Introduction to special issue: conquest, constitutionalism and democratic contestations

Joel M Modiri

Department of Jurisprudence, University of Pretoria, Pretoria, South Africa

Joel.Modiri@up.ac.za; Law Building, Hatfield Campus, University of Pretoria, Pretoria, 0002

Special Issue Editor, Lecturer, Department of Jurisprudence, University of Pretoria, Tshwane, South Africa

> '[T]he past is not done with us […] it is not past […] it will not leave us in peace until we have reckoned with its claims to justice.'[1]

This special issue of the *South African Journal on Human Rights* comprises a selection of papers that were first presented at a colloquium in May 2017 entitled 'Conquest, Constitutionalism and Democratic Contestations'. Both the colloquium and the articles in this special issue are animated by pressing political and intellectual contestations circulating in South African academic and public discourse relating to continuities and discontinuities between the colonial-apartheid past and the post-1994 constitutional present. Indeed, even the distinction between the 'past' and the 'present' in the South African context is an object of critical interrogation.

Two decades since the enactment of the present constitution, problems of inequality, poverty, violence and social exclusion persist stubbornly along racial lines, and much of the optimism of the early 1990s concerning the promises of new legal and political order has dissipated. On a deeper level, this persistence suggests the continuity and durability of the

[1] Cameron J in *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) para 154.

political ontology, political economy and symbolic order created through colonial conquest and white supremacy. The durability and endurance of 'past' inequalities and injustices illustrate that the 'new South Africa' – lauded as a 'miracle nation' with the 'best constitution in the world' – can no longer be regarded as an unqualified success. A central theme in this special issue is to take seriously the moral, intellectual and political unravelling of post-1994 South African constitutionalism (as legal text and political culture) and to enquire whether it has been able to respond adequately to the *fundamental* contradictions generated by colonisation and apartheid.

Whereas popular scholarly accounts associate the limitations of constitutional transformation with, among other sources, the lack of political will on the part of the ruling party, corruption and maladministration in government, the constraints of global capital and the vagaries of legal interpretation and adjudication, the starting point of this special issue is different. Authors were invited to consider how centring the historical problematic of European domination and conquest in Africa – and South Africa in particular – might provide an alternative frame or lens to theorise and understand contemporary South African realities. Thus, each article is premised on an analysis that locates constitutionalism and the ideal of the rule of law within the historical matrix of colonialism and Eurocentrism – not only at the level of political economy, social organisation and law but also at the level of culture and epistemology – and of *resistance* to those formations. The articles are not isolated, however, but speak directly to the theme of the special issue and to each other, albeit in different registers and vocabularies.

Read together, the articles mark out a complex field of contestation – involving competing histories, locations, visions and perspectives – that raises multifaceted questions regarding law, history and politics. While they cannot be reduced to single or fixed propositions, the articles do take unambiguous positions in relation to the South African

constitutional order, ranging from optimism about its democratic and transformative potential to scepticism concerning its responsiveness to colonial and imperial histories and extending further to radical and abolitionist critiques of the political imaginary upon which the constitution is premised. Indeed, one angle of reading the special issue may be in terms of a tension between three broad standpoints, namely 'constitutional optimists' (who accept the constitution as the overarching moral, political and jurisprudential lodestar of South African society), 'critical sceptics' (who problematise the grand narratives of post-1994 constitutionalism and expose the limits of law, liberalism, Enlightenment reason, the Truth and Reconciliation Commission and so forth) and 'constitutional abolitionists' (who pose a wholesale challenge to the philosophical, historical and cultural bases of the South African constitution from the perspective of occluded ontologies and epistemologies). If these positions sometimes overlap and may not always be easy to distinguish, a crucial point of contrast between them would be that while constitutional optimists advance a faithful commitment to transformative social change through and within the constitutional framework and critical sceptics are wary of 'faithfulness' as a mode of relating to (the) law, constitutional abolitionists repudiate the social vision underpinning post-1994 constitutionalism on the basis of more far-reaching conceptions of history and justice. The tension along these three positions is developing in the legal academy and beyond, and encompasses many more voices and nuances than could be captured in this special issue. One can only hope that this tension is openly acknowledged and productively engaged in the spirit of intellectual generosity, self-reflexivity, political candour and – most importantly – a striving for deep and meaningful justice.

The special issue comprises an intergenerational and ideologically diverse group of scholars in law, the humanities and social sciences. In this way, it is also a model for future directions in legal scholarship and, in particular, discloses stimulating questions that could

inform legal theory and jurisprudence in South Africa. South African law faculties and schools have are at this very moment grappling with the process of curriculum transformation instantiated by the national review of the LLB degree together with the demands of institutional and epistemic decolonisation in our universities, so this special issue could not be more timely. Law faculties and law schools in South Africa are having to more openly confront the weight of (their) history, and while conservative voices defending an unreflective and dated traditional, black-letter legal pedagogy remain in our midst,[2] it is clear there is no turning back. Questions of race, class and gender, poverty and economic inequality, the politics of law, culture and epistemology, as well as the philosophical, historical and sociological contours of law and legal discourse would need to be addressed more explicitly and prominently in legal education and scholarship. This is to say that the legal and constitutional foundations of post-1994 South Africa are in a process of 'renegotiation' that invites new and alternative perspectives and approaches. This special issue represents an attempt at a first opening into such a process of renegotiation.

