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“Not Yet Uhuru” - The Usurpation of the Liberation Aspirations of South Africa’s Masses by a Commitment to Liberal Constitutional Democracy

By

Sanele Sibanda

A thesis submitted to the School of Law, University of Witwatersrand, Johannesburg in fulfilment of the requirements for the degree of Doctor of Philosophy under the supervision of Professor Heinz Klug and Professor Stuart Woolman.

21 November 2018

Declaration

I declare that this thesis is my own unaided work. It is submitted for the degree of Doctor of Philosophy, in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination at any other university.

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Signature

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Student number

21 November 2018

Abstract

At the heart of this study is the idea of constitutionalism; its promise, conception and deployment in South Africa's post-apartheid constitutional discourse; and ultimately the need for its re-imagination if it is to be part of advancing a truly decolonising liberatory project. A core premise of this study is that there exists, in post-apartheid South Africa, a stark discursive disjuncture between what has emerged as a hegemonic liberal democratic constitutional discourse and the discourse of liberation that served as the ideological pivot of the anti-colonial struggles. Animated by this premise, this study asks *why it is that liberation as a framing set of ideas has either played no part or exerted so little obvious influence on how post-apartheid South Africa self-comprehends and organises itself in constitutive terms?*

Recognising that the formal end of colonial-apartheid as a system in 1994 inaugurated a seismic shift in the country's constitutional discourse as the notion of constitutionalism took centre stage, this study seeks to problematize this idea by examining its underlying assumptions, connotations and import as deployed in mainstream South African academic and public discourses. In doing this the study aspires to offer a novel perspective that shifts the fixity of the conceptualisation of constitutionalism by amplifying the point that how one chooses to conceptualise constitutionalism has profound implications for what one understands to be the function, scope, ambition and possibility of a constitution.

Crucially, the study seeks to advance a historicised, yet non-ideological understanding of the emergence of modern constitutionalism. This, the study argues, is necessary if the real constitutive work and worth of constitutions of different types and thrusts is to remain open to critical engagement as well as fostering the possibility of constitutional imaginings of new, different forms of society or social ordering. As the study works towards responding to the core question it poses, it embarks upon a critical historiography of South African constitutionalism from the 1910 Union constitution to the present one. It does this in an attempt to demonstrate that some of the challenges faced by the current constitution are, profoundly influenced, if not directly produced, by legal, structural, cultural and economic continuities rooted in the past, with race being a central axis around which South African constitutionalism has been imagined, enacted, opposed and resisted. In so doing, the study seeks to demonstrate that despite the indisputable paradigmatic shift ushered in by the fall of colonial-apartheid, on current evidence that shift has been unable to displace nor disrupt

the many continuities that remain stubbornly etched into the South Africa's constitutive DNA inherited from earlier racially exclusive and exploitative constitutional expressions.

Engaging South African constitutionalism from a critical historical perspective, the study turns its attention to the emergence and eventual ascendance of transformative constitutionalism as arguably the mainstream conception of contemporary South African constitutionalism. The study argues that transformative constitutionalism, whilst claiming radical far reaching means and ends, has established limited intellectual and programmatic horizons focused on litigation. From within this discourse, it is argued, there is little or no evidence of other work directed at inculcating institutional or structural power shifts or innovations beyond the courts and lawyering. Ultimately, the study argues that transformative constitutionalism is an inadequate framework through which we can begin reimagining South African constitutionalism and its attendant political, social and cultural dynamics in a more emancipatory and inclusive ways.

Finally, in light of the discursive disjuncture identified earlier, the study concludes by turning its attention to the notion of liberation. It does this in an attempt to reveal liberation thought's constitutive potentialities through its political, social, economic, and cultural dimensions that exist as the epistemic underpinnings of the visions of liberated societies and states as imagined and put forward by the like of Steve Biko, Amilcar Cabral and Frantz Fanon amongst others.

Keywords

Constitutionalism, transformation, liberation, critical historicism, imagination, emancipation, culture, transformative constitutionalism, liberal democracy

Dedication

I dedicate this work to:

Leonora Nomampondo and **Siwanda Kennedy Mbuso Sibanda,** my parents without whose nurturing love, sacrifice and unending support none of this would have been possible. If I have managed to be only half of what you have meant to me then I will have been a worthy son!

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The dissertation or the 'D' project has been a long time in its formulation and it seems even longer in its writing. There were times when it felt like it might never be completed, let alone hang together as a coherent and, hopefully, thought-provoking whole of which I am immensely proud. To achieve this I must at the outset express my deep and heartfelt gratitude to my supervisors **Professors Heinz Klug** and **Stuart 'Stu' Woolman**.

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A project that from conception through gestation to birth that takes shape over many years and gets executed across 3 continents accumulates a lot of debts of various kinds along the way; of course, equally one has the opportunity to make and grow enriching life-long connections and friendships. The scale and ambition of my project was such that the thinking work that it necessitated could not have been done without the help of some of the most generous, brilliant and critical of interlocutors, sparring partners and sounding boards along the way. In this respect I take time to thank some of them. My most faithful, long standing sparring partner, my brother **Tshepo Madlingozi**, we have been through a lot together and on this journey you were ever true, too too many things to mention. I have learnt so much from you over the years, you are an inspiration and your brother's keeper! Bhuti wam', **Chaka Uzondu**, from a distance you kept me focused as you listened, read and critiqued carefully; most crucially our talks helped me to crystallise many a messy or

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Finally, I acknowledge the borrowing in the title of the 'D' from **Letta Mbulu's** famous song "Not Yet Uhuru", a song whose overarching sentiment sadly still resonates deeply amongst the masses of South Africa despite over 25 years of 'freedom'.

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Chapter 1

Introduction: Constitutionalism, Universalising Norms, Structural Continuities and an Overarching Hegemonic Liberal Paradigm

1.1 The Overarching Context of the Dissertation

There was a point in South Africa's recent history, more precisely, after the end of formal apartheid wherein it could justifiably be said that no amount of encomia could ring insincere with respect to the momentousness of the adoption of the post-apartheid South African Constitutions.[1] The Interim Constitution was, first and foremost, a negotiated settlement that ended a political deadlock and averted potential civil war. Its drafters crafted a basic law drawn from global institutions and an international body of jurisprudence thought to reflect the best practices of constitutional democracies. The contemporaneous democratic elections of 1994 were followed by two years of democratic deliberation that produced the more nuanced 1996 Constitution ('the Constitution'). South Africa's rapid transition from a racist state to a constitutional democracy was extensively and loudly declared a miraculous feat.[2]

The advent of this democratic constitutional state created high expectations and a host of new demands. However, because the Constitution unveiled in 1996 embraced a bill of rights incorporating social and economic rights; an independent judiciary that included a,

[1] I refer here to the interim Constitution (1994) which paved the way for South Africa's first democratic elections as well as the adoption of the final Constitution (1996).

[2] A few examples bear the point; Ben Turok, *Beyond the Miracle: Development and Economy in South Africa: A reader* (1999); Allister Sparks, *Beyond the Miracle: Inside the New South Africa* (2003); Steven Friedman, Glenn Moss, Ingrid Obery et al (eds), *The Small Miracle: South Africa's Negotiated Settlement* (1992) Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (1997).

then recently-established, Constitutional Court with powers of judicial review; and a democratic system of governance premised on equal-citizenship and multi-party participation, it was easy for even modest supporters of the basic law to lose sight of the enormous burden of entrenched systemic racialised advantage and disadvantage that had to be undone before the state could deliver on the dramatic promises of a document committed to a substantive social democracy.[3] Rather, more realistic assessments of the new dispensation recognised the need to first undo the deeply entrenched social, economic, cultural and political institutionalization of colonial-apartheid.[4] In short, the state would have to remedy an odious legacy of black dispossession, exclusion, entrenched poverty and structural unemployment on the one hand, and, necessarily, on the other, unsettle legislated and socially embedded notions of white supremacy, a history of job reservations, as well as racialised social and economic privilege.[5]

Shifting to the present, as the euphoria of the dawn of the new nation has gradually receded into the background after nearly two and half decades of freedom, South Africa finds

[3] On the social democratic vision in the Constitution see Francois Venter, 'Liberal democracy: The unintended consequence. South African Constitution-writing propelled by the winds of globalisation' (2010) 26 *SAJHR* 45; Marius Pieterse, 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SAPL* 155.

[4] The term colonial-apartheid is the term that I shall use throughout this dissertation when I make reference to colonialism and apartheid as a continuous racially oppressive system between white and black population groups characterised by structures and relationships of domination/subjugation, appropriation/dispossession and enfranchisement/disenfranchisement that have existed in various guises over parts and sometimes the whole of the territory currently known as South Africa from at least the time of the first Dutch settlements in the 17th century. I do this as I believe it is a more conceptually accurate way to reflect the relationship between two historically imbricated periods whose substance trumps any apparent differences in form and specific details. In this regard, Mabogo More dispels any notion that there is a difference or a disjuncture between colonialism and apartheid or that is was 'colonialism of a special kind' as the South African Communist Party refer to it. According to More there is no separation of the two in any meaningful way that seeks to address matters of substance. More captures this undisturbed morphing of regimes of white supremacy vividly as follows "every feature of the British and Dutch colonial system bled into the Union of South Africa and ultimately became the system of apartheid." See Mabogo Percy More, 'Locating Frantz Fanon in Post-Apartheid South Africa' (2014) *Journal of Asian and African Studies* 7.

[5] See Sampie Terreblanche, *A History of Inequality in South Africa, 1652-2002* (2002) Nicoli Nattrass & Jeremy Seekings, 'Class, distribution and redistribution in post-apartheid South Africa' (2002); and Bethuel Setai, *The Making of Poverty in South Africa* (1998).

itself at something of a crossroads. On the one hand, South Africa possesses a still widely celebrated and ambitious constitution that promises to improve the lives of all citizens. Against the background of a political compromise widely believed to have averted a race war, the Constitution is taken to symbolise the renewal or rebirth for South Africa. However, on the other hand, after 24 years of freedom, a growing section of the population is coming to the realisation that the political gains that marked the *de jure* end of colonial-apartheid have not necessarily translated into the expected delivery of even the most basic social and economic constitutional entitlements, a fact starkly revealed by the lived experiences of multitudes whose stories have been captured in innumerable studies, including that of the National Planning Commission in 2011.[6]

Notwithstanding the multiple expressions of commitment by government, the courts, scholars, activists and civil society, over the past two decades, to what has come to be widely known as a transformative constitutional project, it remains extremely difficult to capture in words and numbers, with sufficient precision and pathos, the exact nature and extent of the disparities in living conditions, life opportunities, and social provisioning that stubbornly persist between blacks and whites in South Africa. There have been numerous studies undertaken that have sought to detail these disparities rooted in history, as well as how they continue to be a commonplace feature of contemporary South Africa. Some examples of these include the following: in 1994 Herbst recorded that 53 percent of all Africans were living below the poverty line as compared to only two percent of all white people; also at the time the education budget for white children was five times higher than that spent on African

[6] See National Planning Commission, *National Planning Commission Diagnostic Overview*, (2011), available at https://www.nationalplanningcommission.org.za/Downloads/diagnostic-overview.pdf, (last accessed on 16 November 2018).

children; whilst at the level of tertiary education 4,467 out of every 100,000 white applicants were enrolled as compared with only 665 out of every 100,000 Africans.[7]

Later in 1998, it was reported in the *Poverty and Inequality Report* that 50% of the poorest in the population (overwhelmingly the black members thereof) received only 11% of the national income whilst 7% of the population (overwhelmingly their white counterparts) received over 40% of the national income.[8] In the period 2000-2011 the *Poverty Trends Report* revealed that poverty levels in South Africa had dropped albeit largely due to the distribution of government social grants. However, despite this drop in the poverty rate, according to the same report, inequality in South Africa remains one of the highest in the world.[9] Coupled with numerous other socio-economic disparities in education, healthcare, land distribution, basic sanitation, inadequate infrastructure and rapid urbanisation, Marais poignantly captures the contemporary state of post–apartheid South Africa as follows:

> [I]nequality has widened, precariousness is routine and a palpable sense of unfairness is rampant. The problem is not simply one of 'poverty' – a lack of means – but of the glaring disparities that assault people day in and out. A seething sense of injustice exists, generating rancour and insubordination.[10]

Of course this is not to suggest that post 1994 there have been absolutely no changes in living conditions and life opportunities, nor that there have not been any policies or laws targeted at redressing these disparities.[11] Indeed, there has been a proliferation of legislated

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[7] Jeffrey Herbst, 'South Africa: Economic crises and distributional imperatives' in Stephen John Stedman (ed), *South Africa: The Political Economy of Transformation* (1994) at 30-31.

[8] Julian May, Debbie Budlender, Renosi Mokate et al, *Poverty and Inequality in South Africa: Report Prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality; Summary Report*, (1998). (on file with the author).

[9] StatsSA, *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2011*, (2014) available at http://beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf, (last accessed on 16 November 2018). See also Hein Marais, *South Africa Pushed to the Limit - The Political Economy of Change* (2011) 205.

[10] Ibid at 4.

[11] See generally: National Planning Commission, *National Planning Commission Diagnostic Overview* op cit note 6.

affirmative action, access to education, employment equity, health care and housing programs targeted at advancing the life prospects of 'previously disadvantaged groups', especially along the axes of race and gender. However, what has become apparent is that not only have these transformative initiatives failed to bring about a socio-economic 'miracle' equivalent for South Africa's masses that matches the much vaunted constitutional 'miracle' (assumed to be captured in the promise of transformative constitutionalism), but these initiatives have largely yet to redress the racial, economic, cultural, and epistemological hierarchies associated with colonial-apartheid.

The increasing tensions between the rhetoric surrounding the Constitution and the lived reality of the majority of South Africans is increasingly more palpable. For example, the more than ten thousand civic protests reported in 2011 caused Peter Alexander to dub South Africa as 'the protest capital of the world'.[12] Beyond the socio-economic sphere, tensions pitting the executive branch against the judiciary have also arisen purportedly around the conceptualisation and implementation of South Africa's transformative constitutional project.[13] What is also becoming increasingly evident is that despite the beneficence associated with the Constitution, there are increasing concerns about the future stability of South Africa's constitutional democracy.[14] Under the weight of these tensions, coupled with stubborn, entrenched and largely racialised structural poverty; a dominant global neo-liberal framework; seemingly endemic systemic corruption; and a dominant political elite, the

[12] Peter Alexander, 'Rebellion of the poor: South Africa's service delivery protests–a preliminary analysis' (2010) 37 *Review of African Political Economy* 25.

[13] See Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report, available at http://www.justice.gov.za/reportfiles/2017-CJPreport-Nov2015.pdf, (last accessed 2 September 2018).

[14] See Henk Botha, 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26 *SAJHR* 66 and Venter op cit note 3.

'miracle' of the 'new' South Africa seems to be in the process of decline – a decline that, I suggest elsewhere, is reminiscent of other post-colonial states at some stage after independence.[15]

Those familiar with Frantz Fanon's work will no doubt know that he was not a constitutional theorist (at least not in a conventional constitutional law sense); however, Fanon's thoughtful reflections remain, in my view, some of the most probing and prescient critiques of the constitution and condition of the post-colonial African state.[16] Fanon's ideas, remain important, especially in the context of this dissertation, for the powerful and precise elaboration of the types of deep structural challenges that would plague post-colonial African states, including South Africa, in spite of their having adopted western-style constitutional systems and structures.

Fanon recognised that the struggles to end colonialism and the subsequent establishment of independent nation states was accompanied by the development of nationalist sentiment as all 'nationals' struggled together to bring down the colonial power. Of course, it is trite to suggest that the foundations of the nation states that emerged from colonialism were almost exclusively as a result of European imperial ambitions rather than the agency of population groups that regarded themselves as nations.[17] The national consciousness that arose as a result of independence statehood was, thus, in many instances

[15] See Sanele Sibanda, 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *Stell LR* 482.

[16] See also Nigel Gibson 'The Pitfalls of South Africa's "liberation"' (2001) 23 *New Political Science* 371 at 374-5.

[17] The formation of Africa's colonial borders is generally accepted as being the result, initially of the Berlin Conference of 1884-5, although colonial occupation had long preceded that. For a useful account of the history of the nation state and the imposition of borders in Africa see Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation State* (1992).

a novel notion touted by the ruling political elites as being an important moral and political foundation upon which the new nation should be built.

Whilst Fanon acknowledged the importance of establishing a social and political consciousness as part of the broader emancipatory project of decolonisation,[18] he was not only sceptical of an elite driven project of establishing national consciousness, but was in fact deeply critical of it and warned of the pitfalls it presented. Carefully noting the fragility of the constructed idea of the nation in the post-independence state and the fact that rather than a genuine national consciousness, what evolved was a conjured up 'national' identity forged together often via disparate 'native' struggles to overcome the various forms of colonial subjugation,[19] Fanon decried this kind of national consciousness when he wrote:

> [N]ational consciousness, instead of being the all-embracing crystallization of the innermost hopes of the whole people, instead of being the immediate and most obvious result of the mobilization of the people, will be in any case only an empty shell, a crude and fragile travesty of what it might have been.[20]

He proceeds further:

> [T]his traditional weakness, which is almost congenital to the national consciousness of under-developed countries, is not solely the result of the mutilation of the colonized people by the colonial regime. It is also the result of the intellectual laziness of the national middle class, of its spiritual penury, and of the profoundly cosmopolitan mould that its mind is set in.[21]

Integral to Fanon's critique is an understanding of *how* the project of nation-building was a reaction to colonialism rather than as a project arising out of a truly shared sense of nationhood among the disparate groups within the colony. In other words, within colonial struggles, the quest for independence demanded that ethnic, class, rural-urban and other differences be put aside in the name of nation-building in order to establish a 'national' force

[18] See Frantz Fanon, *The Wretched of the Earth (Reprinted.)* (1990) at 164-5.
[19] Ibid at 119.
[20] Ibid at 119.
[21] Ibid at 119.

to overcome the colonial power. Therefore, the post-independence domination by the political elites and the middle-class in the affairs of the state – both the political and the economic - and their deployment of an elite-driven national consciousness to achieve this domination caused Fanon to denounce it as being inimical to the interests of the masses or the ordinary people. Fanon, according to Nigel Gibson, recognised that:

> [u]nless developed into a new humanism, into a social and political program that addresses the elemental needs of the mass of the people and includes them in the very discussion of the 'nation', national consciousness becomes an empty shell, a slogan cynically repeated at rallies and anniversaries and the for the advance of the new huckstering elite.[22]

Based on these inherent tensions and imbalances characteristic of post-independence society, Fanon was, accordingly, of the view that whilst the project of forming a truly inclusive and emancipatory national consciousness was necessary, it was always going to be plagued by pitfalls owing to elite domination.[23] Similarly, I have, in previous work, suggested that, transformative constitutionalism as the pre-eminent discourse on constitutionalism operates as a form of 'national consciousness' produced and dispensed primarily by elites in the legal fraternity.[24] Further, I have suggested that it, too, suffers from various pitfalls such as its embeddedness in liberal discourses and its court-centric bias, which together function to negate its stated commitments to delivering far reaching social, political and structural changes. These are be explored at greater length in the dissertation.

[22] Gibson op cit note 16 at 383.

[23] See also Nigel Gibson, 'The limits of black political empowerment: Fanon, Marx, 'the Poors' and the 'new reality of the nation' in South Africa' (2005) *Theoria* 89.

[24] See Sibanda op cit note 15 at 492.

1.2 The Manifestation of the Problem

An important underlying premise of this thesis is that, broadly speaking, the history and structure of post-apartheid South Africa resembles that of many post-independence African states with their shared colonial history of racialised oppression; a sustained period of anti-colonial struggle; a negotiated constitutional settlement that produced a liberal constitutional document; atop an unequal society riddled with poverty governed by the politics of elites. [25] Much like the advent of independence in other former colonies in Africa in the 1960s, the end of apartheid in 1994 marked the end of institutionalized white political rule in South Africa.

The adoption of the post-apartheid constitutions established a multi-party liberal constitutional democracy about which much has been written.[26] Both locally and internationally, the current constitutional era has generated a vast amount of constitutional law literature, especially that engaging with, and examining, the jurisprudence of the Constitutional Court. Equally, much has been written about the gains and missed opportunities with respect to the attainment of socio-economic rights and the reduction of poverty.[27] A great deal of work has critically engaged with how these rights can be made to

[25] It requires mentioning that I am not suggesting that colonization manifested in a monolithic and uniform fashion across all African colonies without any material differences. What I am suggesting is that whilst there were differences in the details of the practices and processes of effecting colonial domination, such difference reflect a difference of degree rather than substance as to what the impetus and consequence of colonization was. See generally Davidson op cit note 17.

[26] See Allister Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Road to Change* (1996); and Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (2010) .

[27] See Malcolm Langford, Ben Cousins, Jackie Dugard et al, *Socio-economic Rights in South Africa: Symbols Or Substance?* (2013).

contribute more deliberately to a more equal society founded on equality, dignity and freedom.[28]

Seemingly implicit in many of these engagements is an assumption or belief that the meta-constitutional foundation upon which post-apartheid South Africa is built, if not entirely apt, is alive to the possibilities of delivering a 'new' society in which equality, dignity and freedom are paramount and realised. However, despite this fact, it is notable that there is little or no constitutional scholarship that has, in a sustained way, critically examined – with reference to its philosophical, cultural and ideological underpinnings - the aptness of the prevailing liberal democratic constitutional model for delivering and sustaining an all-encompassing project of human liberation required to overturn the inherited colonial-apartheid legacies of inequality, social exclusion, endemic poverty, and structural unemployment that have entrenched social, economic and cultural relations of superiority/inferiority, privilege/disadvantage, enrichment/impoverishment, or domination/subordination.

Woolman and Swanepoel, in a thought provoking historical account of the adoption of the Constitution, recognising a gap in the literature anticipate such a critique and ask whether or not the current South African conception of constitutionalism may, in future, have "radical consequences" that may cause the country to implode in a fashion similar to that of many post-colonial African states.[29] South Africa shares many similarities with other post-

[28] See Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010); Sandra Liebenberg and Beth Goldblatt, 'The interrelationship between equality and socio-economic rights under South Africa's transformative constitution' (2007) 23 *SAJHR* 335; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (2007); and Marius Pieterse, 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383.

[29] See Stu Woolman and Jonathan Swanepoel, 'Constitutional history' in Stu Woolman and Michael Bishop (eds), *Constitutional law of South Africa*, vol 2 (2009) at 48.

independence African states, yet despite these similarities, South African constitutional scholarship has, thus far, generally eschewed any critical engagement with post-independence Africa's experiments with liberal constitutionalism that have resulted in crisis or failure in many instances.[30]

In South Africa, the post-1994 era has produced a rich vein of constitutional scholarship. From early on in South Africa's constitution-making project the pre-eminence of the idea of transformation was evident in the literature addressing itself to the advent of this new era of constitutionalism.[31] In this dissertation whilst I discuss various conceptions or approaches to constitutionalism in the contemporary era, I ultimately focus my attention on transformative constitutionalism because it has emerged as the dominant, most hope-filled conception with respect to addressing itself deliberately to redressing the multiple legacies of apartheid. In addition, it is also a conception that discursively can be said to have been inculcated with deliberateness in response to the specificities of post-apartheid South Africa and its context, its liberal moorings notwithstanding.

However, despite its pre-eminence, its proponents have been careful to note its limits, particularly what Karl Klare, one of its earliest proponents, characterises as "disconnect or chasm between the Constitution's substantively transformative aspirations and the traditionalism of South African legal culture".[32] As transformative constitutionalism has evolved with its critics tending to focus on the courts' interpretive role in the delivery of social transformation; much less attention has been paid to systematically interrogating the

[30] See ibid; see also HWO Okoth-Ogendo, 'Constitutions without constitutionalism: Reflections on an African political paradox' in Issa G Shivji (ed), *State and Constitutionalism: An African Debate on Democracy* (1991); Issa G Shivji, 'State and constitutionalism: A new democratic perspective' (1991).
[31] See Pieterse op cit note 3 at 155-6.
[32] Karl Klare, 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 170.

premises and presuppositions of transformative constitutionalism with respect to whether or how it advances or impedes a project of liberation. It is this line of critique that this dissertation seeks to develop.

To make the point more clearly, as alluded to above, despite the voluminous scholarship South Africa's transition and the mode of constitutionalism it delivered, it is notable that in the aftermath of the negotiated settlement little or no conversation ensued with respect to how South African constitutionalism did not comport with the vision of liberation that fuelled the struggles against colonial-apartheid. Whilst the negotiated constitutional settlement may have closed the conversation on the constitutional text outside of amending it, how South Africa's constitution is to be understood more broadly in ideological terms has, I argue here, elicited much less critical reflection or contestation than would have been anticipated. I make this assertion by virtue of the fact that since both post-apartheid constitutions were the products of much compromise, one might have expected that the post-settlement contestation around the conceptualisation of South Africa's incipient constitutionalism was going to be ideological and directed at its scope and meaning in social, political, economic or cultural terms. Instead the battle lines around constitutionalism have in the main been largely confined to academic hermeneutic jurisprudential contestations about adjudicative method and determining an appropriate institutional role for the courts.

I must admit that the minimal extent to which the *idea* of constitutionalism tends to be engaged with is a source of substantial disquiet; there continues to be very little overt effort to examine, explain or justify how the concept is understood or being used. The irresistible implications of this are that there exists an unlikely, yet, incontrovertible

consensus as to the meaning of constitutionalism, and by necessary extension the scope of its ambition and mode of delivery. The significance of the emergence of this particular era of a largely uncontested notion of constitutionalism is that it is this understanding that has defined the parameters of the act of constituting South Africa's post-apartheid society, its constitutional discourse, and more generally the modes of political, social, economic and cultural contestation. This idea of an uncontested constitutionalism as 'fact', it must be said, is simply not the case, particularly as the tensions described above, arising from the failure of the 'miracle' to manifest in material terms, have resulted in questions being raised, periodically, about the nature and content of the constitutional promise as will be demonstrated in the body of this study. Implicit in this questioning is whether South African constitutionalism, as currently framed and conceived of, is able to deliver on the promise of liberation?[33] Or brusquely put, why is there such a stark discursive disjuncture between South Africa's constitutional discourse and the discourse of liberation that served as the ideological pivot of the struggle that contributed to delivering South Africa's current constitutional dispensation? This is one of the primary questions that is delved into more extensively in this dissertation.

1.3 Questioning the Foundations or Constitutional 'DNA' of Prevailing Approaches to Constitutionalism in South Africa

In the section above I have sought to characterise contemporary South African constitutionalism as being an indisputably welcome shift away from that which preceded it.

[33] For example Madlingozi succinctly captures prevailing sentiments as elicited from social movements about their place within South Africa's constitutional democracy Tshepo Madlingozi, 'Post-apartheid social movements and the quest for the elusive 'new'South Africa' (2007) 34 *Journal of Law and Society* 77; Tshepo Madlingozi, 'The Constitutional Court, court watchers and the commons: A reply to Professor Michelman on constitutional dialogue,'interpretive charity'and the citizenry as sangomas: Lead essay/response' (2008) 1 *CCR* 63.

