposition of pure foundations – even in the face of South Africa's impure origins in white supremacist colonial domination.¹⁵³

In response to the claims – which he does not cite or engage at any length – that the political malaise that has since followed the period of transition in South Africa is an outcome of the failure to follow the model of "vertical sovereignty" (decolonisation), Van der Walt comes into collision with Biko, and to some extent

¹⁵² J Van Der Walt "Vertical Sovereignty, Horizontal Constitutionalism, Subterranean Capitalism: A Case of Competing Retroactivities" (2010) 26 *SAJHR* 102 – 129.

¹⁵³ Van Der Walt (2010) *SAJHR* 110.

Ramose as well. He refers to both Biko and Ramose as expressions of the “growing sentiment” among “some South Africans” that the “post”-apartheid South African constitutions of 1993 and 1996 are not autochthonous (or not “entirely [their] own”) and reflect an excess of Western values.¹⁵⁴ He specifically quotes Biko’s call for the substitution of the foreign, disenchanted and individualistic Western values of white society with the humanistic values of African cultures which Biko believed was the only way to “[give] the world a more human face”.¹⁵⁵ To this, Van der Walt responds by asking

how the indigenous sentiments voiced here can seriously hope to become the exclusive foundation for co-existence in social contexts that are irredeemably heterogenous, fragmented, multi-cultural, mixed and mixed-up in more ways than we can fathom, without risking a new apartheid; without risking again a purity-driven *apartness without partnership*.¹⁵⁶

The passage above contains several remarkable claims, not the least of which is that the “some South Africans” who are Van der Walt’s imagined interlocutors all turn out to be indigenous Africans and that he reduces long-standing anti-colonial discontent concerning European domination to a mere “sentiment”.

First, for the clearly Eurocentric Van der Walt to associate African culture with unity, singularity and purity when he relies *exclusively* on white European and American philosophers (Kelsen, Arendt, Derrida, Rawls) and mobilises them in support of a largely western-style liberal democracy suggests that his universalist emphasis on “plurality” is unable to overcome the civilizational delusion that

¹⁵⁴ Van Der Walt (2010) *SAJHR* 112.

¹⁵⁵ Van Der Walt (2010) *SAJHR* 113.

¹⁵⁶ Van Der Walt (2010) *SAJHR* 113.

represents Western culture as enlightened, universal, modern and progressive while depicting non-Western cultures as archaic, particular, backward and regressive.

Secondly, Van der Walt appears unbothered to ask the more pressing question, namely how it is that the culture, languages, traditions and political institutions of Western culture, imposed on Africans through unspeakable terror and violence, could ever seriously hope to serve as the foundation of co-existence in a Black-majority country on the African continent? Why does Van der Walt choose to repress the historically fragile, unstable and contested terms of the post-1994 transition and rhetorically recast those exposing these contestations instead as cynical, unduly suspicious, and populist? He appears unable to comprehend that it is precisely the point of his African interlocutors that the South African constitution-making process represented a continuation of colonial-apartheid's denial of human co-existence and *plurality* through the imposition of a Western legal paradigm and a constitutional arrangement which perpetuates racial hierarchy and inequality.

Thirdly, Van der Walt makes it explicit that he proceeds in his analysis from a position of faith and hope in the Constitution.¹⁵⁷ The theological and depoliticising tones of this stance notwithstanding, it is a question to be raised what form of faith is this that appears to concede to the impossibility of Black people claiming complete justice, and demanding that the remnants of colonial sovereignty and Western hegemony could be dismantled in the name of a truly new post-conquest society?

Fourth and finally, Van der Walt appears to treat the major criticisms of the Constitution as essentially concerning economic inequality and the ravages of

¹⁵⁷ Van Der Walt (2010) *SAJHR* 107, 110, 129.

neoliberal capitalism. But this reduction of colonial-apartheid to a problem of economic distribution and poverty ignores the fact that it was self-determination and liberation, including land restoration and cultural and epistemic decolonisation, that is at stake in anti-colonial struggles. It also converts Blacks into purely economic subjects and not, as Biko would insist, also political and cultural subjects with the right to be self-defining and self-naming “in the country of their birth” and in accordance with their ways of life.

I scrutinise Van der Walt’s argument at length not only because he appears to refute (without really engaging) Biko’s conception of liberation but also because his work represents among the most sophisticated and sustained attempts to legitimise the post-1994 constitutional order without ever reckoning with the history of race, conquest, white supremacy, and settler-colonialism. In his work, Van der Walt appears to treat “apartheid” as a metaphor for a generalised and depoliticised form of totalitarianism and immoral law thereby ignoring the specificity of racial oppression and anti-blackness as the fundamental motor-scheme of South African history. His inability to see South Africa as historically and presently structured by an unceasing antagonism between the conqueror and conquered explains why the responsibility of whites in the making of the new order features nowhere in his paper. The history of violence, conquest, brutality and terror that is at the heart of white South Africa is consistently understated by Van der Walt and gives rise to what might be taken as the major flaw of his argument, namely his failure to entertain the Africanist and Black Consciousness hypothesis that true and sustainable horizontality between former antagonists is achieved precisely *through* a vertical process of

reconstitution, in terms of which perpetrators and beneficiaries of colonial-apartheid *concede* ethically to the natural, moral and historical claims to justice of the indigenous conquered peoples of South Africa. It is for Biko only once whites face up to the absolute moral *asymmetry* between the conqueror and the conquered that a true reconciliation with the past and the future can begin.

Van der Walt is however not alone in deploying a broadly critical legal theoretical method towards the evasion of race. In a paper entitled "Equality, Plurality and Structural Power", Henk Botha argues for an approach to legal and social equality that embraces radical difference, destabilises binaries and resists closure and sameness.¹⁵⁸ In the course of his discussion, Botha turns to what he calls the "banality of race", and points out what he sees as the irony of using apartheid era racial categories to advance constitutional redress of inequality, discrimination and disadvantage. He relies on Gerhard Mare and Michael McDonald to take issue with the emphasis on race in the post-1994 government's approach to redress, and argues that "redress which turns primarily on socio-economic class rather than race will not only be better able to achieve a more equitable distribution of wealth and resources, but will also be more consonant with the constitutional ideal of a non-racial society".¹⁵⁹

It is easy to stage a sharp disagreement with Botha by recalling Biko's critique of class-reductionism and his insistence that the effects of racism are not purely economic (material) but also symbolic, spatial, psychological and cultural. The larger blindspot in Botha's position however is his reliance on a liberal colorblind discourse

¹⁵⁸ H Botha "Equality, Plurality and Structural Power" (2009) 25 *SAJHR* 1-37.

¹⁵⁹ Botha (2009) *SAJHR* 23.

of race that treats the history of racialisation in South Africa as a process of imputing socially constructed and arbitrary labels on individuals rather than, as Biko suggests, a process of constructing a system of racial subjugation. Botha's lament concerning the use of apartheid-era racial classifications falsely represents the primary legacy of colonial-apartheid as being one of racial divisions and the creation of hostility between racial groups rather than representing that legacy more appropriately as one of racial oppression and the creation of racial hierarchies between whites (coded as Humans) and those deemed non-white (and hence coded as non- or sub-human).

In his protest, mainly against racial classification rather than *racial stratification*, Botha takes the position of "anti-racialism" rather than "anti-racism".¹⁶⁰ Such anti-racialism takes a stand against a concept, label, and category without standing up to and against a racially oppressive condition: his appeal to a race-neutral approach to redress refuses the language of race without placing emphasis on challenging racism. The critique in this instance concerns the logical but also political priority of Botha's argument. His call for a departure from the category of race comes before and without yet redressing the roots, legacy and history of racism itself. As David Goldberg puts it, "we are being asked to give up on the word, the concept, the category ... But not, pointedly not, the conditions for which those terms stand".¹⁶¹ This is somewhat surprising for a paper that claims to address "structural power".

¹⁶⁰ DT Goldberg *The Threat of Race: Reflections on Racial Neoliberalism* (2009) 21: "If antiracist commitment requires remembering and recalling, antiracism suggests forgetting, getting over, moving on, wiping away the terms of reference ...". Goldberg continues (at 22): "As an end in itself, antiracism it turns out for the most part, is whiteness by another name...".

¹⁶¹ Goldberg *Threat of Race* 21.

A quite similar impulse towards colour-blindness and evading the material and symbolic depth of racism is evident in the work of Pierre de Vos who, in a defence of race-based affirmative action policies, nevertheless elects to place the racial denominators "Black", "coloured", "Indian" and "white" in quotation marks. De Vos explains his reason for doing so on the basis that racial categories are "constructed and contingent" and in order to counter what he takes to be the widespread belief that racial identities and race-based thinking express an essential truth about human beings.¹⁶² But by placing race in inverted commas, De Vos denudes race of its materiality as primarily a historically deep structure of power. He moreover overlooks the Black Consciousness Movement's transvaluation of racial categories, contra the apartheid government, into political and cultural identities and sources of resistance against white supremacy. In any case, De Vos and Botha's aversion to race on the basis of its socially-constructed character raises the question of which identity categories are *not* socially constructed.

