

THE COLOUR OF LAW, POWER AND KNOWLEDGE: INTRODUCING CRITICAL RACE THEORY IN (POST-) APARTHEID SOUTH AFRICA

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ABSTRACT

Many legal scholars, practitioners and judges have overlooked the ways in which racial identities and hierarchies have been woven into social systems like law, labour, social power, knowledge and ideology. This article suggests that this oversight can be addressed by developing a post-apartheid critical race theory that puts 'race' back on the agenda by situating it within legal, political and social discourses. Such a critical race theory is proposed as an alternative to, and critique of, traditional (liberal/conservative) approaches to race and racism that emphasise individual autonomy, colour-blind constitutionalism and race-neutrality. Critical Race Theory (CRT) seeks to examine, from a legal perspective, the ways in which prevailing conceptions of race (and to some extent, culture and identity) perpetuate relations of domination, oppression and injustice. In South Africa, the necessity of such a critical engagement with race and law is justified by a long history of institutionalised white supremacy and white racial privilege which today coexists with ongoing (and lingering) forms of anti-black racism and racial exclusion. The starting point will be a broad discussion of competing approaches to race and racialism that inform equality jurisprudence and socio-political discourse followed by a theoretical discussion of the conceptual tools of US CRT and an analysis of post-1994 constitutional jurisprudence. The main aim is to problematise the contradictions and tensions that characterise South African equality jurisprudence and human rights discourses by exposing and critiquing the racial ideologies embedded in them. The broader concern of this article, however, is to point to the significance of critical race perspectives in South African legal and interdisciplinary thinking in a way that might disclose possibilities for racial justice and equality.

I INTRODUCTION

(a) The central thesis

APARTHEID – may that remain the name from now on, the unique appellation for the ultimate racism in the world, the last of many.¹

As I see it, critical race theory recognizes that revolutionizing a culture begins with a radical assessment of it.²

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1 J Derrida 'Racism's Last Word' (1985) 12 *Critical Inquiry* 291.

2 J Calmore 'Critical Race Theory, Archie Shepp and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World' (1992) 62 *Southern California LR* 2124.

The point of departure for this article is the argument that many legal scholars, practitioners and judges have overlooked the ways in which racial identities and hierarchies have been woven into existence in social systems like law, labour, politics and ideology. This article attempts to interrogate the overt and covert role of race in legal and public discourses by employing theoretical perspectives developed by critical race theory (CRT) scholars. As a legal-philosophical discipline, CRT has yet to be ‘formally adopted’ in mainstream South African legal scholarship.³ This is somewhat puzzling for a country with a long and tragic history of racial segregation and institutionalised race-based discrimination and oppression.⁴ The legacy of this oppression, of course, continues to persist in post-apartheid South Africa with wealth, education, and power being largely divided along the lines of race. To engage with the vicissitudes of race in post-1994 South Africa, one must also consider the implications of *life under law after apartheid* – particularly the reproduction and maintenance of white supremacy and white privilege as well as the systemic exclusion of black people⁵ through direct and indirect forms of racial marginalisation.

Theoretically, the support for this thesis is found in two foundational principles of CRT, namely (1) the *centrality of racism*: that racism is a normalised and ingrained feature of the social order which appears often in nuanced and covert ways; and (2) that white supremacy does not refer to right-wing extremist racist hate groups that consciously promote white domination, but rather denotes a *system* (political, legal, economic and cultural) in which whites maintain overwhelming control and power.⁶ Part of the blind spot in South African race discourses (which in turn undergird human rights and equality) is an insistence on the belief that since 1994, the *de jure* end of apartheid, whites and blacks now equally enjoy formal legal rights (or put differently that the law is no longer instrumental in the marginalisation and

- 3 See T Mosikatsana ‘Critical Race Theory’ in CJ Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 276. In making this claim, I recognise the work of Penelope Andrews and Adrien Wing, which draw on Critical Race Theory and Critical Race Feminism in reflecting on legal developments in South Africa. See P Andrews ‘Making Room for Critical Race Theory in International Law: Some Practical Pointers’ (2000) 45 *Villanova LR* 855; P Andrews ‘Globalization, Human Rights and Critical Race Feminism: Voices from the Margins’ (2000) 3 *J of Gender, Race and Justice* 373. See A Wing ‘A Critical Race Feminist Conceptualisation of Violence: South African and Palestinian Women’ (1997) 60 *Albany LR* 943; A Wing ‘Critical Race Feminism and the International Human Rights of Women in Bosnia, Palestine, and South Africa: Issues for LatCrit Theory’ (1997) 28 *Univ of Miami Inter-American LR* 337; A Wing ‘The South African Constitution as a Role Model for the United States’ (2008) 24 *Harvard Blackletter LJ* 73.
- 4 See S Terreblanche *A History of Inequality in South Africa 1658–2002* (2002) 15; H Giliomee & B Mbenga *New History of South Africa* (2007) 306.
- 5 Unless the context indicates otherwise, I will use the terms ‘black people’ and ‘blacks’ interchangeably (and in a non-essentialist way) in order to refer to not just Africans but also so-called ‘coloureds’ and ‘Indians’ (and all other groups previously designated as ‘non-white’ and discriminated against, disenfranchised and oppressed on that basis during (and after) apartheid). See S Biko *I Write What I Like* (1978) for an understanding of ‘black’ as a liberating but non-essentialist signifier that captures the social force of ‘race’ but does not attempt to deny the ethnic, cultural and political diversity and experiences of those identified and who identify as ‘black’.
- 6 F Ansley ‘White Supremacy (and What We Should Do About It)’ in R Delgado & J Stefancic *Critical White Studies* (1997) 592.

exclusion of blacks and in perpetuating deep inequalities between whites and blacks). This is evidenced by the popular use of the phrase ‘*previously disadvantaged group*’ to refer to, inter alia, blacks. The erasure implied in describing historical racial disadvantage in such terms as ‘previous’ (as if something of the past) stems precisely from the 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. In this article I suggest that a post-apartheid critical race theory should problematise these discourses, which are heavily informed by formal legal liberalism and also by a reluctance to fully account for the racist brutality of apartheid. I argue for a much more detailed and complex analysis of the race problem and its implications for law and constitutionalism, which mainly entails seeking out and critiquing the paradox of the co-existence of a non-racial, multi-cultural constitutional democracy with white racial privilege, anti-black racism and inequality. Before moving on to the main argument, I first elaborate on the theoretical position taken in this article and then outline the structure of the remainder of the article.

(b) Theoretical background

At the outset it should be noted that developing a critical race theory suited to the demands, historical specificity and shifting realities of ‘post’-apartheid South Africa cannot be done only through a reconceptualisation of United States CRT insights alone.⁷ Such an approach immediately seems too limited. To this end, I identify radical black thought (Africana philosophy and black existentialism), post-colonial studies, certain stands in feminist theory, law and literature, post-structuralism, critical legal theory, Marxist/socialist theories and post-apartheid jurisprudence as some of the theoretical and philosophical traces that could support such a critical race theory. For the purposes of this article, the main theoretical thrust needs to be emphasised. I contend that a post-apartheid CRT should entail an interweaved exploration of at least three points, namely: (1) a critique of law and legal institutions implicated in perpetuating racist ideology; (2) an analysis of the racialised patterns of wealth distribution, economic inequality and poverty (and specifically how they are enabled by law and tolerated within the legal culture); and (3) an engagement with the dynamics of race (and also culture and identity) in ‘post’-apartheid social and political life. On the first point (critique of law), the insights of

7 In this article, I draw largely on the insights of US CRT. However, the developing work of British CRT scholars (represented by, among others, Patricia Tuitt, Peter Fitzpatrick & Denise Ferreira da Silva) should be taken into account. As representative writings, see P Tuitt *Race, Law, Resistance* (2004); P Fitzpatrick ‘Racism and the innocence of Law’ in P Fitzpatrick & A Hunt (eds) *Critical Legal Studies* (1987) 119; D Ferreira Da Silva *Toward a Global Idea of Race* (2007); P Tuitt & P Fitzpatrick (eds) *Critical Beings: Race, Nation and the Global Subject* (2004).

US Critical Legal Studies (CLS) – from which CRT originated – are useful.⁸ CLS is aimed at exposing the ideologically charged and political nature of law thus implicating law as an instrument of protecting and maintaining existing power relations and social arrangements.⁹ Thus, if the argument of CLS is that legal institutions are deeply divided over an appropriate vision of political and social life and that law serves to legitimise the existing social order,¹⁰ then the argument of CRT is that law's normative vision of social and political life is imbued with racialised power and the existing order is one that operates from a largely white (and male), western perspective and denies black history/ies and black experience(s).¹¹ In addition to highlighting the persistence of racism and white supremacy in society, CRT also emphasises a focus on context and particularity by showing how black people experience rights differently to whites.¹² The combination of CLS and CRT scholarship has debunked the dominant conception of law as objective, neutral and apolitical through the call for legal thought to also take notice of subjective experiences and material living conditions.

On the second point (racialised inequality), I suggest that CRT should not only be anti-racist but anti-capitalist as well.¹³ I base this suggestion on the argument that racial injustice, inequality and domination (from slavery through to colonial apartheid) has always been caught up within the larger global capitalist machinery of profit-driven capital accumulation, aggressive property and land ownership, and (mostly black) labour super-exploitation.¹⁴ The African National Congress (ANC) government's choice for a liberal capitalist model as the basis for constitutionalism and the rule of law has meant that reparations, redress and socio-economic transformation and deracialisation are constrained to what won't interfere with 'market rationality' or discourage 'foreign investment'.¹⁵ Consequently, the ideals of freedom, justice, dignity and community which are central to the reconstruction of (post-)apartheid South Africa are also subject to the rules of globalisation, industry, privatisation, commerce, and technology. This oppressive connection between white supremacy and capitalism is significant because it renders the economic conditions, cultural hegemony and political power which are the consequence of over 350 years of racial domination and violence, inescapable and immutable, and thereby also normalises the suffering and alienation of

- 8 For a discussion of the relationship between CLS & CRT, see the entire collection of essays in Symposium 'Minority Critiques of the Critical Legal Studies Movement' (1987) 22 *Harvard Civil Rights – Civil Liberties LR*.
- 9 K van Marle & W Le Roux 'Critical Legal Studies' in Roederer & Moellendorf (note 3 above) 247.
- 10 Ibid 251.
- 11 D Bell 'Who's Afraid of Critical Race Theory' (1995) *Univ of Illinois LR* 893.
- 12 P Williams *The Alchemy of Race and Rights* (1991) 151.
- 13 See C Mills *From Class to Race: Essays in White Marxism and Black Radicalism* (2003).
- 14 D Cornell & KM Panfilio *Symbolic Forms for a New Humanity* (2001) 125–49; Terreblanche (note 4 above) 21, 413.
- 15 A Mbembe 'Passages to Freedom: The Politics of Racial Reconciliation in South Africa' (2008) 20 *Public Culture* 10.

blacks. In a conservative legal culture, structural oppressions such as these are also often concealed by the reification of rights and through formalist modes of interpretation whereby rights are frozen and ‘de-contextualised’ (by reducing social complexity and ignoring the effects of power relations). The transformation of black people’s material conditions and group-based disadvantage thus relies primarily on the eradication of racialised capitalist relations. In South Africa, there is a very pronounced and invariant correlation between race and resources – and between resources and prosperity, good health, quality education, living standard and safety.¹⁶ Because race and class are interlinked, CRT’s call for the eradication of white supremacy must go hand in hand with the rejection of capitalism.