But, by the same token I have also sought to illustrate that as a constitutional arrangement arising out of compromise, it is not rooted in, nor does it capture, the ideals or vision of liberation that inspired the mass struggles that preceded the adoption of South Africa's transformative constitution. I will argue in this study that in light of the prevailing political, social and economic challenges that continue to plague post-apartheid South Africa, the extent to which these conditions comfortably exist within the logic, norms, and structures of the transformative constitutionalism, as an expression of liberal constitutionalism, renders the model questionable.

Therefore, despite the prevailing political, social and economic stability for a majority of the post-apartheid period, South Africa's constitutional democracy as we know it may, in future, unravel. Whilst many, for a long time remained in awe of, and celebrated, the 'miracle' of a 'peaceful' transition and South Africa's exemplary constitution there is a need to be mindful of the fact that constitutions cannot be and are not by themselves, a panacea for redressing deeply entrenched social and economic ills. This dissertation raises questions that have largely gone unasked, more than likely, due to the difficult issues they throw up. Questions such as: can South Africa expect to sustain its institutionally and structurally stable constitutional democracy, whilst a majority of its citizens continue to live in penury? Or how sustainable is the post-apartheid constitutional order as currently conceived of? Was the struggle for liberation's sole objective to dismantle apartheid's constitutional, legal and institutional legacies? Or was it to achieve deeper and more meaningful change in the social, cultural and material conditions of all the citizens of the 'new society'?

The major questions animating this study are the following: Can constitutionalism in South Africa be (re)imagined outside of a hegemonic liberal democratic constitutional

discourse in order to capture the ideals of liberation that envisioned greater political, social, economic and cultural emancipation? Can it be imagined so that it provides for meaningful and substantive popular participation in socio-political decision-making? Can it be imagined in such a way that it results in more evenly distributed social costs and benefits of economic activity and its outcomes? And more broadly speaking a more equal and just society that is conducive to human liberation?

In essence, the kernel of the critique that I embark upon in this study is captured in the question to which there is no definitive answer just yet; namely whether or not South African constitutionalism can be (re)imagined in order to transcend the current liberal democratic framework? Because at this juncture, despite its best intentions, it has delivered what is probably at best a postcolonial caricature of "liberation". The critique advanced in this study is an ambitious one and, owing to the breadth of the subject matter under consideration, can therefore only achieve so much. However, as a consequence of the type of meta-analysis it engages in more questions arise that will, in future, demand answers. Questions such as, how does liberal constitutionalism in South Africa sustain itself, and for how long, in light of its failure to address the underlying causes and prevailing reverberations of colonial-apartheid's dispossession and domination? What sort of constitutional forms, structures, commitments or foundations will it take to bring about a break from the colonial state to that of a liberated one?

1.4 With an Eye Firmly on Re-imagination – Examining the Relationship of Constitutionalism with Liberation Thought

By placing constitutionalism at the centre of this dissertation, my objective is to critically engage with how it is understood and deployed in South Africa's constitutional

discourse. My intention here is to demonstrate that how we approach or understand constitutionalism has implications for our conception of the function, scope, ambition and possibility of an actual constitution in a given polity with a particular history, social, economic and cultural make-up. For example, I will argue that whether constitutionalism is understood primarily in terms of an evolving historical, functional, normative or ideological account, or some combination of these, will influence greatly what one accepts as falling within the parameters of legitimate constitutional concerns, appropriate constitutional forms, as well as who is considered to be a legitimate actor or role player in as far as giving meaning or shape to a constitution. In other words, despite an international coalescence around the hegemony of liberal constitutionalism, I advance here a view that seeks to demonstrate that constitutionalism need not be understood as being teleological as is increasingly the case. It is the intention of this thesis to question the naturalness attached to liberal constitutionalism, with its attendant underlying philosophy, norms, values, principles or doctrines that are often uncritically posited and received as 'universal'.

To elaborate on the point made above, it is my aim to destabilise the limited nature of what has - within the discipline of constitutional law in particular – come to be considered as falling 'naturally' within (as well as outside) the realm of what is contested under the guise of the constitutional. In short, as a build up towards my ultimate aim to propose how constitutionalism could be conceptualised from within the frame of liberation political thought, I seek to demonstrate that constitutions do not self-generate their underlying logics. Therefore, despite the prevailing contemporary political, ideological and cultural currents that have established liberal constitutionalism as a hegemonic paradigm and discourse in South Africa, I aim to argue that from a conceptual standpoint constitutionalism can, and needs, to be understood outside any particular ideological frame if it is to serve some

analytical purpose that helps us understand the purpose and possibility of constitutions, their role in the structuring and ordering of society and why they have become a *sine qua non* of modern states where questions of legitimacy are at stake.

Beyond critically engaging with the idea of constitutionalism, what I strive to do in this dissertation is propose that the question of constitutionalism be approached differently. That is to say that I propose that we eschew an approach that posits, as universal truisms, liberal normative prescriptions,[34] but rather to prefer an approach whose starting point reflects deeply upon the idea of constituting or what it is that is in fact being constituted. Such an approach demands that we be prepared to revisit the ideas underlying constitutionalism, in other words it requires that we open ourselves up to contemplating anew what constitutional imagining might entail in any one given instance. In more precise terms, in this dissertation I hope to articulate the basis for conceptualising, as a distinct imaginary, an understanding of constitutionalism that, whilst critically engaged with South Africa's colonial-apartheid history, simultaneously and self-consciously strives to bring together a philosophical, political, economic and cultural framework of constitutionalism premised on liberation thought as the appropriate response to the legacies of colonial-apartheid.

Ultimately, whether I am adjudged to have achieved my objectives in this dissertation will depend on my ability to cogently hold together my argument positing that the decision

[34] Whilst I recognise that there a several different notions of liberalism with variances that can be plotted on a continuum from the minimalist classic, or night-watchman liberalism, to the more socially ambitious variant such as egalitarian liberalism, I maintain that there are arguably some core normative features that are identifiable in liberal democracies that allow for some level of generalisation to be made. For example, structurally South Africa's transformative constitution, despite claims to being 'postliberal', retains many of the same structures and institutions that one might find in a classic liberal democratic constitution. It contains, among other things, a bill of abstract, largely individual, rights (admittedly one that goes beyond classic civil and political rights); makes provision for the limitation of governmental power through the separation of powers and commitment to rule of law; and establishes a procedural democratic state with periodic elections.

to embrace liberal constitutionalism as the prevailing mode for South Africa was not premised on its naturalness or inherent suitability. Numerous factors influenced this decision, chief amongst which, that I will seek to demonstrate, was the prevailing discursive hegemony enjoyed by liberal democratic constitutional discourses in the modelling, design and making of South Africa's post-apartheid constitutions. Crucial to achieving my objectives in this dissertation will be my embrace of the notion of constitutionalism as a concept, idea and practice of governance in a non-ideological sense in order to uncouple it from its oft *uncritical* ideologically driven conflation with its liberal version.[35]

What I am hoping will be the lasting significance and contribution of this dissertation is its commitment to fostering critical inquiry that does not shy away from problematizing and exposing the growing inadequacies of South Africa's liberal constitutional model in as far as disturbing or negating the continuing political, social, economic and cultural disparities that are the legacy of colonial-apartheid or 'neo-apartheid' as scholars like Tshepo Madlingozi have dubbed it.[36] By proposing an approach that, with deliberateness, connects constitutionalism to liberation thought, I hope to contribute to the opening up critical spaces for a new mode of constitutional imagining informed by a historicised and situated take on what it might mean to constitute a liberated society.

1.5 Unpacking the Idea of Constitutionalism Through Critical Methods

At this juncture it should be fairly clear that at the core of attaining the objectives of this dissertation is a commitment not only to critique, but also to a constructive project that is working towards advancing the development of a framework of constitutionalism premised

[35] Sibanda op cit note 15 at 494.

[36] Tshepo Madlingozi, 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stell LR* 123.

on liberation thought. This in practice means that I am committed to advancing critical perspectives and methods in order to achieve this. With respect to South African constitutionalism, I am clearly not alone in this critical endeavour nor am I the first. Whilst not squarely addressing the question of the aptness of liberal constitutionalism per se, there have also been some important critical perspectives that have questioned the sustainability of South African constitutionalism as currently conceived.

For example, writing in 2008, Madlingozi interrogates the phenomenon of what he perceived then as an increasing distance between the courts (judiciary), court-watchers (academics) and the commons (the citizenry) within the South Africa's post-apartheid constitutional dispensation. In so doing Madlingozi cautioned that the consolidation of South Africa's constitutional culture may already have been under threat then owing to the failure of the state to address the plight of the poor.[37] Madlingozi, cautions that:

> [t]he biggest threat to the consolidation of South Africa's constitutional culture is not the unprincipled and crass accusations lodged by political elites within the African National Congress against South Africa's 'independent' judiciary. The time bomb ticking away inside our polity is the disillusionment of the overwhelming majority of South Africans with the politics and policies of our post-apartheid democracy. Constitutional culture thrives when mobilised groups feel that they can appeal to constitutional norms and procedures in order to have their disputes settled. It withers when such appeals go unheard.[38]

Although, not the gravamen of his argument, Madlingozi notes critically that whilst our constitutional culture develops and addresses doctrinal questions of undoubted importance, developing in parallel is a deep chasm between what South Africa's constitutional democracy actually delivers and what the masses expect or feel entitled to under it. Madlingozi, however, stops short of directly questioning the political or

[37] Madlingozi op cit note 33 at 66.
[38] Ibid.

philosophical foundations or assumptions upon which South African constitutionalism is premised nor does he locate the problem there.[39]

Whilst providing a critical account of South African constitutional history Woolman and Swanepoel's contribution is notable in that unlike many other accounts, theirs anticipates questions concerning the decisions made by the drafters of the Constitution regarding the extent to which it does not encapsulate the aspirations of those who fought for liberation.[40] Contrasting the radical changes called for by Steve Biko in the 1970s with the country's constitutional commitments to dignity, democracy, legality and coupled with 'the current climate of globalised, state-enforced capitalism', the writers tentatively acknowledge that South African's much lauded version of constitutionalism can be read as having been secured at the expense of the promise of liberation. Building on this, the authors ask whether or not such a conception of constitutionalism may in future have "radical consequences" that may cause South Africa's democracy to wither and decay in similar fashion to that of other countries on the African continent at some point after independence.[41]

In this study, I want to add my own critical insights that seek to demonstrate the disconnect between South Africa's current conception of constitutionalism from liberation thought. I will do this using critical methods that necessitate a reconsideration of South Africa's constitutional history from the 1910 constitution to the current one. I do this in order

[39] Ibid. See more recently Madlingozi op cit note 36.

[40] Woolman & Swanepoel op cit note 29 at 49.

[41] Ibid at 49. See also Stu Woolman, 'My tea party, your mob, our social contract: freedom of assembly and the constitutional right to rebellion in *Garvis v SATAWU (Minister for Safety & Security, third party)* 2010 (6) SA 280 (WCC)' (2011) 27 *SAJHR* 346. Here, Woolman suggests that amongst South Africa's masses there is an increasing belief that some of the constitution's basic promises have largely gone unmet. It is this belief, according to Woolman, that goes some way to explaining the so-called xenophobic violence in 2008 and the increasing number of, sometimes violent and destructive, demonstrations. By all accounts, Woolman's observations made in 2010, if not pointing to an actual implosion in the process of happening, must be read as sounding a clear warning.

to actively resist the general approach of South African constitutional scholarship that deploys history, methodologically speaking, as 'mere context' where historical facts or events tend to be presented as forming the background of constitutional developments. In this dissertation, as I endeavour to illustrate the disjuncture between South Africa's post-1994 constitutionalism and the liberation thought that undergirded the struggle against colonial-apartheid, I have been forced to rethink my approach to the narration of South Africa's constitutional history. In particular, I have sought to bring into the reckoning the influence of other histories (social, economic, cultural as well as intellectual) that are not usually brought to bear when discussing the process of constituting South Africa and why a liberal constitution was the end result.

This invocation of other histories brings into play factors, actors and events that are, I argue, critical to properly understanding where South Africa is in terms of prevailing constitutive continuities and disjunctures. This approach seeks to bring to the fore the historical and sociological elements of constituting a society in order to deepen this dissertation's characterization of the reach of constitutions, the political contestations that drive them and the contested social, economic and cultural ambitions they embody (or exclude). The practical implications of this approach are that I periodize South Africa's constitutional history in a manner that engages these other histories from the 1910 constitution to the current dispensation in an attempt to draw out the underlying contestations, the discomfiting levels of continuity and substitution without substantive change. In particular, in this study I am at great pains to write up a history of South Africa's previous constitutions that consciously foregrounds the black population's contestation as well as the orchestrated and deliberate manner of their exclusion and subjugation under a racist colonial-apartheid system.

My approach as described above is committed to advancing a critical historiography with respect to how we approach constitutionalism and South Africa's constitutional history. The approach I take draws inspiration from several different sources and disciplines wherein scholars have sought to displace or refute either dominant historical narratives, or misreadings of the motivating force informing critical histories. Antony Anghie, making his point with respect to his project that revisits the history of international law, well captures the underlying spirit of the discussion that ensues when he tells us '[t]he study of history is in many respects a practical exercise, a means of facilitating and furthering the reconstructive project … of creating an international law that is responsive to the needs of the variously disadvantaged.[42] Owing to the importance of properly characterising my endeavour for the purposes of elucidating how my dissertation unfolds, I will elaborate below at some length on the importance of critical historicism as broadly understood, as well as its particular importance in relation to clearing the path towards making a case for a liberation framework of constitutionalism.

The question of how to historicise the colonial narrative is not an uncontroversial one as post-colonial literary scholar Ato Sekyi-Otu demonstrates when responding to historian and philosopher Achille Mbembe's provocative and influential article entitled *African Modes of Self-Writing.*[43] Sekyi-Otu describes Mbembe[44]'s argument as a 'sweeping excoriation of two centuries of social thought in the African world for being driven by a debilitating

[42] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (2005) at 8.

[43] Ato Sekyi-Otu, 'Fanon and the possibility of postcolonial critical imagination' in Nigel Gibson (ed), *Living Fanon - Global Perspectives* (2011) 45. See also Achille Mbembe and Steven Rendall, (translator) 'African modes of self-writing' (2002) 14 *Public Culture* 239.

[44] A distilled summary of Mbembe's thesis posits that much African writing (including historical narratives) tends to be self-indulgent and prone to advancing the politics of race whilst vacillating between two ghettoised modes, namely Afro-radicalism and victimhood.

historicism in the twin forms of "Afro-radicalism" and "the metaphysics of difference (nativism)."[45] However, for the purposes of this study, Mbembe's thesis is not the primary concern, but rather Sekyi-Otu's profound and insightful response to it for what it tells us about critical historicism and its vital importance in bringing to life a critical imagination that is necessary for envisioning liberation.

To be clear, Sekyi-Otu does take Mbembe's critique seriously and expresses some sympathy for his view that in numerous instances the approach to African historicism by African writers can be read as assigning blame and assuming no sense of agency for any of the historical occurrences that contributed to the perpetuation of the 'three evils' of slavery, colonialism and apartheid. However, Sekyi-Otu distances himself from Mbembe's suggestion that this approach taken by African writers need, necessarily, be read as a form of retreat into a radical or nativist intellectual ghetto that seeks to erect a divide between the African condition and other philosophical and metaphysical undertakings from other traditions of thought.

Sekyi-Otu, in refuting Mbembe's denouncement of African writers, argues that Mbembe misses the point when he reduces the historical narratives within his contemplation as being tantamount to an abnegation of agency in preference for what is essentially a victim's narrative. Instead, according to Sekyi-Otu, what Mbembe fails to appreciate is that rather the writers in question can equally be read as straining to comprehend, imagine and articulate how 'the effects of that [colonial] history impose limits on being, knowledge and action.'[46] The approach they take to history, according to Sekyi-Otu's, is one that recognises that '[a]

[45] Sekyi-Otu op cit note 43 at 46.
[46] Ibid at 48.

coherent historicism is and must be predicated on a consciousness of the possibility of freedom, intimations of what the nature of things might have been.' *This,* according to Sekyi-Otu, is 'critical historicism.'[47] In other words, these writers are not engaging in a romantic historicism occasioned by valorising the 'motionless substance' that is race, rather Sekyi-Otu suggests, they are refusing to be confined to a historical trajectory that has been imposed on them.

Overall, the most important element I draw from Sekyi-Otu's conceptualisation of critical historicism for present purposes is in the manner in which he characterises it as not being an end in itself; or simply critique for critique's sake. But rather, as the method unfurls, it become evident that Sekyi-Otu conceives of it in catalytic terms in that he understands critical historicism to be crucial in enabling a process of decolonisation (and ultimately liberation). In as far as how we regard the history of colonisation when acting to bring about 'true decolonisation', Sekyi-Otu suggests that rather than think of this history as a compartment or space with an enduring, enclosing finitude, it would be more productive to think of that history as an 'event of disruption'.[48] Implicit here is the idea that decolonisation, instead of being understood as an epoch ending racial injustice and ushering in a period of 'interracial justice', it is better understood as intrinsically being about the opening up of new possibilities and futures that demand transcending the asphyxiating effects of totalising colonial-apartheid narratives. Sekyi-Otu captures this notion, with brilliance and clarity, this intellectually liberating idea, which I quote at length:

> Supposing, then, that decolonization, the postapartheid radically construed, is not a matter of reclaiming stolen legacies, patents and ownership rights; gaining recognition of equal worth for our customs and practices and beliefs; getting back our very own world and words, our gods and our shrines; getting back our title deeds to artefacts

[47] Ibid at 48.
[48] Ibid at 54.

> upon which others have through ruse and force affixed their names? What if it is not merely or principally a matter of moral litigation, restitution, and distributive justice between "us" and "them?" Supposing decolonization, the postapartheid, is first and foremost a resumption of interrupted history. A resumption not indeed of some original purities and essences before the Fall, but of interrupted dramas, the essential tensions of native universals; above all a resumption of our dialogue and disputation with one another, with ourselves.

Sekyi-Otu continues:

> This is arguably the most revolutionary moment in Fanon's portrait of decolonization, the moment when decolonization ceases to be strictly and restrictively anticolonialist. Or rather the moment when it becomes most radically anticolonialist precisely because the political and moral horizons of its protagonists cease to be fixated upon white supremacy, white ethics, in a word with the white man. True decolonization, the postapartheid, would be signalled by a reawakening of the inward eye.[49]

This excerpt from Sekyi-Otu is crucial because it encapsulates the heart of this dissertation; namely that to understand the state of contemporary South Africa and how the current conjuncture emerges as essentially an inchoate process of decolonisation that has not delivered liberation requires grappling critically, not only, with the history of South Africa's making, but also the histories of constitutionalism and liberation.

1.6 The Organisation of the Chapters

The dissertation is organised into seven chapters including this introductory one. In chapter two the dissertation introduces and focuses on the idea of constitutionalism in order to critically engage with how it is understood and used in South Africa's constitutional discourse. My intention here is to demonstrate that our approach to, or understanding of, constitutionalism has implications for how we conceive of the function, scope, ambition and possibility of an actual constitution. For example, I will argue that whether constitutionalism is understood primarily in terms of an evolving historical, functional, normative or ideological

[49] Ibid at 55.

account, or some combination of these, will greatly influence what one comprehends as falling within the parameters of legitimate constitutional or constitutive concerns, appropriate constitutional forms, as well as who is considered to be a legitimate actor or role player in as far as giving meaning to a constitution.

Further, I will argue that the naturalness of what is considered as falling within the realm of constitutional contestation, or, alternatively, the subject of constitutional politics cannot rightly be determined *a priori* without regard to prior substantive, procedural or structural commitments. In short constitutions do not self-generate their underlying logics. Therefore, despite the prevailing contemporary political, ideological and cultural currents that have established liberal democratic constitutionalism as a hegemonic paradigm and discourse, I will demonstrate in this chapter that from a conceptual standpoint constitutionalism can and indeed *needs*, to be understood outside any particular ideological frame if it is a to serve some analytical purpose that helps us understand the purpose of constitutions, their role in structuring and ordering society and why they have become a *sine qua non* of modern states where questions of legitimacy arise.

In chapter three, the dissertation commences its engagement with the constitutional history of the making of the South African state. In examining the roots of South African constitutionalism from the period immediately preceding the adoption of the 1909 Union Constitution until 1983 under the auspices of the much maligned and farcical Tricameral Constitution, I intend to provide a critical historical narrative account that attempts to break from that which has dominated South African legal scholarship, namely one that focuses on the construction of the state through legal enactment and the near exclusive agency of the white section of the population during that period. In this, and the following chapter, my

approach to the narration of South Africa's constitutional history will seek to make apparent the interplay between "non-legal' histories (economic, political and social) and 'legal' histories and how these influenced the process of constituting South Africa at different times. This invocation of other histories of a non-legal nature brings into play factors, actors and events that are critical, I argue, to properly understanding how South Africa gets to where it is currently in terms of the continuities and disjunctures that prevail. This approach is important as it seeks to establish a closer nexus between my theoretical framing of constitutionalism that eschews a juridified approach viewed against the content and commitments of particular constitutions.

Chapter four follows on methodologically from the previous one, albeit that it addresses itself to South Africa's constitutional history over the period 1983-1996 when the current Constitution was adopted. The historical account in this chapter looks beyond the history of the drafting of the constitutional text, considering also the politics of negotiation and compromise that brought into play many different political parties, interest groups, agendas, and ideals that were often in conflict or opposition to each other. In this chapter I will argue that whilst compromise prevailed on the political front, in as far as the specifics of the arrangement of power are concerned, on an economic and cultural front, the post-1994 period is equally characterised by clear continuities on these fronts. The main aim of this chapter is to make the point that whilst it is difficult to deny the importance of the post-apartheid constitutions ushering in a relatively orderly political transition as well as the far-reaching nature of the changes in question when compared to the status quo ante; what those constitutions and their underlying intellectual architecture were not designed to do was to bring about a revolutionary overhaul to the extant racialised distributive patterns, and the cultural and epistemic ordering established under colonial-apartheid. Rather, the

compromise of the day ushered in an ill-defined, somewhat open-ended transformative project largely premised on abstract liberal constitutional values, norms, principles and legal doctrines.

In chapter five, the most important thing that I do there is to destabilise the notion that the discourse of transformative constitutionalism is in any form an approximation of what South Africa's liberation project sought or ought to have achieved in as far as constituting a new liberated society. At the heart of the critical work done in this chapter is an attempt to make sense of the prevailing paradoxical situation in terms of which South Africa's political, social, economic and cultural imagination which largely remains captivated by the idea of transformation, despite the distinct lack of consensus as to what exactly transformation means or requires in any particular instance or context. In spite of this lack of consensus, somehow the idea of transformation has retained its discursive traction and appeal amongst many scholars, activists and the broader public. So, in this chapter I probe what this apparent discursive consensus amongst South Africans who retain a commitment to the idea that transformation, as either a means, measure or goal actually contributes to undoing the multiple legacies of colonial-apartheid. In other words, I want to critically examine - from a constitutional standpoint – what has been gained or lost by casting transformation as *the* definitive or core paradigmatic conception of South African constitutionalism as put forward by the proponents of transformative constitutionalism.

In chapter six I embark upon an elaboration of liberation as a central idea and ideal in order to explore what it entails philosophically, politically, materially and culturally as well as to account for its historical roots in anti-colonial struggles and what it sought to respond to. This will serve the purpose of not only providing a philosophical account of liberation, but also

make the argument for the continuing relevance and utility of liberation thought as an ideological foundation for generating an alternative basis upon which a society may be imagined and ultimately constituted in ways that deliberately attend to questions of the social, the political, the material and the cultural from the perspective of the oppressed masses and not elite actors.

In chapter seven, the dissertation will draw to a conclusion and make a call for an approach to constitutionalism that addresses, with deliberateness, the relationship between liberation and constitutionalism, as well as how it ought to influence the constituting of a new society.

Chapter 2

On Constitutionalism, Constitutional Politics, and Contested Constitutional Cultural 'DNA' – Beyond a Juridified Conception of what it Means to Constitute a Society

2.1 Introduction

As already suggested in the previous chapter, the formal end of colonial-apartheid as a system in 1994 inaugurated a seismic shift in the country's constitutional discourse as the idea of constitutionalism took centre stage. Used in obvious reference to the post-apartheid constitutional era, the extensive deployment of the idea of constitutionalism in public and academic discourse has tended to suggest that the notion itself is uncontroversial, uncontested and subject to universal consensus as to its import, connotations and underlying assumptions. The significance of the emergence of this particular era of a largely uncontested notion of constitutionalism is that it is this understanding that has defined the parameters of the act of constituting South Africa's post-apartheid society, its constitutional discourse, and more generally the modes of political, social, economic and cultural contestation. Therefore, in this chapter I turn my focus to the idea of constitutionalism in order to critically engage with how it is understood and used in South Africa's constitutional discourse.

My intention here is to argue that how we approach or understand constitutionalism has implications for our conception of the function, scope, ambition and possibility of a constitution as a document that a given society holds up as the shaper of its reality and a mirror with which it sees itself. For example, I intend to argue that whether constitutionalism is understood primarily in terms of an evolving historical, functional, normative or ideological account or some combination of these, will greatly influence what one accepts as falling

within the parameters of legitimate constitutional concerns, appropriate constitutional forms, as well as who is considered to be a legitimate actor or role player in giving shape to a particular society. In brief I intend to argue that the 'naturalness' of what is considered as falling within the realm of what is constituted, or what becomes the subject of socio-political contestation cannot rightly be determined *a priori* without regard to other pre-existing philosophical, epistemic, political, ideological, or, even cultural commitments. Simply, I want to be understood to suggest that there are no free floating 'natural' 'universal' incontrovertible constitutional ideals when it comes to the specifics of how a political community is constituted. Constitutional ideas have been and remain the subject of contestation that is the product of particular histories and the pre-eminence of particular intellectual traditions at particular points in history.

As I have already argued in chapter one, I start from the premise that prevailing political, ideological and cultural currents in South Africa have established liberal democratic constitutionalism as a hegemonic paradigm and discourse. Despite this assertion I intend to demonstrate here that the idea of constitutionalism, conceptually speaking can and should be understood outside any particular ideological frame if it is a to serve some analytical purpose that helps us understand the possibility and purpose of constitutions, their role in structuring and ordering society as well as why they have become a *sine qua non* with respect to determining questions of legitimacy as far as modern nation states are concerned.

In this chapter I briefly set out three vignettes around episodes of national significance and ask us to contemplate what it is about them individually that leads us to conclude whether or not they give rise to constitutional questions with implications for the country's constitutional politics. I do this as a way to segue into a discussion that makes us contemplate

what exactly it is that we understand constitutionalism to mean and what is it that informs our conception of constitutionalism. I then provide a brief sociological account of the rise of modern constitutionalism and how the evolution of this form of constitutionalism, in Europe, under specific circumstances was eventually universalised to establish an objective normative discourse of constitutionalism that has ultimately resulted in the prevailing hegemony of liberal modes of constitutionalism that operate as a 'global' template irrespective of a nation's history, economic ambition, or cultural context.