The quite uncritical treatments of race in the work of the three progressive legal scholars adumbrated above is not helped by the fact that one will be hard pressed to find any close reading of critical race or Africana philosophical scholarship written by Black scholars in the work of South African critical or progressive legal scholars. Consider for example Marius Pieterse's endorsement of Bulgarian-French philosopher Tzvetan Todorov's faulty definition of racism as "a form of behavior" and "a manifestation of hatred or contempt for individuals who have well-defined

¹⁶² P De Vos "The Past is Unpredictable: Race, Redress and Remembrance in the South African Constitution" (2012) 129 *SALJ* 74.

physical characteristics different from our own".¹⁶³ This behavioral conception of racism has long been discredited in critical race scholarship and it is curious that rather than consulting sustained black scholarship on this topic, Pieterse would choose the work of a European literary critic to analyse the racialised underpinnings of African customary law. The systemic under-theorisation of race reflected in the work of the scholars discussed above is thus more than an accident or a difference in theoretical orientation. Rather, it indicates the workings of "epistemologies of ignorance" as well as the presence of an unexamined whiteness in the political and social judgements of South African legal scholars.¹⁶⁴

Recent investigation on this topic suggests that post-apartheid scholarship on race beyond the legal academy in fields such as economics, education, literature, philosophy and sociology (as well as demographics and communication studies) generally enforces the racial ideology of colourblindness. Marzia Milazzo, for example, has studied how the reproduction of colourblind discourse in the South African academy functions as a "rhetoric of racial power" and is "emblematic of an investment in maintaining" racialised inequality, power and privilege.¹⁶⁵ It allows racialised subjects to avoid the question of race, racism and racial inequality while appearing to not depart from democratic and egalitarian ideals.¹⁶⁶ In her study, Milazzo identifies a number of rhetorical tropes and techniques by which colourblindness, and thus the racial status quo, is reproduced in South African

¹⁶³ M Pieterse "It's a Black Thing': Upholding Culture and Customary Law in a Society founded on Non-racialism" (2001) 17 *SAJHR* 365; 365-367.

¹⁶⁴ See generally S Sullivan and N Tuana (ed) *Race and Epistemologies of Ignorance* (2007).

¹⁶⁵ M Milazzo "The Rhetorics of Racial Power: Enforcing Colorblindness in Post-Apartheid Scholarship on Race" (2015) 8 *J of International and Intercultural Communication* 7.

¹⁶⁶ A Ansell "Casting a Blind Eye: The Ironic Consequences of Color-Blindness in South Africa and the United States" (2006) 32 *Critical Sociology* 345.

scholarship on race across the disciplines. These include: appeals to liberal humanism; demonization of race-based redress; depictions of “racial thinking” as a violation of the constitutional vision of non-racialism; individualisation and “culturalisation” of race; claims that class supersedes or trumps race; whitewashing of history; and the relegation of racism to the past.¹⁶⁷

Amy Ansell, who focuses more broadly on the widespread rearticulation of colour-blindness among South African citizens and in public discourse, highlights similar tropes or techniques: the selective acknowledgement of history; the denial of the continuing impact of legacies of the past; assertions of unbiased white innocence; complaints of white victimisation or “reverse-racism”; idealistic conceptions of race that exclude its structural and institutional dimensions and injunctions to forget the past and move on.¹⁶⁸ Interestingly, another key move of colourblindness involves the misappropriation of the philosophical thought of postcolonial theorists such as Edward Said and Homi Bhabha and Black anti-colonial figures such as Biko himself.¹⁶⁹ In short, these thinkers are misrepresented and used in the service of prioritising the theoretical deconstruction of racial categories and identities rather than being directed towards a critique and analysis of institutional, structural and epistemic racism.¹⁷⁰ Indeed the overall effect of this racial ideology is phrased by Milazzo in the following stark terms:

As white domination persists, the South African case reveals itself as symptomatic of an ongoing global assault on the knowledges and lives of people of color. Millions of students of all

¹⁶⁷ Milazzo (2015) *J of International and Intercultural Communication* 10-20.

¹⁶⁸ Ansell (2006) *Critical Sociology* 343-352.

¹⁶⁹ Milazzo (2015) *J of International and Intercultural Communication* 19.

¹⁷⁰ Milazzo (2015) *J of International and Intercultural Communication* 14.

backgrounds are being indoctrinated into naturalizing and reproducing racial inequality.¹⁷¹

My own critical unease with the conceptual handling of race by the legal scholars discussed above echoes not only Biko's critique of white liberals but also the more familiar critique by critical race theorists of critical legal studies (CLS) as an elitist white male enterprise that is inhospitable to the political realities and legal needs of racially oppressed communities.¹⁷² Famously, critical race theorists took CLS to task for its inability to account for the constitutive power and contemporary persistence of white supremacy in their critical examination of law as a site of politics and ideology. They also challenged CLS for its generally tangential treatment of race (figured in CLS as either a by-product of the capitalist class structure, as a relic of the legal past, or as an individual aberration made up of ideas and behaviours).¹⁷³ Insofar as progressive legal scholars in South Africa inherited aspects of CLS' theories and methods, it is not entirely surprising that they would be blind to the anti-black logic of race and thereby conceptually minimise the historical problem of racial oppression.

(c) Ahistorical histories

If our accounts of the constitutional present and racial *status quo* are tied to our particular understandings and interpretations of South African history, and particularly the period of the transition to constitutional democracy in the early

¹⁷¹ Milazzo (2015) *J of International and Intercultural Communication* 22.

¹⁷² See, among others, R Delgado "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" (1987) 22 *Harvard Civil-Rights-Civil Liberties LR* 301; P Williams "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 *Harvard Civil-Rights-Civil Liberties LR* 401; H Dalton "The Clouded Prism" (1987) 22 *Harvard Civil-Rights-Civil Liberties LR* 435; K Crenshaw "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 *Harvard LR* 1331.

¹⁷³ J Hardwick "The Schism Between Minorities and the Critical Legal Studies Movement: Requiem for a Heavyweight?" (1991) 11 *Boston College Third World LJ* 150 – 155.

1990s, we must pay closer attention to the ways in which the aspiration towards colour-blindness (expressed in the avoidance of race and the desire to nominally transcend racial categories) is intricately tied to the belief that the juridical end of *de jure* apartheid signals the eradication of structural, institutional and intersubjective racism. It seems entirely apposite then to take a brief excursion into the post-1994 history classroom to grasp its working as a site for the reproduction of post-apartheid reason.

Educational sociologist Chana Teeger has examined the teaching of history in multiracial “post-”apartheid secondary schools and their role in disseminating race-neutral discourses and colourblind ideologies which deny “both present-day racism and the contemporary effects of histories of racial oppression”.¹⁷⁴ Through an empirical study grounded in critical race theory, Teeger notes that the predominant mode employed in the teaching of history is the conveyance of a trope that the interviewed teachers themselves call “both sides of the story”. “Both sides of the story” is composed of the narratives that “not all whites were perpetrators and not all blacks were victims”¹⁷⁵ and “not all whites supported apartheid and not all blacks suffered under apartheid”.¹⁷⁶ As Teeger notes, the function of these narrative tropes is to individualise the history of colonial-apartheid, to decouple the racialised coding of victims and perpetrators and to thereby detract from the structural dimension of racism as well as its continuity into the present.

¹⁷⁴ C Teeger “Both Sides of the Story’: History Education in Post-apartheid South Africa” (2015) 80 *American Sociological Review* 1175.

¹⁷⁵ Teeger (2015) *American Sociological Review* 1175.

¹⁷⁶ Teeger (2015) *American Sociological Review* 1186.

It is noteworthy that the trope of “both sides of the story” is an ideological improvisation of the teachers themselves as it does not appear in any national curricular guidelines.¹⁷⁷ The professed aim of conveying history in this way is to manage possible conflict emanating from learners’ opposing feelings of guilt/denial (white learners) and anger/resentment (Black learners). Indeed, Teeger’s report suggests that the deployment of “both sides of the story” primarily serves to relieve the white learners of any sense of guilt or historical culpability and to protect what Robin DiAngelo calls “white fragility”.¹⁷⁸ In contrast, Black learners have their claims concerning historical and contemporary racism delegitimised through the reminder that “they were not the ones who suffered under apartheid, and they should not use apartheid as an ‘excuse’”.¹⁷⁹ As Teeger observes, this way of representing colonial-apartheid in South African school curricula problematically “eschews discussions of the constitutive role of racism in national histories”.¹⁸⁰

The trope of “both sides of the story” proceeds through a number of discursive moves. First, excessive attention is paid to “white resisters” (i.e. those white liberals and leftists who opposed apartheid) in order to underscore that “not all whites *were* racist”.¹⁸¹ Here no mention is made of the white electorate that regularly returned the National Party to power nor to the general enjoyment by all whites of the benefits, advantages and privileges of being white in apartheid South Africa. The second complementary move involves the addition of “black perpetrators” and here

¹⁷⁷ Teeger (2015) *American Sociological Review* 1176.

¹⁷⁸ R DiAngelo “White Fragility” (2011) 3 *International J of Critical Pedagogy* 54-70. By “white fragility”, DiAngelo refers to white people’s expectation to be protected and insulated from race-based stress which leads to a lowering of their ability to handle and tolerate racial stress, resulting primarily in defensiveness.

¹⁷⁹ Teeger (2015) *American Sociological Review* 1192 – 1193.

¹⁸⁰ Teeger (2015) *American Sociological Review* 1179.

¹⁸¹ Teeger (2015) *American Sociological Review* 1187. My emphasis.

the Pan-Africanist Congress and its espousal of the view that Blacks ought to control and define their own liberation is represented as engaging in activities and holding views that are “morally equivalent to the apartheid regime”.¹⁸² They are represented within the “both sides of the story” narrative as evidence of the point that “some blacks were also racist” and stood for “reverse apartheid”.¹⁸³ Here again learners are not taught to view Africanist and Black Consciousness political activists and organisations as exponents of alternative conceptions of liberation and resistance. In the third move, apartheid itself is reduced to hate and misunderstanding, an abstract and generalised form of violence and conflict with no particular racial ordering and in which “everybody suffered”.¹⁸⁴ In this way, the structural and systemic character of colonial-apartheid as an order of racial subjugation and inequality is minimised. The fourth move involved in history teachers telling “both sides of the story” is the construction of a sharp boundary between “then” and “now” – to disconnect the past from the present and foreclose reflection on the legacies and continuities of the “past”.¹⁸⁵

Far from being isolated, Teeger argues that despite how flawed and inaccurate this narrative of history is, it ended up becoming hegemonic in the public imaginary and collective memory of South Africa through its institutionalisation in the TRC, adding credence to the view that post-1994 South Africa was built on faulty moral, political but also historical foundations.¹⁸⁶ In the result, a “normative climate” becomes widespread in society which obscures the continuities in the social

¹⁸² Teeger (2015) *American Sociological Review* 1189.

