

# **Conquest and constitutionalism: first thoughts on an alternative jurisprudence**

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This article examines the meaning and progress of post-1994 constitutional democracy in South Africa from the perspective of its (dis)continuity with the *longue-durée* history of colonial conquest, settler-colonialism and white supremacy. The argument developed in this essay is that the lack of restoration and fundamental change that haunts the present South African legal and political order can be traced to this (dis)continuity. This argument is deepened by a problematisation of the widespread public, political and academic worship of the South African constitution as well as a synthesis of a variety of critical perspectives on post-1994 law, society and constitutionalism into a challenge to the putatively transformative and revolutionary pedigree of the 1996 constitution. This article ultimately defends the emerging critique of the constitutional order as a historical opening for the reimagining of a new social order and, for the purposes of this article, an alternative jurisprudence as well.

**Keywords:** constitutionalism; critical race theory; jurisprudence; legal history; decolonisation

The desideratum for democracy and non-racialism cannot replace natural and historical justice.<sup>1</sup>

The past is no longer imagined as a time that can be overcome. In our liberal and liberalizing time, emancipation has given way to accommodation, and reconciliation has displaced revolution as the language of social and political change where the future has been reduced to a mirror image of the present.<sup>2</sup>

### **1. Preface: liberal constitutionalism in the ‘Mandela republic’**

The prolific literary critic and novelist Lewis Nkosi provides an apposite starting point for this paper in light of the analogy he prompts between certain trends in post-1994 South African literature and culture and the problem of reconstituting a new polity and a new law. The following quote by him sets the tone for these reflections:

Much has changed in South Africa. Or not much has changed; depending from what perspective you are looking at our ugly past. What has changed is the physiognomy of white power, which allows a white minority to maintain its hegemony under the guise of non-racialism.<sup>3</sup>

In the essay ‘The republic of letters after the Mandela republic’, Nkosi associates the period that is temporally described as ‘post’-apartheid or symbolically

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<sup>1</sup> MB Ramose ‘The philosophy of the Anglo-Boer War’ in I Snyman, I Liebenberg, G van der Westhuizen and M Roos (eds) *A Century is a Short Time: New Perspectives on the Anglo Boer War* (2005) 23.

<sup>2</sup> D Scott *Omens of Adversity: Tragedy, Time, Memory, Justice* (2013) 131.

<sup>3</sup> L Nkosi ‘The ideology of reconciliation: its effects on South African culture’ in L Stiebel & M Chapman (eds) *Writing Home: Lewis Nkosi on South African Writing* (2016) 149.

as ‘the Mandela republic’<sup>4</sup> with ‘the failure of South Africa to function as a unitary nation’.<sup>5</sup> This failure, for Nkosi, is linked to the fact that South African literature ‘has been held hostage by apartheid’, which in his view ‘remains a presence, a shadow of unpunished wickedness and inequality ignored’.<sup>6</sup> The unresolved fractures at the heart of the ‘new’ polity that embody the afterlife of colonialism and apartheid have, according to Nkosi, inhibited the emergence in South African literature of the ‘shared assumptions of a national culture’.<sup>7</sup> Nkosi relates this absence of a national culture to South Africa’s history *and present* of settler-colonialism – both its denial of ethical and political co-existence between its inhabitants and the unliveable levels of racial stratification and violence it produces.<sup>8</sup>

A number of signifiers mark Nkosi’s text and stand in as metaphors of the ‘post’-apartheid condition: ‘horror’, ‘anxiety’, ‘nervous condition’, ‘malaise’, ‘shadow’, ‘double trauma’, ‘irrecoverable loss’. Nkosi situates his reflections against the background of a critique of the liberal humanist novel that, he argues, represents ‘an ideology which, with very good intentions but with very little support, attempts to will into existence the “nation”’. The liberal humanist novel attempts to ‘fill the empty category of the “nation” with subjectivities which have to come into being’.<sup>9</sup> In addition to a premature triumphalism, Nkosi notes deeper problems embedded in the narrative structure of the liberal humanist novel, namely (1) the pre-eminence of a white literary voice, (2) a liberal conception of race, and (3) an inability or refusal to

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<sup>4</sup> L Nkosi ‘The republic of letters after the Mandela republic’ in Stiebel & Chapman *ibid* 240.

<sup>5</sup> *Ibid* 240.

<sup>6</sup> *Ibid* 240.

<sup>7</sup> *Ibid* 241.

<sup>8</sup> *Ibid* 241.

<sup>9</sup> *Ibid* 244.

accommodate an African perspective.<sup>10</sup> The coupling of ‘nation’ with ‘narration’ in postcolonial studies led Nkosi, in the early 1990s, to question the very idea of a ‘South African national literature’ and thus of a ‘South African nation’ since the very idea of ‘South Africa’ ‘has operated under the sign of a division so profound that only a complete overhaul of the social infrastructure could clear the ground for the emergence of a truly national literature’.<sup>11</sup>

Nkosi continues further to suggest that it is not only that South Africa is not able to sustain a shared conception of the nation that could serve as the grounds for a national literature but also that the idea of ‘post’-apartheid is an impossibility<sup>12</sup> – ‘a fiction at odds with reality’.<sup>13</sup> Indeed, Nkosi reminds us that, ‘[I]t is premature to talk about the end of apartheid’<sup>14</sup> since ‘[M]any social and economic structures remain much the same even after the repeal of apartheid laws.’<sup>15</sup> The negotiated settlement that delivered constitutional democracy in South Africa was ‘conclude[d] with a rather banal muted whimper, a finale in which the fundamental economic structures of society would remain largely uncontested’.<sup>16</sup> In the result, Nkosi explains that the post-1994 novel would remain haunted by the ‘intractable problems [...] bequeathed to us by an *insolite* history of racial division and racial oppression’.<sup>17</sup> In particular, he highlights two burning issues that demand critical attention from writers, cultural workers and intellectuals in post-1994 South Africa: (1) a critique of the ‘instant,

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<sup>10</sup> Ibid 244.

<sup>11</sup> Ibid 246.

<sup>12</sup> Ibid 248.

<sup>13</sup> Nkosi (note 3 above) 152.

<sup>14</sup> Nkosi (note 4 above) 250.

<sup>15</sup> Ibid 253.

<sup>16</sup> Ibid 248.

<sup>17</sup> Ibid 251.

enforced reconciliation’ imposed by the Truth and Reconciliation Commission; and (2) the ‘continuing and vexed land question’, which remains unresolved by the ‘bourgeois nationalist state’ under African National Congress (ANC) rule.<sup>18</sup> A focus on these two issues is crucial in Nkosi’s estimation for the South African imagination to overcome the false narrative of ‘national transcendence’ and to resist being pressured into promoting the official and hegemonic narratives of the new dispensation.<sup>19</sup> As he writes: ‘At the end of the day, there was a “crime” but no “punishment”. The truth of recent South African history can only be told in novels of the abyss [...].’<sup>20</sup>

Nkosi thus reads post-1994 South Africa or the ‘Mandela republic’ as a time and a place in which the past has not only shaped but continues to *exert pressure* on the present.<sup>21</sup> In this way, he has simply rendered as literary a problem that is not only common to all disciplines, including law and jurisprudence, but that characterises the entire social life of the putatively ‘new’ South Africa, in both its public and private as well as material and symbolic guises. And in this regard, the political question of how we should read the constitutional present in South Africa is intimately tied to the epistemic injustice of the virtually complete silencing of African and black intellectual and political perspectives, voices and realities in legal theory and related disciplines. Through Nkosi’s prompting of a connection between the political/historical and the epistemic/literary, the world and the word, we may treat the absence of an experience of historical justice, reparation and meaningful onto-epistemic transformation in South African lives as a starting point in the search for

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<sup>18</sup> Ibid 255.

<sup>19</sup> Ibid 255. See also Nkosi (note 3 above) 154-155.

<sup>20</sup> Ibid 255.

<sup>21</sup> Ibid 253.

ways of reading, thinking and imagining, and also living and being, that work outside of state-driven logics, moderate political visions and Western legal paradigms.

## **2. Introduction**

The purpose of this article is to draw the outlines of a historical, political and ethical critique of the South African constitution.<sup>22</sup> It considers South Africa's history of colonial conquest and the persistence of its constituent elements (racism, dispossession, poverty, epistemicide, spatial injustice) into the present period as a critical predicament that unsettles post-1994 constitutionalism and its associated political culture and jurisprudence. The central premise of this article is that South Africa's constitutional democracy has over the years been rendered empty by the absence of concrete historical justice and the non-realisation of an emancipatory experience of freedom and dignity in the lives of the black majority in South Africa. While a set of external global economic forces and the chronic levels of corruption and maladministration by the ruling ANC government partly accounts for these problems, it is the *longue durée* (long duration) historical unfoldment of European colonial conquest and white supremacy in conjunction with the terms of the constitutional transition and negotiated settlement that will be marked out for critical examination in this article.

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<sup>22</sup> To be consistent with the philosophical spirit and integrity of the text, this article follows Mogobe Ramose (elsewhere in this issue) in subverting the convention that capitalises references to the present South African constitution. The purpose of referring to the constitution in all lowercase is to put into question the hierarchy between the constitution and African law in particular, and to contest the symbolic and ideological elevation of the constitution to the status of human-made deity.

