SOCIAL JUSTICE IN A TIME OF NEO-APARTHEID CONSTITUTIONALISM: CRITIQUING THE ANTI-BLACK ECONOMY OF RECOGNITION, INCORPORATION AND DISTRIBUTION* **

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1   Introduction: A brief meditation on the time of neo-apartheid

"If time is an ocean, rather than linear (as white cultural imperialism defines it), then 500 years is simultaneously this minute. The past is the past only for the sake of white's comfort and safety."[1]

"The past is not really past. Yes, it's the past in terms of the Constitution. That's the political rhetoric that we hear …"[2]

What time is it? The thesis defended in this article is that apprehended from the lived experiences of South Africa's socially excluded and racially discriminated: this is the time of neo-apartheid constitutionalism.[3] From that vantage point, as I will show, it becomes clear that the majority of black people are not simultaneous with the dominant society made up of white people and

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1   FB Wilderson *Incognegro: A Memoir of Exile and Apartheid* (2008) 235.

2   Interview with Sizwe in S Swartz *Another country: Everyday social restitution* (2016) 61.

3   In section one of this article, I explain what I mean by neo-apartheid constitutionalism and in part three I show how social justice, transformative constitutionalism's master frame for social emancipation, is complicit in the perpetuation of an anti-black bifurcated society. In response to an anonymous reviewer's suggestion that I should immediately make it clear whether I think that systemic racism continues today, I wish to state the following: the epigraphs to this article, my reference to the time of neo-apartheid and the rest of this introductory section make it clear that indeed I do believe that this is the case. For recent empirical evidence see chapter 3, "Black pain and the outrage of racism" in Swartz *Another country* 45-68. In this article, I invoke the lived experiences of members of *Abahlali baseMjondolo* – the twelve-year old, approximately 10 000-strong social movement of shack dwellers – to demonstrate firstly, that impoverished black people still suffer racialised dehumanisation and social invisibility, and secondly, that the ruling elites are responsible for maintaining this world of apartness. On how a predominantly black government could perpetuate an anti-black bifurcated society, see L Gordon "A phenomenology of Biko's Black Consciousness" in A Mngxitama, A Alexander & NC Gibson (eds) *Biko Lives! Contesting the Legacies of Steve Biko* (2008) 83 91 and R Grosfoguel "What is Racism?" (2016) 22 *Journal of World-System Research* 1 9.

the black elites.[4] To be denied simultaneity is, as Benedict Anderson implies in *Imagined Communities*,[5] to be interpellated as not coeval with the rest of society – in purportedly post-colonial contexts, it is not to belong to the "new" society. The premise of this article is that those who are still socially excluded and racially dehumanised remain banished to the "other side" of what Boaventura de Sousa Santos terms the "abyssal line".[6] The abyssal line ("the Line") divides historically colonised worlds, parcelling out such worlds into a "zone of beings" and a "zone of non-beings" with dwellers of the latter zone being regarded as *not-yet* beings.[7] Those confined to the "other side" of the Line (the "zone of non-beings") suffer unremitting dehumanisation and social invisibility. According to *Abahlali baseMjondolo* ("*Abahlali*") – literally: "those who dwell in shantytowns," the quintessential locality of the "other side" – an other-side-being is a being who continues to be pushed below the line of the human, a humanoid whose "life and voice does not count".[8]

With this interpretation, *Abahlali* is bringing attention to the fact that, in their lived experiences, the main edifice of the ontological structure of colonial-apartheid – white human ≥ black sub-human – remains in place, except that today historical beneficiaries of the bifurcated social structure, white South Africans, are re-constituting and reconfiguring the Line in cohort with what *Abahlali* calls the "black boers" [black colonialists].[9] The designation "black boers" is meant to convey the sense that the black ruling class, similar to neo-colonial rulers in other contexts, benefit from, and thus have an interest in, maintaining a world of apartness.[10] Crucially, as Sizwe declaims in the epigraph, this reconfiguration of the Line takes place despite the new constitutional architecture and political rhetoric to the contrary. In South Africa today, an anti-black bifurcated societal structure can, thus, be discerned in which, generally speaking, on "this side" white people and the black middle class are governed through a system of liberal democracy, and on the "other side", patronage, appropriation, and repression remain politics

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[4]   In a 15-year long series of interviews on contemporary experiences of racial oppression and structural impoverishment, Schutte and Singiswa found that the black elites understand themselves to be part of the new South Africa and, "have distanced themselves from the poor in a bid to dissociate themselves from black oppression and suffering …" G Schutte & S Singiswa "Ten layers of oppression when you are black and poor" (2013) *SACSIS* <http://sacsis.org.za/site/article/1844> (accessed 10-11-2016).

[5]   B Anderson *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2006) 24-26.

[6]   B de Sousa Santos "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges" (2007) 30 *Review* 45 45.

[7]   F Fanon *The Wretched of the Earth* (1963) 37-38.

[8]   L Figlan "The Politic of Human Dignity" (2012) *Abahlali baseMjondolo* <http://abahlali.org/node/9325/> (accessed 20-03-2016).

[9]   B Mdlalose "Marikana Shows that we are Living in a Democratic Prison" (2012) *Abahlali baseMjondolo* <http://abahlali.org/node/9061/> (assessed 20-03-2016). For the theory and genealogy of apprehending neo-colonial leaders as "black colonialists", see Chinweizu interviewed by Odili in P Odili "Black Colonialists: The Root of the Trouble with Africa" (2009) 4 *New Frank Talk* 6-56.

[10]   Some readers may retort that exclusion and subjugation are more class-based than racialised, since income inequality is increasing amongst black people. To this I would respond that the decolonisation critique I adopt here demands an analysis that pays attention to structures of coloniality and racism to account for the reality of neo-apartheid and the lived experiences of on-going racial dehumanisation and social invisibility. In any case, as the National Planning Commission finally concludes in its Diagnostic Overview, "we remain a divided society and the major dividing line is still race." National Planning Commission "Diagnostic Overview" (2011) *South African Government* 26 <http://www.gov.za/sites/www.gov.za/files/npc_diagnostic_overview.pdf> (accessed 15-11-2016).

du jour. Thus, even under conditions of constitutional democracy, a culture of human rights, and for our purposes, most pertinently the hegemonic discourse of social justice, "…if you are poor and black you can be killed with impunity …".[11]

Neo-apartheid constitutionalism is the name I propose to call this political and legal system that reiterates the constitutive ontological Manichaeism at the heart of the founding of South Africa in 1910. I borrow and expand upon the concept of "neo-apartheid" from Leonard Gentle who defines it as a socio-economic system where "capitalist accumulation has been filtered through and sustained by social relations inherited from colonialism …"[12] I expand on this concept and propose to introduce it into the lexicon of constitutional discourse to call attention to the fact that post-1994 constitutional re-arrangements *are transforming* society in ways that do not instantiate a fundamental rupture with the inherited, sedimented and bifurcated social configuration. More specifically, I intend to demonstrate that in this time of neo-apartheid the contemporary discourse of social justice, which is transformative constitutionalism's master frame for social emancipation, is actually complicit in the continuation of this anti-black bifurcated societal structure.

To evoke the phrase "the time of neo-apartheid" is to suggest that the constitutive Line of colonialism and apartheid has survived the so-called transition from apartheid to post-apartheid in that impoverished black people remain ensnared in a zone of stasis.[13] It is in this sense that *Abahlali* mourns that those trapped on the "other side" of the Line are "the forgotten"; that is to say that they are left behind from the proverbial bridge to the new South Africa.[14] The forgotten suffer from what we may call the colonisation of time. This is because those on the underside of the new South Africa suffer from *historical omission* because they feel excluded from the "miracle of the transition" and putative processes of nation-building; *temporal ossification* by deliberate processes that re-enact colonial and apartheid processes of primitive accumulation, impoverishment, re-"tribalisation", enforced racialisation and social invisibility; and an *imposed conceptualisation of time and temporality via* a cluster of post-1994 keywords – including *transitional* justice, *final* constitution, a *new* united nation – that perpetuates the monoculture of western modernity in terms of which time unfolds in a linear, evolutionary, and homogenous manner, and thus rendering invisible those groups that exist

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[11] *Abahlali baseMjondolo* "The Struggle for Human Dignity Continues in the Shadow of Death" <http://abahlali.org/node/15155/> (accessed 18-05-2016). Readers are urged to read this press statement for an explication of having ungrievable lives while struggling and existing precariously "in the shadow of death". Judith Butler describes an ungrievable life as "… one that cannot be mourned because it has never lived, that is, it has never counted as a life at all" J Butler "Precariousness and Grievability - When Is Life Grievable? (16-11-2015) *Verso Books* <http://www.versobooks.com/blogs/2339-judith-butler-precariousness-and-grievability-when-is-life-grievable> (accessed 16-12-2016).