¹⁸³ Teeger (2015) *American Sociological Review* 1189.

¹⁸⁴ Teeger (2015) *American Sociological Review* 1189.

¹⁸⁵ Teeger (2015) *American Sociological Review* 1191.

¹⁸⁶ Teeger (2015) *American Sociological Review* 1190.

structure, symbolic order and political economy of colonial-apartheid – the power asymmetries and intergenerational disadvantages which still trail us even in the “new” constitutional dispensation.¹⁸⁷ In this climate, interpersonal and structural racism becomes illegible and Blacks in particular are disarmed of the ability to name and make visible the impact of racialised powers and discourses on their lived experience and life chances.

Teeger then extends her analysis from the history classroom and the TRC to the Apartheid Museum to read this normative climate as part of a broader attempt by the post-1994 constitutional state to “control for consensus”, meaning to inculcate forgetting through the orchestration and configuration of collective memory in particular ways.¹⁸⁸ According to Teeger, the need to legitimise the negotiated settlement and the constitutional democracy that followed it required that history be remade in the service of generating an official narrative or founding myth for the new dispensation. And a crucial component of this remaking, she notes, was the “forgetting of alternative visions and ideologies” such as those of the BCM and PAC in order to make the political compromises reached in the transition appear inevitable and even natural.¹⁸⁹ The repressions and distortions of history that Teeger documents in her study ultimately appear as a *precondition* for the coherence, stability and legitimacy of the post-1994 order, since more comprehensive memories of the past and the justice claims that would flow from them would become unmanageable for a multi-racial post-conflict society trying to present an image of

¹⁸⁷ C Teeger “Ruptures in the Rainbow Nation: How Desegregated South African Schools Deal with Interpersonal and Structural Racism” (2015) 20 *Sociology of Education* 1-18.

¹⁸⁸ C Teeger and V Vinitzky-Seroussi “Controlling for Consensus: Commemorating Apartheid in South Africa” (2007) 30 *Symbolic Interaction* 57 – 78.

¹⁸⁹ Teeger and Vinitzky-Seroussi (2007) *Symbolic Interaction* 69.

having overcome its racist past and give across a sanguine image of racial equality, integration and consensus.¹⁹⁰

Tying into Teeger's work is a recent book by Ndumiso Dladla on the philosophical history of race in South Africa. Dladla links the hegemony of ahistorical, largely analytic and liberal-individualist, conceptions of race to the absence of a sustained tradition of African historiography – and the fact that what passes for African history predominantly denotes the collective experiences of European conquerors and their descendants in the academy.¹⁹¹ The works of African scholars from Cheikh Anta Diop and Theophile Obenga to Bernard Magubane and Jordan K Ngubane are generally overlooked. Dladla notes throughout the Settler, Afrikaner Nationalist, English Liberal-Pluralist and Neo-Marxist-Radical schools of South African historiography a disturbing homology that unites all these schools, namely a commitment to white supremacy and legitimization of the "right of conquest" that was the basis of European invasion and colonisation of this part of the African continent.¹⁹² According to Dladla, the interpretive approaches that undergird the study of South African and African history – and the concomitant treatment of race in these approaches – is generally reflective of the political pursuits and interests of the conqueror in the form of what he calls "historical power" – reflecting both the politico-historical development of white power in South Africa but also the power of whites over the enterprise of history-writing itself.¹⁹³

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¹⁹⁰ Teeger and Vinitzky-Seroussi (2007) *Symbolic Interaction* 65.

¹⁹¹ N Dladla *Here is a Table: A Philosophical Essay on the History of Race in South Africa* (2016) 53-55.

¹⁹² Dladla *Here is a Table* 56-66.

¹⁹³ Dladla *Here is a Table* 82.

Attention to the three moments or instances of post-apartheid reason above sketches a picture of a present South African society possessed of a significantly impoverished political, moral and historical imagination, particularly as this pertains to the topics of race and racism. The transition to constitutional democracy which was ostensibly also the making of a new nation relied principally on the consolidation of hegemonic archives (among them, constitutions, intellectual practices in the legal academy and “rainbowist” historical narratives) together with the bureaucratic and institutional manufacturing of consensus. This was a transition facilitated by institutionalised rituals of exoneration, obfuscation, depoliticisation and the dissemination of cosmetic images of equality, change and reconciliation across a wide array of spaces: courts, classrooms, the academy, public discourse, museums. The combination of a starkly incomplete national reckoning with and understanding of history together with a teleological compulsion to see progress, transformation and possibility where there is – *or where there is also* – failure, continuity and stagnation work to sustain a particular kind of political and intellectual imaginary, a facile optimism, that results in forms of closure, erasure and silencing which make the racially unjust and unequal *status quo* illegible and unchallengeable. In this sense, the work of post-apartheid reason is ultimately to justify colonially produced asymmetries in racial power and to maintain – or at least turn a blind eye to – a metric of human value and status defined by colonial conquest and white supremacy.

Although post-apartheid reason may signal for its proponents a faithful commitment to constitutional values and ideals and a repudiation of everything colonial-apartheid stood for, it appears on this reading to result in a weakening of

South Africa's public imaginary and collective self-consciousness about what it would take – and *what it still requires* – to substantively overcome colonial-apartheid. The powerful role of law in shaping “popular consciousness toward accepting the political legitimacy of the status quo”¹⁹⁴ should not be overlooked in this regard. To purloin Peter Gabel and Paul Harris slightly, the South African constitutional order and legal system are important public spaces through which the “post”-apartheid State attempts “through the manipulation of symbols, images and ideas”¹⁹⁵ to legitimise the present social order, principally by presenting it as the outcome of a fair, faultless and inevitable process of political compromise and negotiation. But what happens when the social order presented in these ways continues to be defined by racial hierarchy, and when the majority Black population which is said to have been liberated through constitutional transition still experiences the absence of genuine freedom, power, justice and dignity? Gabel and Harris answer as follows:

The principal role of the legal system within these societies is to create a political culture that can persuade people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement. The need for this legitimation arises because people will not accede to the subjugation of their souls through the deployment of force alone. They must be persuaded, even if it is only a “pseudo-persuasion,” that the existing order is both just and fair, and that they themselves desire it. In particular, there must be a way of managing the intense interpersonal and intrapsychic conflict that a social order founded upon alienation and collective powerlessness repeatedly produces. “Democratic consent” to an inhumane social order can be fashioned only by finding ways to keep people in a state of passive compliance with the status quo, and this requires both the pacification of conflict and the provision of fantasy images of community that can compensate for the lack of real community that people experience in their everyday lives.¹⁹⁶

¹⁹⁴ P Gabel and P Harris “Building Power and Breaking Images: Critical Legal Theory and the Practice of Law” (1983) 11 *NYU R of Law and Social Change* 370.

¹⁹⁵ Gabel and Harris (1983) *NYU R of Law and Social Change* 370.

¹⁹⁶ Gabel and Harris (1983) *NYU R of Law and Social Change* 372.

In order for the legal system to perform the ideological function of legitimation, it relies on rituals, symbols and memories which help to generate a belief in the authority of the law and the authority of dominant historical and political narratives¹⁹⁷ – hence the fetishisation of the Constitution and the relentless desire to be “post-apartheid”. Thus, if they appeared disparate to the reader, the connection between the Constitutional Court, the TRC, constitutional fetishism, colourblind legal scholarship, and reductionist history curricula – together with the wilful ignorance shown towards Black radical and African historical and philosophical scholarship – lies in the collective role they play in inducing passivity and “consent” to the inhumane and inequalitarian conditions of the post-1994 present. As I noted above, this happens principally through the continual construction of a discursive divide between the past and present, then and now, apartheid and “post”-apartheid – thereby denying the continuity and persistence of the racial past into the constitutional present. This is central to how legal and political institutions manage and conceal the tension between the ideals of the putatively new nation and the reality of continuing racial stratification.

The counter-hegemonic legal consciousness and the counter-archival sense that Biko evokes is thus crucial in disclosing a jurisprudence that would overturn the logics of post-apartheid reason through an openness and a re-opening of lost and forgotten historical and intellectual archives that will enable the questioning of settled narratives and sedimented official histories. This could not be more timely since the failure to properly deal with the “past” and its legacies has paradoxically ensured that it stays alive and that the voices insisting on justice become more

¹⁹⁷ Gabel and Harris (1983) *NYU R of Law and Social Change* 372.

vocal. Since the nominal and formal changes did not come with commensurate substantive changes in the quality of life of Black South Africans, the constitutional order will remain haunted by its own instability and falsity. We need a jurisprudence that can grapple with, and face up to, this haunting. It was after all a key tenet of the ethics and pedagogy of Black Consciousness that the process of transition to a new society must withstand, rather than repress, the discomforts, contradictions and disunities of political and ethical life in a still-racialised world. This is another way of phrasing Biko's insight that the education of a society's political outlook – what he called "learning to live" in a non-racial, just and egalitarian society – is a precondition for lasting social change.¹⁹⁸

5.5 Critique, liberation and reimagining jurisprudence: Biko's prophecy

From his own time and space, Biko prophetically announces his opposition to "post-" apartheid law, constitutionalism and jurisprudence by asserting a contending historical and social interpretation of the South African colonial reality and thereafter setting out an alternative vision for liberation, reconstruction and reharmonisation to the one that ultimately determined the terms of the transition to a "new" South Africa. We could say that the failure to heed Biko's prophetic insights is what conditions the existence and nature of the "new" South Africa. Yet the fact of Biko's life and thought – that he lived here and put his thoughts to paper – is a reminder that different historical possibilities had been enunciated and were available for the making of a new South Africa. Recognising this fact, and thereby denaturalising the outcomes of the settlement and compromises that gave rise to the present South

¹⁹⁸ Biko *I Write What I Like* 170.