Drawing on critical race theory, settler-colonial studies and African jurisprudence, I aim to employ conquest as a framework and basis for a historically grounded analysis of the present legal and political condition in South Africa. As the historical record shows, the mid-17th century European colonial conquest of indigenous peoples in what would only much later be called ‘South Africa’ and the subsequent installation of a regime of settler-colonial white supremacy constitutes not only a foundational violence<sup>23</sup> but also an ongoing structuring dynamic of social organisation in South Africa and not a mere past historical event.<sup>24</sup> The settler-colonial usurpation of South Africa was marked not only by brutal violence, land dispossession and exploitation of black bodies but also by enduring forms of legal and political governance of indigenous populations; arrangements of socio-economic inequality and extreme poverty; spatial containment and segregation; annihilation of African cultures and onto-epistemes; as well as psychic alienation and imposed symbolic degradation of African personality.<sup>25</sup> Through its racialising (or subject-producing) technologies, colonial domination in South Africa both produced and then worked to maintain and institutionalise a political ontology that positioned white people at the zenith of all definitions of humanity (civilisation, reason, morality)

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<sup>23</sup> Y Winter ‘Conquest’ in *Political Concepts: A Critical Lexicon* (2011) < <http://www.politicalconcepts.org/issue1/conquest/>>; L Veracini *Settler Colonialism: A Theoretical Overview* (2010) 78.

<sup>24</sup> See AT Moleah *South Africa: Colonialism, Apartheid, and African Dispossession* (1993); T Keegan *Colonial South Africa and the Origins of the Racial Order* (1996); N Worden *The Making of Modern South Africa: Conquest, Apartheid, Democracy* (2012); JS Saul & P Bond *South Africa – The Present as History: From Mrs Ples to Mandela & Marikana* (2014).

<sup>25</sup> Worden *ibid* ; GM Fredrickson *White Supremacy: A Comparative Study in American and South African History* (1981) 179-198; Saul & Bond *ibid* 36.

while simultaneously placing Black people<sup>26</sup> at the nadir of the social hierarchy and binding them into perpetual inferiority and powerlessness. In this process, centuries of white colonial domination have also generated a protracted antagonism at the heart of the South African society and polity, which is reflected (albeit in different historical stages) by an unceasing irruption of social, political and existential instability and uncertainty felt by all of its inhabitants.

Crucially, the amalgam of powers, systems, relations, identities and logics that comprise colonial conquest and settler-colonial white supremacy stretch beyond the legal and political domains into the socio-economic, cultural, spatial, epistemic/cognitive, psychic and ontological.<sup>27</sup> The racialised social contradictions it engenders leave the entire social landscape with deep, enduring and indelible imprints that are by design resistant to legal and political reforms aimed at formal deracialisation of civil society and integration of historically oppressed peoples into the frame of human rights and citizenship. Since settler-colonialism is, in Patrick

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<sup>26</sup> Throughout this article, I shall use the term 'Black' to include groups traditionally labelled as Africans, Indians and Coloureds, unless where context indicates otherwise, in which Black denotes only 'Africans'. Throughout the text, I capitalise references to Black people as a group, not only because, as a specific political and socio-cultural group, they require denotation as a proper noun but also to adhere to the conventions of critical race theory literature and in order to discursively resist the racist diminution and negation of blackness in general, and to challenge the racial hierarchy in which blackness has been historically cast as inferior. It is for this reason that I do not capitalise 'white'. Where I use 'black' in all lowercase, it is in reference to a descriptive category. See KW Crenshaw 'Mapping the margins: intersectionality, identity politics and violence against women of colour' (1991) 43 *Stanford Law Review* 1244.

<sup>27</sup> C Mills 'White supremacy as a socio-political system' in AW Doane & E Bonilla-Silva (eds) *White Out: The Continuing Significance of Racism* (2003) 35.

Wolfe's famous formulation, 'a structure and not an event',<sup>28</sup> conquest must be understood as an order of constitutive physical, structural and symbolic violence that serves as the *foundation* for the very coherence of South Africa as a territory, polity and community.

It is from the vantage point of this deep and long historical framework that we may examine the progress of two decades of constitutional democracy in South Africa. For such an examination to be possible, however, it is necessary to repudiate the prohibitive intellectual and political conventions in the legal academy and beyond that treat the constitution in South Africa as universal, immutable, faultless and impervious to critique and revision. In this regard, this project shares an affinity with a number of scholars who have opened critical inquiries into the limitations and failures of 'post'-apartheid constitutional democracy, showing in different ways how the origins, spirit and content of the constitution are grounded upon a set of faulty political, conceptual and ideological predicates that not only violate the principle of historical justice but also stand in the way of a radical-democratic, decolonised and liberated future.<sup>29</sup> My own contribution to these lines of critical inquiry will be to

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<sup>28</sup> P Wolfe 'Settler colonialism and the elimination of the native' (2006) 8 *Journal of Genocide Research* 387, 388.

<sup>29</sup> For representative writings, see M Mutua 'Hope and despair for a new South Africa: the limits of rights discourse' (1997) 10 *Harvard Human Rights Journal* 63-114; MB Ramose 'In memoriam: sovereignty and the 'new' South Africa' (2007) 16 *Griffith Law Review* 310, 318-319; M More 'Fanon and the land question in (post)apartheid South Africa' in N Gibson (ed) *Living Fanon: Global Perspectives* (2011) 173-186; S Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *Stellenbosch Law Review* 482; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123-147; N Dladla

reflect on the fundamental (dis)continuity between the historical fact of colonial conquest and settler-colonialism in South Africa and the aims and vision of a constitution made in the image of Western liberal democracy. I propose to argue that the lack of restoration and fundamental change that haunts the legal and political transition of the early 1990s, the seeming intransigence of old and new power structures and vested interests and the ongoing forms of dissent and discontent raging across South African public and political life can all be traced to this (dis)continuity.

In the course of this article, the constitution is figured not only as a supreme law but also a supreme *rationality*. Not only is it a formal law-text but it is also a particularly hegemonic public grammar, political imaginary and a form of historical and social consciousness. It embeds *particular* cultural and ideological values into its fold and as such works to consolidate and preserve *particular* arrangements and relations of power and knowledge. Understood in this way, the constitution must be implicated in the continuation of colonial-apartheid power relations, value systems and subjectivities. How else could we explain why the advent of constitutional democracy in South Africa has left white supremacy and coloniality largely undisturbed? What interests and powers does the constitution secure and leave untouched, and what realities and demands does it silence, minimise or erase?

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‘Towards an African critical philosophy of race: ubuntu as a philo-praxis of liberation’ (2017) 6 *Filosofia Theoretica* 39-68. See also J Saul ‘On taming a revolution: the South African case’ (2013) 49 *Socialist Register* 212-240; P Bond ‘Constitutionalism as a barrier to the resolution of widespread community rebellions in South Africa’ (2014) 41 *Politikon* 461-482; T Delpont ‘An ethical (anti-)constitutionalism? Transformation for a transfigured public’ (2014) 46 *Acta Academica* 104-121; G van Riet ‘The limits of political development and constitutionalism in South Africa’ (2016) 75 *New Contree* 98-115.

I shall aim to engage these and other questions in this article, which is structured as follows: in the part that follows, I trace the connection between the excessive and widespread idealisation and worship of the South African constitution to the problem of colonial unknowing (in terms of which the fact of settler-colonialism is erased from theoretical and historical comprehension). Following this, part four considers the possibility that the hallowed status and moral power of the constitution is beginning to wane and puts forward a critical reading of post-1994 constitutionalism in the register of Wendy Brown's *Politics Out of History*, in which she reflects on the political, intellectual and cultural effects of the destabilisation of modernist narratives. Along such lines, I develop an account of the critique of constitutionalism with an emphasis on how such critiques: (1) reconceptualise the traditional historical periodisation upon which the constitution is premised, (2) insert black radical and Africanist imaginaries and vocabularies into legal and political thinking, (3) unearth the ideological presuppositions (and mystifications) of the post-1994 constitutional dispensation, and (4) issue 'uncompromising' demands for concrete justice and fundamental change. Part five concludes the article by briefly revisiting Nkosi's insights and reflecting on jurisprudence, decolonisation and the continuity between the colonial 'past' and the constitutional 'present'.

These reflections are set against the backdrop of the search for an alternative jurisprudence that would work against not only the more conservative positivist/black-letter legal thinking and liberal legalism but also the excessively Eurocentric traditions of critical legal theory. On this score, the invocation of conquest as a historical marker for reading the present functions as a counter-narrative to these more dominant traditions of white legal scholarship in South Africa. Yves Winter points to what he calls the 'double narratability' of the concept of conquest:

the fact that it contains both the stories, memories and experiences of the conqueror as well as those of the conquered. While conquest mainly denotes a paradigmatic type of violence or technology of acquisition and domination, as a historical trope, it can also be mobilised as the basis for a counter-history and counter-discourse. As Winter explains:

stories of conquest challenged the official representations of the state and the law to the extent that they rendered society as riven by a binary division between conquerors and conquered. By appropriating this division as an analytical lens, these narratives of conquest demonstrate that the foundational narratology of conquest can be inverted and turned against the dominant class to generate a critique of official history and show the extent to which the hegemonic histories function as forms of ideology. Conquest, in other words, functions also as the paradigmatic form of history from below, a narrative form that justifies rebellion and insubordination and that, beginning in the 17th century, offers an interpretive schema for telling an alternative account.<sup>30</sup>

Following Winter, this article adopts a critical counter-historical and counter-hegemonic standpoint and gathers together a wide variety of thinkers and theoretical approaches in order to contemplate a jurisprudence outside of, and beyond, liberal constitutionalism.