On the third point (post-apartheid lives, and subjectivities), I also identify CRT as a much-needed contribution to the ‘becoming of a post-apartheid jurisprudence’. As Van Marle mentions ‘every day we still experience the legacy of apartheid on many levels’¹⁷ and so post-apartheid jurisprudence ‘indicates the attempts to deal with the past, the struggle of the becoming of something that could be named as ‘post’ but not ‘past’, at least by no means yet’.¹⁸ The link between CRT and post-apartheid jurisprudence is instrumental in demonstrating that apartheid is not a simple legal mistake that can be rectified through new laws and policies, but rather that raci(al)ism is a socially engineered, pervasive and brutal structure of power that requires radical transformation. The temporal emphasis on *post*-apartheid can be connected to the well-known bridge metaphor which views the Constitution of the Republic of South African, 1996 as a historic bridge that will form a ‘secure foundation’ for a post-apartheid society.¹⁹ According to this metaphor, the Constitution marks the transition from the ‘past’ of deep societal divisions characterised by racial conflict, suffering and iniquity against black people, to a future founded on the recognition of human rights, multiculturalism, democratic citizenship, harmonious community and access to development opportunities and resources for all South Africans, irrespective of race, class, belief or sex.²⁰ In contrast, the position I take in this article is that South African society is stuck in the middle of that bridge somewhere between an authoritarian system based on racial oppression and inequality and a ‘transforming’ democratic system based on dignity, freedom and equality.

16 D Posel ‘Rethinking the “Race-Class Debate” in South African Historiography’ (1983) 9 *Social Dynamics* 50–66; J Seekings & N Natrass *Class, Race and Inequality* (2006).

17 K van Marle ‘Jurisprudence, Friendship and the University as Heterogeneous Public Space’ (2010) 127 *SALJ* 635.

18 *Ibid.*

19 E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* 31. For critiques of the bridge metaphor, see AJ van der Walt ‘Dancing With Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State’ (2001) 118 *SALJ* 258; and P De Vos ‘A Bridge Too Far? History as Context in the Interpretation of the South African Constitution’ (2001) 17 *SAJHR* 1.

20 W Le Roux ‘Bridges, Clearings and Labyrinths: the Architectural Framing of Post-Apartheid Constitutionalism’ in W Le Roux & K van Marle (eds) *Post-Apartheid Fragments: Law, Politics & Critique* (2007) 61–3.

The official formal shift from apartheid to the ‘new South Africa’ has not been conterminous with the economic, political and social situations of the majority of citizens. This observation vindicates Van Marle’s assertion that the search for a *post*-apartheid jurisprudence ‘might forever be postponed’; that the ‘post’ in ‘post-apartheid’ will always be delayed.²¹

(c) Plan of the argument

This discussion of CRT to follow stands in the framework of the three-fold critique of law and rights outlined above. To state the case for critical race theory in post-apartheid South African legal theory in one short article is admittedly, an impossible task so this article proceeds from the fairly modest claim *that critical race theory matters in South Africa*. Its intended audience is for those uninitiated in ‘race critical theories’ and in particular those interested in ‘critical legal race theory’.²² Although I do want to say something specific about the South African legal culture as it relates to race, racism and power, the aim of this article is unapologetically ‘theoretical’ and introductory: the idea is to introduce CRT by means of critical theoretical description, comparison and use of examples of application and applicability. To achieve this basic aim, the argument shall unfold as follows: In part II, I proceed firstly to critically engage with present race discourses with reference to Joshua Glasgow’s distinction between three approaches to race (namely racial eliminativism, racial conservatism, and racial reconstructionism). I argue for a reconstructionist approach that takes into account how race is at once historically constituted and also socially, politically and economically constitutive as opposed to approaches that can be categorised as liberal or conservative, which call either for race to be conserved in its biological and naturalist conception or to be eliminated altogether. Thereafter in part III, I proceed to discuss key themes in the broad, diverse field of US CRT. My aim is to offer a clear conceptual description of the themes, which I believe is necessary given the paucity of *critical* race and law scholarship (outside of traditional liberal focus) in order to explore the value and import such themes might have for South African jurisprudence. Finally in part IV, with reference to the CRT themes discussed in part III, I offer brief commentary on the relationship between race and law in the constitutional jurisprudence of South Africa. I seek to propose the role of post-apartheid CRT as one of critique and questioning – and specifically as one of problematising race-neutral and colour-blind approaches. I do not, however, attempt to be prescriptive about the ‘correct’ approach to research and writing on critical race theory. As I understand it, CRT does not adhere to a belief in one set of canonical doctrines or correct methodologies – not least because that goes against the very grain of critical thinking, but also because the very oppositionist and

21 Van Marle (note 17 above) 628.

22 See P Essed & DT Goldberg (eds) *Race Critical Theories: Text and Context* (2002); L Black & J Solomos (eds) *Theories of Race and Racism: A Reader* 2 ed (2009).

anti-establishment nature of CRT scholarship is aimed at destabilising the belief in scientific legal foundations and austere theories and doctrines.²³ The aim of this article then is to demonstrate, and offer commentary on, the *racialised* nature of law, power and knowledge.

II TOWARDS A CRITICAL THEORY OF RACE

Before discussing US CRT and specifically how it explicates the construction, representation and deployment of race in legal cultures and institutions, I will turn to Joshua Glasgow's philosophical and empirical study of race, racism and racialism. Such a study is useful in exploring the discourses that shape social, political and legal thinking on race in South Africa because it has direct implications for how notions such as 'non-racialism', equality, redress and transformation are interpreted and applied in legislation and by the courts. Because of the legacy of racism that continues to unsettle and trouble South African society and because of presently racialised patterns of health, life expectancy, education, housing, access to employment, land, service delivery, wealth distribution and income and general standard of living, what meanings we attach to race, and how we choose to approach it, is an obviously important starting point.²⁴ For the purposes of this article, I propose a conception of race that does not locate race and racism exclusively in social relations such as prejudice and stereotyping based on skin colour, but rather which understands racial oppression as primarily an institutional and systemic problem. Such a conception of race avoids and challenges the now prevalent view that identifies the eradication of racism and racial progress with the transcendence of a racially conscious standpoint – with the result being a racial ideology premised upon colour-blindness, race-neutrality and post-racialism. The problem with this view, with its heavy emphasis on the individual and the personal, is that it undercuts its own attempt to redress both the individual acts of racism but also the institutionalised effects of white supremacy and racial subordination (which are the source of the individual acts in the first place). Contrary to this view, it is precisely a racially conscious approach that I propose as the basis of a post-apartheid critical race theory (this argument will be expanded in part III). For this reason, Glasgow's typology is useful in its analysis of arguably the three most dominant approaches to race not just in South Africa but globally as well.

The central aim of Glasgow's intervention was to consider whether racial labels and categories should be conserved (a position referred to as *racial conservatism*) or eliminated (*racial eliminativism*) from our practices, procedures, discourses, institutions and private thoughts and attitudes.²⁵

23 K Crenshaw, N Gotanda, G Peller & K Thomas (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) xiii.

24 K Durrheim, Xoliswa Mtose and Lindsay Brown *Race Trouble – Race, Identity and Inequality in Post-Apartheid South Africa* (2011) 86–111.

25 J Glasgow *A Theory of Race* (2009).

Finding that these two choices are too narrow, Glasgow contemplated a third approach; what he calls *racial reconstructionism*.²⁶ *Racial reconstructionism* argues that while race is an illusionary 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, scientific or ontological fact but rather as an entirely social phenomenon with contingent and varying meanings and value.²⁷ The choice between these three approaches is dependent upon four questions namely, (1) the normative question of whether racial discourse is morally, politically or prudentially valuable;²⁸ (2) the ontological question of whether race is real;²⁹ (3) the conceptual question of what the ordinary meaning of race is as opposed to its popular ‘folk’ meaning³⁰; and (4) the methodological question of how the concept and theory of race should be identified and used.³¹

(a) Eliminativism

The popular sentiment that the concept of ‘race’ should be eliminated completely from people’s thoughts, identifications and from official political and legal processes (voter registrations; birth certificates etc) in order to cultivate a politics of peace and friendship in societies historically divided by race is best captured in Martin Luther King’s hope that his ‘children be judged not by the colour of their skin but by the content of their character’. Glasgow highlights three related versions of *racial eliminativism* that are relevant in assessing its claims. Firstly, the ‘political version’ which calls for the removal of racial categories from state policies, processes, documents, and institutions. Secondly, ‘public eliminativism’ in terms of which, race should not only be eliminated 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. The third version, ‘global eliminativism’, makes the strongest claim: That, in addition to removing racial thinking and racist attitudes from state administration instruments and from the public world, it should also be eliminated in our private attitudes and thoughts thus completely extinguishing the idea, concept and construction of race from our existence.³² The racial eliminativism approach though making some important anti-racist claims runs the risk of affirming the status-quo because it denies the way in which race has been historically used as an instrument of domination, human rights violation and deprivation. Accepting the position of eliminativism in South Africa undermines important policies

26 Ibid 2.

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

28 Glasgow (note 25 above) 2.

29 Ibid 4.

30 Ibid 6.

31 Ibid 8.

32 Ibid 1–2.

like affirmative action and broader redress and reconciliation efforts designed to address inequality and systemic disadvantage.