[12] L Gentle "Poverty and Social Movements" in B Maharaj, A Desai & P Bond (eds) *Zuma's own Goal: Losing South Africa's "War on Poverty"* (2011) 359 371.

[13] Fanon *The Wretched of the Earth* 51.

[14] *Abahlali baseMjondolo* "No Freedom for the Forgotten" (2011) *Abahlali baseMjondolo* <http://abahlali.org/node/7981/> (accessed 18-04-2016).

according to the times of "non-western" cosmologies, epistemologies and legalities.[15]

What does time and temporality have to do with debates around constitutionalism, liberation and structural social injustice? Firstly, from the perspective of constitutionalism – constitutionalism understood both as a legal concept dealing with allocation of rights and responsibilities and a politico-ethical theory prescribing how to (re)constitute a political society – to be "forgotten" is to be as if one is outside the wall constituting the new political society. To be interpellated as outside the wall of the new polity, is to be cast as the Other and to be produced as "invisible, unintelligible, or irreversibly discardable".[16] Importantly, despite constitutional rhetoric and some court victories, as *Abahlali* points out, to be the Other is to be one whose humanity still does not count. Secondly, if we bear in mind Santos's reminder that "the understanding of the world and the way it creates and legitimates social power has a lot to do with the conceptions of time and temporality",[17] colonisation of time in the terms I sketched above and the hegemonic signification that this is the time of post-apartheid, serve to mask on-going domination and subordination.[18] The discourse of post-apartheid constitutionalism enables beneficiaries of this elite transition to manufacture the consent that the year 1994 presaged both emancipation from racial domination and colonisation, and liberation to be post-racial and Afropolitan while in reality the majority of black people still suffer from systemic exclusion and institutionalised racism. From a Foucauldian perspective, this hegemonic discourse is meant to mould the political subjectivities of "the forgotten" in a way that ensures that "the forgotten" internalise the idea that they are not casualties of historical structural societal problems but that because "the past is in the past" "the forgotten" are themselves the problem.

To sum up this meditation on the time of apartheid, from the perspectives of victims of systemic social exclusion and racial subjugation, then, post-1994 constitutional re-arrangements were decidedly not constitutive moments of decolonisation, and of liberation understood as a forward march into the future. Thus, writing on the twentieth anniversary of the supposed denouement of apartheid, and as part of its 27 April yearly ritual of mourning "UnFreedom", *Abahlali* summed up their experience of unfreedom, neo-apartheid and on-going scepticism regarding the humanity of impoverished black people as follows:

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[15] This is not to suggest that impoverished black people lack agency or have resigned themselves to this "not-yet" state of affairs. See T Madlingozi "Post-Apartheid Social Movements and the Quest for the Elusive 'New' South Africa" (2007) 34 *J Law Soc* 77.

[16] B de Sousa Santos "A Critique of Lazy Reason: Against the Waste of Experience" in I Wallerstein (ed) *The Modern World-System in the Lounge Durée* (2004) 157 165.

[17] 158.

[18] To put it another way, to end this neo-apartheid time and its invisibilising world, time itself will have to be decolonised and its conception radically altered from the standpoint of "the forgotten", for as Giorgio Agamben reminds us, "every conception of history is invariably accompanied by a certain experience of time which is implicit in it, conditions it, and thereby has to be elucidated … The original task of a genuine revolution, therefore, is never merely to 'change the world', but also – and above all – to 'change time'". G Agamben *Infancy and History: Essays on the Destruction of Experience* (1993) 91.

"Twenty years after apartheid we live like pigs in the mud, our children die of diarrhœa, we are forced into transit camps at gun point, the police beat and shoot us in the streets and the assassins kill us with impunity. If we stand up and *demand that our humanity is recognised* we are removed from the housing list and placed on the death list."[19]

At the same time from the perspective of hegemonic discourse, the adoption of the Constitution of the Republic of South Africa, 1996 ("Constitution") inaugurated the time of post-apartheid. On 7 May 1996, which was the deadline for the Constituent Assembly to finalise the draft of the "final" constitution to be presented to the National Assembly, Cyril Ramaphosa, the African National Congress's ("ANC") main negotiator, begged twenty more minutes from the fifty exhausted politicians who made up the Constitutional Assembly. He reminded them that sacrificing twenty minutes was worth it for a constitution "which is for the next 20 years, no, fifty years, 100 years, 200 years …"[20] Speaking on the day of the signing of the Constitution, Ramaphosa christened the day of the adoption of the Constitution as "the birthday to the South African rainbow nation".[21] Although constitution-making ought to be bifocal in a sense of being both backward-looking and forward-looking, Ramaphosa and other constitution-makers propagate the notion that the moment of the adoption of the Constitution was both a constituent and constituted moment of rupture and of natality and of founding and of closure.

1 1   Social justice offered as panacea to the "Forgotten Problem"

Abahlali and other movements of "the forgotten" dispute this idea of complete post-colonial posterity arguing that victims of neo-apartheid constitutionalism are not simply *the left-behind* in a past that has not passed; they find themselves interned in a liminal space that the former secretary-general of *Abahlali* designates as "the democratic prison".[22] Substitute "democratic" with "civilisation" and you realise that what we are dealing with here is the *longue durée* of settler colonialism: as in the seemingly benign prison of western modernity, the historically conquered are deemed not simultaneous and co-present with the rest of the modern/new society because they are still considered beings with defective humanity; an unrecognised humanity as *Abahlali* protests in the quote above.

Let us get to the main point. During colonialism, humanitarians and other well-meaning dwellers of "this side" of the colonial Line sought to resolve the "Native Problem" – the dilemma of how to include the conquered into the newly-created Briton-Boer polity in a way that does not lead to full inclusion and thus the dismantling of the settler polity – by propagating conversion into Christianity and proficiency in Western education. These humanitarians considered these to be routes towards domestication, assimilation and the

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[19]   *Abahlali baseMjondolo* "UnFreedom Day 2014: We Mourn Twenty Years of UnFreedom" (2014) *Abahlali baseMjondolo* <www.abahlali.org/node/13640> (accessed 29-04-2016) [emphasis added].

[20]   Cited in C Murray "A Constitutional Beginning: Making of South Africa's Final Constitution" (2000-2001) 23 *U Ark Little Rock L Rev* 809 810.

[21]   Cited in N Oswin "The End of Queer (as we knew it): Globalization and the making of gay-friendly South Africa" (2007) 14 *Gend Place Cult* 93 96.

[22]   B Mdlalose "Marikana Shows that we are Living in a Democratic Prison" (2012) *Abahlali baseMjondolo*.

attainment of some socio-economic opportunities in a colonial society. Today, humanitarians and other well-meaning academics and activists seek to resolve the Forgotten Problem – the aporia of integrating millions of "historically marginalised" people into the "new" society without dismantling the elite compromise and its neo-colonial structure – by putting forth that "the forgotten" are in need of *recognition* and *incorporation* in order for them to become beneficiaries of some *distributive* outcomes in society. These humanitarians, academics and activists – liberal and leftist – assert that recognition, incorporation and distribution are the means to justice-in-society. The prevailing argument goes that having obtained "political justice" the historically marginalised are, now, in need of "social justice" in order for them to enjoy "a better life".[23]

Thus, a commitment to what Dikgang Moseneke DCJ (as he then was) refers to as "social redistributive justice", is at the heart of post-1994 societal transformation.[24] Alongside the constitutional values of human dignity, equality, freedom, accountability, responsiveness and openness, "social justice" has been declared a "premier foundational value".[25] This manifesto of post-apartheid constitutionalism, to summon a hegemonic signifier, is enshrined in the preamble to the Constitution and finds validation in Karl Klare's discourse-setting essay in which he contends that the Constitution prescribes "transformative constitutionalism".[26] The *telos* of "post-apartheid constitutionalism" is said to be a changed society, or alternatively a permanently changing society,[27] based, finally, on what I argue are the fundamental elements of social justice in South Africa, namely, recognition, incorporation and distribution.

This constitutional commitment to recognising and incorporating the historically oppressed and marginalised through a programme of social justice, has provided a discursive and structural opportunity for the hegemony of both social justice-talk and the social justice civil society sector. "Social justice" – grounded in the foundational law of the "new South Africa" (a transformative constitution), wrapped around the *lingua franca* of "post-apartheid" politics (human rights), and advanced by an epistemic community made up of public interest litigation organisations, legal advocacy organisations, cause lawyers, think tanks, state officials, and charity organisations (the social justice sector) – has, as a result, become the master frame for imagining emancipatory politics in the "new" South Africa. By master frame, I mean, as does Sidney Tarrow,[28] those collective action frames that colour and constrain the lens of understanding what was wrong with the "past" (in this case, social injustice) and what the organising principle of the new society should be (social justice).