### **3 Constitutional worship as ‘colonial unknowing’**

Over a series of publications, the anthropologist couple Jean and John Comaroff have described South Africa as a country in the grip of a pervasive culture of

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<sup>30</sup> Winter (note 23 above).

constitutionalism, legality and rights.<sup>31</sup> This culture, they explain, is characterised by an excessive faith in the South African constitution – which they refer to as an ‘[e]mpirically modernist, Eurocentric, and liberal’<sup>32</sup> text – to solve social problems, a faith they describe as bordering on fetishism. John Comaroff describes this fetishisation of law and constitutionality as being associated with, among other things, the judicialisation of politics; the global hegemony of human rights; the increasing tendency of subjects of class, race, sex, gender, and cultural difference to turn to law and courts as a means of constructing and representing themselves; and excessive litigiousness in society.<sup>33</sup> According to the Comaroffs, this fetishism of law and constitutionalism is a peculiar feature of the postcolonial condition in South Africa<sup>34</sup> and is linked to the governing ANC’s aspiration towards a ‘Eurocentric ideal of the nation-state’.<sup>35</sup>

Another source of the fetishisation and indeed worship of the constitution is a legal and political theology that views the promulgation of a new national constitution after conflict as a substantive and symbolic break with the past. As such, the culture of legality in ‘constitution-obsessed South Africa’<sup>36</sup> is central to the production of a particular political culture as well as particular conceptions of nationhood and subjectivity and a particular vision of civil society. But, as Stacy Douglas has pointed

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<sup>31</sup> J Comaroff & JL Comaroff ‘Policing culture, cultural policing: law and social order in postcolonial South Africa’ (2004) 29 *Law & Social Inquiry* 513, 521.

<sup>32</sup> Ibid 521.

<sup>33</sup> JL Comaroff ‘Reflections on the rise of legal theology: law and religion in the twenty-first century’ (2009) 53 *Social Analysis* 193, 195.

<sup>34</sup> JL Comaroff & J Comaroff ‘Law and disorder in the postcolony: an introduction’ in J Comaroff & JL Comaroff (eds) *Law and Disorder in the Postcolony* (2006) 22.

<sup>35</sup> Comaroff & Comaroff (note 31 above) 522.

<sup>36</sup> Comaroff & Comaroff (note 34 above) 26.

out in a paper entitled ‘Constitutions are not enough’, this centring of constitutions as the central instruments for the production and reconstruction of political community after conflict always comes at the expense of alternative ‘imaginings of political community’.<sup>37</sup> It also denies ‘the messy realities of subjectivities, and glosses over persistent issues of inequality’.<sup>38</sup>

Because a postconflict constitution signals ‘particular kinds of cultural shifts’ and ‘articulates aspirations for renewal’,<sup>39</sup> it often contains a false teleological conceit that casts the social, political and legal order as being on a progressive move from a dark and conflictual past to a democratic future. This fetishistic over-investment and overreliance on constitutions is problematic given that constitutions and constitutionalism are incapable of providing a reflexive politics<sup>40</sup> and are thus also unable to appreciate how deeply the terrors and conflicts of colonial-apartheid resulted in unstable conceptions of political community – particularly in the context of land, race and culture. Defining the social and political life of a polity mainly through constitutions, constitutionalism and constitutionality represents a closure of politics, rather than its opening – since in binding a political community together through its sovereign devices, a constitution and its devout proponents must also be blind to its own failures and exclusions.<sup>41</sup> The Comaroffs’ use of the term *fetish* to

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<sup>37</sup> S Douglas ‘Constitutions are not enough: museums as law’s counter-archive’ in S Motha & H van Rijswyk (eds) *Law, Memory, Violence: Uncovering the Counter-Archive* (2016) 140, 141.

<sup>38</sup> *Ibid* 142.

<sup>39</sup> *Ibid* 141.

<sup>40</sup> E Christodoulidis ‘Constitutional irresolution: law and the framing of civil society’ (2003) 9 *European Law Journal* 401-432.

<sup>41</sup> S Douglas *Curating the Community: Museums, Constitutionalism and the Taming of the Political* (2017) 116.

describe the prevailing South African fixation and attachment to the constitution goes beyond signalling a law-abiding commitment but highlights the necessarily theological and ideological function of a postconflict constitution. Not only does a 'new' constitution purport to ground a transformed polity and define its values and ideals, it also hopes to hold together the always-already fragile civic bonds of the nation. In so doing, the constitution and the discourses and subjects it produces, *must* repress the difficult issue of the contested foundations and unrealised promises of the new order. It must also monopolise the sphere of public and political engagement unless actively countered by a different, more radical, politics.

The concept of 'colonial unknowing' stands out as an apposite description of the South African legal mind and legal culture in the grip of constitutional worship. Recently introduced to settler-colonial studies by Manu Vimalassery, Juliana Hu Pegues and Alyosha Goldstein, 'colonial unknowing' denotes an epistemological orientation that 'renders unintelligible the entanglements of racialization and colonization, occluding the mutable historicity of colonial structures and attributing finality to events of conquest and dispossession'.<sup>42</sup> In other words, colonial unknowing erases and overlooks the immoral and unjust historical foundations of settler-colonialism, treating it instead as an immutable, unproblematic and naturalised social fact – as something that happened and can no longer be reversed or challenged.

When 'colonial unknowing' is operative, the possibilities for reversing the colonial order are silenced even before they can be spoken, and the exigency of complete justice is undermined even before it can be demanded. It is through colonial unknowing that the afterlife of colonial-apartheid can at once remain pervasive in the

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<sup>42</sup> M Vimalassery, JG Pegues & A Goldstein 'Introduction: on colonial unknowing' (2016) 19 *Theory & Event*.

form of inequality, poverty, violence and suffering but not be ‘comprehended as an extensive and constitutive living formation’.<sup>43</sup> Colonial unknowing operates centrally through the disavowal, dissociation and normalisation of the history *and horror* of colonialism, land dispossession, white domination and racism. By making settler-colonialism illegible as a historical, political and moral problem, colonial unknowing normalises white hegemony in South Africa, enforces the expiry of colonised people’s right to historical justice, and structures the field of sense, knowledge, perception and imagination in such a way as to make substantive decolonisation appear ‘unreasonable and unrealistic’.<sup>44</sup>

The centring of the constitution in South Africa’s political and legal culture and social discourse has also had the effect of narrowing the space for political contestation and removing from serious analytic view the living memory of South Africa and South African law as artefacts of colonial conquest. In this respect, constitutional worship also contains traces of what Brown has described under the heading of ‘moralism as anti-politics’.<sup>45</sup> The moralistic dimension of constitutional worship inheres in its deification of the constitution and its inevitable casting of any criticisms of the constitution as in some way sacrilegious. To be sure, the problem with the pervasive culture of constitutional worship – and the colonial unknowing and moralism it disseminates – is its adherence to a static and undemocratic discursive universe in which it appears as though academics, civil society, political commentators and ordinary citizens cannot live and think outside of, at a distance from or even against the present constitution.

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> W Brown *Politics Out of History* (2001) 18-44.

#### 4. Constitutionalism out of history

Brown begins the introduction to her book *Politics Out of History* with the following question: ‘What, other than anarchy or free fall is harboured by the destabilization of constitutive cultural or political narratives?’<sup>46</sup> With this question, she aims to study the reactive political and intellectual formations (anxieties and tensions) that emerge in the wake of the erosion of ‘the fundamental premises of an order’.<sup>47</sup> Brown’s argument translates productively into the contemporary South African context in which the political-cultural narratives of constitutionalism and rainbowism are no longer as firmly intact as they once were. Brown, though, is writing from the perspective of a world-historical unravelling of Western modernity. In her account, both the universalist precepts of liberalism and its promises of freedom as well as the epistemological presumptions of the Enlightenment (teleological notion of progress, rationality, objective truth, universalism, sovereignty) have been significantly undermined and disturbed by critical theoretical interventions and political upheavals exposing their falsity and complicities with imperial, racist and patriarchal power.<sup>48</sup> Despite this, however, Brown notes that since alternatives to these narratives have yet to be imagined, we remain bound to them in their ‘broken and less-than-legitimate-or-legitimizing form’.<sup>49</sup> As this attachment to disintegrating political-cultural narratives tends to generate ‘reactionary and melancholic responses’,<sup>50</sup> she counsels instead a search for possible alternatives to what has been destabilised.

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<sup>46</sup> Ibid 3.

<sup>47</sup> Ibid 3.

<sup>48</sup> Ibid 3-11.

<sup>49</sup> Ibid 3.

<sup>50</sup> Ibid 4.

I am interested in considering what possibilities could emerge from the realisation that the constitution's universal acclaim, transformative pedigree and binding force can no longer be taken for granted and is increasingly being viewed critically. If the constitution has since its enactment functioned as the overarching historical, political and epistemological story of South Africa, what happens when this story begins to fragment in the face of extant material conditions and the (re-)emergence of provocative intellectual currents? I propose that legal scholars, activists and ultimately citizens *give up* the attachment and dependence on the constitution as an instrument for securing consensus and coherence and seek out another futurity for justice that is not grounded in the certainties of Western modernity and its surrounding constellations (liberal democracy, humanism (universalism), capitalism and Eurocentric cosmologies).

For the purposes of this paper, I want to trace some features of the political, intellectual and cultural disintegration of 'post'-apartheid constitutionalism with a view to also providing an overview of scholarly and public criticisms of the constitution.<sup>51</sup> The argument underlying the discussion to follow is that these critiques represent a historical re-opening for the emergence of bold articulations of counter-hegemonic theories and politics.

The general unravelling of the constitutional ideal has been instigated in large part by the social reality of persistent racial and gender stratification and social exclusion. As the hope and euphoria of the Mandela republic waned in the face of the ongoing horror of the black condition and the devastations of global capitalism, the

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<sup>51</sup> Compare H Botha 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26 *South African Journal on Human Rights* 66.

pithy phrase ‘you can’t eat a constitution’ became a popular refrain.<sup>52</sup> In this iteration, the critique of constitutionalism accepts the internal terms of the constitution and is often directed outward to the jurisprudence and reasoning of the courts, to the inaction of government in implementing the provisions of the Bill of Rights, to the conservatism of legal culture and, in more abstract terms, to the limits of law.<sup>53</sup> We might rather call this a critical affirmation of the constitution, as the aim of these interventions was to fortify and ultimately redeem the constitution, even as scholars were noting a widening gap between the ‘reality and the promise’ of the constitutional dispensation.<sup>54</sup>

What emerged from these positions was an ambitious support for ‘transformative’ law reform and legal development of the colonially imposed common-law rules in select private law fields, such as contract and property, as well as a strong emphasis on socio-economic rights and equality jurisprudence.<sup>55</sup> In this

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<sup>52</sup> See M Pieterse ‘Eating socio-economic rights: the usefulness of rights talk in alleviating social hardship revisited’ (2007) 29 *Human Rights Quarterly* 796-822; and T Thipanyane ‘You can’t eat the Constitution: is democracy for the poor?’ in K Bentley, L Nathan & R Calland (eds) *Falls the Shadow: Between the Promise and the Reality of the South African Constitution* (2013).