(b) Conservationism

Supporters of *racial conservatism* argue that the elimination of race-thinking could be a serious error because it ignores the significance of race in shaping social realities, identities and determining power. Proponents of racial conservatism argue rather that racial labels and categories (and thus practices, attitudes and systems based on race – including those under the guise of language or cultural heritage) ought to be retained in mainstream discourse – and even that they are deserving of legal protection. Glasgow outlines other justifications for racial conservatism such as the view that racial identities have psychological and material relevance to people in the sense that they operate as a source of meaning in life and provide important resources for accurately predicting life experiences.³³ In this sense, even if race was no longer used as an instrument of oppression and division, it would still be valuable.³⁴ The racial conservationist argument could serve two purposes. The first and more divisive one could be to uphold certain separatist or nationalist beliefs and practices and in the process, ensure that the dominant race group maintains its hegemony. This is probably because it fails to grasp the nuanced differences between race and culture and assumes a unity between them. The second, closely related to *reconstructionism*, could be to use race as a social indicator to repair serious racial disparities, achieve trans-racial equality and friendship and create political alliances aimed at overcoming racism. However, it will fail in this respect because it assumes a hypothetical equality between whites and blacks and also ignores that the social fiction of race is inextricably allied with exploitation, subordination and discrimination. In any case, the problem with either of the two purposes is the risk of reinforcing harmful stereotypes and its apparent insensitivity to the differences between people within the same ‘race’ group.

(c) Reconstructionism

The third approach Glasgow examines, racial *reconstructionism*, is more in line with the approach to race taken by critical race theorists. Although reconstructionists support the conservationist view that racial-thinking and the maintenance of racial identities is crucial in addressing racial injustice, it differs with the conservationists view in that they do not treat race as a biological or scientific fact. Glasgow suggests that the meaning, concept and utility of race should be *reconstructed* as a social phenomenon through which people can address the legacies and ramifications of racialised history – the

33 Ibid 134. See P Taylor *Race: A Philosophical Introduction* (2004); L Alcoff *Visible Identities: Race, Gender and the Self* (2006).

34 Ibid 134. See L Outlaw ‘Conserve Race?': In Defence of W.E.B Du Bois' in B Bell et al *W.E.B. Du Bois on Race and Culture* (1996) 34.

ways in which racial groups have been subordinated or privileged through the medium of racial discourse and practice.³⁵ Glasgow calls for the reconstruction of racial discourse in such a way that it no longer induces racial hierarchies or promotes racial supremacy. But in order to transcend race, one must openly confront racism. Reconstructionism also demands that concrete differences between people (not just of different ‘race groups’ but within the ‘race groups’ themselves) be taken into account and embraced to counterbalance the insistence on conformity, sameness and reductionism in society.³⁶ Race-consciousness, the notion that race is constructed by social forces, as Glasgow argues, is critical in confronting the race-related moral, political and legal issues that face modern civilisation.³⁷ US CLS scholar Duncan Kennedy also supports race-consciousness as a way of talking about race without falling into the trap of racism, essentialism or the concept of a ‘nation’ tied to sovereignty which in turn allows us to conceptualise the political and societal relations of various social groupings from a ‘postmodern’ perspective that recognises the ‘partial, unstable, contradictory nature of group existence’.³⁸ In part III, I argue that legal issues concerning race need to be approached from this race-conscious orientation and that the conceptual tools and theoretical perspectives of CRT exemplify such an approach.

III THEORETICAL PERSPECTIVES OF CRITICAL RACE THEORY

CRT focuses on the ways in which the social construction of race is present in legal systems and how power and knowledge production, specifically but not only in law, are also racially structured. While Glasgow’s treatment of race can be read as a neutral philosophical analysis, CRT has an explicitly activist dimension in its aspiration to transform the relationship between race, law and power and to reform ways in which legal knowledge and formal approaches to rights have ignored the historically entrenched marginalisation of black people. Below, I tentatively highlight six key theoretical elements of CRT with specific reference to how they challenge mainstream legal knowledge and do not conform to western notions of rationality, neutrality and objectivity. It should be noted that CRT is a vast and diverse body of scholarship and the themes below do not represent a unified position but organising principles of critique that often lead to different perspectives and new debates.³⁹

35 Glasgow (note 25 above) 152.

36 Compare H Botha ‘Equality, Plurality and Structural Power’ (2009) 25 SAJHR 21–6.

37 Glasgow (note 25 above) 153.

38 D Kennedy ‘A Cultural Pluralist Case for Affirmative Action in Legal Academia’ in Crenshaw et al (note 23 above) 159.

39 See R Delgado & J Stefancic ‘Critical Race Theory: An Annotated Biography’ (1993) 79 *Virginia LR* 461; K Crenshaw ‘Twenty Years of Critical Race Theory: Looking Back to Move Forward’ (2011) 43 *Connecticut LR* 1253; DL Hutchinson ‘Critical Race Histories: In and Out’ (2004) 53 *American Univ LR* 1187.

(a) Critique of liberalism

CRT rejects liberalism's cautious approach to transformation – particularly the insistence on 'colour-blind politics' and exclusively rights-based approaches (like anti-discrimination legislation) to resolving racial problems. In this way, CRT creates new, oppositionist and radical accounts of race other to those formulated by the dominant liberal tradition. Where CRT pointedly departs from liberal and conservative scholarship is on the understanding of racial power and racial (in)justice. Liberalism views racism from the 'perpetrator perspective' whereby racism is conceived as an irrational, aberrational act committed by a conscious wrongdoer often deviating from fair and impartial ways of treating fellow humans, distributing jobs, power, prestige and wealth.⁴⁰ The adoption of this approach has downplayed racial intolerance as an irregular, rare and individual problem with little significance. CRT scholars however argue that racism should be seen as systemic and ingrained in the social culture and reinforced through the reproduction of political power and legal reasoning. The corollary of this is that the practices of subordination that trap black people in poverty, discrimination and exclusion are sanctioned by law and legal institutions.⁴¹ It is the structural nature of racial power that is at the heart of the CRT critique of liberalism. The narrow ideological channel of mainstream liberal scholarship which rigidly defines law and politics as qualitatively different is also central to this critique. The myth that law occupies a rational, apolitical and neutral position in relation to social power negates the fact that politics embed the doctrinal categories and normative assumptions with which law organises and represents social reality and responds to social ills. Thus, the indeterminacy of legal rules and the political nature of law are often obscured by the constant obsession with technical discussions about locus standi, causation and procedure.

Although it is easy to indentify theoretical and intellectual disjunctures between CRT and CLS (specifically as regards the critique of rights), the entire critical project is animated by a frustration with the depoliticised and technocratic assumptions of legal pedagogy, which then reproduce the false concept of law as rational, apolitical and technical. In the South African context, the dignity-based approach to equality – endorsed by the Constitutional Court⁴² and reflected in international law instruments and domestic legislation⁴³ –

40 See A Freeman 'Legitimising Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 *Minnesota LR* 1049; R Delgado 'Two Ways to Think about Race: Reflections on the Id, the Ego, and other Reformist Theories of Equal Protection' (2001) 89 *Georgetown LJ* 2279.

41 A Harris 'Foreword' in R Delgado & J Stefancic *Critical Race Theory: An Introduction* (2001) xx.

42 For a critique of the dignity-based approach, see C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 254; D Davis 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *SALJ* 413; P de Vos 'Equality for All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court' (2000) 63 *THRHR* 62; H Botha 'Equality, Dignity and the Politics of Interpretation' (2004) 19 *SA Public Law* 731–43.

43 See art 1 of the UN Declaration on the Elimination of All Forms of Racial Discrimination (1963); the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

resulted in part from this failure to comprehend issues of racial discrimination in terms of systemic disadvantage and structural power. Instead it follows moralistic and liberal notions of personhood and individual autonomy which, from a critical race perspective, reinforce the ahistorical and privatised understanding of race that reduces racism to intolerant attitudes, irrational behaviour and prejudice, and from a critical legal perspective, continue the dated formalist desire for neutral principles and reasoning (in the name of ‘jurisprudential discipline’).⁴⁴ In the end, the result will always be the same: neutrality always normalises the status quo, and in situations where material inequality suffered by blacks is the status quo, neutrality can have disastrous racist consequences. The liberal legalist emphasis on universal and abstract theories and on law as objective and determinate results in ‘race-neutral’ laws which can only address the most blatant acts of racial discrimination but do not offer any insight into the structural nature of racial power, the ingrained and banal nature of anti-black racism and the role of law in reinforcing unearned white privileges. Crenshaw et al write that:

without a counter vision of race that does not fall into the world of liberal ambivalence and apology, the dangers of racialist politics for communities of colour will continue to go unheeded, even in light of the contradictions such a politics produces.⁴⁵

(b) Anti-essentialism

Anti-essentialism is an analytical tool used also in feminist theory to highlight that an identity category (like woman or black person) cannot be fixed, categorised or boxed into a common experience with one singular essence.⁴⁶ Given that previous attempts to create one generalised monolithic account of black identity have negated differences between blacks, CRT scholars are critical of any attempts to define one specific black community or to articulate a unitary black experience. This is largely due to the failure of essentialist perspectives to address the different needs and concerns that exist within one ‘race’ group. Although many CRT scholars, faced with the tension between race-consciousness and anti-essentialism have adopted ‘strategic essentialism’ as a way to articulate racial issues and the plight of black people as a group, while not arrogating to itself the position of a voice that claims to speak for all, theory and critique on race should be careful not to design a univocal black experience that creates and enforces a distinctive voice for all racially oppressed communities. As Lipsitz notes, to engage and transcend racism,

44 See L Ackermann ‘Equality and the South African Constitution: The Role of Dignity’ (2000) 63 *ZaöRV* 537.

45 Crenshaw et al (note 23 above) xxxii. See K Thomas ‘Racial Justice’ in A Sarat, G Bryant & R Kagan (eds) *Looking Back at Law’s Century* (2002) 78.