[23] M von Broembsen & D Davis "South Africa must address social justice" (2008) *SACSIS* <http://sacsis.org.za/site/article/186.1> (accessed 09-04-2016).

[24] D Moseneke "The Fourth Braam Fischer Memorial Lecture: Transformative Adjudication" (2002) 18 *SAJHR* 309 318.

[25] 314.

[26] K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150.

[27] P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 354.

[28] S Tarrow *Power in Movement: Social Movements, Collective Action and Politics* (1998) 390.

A just society is said to be a society in which all can participate in the economy, have access to basic services, have equal opportunity to participate in deliberative processes of democracy, and are generally able to pursue happiness.[29] And yet, as *Abahlali* argues, two decades after the coming into effect of the final Constitution and in spite of the mushrooming of the sphere and organisations of social justice, the majority of black people still bear the brunt of normalised forms of social injustices, "the violence of generalised social denial",[30] and ultimately, "social death".[31]

In this article, I intend to advance a two-fold argument. Firstly, I will argue that inherent to the politics of social justice is an assimilationist logic that perpetuates an anti-black bifurcated society. I will show that as in any other contexts assimilation processes always serve to reconfirm hierarchical social structures. Secondly, after demonstrating that the pivotal pillars of contemporary social justice praxis are fetishisation of human rights, deification of the Constitution, and veneration of civil society, I argue that in its *telos* of transforming society through a recognition-incorporation-distribution framework social justice discourse is invested with a certain historicity that ultimately functions precisely to confine the racially oppressed and socially excluded in an interregnum, a time of neo-apartheid. Historicism – in our case, in the realm of extending human rights to the historically dehumanised, of reconstituting political society, and of reconfiguring civil society – functions to seduce historical victims of social exclusion and anti-black racism into teleological whiteness – the idea that being white and the attainment of whiteness are the highest ideals of emancipation and human progress. This is because historicism is based on the sequence, "first in Europe [white South Africa], and then elsewhere".[32]

The decolonisation critique of transformative constitutionalism that I am advancing here jettisons liberal and leftist critiques that apportion the blame regarding the perpetuation of a world of apartness on a rapacious black elite or a pervasive betrayal of otherwise unimpeachable constitutional ideals. In section three I outline and apply this decolonisation critique. In the section that follows, I discuss the divergent ways in which political movements against colonialism and apartheid sought to embrace or reject constitutional historicism. More specifically, I show that the Pan-African Congress of Azania (the "PAC") and the Black Consciousness Movement (the "BCM") drew a sharp distinction between transformation and decolonisation and thus

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[29]   S Liebenberg *Socio-economic Rights-adjudication under a Transformative Constitutionalism* (2010) 27-28.

[30]   H Grunebaum *Memorializing the Past: Everyday Life in South Africa after the Truth and Reconciliation Commission* (2012) 41.

[31]   FB Wilderson "'We're trying to destroy the world': Anti-Blackness and Police Violence after Ferguson, an interview with Frank B. Wilderson, III" (01-10-2014) *IMIXWhatILike* <https://imixwhatilike. org/2014/10/01/frankwildersonandantiblackness-2/> (accessed 14-05-2016). To be sure, an empirical study undertaken by the Human Sciences Research Council effectively concluded that the lives of many black people "… remain constituted as bare life …". See V Barolsky "'A Better life for all', Social Cohesion and the Governance of Life in Post-apartheid South Africa" (2012) 38 *Social Dynamics* 134 137.

[32]   D Chakrabarty *Provincializing Europe: Postcolonial Thought and Historical Difference* (2000) 22.

rejected social-justice-as-emancipation arguing that such an emancipatory praxis leads to a neo-apartheid dispensation.

2   The triumph of social justice over liberation

In this section I am concerned with deepening the contradictions between the assimilationist politics of social justice and the post-abyssal line-politics of liberation. The mostly descriptive historical foray that follows is a reminder that transformative constitutionalism and social justice were not the only emancipatory horizons of anti-colonial struggles. This section lays the groundwork for the main section below on how the contemporary discourse of social justice is made possible by and makes possible the silent discourse of neo-apartheid.

The antinomy of black emancipatory thought – democratisation *versus* decolonisation; social justice *versus* liberation – emerged out of divergent African responses to colonial defeats of the nineteenth century. Charges by African nationalists that the pursuit for recognition-incorporation-distribution in the settler-created polity amounted to assimilation and perpetual defeat first came up in this era. Confronted by seemingly unstoppable irruption of western modernity and political conquests, some African chiefs and kings "chose" for their people the route of surrendering, converting to Christianity and attaining Western education, while others insisted on both African and black nationalism and resisted colonisation.[33] This antinomy was to shape black emancipatory scripts up to the late twentieth century with, on the one side, the ANC and its emancipatory praxis of claiming civil rights and of demanding democratisation and incorporation into a transformed South African society. On the other side, we find the PAC's and later the BCM's prefigured politics of decolonisation, liberation, and the pursuits of an African- or black-created new polity that recognises and incorporates settlers.

Both sides were responding to the fact that the British and the Boers had created the Union of South Africa (the "Union") and later the Republic of South Africa in 1961, as an independent settler colony, not through an inclusive social contract but rather based on what Charles Mills terms a "racial contract".[34] This constitutive moment led to an atypical settler colony since "the natives" were not exterminated and were acquired as cheap labour. Thus, even before the founding of South Africa, the "Native Problem" loomed large. The founders of the Union eventually resolved this "problem" by constitutionalising the Line and its bifurcated social structure. In these terms, South Africa was to be a White Man's polity with Africans banished into "tribal reserves" or included in "European areas", 87% of the land, as "temporary sojourners" in service of racial capitalism.

Here is the fundamental point. This oppressive, anti-black bifurcated political and social system obscured and narrowed the question of

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[33] N Mostert *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People* (1993) 310-314

[34] C Mills *The Racial Contract* (1997) 3.

emancipation in ways that still resonate today. Firstly, white liberal academics and humanitarian activists considered South Africa to have been decolonised and as such, achieved some measure of legitimate statehood. They thus narrowed the injustice frame to the egregious denial of recognition of the human rights of Africans, the failure to both fully integrate them into the Union and grant them some access to societal resources. Secondly, the dominant strand of African elites was impelled to elaborate a reactive praxis of emancipation whose main task was to counter colonialist assertions that the natives could not be granted citizenship rights and full belonging because the natives had yet to reach the stage of maturity and civilisation required to participate in South Africa properly. It is this reactive praxis that reduced the quest for emancipation to a quest for a constitution that will not so much decolonise the state and society, but will rather transform them. At the heart of this emancipatory quest were politics of social justice *contra* liberation.

2 1 New Africanness: the struggle for recognition and incorporation into South Africa

The latter strand of African elites dominated black emancipatory thought during the last years of the nineteenth century and the first four decades of the twentieth century. These "New Africans" were seized with a "civil imaginary" in that they held on to the promise that conversion into Christianity and attainment of Western education would lead to human recognition, extension of civil rights and their integration into the South African polity as British subjects.[35] African elites – mainly lawyers and *petit-bourgeoisie* – that established the South African Native National Congress (later the ANC) were self-avowed New Africans who feared that the abyssal societal structure of the Union held the possibility of them being forever banished to the "other side" and reduced to the ranks of uneducated and "uncivilised" Africans.[36] Over and over again, ANC spokesmen asserted that they are as mature and civilised as any [white] South Africans and thus they are deserving of recognition, incorporation and equal opportunities in the Union.[37] The ANC accepted the sovereignty and legitimacy of the settler-created state. Its demand for franchise was, therefore, a political demand for the recognition of the humanity and rights of Africans; a process that, if successful, will eventually lead to their incorporation and full participation in the Union.[38] This position was slightly modified in the ANC co-sponsored Freedom Charter of 1955. Although the long-standing ANC policy of not contesting the legitimacy of the settler-created state and of not demanding the restoration of subjugated indigenous sovereignties and the return of dispossessed land remained, the ANC now advocated for universal franchise in a multiracial union based

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[35] L de Kock "Sitting the Civilisational Test: The Making(s) of a Civil Imaginary in Colonial South Africa" in L de Kock, L Bethlehem & S Laden (eds) *South Africa in the Global Imaginary* (2004) 117.
[36] T Lodge *Black Politics in South Africa since 1945* (1983) 2.
[37] GM Gerhart *Black Power in South Africa: The Evolution of an Ideology* (1978) 38.
[38] M Motlhabi *The Theory and Practice of Black Resistance to Apartheid: A Social-ethical Analysis* (1984) 40-41; Lodge *Black Politics* 61.

on equality and fair distribution of resources. As is clear, the predominant character of the ANC's vision of emancipation was that of justice-in-society, albeit a transforming South African society.