Africa as we know it, is the first gesture of theorising and again struggling for a more just, peaceful and truthful society and world.

To illustrate this further, it is necessary to briefly recapitulate Biko's proposition concerning the proper interpretation of the historical situation and social reality of South Africa. Biko recognised that the "fundamental disorder" in South African society was (and is) that while Blacks numerically and statistically outnumbered whites, they were subjugated by a white minority government and were subjected to the most extreme forms of social, political, economic and cultural domination which subsumed Black people's entire lived experience.¹⁹⁹ Biko's analysis of the sources of this disorder however differed radically from the dominant doxa of the times which saw the problem of South Africa as the specific juridical formation of apartheid (and its operative pillars of authoritarianism, discrimination, segregation, disenfranchisement, and deprivation).

On the logic of this doxa, the remedy to correct the injustices of apartheid would be non-racial universal suffrage, liberal democracy, constitutional supremacy and human rights. Such a remedy, it was presumed, would not only depart from the legal and political culture of the apartheid regime but also facilitate the incorporation of Blacks as equal citizens into the South African polity. (Entailed in this position are a number of historical distortions: (1) *erasure of the land question* (construed to mean the question of territorial and political sovereignty, and the associated cultural integrity and status of African people); (2) *backtracking on the timeless immorality of colonial conquest* and (3) the *introduction of a highly spectacular and liberal-*

¹⁹⁹ Biko *Black Consciousness in South Africa* xiv.

legalistic view of racism – stripped of its structural, foundational and systemic content and characterized by an undue focus on individual actors (apartheid police, the National Party and so on)). This doxa is premised on the assumption that the racial exclusion of Blacks in South Africa should be corrected through integration. And it is this doxa that ultimately framed the negotiations as well as the transitional justice and constitution-making process in South Africa.

In contrast, Biko traces the problem to 1652 which signifies that according to his understanding, South Africa is a settler-colony that at least since the mid-17th century has been organised in terms of “the totality of white power”. In this situation, it is what he called “the colour problem” (i.e race) and not class or totalitarianism that is the source of the fundamental problematic of South Africa. To end the colonial order in South Africa and actualise a liberated society, the thesis (white supremacy) and antithesis (Black Consciousness) have to come into dialectical conflict. Without such a conflict, the thesis would remain the organising principle of a society, which for our purposes means that a new constitution emerging from compromise and negotiation, as opposed to dialectical struggle, cannot result in a synthetic and hence revolutionary reconstitution of South Africa. It can, in other words, only result in a reconfiguration of the thesis and thus a continuation of white supremacy.

In Biko’s conception, a non-racial society can only come into being through the abolition of racialised markers of being and precisely not through the protection of white racial interests in the name of national unity. The choice to found a new South Africa on the basis of compromise, reconciliation and negotiation paradoxically

keeps alive the antagonism that is purportedly being ended or overcome. It keeps alive, in other words, the “the superior-inferior white-black stratification that makes the white a perpetual teacher and the black a perpetual pupil” and does not address the problem that a “settler minority [imposed] an entire system of values on an indigenous people”.²⁰⁰ The inordinate focus during the transition to a new constitutional order on only legal and political apartheid and not on the longer colonial period characterized by land dispossession and epistemicide, as well as on the spatial, cultural, epistemological, social and economic apartheid that so crucially defined the racial reality in South Africa is what has now brought the present South Africa into conceptual and political crisis. The transition to a “new” South Africa and the jurisprudence that followed it thus adheres precisely to the model of integration that Biko so presciently warned against.²⁰¹ Such a path of change, Biko intimated, would be artificial:

The myth of integration as propounded under the banner of liberal ideology must be cracked and killed because it makes people believe that something is being done when in actual fact the artificial integrated circles are a soporific on the blacks and provide a vague satisfaction for the guilty-stricken whites. It works on a false premise that because it is difficult to bring people from different races together in this country, therefore achievement of this is in itself a step forward towards the total liberation of the blacks. Nothing could be more irrelevant and therefore misleading. *Those who believe in it are living in a fool's paradise.*²⁰²

Integration for Biko is not a workable path for the reconstruction of a society because it has a built-in Manichean asymmetrical structure to it in which there is the

²⁰⁰ Biko *I Write What I Like* 26.

²⁰¹ See A Mngxitama *et al* “Biko Lives” in A Mngxitama *et al* (eds) *Biko Lives! Contesting the Legacies of Steve Biko* (2008) 17 for the contention that the “experience of post-apartheid has been the realisation of the integration model”. See also section 3.4.3 of this thesis.

²⁰² Biko *I Write What I Like* 23.

integrator (white South Africa) and the integrated (oppressed Black majority). In this arrangement, Blacks (marked as “previously disadvantaged”) are the candidates for integration into the largely white-created polity while whites set the standard for integration. Because it is itself an expression of domination and inequality that rearticulates and recirculates the characterological superiority of whites over Blacks, integration cannot result in substantive change across the public and private, cultural and socio-economic, spatial and psychic landscape of South Africa. As Biko explains further:

[H]astily arranged integration cannot be the solution to the problem. It is rather like expecting the slave to work together with the slave-master’s son to remove all the conditions leading to the former’s enslavement.²⁰³

And because the transition was an elite-driven one, this also means that Blacks did not develop the trajectory of their own struggle – something Biko saw as a precondition for true social change in South Africa. If one thus reads the present South Africa through Biko’s looking-glass, it should come as no surprise that the power relations and governing paradigms produced through colonisation and apartheid have remained virtually untouched in the post-1994 period.

Biko placed an emphasis on *substantive* social reconstruction and on a paradigm shift in the governing value systems, social relations and institutions. He foresaw that Black political leadership in an unchanged economic and social structure would have no effect on the hegemony of the historically dominant white racial group in South Africa. Famously Biko predicted that:

If we have a mere change of face of those in governing positions what is likely to

²⁰³ Biko *I Write What I Like* 22.

happen is that black people will continue to be poor, and you will see a few blacks filtering through into the so-called bourgeoisie. *Our society will be run almost as of yesterday.*²⁰⁴

It is thus an error to equate the absorption of Blacks into already created legal, political, economic and socio-cultural systems, institutions and practices with freedom or justice. And it is an even greater error to reduce liberation to the constitutional recognition of socio-economic rights and access to basic services. As explained in chapter 2, a process of liberal-democratic constitutional change which does not at the same time bring about a reconstitution and restoration of the polity, at the level of sovereignty, political economy, onto-epistemes (ways of knowing and being) and social relations can only produce abstract, rather than authentic and concrete, liberation. This delivery of only an abstract and illusory freedom creates a ruse or tension in which formally liberated subjects *still* occupy the position of the underclass of a society. In such a case, the new order marks a *rearticulation* (and concealment) of Black people's unemancipated condition.

Biko's prophecy is coeval with Fanon's widely quoted and equally prophetic chapter in *The Wretched of the Earth* on the pitfalls or misadventures of national consciousness. In that chapter, Fanon develops a now definitive critique of the postcolonial national bourgeoisie who, upon taking power, end up replicating the ways of the "former" colonial power. At once dystopic and nightmarish, Fanon depicts the postcolonial situation as one characterized by stagnation, corruption, poverty, economic inequality, creeping xenophobia and inter-ethnic conflict, the intensification of Western imperial hegemony, the erosion of democracy,

²⁰⁴ Biko *I Write What I Like* 169.

marginalization of masses of the colonized people, moral and ideological decay of erstwhile liberation movement(s) and the absence of revolutionary leadership. There is no doubt that many of these foregoing elements feature strongly in the social fabric and body politic(s) of post-1994 South Africa.²⁰⁵ But the moment from Fanon's chapter with the most profound relevance to the present South Africa is his capturing of the deep sense of unfreedom, inertia and discontent that emerges in the wake of post-colonial democratisation. It is not long in this neocolonial nightmare before the realization sets in among the masses of colonized people that nothing *truly* new has been brought into being:

During the struggle for liberation, the leader roused the people and promised them a radical, heroic march forward. Today he repeatedly endeavors to lull them to sleep and three or four times a year asks them to remember the colonial period and to take stock of the immense distance they have covered. *We must point out, however, that the masses are quite incapable of appreciating the immense distance they have covered.* The peasant who continues to scratch for a living from the soil, the unemployed who never find a job, are never really convinced that their lives have changed, despite the festivities and flags, however new they might be.²⁰⁶

As Fanon further elaborates, liberation from colonial-apartheid will remain incomplete if legal and political transformation is not accompanied first by a complete economic restructuring of society and also by a new, emancipatory, radical-democratic and humanist national consciousness.²⁰⁷ This is what Biko expresses in his call for an experimentation with black socialist or communalist

²⁰⁵ Mabogo More ("Fanon and the Land Question in (Post)Apartheid South Africa" in N Gibson (ed) *Living Fanon: Global Perspectives* (2011) 175), for example, argues that "almost the entire diagnosis Fanon makes about post-independent African states in this chapter applies with stunning exactness to post-apartheid South Africa". For another explicit theorization of post-1994 South Africa through the prism of Fanon's chapter on the pitfalls of national consciousness, see N Gibson "The Pitfalls of South Africa's 'Liberation'" (2001) 23 *New Political Science* 373.