<sup>53</sup> See for example KE Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146-188; K van Marle ‘The spectacle of post-apartheid constitutionalism’ (2007) 16 *Griffith Law Review* 411-429; C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *South African Journal on Human Rights* 253-276; and see generally S Woolman & M Bishop (eds) *Constitutional Conversations* (2008).

<sup>54</sup> See for example D Davis ‘Transformation: the constitutional promise and reality’ (2010) 26 *South African Journal on Human Rights* 85-101.

<sup>55</sup> See for example A van der Walt *Property and Constitution* (2012); S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010); AJ Barnard-Naudé ‘Oh, what a tangled web we weave: hegemony, freedom of contract, good faith and

moment of the critique, heavy reliance is placed on a variety of Euro-American schools of legal thought (hermeneutics, Marxist and poststructuralist iterations of critical legal studies (including psychoanalysis, aesthetics, law and literature), legal feminism, civic republicanism, welfare liberalism, Dworkinian interpretivism, international and comparative human rights to name a few) to provide tools to enhance legal theorising, legal interpretation and adjudication with the principal aim of realising, rather than problematising, the aims and vision of the constitution. It is instructive at this point to remember that even if expansive and creative forms of constitutional interpretation could widen the meaning and potential of the constitution, it would be an overstatement to deny that the constitutional project remains constrained by the context of its emergence, the reigning legal and political culture, and by the nature of modern law to draw lines (rationalisation), give effect to a decision (fixity) and perform sovereign acts (closure). In other words, while transformative constitutional discourse can open debate *within* the governing social rules, its ability to contest the actual rules themselves is severely limited.<sup>56</sup>

If the varying approaches described above implicitly discouraged *blind* triumphalist faith in the constitution, they nevertheless remained markedly optimistic about its ‘transformative’ and ‘progressive’ possibilities and thus did not occupy themselves with the fashioning of radical alternatives grounded in and sensitive to the

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transformation – towards a politics of friendship in the politics of contract’ (2008) 1 *Constitutional Court Review* 1-54; P de Vos ‘The past is unpredictable: race, redress and remembrance in the South African Constitution’ (2012) 129 *South African Law Journal* 73-103.

<sup>56</sup> See generally Christodoulidis (note 40 above) and GW Anderson ‘Imperialism and constitutionalism’ in E Christodoulidis & S Tierney (eds) *Public Law and Politics: The Scope and Limits of Constitutionalism* (2008) 129-140.

specific social, cultural and historical realities of South Africa. Recent studies have furthermore revealed the operation of a hierarchy in terms of which the development and conceptualisation of knowledge on modern constitutionalism is framed through the experiences, institutions and epistemologies of the Global North, with the Global South relegated to a lower, underdeveloped and purely mimetic tier. This attachment to hegemonic North American and European legal traditions and schools of thought reproduces global patterns of legal knowledge that perpetuate the marginality of Southern law and African jurisprudential approaches in knowledge production on South African constitutionalism.<sup>57</sup>

It is of sociological significance that the primary architects and proponents of 'post'-apartheid constitutionalism in the legal academy and in civil society are white leftists and liberal progressives who tend to place much emphasis on litigation and the judiciary as sites of democratic social change. What was famously termed the shift from a culture of authority (parliamentary sovereignty) to a culture of justification (constitutional supremacy)<sup>58</sup> meant that the constitution became the overarching frame of social and public discourse and action. And here problems of racial power, voice and representation necessarily loom large. In a social context where white power has insulated itself in the private sphere (as well as in the realms of economics, media, culture and educational institutions) while the public (legal and political) face of the new order is *seen as black*, this vertical gaze (towards organs of the state), as Tshepo Madlingozi explains, means that a largely white 'social justice civil society'

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<sup>57</sup> See D Bonilla Maldonado 'Introduction: toward a constitutionalism of the Global South' in D Bonilla Maldonado (ed) *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (2013) 1-39.

<sup>58</sup> E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

community organises its advocacy, litigation and research priorities in a way that juridifies social struggles and appropriates the suffering of marginalised communities.<sup>59</sup> Significantly, this also directs attention away from the economic and cultural power still wielded by the historical beneficiaries of colonialism and apartheid in favour of an ahistorical and 'de-radicalising' programme that contributes to framing the post-1994 black government as the *primary* source of South Africa's failings.<sup>60</sup> Moreover, as courts (rather than the citizenry and communities) became the guardians of the new dispensation, it also happened that predominantly white lawyers, activists and academics emerged as the primary intellectual and moral custodians of constitutional democracy in South Africa.

The anomalous overrepresentation of white lawyers and academics in shaping the practice and theory of South African constitutionalism becomes especially vexed in view of a counter-history of non-racialism that illustrates how white anti-apartheid commitment to democratic reform was never *inherently* antithetical to the perpetuation of white domination and assertions of the superiority of Western culture and civilisation.<sup>61</sup> From missionary education and Christianisation to the proselytisation of black communities into a workerist rather than Africanist politics, and to disproportionate leadership and influence in Congress and trade-union politics, post-1994 public-interest litigation, civil society and non-governmental organisation (NGO) activism as well as constitutional scholarship take their place in a long line of

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<sup>59</sup> Madlingozi (note 29 above) 144.

<sup>60</sup> Ibid.

<sup>61</sup> J Soske 'The impossible concept: settler liberalism, pan-Africanism and the language of non-racialism' (2015) 47 *African Historical Review* 1-36. This is an insight derived from S Biko *I Write What I Like* (2012) 63: 'The biggest mistake the black world ever made was to assume that whoever opposed apartheid was an ally.'

paternalistic impositions by white people of the political and intellectual terms and norms of African resistance to domination and exclusion. What this counter-history further reveals is a genealogy in terms of which, from the late 19th and early 20th century up to the present, white liberal and left participation in black struggles was driven by two interrelated aims, namely: (1) the introduction and normalisation of Africans into a Eurocentric public sphere, and (2) the interception of the development of an autonomous black radical political subjectivity.<sup>62</sup> A third aim might include the universalisation and valorisation of self-identified Western civilisational standards of law, culture and justice.<sup>63</sup> This reflects, to quote Franco Barchiesi, that white progressive politics – today represented by the human-rights lawyer and the leftist intellectual among others – has been historically punctuated by:

white claims to possess the ethical and productive norms needed to ‘improve’ Black functionality in white civil society and political economy, which justifies the positing of Black bodies as objects of white instruction, mediation, concern or coercion.<sup>64</sup>

As much of the litigation taken up in the NGO and civil-society sector involved confrontations with the state’s failure to implement and adhere to constitutional and administrative law provisions, this presaged another wave of critiques of the constitution emanating from the ruling party and other proponents of

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<sup>62</sup> F Barchiesi ‘The problem with “we”’: affiliation, political economy and the counterhistory of nonracialism’ in J Soske & S Walsh (eds) *Ties that Bind: Race and the Politics of Friendship in South Africa* (2016) 125-166.

<sup>63</sup> S Pillay ‘Prerogative of civilized peoples: apartheid, law, and politics’ (2014) 34 *Comparative Studies of South Asia, Africa and the Middle East* 294-313.

<sup>64</sup> Barchiesi (note 62 above) 129.

the ‘national democratic revolution’.<sup>65</sup> In these critiques, the constitution was conceived as an obstacle to black majority rule and was seen to subvert the democratic legitimacy of the ruling party by subjecting the decisions of the executive to the scrutiny of the judiciary. Other voices from similar quarters extended this critique to the property clause and its requirement of (*some form of*) compensation for land expropriation, while others highlighted the foreign or Western character of the constitution as out of sync with the cultural worldview of the majority of South Africans.<sup>66</sup> Even if expressions of this critique sometimes took crude forms, such as in the charge that the courts in South Africa are ‘counterrevolutionary’, it nevertheless represented legitimate frustrations over unresolved political contradictions.

In sum, although there has always been *mild* contestation over the content, implementation and interpretation of the constitution, such contestation never rose to

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<sup>65</sup> Another scene of constitutional contestation that will not be discussed in this article also came from conservative and right-wing quarters of Christian and white minority-rights organisations. The Christian lobby critiqued the new secular constitutional order for licensing what they viewed as social vices such as termination of pregnancy, promiscuity, same-sex marriage, alcoholism, disrespectful youths, criminality and so forth. White minority-rights organisations, on the other hand, sought to reframe white South Africans under the new constitutional dispensation as a racial minority vulnerable to crime and discrimination. They accordingly waged campaigns and litigation on a variety of issues tied to protecting the rights and privileges of white people such as challenging affirmative action and race-based redress measures, demanding the retention of apartheid-era street names and of Afrikaans as a medium of instruction in schools and universities, and calling for farm murders to be recognised as a form of racial genocide.