2.2 Political Problems and Constitutive Solutions *or* Constitutive Problems and Political Solutions? - No Clear Lines in the Sand

Before addressing ourselves to the central concern of this chapter, namely critically engaging the political, social, economic and cultural implications of how we approach constitutionalism from a conceptual standpoint, I want us to reflect on what renders a particular set of events to be regarded as having implications for constitutionalism and others not? In other words, what is it about some issues within the affairs of the nation that cause us to understand them as necessitating the invocation or appeal to the Constitution in how we make sense of them or work to resolve them? Or more to the point, what are the defining elements or characteristics of those issues, events or controversies that we believe renders those events as requiring that they be viewed through the prism of the Constitution? Without getting too far ahead of myself, what I am asking is what is it in public or academic discourses that causes us to regard certain political, social, economic or cultural controversies and not others as falling within the realm of the constitutional? Stated more urgently, this question asks what gives rise to some disputations in public discourse, for example, being regarded, as

socio-political or economic in nature and others being treated as giving rise to constitutional challenges, if not an out and out constitutional crisis?

In order to better understand what compels us to think of these questions in more practical terms, I am going to briefly present three sets of events that have played themselves out in South Africa over approximately the last seven years: the first being the Hlophe saga, secondly, the so called service-delivery protests and finally, the rise of the Economic Freedom Fighters and its battles in the National Assembly. An engagement with these particular events will enable us to better reflect on the extent to which particular incidents are read by commentators as having implications (or not) for South African constitutionalism, and the stability of South Africa's post 1994 constitutional order more broadly.

2.2.1 Judge Hlophe and the Constitutional Court Saga

The first matter is that relating to Judge President Hlophe of the Western Cape Division of the High Court (hereinafter Hlophe JP) and the judges of the Constitutional Court as well as the Judicial Services Commission, also touched on the overall transformation of the judiciary. In brief, the matter arose in 2008 as a result of allegations contained in a complaint to the Judicial Services Commission averring that Hlophe JP had sought to influence two judges of the Constitutional Court in a matter before that court involving then President Jacob Zuma[50] the details of which are not germane to my argument. What is of interest is the incredible amount of controversy the matter generated and how it was perceived as

[50] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*, *Zuma and Another v National Director of Public Prosecutions and Others* 2008 (12) BCLR 1197 (CC). For a detailed discussion of the factual matrix of this matter see the following: Nomthandazo Ntlama, 'The Hlophe saga: A question for the institutional integrity of the judiciary' (2011) 8 *US-China Law Review* 758; Murray Wesson and Max Du Plessis, 'Fifteen years on: Central issues relating to the transformation of the South African judiciary' (2008) 24 *SAJHR* 187; Sujit Choudhry, 'He had a mandate; The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *CCR* 1.

implicating the Constitution on several levels. The matter was portrayed both in popular and academic discourses as being quite proximate to, if not at the very core of, South Africa's young constitutional order, especially the independence of the judiciary. In the views of some commentators on this situation, what followed in the courts and subsequent disciplinary hearings took South Africa to the very brink of a constitutional crisis.[51]

Theunis Roux, in referencing the Hlophe matter, discusses it circumspectly, using closed quotation marks as 'the current constitutional crisis', noting the lack of consensus as to how best to characterise it.[52] Whereas, Nomthandazo Ntlama expresses the somewhat sensational view that '[t]he entire judicial system in South Africa has been plunged into crisis by nothing more than the "judicial gossip" that emanated from the Constitutional Court.''[53] At issue for Ntlama, was what she typified as the surreptitious manner in which the judges of the Constitutional Court as a collective had handled the whole affair, hence its culmination in a 'crisis'.[54] As the matter dragged on Pierre De Vos, commenting on 'perplexing' subsequent developments in this controversy, and also setting out his own sense of looming

[51] The appropriate characterization of the saga proved to be incredibly fertile ground for debate on public platforms as commentators exchanged views as to whether it constituted a full-blown constitutional crisis or not. See for example: Angela Quintal 'On the brink of a constitutional crisis' Cape Argus 15 June 2008, available at https://www.iol.co.za/news/south-africa/on-the-brink-of-a-constitutional-crisis-404549, (last accessed 16 November 2018); Mia Swart 'Little doubt that Hlophe's court application constitutes a crisis' Business Day 19 August 2009, available at: https://www.pressreader.com/south-africa/business-day/20090819/281968898705969, (last accessed 16 November 2018); and Piet Rampedi "SA 'in crisis over Hlophe' The Mercury 10 October 2013, available at https://www.pressreader.com/south-africa/the-mercury/20131010/281496454004887, (last accessed 16 November 2018).

[52] See Theunis Roux, 'Transformative Constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 Stell LR 258 at 269. Roux elaborates further in the same passage and states that '[t]he reason that I have placed the two phrases here in inverted commas is that events they refer to have attracted a fair amount of disagreement as to their nature and how they should be (or have been) properly characterised'.

[53] Ntlama op cit note 50 at 767.

[54] Ntlama argues that '[t]he manner in which this matter has been handled has undermined public confidence in the administration of justice as evident by the public spat amongst the highly respected people of South Africa.' She continues further, asserting that '[t]he Constitutional Court Judges' activism in this matter has resulted in a brazen wave of discontent, which has cast doubts over the legitimacy of the judicial processes and tarnished the image of the judiciary at large.' Ibid at 798-9.

constitutional doom, contended that the unwillingness of two Constitutional Justices to continue their involvement with the complaint had 'plunged South Africa into a serious constitutional crisis.'[55] For De Vos, rather than the 'flawed' process and the potential cost in public confidence in the courts, that had raised Ntlama's ire, at stake was the fact that he regarded this apparent recantation by the two justices at the heart of the matter to be an abdication of their 'constitutional and legal duty to pursue the complaint.'[56] For according to De Vos, '[j]udges do not have a choice in upholding the Constitution and the law: they are legally bound to report unconstitutional or illegal behaviour by another judge and do not have the luxury of not getting involved.'[57]

Broadly speaking, there was, at the time and subsequent to these events a deep-seated sense that if this was not an actual constitutional crisis, South Africa had been brought to the very cusp of one. Strangely ten years on, this matter at the time of writing remains substantially unresolved, all judges involved either continue to serve or have served out their terms without interruption, despite numerous court cases and hearings on the matter. The case at the Constitutional Court against President Zuma was decided without further fanfare. This raises the question as to why a matter essentially between three judges acting extra-curially, where the facts were so doggedly disputed played itself out in the public domain and came to be perceived, in the public imagination, as having potentially negative implications for the judiciary as a whole and by extension South Africa's constitutional order. If there was indeed a crisis here with implications for South African constitutionalism, what in precise terms was it?

[55] Pierre De Vos, 'We have a constitutional crisis on our hands' (2008), http://constitutionallyspeaking.co.za/we-have-a-real-constitutional-crisis-on-our-hands/, (accessed 16 November 2018).
[56] Ibid.
[57] Ibid.

2.2.2 The So-called Service Delivery Protests and Place of the Local

Another issue that, for a period remained prominent in the public eye over the past few years, is that related to so-called 'service' delivery protests.[58] I say so-called because the sheer extent, and number of protests or crowd-related incidents that occur daily in South Africa is substantial and there continues to be debate as to how - from an analytical perspective - to properly account for, and mark them.[59] Peter Alexander, from surveying the evolving literature, identifies the following ways in which scholars have characterised the protests: 'grass-roots protests', ''citizenship protests', 'social protests' and 'local protests'.[60] Notably in much of the analysis the framing has been focused on politics, corruption, citizenship, governance, representation, social cohesion, methods of protest, organisation and rights in general.[61]

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[58] With respect to the 'service delivery protests' the following sources will serve to illustrate the different takes on the matter: Fienie Grobler 'Service-delivery protests a 'warning sign' for government'. *The Mail and Guardian* 20 July 2009, available at: http://www.mg.co.za/article/2009-07-20-servicedelivery-protests-a-warning-sign-for-govt), (last accessed 16 November 2016); Silas Nduvheni 'Poor service. More protest.' News24.com,,available at http://www.news24.com/Content/SouthAfrica/News/1059/e18f72c8255a4582a71a67749f914319/10-08-2009%2010-08/Poor_service_More_protests, (last accessed 16 November 2018); Wilson Johwa 'Delivery protests growing more political' *Business Day* 22 July 2009 available at http://abahlali.org/node/5501/ last (accessed 16 November 2018); Steven Friedman 'People are demanding public service, not service delivery" *Business Day* 29 July 2009, available at: http://www.abahlali.org/node/5548, (last accessed 16 November 2018).

[59] Peter Alexander, Carin Runciman and Boitumelo Maruping, *South African Police Service data on crowd incidents: A preliminary analysis*, Social Change Research Unit, University of Johannesburg 57 (2015) at 13-15, available at https://africacheck.org/wp-content/uploads/2015/06/South-African-Police-Service-Data-on-Crowd-Incidents-Report.pdf, (last accessed 16 November 2018). In this regard, the main source of information regarding protests is from police statistics, however, the authors of this report note that the nomenclature used by the South African Police Service is that of 'crowd-related incidents' rather than protests. This term thus includes both incidents that are deemed peaceful as well as those deemed to be unrelated to unrest. As such they suggest that the data be used with caution as it is raw and includes all incidents. See also Peter Alexander, Carin Runciman and Boitumelo Maruping, 'South Africa's Incident Registration Information System (IRIS): Its use and abuse in protest analysis' (2016) *South African Crime Quarterly* 9 at10. Using the raw data and defining protest as 'a popular mobilisation in support of a collective grievance', the authors estimate that during the period 1997-2013 there were 67 750 (or 43% of 156 320) recorded 'crowd incidents' that constitute protest in accordance with their aforementioned definition.

[60] Alexander op cit note 12 at 25-26.

[61]See for example the following: Karl Von Holdt and Adèle Kirsten, *The smoke that calls: Insurgent citizenship, collective violence and the struggle for a place in the new South Africa: Eight case studies of community protest and xenophobic violence* (2011); Rebecca Pointer, 'From illegitimate disruption to failing state: How South

By way of contrast it is *not* commonplace to find this rising phenomenon of protest, often accompanied by violence and the destruction of property, being analysed from the perspective of what impact this state of affairs has on constitutional politics or how this bodes more broadly for the South Africa's constitutional project.[62] This is not to overlook the fact that these protests do occasionally attract the attention of constitutional scholars, however on current evidence they are usually raised tangentially within discussions on democracy,[63] poverty,[64] or socio-economic rights; [65] even then the context tends to be one concerned with adjudication rather than with more profound questions around fault lines in the way society is constituted.

Linda Stewart, whilst not drawing a direct connection to the Constitution or constitutionalism, very incisively connects the increasing incidence of protests to the neo-colonial, post-apartheid state that has constructed empty legally constituted subjects who are then rendered invisible in a regime of complex legal organisation.[66]

Invoking Deleuze's critique of human rights discourse, Stewart argues strongly 'that when bodies have limited or no access to water, sanitation, shelter, adequate food and

African newspapers framed 'service delivery' protests in 2013', (Unpublished MA thesis, University of Cape Town, 2015); Alexander op cit note 12; Linda Stewart, 'Rights discourse and practices, everyday violence and social protests: Who counts as subject and whose lives are real in the neo-colonial South African nation state?' (2014) 18 *LDD* 1; Madlingozi op cit note 33, Dugard et al op cit note 27.

[62] Interestingly, there is fair amount of work on the right to protest when more narrowly framed under workers' rights to strike, especially where the destruction of private property is concerned during such strike action. For example, see Ernest Manamela and Mpfari Budeli, 'Employees' right to strike and violence in South Africa' (2013) 46 *CILSA* 308 and Khulekani Khumalo, 'Developing the crime of public violence as a remedy to the violation of the rights of non-protesters during violent protests and strikes - A critical analysis of the South African jurisprudence' (2015) 36 *Obiter* 578. For a more provocative and critical perspective on the importance of the right to assemble as a recognized and fundamental right to rebel in favour of a different form of government or state of being constituted see Woolman, op cit note 41.

[63] Henk Botha, 'Representing the poor: Law, poverty and democracy' (2011) 22 *Stell LR* 521 at 540-1.

[64] Pius N Langa, 'The role of the Constitution in the struggle against poverty' (2011) 22 *Stell LR* 446.

[65] Oliver Fuo and Anél Du Plessis, 'In the face of judicial deference: Taking the" minimum core" of socio-economic rights to the local government sphere' (2015) 19 *LDD* 11. See also Joel M Modiri, 'Law's poverty' (2015) 18 *PELJ* 224 at 234-5.

[66] Stewart op cit note 61at 20.

healthcare this is not merely an infringement of their rights but it is also a form of systematic and structural violence shaping their everyday existence.'[67] Broadly, Stewart's argument, whilst gesturing towards some level of constitutional schism between the promise encapsulated in the rhetoric of rights discourse and lived realities, stops short of arguing that. Ultimately, a question that begs asking, from a constitutional point of view, what is to be made of this 'rebellion of the poor' to borrow Alexander's terminology?[68] What does this say about our regard for the local within our constitutional scheme that espouses a commitment to participatory democracy, dignity, equality, freedom and socio-economic rights, if this state of affairs can complacently be understood as falling beyond the purview of the constitutional? Or to think of it differently, what would it mean for how we think about these types of protests if we framed them as asking profound questions of us as to how our society is constituted?

2.2.3 The Economic Freedom Fighters' Parliament's Cultural Wars

I turn now to the third issue that I wish for us to ponder, namely that concerning the unprecedented rise of the Economic Freedom Fighters (EFF) into what Noor Nieftagodien has dubbed as 'arguably the most effective parliamentary opposition to the ruling party' since the advent of democracy.[69] The EFF came into existence in 2013 and quickly rose within the ranks of parliamentary opposition parties by obtaining the third highest number of seats after the ANC and the Democratic Alliance (DA) in the 2014 national elections. The swearing-in of the EFF into Parliament has, both literally and metaphorically, injected colour into South African

[67] Ibid.
[68] Peter Alexander, 'Rebellion of the poor: South Africa's service delivery protests – A preliminary analysis' (2010).
[69] Noor Nieftagodien, 'The Economic Freedom Fighters and the politics of memory and forgetting' (2015) 114 *South Atlantic Quarterly* 446.

politics by unsettling the usually formal and decorous routine life of South Africa's legislatures.[70]

In its short history as a party in Parliament, the EFF has been, in a non-pejorative sense, a disruptive force with respect to the habitual ebb and flow of parliamentary politics which has resulted in commentators being divided as to whether these are positive or negative developments. For example, the EFF members of parliament have challenged the parliamentary dress code by appearing in red miners and domestic workers overalls apparently symbolising the party's being grounded in workers' struggles; they have been involved in numerous walkouts on grounds of principle; they have refused to vacate Parliament where they believed their ejectment unwarranted resulting in their having to be forcibly removed at the insistence of the Speaker of the House; they have unrelentingly challenged the President during his annual opening of Parliament where he makes his state of the nation address (an occasion where convention usually dictates that no questions are put to the President for the duration of his speech) which, again, led to their being violently ejected from Parliament; and they have litigated against Parliament on several occasions in defence of their rights as members and their party's positions.[71]

Whilst convincingly arguing that the EFF meets the various criteria marking it as a populist party, [72] Sithembile Mbete also makes apparent the tensions and challenges that the EFF presence has exposed with respect to parliament's colonial conventions,[73] including the

[70] SAPA 'EFF overalls brighten up parliament,' available at https://www.news24.com/elections/news/eff-overalls-brighten-up-parliament-20140521, (last accessed on 16 November 2018).

[71] Sithembile Mbete, 'The Economic Freedom Fighters-South Africa's turn towards populism?' (2015) 14 Journal of African Elections 35. As far as litigation is concerned, see for example *Chairperson of the NCOP v Malema* 2016 (5) SA 335 (SCA); *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC)

[72] See also ibid; Nieftagodien op cit note 69; and Roger Southall, 'Threats to constitutionalism by liberation movements in Southern Africa' (2014) 49 *Africa Spectrum* 79.

[73] Mbete op cit 71 at 50.

way the ANC is quite willing to use its parliamentary dominance as the majority party to have members of the EFF physically removed for utterances made in Parliament.[74] What is of interest to me is that beyond the 'aesthetic' and performative' styles aptly identified by Mbete and Nieftagodien, there seems to be some fundamental questions that the EFF is raising about what exactly it is that South Africa has committed to in unquestioningly retaining the 'inherited' conventions, practices and culture of parliament.

From the point of view of (re)constituting South African society, how do we reconcile the fact that Parliament, as an institution that is meant to be representative of the people and at the forefront of driving a 'transformative' national agenda retains much of its elitist, and arguably colonial culture? In other words, despite EFF's prompting why have we failed to have a conversation about whether or not our legislatures are also representative from the point of view of cultural or class inclusiveness as part of a project of constitutional reimagining of what parliament being representative means? Are we able to imagine the contestation around an alienating culture in Parliament being framed as constitutional crisis?

Whilst there is no obvious connection between these three events, what singles them out as being of interest here is how they have all played themselves out in ways that have captured the public imagination and generated academic interest. It is the response to these incidents, specifically how they are perceived to implicate South African constitutionalism or not that interests me. This is because it raises in me questions about what informs or influences what we understand as 'properly' falling within the purview of constitutionalism. For example, do we understand our constitutionalism to be implicated only in those matters

[74] Ibid 52.

relating primarily to formal rules and structures that are textually or normatively framed and concerned with the conduct or relations of named bodies or actors in the constitution?

So, in the Hlophe saga, we understand it as having constitutional implications because it occurs within the judicial branch and involves judges, despite the fact that the matter primarily involved three persons in two discrete incidents. Or do we understand our constitutionalism to extend in such a way that we consider it to be implicated in those matters where the manner in which our society is constituted is experiencing serious tensions owing to some within the polity experiencing a prolonged sense of exclusion either on economic or cultural grounds? In short, in setting out these three vignettes for our consideration I am prompting us to reflect on what or who shapes what we understand constitutionalism to be about? How are the determinants of what we perceive as being in or out of the reckoning arrived at? Is constitutionalism limited to matters within the textual contemplation of the drafters? Or does it extend further to other matters that address questions about the way society is constituted? It is these types of questions and issues that are implicated in the type of inquiry I embark upon in this chapter.

2.3 Attaching Some Meaning(s) to Constitutionalism – In Search of Conceptual Clarity

At the outset of this section it is worth stating that constitutionalism as a concept is notoriously difficult to define, or at least defining it in a manner that is adequately inclusive so as to capture the scope of concerns raised in its name without being overly prescriptive; yet so precisely tailored as to be analytically useful across different contexts and disciplines. In some earlier work where I have grappled with the concept in an attempt to arrive at an analytically useful, yet neutral description of constitutionalism I described it as a "a system

of governance established under a constitutional document whose primary function is to structure, delineate, distribute and limit state power within a defined political community."[75] I was motivated to do this as I believed it essential to seek to provide some clarity, as from the literature it is evident that the term is understood and used in different ways depending on context, which fact is not always obvious.

However, reflecting upon that conception of constitutionalism, whose primary virtue is possibly its simplicity, I have come to realise that this was at the cost of highlighting the importance of any historical and social context, which is critical for understanding the scope of interests and concerns that are encapsulated in the idea of constitutionalism in any applied context. Critically a historically sensitive, yet non-ideological understanding of constitutionalism is necessary if the work and worth of constitutions of different types and thrusts is to remain open to critique whilst also leaving space for debate concerning the possibility of constituting new forms of society or social ordering. Therefore, in as far as proffering an understanding of constitutionalism that is general, yet historically sensitive whilst embracing the necessary sense of openness to new possibilities, Upendra Baxi's conception has much to commend itself. According to Baxi:

> Constitutionalism, most generally understood, provides for structures, forms and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual/associational autonomy. Constitutionalism provides narratives of both *rule* and *resistance.*[76]

Baxi's conceptualisation is particularly appealing in that he draws out constitutionalism's functional concern with power-mapping whilst at the same time

[75] Sibanda op cit note 15 at 484.

[76] Upendra Baxi, 'Postcolonial legality' in Upendra Baxi, Henry Schwartz and Sangeeta Roy (eds), *A Companion to Postcolonial Studies*, (2001) 540.

emphasising the contextual nature of constitutionalism by marking it as a site of contested meanings and possibilities. By this I mean that Baxi implicitly enjoins us to reject the idea of constitutionalism as something that is best apprehended only in terms of prescribed abstract normative terms. Understood in this way, constitutionalism, in a given context, is concerned with both function and a concrete set of societal principles and ideals that emerge as a response to a preceding set of historical circumstances.

In other words, Baxi's conception is edifying in that it alerts us to the idea that constitutionalism in a given setting does not come into existence for its own sake or simply for the sake of venerating an abstract set of norms, values or principles. Consequently, rightly implied, in Baxi's conception is the idea that those constitutional norms, structures, values or principles that are adopted in any given context need not be preordained by some 'higher' force or power, rather they are in the ordinary course of things influenced by the political, economic, social and cultural developments of their time and place.[77]

Therefore, constitutionalism, as I will argue here, ideally should not be understood to as being about the existence or non-existence of a checklist of items that point towards a preordained form of state as suggested in some scholarship;[78] rather it should be understood as expressing the decisions and choices arising out of a society's struggles to self-define, self-comprehend and self-regulate; in other words constitute itself. This understanding stands in stark contrast to many understandings of modern constitutionalism that characterise it as a largely uniform universalist set of institutional arrangements encompassing a basic register

[77] See Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) at 114-7.

[78] Charles Manga Fombad, 'Strengthening constitutional order and upholding the rule of law in Central Africa: Reversing the descent towards symbolic constitutionalism' (2014) 14 *AHRLJ* 412; For a rather uncritical take which, I suggest, was representative of the approach taken in the post-independence era in many African countries see Benjamin Obi Nwabueze, *Constitutionalism in the emergent states* (1973).

of normative, substantive and procedural prescriptions, despite modern constitutionalism's undoubted European roots and its eventual circulation through European imperialism. More on this latter point in due course.

Whilst accepting that modern constitutionalism has come to be associated with particular norms, values and principles, the position I take here is that these are no less the product of evolutionary processes that are closely associated with particular histories, including that of the advent of the nation-state as the pre-eminent state form. Therefore, central to the argument against a near exclusive normative conception of constitutionalism is the idea that constitutionalism need not be understood as being about delivering a single preordained state form either structurally or ideologically. Rather, as I will demonstrate below, if one is true to the historical evolution of the idea of constitutional models and forms then it is an expression of choices made by those collectively responsible for establishing *a particular system or mode* of constitutionalism.[79]

The conception of constitutionalism I advance here thus tends to run counter to more liberal normative accounts such as that of Richard Kay who connects the roots of modern constitutionalism with the works of John Locke - widely viewed as one of the founding fathers of liberalism. According to Kay, constitutionalism, as a concept, arose out of the realization that government as a repository of ever-increasing state power needed to have limitations imposed upon it in order to avoid it encroaching unjustifiably or tyrannically into the private sphere that was the preserve of its citizenry. [80]

[79] Generally, see Chris Thornhill, *A Sociology of Constitutions - Constitutions and State Legitimacy in the Historical-Sociological Perspective* (2011).

[80] Richard Kay, 'American Constitutionalism' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (2001) at 18-20.

The corollary to this was that one of the state's paramount obligations was to secure the rights of citizens, which included protecting the encroachment of said rights by other citizens. So conceived constitutionalism is, I suggest, decidedly ideological and associated with a particular form of government that is poised to advance particular ends irrespective of historical or cultural context. That this conception of modern constitutionalism has seeped into South African constitutional scholarship as a core foundation is illustrated by authors such as Iain Currie and Johan De Waal who describe one version of constitutionalism as "the idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution".[81] Implicit here is that the idea of constitutionalism is, at its core, primarily a limiting doctrine designed to ensure that the exercise of governmental power is limited structurally, procedurally and substantively.

This is a view that I will demonstratively counter in preference for a conception definitional understanding of constitutionalism that is historically sensitive, recognises the role of economic and cultural contexts as well as the power mapping and regulatory elements of constitutionalism. Therefore, the working description of constitutionalism that I articulate in this here builds on Baxi's conception and apprehends the term constitutionalism to speak of a system, primarily of governance, that is established to, amongst other things, regulate power in its many guises, the practices surrounding the use of that power as well mediate the space for the contestation of 'ideas and practices concerning justice, rights, development, and individual/associational autonomy.'[82] Implicit here is the idea that each constitution because

[81] Iain Currie, Johan De Waal, Pierre De Vos et al., *The New Constitutional and Administrative law* vol 1 (2001) 8.

[82] See Baxi op cit note 76 at 540.

of its peculiar historical, social, economic, cultural and epistemic circumstances as it emerges in its own context has an identifiable constitutive or constitutional 'DNA'.

2.4 No Constitutionalism Without Constitutions[83] - The Origins and Dispersal of Modern (Liberal) Constitutionalism

Having already made the case, in the introduction, as to why I consider liberal constitutionalism to be discursively hegemonic in South African constitutional scholarship, I proceed here and in the sections that follow to provide a brief overview of the history of the modern constitutions. This is important in order to lay the foundation upon which a robust and critical engagement with the prevailing conception of South African constitutionalism that foregrounds normative and structural aspects as they relate to obligations borne by the state and institutions deriving their authority from the Constitution. This is a vital first step towards what I believe integral to understanding the limitations imposed on our constitutional imaginary by modern constitutionalism that has evolved into a hegemonic normative framework giving us an appreciation of how ideas central to it have emerged, coalesced and eventually circulated beyond the spaces and contexts of their own origins.

2.4.1 The Organic Development of Constitutions

The suggestion that the history of constitutions, in all likelihood, tracks that of social formation may at first glance appear to be a gross over-statement depending on what you understand a constitution to be or what the act of constituting society entails. Yet, according to some accounts the origin of constitutions is suggested to be grounded in individual acts of

[83] This is a deliberate play on Kenyan constitutional scholar HWO Okoth-Ogendo's famous essay entitled Constitutions without constitutionalism: Reflections on an African paradox', Okoth-Ogendo op cit note 30.

self-regulating which, through necessary familial interactions, then extended through family organisation into what Bruce Yandle, designates as 'organic constitutions.'[84] In making this argument, Yandle posits the notion 'that political constitutions grow from and are rooted in the customs and norms of individuals who form communities that give rise to the nation-state.'[85]

Whilst I am not entirely convinced by the idea of the constitution being one rooted in the individual, I do think that Yandle's elaboration is a provocative one in that it proposes that we perceive the idea of the constitution as emerging, developing and gaining traction from within the ambit of ordinary human relations such as the family unit before incrementally evolving through an ever widening network of relations and complexity ultimately resulting in the contrivance a state constitutions.[86] It is useful in the sense that it causes us to think about the early notions of constitutions that would have been most likely centred on social norms, experiences, practices, or customs that were internally generated rather than exogenous transplants. Implicit here is the idea that such constitutions through proximity to origin would likely have an enduring legitimacy amongst those subject to their authority.

Ruth Gordon develops a conceptually similar approach to Yandle that presents constitutions as living matter through her notion of 'growing constitutions.'[87] Growing

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[84] Bruce Yandle, 'Organic constitutions and common law' (1991) 2 *Constitutional Political Economy* 225.
[85] Ibid.
[86] Yandle argues that:

> The constitutional mapping between individuals, families and communities generates a natural state that forms a basis for consistent (predictable) actions reflecting the root values and goals of the individual units that form it. The mapping, which can also be referred to as culture, customs, social norms and rules that form a natural government, is not everywhere dense.