46 See J Wong ‘The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond’ (1999) 5 *William & Mary J of Women & the Law* 273; T Grillo ‘Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House’ (1995) 10 *Berkeley Women’s LJ* 16, 19.

theorists must ‘challenge both the static universalisms that deny difference and the static essentialisms that fetishize and reify it’.⁴⁷

Consider for example the use of the term ‘black people’ in s 1 of the Employment Equity Act (EEA) Act 55 of 1998 which determines the groups designated to benefit from affirmative action. This term is firstly, used broadly so as to also include (or assimilate?) ‘Africans, Coloureds and Indians’, and secondly it is listed separately to ‘women and the disabled’ and excludes sexual orientation. Two possible interpretive problems may arise in the EEA’s unproblematic deployment of these categories. Firstly, in the definition of ‘black people’, it seems to assert a singular black experience in which the differences, experiences and concrete particularities between (and within) so-called Africans, coloureds and Indians are negated. Secondly, in its separation of race from gender, it subscribes to the second erroneous assumption that ‘[gender] can be separated from how one is racialized, and how one in turn identifies with racialized difference’.⁴⁸ One result may be that, in its separation of race from gender (and then from disability), it inscribes the idea that the situation of *disabled-black-women* for example can be addressed through fragmenting them into the available categories. By adopting such an essentialist and fixed framework, the EEA opts for an approach that fails to recognise the tentative, unstable, and relational nature of *identity*.⁴⁹ What we can observe then is a kind of *compound essentialism*. First it is asserted that there exists a self-evident and unified ‘Indian’, ‘Coloured’ and ‘African’ identity, experience and reality that can be revealed as such and shown to have the same ‘properties’ or essence. Then those three already internally conflicted identity categories are further neatly placed under the homogenous banner of ‘black people’. And finally, this reified account of ‘black people’ is cut off, suspended alongside, gender and disability. Of course, reliance on apartheid-era identity categories as part of legislative efforts aimed at achieving redress and representivity is absolutely necessary. What is not necessary is for the categories to be simplified and reified in the unnuanced way the EEA (and most legislation) does. In this sense, part of race-consciousness, a central tenet of CRT, is also to be conscious of the indeterminacy of the social construction of race. CRT’s emphasis on anti-essentialism is important to law in general and post-apartheid law in particular in order to counter law’s inherent rigidity and its predilection for universalism and abstract categorisation especially given the careless and oppressive use of race and gender categories during apartheid, and their strategic and instrumental use in ‘post’-apartheid South Africa. CRT, however, still emphasises certain commonalities and builds political affinities for black people to be able to clearly express how and why

47 G Lipsitz ‘“Swing Low, Sweet Cadillac”: White Supremacy, Antiblack Racism and the New Historicism’ (1995) 7 *American Literary History* 704.

48 D Cornell ‘Revisiting “Beyond Accommodation” After Twenty Years’ (2011) 1 *Feminists @ Law* 5 <<http://journals.kent.ac.uk/index.php/feministsatlaw/issue/current>>.

49 A Harris ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 *Stanford LR* 581.

race – even though socially constructed – affects identity and history and shapes current realities, identifications and material conditions.

(c) Intersectionality

As a consequence of its anti-essentialist position, CRT understands that people are defined by more than their ‘race’; that we are simultaneously raced, classed and gendered. It is thus crucial to examine how the intersection of race, gender, class, nationality, sexual orientation, religious and cultural beliefs, (dis)ability and other identity locations induce multiple forms of discrimination and oppression. This is relevant in analysing and identifying different types of disadvantage and discrimination, evaluating their individual impact and considering remedies that can respond to the complexity of that discrimination and disadvantage. A discipline which focuses on anti-essentialism and intersectionality, Critical Race Feminism (CRF) was born out of the feeling that feminist jurisprudence did not fully acknowledge the racial element of sexism and gender oppression and that critical race theory did not adequately address gender issues and feminist concerns.⁵⁰ The risk of oversimplifying the human experience and producing fixed analyses and approaches – thereby excluding many – necessitates a deeper focus on the way multiple identities play themselves out in various settings. CRT engages with the multiplicity of social life in attempts to address social ills⁵¹ and eschews essentialist approaches that assume sameness and deny difference.⁵² For its own part, s 9(3) of the Constitution recognises that claims of unfair discrimination can be brought on ‘one or more grounds’ thus leaving it open for black women, for example to assert a different experience of race and gender discrimination to black men and white women.⁵³ The picture would keep changing then, if the black woman is also lesbian and/or disabled, and/or poor and/or pregnant and so on. Customary law issues such as male primogeniture, ukuthwala and polygamy; the provision of health-care services for people with HIV/AIDS in rural communities; the situation and harsh labour conditions of domestic workers as well as the phenomenon of ‘curative’ rapes inflicted on black lesbians are among some South African examples that demonstrate the relevance of intersectional analysis.

50 K Crenshaw ‘Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 139 *Univ of Chicago Legal Forum* 139; K Crenshaw ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 43 *Stanford LR* 1241. See also A Wing (ed) *Critical Race Feminism: A Reader* (1997); A Davis *Women, Race and Class* (2001); b hooks *Ain’t I a Woman: Black Women and Feminism* (1981).

51 Delgado & Stefancic (note 39 above) 54–6.

52 For a critique (or critical poststructuralist version) of intersectionality, see Cornell (note 48 above) 5.

53 See D Hull (ed) *All Women are White, All the Blacks are Men but Some of us are Brave* (1982).

(d) Structural determinism

CRT focuses on the way in the structure of legal thought and the prevailing legal culture determines law's content and thus also who benefits from it and whose interests and values it protects and reflects. That is, it seeks to interrogate how the dominant categories, doctrines and tools influence legal interpretation and analysis, and to what extent this either maintains the racial status quo or seeks to challenge it. To this end, Karl Klare's rightly renowned essay on the South African legal culture being 'conservative' remains instructive.⁵⁴ Klare was not using the term 'conservative' in the socio-political sense (although I think he wouldn't have been wrong had he used it in that sense as well). He was referring to the 'traditions of analysis' and modes of legal reasoning 'common to all South African lawyers' of all political outlooks.⁵⁵ For Klare, the South African legal culture is characterised by a 'relatively strong faith in the precision, determinacy and self-revealingness of words and texts. Legal interpretation in South Africa tends to be more highly structured, technicist, literal and rule-bound'.⁵⁶

Part of what makes the South African legal culture so conservative (and thus unhelpful, if not detrimental, to the interests and plight of black South Africans) is the continuing interpretive legitimacy and dominance given to the Roman Dutch Law (common law). There still remains the view that despite the common law being thoroughly saturated in a 'white, male, western and colonial perspective', it can still provide access to a neutral, pure and universal source of meaning for purposes of interpretation and adjudication.⁵⁷ The continuance of this formalist belief, both in legal practice, adjudication and in legal education, has had the implication that the legal system is structurally determined to reflect and privilege a contingent and contested (and whitened) view of law while falsely portraying it as neutral, normal and fair. In practice, this view has undermined the idea of constitutional democracy and constitutional values as supreme and the imperative to respect and acknowledge the living customary law and black indigenous values. CRT's structural determinism thesis leads us to question how post-apartheid transformation can take place in a legal system and legal culture that is still based on apartheid legal norms and categories.

Obviously, substantive change for victims of apartheid (and the concomitant problems of poverty, exclusion and disempowerment) relies on the transformation and reconstruction of South African law and politics—on emphasising substantive equality and horizontal application of the Bill of Rights, on building democratic dialogue and creating room for ongoing political thought and action, and on

54 K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 157.

55 *Ibid* 168.

56 *Ibid*.

57 AJ van der Walt 'Modernity, Normality and Meaning: The Struggle Between Progress and Stability and the Politics of Interpretation (part 2)' (2000) *Stellenbosch LR* 226–73). See also M Chanock *The Making of the South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (2001) 527 (showing how the common law was inherently linked to, and developed out of, the apartheid project of white nationalism/white supremacy).

addressing power differentials and systemic inequalities. The danger, as Klare warns, is that ‘jurisprudential conservatism ... may induce a kind of intellectual caution that discourages appropriate constitutional innovation and leads to less generous or innovative interpretations and applications of the Constitution’.⁵⁸ To understand the structural determinism of the South African legal system we also have to understand the role of a legal culture. In Klare’s view a ‘[l]egal culture has a powerful steering or filtering effect on interpretive practices, therefore on adjudication, and therefore on substantive legal development’.⁵⁹ Therefore, for the lives of poor and destitute (mostly black) South Africans to change (for the better) and for racial justice to materialise, the (currently formalist) legal culture must change in a more egalitarian and transformative direction with scholars, lawyers and judges adopting morally and politically engaged forms of writing about, practising and judging the law.

(e) Social science insights, historical analysis and multidisciplinary thinking

In its attempt to understand and expose how the regnant regime of white supremacy and anti-black racism has been created and maintained, CRT draws from other fields such as historical and cultural studies, philosophy, anthropology, literature, and political science to develop a politicised and socially relevant account of racial power and its manifestations in legal institutions. A central tenet of CRT scholarship is to emphasise the absolute centrality of historical context in any attempt to theorise the relationship between race and legal discourse. Such a contextualised historical analysis of the effects of past and present racial hierarchies is common to CRT in that it challenges the presumptive legitimacy and normalised practices of societal institutions. To develop a progressive critique of legal discourse, CRT scholars refuse cautious modes of analysis and the pressure of being faithful to a certain notion of analytical rigour and thereby goes beyond expected confines of legal scholarship in order to address the ‘position of a concrete embodied person’.⁶⁰ This interdisciplinary approach is premised on the view that (a) the law itself is a product of the interdisciplinary effects of history, language, politics, culture and society; (b) it is only through an interdisciplinary approach that we can understand how race is constructed, rationalised and experienced in society; and (c) the kind of large-scale social change envisaged by scholars who operate within the critical stream should not, and cannot, be limited to or constrained by law, legal processes and legal enquiry.⁶¹

58 Ibid 171.

59 Ibid 168.

60 K van Marle ‘Transformative Constitutionalism As/And Critique’ (2009) 20 *Stellenbosch LR* 291.

61 Ibid 288.

(f) Storytelling, narrative and ‘naming one’s own reality’

The main aim behind CRT’s controversial use of stories, allegory and narrative is to ‘probe the convolutions and recesses of our thinking about race’.⁶² The use of hypothetical narrative is of course not new to legal scholarship. Lon Fuller’s ‘The Case of the Speluncean Explorers’ remains a seminal text for teaching and reflecting on different jurisprudential perspectives and their application in legal reasoning and judicial decision-making.⁶³ For CRT scholars Derrick Bell’s ‘The Chronicle of the Space Traders’⁶⁴ serves as one of the standard texts for reflecting on CRT through narrative. In ‘Space Traders’, a group of highly advanced extraterrestrials lands on earth in the year 2000 and makes an intriguing offer to the American people. The leaders of the alien armada promised large amounts of gold to bail out the almost bankrupt federal, state and local governments; special chemicals capable of reversing the pollution of the environment which was becoming increasingly toxic and unhealthy and safe nuclear energy and fuel to supplant the nation’s depleted supply of fossil fuel. All they wanted in return was to take all the black Americans back to their alien planet.⁶⁵ The alien force – who news stations began calling the ‘Space Traders’ – gave the nation 16 days to consider the proposal – the last day being 17 January 2000, Martin Luther King’s birthday.⁶⁶