<sup>66</sup> See B Ngoepe ‘Choosing new custodians of our Constitution’ *Sunday Times* (30 August 2009) 11; J Duncan ‘The problem with South Africa’s Constitution’ *South African Civil Society Information Service* (5 September 2011) <<http://sacsis.org.za/site/article/631>>.

the temperature of probing the epistemological, ideological, cultural and political premises of the constitution itself.<sup>67</sup>

I will now turn to critiques that take far more devastating aim at the fundamental premises and legitimacy of the constitutional order itself, arguing in different ways that the constitution represents a continuation and reproduction of the constituent elements of colonial conquest. Attentiveness to enduring and intractable structures of colonial and apartheid power blurs the distinction between the past and present and, in that way, debunks a constitution's claim to inaugurating a new order and representing a radical break with an unjust 'past'. More to the point, the stark continuity and intensification of racial inequality and unfreedom across South African society disturbs the liberal universalist (non-racialist) premises of the constitution.<sup>68</sup>

The unfolding of the afterlife of colonial-apartheid over the past 24 years threatens to slowly erode the constitution's standing as the linchpin of emancipatory and egalitarian progress in South Africa and globally. Consequently, the oxymoronic references to a 'negotiated (or legal) revolution', the description of the constitution as 'the best' in the world', the reference to citizens born after 1994 as 'born-frees' and the designation of the present time as 'post'-apartheid should be viewed with a degree of incredulity. This incredulity is the basis for encasing the phrase 'post'-apartheid in quotation marks or using phrases such as 'neo-apartheid' South Africa to describe the present social and existential reality of the black majority. On this view, the reliance on law, human rights and an elite-driven process of transitional justice as the primary technologies for political reconstruction and social transformation served only to deny

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<sup>67</sup> A prominent exception in this regard would be the work of Mogobe Ramose.

<sup>68</sup> See K Durrheim, X Mtose & L Brown *Race Trouble: Race, Identity and Inequality in Post-apartheid South Africa* (2011).

the exigency of historical justice and reparation, insulate beneficiaries and perpetrators of racial atrocities from historical and moral responsibility and assimilate the historically oppressed majority into the ‘conqueror’s South Africa’.<sup>69</sup>

Less concerned with, though not indifferent to, realising the transformative potential of the constitution, the more fundamental critique of the constitution draws our attention to the anti-decolonisation and non-revolutionary sensibilities embedded in both the constitutional text and the larger political culture and scholarship on ‘post’-apartheid constitutionalism. To give a better account of the terms of this critique, I shall highlight a few overlapping themes that underpin its destabilisation of the logic, premises and framework of South Africa’s constitutional democracy writ large.

#### ***4.1 Redrawing temporal boundaries***

The insistence on the endurance and continuation of the underlying social relations and material conditions established through colonialism and apartheid puts into question a number of temporal signifiers that give the present constitutional order its legitimacy and coherence. It contests the putative ‘newness’ of the ‘new South Africa’, displaces the privileging of 1994 as a date of liberatory significance and thereby disrupts the linear and teleological historical casting of the present South Africa as substantively ‘post’-apartheid. This contestation, in turn, extends to a problematisation of the official representation and widespread assumption that the constitution marks a transcendence or overcoming of earlier historical periods of oppression and injustice. This posture reflects a mode of reading history in terms of

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<sup>69</sup> See again the sources cited in note 29 above.

the *longue durée*<sup>70</sup> and has significant implications for our understanding of the post-1994 constitutional present.

First, it undermines the over-emphasis and exceptionalisation of apartheid (a 46-year historical episode) by restoring a focus on the 1652 European colonial conquest of the territories that would later be called South Africa as the proper founding of South Africa's contradictions and antagonism.<sup>71</sup>

Second, it illustrates with greater clarity how systems of power can outlive the abolition of their more overt legal supports.<sup>72</sup> This means that institutional shifts set in motion through legal transitions are not necessarily coterminous with substantive changes in people's material conditions and social realities. Instead, such systems of power – especially those entrenched through almost four centuries of colonial violence, subjugation and socialisation – tend to undergo reconfiguration over time, permutations in their form but not their force.<sup>73</sup> They do not, in other words, disappear but reinvent themselves in order to adjust to the prevailing conditions. A closely related argument avers that positive gains and advances in racial equality and justice

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<sup>70</sup> See I Wallerstein 'Time and duration: the unexcluded middle, or reflections on Braudel and Prigogine' in I Wallerstein *The Essential Wallerstein* (2000) 160-169.

<sup>71</sup> See L Ntsebeza 'Land redistribution in South Africa: the property clause revisited' in L Ntsebeza & R Hall (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 124.

<sup>72</sup> C Mills *Blackness Visible: Essays on Philosophy and Race* (1998) 119-138.

<sup>73</sup> J Sexton 'The social life of social death: on Afro-pessimism and black optimism' (2011) 5 *InTensions* 1-47.

will only occur to the degree that they converge, and thus do not disturb, the material and psychological interests of the dominant social group.<sup>74</sup>

Third, *longue durée* histories concern themselves with that which endures and remains consistent at the level of the deep structures of a society or civilisation. In other words, it pays closer attention to the inertia or static in a socio-political and cultural order rather than the more episodic, inessential, surface-level changes in the body politic. In philosophical terms, this signifies a subversion of Western conceptions of time and history that situate the ‘past’ in the historical anterior (as *behind* us, but never immediately with us)<sup>75</sup> as well as a certain Hegelian conceit that views historical progress in teleological terms and assumes simply that the conditions of human existence improve progressively with the passage of time.<sup>76</sup> *Longue durée* histories are consistent as well with the African philosophical principle ‘*molato ga o bole*’, which prohibits the automatic cancellation of a historical debt, since neither time nor law can change the truth of what has happened.<sup>77</sup> Similarly, many critical theorists argue that formally ‘post’-conflict societies that have undergone liberal legal reform, such as South Africa, can remain oppressive for as long as they are defined by

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<sup>74</sup> D Bell ‘Brown v Board of Education and the interest-convergence dilemma’ (1980) 93 *Harvard Law Review* 518-533.

<sup>75</sup> E Cavanagh ‘History, time and indigenist critique’ (2012) 37/38 *Arena Journal* 18.

<sup>76</sup> Brown (note 45 above) 6.

<sup>77</sup> MB Ramose ‘An African perspective on justice and race’ (2001) *Polylog* <<http://them.polylog.org/3/frm-en.htm>>; MB Ramose ‘Reconciliation and reconfiliation in South Africa’ (2012) 5 *Journal of African Philosophy* 20, 23.

unredressed asymmetries of power and continue to display features of stratification, exploitation, violence, marginalisation, powerlessness and cultural dominance.<sup>78</sup>

Fourth, the rupturing of the division between the colonial past and the democratic present enables the disinterring of forgotten archives and silenced histories. This is evidenced, for example, by scholars revisiting the decades-old debates on the ‘National Question’ in South African left thought,<sup>79</sup> making the case for a new direction of black studies ‘after Mandela’ in South African higher education,<sup>80</sup> and showing a renewed interest in non-Charterist political movements and events. Insofar as the struggles they articulate remain unfinished and the freedom dreams they conjure are still unrealised, intellectual traditions such as Black Consciousness, the Non-European Unity Movement, Pan-Africanism, and even the Haitian Revolution, among others, become available for retooling in the contemporary context as sources for alternative theories and praxes.<sup>81</sup> As the time of Anton Lembede, Robert Sobukwe and Steve Biko, among others, becomes temporally

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<sup>78</sup> See for example KW Crenshaw ‘Race, reform and retrenchment: transformation and legitimation in antidiscrimination law’ (1988) 101 *Harvard Law Review* 1331, 1336; IM Young ‘Five faces of oppression’ in IM Young *Justice and the Politics of Difference* (1990) 39-65; A Cudd *Analyzing Oppression: Studies in Feminist Philosophy* (2006); NM Torres ‘On the coloniality of being’ (2007) 21 *Cultural Studies* 240-270.

<sup>79</sup> See E Webster & K Pampalis (eds) *The Unresolved National Question in South Africa: Left Thought Under Apartheid* (2017).

<sup>80</sup> See L Modisane, VJ Collis-Buthelezi & C Ouma ‘Introduction: black studies, South Africa and the mythology of Mandela’ (2017) 47 *The Black Scholar* 1-6.

<sup>81</sup> See for example KM Tafira *Black Nationalist Thought in South Africa: The Persistence of an Idea of Liberation* (2016).

entangled with ours, their meditations take on a haunting and prophetic quality in the face of a history that seems to be repeating itself.<sup>82</sup>

To be sure, while the redrawing of temporal boundaries aims to collapse inessential periodisations, it does not amount to the ahistorical claim that *nothing at all* has changed or that no efforts towards change are being attempted. And it is certainly not to deny the immense sacrifices of the women and men who led earlier phases of the anticolonial and anti-apartheid struggle in South Africa. Rather, it shows that the forms and visions of change being employed are not able to successfully dismantle the reigning order at the level of its constitutive or foundational structural elements. Applied to South Africa, this means that the constitutional transformation of South Africa effected change in every area of society *except* where it really matters most. Names of streets and buildings were changed, new faces occupied the seat of government power, official publications were published in a plethora of African languages, a new national flag was designed and a new national anthem composed, a number of old apartheid-era laws were repealed, and the ubiquitous ‘whites only’ signs were taken down. But consider that in contrast to these spectacular ‘changes’, actual arrangements of economic power, land and property ownership, spatial segregation, epistemic violence, Western imperialism, psychic trauma and labour exploitation were all left untouched in the new constitutional dispensation.

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<sup>82</sup> A Veriava & P Naidoo ‘Remembering Biko for the here and now’ in A Mngxitama, A Alexander & N Gibson (eds) *Biko Lives! Contesting the Legacies of Steve Biko* (2008) 234, and D Hook ‘A threatening personification of freedom or: Sobukwe and repression’ (2016) 17 *Safundi* 189-212.

In sum, the critique of the constitution contests hegemonic temporal framings in order to register the reminder that neither 1994 nor the advent of constitutional democracy signalled the end of white supremacy or Black people's struggle against it.