See ibid 227.
[87] Ruth Gordon, 'Growing constitutions' (1998) 1 *U Pa J Const L* 528.

constitutions, according to Gordon, are those whose ability to 'flourish and succeed' is dependent on their being;

> firmly planted in the cultural soil from which they gain legitimacy. Thus, growing constitutions embody the not so novel but no less important idea that constitutions and laws should reflect and be derived from the cultural norms in which they must endure.[88]

Although approaching the subject matter from differing perspectives and speaking to different contexts, both Yandle and Gordon's concern with the rootedness of constitutions brings into the reckoning a critical idea at the core of determining the worth or value of a particular constitution, namely its cultural legitimacy amongst those under its authority, without which, Gordon cautions, constitutions are liable to 'fail' or 'become irrelevant.'[89] Thus by connecting rootedness to legitimacy, the implications are that rather than a focus on its form, the potential for constitutions to successfully take root depends, amongst other things, on their being grounded in the experiences, norms and cultures of those over whom they reign. In other words what is being argued is that constitutional legitimacy should be generated and determined primarily with reference to internal considerations of that which matters and is of social, or cultural value to those living under a particular constitution rather than with reference to externally generated considerations.

[88] Ibid 530.

[89] Ibid 530 -1. She argues further that:

> constitutions that are not firmly grounded in the cultural mores of the society in which they operate are destined to fail, become irrelevant, or be reshaped and adapted to meet the needs of the culture and society in which they are situated. Indeed, most postcolonial constitutions in Sub-Saharan Africa have largely succumbed to irrelevance and debacle.

2.4.2 Sociological Historical Functionalist Approaches to Constitutions and the Question of Legitimacy

This notion of legitimacy is at the heart of Christopher Thornhill's study wherein, from a sociological perspective, he examines why human societies, almost without exception in the modern era, have chosen to "produce, and articulate, their grammar of legitimacy in constitutional laws.'[90] In a richly researched historical account of the evolutionary development of constitutions (and public law) more generally, Thornhill asks:

> why modern societies have tended independently, and with some consistency across socio-cultural variations to elaborate constitutions, why societies tend to concentrate their political functions in constitutional form and why constitutions and the normative reserves that they contain, prove vital to the stability of modern societies and the legitimacy of their political institutions.[91]

Of particular interest to Thornhill is how this development of an abiding fidelity in constitutions as politically legitimating instruments has become established on the basis of abstract constitutional laws, norms and principles derived from the deductive logic of Enlightenment thinkers writing in the 1700s and 1800s. Drawing connections to early critiques by sociologists such as Durkheim and Weber who pioneered what Thornhill terms 'an anti-normative pattern of legal constitutional analysis',[92] Thornhill argues that this normative bias in modern constitutional analysis has resulted in constitutional scholarship that omits to draw the necessary connection between constitutional laws and any underlying political or social structures from which notions of legitimacy may be drawn.

Evidently motivating Thornhill's study is some level of antipathy with a seemingly free-floating normative conception of constitutional legitimacy that remains disconnected from

[90] Chris Thornhill, *A Sociology of Constitutions - Constitutions and State Legitimacy in the Historical-Sociological Perspective* (2011) 4.
[91] Ibid 13.
[92] Ibid 3.

specific social, political or cultural contexts. Demonstrating the full reach of concerns, Thornhill makes his point incisively as follows.

> The fact that *the constitutional order has been promoted as a general ideal of legitimacy in post-1945 politics has tended to obstruct sociological inquiry into the deep-lying normative structure of society, and the increasing reliance of modern societies on relatively uniform patterns of constitutional organisation has not been reflected in a consonant growth of society's self-comprehension in respect of its normative political foundations.* In fact, it is arguable that in the later twentieth century the original and formative post-Enlightenment dichotomy between normative and sociological inquiries into constitutions and constitutional legitimacy reproduced and reconsolidated itself. In this process, the assumption that constitutional principles, especially those condensed into formal rights, could be definitively illuminated as normative objects became almost unshakably dominant. (emphasis added) [93]

Interestingly, despite a clear sense of unease with what he characterises as 'the dichotomy between normative and sociological inquiries into constitutions and constitutional legitimacy'[94], Thornhill makes it clear that his issue is not the normative accounts per se. Rather his own position is that:

> [t]his book is not hostile to normative constitutional claims. In fact, this book shares the conventional position unifying most normative political theories from the Enlightenment, and it accepts as valid the common normative assumption *that particular political institutions (usually states) acquire legitimacy by means of constitutional documents, and that constitutionally enshrined subjective rights, protecting those subject to political power from non-mandated coercion and recognizing these persons as bearers of immutable claims to dignity, equality and like redress are probable preconditions for the legitimate exercise of power.* [95] (Emphasis original)

Thornhill's position above is interesting as by setting out his own normative commitments, as well as alerting us that they indeed cohere with Enlightenment political theories, he demonstrates that his issue is not with normative analysis per se. Rather, what he takes issue with is constitutional analysis that seeks to determine questions of political legitimacy in a

[93] Ibid 7 (emphasis original).
[94] Ibid 4.
[95] Ibid 8.

specific societal context by reference to seemingly free-floating norms. In other words, his overriding disaffection is with the lack of explanatory force that abstract normative constitutional analysis is able to offer in as far as helping us to understand why modern societies have placed so much store in constitutions as legitimating instruments.[96]

It is thus on the basis of this understanding and these commitments that Thornhill justifies utilising historical functionalist methods by which he seeks to make sense of constitutions:

> both as highly varied outcomes of inner-societal processes of historical/political formation, yet also to appreciate constitutions as institutions through which emergent European societies, in relatively generalized fashion regulated and adapted to their underlying functional dimensions and exigencies.[97]

Thornhill's method, therefore, is to seek to comprehend the premises of constitutional legitimacy from an internal perspective that is rooted in an individual society's history, such that even where there is a circulation of constitutional forms and ideas that become imbedded in other settings, it remains important to understand how they become imbedded in local settings and ultimately attain legitimacy. In other words, Thornhill should not be read as deriding or eschewing norms or normative accounts, rather his aim is to demand that our understanding of political legitimacy, as generated by constitutions and related laws, should be read against actual social formations on which constitutions draw their political legitimacy.

Utilising this historical functionalist method, Thornhill details an incredibly rich account of the social and political origins of modern constitutions in Europe through tracking the production and organisation of political power from the feudal period to the end of the 20th century. For example, Thornhill discusses the emergence of the Holy Roman Empire in

[96] Ibid 8.
[97] Ibid 13.

Europe in order to illustrate the process by which the contestation between church and monarchic power over investiture ultimately brought about the development of a commonly held set of rules, processes and administrative institutions that functioned at a growing level of social and personal abstraction.[98] In other words, Thornhill well demonstrates how as the monarchy and the papacy battled for ascendancy in the hearts and minds of the populace, each side was forced to go to ever greater lengths to show that its authority represented uniform, impersonal legal order that rightly had to be obeyed by those subject to it.

The contestation between secular (state) and religious (church) authorities to secure ascendancy over each other was ultimately won by the state (through a co-optation of the church's institutional and normative innovations) and led to the establishment of institutionally abstract autonomous state-based constitutions as the fundamental law underpinned by a formalised regime of legality through the enactment and enforcement of impersonal laws to be applied generally across the population. Thornhill captures this phenomenon as follows:

> Indeed, just as the church had borrowed elements from Roman law and other ideas of legal personality from the secular arena, worldly political actors also began to replicate the church's legal and procedural innovations, and secular institutions increasingly employed techniques of legal-political abstraction that they appropriated from the church. The growing legal order of the church thus provided a general model of legal organization for early Western societies, and, by the twelfth century, this had become formative for the initial construction of secular political power in its characteristically modern institutional form. [99]

The granular detail of Thornhill's treatise whilst fascinating and tightly woven is beyond the scope of my present interest in this chapter, however, there are a few points that I consider particularly noteworthy from Thornhill's overall method that problematise an excessively

[98] Ibid 20-39.
[99] Ibid 32.

normative approach to the study of constitutions, and, I suggest, by necessary extension modes of constitutionalism. The first point to note with respect to the emergence of modern European constitutionalism is that the issue of political legitimacy, whilst undoubtedly having normative dimensions, cannot be satisfactorily understood without tracking its history in terms of the social and political episodes that inform how individual constitutions attained their acceptance or authority as repositories of political power and instruments that structure as well as regulate the respective societies in which they emerged.

The second significant insight that Thornhill offers up is that of vividly illustrating what I term here as the 'normative turn' in modern constitutionalism. This normative turn in the sense of a universalising externally generated abstract set of constitutional norms, principles and doctrines that predominate modern constitutional discourse is strangely at odds with what Thornhill's method illustrates. His method, rather demonstrates that the emergence of the norms of modern constitutionalism in Europe were the result of several centuries widespread contestation, experimentation, crisis, revolution, and a progressive coalescing of ideas that culminated in an incipient form of the rule of law and rights-based constitutionalism. In making evident this emergence of this normative turn as a distinct phenomenon, Thornhill helps us to differentiate between a more organic (and hence arguably more legitimate) conception of the evolution of constitutions that is connected to time and place as opposed to a conception that is teleological in nature which in turn circulates almost invariably as a transplant in post-colonial settings owing to a preponderance of external forces propagating as universal, ideals, normative formulations and prescriptions sourced in Enlightenment thought and European constitutional forms.

Thirdly, Thornhill's methods are suggestive of the idea that approaching the study of constitutions primarily from an abstract normative point of view without locating the constitution in question in its own social and political history that inform its production ultimately does not reveal much about what it is that renders it legitimate or allows it to accumulate legitimacy. By this I mean that Thornhill's method forces us to confront the limitations of normative accounts of constitutional legitimacy if what we're really interested in is how to *engender* a modus of constitutionalism that has the potential to endure as a result of its connectedness to a society's actual history, processes and ambitions.[100]

Whilst the insights I have drawn from Thornhill's method and study are immensely useful for the purposes of helping us to tease out the shortcomings of privileging purely normative approaches to constitutional analysis and legitimacy, I do harbour at least two reservations about its overall utility in helping us make sense of the prevailing hegemony of modern constitutionalism in colonial and post-colonial settings where constitutions have tended to be portrayed as the repositories and measures of political legitimacy. To begin with, his normative commitments betray a constrained, and, I would argue, an ideologically bounded conception of *the political* that limits itself to the so-called public sphere.

I say so-called because Thornhill's conception presumes the existence of a neat and ordered division of spheres between 'the public' and 'the private' that somehow precedes the forces he identifies as producing constitutional and public power. This particular predisposition is evident where Thornhill sets out the features that he considers to be definitive of a constitution namely, his emphasis on constraint, representative forms of government and his near exclusive focus on public power and public law to the near exclusion

[100] Ibid 374.

of economic and social relationships or dynamics in any significant way. In essence his sociologically driven account is focused on social and political elites already in positions of ascendancy at the point at which he commences his account, for example he focuses on the church leadership, monarchs, intellectuals and politicians. As far as the role of ordinary members of society is concerned Thornhill tells us very little; this impacts his characterisation of the realm of the constitutional and therefore how one understands and evaluates questions of legitimacy.

Additionally, Thornhill's analysis, because of its inward focus on European states as forming the subject matter of his study, tells us little about how such states were exercising their emerging constitutional statehood to influence or impact on other parts of the world with which they interacted as part of their imperial expansion. Outside of the revolutionary period in the United States of America, there is little discussion of how the consolidation of European statehood was influenced or impacted upon by the imperial ambitions of the states under study. Nor does Thornhill offer any particular insights into how normative constitutional concepts forged in Europe were then distorted to establish the basis of the constitutional forms imposed on conquered territories to the exclusion of indigenous populations. Although in fairness to Thornhill he does, early on in his study, state that it is limited to modern European states and suggests that in future work he will engage in a sociology of constitutions in the colonies.[101]

However, a question that I would suggest demands some reflection is whether a study locating the evolution of European constitutions within modernity (as Thornhill's does) can make any claim to completeness whilst not engaging modernity's broader implications in as

[101] Ibid 8-12.

far as Europe's imperial histories? This is, in my view, an urgent question as Thornhill's study's lack of engagement with the interconnection between the formation of modern constitutions and the colonisation of Latin America, Africa, Asia and the Pacific, wherein some constitutional systems were regarded as bringing into being systems of established sovereign states as opposed to another tier of state form which, within that same system conjured up by imperial powers, were simply not recognised as being possessors of popular sovereignty (until such time as they were).

In other words, how do modern constitutions emerge in the context of an expansionist European and in what ways does this relationship characterised by what Antony Anghie terms the 'dynamic of difference'[102] influence constitutionalism's normative turn? [103] Of course, Anghie's comments are made with respect to his very well chiselled critical exploration of the historical roots of international law and one of its core doctrines, sovereignty. Ultimately, my point here is that whilst Thornhill's treatise does well to present us with very thoughtful and useful insights with his historicised account of the sociology of modern constitutions, we still need an account of modern constitutionalism that engages in a similar vein to Anghie's critical engagement with respect to international law; that is to say, an account that foregrounds imperialism as it engages the Eurocentric history of modern constitutionalism, questions of constitutional legitimacy and how imperial expansion influenced these developments.

[102] Ibid 4.

[103] Anghie op cit note 42 at 4. Anghie tells us:

> I use the term 'dynamic of difference' to denote, broadly, the endless process of creating a gap between two cultures, demarcating one as 'universal' and the other as 'particular' and the other uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society.

See also at 267 for a discussion on the modern corollary of the dynamic of difference as the gap between the 'developed' and the 'undeveloped'.

2.4.3 Modern Constitutionalism and its Relationship with the Spread of Imperialism

Before turning to deal squarely with the main issue under consideration in this section, namely the relationship between modern constitutionalism and imperialism, it is worthwhile briefly considering some further insights from Antony Anghie's critical account that explores the tight interrelationship between the foundations of international law and imperialism.[104] Expressed succinctly, Anghie's thesis examines closely the *idea* of sovereignty and how it emerges as a legal doctrine in response to, and sometimes in aid of, Europe's civilizing mission that he argues defined the emergence of international law.

According to Anghie, an attempt to make sense of this doctrine only in terms of its normative propositions would be to miss out on the problematics of how a concept conceived of in Europe in accordance with European political and cultural practices came to draw the dividing line between those possessing of said sovereignty and those who lack it; Anghie argues that the development of the doctrine was a response to the 'problems relating to the colonial order'[105]. For instance, it was on the basis of sovereignty that questions relating to who could be recognised as an actor, who could make claims on territory and who could be 'possessed' by, and subjected to, the control of those of who had the authority in international law where such matters were determined.[106] Integral to Anghie's critical method that shows the 'other' side of international law and the evolution of the doctrine of sovereignty is a regard for rich historical accounts of the period during the emergence of international law, that bring into the reckoning, 'alternative histories – histories of colonial

[104] Ibid.
[105] Ibid 6.
[106] On this point see Anghie's discussion of Christopher Columbus' declaration of taking possession of the 'Indies' on his landing in the Americas. Ibid 13-16.

resistance to colonial power from the vantage point of peoples who were subjected to international law.'[107] In this section, I want to engage the pioneering work of James Tully that embarks on a similar type of analysis with respect to the relationship between imperialism and the modern constitutional democracy.

In examining the relationship between modern constitutionalism and European imperial expansion, a useful point of departure is James Tully's provocative study on the subject. At its core, Tully's study argues that this interrelationship between modern constitutionalism and imperialism is more than mere coincidence. Tully presents us with a compelling historicised account that supports his argument, positing that in order to fully understand the emergence of modern constitutional democracy as a quasi-imperial form of global governance, it is also necessary to apprehend the role played by the circulation of Western 'constitutional forms and constituent powers' in advancing imperialism and colonisation.[108] Pivotal to Tully's thesis of modern constitutional democracy serving to perpetuate what is essentially a reformulated imperial world order, is building on ideas he gleans from earlier studies that examined the economics of 'free trade imperialism' producing what he terms to be an 'informal and interactive' mode of imperialism.'[109]

However, Tully notes that, whilst this scholarship recognised the importance of legal and political structures in erecting this world order, it does little more than raise the role or place of these structures in passing. Therefore, central to Tully's aim is to then provide an

[107] In fact, I would suggest that the interrelationship between modern constitutionalism and imperialism that Tully is concerned with is highly reminiscent of Anghie's 'dynamic of difference' that showed to be integral to the formation of the international law system. Ibid 8.

[108] James Tully, 'Modern constitutional democracy and imperialism' (2008) 46 *Osgoode Hall LJ* 461 at 464.

[109] Tully tells us that according to these studies, the end of formal colonialism was replaced by a 'new order of global governance' in which 'a new, non-colonial ensemble of global institutions came together to govern the persisting imperial network of relationships of dependency, inequality, and economic exploitation.' ibid p 463. See also generally Kwame Nkrumah, *Neo-colonialism - The last stage of imperialism* (1971).

account of 'the imperial roles that the spread of modern constitutional forms and constituent powers have played in this interpretation of global governance.'[110] According to Tully, the proliferation of this less formal style of imperialism characteristic of the post-colonial world order or neo-colonialism in short, is a consequence of the distillation of constitutional democracy into a 'universal' system of well-established 'constitutional forms' and 'constituent powers'. Put otherwise, Tully deftly puts forward the idea that constitutional democracy as an internationally recognised form of sovereign equality should also rightly be seen for the work it does refashioning imperialism into something more palatable, modern, yet instantiated as a democratic enterprise.

According to Tully, the term constitutional democracy is an 'elegant phrase [that] hides its historical particularity and makes it appear universal (which is precisely its rhetorical function).'[111] As part of problematizing the proliferation of the idea of modern constitutional democracy, Tully presents what he considers to be seven of its most salient features which in practice manifest as a whole in paradoxical tension, pitting the rigidity of constitutional forms against the fluidity and freedom assumed to be implicit in constituent powers. It is beyond the scope of my current purposes to discuss all seven features, so I will limit myself to briefly engaging four of these seven features that provide particular insights for my own analysis. Before discussing these, it is worthwhile providing a full list of the seven salient features identified by Tully:[112]

[110] Ibid 464.
[111] Ibid 465.
[112] Ibid 465-80.

1. The existence of a distinct constitutional form, namely 'the formality or autonomy condition' of constitutional law as distinct and separate from those subjects it reigns over and empowers to act.[113]
2. The existence of constituent power 'as a condition of possibility of the modern idea of popular sovereignty.'
3. The existence of an autonomous constitutive sovereign that exercises the power of the state.
4. The existence of at least three distinct constituent powers, the political, the economic and the defensive.
5. Governmentalite in the form of vast repertoires of modern techniques to control the exercise of constituent powers
6. The existence of a dynamic relationship between the constitutional forms and constituent powers as they interact.
7. A dynamic universal history that discloses the dominant narrative of the interactions between constitutional forms and constituent powers.

2.4.3.1 The Constitutional Form and Imperial Expansion

The first of these salient features I want us to consider is that relating to the constitutional form. In this regard Tully points out that crucial to understanding his overarching thesis, recognising that as far as constitutional form is concerned, there exists two classes of constitution, namely 'the constitutions of modern states and the constitutions of systems of law beyond the state.'[114] In other words, one class operating and providing for

[113] Ibid 466.
[114] Ibid 467.

arrangements at a municipal level and another at the level of international law. According to Tully, both have their origins in early European states, hence their emerging and growing concurrently and symbiotically. In making this point Tully argues strongly that:

> It is thus misleading historically to picture constitutional states developing first and then beginning to experiment with transnational and international constitutional forms in the twentieth century, as legal and political theorists have done since decolonization. European constitutional states, as state empires, developed within global systems of imperial and colonial law from the beginning, and this whole intertwined complex of two classes of constitutional forms is the historical basis of the very recent, post-decolonization global legal order.[115]

The view expressed by Tully here, shares some similarities with that of Anghie, in that he suggests to us that modern constitutionalism cannot be properly be read as emerging as fully formed and solely designed to address questions of internal state arrangements. Rather, a more accurate account, according to Tully, is one that recognises how constitutional forms in the 'post-decolonization' period were premised on transnational laws and structures developed by European states during the period of imperial expansion. [116] Thus suggesting that to conceive of municipal constitutional emerging as separate and distinct forms from their history as structures complicit in advancing the internationalist impulses of imperial expansion is to misconstrue the very nature of the intertwined relationship between the current (neo-imperial) global order and the rise of constitutional democracy as a prevailing hegemonic constitutional form.

2.4.3.2 The Place of Economic Constituent Power

Whilst the notion of constituent power and how this has been deployed in modern constitutional arrangements is central to Tully's overall thesis, I will limit my engagement here

[115] Ibid 468.
[116] Ibid 448.

to but one facet of his views in this regard. Tully argues that contrary to the common characterisation of constituent power as relating to the realm of the political (its concerns with self-government), constituent powers should be understood historically to also include economic (labour or productive) powers and military (self-defence and police) powers.[117] Tully's insights on constituent power, I suggest, are quite profound for the ways in which he demonstrates the naturalness with which constituent power is, and always has been, concerned with economic questions as 'the people' have an arguably unassailable interest in their labour and its product. Tully makes his point poignantly at length:

> The second type of constituent power, labour power, is exercised by selling it for a wage on the market to competing national or multinational corporations *that manage its exercise and extract a profit*. These capitalist forms of constituent labour power and private property in the means of production and contractual relations are stipulated by the constitutional forms of state and international legal regimes and enforced by the corresponding sovereigns. *This form of organization of productive power is distinctive to modern constitutionalism.* Humans have been dispossessed of their access to the land and independent means of production: first, with the enclosures within Europe and then, with the dispossession of the non-European peoples of their indigenous legal and political control over their resources and labour during the spread of western imperialism and its legal orders... Just as one can think of political powers being either delegated or alienated to the representative institutions, so too can one think of economic powers being either delegated or alienated to the capitalist corporations…[118] (*emphasis added*) (footnotes omitted)

Tully here well illustrates that if we accept that constituent powers are foundational of what constitutes the state and determines the types of affairs that fall within its purview, it should not necessitate a stretch of the imagination to comprehended them as extending beyond the political, but to also encompass matters economic involving labour and production. The force of this point is that it prompts us to recall that economic questions are not insulated from politics as a practical matter, and *are* indeed matters over which 'the people' have a legitimate and continuing interest.

[117] Ibid 472-3.
[118] Ibid 473.

An important insight to be drawn from Tully is that whilst recognising that in spite of the apparent silence of modern constitutional scholarship on economic questions, constitutional questions impact on and are impacted upon by economic matters, for example in structuring relationships to property between the state and its populace and citizens *inter se*. Therefore, Tully rightly suggests that to perceive of constitutionalism as only attending to political questions in a narrow institutional governance, rule-of-law and individual rights frame is fallacious. I suggest that this one of the shortcomings of a functionalist social historiography such as that put forward by Thornhill which privileges legal and political dynamics to the near exclusion of other facets of social existence such as the economic.

2.4.3.3 The Implicit Telos of a Universalising Dynamic History of Constitutionalism

Tully asserts that one of the notable claims made on behalf of constitutional democracy is that it is said to have a 'dynamic history' that frames its narrative in universal terms.[119] Notwithstanding such claims, Tully argues that the framing of this narrative so as to lay emphasis on a common or shared historical trajectory towards modern constitutionalism must correctly be understood as being at the service of imperialism and designed to conceal the imperial denigration that underlay the imposition of constitutional democracy. Tully makes this point brilliantly:

> These so-called processes with their purported necessary logics of development bear a number of descriptive-evaluative names that serve to legitimate them and put them beyond question: civilization, development, modernization, decolonization, globalization, democratization, opening to free trade, and so on. They have their origins in Europe but they sweep up the rest of humanity, which is portrayed as being at lower stages of historical development and in need of western imperial aid, and gradually make the world over in accord with constitutional democracy (in its various iterations over time). This telos is…always posited as a universal and cosmopolitan endpoint for one and all. [120]

[119] Ibid 478.
[120] Ibid 478.

It is this universalising history coupled with the imposition of the other six features that lead to what Tully dubs as the 'crucial eighth feature of modern constitutional democracy, namely 'the right of European states and their companies to trade freely in non-European societies and the duty to civilize non-European peoples, together with the duty of hospitality of non-European peoples to open themselves to trade and civilization.'[121] Much akin to Anghie's argument regarding international law's core drivers being the pursuit of a 'civilising mission', Tully argues that one of the European powers abiding missions was to impose modern constitutionalism on much of the rest of the world.

In other words, according to Tully, rather than regarding the type of constitutional state they had conceived of as marking the manifestation of one particular state form amongst others, the imperial powers set up their version of a constitutional state not only as a signifier of 'civilisation', but also as the standard by which indigenous populations and their constitutional systems were adjudged as to whether they meet the requirements of statehood at international law.[122] Tully makes his point poignantly thus:

> The modern constitutional state…was defined as the uniquely "civilized" and universal legal and political order. Only European states (and the United States in 1895) met the standard and were thus recognized as sovereign under international law. The complex and overlapping legal and political associations of the non-western peoples who had been colonized over the previous four hundred years were defined in contrast as customary and uncivilized. Hence, they were not recognized under international law but were subject to the imperial law of the respective sovereign powers.[123]

By designating non-European societies and their state structures as 'uncivilized' and falling outside of international law's definition of a state, such states were conveniently

[121] Ibid 480.
[122] Again we encounter echoes of Anghie's critical account on the question of sovereignty come through loudly.
[123] Tully op cit note 108 at 484.

rendered available or open for 'legitimate' conquest by European states labouring under the self-imposed 'duty' to civilise which they effected by co-opting local institutions and structures or simply destroying them.[124] The effect of this was to instantiate a self-serving recursive logic in terms of which European states defined the essential terms of constitutional statehood, established a system of subservient colonial states, and then subsequently installed themselves as the adjudicators of who would determine the terms and pace of decolonisation through the control of international bodies like the League of Nations (and subsequently the United Nations), whilst also simultaneously dominating the epistemic agenda that distilled the normative political and economic frameworks of modern constitutionalism.[125]

Ultimately, the imposition of this mode of modern democratic constitutionalism, as problematic as it may have been for simply being exogenous, might have been less contentious had it eventually led to stable constitutional states upon decolonization and

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[124] According to Tully:

> The civilizing duty involved, first and foremost, imposing the civilizing western laws over the indigenous legal order; dispossessing, marginalizing, or transforming their customary forms of cooperative ownership, work, and governance; and introducing capitalist corporations, foreign investment, labour discipline, modern contractual relationships, and a territorially-based colonial political order. The second dimension of the duty to govern the uncivilized was to apply colonial governmentalite in detail to shape and form their forms of subjectivity so they would assume civilized forms of self-government in stages and acquire the competitive individualism of a modern, foreign-controlled capitalist economy in a global system led by the developed states.

Ibid 485.

See also Mogobe B Ramose, 'In memoriam: Sovereignty and the 'new'South Africa' (2007) 16 *Griffith Law Review* 310 for a brilliant account on the history and nature of colonial conquest with a particular focus on South Africa.