Throughout the chronicle, Bell interrogates law’s role in perpetuating a racialised legal order and with the failure of the current system to serve the needs of blacks – who have suffered and continue to suffer from the brutal legacy of slavery, colonialism, and institutionalised racial segregation and inequality. He captures a few critical events starting with how, even without knowing what the aliens intended to do with the black people, the president immediately began calling cabinet and congress meetings where the almost white-only political elite would begin to negotiate on the terms of the bargain for the fate of all the blacks in America. It was clear during the cabinet meeting that the all-white cabinet unflinchingly supported acceptance of the offer – despite opposition from a black senior civil servant. Some of the arguments used to legitimate the decision included the view that the departure of blacks would considerably ease the burden on state and federal budgets since it was the majority of the black population that was reliant on state welfare services,⁶⁷ as well as the suggestion that blacks are compelled to agree with the alien’s terms on the grounds of *patriotism* and *civic duty*.⁶⁸ As one of the characters suggested, all that was really needed to justify the trade-in of blacks was

62 R Delgado & J Stefancic ‘Derrick Bell’s Chronicle of the Space Traders: Would the US Sacrifice People of Colour if the Price Were Right?’ (1991) 62 *Univ of Colorado LR* 321.

63 L Fuller ‘Case of the Speluncean Explorers’ (1949) 62 *Harvard LR* 616–45. See also N Cahn et al ‘The Case of the Speluncean Explorers: Contemporary Proceedings’ (1993) 61 *George Washington LR* 1754.

64 D Bell *Faces at the Bottom of the Well: The Permanence of Racism* (1993) 158; ‘Racism: A Prophecy for the Year 2000’ (1990) 42 *Rutgers LR* 3.

65 Bell (note 64 above) 159–60.

66 *Ibid.*

67 *Ibid* 164–5.

68 *Ibid* 165.

the drafting of legislation ordering all blacks to perform a special service for the nation by handing themselves over to the aliens.⁶⁹ Around this time, progressive lobbyists also assembled to draft a number of legal challenges to the impending decision and planning for massive civil disobedience.⁷⁰

Later on, leaders of Fortune-500 businesses, heads of banks and other corporations also met to consider the implications of the Space Traders' offer. Central to their consideration was the fact that black people represented most of the labour workforce, constituted 12 per cent of the market and generally consumed more income than whites. For them, even the benefits of the trade came with unwanted consequences such as that inexhaustible energy supplies would put most of those companies out of business and the never-ending supply of gold would also put banks and insurance companies in a risky position.⁷¹ Companies that build prisons and law-enforcement agencies and low-cost housing in the ghettos would also lose profits. Not only were blacks crucial to stabilising the economy because they bore the brunt of its disequilibrium, but if they were removed from society, poor whites – no longer distracted by their delusional supremacy over poor(er) blacks – would also begin to realise that they suffer gross disparities (perpetrated by the white elite) in access to resources, opportunities and income.⁷² The debates raged on and chaos ensued across the country as security began using more force against anti-trade protestors. When the matter reached the Supreme Court, it refused to intervene in any matters concerning the proposition citing that there were no 'judicially discoverable and manageable standards' to resolve the issue.⁷³

The Court did mention though that if it had to make a ruling, it was unlikely that the transferral of African-Americans to the Space Traders would be deemed unconstitutional because there was sufficient precedent for it.⁷⁴ The matter was for political authorities and so all actions against the proposition were dismissed. The 'political' authority to which the court deferred was in fact a national referendum which held and confirmed by 70 per cent to 30 per cent what was a foregone conclusion: that blacks can be sacrificed if the price is right. By this time, the police had put in place measures to isolate and place all blacks under some form of detainment to prevent them from escaping or rioting.⁷⁵ On the last day (day 17), the Space Traders drew their strange vessel-like ships and discharged their cargoes of gold, minerals and machinery with the now empty vessels to be filled by the crowd of over 20-million black women, children and men. Bell writes:

As the sun rose, the Space Traders directed them first to strip off all but a single undergarment; then, to line up and finally, to enter those holds ... The inductees looked fearfully behind them. But, on the dunes above the beaches, guns at the ready, stood US guards. There was no

69 Ibid 165.

70 Ibid 173–5.

71 Ibid 180–1.

72 Ibid 181.

73 Ibid 191–2.

74 Ibid.

75 Ibid 193.

escape, no alternative. Heads bowed, arms now linked by slender chains, black people left the New World as their forebears had arrived.⁷⁶

Even for highly conservative South African legal scholars who may critique them for being too subjective, ‘non-legal’ and lacking in analytical rigour, narratives such as these are both moving and thought-provoking. By using storytelling, CRT scholarship exposes the ‘false necessity’ and ‘circular self-serving nature of particular legal doctrines or rules’.⁷⁷ Modest positions that do not pretend to be engaged in some form of grand legal theorising, such as imaginative stories and counter-stories, are not at all weak and need to be considered as legitimate avenues of South African legal scholarship.⁷⁸ Narrative is useful in opening up discursive spaces for previously silenced voices to participate in public life and also to demonstrate how constructions of social reality can be deconstructed and altered.⁷⁹ Of course, ‘Space Traders’ is a short story rooted in American history and politics. It does not offer solutions and doesn’t tell us that there aren’t any. What it does do is open up critical debates and serious questions that could challenge the values and ethos of the legal community in their approach to issues of race. It illustrates the terrible effects that conservative forms of judicial adjudication, uncritical acceptance of state authority or capitalist interests and facially neutral yet oppressive laws can have on social progress and transformation. What would have happened had the aliens asked for homosexuals, atheists, ‘criminals’, or women instead of blacks? Why could the responses have been different? And where do we turn when the law itself reflects and produces hegemonic white power and imposes an oppressive social order on blacks? How do we expand the current constricted understanding of race and power in mainstream legal thinking? CRT, though narrative, forces us to confront these questions and marks itself out as a distinctive intellectual tradition.

CRT has been described as a form of ‘antithetical knowledge’ which refers to the ‘development of counter-accounts of social reality by subversive and subaltern elements of the reigning order’.⁸⁰ The rejection of traditional orthodoxy in legal scholarship – a key feature of all CLS paradigms – opens up legal thinking to the realisation that issues of race (as a special example) cannot be written from a distance of dispassion or an attitude of ‘objectivity’. As Crenshaw et al note:

[t]o the extent that racial power is exercised legally and ideologically, legal scholarship about race is an important site for the construction of that power, and thus is always a factor, if ‘only’ ideologically in the economy of racial power itself.⁸¹

76 Ibid 194.

77 R Delgado & J Stefancic *Critical Race Theory: The Cutting Edge* (2000) 41.

78 P Cilliers ‘Complexity, Deconstruction and Relativism’ (2005) 22 *Theory, Culture and Society* 3–12.

79 Ibid xvii.

80 Crenshaw et al (note 23 above) xix. See CR Lawrence III ‘The Word and the River: Pedagogy as Scholarship as Struggle’ (1992) 65 *Southern California LR* 2231.

81 Ibid xiii.

Accordingly, ‘there is no exit’ – no ivory tower from where to merely analyse and observe outside the social dynamics of racial power. Legal scholarship (that is, the formal production, classification and organisation of what can be called knowledge) on issues of race, sex, gender, and poverty is ‘inevitably political’.⁸² In what follows, by discussing key Constitutional Court cases, I offer examples of what I observe to be a disconnect between the above-discussed themes of CRT and South African race jurisprudence.

IV RACE AND CONSTITUTIONALISM

The advent of a new democratic, multi-racial order underwritten by a Constitution that promises non-racialism and a society based on equality, dignity and freedom, has done little to change the uneasy relationship between race and law in the journey towards this elusive ‘new’ South Africa. This uneasiness has played itself out in various Constitutional Court cases since its establishment. Many of these cases involved questions of equality and discrimination but the Court’s position on race has also been addressed in cases that did not relate ‘directly’ to race (although critical race analysis of case-law should not, and does not, limit itself to cases that involve direct reference to race). For example, in *S v Makwanyane*,⁸³ some observations on the relevance of race were made. Chaskalson P (as he then was) noted the cogent argument that the majority of those sentenced to death are poor and black and thus unable to afford *proper* legal assistance.⁸⁴ However his formulation that ‘race and poverty are also *alleged* to be factors’ points to a strange reluctance to openly acknowledge the ubiquity of race and the role of racial bias in the criminal justice system. It is telling that Chaskalson P’s most substantive engagement with the role of race and class is done in a footnote, which again indicates that though the Court is willing to acknowledge race, it views it only as an afterthought and not a central question which merits thorough analysis as CRT would argue (in *casu*, the accused was black and poor and the judge of the Court *quo* was white, middle class and personally supported the death penalty). It is also clear that Chaskalson P wishes to bracket race out with other issues such as class and ignorance as ‘subjective’ issues. This is, of course, no different to the formalist pretention that race has no real, independent or objective, presence in law and legal processes. In such a view, the fact that the ‘accused’ are black and the impugned law is part of apartheid-era legislation that is implicated in the brutalities of apartheid is only accidental to the case at hand. Klare also expresses surprise at the failure of the Court to draw out ‘the essential connection of the death penalty to racism and racial domination’.⁸⁵ He questions the Court’s failure to make more explicit the equality aspect of the case: that in racialised, unequal societies, the law (and in this case, capital

82 Ibid.

83 1995 3 SA 391 (CC).