²⁰⁶ F Fanon (trans R Philcox) *The Wretched of the Earth* (2004[1961]) 114.

²⁰⁷ Fanon *Wretched of the Earth* 142.

alternatives to racial capitalism and in his call for the re-valorisation of African indigenous values and paradigms.²⁰⁸

Reference has been made in earlier chapters to the argument that post-conflict democratisation in contrast to decolonisation always formulates the content and vision of freedom and justice in limited and limiting ways – not least due to the liberal framework in which it operates. This is made worse by the fact that the process of democratisation that gave rise to the new dispensation was driven by interests that were not primarily of the Black majority. According to Andile Mngxitama, Amanda Alexander and Nigel Gibson, it is precisely this conundrum of incomplete liberation or “partial freedom” that Biko anticipated.²⁰⁹ As such, they argue that the force and contemporary relevance of Biko lies in the fact that the project and problem of realising black liberation still persists today.²¹⁰ In his prophetic moments, Biko gestured, they claim, to the problematics of a post-apartheid society that would remain structured by the colonial-apartheid *status quo*.²¹¹ His dream of total liberation, of a new society and a true humanity, contrasts sharply with the present South African concern with individualist neoliberal schemes such as Black Economic Empowerment (BEE), representivity in the workplace, poverty alleviation and even transformation since his project entailed changing the very structure and order of things in society and not simply racially democratising existing structures and orders.

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²⁰⁸ Mngxitama *et al* “Biko Lives” in A Mngxitama *et al* (eds) *Biko Lives!* 16; Biko and Lanning “Steve Biko Interviewed by Greg Lanning, 5 June 1971” in Hook (ed) *Steve Biko – Voices of Liberation* 148.

²⁰⁹ Mngxitama *et al* “Biko Lives” in A Mngxitama *et al* (eds) *Biko Lives!* 12.

²¹⁰ Mngxitama *et al* “Biko Lives” in A Mngxitama *et al* (eds) *Biko Lives!* 1.

²¹¹ Mngxitama *et al* “Biko Lives” in A Mngxitama *et al* (eds) *Biko Lives!* 2, 4, 12, 17.

Biko's prophetic critique of post-1994 society, and by extension law and jurisprudence as well, serves as an instructive starting point for a *diagnostic* and *critical* jurisprudence that could expose the material and historical persistence of racism and the still unstable grounds of South African political community and identity. The unrepaired fractures in the polity and the problem of outstanding sovereignty and justice must be confronted with a renewed sense of political, intellectual and ethical urgency. This confrontation beckons new modes of analysis and resistance, and urges a return to a *structural* critique of white supremacy. Attending to the task of diagnosis and critique, as well as contemplating liberatory alternatives, will require new practices of reading that eschew the Eurocentrism and legalism of South African legal scholars. A close engagement with the archive of black radical, African and African-diasporic political and ethical thought, social theory and literature – and the many alternative visions and meanings of the world they articulate – is crucial for the becoming of a jurisprudence of liberation. This jurisprudence of liberation, which is also a post-conquest jurisprudence, is one that must begin on the ruins of "post-apartheid jurisprudence" and liberal constitutionalism. Its first gesture is therefore not necessarily to break new ground but to clear the space for alternative theorisations and different futures.

5.6 In place of a conclusion: on the possibility conditions for a jurisprudence of liberation

Seeing post-1994 South Africa through the lens of Biko's politics and Black Consciousness philosophy does not paint a very "pretty picture" as they say. In this picture, we come to understand how a transition from white settler-colonial

domination based on a model of integration – travelling under the banner of human rights, reconciliation and democratisation – not only leaves much of the colonial-apartheid social and economic structure and symbolic order intact but results in a reproduction of white racial power at many levels. We see a country which, by reducing freedom and justice to assimilation into white South Africa, the South Africa named, made and imagined by its European conquerors and their descendants, ends up being “run almost as of yesterday”. When this fact of unfreedom is obscured through the founding of national myths and the ideological mystifications of the law, the entire process of change becomes “obscene” as Saidiya Hartman would say, insofar as it must turn a “narrative of defeat into an opportunity for celebration”.²¹² To this extent, contemporary South Africa when seen through Biko’s eyes is a “fool’s paradise”.

It was the aim of this chapter to explore, track and map out the ways in which Biko’s thought, politics and memory stands in radical opposition to the entire post-1994 constitutional dispensation, including the terms of the negotiated settlement that created it, and the discursive repertoire of historical simplifications, silences, denials and distortions that continue to legitimate it. Against the story of peaceful transition and of the progressive realisation of a reconciled and equal society, the spectre of Biko demands that we witness the intractable injustice and crushing unfreedom that runs as a fault-line across the social and symbolic life of blackness in South Africa. Although Black people in this country are an indigenous majority, and are supposedly the largest beneficiaries of the promises of “post”-apartheid freedom, they, or rather blackness itself, seem to occupy – in jurisprudence and in the public

²¹² S Hartman and FB Wilderson “The Position of the Unthought” (2003) 13 *Qui Parle* 185.

imaginary – the same position they occupied in Biko’s time: “the position of the unthought”.²¹³ Through Biko, the ongoing systemic production of racial domination and abjection can be brought to the surface of theory and history and tied further to the role of law in sustaining and reproducing coloniality at a deeply structural and epistemic level. In this way, post-1994 South Africa is revealed as itself a complex social text available for critique and interrogation of its hidden and faulty foundations, attachments, interests and values.

I situate the arguments put forward in this and earlier chapters within the broad notion of a general jurisprudence as explained by Douzinas and Gearey as an expansive conception of what jurisprudence entails, moving away from formalist treatments of positive law and legal doctrine – what they call a restricted jurisprudence – to posing larger questions concerning the social bond, social existence, power, ideology and history. Their definition of jurisprudence as both the “conscience” and “consciousness” of law opens up generative avenues for thinking and unthinking post-1994 South African law and jurisprudence from the perspective of the history of colonial conquest, racial oppression and their material and psychic concomitants. The notion of a general jurisprudence clarifies the jurisprudential pedigree of Biko’s thinking, and in particular highlights the jurisprudential significance of Biko’s attentiveness to race and racism as central terms in the ongoing historical constitution of South African society. To the extent that the social bond and social existence in South Africa is punctuated by the historical and ideological constancy of white supremacy and coloniality, the philosophical and

²¹³ Hartman and Wilderson (2003) *Qui Parle* 185. Kopano Ratele (“The Singularity of the Post-Apartheid Black Condition” (2015) 49 *PINS* 54) has described this position as “the peculiarity of abject post-apartheid blackness”.

political challenge of Black Consciousness to colonial, apartheid and “post”-apartheid law must be heeded.

Elaborating on Biko’s counter-hegemonic legal consciousness and counter-archival sense, I traced the figure of Biko as a “subjectivity against the law” first in his 1976 testimony in the BPC-SASO Trial in which he enacted an epistemic and juridical crisis in the legitimacy of apartheid law, and positive law as such, through deploying an experientially-grounded, black radical political vocabulary. This analysis was extended to two landmark Constitutional Court cases – namely *AZAPO* and *City of Tshwane* – in which the spectre of Biko re-appeared, this time to disrupt the hegemonic narratives and myths around transition, justice, truth, society, reconciliation race, identity, memory and history that were constructed and disseminated as part of the making of the “post”-apartheid “rainbow nation”. Biko’s political subjectivity against the law, in other words, extends beyond apartheid and into the present. It also extends beyond “the law” to other sites of what I have tentatively named “post-apartheid reason”. In all three of the sites examined for the purposes of this chapter – the Constitution, the legal academy and the multiracial history classroom – a relentless depoliticisation and minimisation of South Africa’s racial and colonial history together with a fetishistic attachment to law, rights and constitutionalism worked tirelessly to divorce the “past” from the present, thereby institutionalising and normalising amnesia, complacency, passivity, ignorance and irresponsibility. In that section, I attempted to show how, from the perspective of South Africa’s racial history and its afterlife, Biko’s philosophical and social thought plots a number of critiques and challenges to “post-apartheid reason”. The form of that critique and challenge ultimately takes the form of a diagnostic critique,

prophetically articulated by Biko four decades earlier, which foresaw how the non-happening of decolonisation and social revolution and their substitution by “democratic” negotiations and reform would prevent South Africa from becoming *substantively* non-racial. The now well-worn empirical and statistical fact concerning the unchanged (and indeed worsening) political, socio-economic and existential standing of Blacks represents the paradigmatic indictment of the falsity and failure of the constitutional and legal arrangement of the post-1994 dispensation.

By marking in advance liberation, justice and restoration as the outstanding and unrealised ideals of the present South Africa, it is *as if* Biko himself tasks the development of an Africanist critical race theory with the unsettling of the new polity and with the introduction of vocabularies, imaginaries and desires that could set in motion a new path for, and imagining of, a liberated and renewed post-conquest polity. As such, the outcome of this jurisprudential reading of Biko has been to lay the foundation for a jurisprudence of liberation which is to say a post-conquest jurisprudence. Such a jurisprudence can be understood first and foremost as an alternative orientation for a different inhabitation of the political, social and legal world. It introduces a different genre of political consciousness but as I have also intimated above, calls for new practices of reading. In this sense, a post-conquest jurisprudence of liberation is also the liberation of jurisprudence itself, not only from the Eurocentrism and epistemic whiteness in which it has been hitherto subsumed but also from the wide array of binding rationalities (constitutional optimism, liberal legalism, colourblindness, ahistoricity among others) which constrict its imagination. If the infinite demands implied in the undertaking I have named a

jurisprudence of liberation appear complex, incomplete, quixotic, unknowable, or impossible, that may be because it is all those things.