[125] Tully op cit note 108 at 486. Tully states as follows:

> However, the former colonies were constrained by the informal means available to the great powers to exercise their constituent powers of self-determination in accord with modern constitutional forms and constituent powers, open themselves to free trade dominated by the great powers, and submit to international legal regimes that denied them permanent sovereignty over their own resources, or otherwise face military intervention and regime change.

after. However, as Tully rightly suggests, this was never the intention of those at the helm of the imperial global order during the period of decolonization. In the final analysis, as Tully points out, this imposition remains 'imperial and abhorrent in [its] inequalities and injustices'[126], hence causing him to argue correctly that constitutional democracy needs to be 'de-imperialised.' This de-imperialisation did not occur, therefore the fate of constitutional democracy in Africa, post-decolonisation, is something that should be of interest to us and something that I address in the following section.

2.4.3.4 Africa's Experiences - The Crisis of Liberal Constitutionalism in Africa

The struggle against colonisation as a system and its ultimate decline in Africa was attained through several different routes and for various reasons. Ranging from independence being conferred on territories such as Tanganyika in 1961 to independence attained pursuant to an armed struggle as in the case of Zimbabwe in 1980, one common feature of that accompanied, what were no doubt, momentous historical events for these colonised territories, was the fashioning of a constitution for each newly independent state.[127] However, despite the so called independence constitutions being characteristically modern and democratic in their form, constitutionalism as envisaged did not take root in Africa.[128]

According to Issa Shivji, broadly speaking, the post-independence constitutional order in Africa, although largely premised on a liberal conception of constitutionalism, did not

[126] Ibid 488.

[127] For a multi-pronged discussion on African constitutional experiences coverings several jurisdictions in sub-Saharan Africa see Morris Kiwinda Mbondenyi and Tom Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives on Sub-saharan Africa* (2013).

[128] See Ibid; Nwabueze op cit note 78; Martin Chanock, 'Constitutionalism, democracy and Africa: Constitutionalism upside down' in Stephen Ellmann, Heinz Klug and Penny Andrews (eds), *Law in Context* (2010) 126.

manage to usher in a new era of equal citizenship and freedom. Instead, as Shivji points out, the new independence orders, despite being established under new constitutions with their classic liberal features that included bills of rights, separation of powers and commitments to democratic practice, were little more than 'excrescences' of the despotic colonial political and legal order.[129] This, according to Shivji, was largely a result of the fact that these independence constitutions, which were for the most part colonial impositions intended to, amongst other things, safeguard the interests of the colonial powers, were after a period amended, modified or simply overthrown as new independence leadership sought to recentralise power.[130] In short, liberal constitutionalism with its emphasis on processes and institutions, as we have come to know it in the modern era, never really took firm root in most post-independence African states even in those instances where it did appear to do so, under the weight of expectation and social upheaval, things seemed to unravel after a while.[131]

The state of affairs described above led to what Okoth-Ogendo has described as Africa's constitutional paradox.[132] Okoth-Ogendo asserts that this paradox lies in the fact that the attainment of independence brought with it "a clear commitment to the idea of the constitution and an equally emphatic rejection of the classical notion of constitutionalism".[133] In explaining the nature of the paradox, Okoth-Ogendo tells us that it is necessary to initially recognise the overwhelming acceptance by political elites that negotiated independence

[129] Shivji op cit note 30 at 27-29. See also Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the Legacy of Late Colonialism* (1996).
[130] Ibid 39. For a more recent account of the 'failure' of constitutionalism in Africa see Charles M Fombad, 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' (2007) *American Journal of Comparative Law* 1 at 2-5.
[131] Ibid, where Fombad tells us that Botswana is generally referred to as the exception.
[132] Okoth-Ogendo op cit note 30 at 3.
[133] Ibid 5.

settlements/constitutions of the fact that a constitution was a *sine qua non* for the establishment of the newly independent state.[134]

He identified two important senses in which this was true. Firstly, it was true in the sense that the constitution was seen as constitutive, in a foundational sense, of the new state. In other words, the constitution was seen as the bedrock of the sovereignty upon which all other acts in the name of the state would be conducted.[135] Secondly, the constitution was seen as forming the *basic law* of the newly established state. In this sense, *basic law* must be understood as denoting a legal regime that establishes minimum rules to be observed and by which those in power would exercise such power,[136] and not necessarily denoting a superior, sacrosanct set of laws that demand observance in all matters relating to state power and the law. A third sense, I suggest, implicit in the first two, is that the adoption of independence constitutions was quite simply a precondition for the transfer of political power on 'agreed' terms, in particular a negotiated sovereignty.

In further describing the development or actual manifestation of the paradox which entails the actual subversion of the constitutional order, Okoth-Ogendo identifies two particular forms of subversion by state elites that cement the paradox. These two forms, according to Okoth-Ogendo, work hand in hand as the elites "*politicise* the constitution; *initially* by declaring it a liability, and subsequently by converting it into an instrument of

[134] Ibid 6.

[135] Ibid p 6. This accords with Tully's third feature of modern constitutional democracy, op cit 108.

[136] Ibid 6-7. Okoth-Ogendo points out that it was actually this particular sense or understanding of the basic law that was instrumental in permitting or promoting some of the most drastic amendments that proved destructive to Africa's nascent constitutionalism. See in particular the examples cited in this chapter. Another way to look at this particular understanding of what the *basic law* stood for is that for those who interpreted it this way, the Constitution represented ground zero rather than revered or 'holy' untouchable ground. This view can be starkly contrasted with the understanding of the term "basic law" in South Africa, which is premised on the idea that the Constitution, as the basic law, is the source of all law and any law that is found to be in conflict with or contravenes it is unconstitutional.

warfare."[137] In terms of the first form of subversion of the constitutional order, the constitution is viewed as an obstacle to rapid economic development.

According to Okoth-Ogendo, the constitution is characterised as "a liability" by virtue of the fact that it diffuses power which in turn then restricts the ability of leaders to effect the 'necessary' changes that will lead to material changes in the lives of the population; being declared a 'liability' is then used to justify calls for it to be changed or simply done away with.[138] The ensuing subversion of the constitutional order then posits the constitution as a political instrument that has the power to rectify its own short-comings by allowing those in power to amend it so as to place more power in the hands of the executive.[139] In his own words, Okoth-Ogendo argues as follows:

> As these and other devices found their places within the 'constitutional' framework, so did the view that the constitutional arena, if properly controlled by the state elite offered a more efficient and effective environment for the resolution of *political* conflicts than even the party and certainly the electorate at large. Indeed, by translating a political option or decision into a *constitutional* device or norm, state elites gained the added advantage of passing on the problem of enforcement or supervision ultimately to the judicial arm of government. A *run to amend the constitution* whenever a political crisis emerged or was apprehended, therefore, became increasingly attractive as a method of re-establishing equilibrium within the body politic.[140]

Although the 'crisis of constitutionalism' discussed above speaks mainly to post-independence Africa before what Kwasi Prempeh terms the "winds of democratic change"

[137] Ibid 11 (emphasis original).

[138] Ibid 6 and 11. Okoth-Ogendo cites the famous example of Swaziland's King Sobhuza II who in 1973 repealed the constitution by royal decree as he considered it out of synch with Swati traditional values, as well as that of Lesotho's Prime Minister who, in 1983, suspended some provisions of the Constitution with a similar justification.

[139] Under the rubric of the constitution as a political instrument, Okoth-Ogendo identifies some of the devices that were deployed to concentrate power in the hands of the executive: (i) granting power to the chief executive to appoint and dismiss all public service appointees, (ii) "subjecting the political party recruitment process at all levels to strict party sponsorship", and (iii) amending the constitution so that it accords with the rest of the legal order, particularly repressive legislation. Ibid 12.

[140] Ibid 13 (original emphasis).

swept through Africa in the mid-1990s,[141] the meaning, place, function and entrenchment of a culture of constitutionalism in many African countries continues to be in question.[142] Much of this crisis, particularly as it is formulated in constitutional scholarship, arises from the fact that the idea of constitutionalism is hardly critically engaged with and is largely unreflectively approached from a normative liberal perspective. In other words, the African 'problem' tends to be, overwhelmingly, framed as one in terms of which Africa (and Africans by necessary extension) has failed to often contort itself into or become 'civilised' enough to fit into the mould of liberal constitutionalism.

In this regard, Martin Chanock has quite rightly argued that Africa's 'problem' has more to do with the fact that the approach to constitutionalism is 'upside down' meaning that the emphasis on 'increasingly complex constitutions, with increasingly sophisticated institutions and rights guarantees' has resulted in these constitutions being disconnected and 'floating meaninglessly above societies.'[143] Part of the difficulty, Chanock correctly notes, is connected to the rise of 'constitutional universalism' which has led to an 'extraordinary narrowing of the constitutional repertoire' which in turn has resulted in what should have been new constitut/ional/ing/ive moments delivering familiar constitutional ideas derived largely from outside of Africa, which ideas simply make familiar rearrangements without bringing about fundamental locally rooted changes.[144]

As far as African states are concerned Chanock is rightly critical of the failure of African thinkers to dedicate intellectual resources to grappling with the idea of constitutionalism as home grown or organic instead of as a project of legalism or comparison.[145] For Chanock, at

[141] H Kwasi Prempeh, 'Africa's constitutionalism revival: False start or new dawn' (2007) 5 *ICON* 469.
[142] See, Fombad op cit note 130.
[143] Chanock op cit note 128 at 127.
[144] Ibid 129.
[145] Ibid 129.

the heart of the problem is the twofold failure to ground the notion of constitutionalism in Africa within 'popular discourses' and the disconnection of constitutional concepts from the societies in which they will purportedly prevail. For example, Chanock expresses the strong view that '[t]he rule of law cannot be built from the top down, some attachment to it must inhere in the society itself.'[146] I would tend to concur with Chanock, whilst adding that far too much constitutional scholarship fails to perform any thorough-going historical or sociological analyses of constitutions and constitutionalism resulting in these ideas being consumed and reproduced as a largely incontrovertible telos.

2.5 Constitutionalism in Post-1994 South Africa: Analysing South Africa's Constitutional 'DNA'

In light of the fact that in the first instance, I clearly locate South Africa within the fold of post-colonial states in the introduction to this dissertation, and, secondly, Africa's problematic relationship with liberal constitutionalism raised in the section immediately above, an inevitable question then is what should we make of the contemporary conceptualisation of constitutionalism in South Africa? In other words, could Okoth-Ogendo's paradox or Chanock's critical observation of a disconnect between the prevailing modes of constitutionalism and the societies over which they prevail be argued to be fair characterisations of South African constitutionalism 20 years after the end of colonial-apartheid? My short answer at this juncture is that quite the contrary seems to be the case. For example, unlike Okoth-Ogendo's clearly deprecating characterisation of the notion of the constitution as a basic law in a merely descriptive foundational sense, within South African

[146] Ibid137.

constitutionalism the notion of basic law is widely accepted as denoting constitutional supremacy in a normative sense.

The latter conception of basic law rather than rendering the constitution available for ease of manipulation, instead saw the drafters with deliberateness establish a set of normative and institutional safeguards that have rendered it extremely difficult for the executive and legislative branches to act with impunity or insulate themselves from constitutional measures of accountability. Therefore, the question for us here is whether the framing of South African constitutionalism is adequately different to effectively render it immune to what has essentially been a crisis of legitimacy endured by earlier post-colonial manifestations of constitutionalism in Africa. In other words, if South African constitutionalism is indeed different or unique, what about it is different or unique, how has this difference or uniqueness manifested, what sustains it and is it in fact sustainable? To gain some sense of whether the nature of South African constitutionalism is different in ways that give us any insights into future perceptions as to the longevity of the legitimacy it is currently perceived to enjoy it will be useful to discuss two different conceptions/approaches of constitutionalism.

2.5.1 South African Constitutionalism Historically and Sociologically Conceived

As we consider the different ways in which South African constitutionalism can and has been conceived I want to start with a perspective that I believe has gone to some lengths to approach the subject from a decidedly more situated stance. I refer to Heinz Klug's conception which refuses to take for granted the legitimacy of the emergence of South African constitutionalism post-1994. Rather, Klug's approach is to problematize it in order to explore and expose the complexities of constituting a new society out of historically divided

groups locked in centuries old conflict and superior-inferior racialised relations. Whilst, noting at the outset that modern constitutionalism is characterised by 'a commitment to limitations on ordinary political power',[147] Klug is quite deliberate in demonstrating that there are and have been differing ways of conceptualising constitutionalism, and that South Africa, with its particular history and vision of a future, needs to determine its own conception as a means of self-comprehension.

A central theme permeating Klug's book is that of conducting a careful analysis of the factors leading to South Africa adopting such a robust model of judicial review under a supreme constitution. However, I would suggest that, probably, its most profound discursive contribution is the richly detailed historicized sociological account of the coming into being of post-1994 South African constitutionalism. A noteworthy feature of Klug's account is that in tracking the source of the various key features characteristic of South African constitutionalism he makes evident that it is, on the one hand, the product of what he terms a 'globalizing constitutionalism' and on the other hand, a response to localized contestations that sought to balance out competing interests as well as establish a mutually acceptable non-racial rights based society that promotes and protects the equality, freedom and dignity. In brief, Klug's account of the foundations and claims to legitimacy of South African constitutionalism is achieved by neatly teasing out the dialectical relationship between exogenous norms, principles and laws, including colonially received or imposed laws, and those norms and laws consciously incorporated and adapted for the purpose, by those responsible for negotiating, and, ultimately, producing the post-apartheid constitutions. In his own words, Klug captures it thus:

[147] Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) 2.

> South Africa's constitutional transition is best understood as the product of a dialectical interaction between a global 'text' constituted by the histories, practices and normative prescriptions of nation-states, international bodies and organisations – such as the United Nations and World Bank – and increasingly transnational corporate and non-governmental organisations and the 'local' struggles and processes through which the new constitutional regime was created and implemented. At the same time, the creation and emergence of a post-apartheid constitutional order in South Africa provides a context in which the global 'text' is being constantly reformulated[148]

Read in the context of the time of writing, Klug is certainly capable of being read as gesturing at what might be termed a syncretic constitutionalism in the making that has been brought to life by an outward and inward-looking constitutional imaginary that embraced possibility. In short, Klug's study can be said to committedly struggle to establish South Africa's distinct constitutional 'DNA' by carefully attending not only to the immediate history of the constitution's formation, but that of the many political, social and global institutional actors involved in its making and their own ideological and intellectual influences; these are discussed in greater detail in chapter 4.

Therefore, if Klug's approach gestures towards a syncretism in South African constitutionalism owing to its situatedness and the specifics of South Africa's colonial apartheid history including the role played by external players and factors such as the fall of communism, his approach differs markedly to that which I argue predominates South African constitutional scholarship. This latter approach is one that, I argue, accords with the normative bias or turn identified by Thornhill as being characteristic of modern approaches to the questions of constitutional legitimacy. This approach that I will argue below is assumptive in nature approaches constitutionalism from a normative democratic liberal perspective.

[148] Ibid 48.

2.5.2. The Prevalent Assumptive Normative Approach to Constitutionalism in South African Constitutional Scholarship

The normative approach to constitutionalism denotes, more, a broad category that speaks to an analytical approach, than it does a distinct school of thought. I say this as I suggest that those who subscribe to this approach are varied both in terms of politics and practice, and neither are they necessarily defined by a singular ideological orientation, the predominance of liberalism as the hegemonic global discursive orientation notwithstanding.[149] Rather what I suggest allows me to place them in one, albeit broad, category is a shared overarching concurrence on the centrality of liberal democratic normative constitutional principles, standards and values in how they approach questions of constitutional legitimacy. In other words, when I speak of those subscribing to this normative constitutionalist approach, I am referring, broadly, to those amongst us whose approach to questions of constitutional legitimacy prioritise what might be termed normative compliance without necessarily problematizing or seeking to account for the rootedness, aptness or otherwise of these prevailing norms barring the fact that they emanate from the much-lauded constitution-making process. Closely related to this is another characteristic that I suggest is critical for those subscribing to this approach, namely that of displaying a distinct belief in the legal, moral and ethical primacy of the courts on virtually all questions that can be demonstrated to have some bearing on the constitution. In short, whilst not suggesting that persons subscribing to this approach necessarily endorse liberalism, I do suggest that, if only

[149] On the predominant liberal orientation of South African constitutional scholarship see: Frank I Michelman, 'Liberal constitutionalism, property rights, and the assault on poverty' (2011) 22 *Stell LR* 706; Sibanda, op cit note 15; David Bilchitz, 'Egalitarian liberalism, distributive justice and the new constitutionalism' (2014) 61 *Theoria* 47.

implicitly, they generally accede to the notion that the constitution's legitimacy is primarily determined with reference to the normative prescripts of the 1996 Constitution.

The approach described here has much in common with that decried by Thornhill as being afflicted by a normative bias in terms of which constitutional legitimacy becomes largely disconnected from underlying politically or socially constructed notions of legitimacy. To cement my point, it is worth spending the remainder of this chapter discussing a few examples of works that I believe are emblematic of this approach. In so doing I hope to show that this normative approach has limited explanatory power in terms of helping us understand South Africa's specific constitutional 'DNA' and the historical and social premises of its legitimacy in that it is largely assumptive; privileges theoretical abstraction; is overly conceptual, and all the while paying little regard to South Africa's social, political or epistemic histories that should help account for what makes it distinctly South African. At a more general level, this approach can be charged with having simply acceded to what may be described as a universalist, ahistorical, culture-neutral normative account of constitutionalism as the standard conception where South Africa is concerned.

Early in the transitional period, scholarly works began to emerge that engaged with South Africa's constitutional shifts and the idea of constitutionalism as contributors to the discourse sought to examine both the possibilities and limits inherent therein. What is interesting in those early engagements and some more recent ones is that the nature of constitutionalism is approached assumptively and within narrowly defined normative parameters with courts envisaged as playing a central role in mediating and resolving such contestation. For example, authors Dennis Davis, Matthew Chaskalson and Johan de Waal, in an important contemporaneous commentary on the 1994 Constitution and South Africa's nascent democratic constitutional order, rather revealingly, and without any prefatory

remarks, announce quite emphatically that with the demise of the last apartheid government '[c]onstitutionalism has finally been placed on the South African legal agenda. In itself, this could produce a legal revolution.'[150]

What constitutionalism 'being placed on the agenda' means is not elaborated upon in relation to the past nor future, instead the text then quickly moves to briefly detail South Africa's rule of law dominated constitutional history, white majoritarianism, before the authors turn their attention to what they anticipated would be tensions of constitutional democracy and majoritarian democracy. Even as the authors subsequently reengage with constitutionalism, when they grapple with what they refer to as the 'puzzle of constitutionalism' which conundrum, according to them, asks 'what is the basis for the binding quality of rights and their ability to trump the outcome of democratic decision-making?'[151], there is no attempt to justify or otherwise provide an account of why in South Africa the puzzle is constituted in this way?

Why the central question for them is the Dworkinian notion of rights as trumps, and how exactly this connects to or advances the struggles to address the legacies of colonial-apartheid is left largely unexplored. Much of the authors reflections on the subject are based on American debates on counter-majoritarianism and are normatively framed with little or no regard as to what the source of those norms is. The question of what renders this framing legitimate and appropriate as far as our understanding of South African constitutionalism is concerned is never really directly addressed.

[150] Dennis Davis, Matthew Chaskalson and Johan De Waal, 'Democracy and Constitutionalism: The role of constitutional interpretaton' in Dawid van Wyk, John Dugard, Bertus De Villiers et al (eds), *Rights And Constitutionalism - The new South African legal order* (1995) 1.
[151] Ibid 1.

The approach taken by the authors, to my mind, suggests several possible conclusions that can be reasonably drawn. First, that the authors are quite secure in their assumption that the term constitutionalism is of such fixed meaning or universal understanding that it requires no further elucidation, save for elaborating on debates 'inherent' to it. Or, secondly, that the reader, presumably through conjecture or intuition, is expected to arrive, on their own, at a conception of what constitutionalism is or the authors intend it to mean. Or, finally, the authors assume that it is self-evident or so uncontroversial that constitutionalism is concerned or associated primarily with rights, democracy and the mediating role of courts that the legitimacy of a constitution will most likely come into question when majorities move against the rights of vulnerable minorities, in which case courts will be called upon to intervene.

Dennis Davis, writing not too long into South Africa's democracy, had occasion to re-engage the idea of constitutionalism in South Africa and was mindful to forewarn the reader that 'constitutionalism does not come without its own problems.'[152] However, what follows is illustrative of the concern that I outline above, in that he offers no account of what he means or understands by constitutionalism. Instead Davis proceeds to introduce a host of, what one is left to presume are, related concepts such as 'constitutional democracy', 'sovereignty', citizenship' and 'representation'.[153] Admittedly, Davis does provide us with some clues to enable us to divine the sorts of issues he considers to be of concern to discussions on constitutionalism. That said he offers us little in terms of a conceptual map to

[152] Dennis Davis, *Democracy and Deliberation - Transformation and the South African Legal Order* (1999) 6.

[153] Whilst Davis does raise these concepts with reference to Jurgen Habermas, it is the way he seamlessly associates these with constitutionalism that leaves one question as to exactly what Davis identifies as constitutionalism's core concerns, or what these 'problems', to use his terminology, that come constitutionalism are?

help explain why and how the issues he highlights are necessarily concerned with constitutionalism as he understands it. Davis is not alone in this.

Writing relatively recently, Bilchitz in expounding his thoughts on what he terms the 'new constitutionalism' that has emerged in the Global South, in similar fashion to Davis, seems to find no cause to explain or account for his conception of constitutionalism. For Bilchitz, this omission seems particularly odd, considering the obvious centrality of constitutionalism to his article and its claim to a novel expression of it.[154] In fact from reading Bilchitz it is hard to discern whether he means by constitutionalism anything more than the existence of a modern constitution with particular normative features in those jurisdictions that fall within the 'Global South. This, indeed, seems to be the case as he does, however, give the reader a sense of what he has his in mind when he sets out the characteristics common to constitutions of the Global South that are discernibly the objects of this 'new constitutionalism' Bilchitz speaks of:

> The modern constitutions (in parts of the world often referred to as being in the Global South), however, invariably contain similar provisions in their bill of rights but also a set of entitlements governing the distribution of socio-economic goods in society. These constitutions thus set themselves up not only as a shield against the exercise of state power but also contain core normative commitments that state institutions have obligations to address questions relating to the distribution of economic resources and opportunities. [155]

What is of interest here is that Bilchitz is of the view that there has come into being a set of overarching internationalised rights and norms whose acceptance in the Global South is now beyond question, and therefore, he seems to suggest, require no localised motivation of either a political, social, economic or cultural kind to ground their legitimacy within specific locales of the Global South.

[154] Bilchitz op cit note 149.
[155] See ibid 44-45.

Broadly speaking what I am suggesting in the paragraphs above is that in much of South African constitutional scholarship there is much that is assumed about how constitutionalism should be approached and by necessary extension what is included and excluded for consideration as to what matters are legitimately within the sphere of concern as far as constitutions go. The most common thread is that much of this scholarship simply approaches constitutionalism in assumptive normative terms. By this I mean that the predominant oeuvre of constitutional analysis has a distinct normative orientation in the issues that it attends to without always connecting the analysis to South African political, social, economic or cultural politics or developments in any meaningful way beyond that of locating them within the country's historical context. Ultimately, as I have tried to demonstrate here the result of this approach is a framing of South African constitutionalism as being primarily a juridified concept (albeit with political roots) that is conceived around legalistic normative contestation.

2.5.3 Alternate Conceptions of South African Constitutionalism

Before bringing that chapter to a close it is worthwhile to bring to the fore a few other examples of constitutional scholarship that have engaged with the conception of South African constitutionalism in ways that do not necessarily fit with the two conceptions identified above. Whilst the engagement with these three examples will be somewhat superficial, I engage them for the purposes of demonstrating that it is possible to creatively engage with how South African constitutionalism is understood without necessarily disturbing the prevalent teological and normative assumptions already identified.

The first example is a sophisticated and thought-provoking endeavour at providing a novel reading of South African constitutionalism is Stu Woolman's *The selfless constitution:*

Experimentalism and flourishing as foundations of South Africa's basic law. Woolman's tome standing in excess of 500 pages is not capable of simple summary and such is not my aim here. Rather my aim is to give but a brief sense of how he approaches South African constitutionalism and how he proposes we should understand it. One outstanding feature of the book is that Woolman's stated aim is to press his 'contemporaries and betters in the South African legal academy, on the bench and in practice, to reassess their most basic assumptions about the self, the social and the political, and to consider their conclusions regarding how we should engage in the practice of South Africa constitutional law.'[156]

In brief, I suggest, how we approach or understand South African constitutionalism. Despite Woolman's own claims at the modesty of his projects' aims, it is ambitious, serious, theoretical yet empirically-driven, critical and above all, an engaging account. Probably Woolman's most original contribution in this regard is in how he weaves theories from several disciplines or fields of thought such as neuroscience, cognitive psychology, consciousness studies, choice architecture, development theory, experimental philosophy, new governance jurisprudence, the capabilities approach and constitutional law in suggesting that we understand the constitution as promoting and standing for experimentalism and flourishing, particularly in how we understand freedom under the Constitution. This approach Woolman ultimately applies to some important Constitutional Court cases suggesting how they could be reread as examples of either promoting or impeding experimentalism or flourishing. Woolman's is ultimately a call and an exemplar of a more theoretically enriched and principled constitutional jurisprudence.

[156] Stuart Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 9.

Another example is James Fowkes' *Building the Constitution: The Practice of Constitutional Interpretation in Post-apartheid South Africa,* however as with Woolman and for the same reason I do not, nor am I able to, offer a summary here.[157] In his 'constitution-building' account of South African constitutionalism Fowkes has produced a commendable and persuasive narrative that focuses on the constitutional court, how scholars have (mis)read it and the influence of the ANC. The valuable contribution made by Fowkes lies, I suggest, primarily in that whilst also problematizing South Africa's court-centric scholarship, he also provides a balanced and insightful account that takes seriously the importance of constitutional and political history, democratic politics and the policy choices made by the ANC in the 'building' of South Africa's 'post-apartheid' constitutionalism and its jurisprudence. For all his expressed scepticism of the dominant court-centric bias in South African constitutional scholarship, Fowkes' essential offering is an interpretive framework that he terms a 'constitution-building' account which infuses social and political histories into legal constitutional interpretation.

The final example I look at here is Thembeka Ngcukaitobi's *The land is Ours, South Africa's First Black Lawyers and the Birth of Constitutionalism,* equally, there is neither room nor necessity to provide a summary account for current purposes.[158] Ngcukaitobi's is a meticulously researched and in many ways a ground-breaking study that places front and centre the narrative of the early history of black lawyering in South Africa, especially where the figures profiled, through their professional endeavours and their involvement with the ANC and the politics of the day, were also embroiled in contesting the constituting of the

[157] James Fowkes *Building the Constitution: The Practice of Constitutional Interpretation in Post-apartheid South Africa* (2016).
[158] Thembeka Ngcukaitobi *The land is Ours, South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018).

colonial-apartheid state. Whilst Ngcukaitobi's is a narrative that is preoccupied with doing the important work of providing much needed historical accounts of the life, work and times of these early black lawyers, it is equally anxious to bring those histories into conversation with contemporary South Africa. This, Ngcukaitobi, makes most evident through his most far reaching claim in the book, namely that through the participation of these lawyers and other actors within the ANC that birthed the African Claims Document, these figures can, by so doing, lay claim to having laid the foundations of contemporary South African constitutionalism via drafting an early iteration of the bill of rights and their reverence for the rule of law. In the final analysis, Ngcukaitobi advances the position that argues that South African constitutionalism is, contrary to increasingly popul/ar/ist acclamations not a Eurocentric transplant, rooted in the efforts and enterprise of Black South African lawyers whose imaginings lead them to envision a rule of law, non-racial human rights based constitutionalism.