84 Ibid paras 48–9.

85 Klare (note 54 above) 174.

punishment) is incapable of race-neutral application.⁸⁶ What is interesting with the *Makwanyane* Court's treatment of the race problem is how race is simply bunched together in a category of factors referred to as 'subjective' and then also reduced to just that: a part of the myriad factors that *could* contribute to arbitrariness in the judicial application of capital punishment. What is more concerning though is that this reduction of race to but one of many factors, and to an aberration and inconvenience rather than an entrenched practice of subordination, is indicative of the Court's liberal search for race-neutral principles and objective standards that consign race to a 'silent category' and negate race-consciousness in favour of typical modes of analysis and reasoning.⁸⁷

Another aspect of the *Makwanyane* judgment needs to be examined in relation to the concept of structural determinism explained above: namely the emphasis by Mokgoro J,⁸⁸ Sachs J⁸⁹ and Madala J⁹⁰, among others, on the significance of traditional African jurisprudence and the value of uBuntu as introducing an alternative epistemology and source of law, other than the Eurocentric western model imposed through the legacy of white racial domination in South Africa. The recognition of African values, underscored by the need to consider the ideals and perspectives of historically marginalised groups (in this case, blacks), was aimed at developing an 'all-inclusive value system' that could form the basis of a South African human rights jurisprudence.⁹¹ This call for a return to African jurisprudence (as manifested in the philosophy of African humanism and the conventions of customary law) could disclose a critical challenge to the racial hegemony of white values in law, specifically in relation to the universal application of the common law vis-a-vis the case-by-case application of the customary law.⁹² This was clearly a variation of the structural determinism argument put forward by CRT scholars in the awareness that a legal culture structured around the values, intellectual sensibilities and beliefs of whites would naturally produce legal outcomes (and thus societal outcomes) that reflect and protect white interests and maintain whiteness as the standard for legal interpretation and practice. As Sachs J writes:

In the past ... the all-white minority had imposed Eurocentric values on the majority, and an all-white judiciary had taken cognisance merely of the interests of white society. Now, for the first time ... we [have] the opportunity to nurture an open and democratic society and to have due regard to an emerging national consensus on values to be upheld ...⁹³

86 Ibid.

87 G Minda *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995) 168.

88 *Makwanyane* (note 83 above) paras 306–8.

89 Ibid paras 358–92.

90 Ibid paras 243–50; 252–3.

91 See generally D Cornell & N Mavangua *uBuntu and the Law: African Ideals and Post-apartheid Jurisprudence* (2011).

92 Compare M Pieterse 'It's a "Black Thing": Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17 *SAJHR* 364.

93 *Makwanyane* (note 83 above) para 359.

It is sad then that Sachs J later refers to these arguments as ‘political’ as opposed to legal thus maintaining the false distinction between law and politics, which is a hallmark of traditional legal orthodoxies that seek to insulate law from broader social and political concerns.⁹⁴ Nevertheless, the inclusion of African humanist insights and values can also be connected to the plea for narrative, storytelling and counter-storytelling that is so central to CRT methodology. This is so because a storytelling approach is ‘a method of telling the stories of those people whose experiences are not often told.’⁹⁵ Such stories and counter-stories are necessary to oppose dominant narratives and meanings of social life that are taken for granted and which ‘privilege whites, men, the middle and/or upper class, and heterosexuals by naming these social locations as normative points of reference’.⁹⁶ This would also address the absence of a critical race-consciousness in legal interpretation and reasoning. It is the potentially disruptive nature of African jurisprudence that could prove useful in problematising race discourses that privilege the perspective of the dominant sectors of society, and in deepening our thinking on the struggle for racial justice.

A more vivid example of how the absence or ‘silence’ of race reinforces the presence of racial exclusion is the *Prince* case.⁹⁷ In *Prince*, the Court rejected the argument that Rastafarians should be exempted from the general prohibition on the use of cannabis provided for in s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992. In the view of the majority, such an exemption would make law enforcement in that regard exceptionally arduous. The Court accepted that the prohibition constituted a reasonable and justifiable infringement of Prince’s right to religious freedom. The result was that Mr Prince, who is a member of the Rastafarian community and thus uses cannabis as part of his religious observance (not for recreation), was barred from becoming an attorney because of the impossible choice he had to make between his religion and his profession. Sachs J dissented with a critique of the majority’s desire to serve the state’s interest in law enforcement, which resulted in conformity to majoritarian standards of ‘acceptable’ religions. He also emphasised the powerlessness of the Rastafari, their marginal outsider status as well as their inability to fully participate in the public life of the country and to effectively protect themselves through legal means.⁹⁸ What Sachs J did not mention explicitly however was the fact that although Rastafari is indeed a religion, thus warranting the heavy focus on the right to religious freedom, it is also a religion practised predominantly by black people. Historical and social analysis of the case would also show the significant role that the Rastafari

94 Ibid para 360.

95 D Solorzano & T Yosso ‘Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research’ (2002) 8 *Qualitative Inquiry* 26.

96 L Hunn, T Guy & E Manglitz ‘Who can Speak for Whom? Using Counter-Storytelling to Challenge Racial Hegemony’ in *Proceedings of the 47th Adult Education Research Conference* (2006) 244–50.

97 *Prince v President of the Law Society of the Cape of Good Hope* 2001 2 SA 388 (CC).

98 Ibid para 156.

have played in resistance struggles against apartheid and colonialism and in that way defend Rastafarianism as a unique religion and also as an intellectual heritage of historically marginalised people. Such a historically grounded interpretation of the right to religious freedom would have also revealed the role played by the apartheid government's stated preference for, and imposition of, Christianity in the subjugation and exclusion of blacks and women.⁹⁹

Once again, the equality aspect was ignored and the possibility of a race-conscious approach (that takes difference and diversity seriously) was negated. Race consciousness (as a method of seeing 'race' where it is otherwise invisible and then viewing that race problem from the perspective of subordinated groups such as black Rastafari) is important in cases such as *Prince* precisely because it helps to recognise and then oppose, the unconscious but systemic preference for values, belief systems and mores that correlate with sensibilities that are inextricably linked to (white) western standards. The judgment can be criticised then for this failure to take the lived experience, history, culture and intellectual tradition of blacks into account. In close relation to the above, it can also be criticised for (even if unwittingly) sanctioning the racist stereotype that depicts the Rastafarians as backward, needing to be civilized but incapable of legal regulation and drug-addicted. This would be in line with the intersectionality analysis advocated by CRT which would illustrate how the combined effects of religious marginalisation intersects with existing racial discrimination and social exclusion based on culture and class to cumulate the oppression experienced by the Rastafari.¹⁰⁰ Without such a critical analysis, the exclusionary and racist nature and effect of the judgment would remain concealed and left unquestioned by race-neutral and formalist approaches. Similarly in *Mabaso*¹⁰¹ the Court held that legislation that prevented legal practitioners admitted in former homelands from enrolling as attorneys in the same way as lawyers from non-homelands unfairly discriminated on the basis of the unlisted ground of those who fell under the jurisdiction of the former homelands as opposed to the listed ground of race.

I turn now to a discussion of two cases that dealt directly with racial equality, and specifically how this relates to redress and transformation. Anton Kok correctly notes that the 'equality jurisprudence produced by the South African Constitutional Court had to be developed with largely the "wrong" kind of claimants'.¹⁰² He refers to *Walker*¹⁰³ as a case where a privileged white man brought a claim of racial discrimination and *Van Heerden*¹⁰⁴ as the first affirmative action claim brought, also ironically, 'by "old order"'

99 To his credit, Sachs J does engage in such an analysis in *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC) para 152.

100 See Sachs J's treatment of intersectionality in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 112–3.

101 *Mabaso v Law Society of the Northern Provinces* 2005 2 SA 117 (CC).

102 A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or Legislature-driven Societal Transformation?' (2008) 19 *Stellenbosch LR* 131–2.

103 *Pretoria City Council v Walker* 1998 2 SA 363 (CC).

104 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC).

parliamentarians'. The people for whom the anti-discrimination legislation was intended for – blacks – are not the ones to bring the claims. In addition to showing how the transformative potential of law is often co-opted to protect the very system it is attempting to eradicate, we could turn to Derrick Bell's theory of 'interest convergence', which holds that 'white elites will tolerate or encourage racial advances for Blacks only when such advances also promote white self-interest' and that when they do not protect white privilege, many whites will employ legal means to challenge such redress measures as unfair discrimination.¹⁰⁵ Naturally given the specificity of apartheid as an authoritarian anti-black racist system, one would view claims that privileged whites can suffer unfair discrimination based on race as being rooted in an ahistorical race-neutral attitude. This is so because a race-neutral perspective based on a constitutional insistence on 'putting the past behind us' fails to view racism as so endemic in society that white privilege itself – which Mr Walker and Mr Van Heerden as white men benefited and continue to benefit from – is also a form of affirmative action, and also a form of selective debt enforcement and subsidisation (in which whites are well-resourced and better placed financially to pay for services and debts). This will take us back to the critique of the liberal approach of formal equality that is so central to CRT.

It is noteworthy that although the Court in *Van Heerden* accepted the need for remedial measures (only if properly constructed in terms of s 9(2)) by setting a three-pronged test, the Court also accepted the measures in question irrespective of the fact that 53 out of the 251 people set to benefit from them were white. This in actual fact means that the measure in *Van Heerden* could not be considered as a race-based affirmative action measure. It was specifically this aspect that led Mokgoro and Ngcobo JJ, in their minority judgments, to question the majority's reliance on the affirmative action clause (s 9(2)) rather than the unfair discrimination clause (9(3)). They both noted that although they reached the same outcome, it is not correct to use s 9(2) for purposes for which it was not intended especially because the majority of the persons set to benefit from the remedial measure were not members of a category previously disadvantaged by unfair discrimination (ie blacks) and most of them were elite politicians.¹⁰⁶ They argued that while s 9(2) looks at the group to be benefitted by a particular measure, s 9(3) focuses on the party/group being discriminated against. On their s 9(3) analysis, they held that the remedial measures create no disadvantages and do not impact negatively on the complainant's rights and dignity. The majority however simply held that the remedial measure in question meets the requirements of s 9(2). In both the majority and minority judgments, it was accepted that in order to advance persons who have been disadvantaged, it may be necessary for other groups to be 'disadvantaged'. I place disadvantage in quotation marks here because restitutionary equality measures for historically disadvantaged

105 Delgado & Stefancic (note 77 above) xvii. See D Bell 'Brown v Board of Education and the Interest Convergence Dilemma' (1980) 93 *Harvard LR* 518.

106 Sachs J (para 136) argues that s 9(2) & 9(3) should be read together.

groups cannot truly be regarded as having a disadvantageous impact on the unjustly privileged and vastly advantaged groups in society. To suggest that redress measures somehow disadvantage whites – even if that disadvantage will later be justified as constitutionally cogent – is actually to uncritically legitimise the ill-gotten gains of apartheid and structural white privilege as normal, deserved and secure.