*

The scene for the special issue is set with an article by this editor that sets out a critique and interpretation of post-1994 constitutionalism from the perspective of its relationship to the *longue durée* history of colonial conquest, settler-colonialism and white supremacy. In this article, I reflect on this relationship in terms of (dis)continuity and draw on a variety of critical theoretical perspectives that challenge optimistic and triumphalist accounts of the constitution and expose the fragility of its emancipatory horizon. I describe these accounts as

[2] For a recent rehearsal of dated conservative legal ideology defending a narrow and restricted vision of law and legal education and exhibiting poor comprehension not only of critical legal theory but also of the socio-political context of transformation in South Africa, see W Gravett 'Of "destruction" and "deconstruction" – why critical legal theory cannot be the cornerstone of the LLB' (2018) 135 *South African Law Journal* 285-323.

‘constitutional worship’ and argue instead for an alternative jurisprudence – a ‘jurisprudence from below’ or ‘jurisprudence of liberation’ – grounded in, and attentive to, histories, experiences and knowledges of Black people, both locally and globally.

Following this article are contributions based on the two keynote papers from the colloquium by Mogobe Ramose and Shireen Hassim. In his article, Ramose offers a further development and reflection upon his long-standing work in African legal philosophy and international law theory. In his article, he deploys the just war doctrine as a basis to critically examine the constitution and to argue that the historical injustice of conquest remains an ethical exigency demanding redress and reparation despite *and against* the present constitutional order. Hassim, drawing on her extensive work as a leading feminist scholar and political theorist, in contrast responds to the decolonisation critique by asserting the radical roots of the equality clause (s 9) of the constitution. Writing from a feminist perspective, her article highlights the agency and contribution of black women in the making of the new constitutional order.

The subsequent articles focus on two broad themes: (1) appraising the emancipatory value of the South African constitution, and (2) evaluating the transformative impact of the constitution on the development of South African law.

In the first theme, Dennis Davis and Firoz Cachalia – in separate but complementary articles – reinterpret the constitution against the binary opposition of constitutional fundamentalists and constitutional critics. For both Davis and Cachalia, the constitution is best seen as a driver of transformative interpretative work and democratic practice, requiring ongoing dialogue and debate. They therefore resist arguments that they believe reduce the constitution to a mere obstacle to fundamental change. Their articles diverge sharply from the articles by Ndumiso Dladla and Anjuli Webster who instead respectively argue that the constitution represents, at the political-ontological as well as cultural-epistemic level, a

continuation of the basic organising principles of colonial conquest and white supremacy. Working from the disciplines of philosophy (Dladla) and anthropology (Webster), both articles reconstruct an alternative analytic and historical paradigm informed by the Africanist/Azanian tradition to illustrate the ways in which the constitutional present silences particular histories and knowledges.

In the second theme, Heinz Klug, Cathi Albertyn, and Emile Zitzke reflect on constitutionalism in the postcolonial legal context. Klug focuses on the burning issue of land and property and argues that part and parcel of South Africa's constitutional property regime is a deep and serious commitment to redistributive justice. Albertyn approaches equality (as both a value and a right) with reference to the contested archive of liberal, egalitarian, socialist and radical conceptions of equality that could shape its interpretation and meaning.

Whereas both Klug and Albertyn develop ambitious analyses to demonstrate the constitution's transformative potential and ability to address the legacies of land and property dispossession on the one hand and systemic inequality and injustice on the other, Zitzke is more cautious. In his article, Zitzke reviews two approaches to the relationship between the South African private law and transformative constitutionalism. The one position he names 'private-law purism' is premised on a traditional vision of the common law, and the other, named 'transformative private law', centres on human rights. In support of the second approach of transformative private law, he cautions the reader at length to remember the roots of both approaches in Western hegemony. He then introduces a third possibility – of Africanisation through conceptual decolonisation – that could be more responsive to the demand of decolonising the law. We round up the special issue with a critical review, by Tshepo Madlingozi, of Tembeka Ngcukaitobi's recent book *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018).

The summary above does not do justice to the richness and depth of the contributions collected in this special issue. It is for the reader to carefully and robustly engage with the positions taken in the articles. Beyond their specific arguments, however, these pieces are noteworthy for what they signal for the future of critical jurisprudence and legal theory in South Africa, as each one centres South African realities, historical contexts and intellectual traditions in their thinking about law, transformation and constitutionalism. It seems apt, then, to conclude with the words of Costas Douzinas and Adam Gearey that capture the spirit and ambition of this special issue:

> 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.[3]

[3] C Douzinas & A Gearey *Critical Jurisprudence: The Political Philosophy of Justice* (2005) 1.