6

Coda:

Black Consciousness and the "Counter-aesthetics" of "Post-apartheid Law

All paradises, all utopias are designed by who is not there, by the people who are not allowed in.¹

I mean all of that work has been done, but then what happens is that the forces that are really hostile to black life, to black people, are always in operation. So that we are in a period of reaction that is strong, that if we are not careful the work we are doing will have to be "rediscovered" at some point. You know people are going to have to keep doing it, or rediscover it again, or reassert it because the forces of opposition are so forceful and powerful and they're always pushing against us, they always want to enforce forgetfulness. They always want to do something that forgets the African presence or reabsorbs it, reappropriates it in another way. The need to confront psychological violence, epistemic violence, intellectual violence is really powerful.²

6.1 Beginning, ending: in the time of Biko

How should we read the archive of Steve Biko and Black Consciousness in the present post-1994 South African context? The labour of this thesis has been to posit the fecundity of Black Consciousness as a critical theory and social vision for the time we currently inhabit. But there are clearly tensions in the temporalities of

¹ T Morrison and E Farnsworth "Conversation: Toni Morrison" in T Morrison (CC Denard, ed) *Toni Morrison: Conversations* (2008) 156.

² Hortense Spillers in "'Whatcha Gonna Do?: Revisiting 'Mama's Baby, Papa's Maybe: An American Grammar Book': A Conversation with Hortense Spillers, Saidiya Hartman, Farah Jasmine Griffin, Shelley Eversley & Jennifer L Morgan" (2007) 35 *Women's Studies Quarterly* 301.

reading Biko, most evidently revealed in a collection commemorating and celebrating Biko edited by the writer Chris Van Wyk. In that collection, one current that emerges strongly is one that seeks to consign Biko to a footnote in history. Jonathan Jansen for example argues that Biko “remains relevant today to the extent that he inspired a generation of black intellectuals to come into their own”.³ Having delimited the relevance of Biko’s Black Consciousness to a mere past inspiration and childhood hero, Jansen continues to confess that despite the lessons and legacy of Black Consciousness in his own life and journey “he now finds himself” more attracted to a cosmopolitan “imagining [of] a world without race”.⁴ In Jansen’s account, Biko belongs to a past time, a racial time which must now be transcended by a vision of common citizenship.

Achille Mbembe joins Jansen but for slightly different reasons. For Mbembe, “the social and political changes the country has undergone have significantly shifted the context of black political struggles”.⁵ As he counsels further, unlike during Biko’s time in 1970s, Black South Africans now have political power and so can no longer act as though “they [are] totally powerless” – more so since according to Mbembe racism “is not the only significant obstacle black South Africans now face”.⁶ Mbembe argues that if Black Consciousness and black radical politics is to have a place in “the post-liberation era”, it should, “conform better to [the] democratic principles” of liberal constitutionalism.⁷ The references to a sense of a “now” that is distinct from

³ J Jansen “King James, Princess Alice and the Ironed Hair: A Tribute to Stephen Bantu Biko” in C Van Wyk (ed) *We Write What We Like: Celebrating Steve Biko* (2007) 131.

⁴ Jansen “King James, Princes Alice and the Ironed Hair” in Van Wyk (ed) *We Write What We Like* 132.

⁵ A Mbembe “Biko’s Testament of Hope” in Van Wyk (ed) *We Write What We Like* 144.

⁶ Mbembe “Biko’s Testament of Hope” in Van Wyk (ed) *We Write What We Like* 144.

⁷ Mbembe “Biko’s Testament of Hope” in Van Wyk (ed) *We Write What We Like* 140-141; 144.

a past “then” is crucial to Mbembe and Jansen’s respective obituaries of Black Consciousness. This distinction is also crucial to those, such as Thabo Mbeki, who constantly speak of Biko in the past tense.⁸ Saths Cooper and Pandelani Nefolovhodwe deepen this temporal distinction by corralling Biko off from the “qualitatively different country” that we currently live in.⁹

Each of these claims rely on the contestable assumption that social change happens automatically with the forward movement of time, and that legal reform and other surface-level social facts (such as a new constitution, universal suffrage, a majority-Black government, and the absence of explicit racial restrictions) translates into the elimination of indelible and deep structures of power. It was these assumptions concerning time, social change, power, history and race which this thesis attempted to put into question through employing the temporal paradigm of the “afterlife”.¹⁰ Reading post-1994 South Africa through this paradigm enables attunement to the constitutive power of historical formations and to the ability of oppressive structures and practices to endure and reconfigure themselves over time. This is a view consistent with the critical race insight that white supremacy as a socio-political system and psycho-existential complex *mutates* rather than disappears in different historical periods.

The voices referred to above are however countered in the same collection by other voices that are more aligned to the paradigm of the afterlife. Mandla Seleokane for example insists that insofar as the problem of justice has not yet been settled,

⁸ T Mbeki “Steve Biko: 30 Years After” in Van Wyk (ed) *We Write What We Like* 21-42.

⁹ S Cooper and P Nefolovhodwe “Steve Biko and the SASO/BPC Trial” in Van Wyk (ed) *We Write What We Like* 115. See also L Mda “Dear Steve” in Van Wyk (ed) *We Write What We Like* 3.

¹⁰ See section 1.4 of this thesis.

Biko's Black Consciousness project is not complete.¹¹ Mosibudi Mangena phrases this in much stronger terms and asserts that "not much has changed".¹² These two lone voices are joined and amplified in another edited collection on Biko's political and intellectual legacy published a year later by Andile Mngxitama, Amanda Alexander and Nigel Gibson.

In the collection, aptly titled "Biko Lives!", the editors argue that "Biko lives today in South Africa" (and I would add in the world) as a radical political memory that circulates and is being contested throughout the post-1994 landscape.¹³ In particular, they locate the living memory of Biko in the "shout of the black majority for whom the formal ending of apartheid has not yet altered circumstances in any meaningful way".¹⁴ For them, the "legacy carriers of BC philosophy are the excluded majority who continue to make life under extreme conditions...".¹⁵ Ahmed Veriava and Prishani Naidoo meditate on "remembering Biko for the here and now" by recalling that Black Consciousness signifies above all else a "seditious style of life".¹⁶ They thus oppose the popular reduction of Biko to an "affirmation of the present".¹⁷ Invoking temporality, or Biko's time, they write that:

Biko belongs to a different order of time, heterogeneous and dense, where the dead still live with us, and past and present are reconfigured in the instantaneous time of the here and now. This Biko is the ghostly presence that haunts the transition and threatens to rise up in the rebellions of the everyday and the force of ordinary people as they claim their dignity against

¹¹ M Seleane "Biko's Influence and a Reflection" in Van Wyk (ed) *We Write What We Like* 75.

¹² M Mangena "Thirty Years on and Not Much Has Changed" in Van Wyk (ed) *We Write What We Like* 11.

¹³ A Mngxitama et al "Biko Lives" in A Mngxitama et al (eds) *Biko Lives! Contesting the Legacies of Steve Biko* (2008) 2.

¹⁴ Mngxitama et al "Biko Lives" in Mngxitama et al (eds) *Biko Lives!* 18.

¹⁵ Mngxitama et al "Biko Lives" in Mngxitama et al (eds) *Biko Lives!* 18-19.

¹⁶ A Veriava and P Naidoo "Remembering Biko for the Here and Now" in Mngxitama et al (eds) *Biko Lives!* 234.

¹⁷ Veriava and Naidoo "Remembering Biko for the Here and Now" in Mngxitama et al (eds) *Biko Lives!* 234.

the violence of history and power.¹⁸

The time of Biko is thus a time that discloses alternative possibilities in face of continuing struggles. Veriava and Naidoo continue:

We re-member Biko for this world where we are told that there is no alternative, and that this time and place is all there is—all there ever will be. Work hard, they say . . . accumulate if you can (it will make you happy)— just don't forget to vote. They teach us to be patient, to trust our leaders and their assurances that things are getting better, however slow the pace might seem. History might as well be over and all that came before no more than the making of this present, all still to come nothing but the eternal repetition of the day before. Time is marked out into empty units to be filled in like the squares on a calendar. And they tell us this is what freedom means. *We re-member Biko as a force for something else.*¹⁹

It is this "something else" that this thesis sought to excavate and make legible through developing a critique of the "post"-apartheid present. As I had first construed it, this project began as an investigation into the development of an indigenous South African critical race theory through the lens of the philosophy of Black Consciousness as specifically elaborated in the work, the life *and the death* of Steve Biko. However, after continued reflection, it became clear that my concern was not so much (or not only) to offer a jurisprudential or philosophical analysis of "What Biko Said". It was not only an attempt to weave together his biography and his thought in order to underscore the depth and enduring richness of his ideas and his life for a critique of "post-"apartheid South Africa. And it was also not an attempt to illustrate the relevance of black radical and Africanist thought to law and legal theory. It has now turned out that the project was not about any one of these because it was about all of them *and more*.

¹⁸ Veriava and Naidoo "Remembering Biko for the Here and Now" in Mngxitama et al (eds) *Biko Lives!* 236.

¹⁹ Veriava and Naidoo "Remembering Biko for the Here and Now" in Mngxitama et al (eds) *Biko Lives!* 248.