Van Heerden also illustrates the difference in application of US CRT. Apart from the fact that blacks in the US are a racial minority while blacks in South Africa are a numerical majority, there is another important difference that needs to be reflected in a South African reconceptualisation of CRT critiques of liberal equality jurisprudence. In South African equality law, affirmative action is not an exception to, or deviation from, the equality guarantee, it is viewed as an integral and composite part of the right to equality.¹⁰⁷ This is in contrast to the US where race-based affirmative action measures are subjected to a strict scrutiny test that is similarly applied to overtly racist and discriminatory policies and practices.¹⁰⁸ As opposed to the US Supreme Court which US CRT scholars often criticise for following a formalistic (process-based), race-neutral approach,¹⁰⁹ the South African Constitutional Court endorses a ‘substantive equality’ approach.¹¹⁰

Thus a CRT critique in South Africa would have to probe other areas of this substantive equality jurisprudence such as showing that this notion of substantive equality is still only a formal and abstract legal declaration that has not, and cannot by itself, translate into substantive change in the lives of blacks. It would also be critical of the Court for not offering a comprehensive treatment of race. While the Court accepts the trite claim that apartheid disadvantaged blacks and advantaged whites disproportionately, the extent and continuation of that disadvantage and advantage is never indicated – nor has the Court ever indicated an awareness of the fact that disadvantage (black suffering) and advantage (white privilege) are the flipside of the same coin. In other words does the Court accept that to end black suffering, white privilege must also be directly challenged and ended?¹¹¹ In *Van Heerden* for example, the complainant and the rest of the old-order parliamentarians still accrued a higher pension benefit than the new parliamentarians who were to benefit from the remedial measure which he charged to be unfair racial discrimination. As

107 Section 9(2) of the Constitution states: ‘Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken’.

108 *Van Heerden* (note 104 above) paras 95 & 147. See I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 264.

109 See N Gotanda ‘A Critique of “Our Constitution is Colour-Blind”’ (1991) 44 *Stanford LR* 1–68.

110 *Van Heerden* (note 104 above) paras 26, 27, 29, 31, 76, 119 & 142. For a critique of the Court’s reliance on a notion of substantive equality from an ethical feminist perspective which can no less be reformulated in critical race terms, see K van Marle ‘“The Capabilities Approach”, “The Imaginary Domain” and Asymmetrical Reciprocity: Feminist Perspectives on Equality and Justice’ (2003) 11 *Feminist Legal Studies* 255.

111 R Delgado ‘The Current Landscape of Race: Old Targets, New Opportunities’ (2006) 104 *Michigan LR* 1269.

Mokgoro J notes: '[his] motivation for contesting the measure was indeed to earn more'.¹¹² White privilege was neither challenged nor dislodged, the Court merely defended the right of others to benefit alongside it.

In *Walker*, the Court concluded that the practice of levying and charging different rates and service charges for residents in 'formerly' black areas and 'formerly' white areas did not constitute unfair discrimination. (The Pretoria City Council was charging the residents in the black townships (Mamelodi, Atteridgeville) at a flat rate while charging the (mainly white) residents of old Pretoria based on actual consumption.) However, the Court held, the practice of selective debt enforcement (whereby legal action to recover arrears was taken only against residents living in old white Pretoria and not the black residents in the townships) did in fact constitute unfair discrimination. It reached this conclusion on the basis that whites are a racial minority that is vulnerable and in need of the Court's protection and also because 'no members of a racial group should be made to feel that they are not deserving of equal protection'.¹¹³

Sachs J's dissenting judgment closely mirrors some of my concerns with the majority judgment.¹¹⁴ By highlighting that the respondents in this case were not vulnerable at all, and in fact lived in a highly affluent area which enjoyed regular municipal services at all material times, Sachs J exposes the false rhetoric of formal equality, which led the Court to declare whites as a vulnerable minority despite their dominance and the political, social and economic advantages that they hold over South Africans. By de-emphasising the questions of rationality and legality that the majority focused on, Sachs J also challenges the formalism that so often obscures inequalities and injustices based on race. In this case, the majority's view that the City Council's policy amounted to indirect discrimination against whites lacked a sufficient appreciation of the conditions of poverty, misery and deep inequality that residents of the black townships find themselves in as a result of the apartheid policies of segregation and separate development.

It is clear in both *Walker* and *Van Heerden* that the Court makes 'unapologetic' (but no less superficial) rhetorical claims to redressing 'past' injustices and imbalances, but no tangible results for racial justice came out of either of these cases. In the first place, both cases were brought by over-privileged whites, so all that was required was for the Court to restate the formal legal position. Due to problems of access to court and a socio-economic rights discourse, which by all accounts has overtaken the

112 Ibid para 101.

113 *Walker* (note 103 above) para 81. One wonders if this is even a case that involved the denial of equal protection to whites.

114 Ibid paras 100–40. If I have a criticism of Sachs J's dissenting opinion it would be for his failure to recognise the racialised nature of South Africa's geographical makeup owing to the legacy of apartheid segregation and unequal separate development. I agree with M Kende *Constitutional Rights in Two Worlds* (2009) 166 that Sachs erred in his claim that the differential treatment of the residents of old Pretoria vis-a-vis the residents of the townships was based on geographical differences and not race. Would that Sachs had grounded his powerful dissent in a race-conscious method.

reparations discourse, we still await cases brought by black South Africans enforcing the positive duty of the state to redress past and current imbalances based on, *inter alia*, race and class as well as more claims against private entities and multinational corporations which supported and benefitted from apartheid. A CRT challenge to both judgments would be firstly to more honestly concede that corrective measures designed to advance historical racial disadvantage are not only *necessary* but also insufficient, and secondly to push whites to ‘identify and acknowledge the systemic range of privileges [they have] purely based on [their race]’.¹¹⁵ Another troubling aspect in most of the Court’s references to race is the emphasis on ‘past’ or ‘previous’ disadvantage, which limits itself to the pre-1994 period, and thus ignores the ways in which that ‘past’ discrimination and ‘past’ disadvantage currently manifests itself as a present condition and is constantly being reproduced. It also places an undue emphasis on the abolition of legal and political apartheid, and not on social, cultural, spatial, epistemological and economic apartheid which was left virtually unchanged post-1994.¹¹⁶ Admittedly this is not a point scored against the Court alone as it is against the entire post-apartheid constitutional order and rights discourse.

For the last section, I have chosen the more obvious cases dealing with racially discriminatory legislative provisions; obvious because the outcome was fairly predictable. The legislation in question was enacted during apartheid, and predicated upon the general belief in black inferiority and was part of the racist attempt at creating a ‘white South Africa’. In *Moseneke*,¹¹⁷ the applicants challenged the constitutionality of s 23(7) of the Black Administration Act 38 of 1987 which prescribes that when a white person dies intestate, her or his estate must be administered by the Master of the High Court, whereas when a black person dies intestate (which was the case in *Moseneke*), her or his estate must be administered by a magistrate. The *Zondi*¹¹⁸ case concerned the constitutionality of certain sections of the KwaZulu-Natal Pound Ordinance 32 of 1947. In short, the Ordinance provides for the immediate seizure and impoundment of trespassing animals by a landowner without notice to the owner of the animals. After the impoundment of the animals, the Ordinance provides for the assessment of damages by ‘two disinterested persons’ who must be voters or landowners. The damages so determined would then have to be paid by the livestock owner for the release of those animals failing which the Ordinance permits the sale in execution of the impounded animals.

The two cases differ from *Prince* and *Makwanyane* in the sense that the Court failed to interpret *Prince* and *Makwanyane* through the prism of race. They also differ from *Walker* and *Van Heerden* in that the Court did

115 I Olckers ‘A “Feminist” Critique of Law’ (2001) 34 *De Jure* 482.

116 See T Madlingozi ‘Post-apartheid Social Movements and the Quest for the Elusive “New” South Africa’ (2007) 34 *J of Law and Society* 77.

117 *Moseneke v Master of the High Court* 2001 2 SA 18 (CC).

118 *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC).

not have to balance black people's equality claims with the economic and political interests of white people. This is another way of saying that the Court will only radically confront anti-black racism and white supremacy in uncontroversial cases concerning the mere invalidation of apartheid-era legislation as opposed to when white interests are at stake or when race can be avoided in favour of other categories such as the rights to life, dignity or religion. In *Moseneke*, Sachs J referred to the Black Administration Act as 'an egregious apartheid law which anachronistically has survived [the] transition to a non-racial democracy'. He highlighted how the legislation in question is 'part of a demeaning and racist system' and not befitting a democratic society based on dignity, equality and freedom.¹¹⁹ 'The Act systematised and enforced a colonial form of relationship between a dominant white minority who were to have rights of citizenship and a subordinate black majority who were to be administered'.¹²⁰ Sachs J laments that the Act still exists and is enforced at all: 'the concepts on which it was based, the memories it evokes, the language it continues to employ, and the division it still enforces are antithetical' to a sound constitutional-democratic society. The continued enforcement of the Act reinforces the subjugation of 'blacks' and normalises their treatment as sub-humans and as people deserving of inferior treatment. Accordingly, Sachs J declared the legislation invalid and unconstitutional arguing that 'to keep a manifestly racist law on the statute books is to maintain discrimination' against black people.

In *Zondi*, the same 'grand' sentiment is expressed differently. The Court began by noting that in cases that involve legislation rooted in apartheid, there is a need to remove them from the statute books. Ngcobo J pointed out that the social context in which the Ordinance operates is rooted in the historical dispossession and deprivation of land to black South Africans. He notes that the Ordinance was enacted under the apartheid legal order as part of a broader racist system characterised by the denial of franchise to blacks, centuries-long forced mass removals of black people and policies of racial segregation, which culminated in black people owning only 13 per cent of land while whites owned the remaining 87 per cent. 'African people were driven into the desolation of homelands' through laws that effectively banished blacks to small overcrowded townships and under-resourced homelands.¹²¹

Ngcobo J notes that the Ordinance does not expressly oblige anyone to give livestock owners like Mrs Zondi notice of the impoundment nor is it relevant that she may be illiterate or does not understand the language of the local newspaper or *Gazette*. The impounding scheme thus traps people like Mrs Zondi in a 'vicious cycle of poverty and landlessness that has been historically perpetuated on them'. 'It works harshly in rural areas and it is 'invasive of rights'.¹²² It is unsurprising then that Ngcobo J found the relevant

119 Ibid 20.

120 Ibid.

121 Ibid paras 38–9.

122 Ibid.

sections of the Ordinance to be ‘manifestly and fundamentally racist in [their] purpose’¹²³ and accordingly could not be reconciled with the Bill of Rights.