2 2   African nationalism: the struggle for decolonisation and the incorporation of settlers into Azania

On the other side of the antinomy of black emancipatory thought we find African nationalists. African nationalists set as their goals national independence and the right of self-determination of conquered people.[39] Africanists, thus, rejected the New Africans' programme of "interracial social incorporation" seeing it as a ploy for assimilation and perpetual colonisation.[40] According to the PAC achieving national independence required a programme of national consciousness through which Africans were to reclaim their humanity for themselves, build a multi-ethnic African unity, destroy white supremacy, and struggle for the dissolution of the settler-state through the restoration of the sovereignties of subjugated kingdoms and the return of dispossessed land.

The Africanists conceived the fundamental injustice bedevilling Africans as the twin problem of "land and status".[41] Unlike the ANC, the PAC's point of departure was that South Africa was a colony and that post-colonialism begins with the return of "stolen" land and the destruction of "the demi-god of white supremacy".[42] The discourse of incorporation into the extant state and society was, therefore, abhorred in PAC lexicon. Similarly, Africanists rejected the ANC's liberal politics of "peaceful recognition" of the humanity and rights of Africans. The PAC's policy of "determined non-collaboration" dictated that they do not make any demands for freedom and human rights against the colonial state, let alone seek human recognition from "oppressors".[43] In other words, the PAC jettisoned politics of justice-in-society, and even distributive justice in a transforming society, and rather advocated for the "complete overhaul of the present structure of society".[44]

Anticipating a social justice debate that is now voguish, recognition or distribution,[45] Robert Sobukwe, the first president of the PAC, argued that this debate was a deliberate strategy of deflection propagated by those who reduced the evils of colonialism and racism to a class question. Calibrated as

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[39] PK Leballo "The Nature of the Struggle Today" (1957) *SAHO* <http://v1.sahistory.org.za/pages/library-resources/articles_papers/1957-nature-of-struggle.htm> (accessed 15-03-2016).

[40] CRD Halisi *Black Political thought in the Making of South African Democracy* (1999) 1 14.

[41] Anonymous "Forward to 1958" reproduced in T Karis & GM Gerhart (ed) *From Protest to Challenge: A Documentary History of African politics in South Africa 1953-1964* (1977) 498 499.

[42] R Sobukwe "The State of the Nation on National Heroes Day 2 August 1959" in T Karis & GM Gerhart (ed) *From Protest to Challenge: A documentary History of African politics in South Africa 1882-1964* (1972) 542 545-546.

[43] PN Raboroko "Congress and the Africanists: (I) the Africanist Case" (2017) *SAHO* <http://www.sahistory.org.za/sites/default/files/DC/asapr60.5/asapr60.5.pdf> (accessed 11-05-2016).

[44] Sobukwe "The State of the Nation on National Heroes Day 2 August 1959" in *From Protest to Challenge* 196.

[45] For eg see R Sarkar & A Sarkar "Dalit Politics in India: Recognition without Distribution" (2016) 11 *Econ Polit Wkly* 14; N Fraser & A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2004).

such, the problem was to be resolved by reducing the African to an "economic animal" to be offered "crumbs from the oppressors" rather than conceiving of the historical antagonism in a way that comprehends that the African is a historically conquered "human being".[46] Ultimately, the Africanists rejected the economy of recognition-incorporation-distribution and postulated a future society based on anti-racism, Africanism, socialism, and restored sovereignties and return of dispossessed lands.[47] In this Africanist Socialist Democratic society "Europeans" were to be given recognition and full incorporation if they accepted majoritarian democracy and became Africans. Sobukwe's perceptive warning was that an alternative to following the Africanists' path would be a neo-colonial/neo-apartheid society still structured by the Line with,

> "African elite[s] being gradually trained, brain-washed, fathered and absorbed into a so-called South African Multiracial Nationhood, whilst the vast masses of Africans are being exploited and denied democratic rights …"[48]

2 3 Black Consciousness: the struggle to dislodge white supremacy and the quest for true humanness in Azania

If the Africanists stressed the colonial nature of the South Africa society, Steve Biko and his BCM protagonists emphasised the fact that South Africa is framed by a "totality of white power structure" that oppresses physically, psychically, politically, and culturally; that conditions and constrains black people's responses to it by limiting the emancipatory strategy to de-segregation and democratisation; and, crucially, that divided the world into the dominant white world and the dominated black world.[49] BCM theorists postulated that unless the totality of white supremacy is destroyed, democratisation and transformative constitutionalism would simply lead to a situation where black elites are "extracted" from the black world into the white world.[50] Such integration amounted to black elites' assimilation into "this side" of the Line, into a "white-type society".[51] In such a neo-apartheid scenario, black-on-black exploitation would be encouraged ensuring that black elites, parvenus to "this side" of the Line, have a stake in maintaining an anti-black bifurcated society.[52] This brief outline offers us a key to understanding why the BCM was totally opposed to the politics of recognition-incorporation-distribution.

Echoing Frantz Fanon's sentiments in the famous essay *The Negro and Recognition*,[53] Biko was aware that in white supremacist societies *emancipation-as-recognition* amounted to an application to be a colonial subject since it meant seeking recognition from colonisers and the settler-

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[46] Sobukwe "State of the Nation" in *From Protest to Challenge* 547.
[47] PAC "Constitution" in PAC (ed) *The Basic Documents of the Pan Africanist Congress of Azania* (1965) 41.
[48] Cited in Gerhart *Black Power* 190.
[49] S Biko *I Write What I Like* (2004) 67.
[50] 21.
[51] SASO "Statement of Objectives" in HW van der Merwe, NCj Charton, DA Kotzé & Å Magnussson (eds) *African Perspectives on Apartheid* (1978) 100.
[52] Biko *I Write What I Like* 101.
[53] F Fanon *Black Skin, White Masks* (2008) 163-173.

created state. Such an eventuality would deepen self-alienation, misrecognition and social death. *Emancipation-as-incorporation* was, therefore, also unthinkable in Biko's discourse because there was no society to integrate into. Rather, an inhumane minority society maintained its pre-eminence by creating an anti-black, bifurcated societal structure and cannibalising the society of non-beings it had produced. For Biko, similar to Sobukwe, the decolonisation imperative was to "overhaul the whole system" to achieve a total end of the anti-black world.[54] This quest is necessary because, as Frank Wilderson surmises in the context of the still un-decolonised society of the United States of America "[black people] cannot enter into a structure of recognition as … being[s], an incorporation into community of beings, without recognition and incorporation being completely destroyed".[55] Finally, unless extant society is completely demolished, distribution of resources in a supposedly post-apartheid society on the basis of black recognition would be anti-liberatory because such a (re)distributive scheme sustains racialism which is the belief that *races* exist and groups must campaign for social and economic goods on the basis of *racial identity*.

Biko approached the current vociferous social justice debate of "redistribution or recognition"' from a slightly different angle to Sobukwe, but reached the same results. For Biko, this debate is itself a truncated debate because (a) it leaves the original iniquities of settler colonialism – land dispossession and subjugation of indigenous sovereignties – un-expiated; (b) it reconfirms the myth of the ontological and epistemological superiority of colonisers since it is the colonisers that get to do the work of recognising the "previously" unrecognised; and (c) it reasserts that most insidious beast of Western modernity and colonialism, *viz.* the politics of identity. This latter reassertion would thwart the ultimate goal of Black Consciousness philosophy, which is the ceaseless quest for "true humanity" where, in a post-South Africa society (Azania) there shall be neither black people nor white people.[56] Finally, Biko's own ominous counsel was that unless a Black Consciousness approach is implemented, the "post-apartheid" dispensation would still be an anti-black bifurcated society in which "a capitalist black society [is created] … and South Africa could succeed to put across to the world a pretty convincing picture [of post-racialism], with still 70 percent of the population underdogs".[57]

To sum up, so far, I have endeavoured to show that a constitutive Manichaeism that has created an anti-black structure undergirds the South African polity. Conquest, land dispossession, epistemicide and institutionalised anti-black racism constitute and are constituted by this abyssal line. African responses to the problem of the colonial Line account for the antinomy of anti-colonial emancipatory thought. On the one hand, for the PAC and the BCM, a post-abyssal world is a decolonised and African-created or black-liberated world of Azania. On the other hand, for the ANC the problem of a