These three accounts briefly set out above, albeit rather succinctly, are good examples of the idea that there is a growing concern and interest in problematizing and offering alternate, more complex accounts and theories on how we can understand South African constitutionalism and its claim to legitimacy beyond a commitment and adherence to 'universal' constitutional norms and principles. This point alone differentiates these accounts from other constitutional scholarship. However, beyond this what they also share in common is that, to my understanding, they do not, at their core, appear to seek to disturb, or, otherwise, fundamentally call into question the liberal normative and teleological logics and assumptions upon which the dominant prevailing conception of South African constitutionalism rest.

2.6 Conclusion

To recap briefly, my argument in this chapter is that that how we approach and frame our conception of constitutionalism does indeed matter. Omitting to specify our conceptual framing of constitutionalism is problematic in that it tends to occlude any discussion as to what constituting a society entails, the contestations involved, or the nature of the competing interests at play. This is an especially crucial issue in a post-colonial setting like South Africa's where the historical questions of justice that must be addressed by way of the constitutional ordering brought into being by the fall of colonial-apartheid demand clarity as to what their legitimating premises are, or simply what their constitutional 'DNA' is. By adopting a predominantly normative approach to constitutionalism which prescribes form, structure and substance from a 'universal' template it becomes easy to lose sight of what the specific social, economic, cultural and political imperatives that require addressing are.

In other words, defaulting to a normative approach seems to absolve constitutional scholars and courts of the need to demonstrate the appropriateness or aptness of a particular understanding of constitutionalism, even in circumstances where some justification of this approach is needed. I am suggesting here that the assumptive normative approach to constitutionalism when presented as largely predetermined set of issues and questions does not put thinkers and scholars to the hard work of continuously justifying the constitutional legitimacy of the norms that they invoke. [159]

[159] It may be worthwhile to make reference to Etienne Mureinik's profound thoughts as he reflected upon the meaning of the shift in terms of values and commitments that the 1994 Constitution represented in terms of the seismic shift in values and commitments from a "culture of authority" to a culture of justification." In his own words:

> If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification -a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not

Second, the normative bias implicit in the conception described above tends to confine the understanding of constitutionalism primarily to a regime of legality without exposing the foreclosing effect this has on other claims and possibilities as to how constituent contestations on different fronts in a given society and the allocation of power can be understood. In other words, this approach tends to place too much emphasis on rights and courts without opening up space for the consideration of questions of materiality, culture and power and how these have been configured. These are areas that an overly juridified framing of constitutionalism does not generally leave open for discussion, let alone decisive intervention. It also tends to conceal the underlying working assumptions and ideological commitments of commentators by treating constitutionalism as though it comprises of particular sets of questions and relationships that are all but sown up.

Finally, if we return to three events introduced earlier in the chapter where I asked what is it in public or academic discourses that causes us to regard certain political, social, economic or cultural controversies as falling within the realm of the constitutional and not others? One answer might be that the judicial fracas does seem to throw up a constitutional issue in that there are specific constitutional provisions and principles that seem to be implicated, particularly the alleged attempt to interfere with the independent functioning of

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> the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.

Etienne Mureinik, 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 at 32. Mureinik's call for power to account for its every instance was well received with the article enjoying nearly legion regard. A personal source of fascination has been how its legendary reception has not served as an impetus of reflection or auto-critique by legal academics holding as it can hardly be denied that legal academia in South African has been a formidable force in contributing to the development of our constitutional jurisprudence. So, if one accepts this, then I believe a pertinent question is; does the pervading constitutional "culture of justification" make no demands of constitutional scholars and thinkers as contributors to the project of meaning making and as part of the community of interpreters of the constitution?

the judiciary, amongst other things. The protests seem less clear cut case if one contemplates litigation to resolve the multifarious service delivery type issues, even if one sought to rely on socio-economic rights jurisprudence which is decidedly less hopeful post the *Mazibuko* case.[160] As for the EFF's battle in Parliament, the EFF has been quite industrious in its few years of existence as far as pursuing a litigation heavy oppositional strategy, however these challenges have not addressed some of the important cultural questions that its presence and repertoire of politics have brought to the fore regarding parliament's processes, symbols and aesthetics that remain undeniably Eurocentric. It is unlikely that one could successfully sustain a legal challenge based on an amalgam of expression, political freedom and cultural rights, let alone frame a remedy capable of sensible execution.

I submit here that questions of structural poverty and inequality that continue substantially to track colonial-apartheid's racial logic and hierarchy, and, the extant alienation occasioned by exclusionary cultural practices that have historically done a lot of the colonising work of enforcing and policing social distance between the 'races' can hardly be argued to be unconnected with the project of constituting a 'new society. Questions of economic relations and culture have, as I will demonstrate in the next chapter, consistently been a concern and feature of South African constitutional history since the making of the first written South African Constitution that came into operation in 1910.

[160] *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC).

Chapter 3

Constituting a Racist Colonial-Apartheid State: South African Constitutionalism 1909 1983

3.1 Introduction – Shifting the Centre of an Otherwise Familiar Historical Narrative

The story of South Africa's constitutional and legal history is one that has been told many times. It is actually quite difficult to determine at which juncture to begin to engage with the narrative if one aspires to add something genuinely insightful, as there are numerous accounts of the making of the South African state from historical, political and economic perspectives.[161] However, it cannot to be avoided in a study such as this one which seeks to demonstrate that some of the current challenges South Africa faces, if not a product of, are deeply influenced by, some of the legal and structural continuities with their roots in the past. In revisiting South Africa's constitutional history, I am hoping to contribute a different perspective to the history of South African constitutionalism.

The function of this chapter is not to provide either a comprehensive or systemic account of the events and developments that lead to the adoption of the South Africa's pre-1994 constitutions. Rather, it is to present a history of South African constitutionalism that exposes the social, political, economic and cultural elements whose interplay influenced how South Africa came to be constituted as a racist state. However, in so doing I also want to introduce and foreground, with deliberateness, what tends to be excluded from other

[161] John Dugard, *Human Rights and the South African Legal Order* (1978); Terreblanche op cit note 5*;* Leonard Thompson, *A History of South Africa* (2014).

accounts, namely the narrative of the opposition and resistance raised by black people to these constitutions and acts.

The reason for the approach, that I take in this chapter and the next is occasioned by the fact that the record of the black populace's opposition to South Africa's brand of racially exclusive constitutionalism from the period commencing with the 1908 convention to establish the Union of South Africa to the final demise of official apartheid rarely receives much by way of detailed exposition, let alone analysis in relation to constitution-making prior to 1994. With few exceptions,[162] the accounts narrated of South Africa's constitutional history before the current democratic dispensation either say very little about black people's opposition or resistance to those South African constitutions, or when they do the accounts generally limit themselves to a commentary on the franchise cases of the 1930s and 1950s, which coincidentally were initiated by liberal white members of parliament.[163]

In other words, beyond narrow legalistic accounts of exclusion, there are relatively few accounts that provide a critical analysis of the coming into being of the bifurcated state and the resistance to this *that centre on the constitution*.[164] Instead the tendency is to focus on the agency of the white minority, particularly that of political leaders and government officials. The superficial narrative account offered by mainstream constitutional scholarship of black resistance and mobilisation paints a one-sided picture that tends to suggest that Blacks either completely lacked political consciousness or had been so absolutely conquered that they had no capacity or inclination to offer any opposition whatsoever to these

[162] See Ibid; Klug op cit note 147; Woolman and Swanepoel op cit note 29; Klug op cit note 77.
[163] See *Ndlwana v Hofmeyr N.O.* 1937 AD 289, Harris *and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) (also known as the Vote case), Minister of the Interior and Another v Harris 1952 (4) SA 769 (A) (also known as the High Court of Parliament case) and Collins v. *Minister of the Interior* 1957 (1) S.A. 552 (A).
[164] Mamdani op cit note 129 at 16; Klug op cit note 147 at 30.

developments, which is, of course, not true as I shall demonstrate shortly. Therefore the narrative account I proffer here seeks to challenge the standard constitutional historical narrative that tends to suggest that the black majority did not bring their minds to bear on the large questions of what it meant for the state to be organised in a way that excluded them and, in Eddy Maloka's words, simply rendered them in the eyes of liberals 'the oppressed [who] were not agents of history, but simply pitiful victims of the system.'.[165]

The problem with a superficial approach to this particular aspect of history is, of course, that it then fails to fully capture the extent or impact of this erasure of black people from constitutional subjecthood beyond the generalities of the legal disabilities that this entailed. What I am suggesting here is that whilst many scholars engaging this history decry the evils, indignity and violence of colonialism and apartheid, few critically interrogate in more composite terms what it meant for black people in effect to be 'perpetually' erased or alienated from exercising their constituent powers whether politically, economically, socially or culturally. Rather, in many accounts, through an uncritical telling of erasure, much becomes assumed regarding the normalisation of the subordinate constitutional status of colonized black 'objects', the legality of their dispossession and their overall socio-cultural exclusion.

It is with these thoughts in mind that I seek to provide a snapshot of the nature and persistence of black opposition to some of the major constitutional moments during the colonial-apartheid period. I cannot possibly do justice to this narrative here and it probably deserves an entire study by itself, so what I shall do is to confine myself to what I consider to

[165] Whilst Maloka's sentiments are made in a different context, where he conducts a hard-hitting critique of the history of liberals and liberalism in South Africa, his words, I maintain, are no less poignant with respect to much of South African constitutional scholarship. Eddy Maloka, *Friends of the Natives - The Inconvenient Past of South African Liberalism* (2014) at 23.

be some illustrative episodes that point toward a long-standing determined opposition to this racial exclusion that was met by an equally, if not more determined, prosecution of a project culminating in constitutional erasure.

3.2 The 1910 South Constitution - Laying the Foundations for a Racist State

Many accounts of South African history start in 1652 with the arrival of Jan van Riebeeck under contract with the Dutch East India Company to establish a refreshment post at what was named by the Dutch as Fort de Gooie Hoop and the eventual colonisation of the territory.[166] The next significant event put forward might be the 1806 occupation of the Cape by the British, generally accepted as the start of British colonialism in the Cape and its eventual spread to the capture of Natal including the many wars of resistance.[167] That account might then turn to the South African war (otherwise known as the Anglo- Boer war in some historiographies) which, according to Nasson, 'ended in victory for Britain, completing the long imperial conquest of Southern Africa.'[168] Then the next most likely place that such narration would move to might be the 1908 convention where British colonial rule of the colonies under British Imperial control, namely the Cape of Good Hope, Natal, Transvaal and Orange Free State, was consolidated to give birth to the Union of South Africa.[169] It is at

[166] See Thompson op cit note 158 at 33.

[167] See Ivan Thomas Evans, *Bureaucracy and Race: Native administration in South Africa*, (1997) For useful accounts of African resistance to colonial domination in the border wars and into the destructive social dynamics brought to bear amongst amaXhosa as a result of colonial expansion see also Xolela Mangcu, *Biko: A Biography* (2012) chapter 1 and 2 and Thembeka Ngcukaitobi, *The land is Ours: South Africa's first Black lawyers and the birth of constitutionalism* (2018) chapter 1.

[168] Bill Nasson, 'Commemorating the Anglo-Boer war in post-apartheid South Africa' (2000) *Radical History Review* 149.

[169] The South African state was founded in terms of the South Africa Act, 1909 with what is generally known as the 1910 South African Constitution as it came into operation on 31st May 1910. According to an introductory recordal in the Act:

> This Act was passed through both Houses of the Imperial Parliament exactly as it was forwarded after the South African Convention was held. It was assented to by King Edward VII. on the

around this historical juncture between the South African war and the 1908 convention that I intend to commence my account of the history of South Africa's colonial-apartheid constitutions wherein I will highlight how through the text racial superiority and inferiority as a determinative factor of constitutional subjecthood was imbedded in the very structure, spirit and body of those constitutions, the political system, the economy, the legal system and the underlying cultural politics.

3.2.1 Resisting Exclusion from the 1909 National Convention

In spite of their participation in the South African war, Blacks were not included in the discussions leading to the signing of the Treaty of Vereeniging in 1902 that captured the terms of ending the war and initiated peace between the Afrikaners and the British. According to Peter Walshe, some of the Blacks who had fought on the side of the British had done so under the belief, that 'the Boer War was being fought to establish British non-racial justice throughout South Africa.'[170] However, in a sign of things to come, the Treaty of Vereeniging recognising the deeply held misgivings held by the two Boer republics, and Natal determined that this matter would be held in abeyance and the pre-war positions of each colony would be maintained as far as the political participation of the black populace was concerned.[171] Further, according to Walshe that exclusion led to the mobilization of the black people who came together to form various associations around different parts of the country. For

20th September 1909; and a Royal Proclamation of the 2nd December 1909 declared the date of the establishment of Union to be the 31st May 1910.

[170] Peter Walshe, *The Rise of African Nationalism in South Africa: The African National Congress, 1912-1952* (1970) 15. See also Klug op cit note 147 at 38.

[171] Article 8 of the Treaty provided that 'the question of granting the franchise to Natives will not be decided until after the introduction of Self-Government.' On the Treaty of Vereeneging see: http://www.sahistory.org.za/archive/peace-treaty-vereeniging-transcript#sthash.3XuXb5O4.dpuf, last accessed on `7 November 2018 (last accessed 16 November 2018). See also Thompson op cit note 158 at 144.

example, the African People's Organisation, the Cape Congress, Natal Native Congress, Ilisolomzi, Native Vigilance Associations, the Orange River Colony Native Vigilance Association, the Transvaal Congress, the Bapedi Association and the Basuto Association were formed.[172] These organisations were, in the main, established by educated black individuals and agitated for inclusion along class lines and did not, in some instances, enjoy the support of traditional leaders. This, however, should not detract from the fact that they were important instruments for putting forward the black majority's grievances and the pursuit of enfranchisement, albeit subject to the class, educational and property qualifications.[173]

Subsequently, the news of the convening of an all-white National Convention in 1908, according to Walshe, provoked 'African agitation' that transcended 'tribal and regional barriers'[174] and resulted in petitions and congresses being held around South Africa. That these meeting were a direct response to the exclusion of the black populace and intended to mark opposition to this process, whose far-reaching consequences were not difficult to imagine against the background of the Treaty of Vereeniging, is self-evident. That these black elites were cognisant of the nature of the debates and the schemes being devised as the Convention progressed is well captured by Walshe who records that '[i]n each case the draft South Africa Act was at issue and every gathering passed resolutions deprecating the colour bar clauses and the failure to extend the non-European franchise to the north.'[175] These congresses culminated in a South African Native Convention on 24-26 March 1908 where 60 delegates determined that the Cape system of franchise should be retained and extended to

[172] Walshe op cit note 170 at 16-17.
[173] See André Odendaal, *The Founders: The Origins of the ANC and the Struggle for Democracy in South Africa* (2012) 398-435.
[174] Walshe op cit note 170 at 20.
[175] Ibid 21.

the rest of the country in line with British commitments to its royal subjects.[176] The gravamen of what the Native Convention demanded, according to Walshe, was a constitution 'providing that all persons within the Union shall be entitled to full and equal rights and privileges subject only to the conditions and limitations established by law and applicable alike to all citizens without distinction of class, colour or creed.'[177]

The resolutions of the Native Convention were communicated to the governors and prime ministers of the colonies and ultimately established the basis upon which a deputation was assembled to travel to Britain in order to motivate for these demands in person.[178] These agitations, as is well known, were to ultimately prove to be unsuccessful as the delegates to the National Convention made no platform available for black participation and the British government considered the matters brought forward by the deputations as being within the realm of the domestic affairs of South Africa as a self-governing territory in which they did not want to interfere.[179]

Whilst the delegation sought to advance a racially inclusive version of constitutionalism, it must be reiterated that this was led by an educated Black elite who believed themselves as having become the equals of their white counterparts and thus deserved to be treated accordingly. This was not yet a movement for the emancipation of all, this particular class bias was to continue to manifest and eventually influence the formation, emergence and participation in South African politics of the South African Native National Congress in 1912 which was later to become the South African National Congress in 1925 and subsequent to that the African National Congress (ANC). This type of agitation and

[176] Ibid 21.
[177] Ibid 21.
[178] Ibid 22.
[179] Ibid 23.

mobilisation was to become characteristic of the black organisations' engagement with the white government as after the Union a slew of racist legislation followed to further legally reinforce and render racial discrimination, exploitation and dispossession the norm.

3.2.2 The 1908 Convention

As already mentioned above, the 1910 Constitution was preceded by the Convention of 1908 at which representatives of the four colonies sat down in secret to negotiate the unification of South Africa. It is worthwhile to spend a few moments considering the events leading to the convention as they shed some light as to (i) how economic competition and tensions between the colonies led to a political union, and (ii) how the so called 'native problem' provided an impetus towards unification and, eventually, the structuring and distribution of power. I believe it important to take some time to consider these points in relation to that constitution as not many accounts of South Africa's constitutional history address them adequately considering how much of an influence these facets of constitutional history played on the institutional make-up and operation of the 1910 constitution.

3.2.2.1 The Economic Imperative

It is generally not well documented in South African constitutional scholarship that the birth of South Africa as a nation state can largely be attributable to on-going 'friction' between the two predominantly Dutch (Afrikaner) colonies, Orange Free State and Transvaal against the two mainly English colonies, the Cape of Good Hope and the Natal regarding membership of the customs union and tariffs concerning the railways.[180] According to Henry John May, so central to the success of the four colonies and the securing of a lasting peace amongst the

[180] Henry John May, *The South African Constitution* (1970) 3.

whites settlers were these two institutions that '[i]n 1908 it was announced that the Customs and Railways Conference then in session had failed; but it succeeded in passing resolutions requesting the colonial legislatures to appoint delegates to a national convention to draft a constitution for a union of the colonies.'[181] Pivotal to the viability of the four colonies was establishing a common economic framework such as a Union. Robert Henry Brand, a delegate at the convention, in motivating his reasons for the urgent resolution of the economic question said as follows:

> In a community whose main object is to develop resources hitherto untouched, and where the government's main work is to foster such development, freedom to adjust customs dues and railway rates to the rapidly changing needs of the community *is a matter of life and death*. It is therefore, no cause for surprise that politics should focus themselves around such questions. (emphasis mine)

It is beyond the scope of this study to detail the nature of the, then, underlying tensions, however, it is seems hardly in dispute that the foundations of the Union were thus strongly underpinned by economic imperatives and enjoyed the support of the British government which had, in any event, from as far back as 1877 sought to impose a Union on the four colonies.[182]

3.2.2.2 The Native Question[183]

In anticipation of the possible union of the four colonies, Lord Alfred Milner, in his capacity as High Commissioner established the Lagden Commission, (also known as the South African

[181] Ibid 4.

[182] Ibid 3-4. According to May, in 1877 the British Parliament passed the South Africa Act, 1877 'for the Union under one government of such South African colonies and States as may agree thereto…' Owing to the unilateral nature of the action, this Act to establish the basis for a constitution was resisted in South Africa and ultimately 'still born.'

[183] Maloka states that:

> [a]ll commonwealth countries had a "native problem", or the aborigines in the case of New Zealand and Australia. It is this recognition that pushed the colonial office in London to convene a parliamentary inquiry of the Select Committee in 1837 whose recommendations defined how the "native question" should be tackled in the colonies. Other Commonwealth states had luck on their side compared to South

Native Affairs Commission) 'to gather accurate information as to native affairs so as to arrive at a common understanding on questions of native policy.'[184] May remarks that '[l]ong before the union was brought about men had recognised that the colour question transcended all others in importance.'[185] Writing at the time Brand, a delegate at the convention, is unequivocal about what he perceived as the consequences of a failure to act on the Union as far as the native question was concerned, he warned that '[a]part, too, from economic questions which have been more immediately in the public eye, thoughtful men have long seen in the native question also a peril which menaces the future…No other nation is faced with a future so perilous.'[186] As with the economic question, Brand viewed that the continuing state of disunion and the 'handling of the native problem is a matter of life and death.'[187] Brand, reflecting upon the position held by the British with respect to notions of formal equality, argued that such a position had no place in South Africa. His strongly held views, as far as the British were concerned, was that despite South Africa's colonial status, this was not an issue over which the British could give direction, being so far removed from what Brand presents as the fraught everyday realities of life in the colonies.[188]

The question of the black elite's involvement at the convention, their disenfranchisement, their effective barring from parliament and more broadly their almost total erasure as political actors was therefore determined against this background of racist

> Africa on the "native question". It did not take them long to dominate the "natives" numerically to oblivion through extermination. By contrast South Africa had the "natives" in big numbers who could not be wiped out from the face of the earth.

Maloka op cit note 165 at 7-8.

[184] South African Native Affairs Commission Report 1903 – 05 available at https://ia801407.us.archive.org/15/items/southafricannati00sout/southafricannati00sout.pdf (last accessed on 16 November 2018)

[185] May op cit note 177 at 5.

[186] Robert Henry Brand, *The Union of South Africa* (1909) 27.

[187] Ibid 101.

[188] Ibid 100-103.

sentiments and political beliefs. Brand's crude view below sums up his justificatory sentiments regarding black exclusion from constitutional subjecthood:

> With the exception of a very limited number of educated natives, the Kaffirs have not the vaguest idea of what parliamentary government means. They have never heard of the franchise and do not want it. The ancient Britons of Caesar's time would be more capable of understanding the British Constitution of to-day than the Kaffirs of giving an explanation of the South Africa Act.[189]

Complicating the native question for the white regime was the clearly recognised fact that the future of the Union's economy was dependent on the exploitation of black people's labour. Maloka captures well the apparent dilemma presented by the native question in this regard, he points out that whilst a 'problem' that needed to be 'subdued, controlled and administered', the natives were nevertheless 'a desperately needed source of cheap labour without whose sweat and blood the colonial economy could not run.'[190]

3.2.3 Establishing South Africa as a Colony

The 1910 Constitution is clear in that what was established under the South African Union Act was a British colony. In the preamble, the drafters announce the establishment of the union of four British colonies as one government 'under the Crown of Great Britain and Ireland.'[191] The South African Union Act was itself passed into law by the British Parliament. The effect of this in structural terms was that as a territory it was arranged and structured under the authority of the King and with the Governor-General as the King's representative. The Constitution specified that the King was responsible for appointing the Governor-General

[189] Ibid 111.
[190] Maloka op cit 165 at 20-21.
[191] Preamble 1910 Constitution.

and any person appointed to that role acted always as the King's representative and at the King's pleasure.[192]

A brief regard to the Preamble of the 1910 Constitution belies any suggestion of it being a people driven constitution. Couched in the language of expediency, the birth of South Africa as a state was very much a contrivance of the British as they sought to consolidate their imperial gains pursuant to the South African war. Stark in its absence was any proclamation purporting to designate this moment as an act of popular sovereignty in the name of the people at what is historically and factually the foundational moment of the modern state of South Africa. The 1910 Constitution contained no bill of rights, the drafters made no allusion to the Constitution being about the protection or promotion of the rights of the inhabitants of the territory.[193] In fact, read in its entirety, the 1910 Constitution, beyond establishing the structures of government, can be read as having a discernible transactional motif running through it, in terms of which the *raison d'etre* of the Union was intimately aligned with the financial interests of the Crown of Great Britain and Ireland.

For example, so crucial was the establishment of infrastructure to enable the exploitation of the colony, purportedly in pursuance of the 'welfare and future progress of South Africa,[194] that the Constitution made detailed provision for the financing of railways, ports and harbours that would be integral to moving raw materials and other goods.[195] Notably, whilst tacitly committing to the subsidisation of 'agricultural and industrial

[192] Ss 8 and 9 1910 Constitution.

[193]This is despite the fact that the notion of rights protections had featured in the constitutionalism of pre-Union South Africa with the Orange Free State having provided for such rights in its 1905 Constitution. Of course, these were the exclusive preserve of Whites, and males in particular. See Dugard op cit note 161.

[194]Preamble 1910 Constitution.

[195] S 117 1910 Constitution provided for the establishment of a Railway and Harbour Fund to receive monies raised from these facilities and provide for their administration.

development within the Union and promotion, by means of cheap transport, of the settlement of an agricultural and industrial population in the inland portions of all provinces of the Union,' the 1910 Constitution determined that the railways, ports and harbours would be run on business principles. In fact, a close examination of the financial provisions betrays a preoccupation with establishing a regulated extractive economy with the Governor-General-in-Council wielding extensive powers over the appointment of financial commissions and state boards.[196] Whilst not establishing a mixed economy, what seems transparent is the role, envisaged by the drafters, that the state would play as an enabler of extraction and accumulation by the white settler minority specifically, and the British Empire more broadly.

3.2.4 The Structure of the 1910 Constitution

The basic structure of the 1910 Constitution mirrored that of the British Westminster system with power divided across the three branches of government. The executive authority was headed by the Governor-General who, as stated above, was appointed by the King[197] and governed with an executive council.[198] These members of the executive council were also designated the 'King's ministers of the State of the Union.'[199] The constitution made provision for a Prime Minister who was responsible for establishing a parliamentary government. In accordance with the doctrine of parliamentary government under Westminster constitutionalism, members of the executive government were required to be members of at least one of the two houses of Parliament.[200] The executive was responsible for establishing

[196] See ss 117 – 131 1910 Constitution.
[197] S 8 1910 Constitution.
[198] S 12 1910 Constitution.
[199] S 14 1910 Constitution.
[200] S 14 1910 Constitution, See P De Vos, W Freedman, D Brand et. al, *South African Constitutional Law in Context* (2014) at 42-3. See also Currie, De Waal, De Vos et al op cit note 81 at 14.

the civil service, which entailed putting together a united bureaucracy that incorporated the administrative structures of the former colonies.[201]

Legislative power under the Union vested in a bicameral Parliament comprising of a Senate and a House of Assembly.[202] Membership of the Senate was made up of both elected and nominated persons.[203] To be an elected member, an individual had to meet certain stipulated criteria including age, citizenship, eligibility to vote, and a property qualification.[204] To ensure white racial exclusivity as far as constitutional subjecthood was concerned, affixed to the citizenship requirement that the individual had to be a British subject was also a racial qualification that excluded anyone not of European descent.[205] The invocation of race as a qualification was most crucially a factor with respect to who was included in the franchise and who was eligible to become a Member of Parliament. The distribution of seats between provinces in the Senate, although initially stipulated in the text, was to subsequently be determined on the basis of a formula whose sole basis was the 'total number of European male adults' whose number was established in terms of a 'census of the European population.'[206]

Equally material, was the race-based *disqualification* of African voters in all the other provinces except the Cape of Good Hope. The 1910 Constitution, in permitting the House of Assembly to craft an enfranchisement law, barred it from fashioning a law that would

[201] S 16 1910 Constitution.
[202] S 19 1910 Constitution. In a gesture more symbolic than real the British King was also listed as being a part of Parliament.
[203] S 24 (i) 1910 Constitution.
[204] S 26 1910 Constitution.
[205] S 26 (d) 1910 Constitution. See Brand op cit note 183 at 100. Brand acknowledges the vagueness of this term and anticipates future litigation around it. He, however, intimates that the reason for the drafters' preference or use of this term was based on their reluctance 'to say in so many words that no man, who could be proved to have a trace of black blood in him, should sit in Parliament.'
[206] S 34 of 1910 Constitution.

'disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only.'[207] Similar qualifications to those affecting senators also applied to the membership of the house.[208] Parliament enjoyed powers to make laws for peace, order and government as well as to appropriate revenue and levy taxes.[209] Laws enacted by Parliament were assented to by the Governor-General who did so in the name of the King, but subject to the King's residual veto that permitted him to disallow any law within one year after the Governor-General's assent should he deem it necessary. [210]

A critical element of completing the amalgamation of the colonial structures into Union assemblies was establishing the Supreme Court of South Africa that had at its apex the Appellate Division.[211] Hierarchically below the Appellate Division were the several Supreme Courts of the colonies that became provincial divisions of the Supreme Court.[212] One consequence of this amalgamation of these courts was that the emergence of the South African legal tradition would thus be subject to strong Roman-Dutch and English law influences.

[207] S 35 of 1910 Constitution. This clause was an entrenched provision as it required a special procedure for its amendment in the event that such amendment sought to remove those Black voters from the voters roll.
[208] S 44 1910 Constitution.
[209] Ss 59-63 1910 Constitution.
[210] S 64 1910 Constitution.
[211] S 95 1910 Constitution.
[212] S 98 1910 Constitution.

3.2.5 Characteristic Features of the 1910 Constitution Enabling the Constituting of a Racist State

3.2.5.1 Parliamentary Supremacy

As I have already indicated above the 1910 Constitution was premised on the Westminster system of constitutionalism of which one of the main consequences was the embracing of the doctrine of parliamentary supremacy. According to this doctrine, in its traditional formulation, there are no limits on the substance of the laws that Parliament can make, save that Parliament must abide by its own binding rules and procedures when adopting new law.[213] Understood within the confines of Western constitutionalism as practiced in Britain, the doctrine's potential for egregious abuse was tempered by its concurrent evolution alongside the development of the principle of the rule of law.[214] In South Africa, under parliamentary supremacy white South Africans used their control of Parliament to legally advance the entrenchment of an economic, social and political structure premised on notions of white supremacy through legislation that confirmed black people as inferior constitutional non-subjects under the 1910 Constitution. For example, the passing of the infamous Native Land Act of 1913, that consolidated the early phase of African dispossession after Union, led Sol Plaatje, an eminent African journalist, writer and founding member of the ANC, to say of the day this law took effect, '[a]waking on Friday morning, June

[213] See generally A V Dicey *Introduction to the Study of the Law of the Constitution* (1885). See Dugard op cit note 161 at 33; see also Ziyad Motala, *Constitutional Options for a Democratic South Africa: A Comparative Perspective* (1994).

[214] In brief, according to Dicey, the rule of Law comprises three central ideas (i) that law is supreme and public exercise of public power is lawful only when done in terms of empowering law; (ii) everyone is equal before the law and subject to the jurisdiction of the courts irrespective of status; and (iii) the constitution was enforced through the enforcement of the ordinary laws by ordinary courts. See Currie, De Waal, De Vos et al, op cit note 81 at 77-79; Dugard op cit note 161 at 37.

20, 1913, the South African Native found himself, not actually a slave, but a pariah in the land of his birth.'[215] Under the guises of a 'flexible constitution' Dugard notes, of parliamentary supremacy, that '[t]he period between 1910 and 1961...saw the expansion of the powers of Parliament and the demise of all curbs on Parliament's will.' For example, this is the period in which an extensive amount of racist legislation was passed into law, the most infamous of which was the Population Registration Act of 1950 which required that all inhabitants of South Africa be officially registered in terms of the racial classification assigned to them.[216] Another prominent example is the Suppression of Communism Act of 1950 that criminalised such a broad range of activity that it required little imagination on the part of the state to find individuals believed to be acting in opposition to the apartheid regimes policies to be in breach of its draconian and far-reaching provisions.[217]

3.2.5.1 Excluding Black Political Participation Through Controlling the Franchise

Accounts of the removal of the Blacks from the Cape voters roll are numerous and well documented.[218] As the issue of the franchise has been anticipated above in the discussion of the Treaty of Vereeniging, it suffices to add here that in terms of the 1910 Constitution, the position, as had prevailed in the former self-governing colonies, was substantially retained in that black inhabitants were denied the franchise entirely in the Orange Free State and the Transvaal, in Natal a handful retained their vote subject to stringent qualifications, and in the Cape black voters formally retained their vote in equal measure to

[215] See Sol Plaatje, *Native Life in South Africa* (2007) 21.
[216] The Population Registration Act 30 of 1950.
[217] The Suppression of Communism Act 40 of 1950 defined communism as any scheme aimed at achieving change--whether economic, social, political, or industrial--"by the promotion of disturbance or disorder" or any act encouraging "feelings of hostility between the European and the non-European races...calculated to further [disorder]."
[218] See Dugard op cit note 161.

their white counterparts which was subject to education, income and property qualifications.[219] Owing to the highly contentious and contested nature of the franchise, the provision dealing with this in the Constitution was an entrenched one that required a special procedure for amendment.[220] Rather than provide yet another account of the legal history of the franchise that emphasises judicial decisions, I will limit my focus to the build-up and opposition to the removal of the black voters on the Cape voters roll and the general consequences of this exclusion to the Constitution.

3.2.5.1.1 The Removal of African Voters from the Cape Voters Roll

The question of the franchise remained a burning issue in South Africa post-1910, with black inhabitants agitating for inclusion on the one hand, and a majority of their white counterparts on the other hand rejecting the notion of equality between the races. The reprieve enjoyed by black voters who already had the franchise in the Cape at the time of the commencement of the Union proved to be a short-lived one. Therefore, despite the very limited nature of the constitutional guarantees of the Cape franchise, the question of the black vote was never really off the table. This fact, alongside opposition to other racially

[219] Thompson op cit note 161 at 150-1.

[220] A two thirds majority vote of both houses of Parliament sitting jointly was required in terms of s 152 in order to amend s 35which provided as follows; Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

motivated legislation in the period shortly after Union, is widely acknowledged as influential in leading to the formation of the South African Native National Congress (SANNC).[221]

According to Walshe, 'they were setting out to attain what they considered their constitutional rights – equality of opportunity within the economic life and political institutions of wider society.'[222] The particular class bias of the founding members constituting, paramount chiefs, lawyers, religious men and teachers, to name a few, as well as their reverence for the Cape tradition was to prove impactful in as far as how they framed the issues at the heart of their cause, as well as the methods they adopted to pursue them. Of the early years of the SANC Walshe remarks, '[b]eing orientated towards the idealised Cape tradition and refusing to accept racial discrimination as the basis of this for this evolving Native policy, (SANC) congressmen committed themselves to an expansive and outward looking nationalism which could make little headway against the reality of the South African power structure and the exclusive ethnic loyalties and narrow nationalism of white South Africans.'[223]

Klug vividly captures the contrasting fortunes between black and white voters noting that '[w]hilst black voting rights remained frozen by the Union compromise the South African parliament soon began extending the voting rights to whites.'[224] More specifically, Klug points out that in 1930 Parliament effected amendments that extended the franchise to white women who were, until that point, disqualified on the grounds of gender, and, subsequently,

[221] See Walshe, op cit note 170 at 30 – 41 for a rich and detailed account of that first congress.
[222] Ibid 34.
[223] Ibid 40.
[224] Klug op cit note 147 at 38.

the vote was extended to the remaining white men in Natal and the Cape previously excluded for failure to meet the property or income qualifications.[225]

For the black populace, however, despite better organisation and an increased repertoire of methods to challenge this exclusionary system via congresses, petitions, deputations to Union and colonial officials, there was little to show for it as far as attaining their actual goal.[226] During the period from Union to the final removal of Africans from the Cape voters roll in *Ndlawana v Hofmeyr* in 1936, there was persistent demand for an extension of the franchise as well as an opposition to various attempts to curtail it.[227] However, this specific demand and the court challenge that resulted from it, as Klug correctly notes, must be seen in the context of other transgressions against the black majority, particularly those related to dispossession of property rights.

3.2.5.1.2 The Construction of the Racialized Inferiorized Constitutional Non-subject

Whilst the black section of the population were, for the most part, denied the franchise with all its inevitable exclusionary consequences, the reality was that Blacks constituted approximately 80% of the population in 1910.[228] This population could not simply be ignored or treated entirely as if it did not exist. Therefore, drafters of the 1910 Constitution were forced to recognise this fact and make some direct reference to the majority of the population this was done through a provision that constituted them as objects of administration. Section 147 provided that:

[225] Ibid.
[226] Walshe op cit note 170 at 46-50.
[227] *Ndlwana v Hofmeyr supra* note 163.
[228] According to Thompson, in 1910, at the commencement of the Union, the population of South Africa was constituted as follows: '4 million Africans, 500,000 Coloureds, 150,000 Indians and 1,275,000 Whites. Thompson op cit note 161 at 153.

> The control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union shall vest in the Governor-General in Council, *who shall exercise all special powers in regard to native administration* hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs, and any lands vested in the Governor or Governor and Executive Council of any colony for the purpose of reserves for native locations shall vest in the Governor-General in Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by any such Governor or Governor and Executive Council. (Emphasis mine)

This sweeping provision, against the background of being denied the franchise and being excluded as citizens essentially confirmed that the black populace enjoyed no constitutional rights or safeguards with respect to their existence or wellbeing except where these were granted at the discretion of the Governor-General. This clearly consigned them beyond the realm of constitutional-subjecthood, or rather constructed them essentially as constitutional non-subjects to be administered as conquered beings whose existence was tolerated for its ability to advancement of white economic interests and service to the colony. The enactment of the Native Administration Act (NAA) of 1927[229] established the legislative framework for the operationalization of this provision.

The founding premise of the NAA, like the related constitutional provision, was to anoint the Governor-General as the "supreme chief of all natives."[230] The Act endowed the Governor-General with essentially unfettered powers to appoint and depose 'native chiefs' and establish new 'tribes' as he saw fit and, of course, as was politically expedient.[231] The Act, as a whole, served to effectively lock black people in as essentially constitutional objects or wards of the state with no rights to speak of in the governance of their own affairs in an

[229] Native Administration Act 38 of 1927. Sometimes also referred to as the Black Administration Act.
[230] S 1 of NAA.
[231] See Thomas William Bennett, *A Sourcebook of African Customary Law for Southern Africa* (1991) 24-35; Thomas William Bennett, *Customary Law in South Africa* (2004) 107-9; Khanya B Motshabi and Shereen G Volks, 'Towards democratic chieftaincy: Principles and procedures' (1991) *Acta Juridica* 104 at 107-8.

extension of Shepstonian notion of indirect rule.[232] More generally, the NAA was instrumental in establishing and entrenching Mamdani's notion of the bifurcated state, a dual legal system that creates a separate and inferior system of administration and justice for the black segment of the population as opposed to the common law system that was applicable to other sections of the South African population, particularly that comprised of white people.[233]

This NAA is but one example of racist laws enacted by successive Parliaments to not only further cement the inferior or marginal status of Africans, but to also shore up the economic, social and cultural position of white society. There was a myriad of legislation that not only discriminated against the black multitudes, but was also instrumental in establishing a white monopoly over economic opportunities on offer, and reserve jobs as well as providing greater remuneration for the same or similar work done by their black counterparts.[234]

Whilst the legislative enactments under discussion can hardly be designated as being constitutional in character or nature in a strict sense, it is hardly a stretch to argue that they

[232] Khanya B Motshabi and Shereen G Volks ibid.

[233] Mamdani op cit note 129 at 16-23; See also Sanele Sibanda and Tshepo Bogosi Mosaka, '*Bhe v Magistrate, Khayelitsha*: A cultural conundrum, Fanonian alienation and an elusive constitutional oneness' (2015) *Acta Juridica* 256.

[234] See Thompson op cit note 161 at 167-170 and Walshe op cit note 170 at 31 A few examples of such legislation are the following: The Native Labour Regulation Act of 1911 (made it a crime for Africans to break their labour contracts or otherwise engage in strike action); The Natives (Urban Areas) Act No 21 of 1923 (regulated the presence of Africans in the urban areas by granting local authorities the power to demarcate and establish African locations (townships) on the outskirts of White urban and industrial areas); The Industrial Conciliation Act No 11 of 1924 (provided for white job reservation that defined "employees" to exclude black people with effect of denying them membership to registered trade unions as well as prohibiting the registration of black trade unions.); The Minimum Wages Act of 1925 (further provided for white job reservation by limiting employment in certain trades for white people only); and The Mines and Works Act (Colour Bar Act) No 25 of 1926 (enforced the wage and job colour bars in South Africa). See: http://www.sahistory.org.za/politics-and-society/apartheid-legislation-1850s-1970s (last accessed 30 August 2018) and https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646.htm (last accessed 30 August 2018).

were clearly rooted in the constitution's racist structure and spirit, which in turn was in keeping with the racist underpinnings of imperial expansion, displacement and dispossession.

3.3 The 1961 Republican Constitution - Consolidating the Racist State

Unlike the making of the 1910 Constitution, the adoption of the 1961 Constitution was not preceded by a convention that brought together the various actors of South African politics. With respect to this Constitution there is relatively little analytical writing that provides an in-depth critical examination of the social, economic, political or cultural stimuli that contributed to its adoption. This is, of course, not to suggest that the period in question is not the subject of extensive study from various perspectives. Rather it is to suggest that there are few accounts that do more than pay passing attention to its adoption and passing. There is probably good reason for this in that there was, arguably, nothing portending a constitutional crisis that preceded it or strictly speaking necessitated it.

Further, in many ways, this shift to republicanism signified more a change in form rather than in substance with an intensification of the state's racist policies and laws which in any event seem a natural continuum from the National Party's coming into power after a narrow electoral victory in 1948. As such, beyond South Africa's founding as a constitutional colonial state in 1910, 1948 is therefore probably one of the most significant years in the history of latter-day South Africa as far as buttressing the agenda of white supremacy as a state policy and practice termed apartheid. Leonard Thompson usefully captures the underlying white supremacist logic of the system of apartheid as follows:

> At the heart of the apartheid system were four ideas. First, the population of South Africa comprised four "racial groups" – White, Coloured, Indian and African – each with its own inherent culture. Second, Whites, as the civilized race, were entitled to have absolute control over the state. Third, white interests should prevail over black interests; the state was not obliged to provide equal facilities for the subordinate

> races. Fourth, the white racial group formed a single nation, with Afrikaans – and English - components, while Africans belonged to several (eventually ten) distinct nations or potential nations – a formula that made the white nation the largest in the country.[235]

This synopsis is very useful for elaborating on how the apartness that was at the core of apartheid was constituted, what it stood for as well as outlining the main themes of a standard apartheid narrative. However, with the National Party having attained and retained power in the 1948, 1953 and 1958 elections, it does little to shed light on why constitutional change in 1961 was either deemed necessary or desirable; nor what social, political, economic or cultural phenomena may have influenced the decision. Whilst, there may be no obvious single or set of reasons or constitutional convention that provide a convenient account for this decision, it is still worth presenting here at least an overview of some of the major events signifying opposition to the increasing institutionalisation of unequal treatment of the black population that was pivotal to consolidating the National Party's deepening racist agenda leading up to the 1961 Constitution.

Interestingly, the National Party had initiated some talk of a new constitution as far back as 1952, but that idea had all but laid dormant for almost a decade.[236] This fact, however, should not detract from the significant slide towards authoritarian rule that was slowly but surely changing the social, political, economic and cultural make up of South Africa. This shift in the racist mood and character of South Africa is well captured by May writing in 1955:

> A constitutional revolution of the utmost importance is taking place in South Africa both in regard to Parliament and through the apartheid laws which have been passed in the last five or six years. The latter have not received the wide publicity of the former, partly because it has not been realised how far-reaching in their consequences they are likely to be. The segregation laws in the southern part of the United States of America can hardly bear comparison with these laws. In the Union a whole way of life

[235] Thompson op cit note 161 at 190.
[236] Klug op cit note 147.

> is being rapidly and fundamentally changed, and millions of people – White, Black, Coloured and Asiatic, will have to adjust themselves to the changes.[237]

The period in question and the schemes in place to advance the National Party project shoring up white supremacy as the overarching state policy were indeed vast and far-reaching, however they did not occur in isolation nor without opposition. Indeed, it could be well argued that some of these schemes were a response to the mounting resistance by the black opposition in various guises that occurred at that time, no doubt that influenced the political landscape that the National Party set itself up to dominate unequivocally.

Although preceding the National Party's rise to power by a few years, one notable occurrence that would no doubt have caused some foreboding within the ranks of those determined to retain South Africa as a 'white country' would have been the ANC's first formal declaratory document on rights, namely the African Claims Document. The document demanded the adoption of a Bill of Rights that included, amongst other rights, a free press, freedom of economic activity and the right to 'own, buy, hire or lease and occupy land'. Finalised in 1943, during the second World War, the African Claims Document was inspired by the Atlantic Charter and signified a definitive shift in African politics as it placed on the agenda clear demands to the end of constitutionalised racial discrimination which, according to the African Claims Document, was to be replaced by equal citizenship on the premise that black inhabitants, too, had rights which entitled them to an equally dignified existence as citizens on the same terms as white inhabitants. It was also at this time that the Congress Youth League (a wing of the ANC) began agitating for more mass based and confrontational resistance under the leadership of Anton Lembede, Nelson Mandela, Walter Sisulu and Oliver

[237] May op cit note 180 at v.

Tambo.[238] The importance of these occurrences, taken cumulatively, is the signal they sent with respect to a shift in the framing of black politics that was, at that time, dominated by compromise seeking elite politics of inclusion to a rights demanding liberation politics that sought emancipation of all the masses.

The 1950s saw numerous instances of mass-based campaigns opposing the apartheid government. 1952 saw the organisation of the defiance campaign which was organised across sectoral lines by organisations from the different racial groups and led mainly by the ANC and the South African Indian Congress (SAIC). The essence of this campaign was that it involved participants volunteering to passively defy various apartheid laws and offering themselves up for arrest rather than obey discriminatory laws.[239] In 1956, the Federation of South African Women, a coalition of women's organisations, also organised across racial lines, came together to organise a march on the seat of the executive at the Union Buildings in Pretoria. The march in opposition to a law that extended the pass law affecting African men to include women is reported to have involved over 20,000 women who handed over a petition for the attention of the prime minister demanding a repeal of these laws.[240]

Probably the best known of the mass mobilisation campaigns of this era and no doubt the gravest in terms of the carnage unleashed on marchers was that which resulted in the Sharpeville massacre in 1960. Organised by the Pan African Congress (PAC) which was in turn lead by Robert Sobukwe (having broken from the ANC), this mass campaign was organised in opposition to the pass laws with protestors refusing to carry their passes and offering themselves up for mass arrest in defiance. On 21 March 1960, the march in Sharpeville ended

[238] Thompson op cit note 161 at 208.
[239] Govan Mbeki, *The Struggle for Liberation in South Africa* (1992) 64-5.
[240] Thompson op cit note 161 at 209.

in a massacre as police fired on unarmed protesters at a police station, killing 67 people and wounding 186.[241] In the aftermath of the massacre, the government took the decision to ban the PAC and the ANC. The bans remained in place for over 30 years. It was after the bans that both movements announced the establishment of their armed wings, namely Poqo (PAC) and Umkonto we Sizwe (ANC). The organisational bans resulted in countless detentions and arrests of activists, many individual bannings while others left the country for exile. The effect of these actions was to severely hamper the organised opposition to the system of apartheid as it was only possible to do so from underground or outside the country.

Whilst these protests described above were momentous in their own different ways and for different reasons, two related occurrences probably better signal the times and shift in mood both from the perspective of those opposing the apartheid government and the government itself. In the first instance I refer to the historic Congress of the People that resulted in the adoption of the Freedom Charter in 1955. The Congress of the People was organised by multiple organisations, with ANC, SAIC, the South African Coloured People's Organisation, the Congress of Democrats (mainly white representatives) and trade union organisations working together to produce the Freedom Charter. The second occurrence that followed on from the Freedom Charter's pronouncement were the treason trials wherein the National Party government charged 156 of the leaders involved at the Congress of the People with treason.[242] The apparent fear struck in government circles around the adoption of the Freedom Charter may have stemmed from the fact that it's demands, reminiscent of the

[241] Ibid 210.
[242] Ibid 209.

Africa Claims Document, called for a fundamental re-imagining of South African society along non-racial, egalitarian and decidedly social democratic lines.

The internal occurrences discussed above were also matched by some international opposition to apartheid which sought to put pressure on the South African government in a bid to encourage reforms. This pressure must be read in light of the calls for decolonisation across the African continent post World War II and the ensuing attainment of independence by some African countries from 1960 onwards. The period of the late 1950s to the early 1960s on the African continent was one widely dubbed as the independence or liberation era as it was at this juncture that many African states were finally released from the yoke of colonialism, at least formally. It was these changes sweeping across the continent that caused British Prime Minister Harold Macmillan, whilst on a visit to South Africa famously to speak of the 'the wind of change [that] was blowing across Africa.'[243]

The role of the United Nations in seeking to put pressure on the NP government, as Klug points out, must also be recognised as some of the newly decolonised African members, joined India (also a former colony) in using their membership to bring the South African case into the international arena. Those states that were also members of the Commonwealth also used their membership there to exert further pressure where South Africa found itself under serious threat of expulsion if no commitment to reforms was made.[244] Therefore, cumulatively these external pressures and the growing internal opposition championed by liberation movements and organisations whilst not entirely threatening of the government's

[243] See generally Saul Dubow, ''Macmillan, Verwoerd, and the 1960 'wind of change'speech' (2011) 54 *The Historical Journal* 1087; Thompson op cit note 161 at 213-14.

[244] Klug, Heinz, Towards a Sociology of Constitutional Transformation: Understanding South Africa's Post-Apartheid Constitutional Order (February 8, 2016) at 5. Univ. of Wisconsin Legal Studies Research Paper No. 1373. Available at SSRN: https://ssrn.com/abstract=2729460 or http://dx.doi.org/10.2139/ssrn.2729460 (last accessed 16 November 2018); Thompson op cit note 158 at188.

power nor the constitutional foundations were, I suggest, significant factors that influenced the National Party to act to consolidate its position through constitutional enactment.

Although none of these occurrences individually targeted specific constitutional provisions nor can they be singularly credited with leading to the demise of the 1910 Constitution, Klug argues convincingly that such occurrences of the nature described above must be considered in the overall calculus of what influences constitutional change beyond a focus on what the drafters intended and the text. This approach is what I understand Klug's to be referring to when he writes of a constitutive approach that posits that in comprehending the sociology of constitutions we should 'explore the relationship between the social processes that produce a constitutional settlement at any particular moment in time and the continuing role particular constitutional ideas and institutions play in the creation and transformation of any society's constitutional identity.'[245]

3.3.1 The Nature of the Changes Ushered in by the 1961 Constitution

As already demonstrated above, rather than a major disruption it was the relatively slow accretion of totalitarian control of state power by the Nationalist Party and, some argue, a reaction to Macmillan's speech that galvanised Verwoerd to call for a referendum asking white voters whether South Africa should become a republic and sever the remaining colonial ties with Britain.[246] So arguably, the move rather than being a political necessity can also be read as being deeply imbued with symbolism pointing towards the attainment of total white power under an Afrikaner hegemony. With the basis for constitutional 'renewal' being self-driven by the National Party rather than a as result of any deep-seated political upheaval or

[245] Ibid 3.
[246] Dugard op cit note 161 at 34.

social contagion it should hardly be surprising that the 1961 Constitution introduced very little by way of structural or substantive changes relative to the 1910 Constitution.[247]

Probably, the most substantive shift introduced by the 1961 Constitution was a formal break of South Africa's colonial ties with Britain as that constitution established South Africa as a republic.[248] However, care should be taken not to over-emphasise this point as the more substantial shift in shaping the fundamental character of South African society at that time had been the National Party victory of 1948, and the control it had taken of all the state institutions and structures including schools, public administration and courts.[249] In effect what the transition from colony to republic did was to replace the British Monarch with the State President as the new head of State.[250] This shift too was hardly impactful as it must also be understood in context as Britain had ceased to exert any direct or indirect legislative control over South Africa since the passing of the Statute of Westminster in 1931 which had the effect of formally relinquishing legislative control. Therefore, the lack of substantial structural and institutional change should not come as a surprise as this moment is better characterised as a period of consolidation rather than one to reimagine or reorganise South Africa in a real sense.

A notable discursive shift from the 1910 Constitution that speaks to the spirit of South African constitutionalism is evident in the preamble of the 1961 Constitution. Instead of the very transactional tone of the preamble of the former, the language of the latter is that of a grand proclamation somewhat reminiscent of that of other foundational constitutional

[247] Dion Andre Basson and Henning Pieter Viljoen, *South African Constitutional Law* (1988) 37.
[248] S 1 1961 Constitution.
[249] Thompson op cit note 161 at 188 and 195.
[250] S 7(4) read as follows: 'The State President shall in addition as head of the State have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative.'

moments associated with vanquishing past adversity. The invocation of the declarator of 'we the people' clearly sought to gesture towards a newly forming 'national' identity of a chosen people who, against all odds, were now confronting their manifest destiny that promised to fulfil their needs. The several references to God were symbolic of an important facet of forging an Afrikaner Christian nationalist ethos that was to be one of the pillars for justifying the exclusion of other inhabitants of the territory of South Africa.[251] Accordingly an excerpt of the preamble to the 1961 constitution reads as follows:

> WE, who are here in Parliament assembled, DECLARE that whereas we
>
> ARE CONSCIOUS of our responsibility towards God and man;
>
> ARE CONVINCED OF THE NECESSITY TO STAND UNITED
> To safeguard the integrity and freedom of our country;
> To secure the maintenance of law and order;
> To further the contentment and spiritual and material welfare of all in our midst;
>
> ARE PREPARED TO ACCEPT our duty to seek world peace in association with all peace-loving nations; and
>
> ARE CHARGED WITH THE TASK of founding the Republic of South Africa and giving it a constitution best suited to the traditions and history of our land

Of course, in the context of South Africa's history, and understood relative to other provisions of the Constitution, this call to nation and people referred exclusively to the white populace. So the preamble and the 1961 Constitution in its entirety must be read in light of the surge of white supremacy and Afrikaner nationalism that was the state's prevailing ideological posture.

[251] S 2 1961 Constitution reads as follows: "The people of the Republic of South Africa acknowledge the sovereignty and guidance of Almighty God."

3.3.2 Institutional and Structural Shifts

As already intimated above, the 1961 Constitution can be characterised as being one that produced more continuity rather than change as far as South Africa's constitutional scheme of governance was concerned. Besides the shift to republicanism, the changes effected were mainly with respect to the detail of provisions rather than shifts on the power matrix or the conferment of rights or privileges.

From an institutional point of view, probably the most politically significant move was the explicit constitutional incorporation of the doctrine of parliamentary supremacy in the 1961 Constitution. Section 59 provided as follows:

> (1) Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic.
>
> (2) No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament...