Through the research conducted in the course of this study, I have come to construe Biko not simply as a great historical icon and revolutionary African thinker but rather as a "figure of thought" – in particular as a critical signifier for a deeply rooted and now barely contained rage at the continuing horror of the black condition in this purportedly "new" and "liberated" South Africa. As a figure of thought, Biko is the name for a sharp dissensus and radical discontent with the post-1994 constitutional dispensation. The invocation of the name "Biko" is also the invocation of a series of intellectual and political disruptions in how we understand issues of race, constitutionalism and justice in the contemporary context. Biko's name still recalls for many a past and a pain that is not yet behind us. His memory continually gestures towards the call of historical justice and the dream of black freedom.

This reorientation of Biko from a transparent and isolated subject to an understanding of the way in which Biko's ideas are a map of a critical discourse on questions of liberation, power, identity, society and the law among other things was instructive in trying to understand exactly what it meant to think of Biko in conjunction with critical jurisprudence. My sense is that when Biko's name is spoken, it is not only Black Consciousness or the history of anti-apartheid struggle that is summoned. Rather it seems to me that Biko functions in the discourses of South African left academics and activists as a sign around which a constellation of radical theories and counter-cultural politics comes to orbit: African nationalism; Black feminism; Marxism; critical theory; Frantz Fanon; Robert Sobukwe; land redistribution, racial unity and self-determination; the meaning of blackness; naming and critiquing white racism, problematisations of modernity as Eurocentric; the critique of the ANC as a compradorial neo-colonial elite are some of the wide array

of referents that attach to the name of Biko. But perhaps most profoundly Biko is the name that many Blacks call upon in an attempt to articulate their well-founded sense of unfreedom, betrayal and continuing suffering under the present constitutional dispensation. In this sense, the terms "Biko" and "Black Consciousness" function as a timely and timeless living political aesthetic and mode of critique.

In what follows, I bring this thesis to a close – but not to a conclusion – by underscoring the ways in which Biko continues to bear supreme relevance for developing a critical and liberatory race discourse and theory in and for the present South African and global context. And as I will highlight below, it is not only the imperishable quality of his writings that accounts for his relevance but also their unsettling and disruptive character.

6.2 Retracing the "jurisprudence of Steve Biko"

In this thesis, I sought to weave together the theoretical themes of critical race theory concerning the continuity, structural character and historically foundational nature of race with the political and historical imagination of Black Consciousness, which treats "South Africa" as a place and time interminably haunted by contradictions, asymmetry and violence from colonial-apartheid into the post-1994 period. I also sought to demonstrate the jurisprudential and theoretic power of Biko's philosophical thought and to thereby affirm Biko's central place in the South African tradition of critical race theorising. The aim was to contemplate a jurisprudence that could unsettle post-1994 South African law and constitutionalism particularly as this pertains to the relationship between race, law and society. This "unsettling" drive in Biko and Black Consciousness is one that works against not only

the *settler-colonial* history of South Africa but also the *negotiated settlement* of the early 1990s which brought into being a new constitutional order that would paradoxically be the *afterlife* of colonial-apartheid.

In chapter 2, an account of the afterlife of colonial-apartheid was offered. Drawing on texts and voices highlighting the resilience and continuity of colonial-apartheid power structures and social relations, I aimed to show how race and racism remain a critical fault line in South Africa. Much of this I argue owes to the deeply entrenched vestiges of South Africa's racial history of conquest, oppression and dehumanisation. But it owes also to the flawed path of transition followed in the early 1990s that was grounded in law, rights and constitutionalism, democratisation and reconciliation without justice. In the end, the post-1994 transition ended up only *reconfiguring* rather than abolishing white supremacy.

This sense of an ultimate incompleteness of the transition and the elusiveness of a liberated, non-racial and just society serves as the basis for recuperating and revisiting Biko's philosophical writing and political activism since the constitutive historical features and organising principles of the society that was the object of his critique remain very much in place in this purportedly "new" South Africa. This recuperation took the form of a reading in Chapter 3 of Biko as a critical race theorist and of Black Consciousness as a social and political philosophy. Two aspects of his thought were discussed in detail: first, his place in the pantheon of African anti-colonial and Black existential thought as seen through his development of a structural and psychosocial account of race and racism, a materialist conception of identity and an Africanist theory of liberation and secondly, his long-view

interpretation of the South African social and historical reality as one grounded principally in colonial conquest and white supremacy – and not merely apartheid. Close attention to both these aspects of Biko’s thinking, I suggest, will raise serious questions concerning the terms by which the democratic transition of the early 1990s was conducted. Black Consciousness philosophy provides an alternative theoretical and conceptual framework as well as a more radical and robust liberatory vision which can be drawn on in contesting and rethinking the present.

This contestation and rethinking in particular is entailed in critical race theory’s investigation of the co-existence of freedom and subjugation or of the continuation of racism and white domination in ostensibly non-racial societies ordered by human rights and legal equality. In order to claim Biko’s thought as an iteration of a South African and indeed African tradition of critical race theory, it was necessary to consider the exact historical and geo-temporal relationship between critical race theory and Black Consciousness in chapter 4. Countering the view that CRT and BC, by virtue of their different sites of origin, are incommensurable paradigms, I drew on a genealogy of the Black Radical Tradition which suggests in fact that CRT and BC belong to the same conceptual, cultural and political space, even if one developed on the continent in South Africa and the other emerged formally in diaspora. Both CRT and BC emerge out of the African resistance to and critique of Western civilisation. This shared African pedigree notwithstanding, it was possible to discern differences between CRT’s rather more legalist and reformist praxis and the largely political and cultural praxis of BC. In CRT, race is made legible to legal discourse through doctrinal critique and narrative in order to make law and legal institutions responsive to the needs of racial minorities. By contrast Biko’s injunction to

decolonise South Africa not only refuses the minoritisation implied in the struggle for legal recognition but also contests the law, legal system and legal order as artefacts of colonial sovereignty. In the process, his thinking works more along the lines of a decentering of law and legal categories in favour of a reopening of radical democratic politics; a displacement of the struggle for racial equality in favour of a struggle for total liberation and the decolonisation of law and legal subjects through the recentering of African indigenous experience and culture. In this regard, Black Consciousness gestures towards a jurisprudence of liberation and decolonisation rather than a jurisprudence of reconstruction or transformation.

In chapter 5, I briefly sketched out the contours of what it might mean to read Biko jurisprudentially, to claim his life, thought and politics as germane to critical legal theory. Working against the purities of method, form and language imposed by a restricted jurisprudence, I situated my reflections within the notion of a general jurisprudence which places questions of social existence, history, power and ideology at the centre of thinking about both law and the law of law. The historical injustices that orbit around the problematic of racial and colonial oppression that was Biko's central preoccupation constitute in this instance that which haunts the conscience of law but also played a role in the making of law's consciousness as well. It is thus not bold at all to reclaim Biko for jurisprudence in his own right. This was further supported by a close reading of Biko's introduction of a counter-archival disruption and a performance of epistemic resistance in the courts of both the apartheid regime and the putatively "post"-apartheid era.

Biko's counter-hegemonic political orientation to the law was reformulated into a critique of what I named "post-apartheid reason". Understood as the basis of the founding narratives and myths of the new order, post-apartheid reason – whether deployed in the courts, the TRC, the legal academy and in history education – appeared to be composed of three principal moves: (1) the erasure or underplaying of colonial history; (2) a pervasively colourblind and post-racial articulation of the nature and depth of racism and (3) the formulation of a faulty status-quo affirming formulation of freedom and reconciliation. Together, these three features of post-apartheid reason combine to perform a deeply binding function in constructing a very powerful epistemological, historical and political story of South Africa. Through Biko, we are able to understand and critique this story – more so because his critique of integration as a model of social change in South Africa allows us to see with tragic clarity how the shift from colonial-apartheid to "post-"apartheid constitutionalism has only resulted in the conservation of settler-colonial power and hence, the deferral of a truly post-colonial revolutionary future.

In Biko and in Biko's jurisprudence, we are always reaching out for the promise of a decolonised, post-conquest Azania – a promise which appears both impossible and urgent.

6.3 Black Consciousness as/and the counter-aesthetic

Everyone knows that a place exists which is not economically or politically indebted to all the vileness and compromise. That is not obliged to reproduce the system. That is writing. If there is a somewhere else that can escape the infernal repetition, it lies in that direction, where *it* writes itself, where *it* dreams, where *it* invents new worlds.²⁰

²⁰ Hélène Cixous in H Cixous and C Clement *The Newly Born Woman* (1996) 72.

In a recent book entitled *Biko's Ghost*, Shannen Hill studies representations of Black Consciousness and Biko in art and visual culture in order to locate and articulate what she calls "an aesthetics of Black Consciousness".²¹ In the course of her study, she identifies the aesthetics of Black Consciousness as one that promotes Black unity, African ancestry and revolutionary political action as central themes of its politics and ideology.²² Hill understands aesthetics to mean a "sensibility or outlook" and associates it with notions of image, voice and values.²³ By linking the aesthetics of Black Consciousness to the "culture of resistance" that it inspired from the 1970s into the present,²⁴ Hill is in fact giving an account of Black Consciousness as a "counter-aesthetics". Black Consciousness poets, artists and other creative workers are shown in Hill's study as engaged in countering dominant aesthetic forms and practices and thereby initiating in the black and popular South African imagination a desire for an alternative way of thinking and being.

Hill pays particular attention to the question of race and shows how visual, cultural and intellectual representations of Black Consciousness attest to its fundamental role in shaping race discourse locally and globally and how this role continues to be buried under the hegemony of the ANC's version of non-racialism in the anti-apartheid struggle narrative. She turns to aesthetics in particular because it is in the domain of the aesthetic that the memory of Biko and Black Consciousness have most forcefully stayed alive, resisting all attempts by the State and other dominant powers to wipe them away from memory.²⁵ Her invocation of Biko's

²¹ S Hill *Biko's Ghost: The Iconography of Black Consciousness* (2015) xxiii.