[54]   Biko *I Write What I Like* 70.
[55]   Wilderson "'We're trying to destroy the world'" (01-10-2014) *IMIXWhatILike* 9.
[56]   Biko *I Write What I like* 99.
[57]   GM Gerhart "Interview with Steve Biko" in A Mngxitama, A Alexander & NC Gibson (eds) *Biko Lives! Contesting the Legacies of Steve Biko* (2008) 21 42.

society of apartness is resolved through a constitution that transforms society and lays the framework for social justice in a multiracial union. African nationalists and Black Consciousness theorists posited a foundational critique of what they regarded as colonial constitutions and argued that in that context democratisation and transformation, in contradistinction to decolonisation and liberation, would lead to a situation of neo-apartheid. In that situation, white domination will mutate into white hegemony with a few professional and politically-connected black people integrated into this side of the Line while the majority of black people continue to be "exploited and denied rights"; "underdogs" who do not count in the "new" society.[58] As is well known, in the negotiations leading up to the constitutional re-arrangement of 1994, the democratisation paradigm triumphed over the decolonisation paradigm.[59]

3   Social justice and the reconfiguration of the abyssal line

To engender a false consciousness of rupture and newness and to enable co-optation into the ideology of post-apartheid, beneficiaries of the political transition do not only perpetually proclaim the mantra of rupture and of a "new South Africa". They also narrow today's fundamental struggle to a struggle, waged on behalf of "the poor", for "a better life for all". As we saw in the introductory section, propagators of transformative constitutionalism propose social justice as the route towards the attainment of this "better life". In this main and final section I will show that contemporary politics of social justice are not only anti-liberatory, they are also complicit in the perpetuation of a society of apartness. A careful observation of post-1994 social justice discourse and praxis reveals that the main pillars of the politics of social justice and its framework of recognition-incorporation-distribution are fetishisation of human rights, deification of the Constitution, and veneration of civil society. I will discuss each of these pillars in turn with the aim of demonstrating how the discourse and praxis of social justice, as mandated by "transformative constitutionalism", perpetuates neo-apartheid.

3 1   Extension of human rights as perpetuation of coloniality of being

At the heart of the post-1994 transition from a racial contract to an ostensibly inclusive social contract is the discourse of human rights. Post-1994 civic engagements, societal development, spatial reorganisation, renegotiation of wage labour and resource distribution are all officially driven by a "human rights approach". The "human" in human rights is ontologically linked to the question of social justice since a just society is said to be a society where every human being is able to pursue happiness and derive a fair share of the

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[58]   In this reconfigured Line of neo-apartheid, as Sobukwe and Biko predicted, a parcelled world is reconfirmed in which as Adam and Adam observe "the white 'haves' … are silently thankful that black 'would-be-haves' now keep a huge mass of black 'have-nots' reasonably pacified and, if necessary, under authoritarian control". H Adam & K Adam "The Politics of Memory in Divided Societies" in J Wilmot & L van der Vjver (eds) *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2000) 32 46.

[59]   M Ramose "Justice and Restitution in African Political Thought" in PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (1998) 541 570.

collective good simply because he or she is of equal worth as any other human being. However, in a society historically constituted on the basis of coloniality of being (in which to be human is to be white),[60] a question that impresses itself upon us is the following: what kind of "human" is being invoked here?

At the beginning of the creation and imposition of the Euro-centered world, beginning in the late fifteenth century, was the colonial word about which beings were on time and which were not. Only beings that were on Western time and temporality were human beings since they were considered civilised and endowed with rationality. Spurred by the ideology of Enlightenment, colonisers justified conquest, dispossession, and dehumanisation of native populations on the basis that the latter were savages and uncivilised peoples. Thus, to be a native was to be without human rights; to be a non-native was to be endowed with human rights and the right to conquer and to dispossess. In South Africa and elsewhere the colonisers did not, therefore, only introduce and constitutionalise the idea of race and anti-black racism, they also imposed their understanding of "the human". This idea of the human was one *invented* by the European humanists of the fifteenth and sixteenth centuries in contradistinction to the "non-European" barbaric Other.[61]

For our purposes, the most important point here is that the dominant creed of human rights arose in this context of European expansion/colonisation when the fathers of global/Western international law had to sketch out the rights that European settler-invaders, the humans, possessed in "Indian" lands.[62] To put it simply, then, "he who spoke for the human also spoke for rights".[63] It is clear, therefore, that the "human" in human rights has never had an objective and shared normative understanding.[64] It has often been a conception imposed by those from "this side" of the Line, the historical colonisers.[65] What does this have to do with our discussion? In the absence of revolutionary and liberatory processes of self-reclamation of humanity, as proposed by African nationalists and Black Consciousness activists in the previous section, in a way that delegitimises not only white supremacy but also the conception of "the human" imposed during colonisation, the extension of human rights from those who have arrogated to themselves the status of humanity to those previously deemed sub-human perpetuates coloniality of being. More importantly, this extension and appropriation of human rights as the only grammar of dignity and *lingua franca* of politics cannot dislodge white supremacy, institutional racism and structural exclusion and invisibility.

Let us come back to South Africa. In section two above we saw that the demand for human recognition and the extension of human rights to Africans

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[60] N Maldonado-Torres "On the coloniality of being: Contributions to the development of a concept" 21 *Cultural Studies* (2007) 240 251-257.

[61] W Mignolo "Who Speaks for the 'Human' in Human Rights?" (2009) 5 *HIOL* 7 8.

[62] A Anghie "The Evolution of International Law: Colonial and Post-colonial Realities" (2006) 27 *Third World Q* 739 742-743.

[63] Mignolo (2009) *HIOL* 10.

[64] C Douzinas *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (2007) 51-57.

[65] This historical insight does not, of course, mean that the discourse of human rights was never appropriated, inflected, creatively extended and developed by enslaved peoples and conquered nations in their encounter with western modernity and in their struggles against colonisers.

came from New Africans and their successors. The praxes of anti-colonial chiefs and kings in the late nineteenth century and early twentieth century and later of the PAC and the BCM were unambiguously never struggles for human rights. Rather, they were struggles for decolonisation and liberation.[66] In other words, they were struggles to end the world in which colonisers arrogated to themselves the right to decide who is human and who is not and which grammar of dignity is legible and which is not. Reducing the latter struggles to struggles for human rights, or even worse subaltern conceptualisation of rights, distorts history. Ultimately, the myth that all black emancipatory projects were struggles for human rights is aimed at dimming the decolonisation memory and consciousness. Most importantly, wittingly or unwittingly, this revisionism is aimed at perpetuating white supremacy and the Line. The defeats of the politics and ideologies of African nationalism and Black Consciousness were, therefore, also defeats of politics of alterity and thus African and black self-reclamation of humanity. Critically, these defeats derailed quests for decolonising "the human" in a way that valorise Sobukwe's pre-figurative politics of there being only one "human race".[67] The result is that deep in the recess of the hegemonic South African consciousness being human is still being like the white man. It follows that demands for human rights and their presumed enabling of justice-in-society often end up being a claim to be like the white man, or less subtly, to live like the white man.

Here is a tendentious argument. South Africa's contemporary social justice sector's ahistorical and colour-blind fetishisation of human rights, as part and parcel of the economy of recognition-incorporation-distribution, both conceals and entrenches this teleological whiteness. This fetishisation masks the fact that the premier struggle in South Africa remains the same struggle confronting all (ex)colonised and enslaved peoples. This is the *struggle for humanity* – a "quest towards true humanism" as Biko summed up this liberation endeavour.[68]

Today, we can detect this impulse of decolonising the human in the struggles of those still confined to the zone of non-beings. We can take the example of *Abahlali* who affirms that even under conditions of transformative constitutionalism and a culture of human rights, poor black people "are not counted as human beings".[69] This consciousness and reality impel *Abahlali*

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[66] Some in the ANC alliance have also expressed despair at the way the human rights frame has crowded out other frames of emancipation. In this regard, Ben Turok, former ANC parliamentarian and member of the South African Communist Party, has demurred that, "we did not say our struggle against apartheid was a civil rights struggle. We said it was a liberation struggle. There is actually a difference …". Cited in SL Robins *From Revolution to Rights in South Africa* (2008) 1.

[67] R Sobukwe "The Opening Address – The Africanist's Inaugural Convention" in PAC (ed) *The Basic Documents of the Pan Africanist Congress of Azania* 9 15.

[68] Biko *I Write What I Like* 102. For the global context of this quest see S Wynter "Unsettling the Coloniality of being/power/truth/freedom: Towards the Human, after Man, its Overrepresentation" (2003) 3 *The New Centennial Review* 257.