Another interesting point indicated by these cases is that legal liberalism can only be effective in remedying deliberate and obvious acts, policies and laws that are racist. Its ability to deal with unconscious, hidden and structural manifestations of racism and to address existing forms of white racial domination, however, is evidently lacking. Through employing the insights of CRT as discussed above, perhaps different conclusions might have been reached and different (and much richer) analyses offered. Of course, much more in-depth CRT analysis of these cases is required – which falls outside of the introductory scope of this article. Hopefully the brief comments provided here open further and deeper thinking on the adoption of CRT in South Africa.

In summary, I would add that the disconnect I have discovered between CRT and South African constitutional jurisprudence relates not so much to presence (what the court said) but to absence (what the court didn’t say, what it neglected to mention). So although the Court perfunctorily gestures towards a paradigm of substantive equality and a contextual approach, many of its outcomes do not reflect the same radical vision of anti-subordination and social justice that would be at the heart of a post-apartheid version of CRT. It is not always clear, if one looks at its reasoning vis-a-vis the final outcome, where the Court *really* stands in relation to racism.¹²⁴ What is clear though is that if the Court does not more clearly state its commitment to addressing the connection between racial inequality and white privilege and the legacy of systemic anti-black racial oppression and how it has evolved in post-apartheid South Africa, it may find itself crafting an equality jurisprudence so pliable and inert, so devoid of any transformative or progressive value, that even previously and currently *advantaged* groups (especially white males) will continue to use it to question and hinder the continued existence of redress measures through increased claims of unfair discrimination.¹²⁵ This may be why CRT rejects incremental and cautious liberal approaches to remedial equality:

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.¹²⁶

The cases discussed above provide important reflections for the ongoing difficulties posed by race to the still inadequate race jurisprudence of the Constitutional Court¹²⁷ and also of the lower courts.¹²⁸ Paradoxically they

123 Ibid para 96.

124 Compare Botha (note 42 above).

125 See the discussion of race in S Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law-Making* (2001) 153–7.

126 Delgado & Stefancic (note 39 above) 57.

127 And also *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC), *Bel Porto School Governing Body v The Premier of the Province, Western Cape* 2002 3 SA 265 (CC); *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC).

128 For example, *Motala v University of Natal* 1995 3 BCLR 374 (D); *Stoman v Minister of Safety and Security* 2002 3 SA 468 (T); *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C).

also show how law is both the cure and the cause: even though it generally operates in reductionist, universalist and essentialist ways that marginalise poor black communities and maintain unjust systems of power, the outcomes-based nature of law, through constitutional litigation also holds *possibilities* for race-sensitive approaches to legal reasoning and judicial adjudication that could result in tangible (albeit short-term and often temporary) outcomes for the disadvantaged and indigent.¹²⁹ One must still ask however: how many silenced black voices and abused and degraded black bodies remain victimised by unscrupulous capitalist interests, excluded and subordinated by entrenched practices designed to perpetuate white power and constantly trapped in the misery of poverty and indignity – all with no recourse to the law? How many of these people can bring their cases to the Constitutional Court? How many of these poor, landless, homeless and mistreated black people enjoy the constitutional protections of access to justice and access to courts? The answers to these questions reveal that while these cases simultaneously reflect some small gains and some serious setbacks, they are small drops in an ocean filled with the broken lives and broken deaths of black people. Although CRT starts with ‘legal’ analysis, the achievement of racial justice and the endless goal of ending racism is way beyond the reach of law and the courts.

V CONCLUDING REMARKS

The dynamics of power trouble all our doing and all our thinking. Knowledge is always contingent, always standing above the abyss.¹³⁰

Cornel West aptly describes CRT as ‘a gasp of emancipatory hope that law can serve liberation rather than domination’.¹³¹ I want to recast – although not answer – a series of questions (parting thoughts if you wish) that West asks, namely, how do we candidly incorporate experiences of intense racial alienation and subordination into the subtle ways of ‘doing’ theory in South African academia? What are the new constructive frameworks, ideological tenets and critical paradigms that could inform radical critique and legal education? What is our vocation as oppositional intellectuals/researchers

129 I leave open for a later discussion the direct question of whether the law can be used as an instrument of social change (in this context, the total eradication of white supremacy and of the structures that produce and perpetuate anti-black racist outcomes). My view is that, in the end, lasting and genuine transformation will come from revolutionary social struggle and not through some transformative or progressive jurisprudence which would remain constrained by working exclusively within the domain of law and court litigation and being conditional upon the presence of radical judges who in our legal culture are virtually non-existent. Law can only offer state protection, court remedies and recognition of rights, whereas what should be the demand of anti-racist struggle is power and freedom. See W Brown *Sates of Injury: Power and Freedom in Late Modernity* (1995). Added to this is the fact that law has also historically functioned to both construct and perpetuate the racial subordination of blacks. And as we know from Audre Lorde (*Sister Outsider* (1984) 110–13) the master’s tools (law) can never dismantle the master’s house (white social power). By this I do not mean to reject the pragmatic use of rights and law to address the social and economic needs and challenges of blacks; I merely mean to point out its insufficiency as a means of serious social change.

130 J Jansen *Knowledge in the Blood: Confronting Race and the Apartheid Past* (2009) 1.

131 C West ‘Foreword’ in Crenshaw et al (note 23 above) xii.

who choose to participate in a legal academy of which we do not feel fully a part and who choose to employ analytical tools, interpretive techniques and writing styles that do not conform to mainstream scholarship?¹³² And with some uneasiness, how can we be sure that CRT, in the process of reminding us how deeply issues of racial ideology matter in social life, does not become another orthodoxy? It is critical that as social realities continue to shift, CRT too must evolve and constantly challenge its own fundamental theoretical underpinnings in a way that embraces dissent and internal criticism and simultaneously avoids prescriptive, herd-like thinking.

Jacques Derrida famously described racism as a ‘western thing’ and apartheid as ‘the ultimate monument of racism’.¹³³ With his words in mind, I ask to what extent the transition to democracy has changed the western and imperialist frameworks and conservative legal tradition on which South African law is based? The currently limited and limiting discourse on race underpinned by rational knowledge and reason are constantly inhibiting attempts to come to grips with the explosive issue of race and specifically its relationship to law and social power. I want to recall the words of Van Marle that ‘apartheid is a crime in the past of white South Africa’¹³⁴ to argue for a critical understanding of how the global systems of racism and white supremacy enunciate themselves in structures of power (economics, law, politics) and institutions of life (society, history, education, sex). I also take for granted that the complications inherent in the notion of race are further complicated by the complex difficulties of transformation, letting go of privilege and living beyond current representations of skin colour and the self.

The need to radically transform society in such a way that racial exclusion and marginalisation become anathema to the claimed democratic and constitutional ethos of South African society urges an engagement with this complexity and with critical/radical thought. The failure to adopt CRT into mainstream legal scholarship has unwittingly left the apartheid legal culture intact. As I have argued in this article, CRT can be conceived of as a potentially transformative genre of post-apartheid critique in at least the following four senses:

- Illustrating how despite ostensible legal reforms and the de jure end of white supremacist rule, racism and white privilege are continually reproduced institutionally (that is legally and politically) and also within numerous vectors of social life and relations.
- Examining and exposing the myriad ways in which law, legal ideology and the legal culture are not at all determinate, objective and free of wider political influence but are in fact implicated in structuring and strengthening existing social arrangements and power relationships.
- Specifically focusing on the economic disadvantages and distributive injustices faced by blacks and showing how these are facilitated and

132 Ibid xii.

133 Derrida (note 1 above) 291.

134 K van Marle ‘Meeting the World Halfway – The Limits of Legal Transformation’ (2004) 16 *Florida J of Int Law* 660.

permitted by present legal discourses undergirded by race-neutral rules and practices and shaped by the dominant ideology of neo-liberal capitalism.

- Disrupting and problematising the celebratory narratives of ‘post’-apartheid South Africa (‘the rainbow nation’) that operate within the liberal economy of formalism and colour-blindness and too hastily proclaim the demise of apartheid by exposing the ongoing racial subordination, social misery and suffering and exploitation experienced by blacks in their daily lives.

As I have also attempted to show, South Africa is best suited to engage in critical race analyses that traverse discourses on law, power and knowledge production and how they interact to produce relations, practices and institutions that (consciously and unconsciously) subordinate black people. The aim is not just to expose the problems of racial politics within the legal system, but also to change them. This is not at all to say that the law is not a limited, if not hopelessly unproductive, instrument of social change (Kok certainly agrees that it is),¹³⁵ but rather that our understanding of law and legal theory can be radically altered by placing ‘race as a central organising theme in their construction’.¹³⁶ To my mind, the current scholarship of constitutional law and anti-discrimination academics remains premised on conservative orthodoxies and liberal paradigms that appear to be too ideologically impoverished and technocratic to uncover and elaborate how law constructs race and how race is *still* a site for power and hierarchy. For now, the future course of CRT in South African legal philosophy cannot be known or predicted. We know that there’s no escape, no turning back and no easy way out. We know that we are faced with the paradoxes of hope and despair, forgiving and forgetting, equality and freedom, denial and dialogue and white power and black emancipation. Perhaps the greatest paradox can be found in those moments where our optimistic hopes are crushed by harsh realities, while our pessimistic intuitions are constantly troubled by hard-worn struggles and victories for racial justice. Though the binaries of black and white; rich and poor and victim and beneficiary haunt and divide the nation, they also confirm that our futures, destinies and fortunes are inextricably linked. So, as race, transformation and reconciliation remain central in shaping our daily lives and relationships, setting the scene for new tragedies and new triumphs, CRT is an invaluable tool in making sense of it all:

To ask such questions, such difficult questions, requires that we change the most resistant, archaic structures of our desire.¹³⁷

135 A Kok ‘Is Law able to Transform Society?’ (2010) 127 *SALJ* 59. Read this together with note 129 above.

136 Tuitt (note 7 above) xiv.

137 J Derrida ‘Opening Plenary: Is Feminist Philosophy Philosophy?’ in E Bianchi (ed) *Is Feminist Philosophy Philosophy?* (1999) 27.