#### ***4.2 Counter-hegemonic political imaginaries***

Taking conquest as the historical starting point for framing the South African historical and social reality also redefines the nature of the injustices to be redressed by a process of legal and political reconstitution. The emphasis on apartheid narrowly focuses on disenfranchisement, segregation, discrimination and deprivation of civil rights and hence prescribes democratisation and formal deracialisation as the solutions to these iniquities. An emphasis on conquest would, in addition to racial discrimination, attend to the more comprehensive injustices of genocidal violence, land dispossession, epistemicide, economic deprivation, super-exploitation as well as psychological degradation. This latter understanding would foreground the antagonism between the settler and immigrant white populations and their oppressive relation to the indigenous African and broader Black population and would insist on a more thoroughgoing process of material and symbolic decolonisation that would liberate the conquered majority from bondage, dismantle the social and psychic structures that secure the superior status of the white population and thereby dislodge the political ontology of conquest. Whereas freedom from apartheid involves the egalitarian liberal inclusion of the oppressed black majority into the conqueror's world, liberation from conquest involves dismantling the conqueror's world altogether followed by the collective construction of a new social order.

This analytical, historical and political distinction between apartheid and conquest instantiates a further set of historically grounded category distinctions,

primarily between: (1) integrationist, assimilationist and gradualist forms of social change and more far-reaching total or revolutionary transformations of the social order; (2) formal and symbolic forms of change in contrast to concrete and material change; and (3) the legal and institutional reconstruction of state and society versus more comprehensive existential, cultural, epistemological and political-economic re-ordering. Marking these category distinctions is an apprehension of power and injustice in structural terms. Structural conceptions of power proceed from the understanding that socio-political and ideological systems are generated to continually reproduce and normalise deep-rooted hierarchies that disproportionately benefit and affirm the existence of one group while disadvantaging others.<sup>83</sup> These systems operate in the public and private spheres, and proliferate in the domains of the law, economy, media, culture, the environment and educational institutions. They are deeply ingrained in people's mind-sets and subjectivities; they determine and shape life chances and opportunities and, once entrenched, become virtually self-perpetuating – sustained by among other dynamics, 'cultural lag, institutional momentum, accumulated wealth and attitudinal inertia'.<sup>84</sup>

Working from a conception of colonialism and apartheid as systems and structures that produce objective material outcomes rather than casting them as the 'evil' or 'hateful' actions of individuals and institutions exposes the falsity of the presumption that the occupation of government power by a black majority political party leads to genuine freedom. The term 'neocolonialism' was, after all, coined precisely to capture the dilemma of postcolonial African states that, after gaining national independence, simply replicated the ways of the 'former' colonial power and

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<sup>83</sup> See IM Young *Responsibility for Justice* (2011).

<sup>84</sup> Mills (note 72 above) 76, 102.

plunged the formally liberated population into a deepening phase of unfreedom and stagnation.<sup>85</sup> In any instance, the South African case has been said to be a paradigmatic case of white people relinquishing the crown (state power) but keeping the jewels (socio-economic power).<sup>86</sup> The formal abolition of legally sanctioned racial discrimination should therefore not be conflated with the elimination of the structures, practices and relations of coloniality and white supremacy.<sup>87</sup> The failure to redress the *structural* continuity of colonial-apartheid renders the constitution's extension of universal suffrage, citizenship and human rights to Black people hollow and abstract.

The shift from racial apartheid to 'non-racial' democracy also relied upon a faulty process of nation building and reconciliation that centred on the experiences of political elites and a narrowly defined set of perpetrators and victims, thus erasing the historical responsibility of beneficiaries of colonial-apartheid.<sup>88</sup> Where perpetrators committed heinous acts of spectacular violence (killings, torture and kidnappings), beneficiaries were socialised to accept their entitlement to a life sustained by the larger structural violence of apartheid that secured for them an infinitely higher quality and standard of living. As the multiple and constant incidents and complaints of racism in white-dominated spaces (shopping malls, restaurants, suburbs, universities, the corporate workplace, farms, holiday resorts and so forth)

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<sup>85</sup> See K Nkrumah *Neocolonialism: The Last Stage of Imperialism* (1974); F Fanon *The Wretched of the Earth* (2004) 97-144.

<sup>86</sup> A Mazrui 'Pro-democracy uprisings in Africa's experience: from Sharpeville to Benghazi' (2011) *Africa Day Lecture 7*.

<sup>87</sup> JM Modiri 'Towards a (post-)apartheid critical race jurisprudence: "divining our racial themes"' (2012) 27 *South African Public Law* 231-258.

<sup>88</sup> M Mamdani 'When does reconciliation turn into a denial of justice?' in *Sam Nolutshungu Memorial Lecture Series* (1998) 1.

demonstrate, the failure to attend to the beneficiaries of colonial-apartheid has resulted in a largely untransformed white minority community with a profoundly limited sense of moral and historical awareness. This undisturbed sense of white privilege can be traced directly to the depoliticising modalities of the Truth and Reconciliation Commission (TRC) and its central trope of forgiveness.<sup>89</sup> As the negotiated settlement was driven more by concerns of stability and peace rather than justice, it leaned more towards the protection of white people's unjustly acquired interests, converting them into constitutional rights and shielding them from demands for redistribution and restoration.

In this sense, the South African constitution cannot logically be categorised as 'non-racial', since it actively preserves interests and powers secured through racial oppression.<sup>90</sup> In so doing, it closes off the possibility of substantively abolishing the hierarchically entwined social categories of conqueror and conquered, settler and native, white and black. In the result, notwithstanding the official completion of the TRC's work, a new national anthem and national flag as well as a nominally non-racial constitution, white people would continue to carry the stigmatic markings of 'oppressor' and thus remain unfree as well.

The counter-hegemonic political imaginaries that unsettle the cherished tenets of constitutionalism insist that the questions forgotten, silenced and avoided in the negotiated settlement and constitution-making process be placed once more on the table. In so doing, they renegotiate the hegemonic terms of post-1994 South Africa

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<sup>89</sup> T Lephakga 'Radical reconciliation: the TRC should have allowed Zacchaeus to testify?' (2016) 72 *HTS Theological Studies* 1.

<sup>90</sup> See N Dladla 'Contested memory: retrieving the Africanist (liberatory) conception of non-racialism' (2017) 153 *Theoria* 101-127.

and insist that freedom, equality, dignity and reconciliation can only materialise in the context of justice, reparations and a reconstruction of the values and institutions that govern society. In simpler terms, they insist on locating and addressing the sources of subordination and suffering at the level of roots rather than symptoms. This is not a question, in the first place, of ‘blaming’ or ‘rejecting’ the constitution on account of South Africa’s many social ills but of asking to what extent *this particular constitution* and liberal constitutionalism in general is able to provide a framework, vision and language that is ‘purpose-made’ to address the accumulated social contradictions of colonial conquest, racial capitalism, apartheid and neoliberalism.<sup>91</sup>

### **4.3 Ideology critique**

Even as liberal democracy attempts to universalise its image and to present itself as post-ideological, both its racialised imperial history and its affinity to the social powers of race, class, and gender that produce stratifications along these lines compromise its presumed universalism.<sup>92</sup> The ‘excluded others’ of liberalism’s chequered past and present, together with its deep imbrication in the civilisational assumptions of Western modernity and European colonial expansion, suggests – at best – that there is no natural tension or necessary inconsistency between liberalism (as a philosophy and a political order) and white domination, colonial violence and racial capitalism. From a Marxist perspective, liberalism is seen as bearing the stunning ability to conceal its resubordinating and exclusionary impulses.<sup>93</sup> From a

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<sup>91</sup> See Sibanda (note 29 above).

<sup>92</sup> Brown (note 43 above) 7-8. See also R Kapur ‘Human rights in the 21st century: take a walk on the dark side’ (2006) 28 *Sydney Law Review* 665-687, and C Pateman & C Mills *Contract and Domination* (2007).

<sup>93</sup> See W Brown *States of Injury: Power and Freedom in Late Modernity* (1995).

postcolonial feminist perspective, liberalism promulgates a vision of non-Western subjects as inert victims of their own ‘backward’ cultures in need of saving from Western actors and ideologies.<sup>94</sup> And from a black radical perspective, liberalism is viewed as a less vulgar but nonetheless potent variety of white supremacy that naturalises European definitions of humanity and perpetuates white privilege through its moderate and non-threatening political posture.<sup>95</sup>

Fundamental critiques of constitutionalism emanating from Africanist and socialist traditions take off from this ideological unmasking of liberalism to interrogate other features of the democratic transition and legal architecture of South Africa. One line of critique begins with an exposure of the ruling ANC’s own history of elite missionary liberalism – highlighting its acceptance of the colonial sovereignty of the British Crown, its embrace of Western colonial definitions of civilisation, its amenability to white intellectual and political influence, and its surrender of the struggle for land and sovereignty through its agreement to the terms of the Freedom Charter.<sup>96</sup> Consider one historical account of the ANC in the 1950s:

Sensitivity to racial tensions and white fears had always exerted a restraining influence on the ANC and had caused it throughout much of its history to project African aims in ways that would minimize white backlash. In their anxiety not to be guilty of racism in any form, Congress leaders had many times found themselves constrained by the tendency of

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<sup>94</sup> R Kapur ‘The tragedy of victimization rhetoric: resurrecting the native subject in international/postcolonial feminist legal politics’ (2002) 15 *Harvard Human Rights Law Journal* 2-37.

<sup>95</sup> B Hooks *Killing Rage: Ending Racism* (1995) 184-194.