[69] *Abahlali baseMjondolo* "Statement for the Human Rights Commission Hearings Relating to Access to Housing, Local Government and Service Delivery" (12-02-2015) *Abahlali baseMjondolo* <http://abahlali.org/node/14586/> (accessed 20-03-2019).

to conclude: "we are not a human rights organisation".[70] This "other side" movement encapsulates its struggle as rather, "… a real struggle to put the human being at the centre of society".[71] The struggle to put the human being at the centre of society and to decenter beneficiaries of apartheid and the black elites is a struggle to end a world carved by a Line in which those on the "other side" are considered beings who do not count.

Conversely, in the context of this on-going Manichaeism an appeal for human rights – a moral and strategic resource from "this side" – by beings from the "other side" can be treacherous. In the still anti-black bifurcated world of South Africa, to recast Lewis Gordon, "blacks are human if they can speak white [rights], but if they can speak white [rights], they are dangerous; therefore they must be reminded of their [ontological] limitation …"[72] The appropriation of rights by those from the zone of non-beings, a zone customarily governed through appropriation and violence,[73] can thus be fatal:

> "That is why the strikes happened ... We are human beings and we demand to be treated as such. I know that *the world* sees us as *boys* when it suits them and as *savage men when we stand up for our rights*. We are human beings"[74]

The above testimony by a survivor of the 2012 Marikana massacre reminds us of the unaccounted for and unmourned for killing of 34 black mineworkers. This massacre was only a spectacular manifestation of neo-apartheid – the fact that black humanity remains suspect, and that the South African society replenishes itself on the basis of the confinement of the majority of black people in the zone of non-beings. The fatal error that the miners committed was to seek to end their slavery-like existence through recourse to tools from the zone of beings. As the survivor above confirms, it was here that state power and "the world" of self-declared humans changed their perception of the miners from that of non-simultaneous beings ("boys") to that of being creatures who actually threaten the stability of the "new" society ("savage men"). This massacre, triggered by a simple error of "standing up for our rights," symbolised the definite end of the myth of transition. This is the myth, as I discussed in the introductory section, which suggests that political justice has been achieved and all those who live in South Africa are now treated as human beings. To summon Jared Sexton's reflections in the United States of America context, this massacre, therefore, "names the retreat of the idea

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[70]   Interview with S'bu Zikode, first president of *Abahlali*, by Kate Tissington and Jackie Dugard (Durban, 25 April 2012). The transcript is available on file with the author.

[71]   *Abahlali baseMjondolo* "Abahlali baseMjondolo Statement on the Xenophobic Attacks in Johannesburg" (21-05-2008) <http://abahlali.org/node/3582/> (accessed 15-03-2016).

[72]   LR Gordon "Through the Zone of Nonbeing: A Reading of *Black Skin, White Masks* in Celebration of Frantz Fanon's Eightieth Birthday" (2005) 11 *CRL James Journal* 1 5.

[73]   See R Pithouse & M Butler "Lessons from eThekwini: Pariahs Hold their Ground Against a State that is Both Criminal and Democratic" (03-2007) <http://abahlali.org/files/Pithouse%20and%20Butler%20 2007%20Lessons%20from%20eThekwini.pdf> (accessed 15-03-2016).

[74]   A Marikana miner, after the August 2012 massacre of 34 striking miners, cited in G Schutte "The World treats us like Boys and Savages" (06-11-2012) *SACSIS* <http://sacsis.org.za/site/article/1479> (accessed 14-10-2015) [Emphasis added].

throughout the fabric of civil society that blackness and human being are not permanently and mutually exclusive".[75]

I want to suggest that the language and praxis of human rights collapse when they are accosted by the demands of those who are considered non-humans. The discourse of human rights has nothing to say to those who suffer dehumanisation and social death because it is predicated on the humanity of those already inside the wall of political society.[76] Understood in this way, the discourse of social justice and its ahistorical fetishisation of human rights ultimately leads to co-optation into white supremacy and masks the enduring potency of the Line.

3 2   Deification of the Constitution as a "second conquest"

Post-1994 fetishisation of human rights accords with the deification of the Constitution. This deification is seen in the way the Constitution is often evoked and invoked as the "best constitution in the world". Critics of the Constitution refuse to deify it; arguing, following Sanele Sibanda, that the Constitution is "not purpose made" to realise its avowed objectives of social justice. [77]

From our perspective, this Constitution should be placed in New African and liberal impulses towards democratisation in contradistinction to decolonisation. This approach demand of us to pay close attention to the ways in which, as we shall shortly see, the Constitution is part of the counter-decolonisation project of masking white hegemony and historical conquest through the economy of recognition-incorporation-distribution. Such an approach calls on us to impugn the Constitution and post-1994 constitutionalism in a manner that goes beyond immanent critiques of the Constitution such as that its wording restricts a core-content reading or an immediate application interpretation of socio-economic rights provisions. A decolonisation critique also goes beyond pointing out that legalistic and formalistic adjudicative practices restrict the project of transformative constitutionalism. Putting the spotlight on lackadaisical state conduct and the assumed impact of one-party domination also fails to fully rise to the temperature of the problem. The critique that I am proposing here certainly also disavows feminist, queer and critical race critiques that seek to rescue the post-1994 constitutional project by pleading for more gendered, queered,

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[75] J Sexton "Racial profiling and the societies of control" in J James (ed) *Warfare in the American Homeland: Policing and Prison in a Penal Democracy* (2007) 197 208.

[76] This does not mean that movements from the "other side" have not sometimes appropriated the discourse, procedures, and symbols of human rights to win *defensive* and *symbolic* victories. For an extensive discussion of this phenomenon, see T Madlingozi "Post-Apartheid Social Movements and Legal Mobilisation" in M Langford, J Dugard, B Cousins & T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbol or Substance?* (2014) 92 106-122. In this regard, it is important to emphasise that the jury is still very much out on whether court victories have resulted in substantive material and long-term changes in a way that begins to dislodge the Line or whether court victories are simply symbolic, palliative and thus cooptive. For a comprehensive and multi-disciplinary debate on this, see M Langford, J Dugard, B Cousins & T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbol or Substance?* (2014).

[77] S Sibanda "Not purpose-made! Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty" (2011) 22 *Stell LR* 482.

and raced readings and applications of the Constitution as a way of achieving social justice for historically marginalised groups. To take a distance from liberal and left critiques in favour of the afore-mentioned African nationalist and Black Consciousness critiques, I will have recourse to Mogobe Ramose's manifesto for a post-conquest constitution.

In order to understand how post-1994 constitutional re-arrangements precluded liberatory outcomes some historical revisionism is, again, required. In the late 1980s "people's power" civic organisations that had emerged to render South Africa "ungovernable" and that rejected the recognition-incorporation-distribution framework and prefigured politics of liberation were brutally suppressed by the apartheid regime and finally demobilised by the returning ANC in the late 1980s. The suppression and demobilisation of these radical black community organisations went hand in hand with the emergence and valorisation of public interest litigation organisations and human rights Non-Governmental Organisations ("NGOs") from the mid-1980s. It is against this domestic background and the geopolitical context of the waning influence of the Soviet Union, the currency of socialism, and the ideals of revolutionary seizure of power that the ANC began taking steps in readiness to govern by drafting Constitutional Guidelines for the future society.

Internally, debates about the form and content of a constitution for the future society started raging. These debates took place *mainly* between white progressive lawyers and activists and white supremacist organisations on "this side" of the Line. On the "other side" of the Line, most black activists were suspicious of talks of a post-apartheid constitution in the absence of a revolution or a negotiated framework for achieving decolonisation. These activists and intellectuals demurred that such a constitution might, in reality, entrench a Bill of Whites. It is, therefore, important to remember that the calls for a supreme constitution with a bill of rights came *overwhelmingly* from amongst the ranks of the historical beneficiaries with the view of keeping the main edifice of the anti-black bifurcated polity intact. As Albie Sachs reported in the late 1980s, "… most proponents of a Bill of Rights in South Africa see it as an instrument designed to block rather than promote any significant social change …"[78] These proponents' motivation was the installation of neo-apartheid constitutionalism, what Sachs calls a "hidden or democratic apartheid" achievable through the "de facto constitutional freezing of historical injustice".[79]

Non-ANC anti-colonial scholars and activists then led and still led by Ramose, made it clear that a post-colonial constitution would only be post-colonial to the extent that it terminates what Ramose terms the colonisers' and their successors' "right of conquest".[80] Terminating this assumed right would begin the process of terminating the bifurcated world because this putative right grounds the colonisers' self-arrogation of the power to draw a

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[78]   A Sachs *Protecting Human Rights in the New South Africa* (1990) 12.
[79]   11.
[80]   Ramose "Justice and Restitution" in *The African Philosophy* 571.