²² S Hill *Biko's Ghost* xxii.

²³ S Hill *Biko's Ghost* xxiv.

²⁴ S Hill *Biko's Ghost* xx.

²⁵ S Hill *Biko's Ghost* 275.

“ghost” gestures towards precisely this refusal to be silenced and forgotten and speaks to her own injunction that “we can no longer leave [Biko and Black Consciousness] out of the picture” in post-1994 discourse and politics. The reference to the ghostliness of Biko takes us back to the allusion made earlier regarding Biko as a figure that haunts and counters the terms, presuppositions, language, historical and theoretical narratives and ideals of “post”-apartheid law and constitutionalism. Indeed, Veriava and Naidoo speak of Biko as a “haunting presence that threatens to rise up against the present so that we may see ourselves differently in the here and now”.²⁶

Biko and Black Consciousness stand in the guise of the counter-aesthetic of the new order insofar as they carry a vision and critical politics that continues to challenge the conception of non-racialism upon which the transition to a “new” democratic society was based. If the counter-aesthetic is that which disrupts the configuration of what is sayable, audible, and visible, “Biko’s ghost” – or what Hill calls “the ongoing life of Black Consciousness” – poses to the new legal and political order, alternative representations and enactments of history, politics, theory and activism and introduces more robust and radical imaginings of community, freedom and justice. This is much in the same way that critical race theory introduces a different set of aesthetic and epistemic markers – blackness, perspective, history – into legal pedagogy and jurisprudence, countering both the formalism of (the) law and its paradoxical denial and reproduction of colourblindness and racism.

This understanding of Black Consciousness as the counter-aesthetic of “post-”

²⁶ Veriava and Naidoo “Remembering Biko for the Here and Now” in Mngxitama et al (eds) *Biko Lives!* 235.

apartheid law takes its cue from the perspective that the cultural and intellectual productions from thinkers in Africa and from her diaspora share the character of being normatively oppositional in relation to dominant cultural, socio-economic and political patterns, serving as a critical response to the excesses and violence of the modern world. This perspective finds expression in bell hook's view of "loving blackness as political resistance" and also resonates with Archie Mafeje's description of Africanity as a "combative" ontology and epistemology.²⁷ hooks writes that

a fundamental task of black critical thinkers has been the struggle to break with the hegemonic modes of seeing, thinking, and being that block our capacity to see ourselves oppositionally, to imagine, describe, and invent ourselves in ways that are liberatory.²⁸

In hooks' estimation, the construction of an "oppositional black culture" is integral to the project of decolonising self, psyche and society. Such an oppositional black culture cannot be assimilated or integrated without seriously calling the dominant culture into question in the first place. On this view, a decolonising oppositional Black culture and consciousness is an altogether "alternative worldview" that stands in contrast to, or in combat with, what hooks calls a "culture of domination".²⁹

The resistance against assimilation and the fear that the critical edge of Black and African culture could be blunted if its radical difference is not heeded comes out most strongly in Hortense Spillers' project on "the idea of black culture".³⁰ Through an interlocution between Herbert Marcuse and W.E.B Du Bois, Spillers contemplates Black culture as "critical culture", as a normatively oppositional episteme in contrast

²⁷ A Mafeje "Africanity: A Combative Ontology" in R Devisch and FB Nyamnjoh (eds) *The Postcolonial Turn: Reimagining Anthropology and Africa* (2011) 31.

²⁸ b hooks "Revolutionary Attitude" in *Black Looks: Race and Representation* (1992) 2.

²⁹ b hooks "Loving Blackness as Political Resistance" in *Black Looks: Race and Representation* 19.

³⁰ HJ Spillers "The Idea of Black Culture" (2006) 6 *CR: The New Centennial Review* 7 – 28.

to the capitalist and imperialist culture of the Euro-American West.³¹ On this definition, Black culture is engaged in a systematic dispute with the violence and excess of the modern world. It is a search for “new epistemes” and for a “process of humanization” that could translate into “a radical social and democratic transformation of the social order”.³² In this vein, Spillers writes of Black culture as “a counterstatement to... Western culture/civilization...” which, because of its emergence in a world of normative violence and in the “absolute crush of the everyday struggles of existence”, could imagine a world beyond that violence – seeking out historical possibilities for emancipation.³³

The counter-aesthetic dimension of Black Consciousness can also be clarified through the rearticulation of its complete form, namely Black Consciousness *Movement*. “Movement” here denotes not a fixed organisational entity or philosophical dogma but precisely a *politics that is in motion* – a movement towards Azania. The presently circulating radical democratic calls for the repossession of land, the repudiation of the Constitution; and for free quality decolonised higher education all threaten to render the very idea of South Africa incoherent since their realisation would surely result in the actual collapse or destabilisation of the South African state, society, economy and psyche. The world as currently constituted by the powers of anti-blackness, the right of conquest and capital cannot accede to such demands without dissolving entirely. As Lobban also reports, Black Consciousness represented a threat to the apartheid government – resulting in the labelling of its ideas as “terrorism” – precisely because the logical conclusion of its

³¹ Spillers (2006) *CR: The New Centennial Review* 15.

³² Spillers (2006) *CR: The New Centennial Review* 12.

³³ Spillers (2006) *CR: The New Centennial Review* 26.

political demands was the end of the white settler polity and the beginning of Azania,³⁴ a demand incompatible not only with the apartheid system but also with the ideological commitments of the ruling ANC, the present post-1994 liberal democratic order, the psychic and material interests of whites and the global political and libidinal economy. The notion of the "counter-aesthetic" thus goes beyond the standard grammar of even critique insofar as it demands that which is impossible, or put better, that which cannot be realised without the catastrophe that Aime Cesaire named "the end of the world".³⁵ As Wilderson states:

[R]epair is impossible; and any *struggle that can act as a stick up (sic) artist to the world*, demanding all that it cannot give (which is everything), is a movement toward something so blindingly new that it cannot be imagined. This is the only thing that will save us.³⁶

To remember Black Consciousness is to remember not only the unfreedom that persists today but also to make legible that which has been declared impossible by "post"-apartheid law and post-apartheid reason, namely *black liberation*. In this sense, the counter-aesthetics of Black Consciousness is also the immemorial of "post"-apartheid law. For Emiliios Christodoulidis, the immemorial denotes a "logic of a certain concealment both of *what* is forgotten and of [the fact] *that* it is forgotten".³⁷ Law's *immemorial* therefore calls attention to that dimension of memory, of the "past", that is erased in all attempts to remember. Indeed, the

³⁴ M Lobban *White Man's Justice: South African Political Trials in the Black Consciousness Era* (1996) 56 – 57.

³⁵ A Cesaire *Notebook of Return to The Native Land* (2011) 27: "One must begin somewhere. Begin what? The only thing in the world worth beginning: The End of the world of course."

³⁶ FB Wilderson "Wallowing in Contradictions" (Part 1) <<https://percy3.wordpress.com/2010/07/09/frank-b-wilderson-%E2%80%9Cwallowing-in-the-contradictions%E2%80%9D-part-1/>> (accessed 27 March 2017).

³⁷ E Christodoulidis "Law's Immemorial" in E Christodoulidis and S Veitch (eds) *Lethe's Law: Justice, Law and Ethics in Reconciliation* (2001) 208.

immemorial is “that which can only be remembered *as* forgotten”.³⁸ It cannot be recalled, mastered or recorded into a narrative that is fully legible to the present. This illegibility in turn imbues the immemorial with a certain spectrality and ghostliness – the immemorial of law’s memory becomes precisely that which haunts law’s particular relationship with the past, and with tragedy, trauma, violence and injustice. The immemorial names that disruptive and incongruous memory that complicates and unsettles dominant forms of legal and constitutional memory and in turn destabilises the established histories, accepted discourses and hegemonic powers that found, operationalise and legitimise the present order of things.

I ultimately situate the idea of the “jurisprudence of Steve Biko” within this space of critique and refusal, of combat and resistance, of questioning and rebellion against reigning epistemic, symbolic, cultural and also socio-economic and political arrangements. Black Consciousness provides not simply a Black version of current ways of knowing and being but discloses a radically imaginative alternative to the present as we know it. It is in other words a worldly project that promises to liberate not only Blacks but the world.

6.4 Ending, beginning: Biko’s last word?

How does one end a thesis on a philosophical tradition of a struggle that has not ended, or that perhaps, has not even begun in earnest? Clearly, there can be no last word here. Closure or settlement appears an impossibly bold task in the face of historic movements and continuities – and is made even more unfitting by the unpaid and unacknowledged debts owed by the living to the dead. This is thus only a momentary ending, a looking towards the horizon of theoretical possibility. The

³⁸ Christodoulidis “Law’s Immemorial” in Christodoulidis and Veitch (eds) *Lethe’s Law* 213.

hope – if that is the right word – is that aspects of our world that were previously unthought may begin to approach a semblance of thinkability through the efforts attempted in this study. The project of seeing the world (and the word of law) through the history, culture and experience of Black people – here and in diaspora – prepares the ground not only for a new theory but an entirely different *logos* – or counter-*logos* – which may play host to the emergence of radically new ways of knowing and being, and to a textual dance of known and unknown grammars. It is the anticipation of these new grounds, and this dance, that suspends the closure of this thesis.

Black Consciousness should not be lost, it should still be instilled within the community. A lot of people still have not gained their self-awareness and a lot of black people are still psychologically oppressed, not talking even about economically oppressed. We all are still struggling and still battling.³⁹

³⁹ D Matshoba in "Interview with Deborah Matshoba" in Mngxitama *et al* (eds) *Biko Lives!* 283.



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