<sup>96</sup> See GM Gerhart *Black Power in South Africa: The Evolution of Ideology* (1978) 39-44 and CRD Hlisi *Black Political Thought in the Making of South African Democracy* (1999) 4-8, 110 -131.

whites to label any suggestion of an African takeover of power as ‘black racialism’ or ‘apartheid in reverse’.<sup>97</sup>

Further according to this critique, the ANC’s largely moderate and liberal non-racial commitments significantly attenuated its ability to mobilise anti-apartheid struggle on the basis of revolutionary nationalist demands. As a result, the ANC entered the ‘negotiations’ from a position of weakness and ended up agreeing to compromises with the National Party (NP) that resulted in the protection and consolidation of white minority interests, shielding their massive privileges and preventing large-scale redistribution of resources along more egalitarian lines. Each major concession the ANC made in the constitutional negotiations with regard to land, property, the power of the judiciary and the structure of the state ensured the survival of the old order in the new dispensation and legitimised the historical results of colonial-apartheid.<sup>98</sup>

This critique emphasises the ideologically *multivalent* nature of the ‘post’-apartheid constitutional project – that it contains *both* its avowed, progressive and transformative elements (rights, institutional stability, rule of law, accountable government; multiculturalism, democracy and so forth) as well as a set of unavowed or hidden ones (a Eurocentric order of power/knowledge; a relatively undisturbed status quo; secret negotiations and elite power-broking; ANC-centric historiography; anti-blackness). Ideological critiques reveal that the South African constitution is not entirely benign or transparent; that it is *not only* what it says it is. Rather, the major signifiers of constitutional democracy in South Africa – Nelson Mandela, the TRC,

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<sup>97</sup> TG Karis & G Gerhart *From Protest to Challenge: A Documentary History of African Politics in South Africa, 1882–1990* vol 3 *Challenge and Violence, 1953–1964* (2013) 121.

<sup>98</sup> Mutua (note 29 above).

electoral democracy, the rainbow nation motif as well the constitutional text itself – are seen to have the effect of concealing inconvenient truths about the transition: pacifying critical inquiry and political dissent and euphemising difficult conversations about race, history, and power.<sup>99</sup> On this score, it has been argued that the aesthetic of reconciliation that underpins the constitutional transition should be understood in terms of the verb ‘to be reconciled to’:<sup>100</sup> to be reconciled to unchanged living conditions, to tolerate racial inequalities and abuses, to forget about the past and move on. The logic of compromise that underlies the constitutional transition could be similarly interrogated in terms of the sacrificial diminution of Black people’s historical and moral claims to justice and reparation. As a technique of ideology and as a normative project, the constitution is seen in this critique as aligned to subterranean racial, imperial and economic powers. Understanding the constitution as an ideological device also enables us to see how it imposes a limiting and limited index of what constitutes change, freedom and democracy.

Because it is not restricted to the *realpolitik* of the negotiated settlement, this critique has the value of, among other things, laying to rest the hackneyed claim that the political compromises contained in the negotiated settlement were *singularly and unquestionably necessitated* by the (global and local) balance of forces and the need to avert civil war.<sup>101</sup> While these considerations were certainly factored into the

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<sup>99</sup> C Teeger & V Vinitzky-Seroussi ‘Controlling for consensus: commemorating apartheid in South Africa’ (2007) 30 *Symbolic Interaction* 57-78.

<sup>100</sup> S Motha “‘Begging to be black’: liminality and critique in post-apartheid South Africa’ (2010) 27 *Theory, Culture & Society* 297.

<sup>101</sup> Compare H Klug *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (2000); ZP Jordan *Letters to My Comrades: Interventions and Excursions* (2017) and K von Holdt ‘South Africa: the transition to violent democracy’ (2013) 40 *Review of African Political Economy* 589-640.

constitution-making process, they cannot constitute the whole picture of the transition. Instead the political malaise and incomplete transformation that followed the democratic transition must also be attributed to the lack of a philosophically rigorous and radical humanist ideology to underpin the conception of a new society.<sup>102</sup> This was made worse by the fact that the process of democratisation that gave rise to the new dispensation was driven by interests that were not primarily of the black majority. A combination of global and local capitalist interests, as well as white people's vested interests in the historical results (socio-economic, cultural, epistemic, psychic and spatial) of settler-colonialism, constrained the imagination of the elite architects of the 'new' South Africa, leaving us with a still unfree and unequal society.<sup>103</sup>

There are, of course, multiple readings of liberalism, the ANC, the transition and the constitution, and certainly not all are aligned with the arguments set out above. The central point, however, is that all of these readings represent *contested ideological assumptions* and, whether intentionally or not, function to secure and protect certain powers, discourses, interests and investments while eclipsing and negating others.

#### **4.4 Radical structure(s) of feeling**

The political ethos or structure of feeling that animates the critique of the constitution distinguishes itself from liberal, reformist and accommodationist positions by the ambitious scope, drama and extravagance of its political vision. Where the former

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<sup>102</sup> N Gibson 'Upright and free: Fanon in South Africa, from Biko to the Shackdwellers' Movement (Abahlali baseMjondolo)' (2008) 14 *Social Identities* 683, 691.

<sup>103</sup> See S Terreblanche *Lost in Transformation: South Africa's Search for a New Future Since 1986* (2012).

positions concern themselves with pragmatic and gradualist responses to social and historical injustice with a strong sensitivity to the fears and anxieties of the dominant group, radical positions traditionally urge a direct confrontation with oppressive power and mobilise and theorise for fundamental and concrete change. What underlies this posture is not simply a set of millenarian and populist political passions or naïve idealism but rather an ethical refusal to accommodate unjust social systems and an analytic hypothesis concerning the intransigence of oppressive power – the fact that it ‘concedes nothing without demand’.<sup>104</sup> Although revolutionary violence has been posited as one solution to the colonial situation, other radical policies and calls for constitutional amendment such as reparations and wealth taxes, nationalisation of mines and banks, land expropriation without compensation, criminalisation of colonial apologism, and apartheid denialism and cultural re-ordering (‘Africanisation’) of state and educational institutions have been proposed. While these latter proposals generally eschew violence, they do entail an embrace of the *catastrophic*, defined not as chaos, suffering and disaster but in terms of its ancient connotations as ‘*katastrophē*’, overturning a governing order.

Radicalism here signifies not only its traditional definition of grasping problems at the root level but also a desire to breach the boundaries that demarcate what is ‘realistic’ and ‘possible’ and what is not – especially given that these demarcations themselves are productions of the dominant symbolic order. The emergent contrast between egalitarian formulations of transformation or social justice that seek to *include* the historically oppressed into the existing social order vis-à-vis Africanist formulations of decolonisation and black liberation that seek a fundamental

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<sup>104</sup> This view was expressed in the South African context by Biko (note 61 above) 100 but originates from the slave abolitionist Frederick Douglass.

overhaul or annulment of that order is also a difference in feeling and temperament. If an optimistic faith in the promises of a united and equal society living under the rule of law and constitutionalism always involves some measure of seeing past the failures and fragility of the post-1994 political settlement, this sanguine sentiment is mostly the preserve of the privileged and the powerful. The critique of the constitution performs a disruption of this optimism, calling attention, instead, to the dark side and ‘hidden cruelties’ of the new dispensation.

Another dimension of the radical critique of constitutionalism is the refusal of compromise and negotiation as genuine modes of social reconstruction and reharmonisation. This uncompromising ethics rather than pleading for equality and celebrating incremental gains, opts rather to ‘refuse what has been refused’<sup>105</sup> and so is vulnerable to the false charge of nihilism or pessimism. After all, long-standing pressure on Black people to engage ‘rationally’ with whiteness and white racism, and to adopt moderate and reconciliatory postures in relation to their oppression, reflects not only the imposition of colonial standards of civilisation disguised as humanism but is also a mechanism of preserving white social, economic and cultural power, rationalising quotidian expressions of subordination and affirming the status quo.<sup>106</sup> Similarly, from this view, the constitutional tropes of diversity, tolerance, reconciliation and nation building function as disciplinary technologies, ways of managing and containing the racial Other and thus also as sinister re-inscriptions of the ‘Native Question’ in a postcolonial guise.

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<sup>105</sup> F Moten & S Harney *The Undercommons: Fugitive Planning and Black Study* (2013) 8.

<sup>106</sup> See NA Cazenave *Conceptualizing Racism: Breaking the Chains of Racially Accommodative Language* (2016) 13-28.

If settler-colonial violence involves transferring the non-belonging of the settler population onto the indigenous people, rendering them foreigners and minorities in the lands of their birth, then it follows that the undoing of settler hegemony would involve reckoning with the fact of South Africa as a black-majority African country. This socio-historical fact should stand central to any conception of restoration and justice in the South African context and should inform the reconfiguration of a new ethics, politics and way(s) of life.

However, there may be a deeper *aporia* here: both the founding premises of colonial conquest and its unfoldment (as a process of social ordering and subject production) through white supremacy creates an absolute bifurcation of society on the basis of an assumed ontological divide between white and black populations. Through this divide, those racialised as white collectively imagined and institutionalised the idea of themselves as superior and entitled to unlimited social, economic, cultural and psychic dominance over Black people. This resulted in the construction and intergenerational reproduction of arrangements and systems in which equality and freedom for Black people became irreconcilable with the material and existential interests of white people as a group. By normalising the subordination of Black people as a tolerable and even necessary feature of the social order, colonial conquest and its afterlives generated an antagonistic historical situation that is by design not amenable to negotiation, compromise and reform and might only be resolvable through total and complete dismantling.

The view of the South African constitution as the outcome of the choice by the negotiators for a 'new' South Africa to follow a path of democratisation rather than

decolonisation becomes significant here.<sup>107</sup> One distinctive feature of settler-colonial formations – in which the European settler comes to stay permanently, supplant and dominate the native population and constitute themselves as a racially distinct community – is their high level of historical resilience. Wolfe speaks of settler-colonialism as ‘relatively impervious to regime change’<sup>108</sup> and Lorenzo Veracini explains that since ‘settlers carry colonialism “in their bones”, settler-colonial forms may ultimately prove unreformable’.<sup>109</sup> Furthermore, the historical record suggests that most settler-colonial polities have followed processes of transition that seek to evade and undermine the exigency of decolonisation:

[T]he reforming settler polities of the 1980s and 1990s share historiographical debates where a settler colonial past was displaced rather than addressed, and the determinations of a settler colonial present avoided rather than decolonised. In the end, an emphasis on alternative traditions of settler-Indigenous partnership has been easier than insisting on the need to decolonize settler colonial sovereignties, and a widespread disinclination to enact substantive decolonising ruptures resulted in a tendency to avoid disturbing the foundational determinants of settler colonial polities. Foundational settler narratives were ultimately resilient [...].<sup>110</sup>

Thus, the turn to reconciliation, liberal constitutionalism, human rights and multiculturalism as the dominant modalities of postcolonial reconstruction has not been primarily about enacting genuine post-settler and post-conquest passages of

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<sup>107</sup> See Ramose (note 77 above).