Line that separates humans from those who are deemed sub-human; those who have the right to conquer and those who are liable to be conquered; those who form part of the polity and those banished to its underside. In South Africa, as elsewhere in the colonised world, the unjust wars of colonisation solidified and eventually ensured that the right of conquest and its abyssal line are constitutionalised.[81]

Ramose's starting point is that only an "authentic constitution" would terminate this putative right of conquest.[82] An authentic constitution is post-abyssal because it *constitutes* – etymologically from *constituere* meaning to stand together. Any constitution worthy of the designation must, therefore, re-constitute society in a way that ends the bifurcated world. In the second place, for Ramose, as is the case with Sobukwe, a post-colonial constitution must "constitute", in the sense of *founding* an African home for all and correspondingly undoing the settler-created house. In this regard, Ramose advocates not just for a post-segregationist constitution but also a *post-conquest* constitutional dispensation.[83] According to Ramose, a post-conquest constitution is one that leads to "the restoration of complete, unencumbered and integral sovereignty to the conquered as at conquest … [and] … since the concept of sovereignty without territory is empty, it follows that this exigency of restoration entails by necessity the return of the land to the indigenous people". [84]

Finally, a Ramosean constitution is one that is permeated by the spirit of restitutive justice and reparative justice to enable restitution and compensation for the damage done in the application of the right of conquest.[85] A constitution that is not motored by these two forms of justice, but merely enshrines affirmative action measures and guarantees socio-economic rights under the banner of recognition-incorporation-distribution would fail to make it clear that questions of material justice and structural impoverishment are questions of historical justice, and are thus deeply constitutional issues.[86]

Alas, the Constitution that was finally adopted in 1996 is the anti-thesis of the Ramosean constitution: it is not post-abyssal; it does not undo the settler-created house; it posits a social justice framework while hindering an extensive scheme of reparation and restitution; and it is a supreme deity that blocks revolutionary being-becoming.

Let us start with the last point, the adoption of a supreme constitution. Ramose asserts that the move from parliamentary sovereignty to constitutional supremacy consolidated historical injustices, and is, thus, tantamount to a "second conquest", a conquest by consent.[87] From the perspective of a decolonisation critique, the transmutation of ill-gotten property into

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[81]   M Ramose "In Memoriam: Sovereignty and the 'New' South Africa" (2007) 16 *Griffith LR* 310 318.

[82]   M Ramose, TG Maphala & TE Makhabane "In Search of a Workable and Lasting Constitutional Change in South Africa" (1991) 5 *Quest: An International African Journal of Philosophy* 4 21.

[83]   Ramose (2007) *Griffith LR* 321.

[84]   M Ramose "Philosophy and Economic Independence in Africa" (2006) 25 *Politea* 3 7-8.

[85]   8.

[86]   *Cf* Sibanda (2011) *Stell LR* 483.

[87]   M Ramose "Affirming a Right and Seeking Remedies in South Africa" in L Preag & S Magadla (eds) *Ubuntu: Curating an archive* (2014) 121 132.

constitutionally protected property *via* a supreme constitution obviates the decolonisation project. From this perspective, therefore, the post-1994 move from parliamentary sovereignty to constitutional supremacy was motivated by the need to ensure that once the barbarians are let through the gate, their numerical superiority would not dislodge the Line and the historical benefits that accrued as a result.[88] Ramose, therefore, argues that the Constitution constitutionalised the right of conquest.

In the logic of this blood-soaked "right", colonial conquest by the Dutch and the British meant that conquered people suffered "irreversible and permanent" loss of sovereignty and land.[89] It is Ramose's contention that the Constitution, therefore, shows a bias towards Eurocentric legal doctrine, and the putative right of conquest, because it aligns itself with the doctrine of extinctive prescription in terms of which after a passage of some time illegally obtained property becomes lawful. This principle conflicts with the fundamental legal doctrine of *ubuntu* constitutional law which commands that *molato ga o bole* – meaning that an injustice remains an injustice until it is rectified.[90] The result is that *de facto* and *de jure* doctrine of non-reversibility with respect to loss of territory applies. Consequently, a land redistribution regime based, in practice, on a willing-seller-willing-buyer principle obtains. The result is that only a puny percentage of commercial farmland has been restored through land restitution. Most pertinently, more than two decades since the advent of transformative constitutionalism the settler (dispossessing)-native (dispossessed) relation, thus, remains.

Ramose demonstrates that the final Constitution of 1996 is neither post-segregation nor post-conquest because it has not founded a post-colonial home; instead Africans were incorporated into a settler-created, albeit transforming, house. In this house, social justice and its recognition-incorporation-distribution framework are offered in the place of more radical tools that would realise Sobukwe and Biko's goals of totally overhauling this edifice. Ramose's work enables us to understand how post-1994 constitutions reflect both a teleology that preserves white supremacy and that inaugurates a neo-colonialist time. Ultimately, as Sobukwe and Biko predicated, a system of neo-apartheid constitutionalism subsists in that historical injustices have been constitutionalised in support of an elite transition that sought to exonerate historical conquerors while incorporating some of the conquered to "this side" of the Line.

3 3   Veneration of civil society ensures transition from white domination to white hegemony

The final piece of the puzzle of how the discourse of social justice, ultimately, contributes to the maintenance of an anti-black bifurcated society is the strategy of venerating civil society. "Civil society proper" as opposed to

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[88]   *Cf* Sachs *Protecting Human Rights* 6-7.
[89]   Ramose "Justice and Restitution" in *The African Philosophy* 572.
[90]   As above.

the racialised, excluding and repressive civil society of apartheid is said to be what stands on the other side of the bridge after the dark and barbaric era of apartheid. Civil society is venerated as the domain where South Africans in their diversity can come together in post-conflict processes of nation-building, social cohesion and fair distribution of resources. Two lines of enquiries animate this sub-section: what is the nature of this venerated "post-apartheid" civil society? More crucially, what ends are served by its veneration?

These questions are important if we remember the discussion so far. Historically, South African society is a society split into two – one white and supposedly human, and the other black and supposedly sub-human. An invisible but very much felt Line ran through the South African society in a way that banished Africans to the zone of non-beings. Historically, then, it is not that African people were marginal to or on the periphery of civil society; they were not part of it. If my arguments about the evolution and the role of the discourse of social justice from colonialism up to today are correct, then contemporary social justice civil society ("SJCS") is a successor of South Africa's colonial liberal civil society. In the face of the colonial state's policies of forced "tribalisation", segregation, denial of franchise and multiple strategies of repression and pauperisation, humanitarians and other liberal civil society actors followed a two-fold strategy focused on recognising, uplifting and integrating "Westernised" natives on the one hand, and charity schemes for "non-Westernised" and uneducated natives on the other.

This is not to say that members of today's SJCS have the same sense of overt ontological and epistemological superiority as their predecessors. Having said that, in socio-political terms, today's SJCS is not fundamentally different to the one that Biko critiqued in his 1970 felicitously titled essay *Black souls in white skins*?[91] Biko argued that the exigencies of black liberation were unintelligible to the SJCS. He maintained that even though there were members of the SJCS, who were anti-capitalist radicals, these radicals were more invested in integrating black people into a society structured by "values of a settler minority" and that they could not countenance the destruction of the totality of the white power structure.[92] The ultimate strategy of the SJCS, Biko predicted, would be an "integrated civil society" where white vanguardism remains the norm. Such a society is a "new" society in which, "the superior-inferior white-black stratification that makes the white a perpetual teacher and the black a perpetual pupil" holds sway.[93]

In South Africa today, we see the consequences of the triumph of a democratisation paradigm over a decolonisation paradigm; a policy of de-racialising and not rescinding extant civil society; and campaigns by the ANC, local big business, and international civil society donors of demobilising black radical civic organisations in favour of privileging mainly white-led anti-apartheid social justice organisations. The contemporary realm of social justice is a realm dominated by professional NGOs made up of middle-

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[91] Biko *I Write What I Like* 24.
[92] 26.
[93] 26.

class officials who accept the legitimacy of the post-1994 dispensation, are in a conflictual but civil relation with the state, and who mainly pursue a recognition-incorporation-distribution agenda.

More specifically, contemporary SJCS is, as in the past, dominated by white South Africans: the executive directors of the most influential public interest litigation organisations, legal advocacy organisations and law clinics are white; five white senior counsels dominate social justice litigation before the Constitutional Court; and the production of social justice knowledge in the academia is dominated by white people. It is in this context that Liepello Pheko and Edward Sebastein observe that many of the public voices and faces of "mobilising social justice" in South Africa today are white.[94] Therefore, an overwhelmingly white epistemic community theorises social justice, calibrates its agenda, selects "test cases" and engages in "strategic litigation" on behalf of "poor communities".[95]

Is the involvement of those from "this side" in struggles of the "other side" all that bad? After all, in every struggle of dominated people it is common for some members of the dominant group to get involved in the struggles of the dominated group and use their elite status to provide material, moral, and cultural resources often out of reach of dominated groups. However, in the context of a historically anti-black society racial vanguardism is insidious. Firstly, white hegemony is contradictory to the avowed goals of social justice that are about redistribution of political and economic power in egalitarian ways. Here, once again, beneficiaries of apartheid privileges use their privileged positionality to benefit materially and psychically through helping the historically oppressed. This does not only amount to a double benefit for those who have benefitted historically; it also amounts to an economy of appropriation in terms of which SJCS officials arrogate black pain for their own psychic benefits. From a Bikoean perspective, white vanguardism reiterates the "inferior-superior, teacher-perpetual pupil stratification" as it reconfirms the supposed moral superiority of white activists. The point here is not whether a specific cause lawyer or white activist is racist or has nebulous objectives, or whether a specific black beneficiary community leader suffers from an internalised sense of inferiority. The point is that the accumulative effects of white vanguardism reinforce white supremacy and most pertinently, as Biko forewarned, only palliate this anti-black bifurcated world.

In addition to the problem of white vanguardism, the second manner in which the SJCS contributes to the maintenance of an anti-black bifurcated world is by calibrating the parameters of social emancipation. First, white dominance of the SJCS as well as the colour-blind framework inherent to

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[94]   L Pheko & E Sebastein "A Critical Historical Context on *Mobilising Social Justice*" in J Handmaker & R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2013) xv xvii.

[95]   On 31 August 2016, a group of approximately 45 young black professionals working in the public interest law sector handed a memorandum to the directors of this sector at the annual Public Interest Law Gathering. These professionals, who subsequently constituted themselves into the Black Workers' Forum, denounced white dominance of this sector and called for, "urgent emancipation from the repressive structures and attitudes of oppression in civil society institutions ...". A copy of this memorandum is on file with the author.

this sector lead overwhelmingly to social emancipation being depoliticised and juridified. Second, although the Constitution explicitly permits both horizontal and vertical application of enshrined rights, SJCS's gaze of social emancipation is focused vertically against the post-1994 government and away from historical beneficiaries of colonialism and apartheid. Thus, despite the SJCS's repeated affirmations that the social justice agenda is geared toward achieving large-scale social change through the redistribution of power and resources in society, social justice has been conceived primarily – apart from defensive campaigns dealing with temporary relief in cases of evictions from privately-owned properties – as being about "developing the normative and remedial apparatus for imposing duties on organs of State."[96]

Thus, white vanguardism comes together with colour blindness in SJCS to sever memory of offenses relating to on-going conquest and institutionalised racism. This is the reason why land redistribution and reparation demands are crowded out by socio-economic rights claims in the repertoire of South Africa's SJCS.[97] In this way, the SJCS has developed a "racial grammar" that normalises and 'invisibilises' structural anti-black racism and historical injustice.[98] Contemporary social justice praxis is, ultimately, refracted through an ahistorical, de-radicalising and disarming "white disourse" that Andile Mngxitama, then of the Landless Peoples' Movements, captures as follows:

> "To a large extent, it is true that the demands of [impoverished black people's] movements are being constructed by a sort of a white discourse. So for example, people struggling against eviction: 'what you need is a house for these people'. There is no conception of attacking the larger structure that perpetually excludes the larger majority of our people. Nobody wants to talk about history…We then simply fight at the level of 'this government', the ANC government for those directly affected without infusing it with understanding how this process is about protecting whiteness."[99]

Seen in this way, the SJCS and its framework of recognition-incorporation-distribution is an important cog in the neo-colonial strategy of perpetuating an anti-black bifurcated society by deflecting attention away from institutional racism and systemic marginalisation.

4   Conclusion

> "Apartheid is dead. Viva neo-apartheid!"[100]

The thesis I sought to defend in this article is that apprehended from the lived experiences of South Africa's socially excluded and racially discriminated: this is the time of neo-apartheid constitutionalism. By neo-apartheid constitutionalism I mean to convey the fact that post-1994 constitutional re-arrange-

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[96]   S Liebenberg "Socio-economic rights beyond the public-private law divide" in M Langford, J Dugard, B Cousins & T Madlingozi (eds) *Socio-economic Rights in South Africa: Symbols or Substance?* (2014) 63 64.

[97]   It is with this in mind that the aforementioned Black Workers' Forum also calls for a proactive and fully-funded programme of "land reclamation and redistribution" in the social justice sector.

[98]   On 'racial grammar', see E Bonilla-Silva "Weight of Whiteness: The Racial Grammar in everyday Life in Contemporary America" (2012) 35 *Ethnic and Racial Studies* 173 173.

[99]   A Mngxitama *Interview with T Madlingozi* at Braamfontein, 02-11-2008 (transcript available with the author).

[100]   A Sachs "A Freedom Charter for South African Artists" (1991) 9 *Staffrider* 45 46.

ments *are transforming* society in ways that do not instantiate a fundamental rupture with the inherited, sedimented and bifurcated social structure in terms of which the majority of black people remain confined in a "zone of non-beings". More specifically, I demonstrated that in this time of neo-apartheid the contemporary discourse of social justice, which is transformative constitutionalism's master frame for social emancipation, is actually complicit in the continuation of this anti-black bifurcated societal structure. The historical discussion in section two served as a compulsory reminder that transformative constitutionalism and social justice have not always been the only emancipatory game in town.

In section three I demonstrated that the pillars of the contemporary discourse and praxis of social justice are fetishisation of human rights, deification of the Constitution, and veneration of civil society. Taking each of the three pillars in turn, I argued that in historically white supremacist countries, firstly, the human in "human rights" is the conception of humanity imposed during colonisation, and that in the absence of the revolutionary approaches that decolonise and reconceptualise "the human", as historically proposed by the PAC and the BCM, the extension of human rights to those historically deemed sub-human is an endeavour to enact transition from the status of sub-humanity to that of being human like the white man.

Secondly mobilising Mogobe Ramose's manifesto for a post-conquest constitution, I showed how this idea of the human and of human rights is guaranteed by a supreme Constitution that is historicist and assimilationist in that it seeks to incorporate the historically conquered into an un-decolonised bifurcated societal structure.

Finally, I argued that the veneration of civil society as the guardian of social justice in the context where the "post-apartheid" realm of civil society reflects the Gramscian hegemony of individuals from "this side" of the line entrenches teleological whiteness in a way that makes it complicit in the perpetuation of a society of apartness. The decolonisation critique that I offered here is in line with emergent calls for the decolonisation of South Africa.

SUMMARY

In this article, I deploy a decolonisation critique to show that apprehended from the lived experiences of South Africa's socially excluded and racially discriminated: this is the time of neo-apartheid constitutionalism. By neo-apartheid constitutionalism I mean to convey the fact that post-1994 constitutional re-arrangements *are transforming* society in ways that do not instantiate a fundamental rupture with the inherited, sedimented and bifurcated social structure in terms of which the majority of black people remain confined in a 'zone of non-beings'. More specifically, I demonstrate that in this time of neo-apartheid the contemporary discourse of social justice, which is transformative constitutionalism's master frame for social emancipation, is complicit in the continuation of this anti-black bifurcated societal structure. A historical survey of the emancipatory politics of anti-apartheid movements serve as a reminder that transformative constitutionalism and social justice have not always been the only emancipatory horizons.

I then demonstrate that the pillars of the contemporary praxis of social justice are fetishisation of human rights, deification of the Constitution, and veneration of civil society. I argue that in historically white supremacist countries, firstly, the human in "human rights" is the conception of humanity imposed during colonisation, and that in the absence of the revolutionary approaches that decolonise "the human", as historically proposed by the PAC and the BCM, the extension of human rights to those

historically deemed sub-human is an endeavour to enact transition from the status of sub-humanity to that of being human like the white man without dislodging the edifice of this society of apartness.

Secondly, I show how this idea of the human and of human rights is guaranteed by a deified Constitution that is assimilationist in that it seeks to incorporate the historically conquered into an un-decolonised bifurcated societal structure.

Finally, I show that the veneration of civil society in the context where the realm of civil society is dominated by white people – who, of necessity, deploy an ahistorical, colour-blind and state-focused notion of social emancipation - entrenches teleological whiteness and deflects attention away from structures of coloniality and racism.