<sup>108</sup> Wolfe (note 28 above) 402.

<sup>109</sup> L Veracini ‘Settler colonialism and decolonisation’ (2007) 6 *Borderlands e-journal* <[http://www.borderlands.net.au/vol6no2\\_2007/veracini\\_settler.htm](http://www.borderlands.net.au/vol6no2_2007/veracini_settler.htm)>.

<sup>110</sup> *Ibid.*

transition and reharmonisation but rather about expanding the definition of ‘who can claim belonging to the settler body politic that leaves the settler-colonial structures unchallenged’.<sup>111</sup> Democratisation preserves what decolonisation aims to destabilise and undo, namely the conqueror’s South Africa, and this explains the tendency of constitutional scholarship to emphasise notions of rights, political equality, procedural democracy and good governance while bypassing larger questions of land, political economy, culture, identity and sovereignty tied to settler-colonial histories.

The critiques adumbrated above come from multiple sources and perspectives; they are not unified but, read together, they suggest nothing less than a political and conceptual disorientation of the very organising terms of ‘post’-apartheid South African constitutionalism. Constitutionalism, non-racialism, liberal democracy, reconciliation and rule of law have become increasingly troubled narratives, declining in moral power and political legitimacy and crumbling as material formations for organising a society still ‘held hostage’ by its history. However, ending the argument here may leave other sides of the story untold. I should add that the discussion above relates to the official and hegemonic varieties of constitutionalism. There are also what we might call ‘constitutionalisms from below’, enacted by social movements and marginalised communities who engage in legal mobilisation strategies and court litigation to contest state power, issue change-oriented political demands and address immediate legal and socio-economic needs.<sup>112</sup> These movements and communities do not only rely exclusively on rights tactics but also engage in extra-institutional collective political action, consciously eschew constitutional optimism and are

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<sup>111</sup> Ibid.

<sup>112</sup> T Madlingozi ‘Post-apartheid social movements and legal mobilisation’ in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-economic Rights in South Africa: Symbol or Substance?* (2013) 92-130.

cognisant of the limits and limitations of the law in bringing about decommodification of basic necessities, redistribution of resources and participatory democracy.<sup>113</sup> Their own contribution to decentring hegemonic constitutionalisms should also be noted.

**5. Closing reflections: ‘Tell no lies ... mask no difficulties ... claim no easy victories’<sup>114</sup>**

The aim of this article was to challenge the widespread public, political and intellectual hegemony and celebrated status of the South African constitution through the introduction of different political and historical frames, competing theoretical approaches and divergent analyses and visions. In terms of this challenge, I pursued the argument that post-1994 South African constitutional democracy rests on compromised political foundations and has in the final analysis failed to disrupt the historical dynamics and afterlives of colonial conquest. As any empirical and existential account of the present illustrates, the South African socio-political, economic, and cultural landscape remains organised in terms of the political ontology of conquest established almost four centuries ago. The history of colonial conquest in South Africa echoes out into the present as ‘unfinished business’ as the racial regimes of socio-economic, cultural, psychic and epistemic power that it set in motion appear remarkably persistent and intractable – and not merely as legacies or residual leftovers. In such circumstances, it seems apt to mute or pause the constitutional optimism and national myths that make up the hegemonic story of the ‘new’ South Africa.

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<sup>113</sup> Ibid.

<sup>114</sup> A Cabral *Revolution in Guinea* (1974) 72.

The invocation of conquest as a historical and political analytic with which to read the present South Africa maps a longer history and evokes a deeper injury. In so doing, it may also incite hopes for a radically transformed society. Taking colonial conquest as the basis for a counter-history of the place we call South Africa discloses traces of an alternative jurisprudence – a different thinking of law, politics, history and the social along the lines of a ‘jurisprudence of liberation’.<sup>115</sup> The first gesture of such an alternative jurisprudence is not (yet) the provision of a programmatic blueprint or list of solutions but entails an opening of forgotten/erased archives and a disruption of dominant discourses and approaches. My presumption is that a jurisprudence emanating from the imaginations and experiences of the colonised peoples who have been historically racialised as black and which takes seriously the intellectual heritages of African peoples (African philosophy and black radical thought in particular) would pose very different questions and enact a different orientation towards South African law and constitutionalism than is presently the case in a legal academy dominated by conservative, liberal and even critical traditions shaped by the epistemic standpoint of Western-oriented and white scholars.

In an article entitled ‘Decolonisation is not a metaphor’, indigenous studies scholars Eve Tuck and K Wayne Yang set out to remind readers ‘what is unsettling about decolonisation’.<sup>116</sup> As they argue, decolonisation brings about the ‘repatriation of indigenous land and life’ and should not be used as a metaphor for ‘other things we want to do to improve our societies’, such as social justice, human rights and

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<sup>115</sup> See J Modiri ‘The jurisprudence of Steve Biko: a study in race, law and power in the ‘afterlife’ of colonial-apartheid’ Unpublished PhD thesis, University of Pretoria (2018).

<sup>116</sup> E Tuck & KW Yang ‘Decolonization is not a metaphor’ (2012) 1 *Decolonization: Indigeneity, Education & Society* 1.

curriculum transformation. They worry that the unsettling and subversive features of the notion of decolonisation have been reduced to a metaphor:

When metaphor invades decolonization, it kills the very possibility of decolonization; it recenters whiteness, it resettles theory, it extends innocence to the settler, it entertains a settler future. Decolonize (a verb) and decolonization (a noun) cannot easily be grafted onto pre-existing discourses/frameworks, even if they are critical, even if they are anti-racist, even if they are justice frameworks.<sup>117</sup>

Tuck and Yang also caution that the difficult task of reckoning with colonial histories remains impeded by a ‘set of evasions’, ‘settler fantasies of easier paths to reconciliation’ and forms of historical amnesia that work to diminish historical justice claims over generations.<sup>118</sup> Drawing on Frantz Fanon, they thus call for a closer attention to an ‘ethic of incommensurability’, which they explain requires the acknowledgement that ending settler-colonialism ‘will require a change in the order of the world’.<sup>119</sup> This change in the order of the world does not entail reversing or replicating the current order of power. The goal is not ‘for everyone to merely swap spots on the settler-colonial triad, to take another turn on the merry-go-round’. Rather, it entails breaking with and dismantling colonial and racial power structures. Tuck and Wayne underscore that they are speaking of ‘a break and *not a compromise*’.<sup>120</sup> They add further that, ‘[D]ecolonial struggles here/there are not parallel, not shared

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<sup>117</sup> Ibid 3.

<sup>118</sup> Ibid 12.

<sup>119</sup> Ibid 31.

<sup>120</sup> Ibid 31, emphasis added.

equally, nor do they bring neat closure to the concerns of all involved – particularly not for settlers.’<sup>121</sup>

We can situate the present debates on the constitution within the fundamental contrast Tuck and Wayne construct between decolonisation and reconciliation (the latter they argue is ultimately ‘about rescuing settler normalcy [and] rescuing a settler future’).<sup>122</sup> If the post-1994 constitutional project aspires to the (impossible) construction of a united, non-racial society in which historical antagonisms can be reconciled and formally settled, a critical interruption to this aspiration would seek to highlight what will always remain unsettled, irreconcilable, incommensurate, irreparable, asymmetrical and unfinished in the absence of genuine decolonisation. Wayne and Yang depict decolonisation as a complex and discomfoting process and praxis that also eschews the liberal postcolony’s narratives of national consensus, white innocence and historic closure:

The answers are not fully in view and can’t be as long as decolonization remains punctuated by metaphor. The answers will not emerge from friendly understanding, and indeed require a dangerous understanding of uncommonality that un-coalesces coalition politics - moves that may feel very unfriendly [...] Decolonization offers a different perspective to human and civil rights based approaches to justice, an unsettling one, rather than a complementary one. Decolonization is not an ‘and’. It is an elsewhere.<sup>123</sup>

By following a path of ‘friendly understanding’ rather than ‘dangerous understanding’, the constitution-making process in South Africa may have foreclosed

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<sup>121</sup> Ibid 31.

<sup>122</sup> Ibid 35.

<sup>123</sup> Ibid 35.

a deep (and difficult) reckoning with our colonial and apartheid history, leading us on the trail of an unsustainable future.

This brings us back to Nkosi's lament referred to in the preface of this article concerning the way in which unresolved historical contradictions and unrepaired injustices (land dispossession and systemic racism being his central concerns) have stunted South Africa's ability to imagine a shared national culture that could be the basis for a new sense of belonging and co-existence that could bridge old and new divides and dismantle power asymmetries at all levels of public and private life. Is the constitution not simply the liberal humanist novel in sovereign form? Though Nkosi formulated this problematic in the context of literature and the arts, it does also underscore the need for a jurisprudence that can grapple with this conundrum centrally through contesting and disrupting the moral, epistemic, political, historical and ideological framework of the constitution and constitutionalism. Such a jurisprudence would need to overcome the lure of redemption, transcendence and false optimism in its search for new lines of critique and repair that could confront what Nkosi understood to be South Africa's still abyssal historical condition.

“The “freedom dreams” of those who know that what has been institutionalised is not what was imagined have not gone away.”<sup>124</sup>

### **Disclosure statement**

No potential conflict of interest was reported by the author.

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<sup>124</sup> T Willoughby-Herard 'Fighting for an intervention in history in the face of dreams deferred in the making: twenty years of South African democracy' (2014) 12 *African Identities* 225, 226.

**Notes on contributor**

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