Clearly, in the wake of the 1950s the trilogy of cases concerning the removal of the Coloured franchise, the 'constitutional crisis' brought about by the Court intervening in the exercise of Parliament's powers, the drafters of the 1961 Constitution sought to foreclose any possibility of the courts continuing to harbour any belief in the notion that they enjoyed constitutional jurisdiction where the substance of legislation was at issue.[252]

Unsurprisingly, under the 1961 Constitution, membership of the white section of the population continued to provide the standard definition as to who was clothed with constitutional subjecthood with its obvious implications as to who could participate in the political process. Qualification or disqualification for membership to Parliament continued to

[252] See also s 94 (2) specifically subjecting the jurisdiction of the Supreme Court in line with the provisions of s 59 1961 Constitution.

be premised on racial belongingness; where under the 1910 constitution it hinged on being a 'British subject of European descent', in the 1961 Constitution, the requirement now starkly stipulated that an individual had to be 'a white person' and a South African citizen' in order to be eligible.[253] One novel inclusion given rise to by the removal of the Coloured franchise in the Cape, was the requirement that the State President had to provide for Coloured representation in the Senate. In effect this meant that the President had to ensure that he included at least one senator from each province whom he considered to be 'thoroughly acquainted… with the interests of the Coloured population' such that that individual could serve as a conduit in the promotion of Coloured views and interests.[254]

Under the 1961 Constitution, Africans and Asiatics, were, again, included mainly for the purposes of being construed as the other to whom the constitution held out little beyond being subjected to yet another regime of administrative control. Perhaps, the only notable change in this regard was the change of label by which Africans were referred to, namely that from being natives they were now referred to as Bantu; although this fact had no status implications as far as constitutional subjecthood was concerned.[255] Apart from this change the inferiorization and general disregard for black people under the 1961 constitution remained unchanged.

The 1961 Constitution was again responsive to the acknowledged cultural tensions between the Afrikaners and the English, and like the 1910 Constitution responded to these in that the entrenched language provision establishing English and Afrikaans (formerly Dutch)

[253] See ss 34 (d) and 46 (c). See also s 42 with respect to the delimitation of electoral divisions whose determination was made with reference to white voter presence.
[254] S 29 (2) (b) 1961 Constitution. See also s 40 (c) providing for coloured representation in the House of Assembly.
[255] See s 111 1961 Constitution.

as the official languages in South Africa enjoying equal status were retained.[256] The constitutional safeguards on this score were more elaborate under the 1961 Constitution with detailed provisions requiring simultaneous dual publication of 'anything' appearing in a newspaper at the instance of the state.[257] The importance of the language provisions serving to provide some equilibrium and maintain harmony between the Afrikaans and English speaking whites was a significant factor in securing white domination as the Afrikaners consolidated the rule and engaged in more repressive measures on the ground to suppress the internal opposition to Apartheid.

Generally, I have sought to highlight the fact that between the 1910 and 1961 Constitutions there was really little by way of substantive change to the fundamental structure of the state and the relationships between those governing and those governed under either of these constitutions. Significantly, from a constitutional point of view, this moment in 1961 did nothing to reshape nor reimagine the relationships between the different racial groups in South Africa, if anything it served to reinforce the possibility and reality of white dominance in all spheres of life by further entrenching parliamentary sovereignty. The fact of increasing repression and a legislative programme advancing white interests can therefore not be attributed to the 1961 Constitution per se, rather what was, I suggest, its primary constitutive role was to deepen the roots of a racially divided state wherein constitutional subjecthood was unambiguously racially determined as were social positioning and material wellbeing.

[256] S 108 1961 Constitution. S 118 providing for the amendment of the Constitution, provided a special procedure for the amendment of the language provision by establishing a unicameral procedure that needed two thirds support of all members of Senate and the House of Assembly.
[257] S 110 1961 Constitution.

3.4 Subterfuge as Inclusion – On the Cosmetic Constitutional Reforms of the 1983 Tricameral Constitution

With the major liberation movements banned and many of the leaders of those movements either in prison or in exile, the period after the passing of the 1961 Constitution is one that is sometimes characterised as one in which the internal struggle for liberation went into a lull. Gregory Houston captures the bleakness of the period when he tells us 'the 1960s marked a decade in which black resistance was silenced and which repressions led to the establishment of underground insurgent organisations and missions-in-exile by the major political organisations.'[258] For it was during this period that the apartheid government pressed on with its apartheid policy of separate development through the establishment of Bantustans, notionally independent states which the NP government cynically dubbed as representing an internal process of 'decolonisation'.[259] Also occurring at an increased rate was the process of dispossession in the form of forced removals in various guises which included moving people from so called 'black spots' (black owned land in areas designated for white communities in rural areas), and from urban areas of South Africa to Bantustans.[260]

This period also saw the emergence of the Black Consciousness Movement (BCM). Led by Steve Biko, the BCM advanced a politics of black liberation. Black consciousness as a philosophy advocated self-reliance, black self-love, black unity and liberation, especially the

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[258] Gregory F Houston, *The National Liberation Struggle in South Africa: A Case Study of the United Democratic Front, 1983-1987* (1999) 38.

[259] The cynical and malicious nature of this policy is well captured by Klug:

> Rejected by the majority of South Africans and the international community as a violation of black South African's right to self-determination, 'separate development' became a process of denationalisation in which the citizenship of black South Africans was recreated as foreign citizenship regardless of the individual's place of birth or preference.

Klug op cit note 147 at 40-1.

[260] Ibid 4, Thompson op cit note 161 at 193-5.

mental liberation that is crucial in overcoming the black inferiority complex. In Biko's own words:

> Briefly defined therefore, Black Consciousness is in essence the realization by the black man of the need to rally together with his brothers around the cause of their oppression - the blackness of their skin - and to operate as a group in order to rid themselves of the shackles that bind them to perpetual servitude. It seeks to demonstrate the lie that black is an aberration from the "normal" which is white. It is a manifestation of a new realization that by seeking to run away from themselves and to emulate the white man, blacks are insulting the intelligence of whoever created them black. Black Consciousness, therefore takes cognizance of the deliberateness of the God's plan in creating black people black. It seeks to infuse the black community with a new-found pride in themselves, their efforts, their value systems, their culture, their religion and their outlook to life.
>
> The interrelationship between the consciousness of the self and the emancipatory programme is of a paramount importance. Blacks no longer seek to reform the system because so doing implies acceptance of the major points around which the system revolves.
>
> Blacks are out to completely transform the system and to make of it what they wish. Such a major undertaking can only be realized in an atmosphere where people are convinced of the truth inherent in their stand. Liberation therefore is of paramount importance in the concept of Black Consciousness, for we cannot be conscious of ourselves and yet remain in bondage. We want to attain the envisioned self which is a free self.[261]

The importance of the emergence of the BCM as a liberation movement cannot be overstated; Pal Ahluwalia and Abebe Zegeye observe that BC had a profound influence on the politics of the 1970s, particularly in bolstering the Black youth rebelling against the system. BC is widely believed to have been the main ideological influence on the youth in 1976 youth uprisings around South Africa.[262] BC not only rekindled the flames of resistance in a time of organisational and individual bannings, but it also fuelled greater contestation within black

[261] Steve Biko, *I Write What I Like* (2006 Reprint) 53.

[262] Pal Ahluwalia and Abebe Zegeye, 'Frantz Fanon and Steve Biko: Towards liberation' (2001) 7 *Social identities* 455.

politics by offering up a different vision.[263] Some of the consequences of this contestation will be developed further in the next chapter.

The history behind the 1983 Constitution is notable in that its coming into being, like the 1961 Constitution, was driven by an entrenched and dominant NP government which took it upon itself to make some changes to the Constitution after having endured a fraud scandal involving many cabinet ministers that caused John Vorster to resign as Prime Minister and PW Botha to replace him in 1978. It is widely accepted that in the 1970s the South African state was in crisis, beyond the 1976 youth revolt, the economy was in a serious predicament and the government was also increasingly isolated with colonialism in the rest of the Southern African region on the verge of being entirely overturned politically.[264] Beyond Southern Africa, fewer and fewer states, especially in Europe were willing to retain open and friendly relations with the Pretoria regime, this position was likely influenced by the fact that apartheid had begun to attract such a level of international condemnation that it was declared a crime against humanity by the United Nations in 1973.[265] Therefore, the move to replace the 1961 Constitution with that of 1983 was, as was the case in 1961, not precipitated by a singular catastrophic event or a spectacular sequence of events that seemed to necessitate it. Its adoption was widely opposed, especially as it was premised on *faux-reforms* to the system of apartheid that also served to foment divisions amongst various segments of the

[263] See generally Nozipho J Diseko, 'The origins and development of the South African student's movement (SASM): 1968–1976' (1992) 18 *Journal of Southern African Studies* 40; David Hirschmann, 'The black consciousness movement in South Africa' (1990) 28 *Journal of Modern African Studies* 1.

[264] Thompson op cit note 161.

[265] International Convention on the Suppression and Punishment of the Crime of Apartheid. Adopted by the General Assembly of the United Nations on 30 November 1973. Available at https://treaties.un.org/doc/publication/unts/volume%201015/volume-1015-i-14861-english.pdf (last accessed on 30 August 2018).

black population. This opposition to the 1983 Constitution will be discussed in greater detail in the next chapter.

3.4.1 The Superficial Changes Ushered in by the 1983 Tricameral Constitution

The 1983 Constitution was a *faux-reform* process in that whilst it presented a shift in the state's racist policies, it retained the essential structure of the prevailing racist hierarchy while it, outwardly, sought to portray itself as redefining the racial structure of society by granting fairly innocuous concessions to Indian and Coloured voters. Therefore, with what was in essence an attempt to manage the image of government and present a gradualist picture of reform that retained the Bantustans intact, the contradiction that was the 1983 Constitution sought to present South Africa as a constitutionally reformed state. This was despite the fact that a fundamental premise of that constitution was that it accepted as constitutive a racialized conception of constitutional subjectivity by purportedly incorporating previously excluded racial groups, namely the Coloured and Indian population groups, on the basis of their collective group membership yet still perpetuating apartheid's fundamentally racist unequal premise of separate but (un)equal.

3.4.2 Institutional and Structural Shifts

The most significant structural change made by the 1983 Constitution was to abolish the House of Senate and in its stead replace it with a three house parliamentary structure comprising the House of Assembly for Whites, the House of Representatives for Coloureds and the House of Delegates for Indians.[266] This structure mirrored the imagined hierarchy of the races in South Africa as the different houses had different numbers of members roughly

[266] S 37 1983 Constitution.

on a 4:2:1 ratio.[267] Widely considered a sham-structure, it is notable that the drafters made provision for the possible collapse of the arrangement by the inclusion of a provision that in the event of a failure of any one of the houses to convene or perform its functions, this would not bring about a constitutional crisis nor precipitate the need for a new election. Instead the Constitution provided that in such an instance Parliament would be construed to be duly constituted when the House that remained able to perform its functions in accordance with the constitution did so. This, of course, in practice meant that only the white house could govern in the event of failure as only it had the requisite majority.[268]

The three-tier parliament was premised on a novel, but deceptively simple, idea of 'own affairs' and 'general affairs'. In terms of this notion, the position was that, at least in theory, each race group, within the confines of its designated house, was to have control of legislative programmes affecting it where matters under consideration related to its 'own affairs', namely 'the maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs.' [269] General affairs were simply those matters that fell outside of the scope of the definition of 'own affairs.'[270] Strictly speaking, the potential for discord between the Houses should have been high considering the open-endedness of the characterisation of 'own affairs', however the reality was that it was never the drafters' intention that Coloureds and Indians representatives actually exercise any genuine powers of

[267] According to ss 41-43, the House of Assembly had 178 members, House of Representatives 85 and the House of Delegates 45. Note that the combined number of white members of the House of Assembly was significantly more than that of the membership of the other two houses put together.

[268] S 37 (2).

[269] As to how this idea was to be understood, s 14 provided as follows:

> Matters which specially or differentially affect a population group in relation to the maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs, are, subject to the provisions of s 16, own affairs in relation to such population group.

[270] With respect to general affairs, S 15 rather cryptically described these as 'matters which are not own affairs of a population group in terms of s 14 are general affairs.'

self-determination or even to put forward policy. In anticipating the possibility of actual discord occurring, the drafters placed the decision of determining whether a particular matter was 'general affairs' or 'own affairs' in the hands of the State President.[271] According to the 1983 Constitution, a decision by the President on a question of whether a matter was 'own' or 'general affairs' was placed outside of the review competence of the courts as far as the validity of such decision was concerned.[272] By excluding the jurisdiction of the courts in dealing with such a matter, the drafters were acting in keeping with one of the other major features of the 1983 Constitution, namely that of creating a very strong executive State President whose powers were used extensively from the mid-80s to the advent of democracy to sustain an authoritarian militarized state prone to the use of violence during the states of emergency declared in the 1980s.

The 1983 Constitution established, for the first time in South Africa, an executive presidency by doing away with the office of the prime minister. Under the 1983 Constitution the State President was elected by an electoral college comprising members from the three houses, with the whites-only House of Assembly carrying a majority of the votes.[273] The structure of the office of the State President was such that whilst executive authority constitutionally vested in him, this executive authority was also split to mirror the 'own affairs' and 'general affairs' dichotomy.[274] The State President also exercised power with respect to certifying what legislation was designated 'own affairs' or not, and more generally had far-reaching influence within the legislatures. For example, where a disagreement arose

[271] S 16 1983 Constitution as read with s 31.
[272] S 18(2) 1983 Constitution.
[273] See ss 7-8 1983 Constitution.
[274] Ss 19-21. The Constitution established a cabinet, presided over by the State President and comprising of ministers of state for general affairs. Alongside that was a minsters' council comprising ministers responsible for various aspects of own affairs and chaired by a minister designate for the purpose by the State President.

between the Houses and they were unable to resolve it, the State President was empowered to intervene referring the disputed bill to the President's Council which was empowered to make the final decision as to whether a bill should be accepted or rejected.[275] The President's Council was a *sui generis* advisory body whose primary function was to advise the President in the public interest on any matter he referred to it.[276]

Again, in terms of the language provisions English and Afrikaans were established as the official languages enjoying an equal footing as well as being designated as the official language of record.[277] In attempting to confer some credence to Bantustans being 'independent' or 'self-governing' within the territory of South Africa, the drafters of the 1983 Constitution took the unprecedented step of recognising African languages as additional official languages in the 'independent' territory concerned.[278] Once more, the 1983 Constitution consigned Black South Africans to the 'control and administration' of the State President in a similar fashion to that of previous constitutions.

Finally, I submit here that the 1983 Constitution is generally understudied and more generally treated as an aberration, most likely for some of the following reasons: the fact that both the Coloured and Indian populations are widely seen as having disregarded it, thus rendering it in the eyes of most commentators as a sham. Further, the perception that it came into being at a time when apartheid is generally regarded as being already in terminal decline tends to justify the lack of attention to it. This general disregard, whilst understandable, seems to lose sight of the fact that it was under this constitution that colonial-apartheid constitutionalism was officially ended and that it was upon much of the

[275] See s 32 in general with a particular focus on subsection 4. See also ss 70 and 78 (4).
[276] S 78(1).
[277] Ss 89 (1) and (2). See also s 91.
[278] S 89 (3).

institutional infrastructure 'inherited' from this constitutional dispensation that the post-1994 South African state was built.

3.5 Conclusion

This chapter has sought to engage with the constitutional history of the making of the South African state. In examining the roots of what we might term South African constitutionalism from the period immediately preceding the adoption of the 1909 Union Constitution until 1983, under the auspices of the much maligned and farcical Tricameral Constitution, I have sought to show, through the framing of a critical historical account how the narrative of the construction of the state through legal enactment and the near exclusive agency of the white section of the population during that period is only a partial account. In approaching the narration of South Africa's constitutional history from a perspective that seeks to make apparent the interplay between "non-legal' histories (economic, political and social) and 'legal' histories and how these influenced the process of constituting South Africa at different times, this chapter seeks to bring into the reckoning other factors, actors and events that are critical in order to properly understand how South Africa is where it is currently in terms of the continuities and disjunctures that prevail. This approach is important as it seeks to establish a closer nexus between my theoretical framing of constitutionalism that eschews a juridified approach viewed against the content and commitments of particular constitutions.

Again, regard to Klug may help me bear out the point, wherein his treatment of episodes such as the removal of the Black vote in the Cape is to approach it as more than mere denial of the vote. According to Klug, to fully appreciate the gratuitousness of the state's machinations requires that the issue of disenfranchisement be seen within a wider

context of a network of laws and brutal enforcement mechanisms that were designed to further the idea of South Africa as a white country. Implicit in Klug's account is a criticism of the prevailing tendency to treat the denial of the franchise in isolation from other pernicious social developments that were being engineered via legislation. Therefore, Klug's presentation of South Africa's constitutional historiography provides us with an important point of reflection with respect to how we engage with constitutional politics in between the easily identifiable high water points of constitutional enactment, amendment or adjudication.

Most importantly, I argue that the methods I adopt here, rather than constructing black engagement with constitutional politics as being episodic, defined by exclusion and focused on court challenges, go a long way to demonstrate two related but contrasting points. On the one hand, viewed in this way and focusing only on the contestation of obviously divisive points, largely reduces constitutionalism to the text and disagreements relating to that text, as well as drawing a sharp distinction between episodes of constitutional politics and every day contestations concerning matters that affect the life blood of the populace. On the other hand, this approach, draws our attention to the long-term nature of entrenching a particular mode of constitutionalism as well as opposing it. In other words rather than a narrative of erasure at the point of exclusion (the convention, the definition of citizenship in exclusionary terms etc.), we see that the erasure of any remaining traces of black people's constitutional subjecthood was doggedly pursued through a gamut of racist legislation, and only cemented over time. This was achieved, evidence suggests, through a deliberate and systemic manipulation of political, economic and cultural power which through conquest was declared legitimate by the white section of the population and underwritten by British imperial power.

Chapter 4

The Transition from an Exclusionary Racist Order to an Inclusive Democratic Order – The Post-1994 Constitutions

4.1 Introduction

As we proceed towards a consideration of the current era of South African constitution-making, it is important to note that this chapter makes no pretence at being anything resembling a full account of the events and the actors involved in negotiations. The period between the fall of apartheid and the adoption of South Africa's post-apartheid constitutions has been extensively studied and written about from multiple disciplinary perspectives. In many of these studies, the tendency is to commence the accounts from 1990, at the point of the unbanning the liberation movements and, with some justification, focus mainly on the ANC and the NP government, or their respective leaders. Where studies do consider the period prior to the 1990s, again the tendency is to focus on the ANC in exile, the impact of international sanctions on the South African economy, and the National Party in crisis. Few of these studies, with a constitutional slant, examine the internal history of black resistance and opposition to the same, in much depth with the view in mind to analyse whether or how such resistance may have impacted the pace, nature and content of South Africa's transition to democracy or the nature of the constitutionalism that emerged.

In this chapter, more than providing an account of the events that shaped South Africa's post-apartheid constitutionalism, I will also be advancing an argument that posits that in order to understand how the negotiated settlement delivered the type of constitutions it did, it is necessary to understand the interplay and confluence of the internal factors, external factors, intellectual traditions and the negotiation dynamics of the period. I believe it is

necessary to first examine the period leading up to the drafting of the constitutions; commencing in the early 80s up to the adoption of the 1994 Constitution. In particular I will briefly discuss the historical occurrences, that I will argue impacted the negotiations and their outcomes, from the perspectives of (1) internal resistance politics, using the United Democratic Front (UDF) as a case study, (2) external pressures and influences, (3) the dominant or prevailing intellectual traditions drawn upon by the main actors and (4) the dynamics of the negotiating process. Owing to the immensity of the subject matter, beyond merely scratching the surface of these histories, the point is to provide a sense of the variant political positions, the structural pressures and the interests at play leading up to, and including, the time of negotiations. In brief I want to provide a sense of how the events and prevailing circumstances of the 1980s may well have influenced the overall content of the compromises made during the constitution-making process in the 1990s, as well as the final outcome.

In contextualising the discussion of the content of the post-apartheid constitutions, I am hoping to tease out the connection between this history and the form and content of the constitutions that ushered in, mainly political, institutional and human rights, changes that ushered in the era of the deracialisation, democratisation, reconfiguration and transfer of power in South Africa. Implicit in this argument is a suggestion that many issues or questions left out, or left open, in these constitutions were also a (by)product of the same negotiating dynamics. In other words, I will demonstrate that whilst the constitutional negotiations may be popularly characterised, in some academic writing and popular discourse as having been fairly comprehensive and inclusive in as far as capturing South Africa's aspirations and commitments towards a future conducive to the well-being of, and provisioning for, all, there are some questions, fundamental to constituting the 'new' South Africa, that were left

untouched or only dealt with superficially. For example, the entrenched inherited cultural and linguistic imbalance or specific commitments around the structural foundations of the economy.

4.2 Challenging the Racist State from the Ground - The Internal Turmoil of the 1980s

Despite claims to the contrary by the NP, it requires little imagination to realise that at its heart, the 1983 Constitution, as already introduced in the previous chapter, was a ruse that did little to shift perceptions as to the prevailing racist nature of South Africa's socio-economic and political structures.[279] The South African state in the 1980s was in crisis as the apartheid project was increasingly unravelling with internal pressures from popular uprisings and external pressures from exiled liberation movements, boycotts and sanctions threats. In turn, the state adopted what become known as a 'Total Strategy' that was 'devised to counter what was perceived by government as a total internal and international onslaught against South Africa.'[280]

Such was the state of affairs in the 1980s that the inner sanctum of the NP was being forced into re-examining the sustainability of the racist state. For example, in 1985, even as the crisis was clearly gaining momentum, PW Botha, in his infamous Rubicon speech, reaffirmed a steadfast commitment to perpetuating apartheid.[281] Botha had been widely expected to make some meaningful concessions towards political reform but instead doubled

[279] Madlingozi op cit note 33 at 84. Madlingozi refers to these purported constitutional changes as 'fake state reforms'.
[280] Houston, op cit note 258 at 34; Jeremy Seekings, *The UDF - A History of the United Democratic Front in South Africa - 1983-1991* (2000) 29-30.
[281] Hermann Giliomee, *The Rubicon Revisited* (2008) available at http://www.politicsweb.co.za/iservice/the-rubicon-revisited, last visited 16 November 2018.

down and committed to further state repression. Reaction to his speech, even within the white community, was largely that of widespread disapproval. According to Hermann Giliomee, the economic costs were substantial as'[t]he speech triggered a massive outflow of capital and intensified sanctions against South Africa.'[282] The history of this period from the point of view of government and the demise of the National Party is well known and documented as there are numerous rich and detailed accounts of those events.[283] Less explored has been the part played by black resistance, especially that of the UDF and how its existence contributed to precipitating the crisis referred to above, the unfolding of the transition and, if only indirectly the constitution-making process.

4.2.1 The UDF Years and the Resurgence of Movement Building

The UDF was established in January 1983 apparently around a solitary objective, namely to unite a multiplicity of resistance organisations in opposition to the National Party's impending constitutional reforms that were set to usher in the Tricameral Constitution. [284] According to Jeremy Seekings, the state of both the economy and politics in the country at the time was conducive to the emergence of an organisation like the UDF.[285] He attributes this to a confluence of issues in the early 80s that, together, deepened black impoverishment and alienation. In particular, Seekings identifies issues such as, rising municipal rents and rates in black townships, the economic recession and the increasing numbers of unemployed black youths, a significant portion of whom had become politicized in the wake of the 1976 youth revolt.[286]

[282] Ibid.
[283] For example see Sparks op cit note 26.
[284] See Seekings op cit note 280 at 1-4; Madlingozi, op cit note 33 at 82.
[285] Ibid.
[286] Ibid.

4.2.1.1 Characterising the UDF – A Mass Umbrella Organisation

The exact character of the UDF over its lifespan as an organisation has generated a fair amount of discussion and debate.[287] According to Seekings, the UDF was not a political party, rather it was conceived of by its founders as "an umbrella structure for highly diverse affiliated organisations" that operated either at national, regional and local levels. The UDF, apparently for strategic reasons, purposefully set out to establish itself as a structure that was focused on forging unity amongst anti-apartheid organisations without regard to any one individual organisation's ideological orientation nor the type of work it engaged in. This open, all-embracing approach belied the existing ideological divisions amongst affiliate organisations along either Charterist or Africanist lines; not to mention the then extant mistrust along racial lines even within the UDF despite its self-identifying as a non-racial organisation.[288]

In sum, the UDF, therefore, existed as a coordinating and organizing body that brought together affiliate organisations on a non-ideological basis. The only requirement for affiliation was that organisations had to identify with the UDF's vision and mission as set out in its Declaration and Working Principles. These included a commitment to democracy; a unitary non-racial South African state; unity in struggle without regard to race or religion; and a living democratic politics. The very simple and functional UDF Declaration to which all affiliates committed read as follows[289]:

> We commit ourselves to uniting all our people wherever they may be, in the cities and countryside, the factories and mines, schools, colleges and universities, houses and

[287] See Houston op cit note 258 at 1-3; Seekings op cit note 280 at 42-46 ; Raymond Suttner, 'The UDF period and its meaning for contemporary South Africa' (2004) 30 *Journal of Southern African Studies* 691 at 694; Madlingozi, op cit note 33 at 82-84.

[288] Owing to the political nature of the UDF, there were of course organisations that were barred from affiliating on the basis of falling into any one the following three categories: (1) any organization that participated in Bantustan structures; (2) any organization that participated in central or local government structures and (3) those that broke the sport and cultural boycott. See Seekings op cit note 280 at 53.

[289] Ibid 50.

> sports fields, churches, mosques and temples, to fight for our freedom…We pledge to stand together in this United Democratic Front and fight side by side against government's constitutional proposals and the Koornhoof Bills.

4.2.1.2 Opposing the Tricameral Constitution

It was through action led campaigns that the UDF sought to define itself as it pursued its stated goal of opposing the NP's *faux* constitutional reforms. The UDF's first steps entailed organising an oppositional campaign against the referendum designed to measure the level of government support for the Tricameral Constitution.[290] On the question of strategy and tactics, despite the clarity of the UDF's core goal, the approach was far from straight-forward for an organisation made up of diverse affiliates with different individual priorities, missions, ideologies and practices. For example, the centrality of race as a primary organising principle of the Tricameral Constitution in the establishment of the three houses gave rise to divisive organisational tensions within the UDF as to how to orchestrate a unified response that was non-directive, non-ideological and above all non-racial.[291]

In mediating these tensions as they played themselves out, the UDF had to balance its own role as an umbrella body and the politics of its affiliates that had different views on *how* best the opposition to the referendum should be expressed. In essence, the turmoil with respect to the referendum related to the question of (i) whether all UDF affiliates should boycott it entirely, or (ii) whether the Coloured, Indian and White affiliates should participate and vote no against the proposals which necessarily entailed participating in something organised by the government along racist lines in stark contravention of what the UDF stood

[290] Houston op cit note 258 at 71.

[291] According to Seekings, the issue of whether a UDF wide position should be taken, or even what that would be between a boycott and a no-vote, was hotly debated. This reportedly led to much internal contestation within the UDF.

for.[292] The UDF's position, in the end, was to speak out collectively on a matter of principle against the referendum whilst leaving it to affiliates to decide whether to boycott or participate and vote no. This position prioritised organisational unity whilst respecting the autonomy of affiliates.

In the final analysis, the referendum vote was only extended to white voters and this helped dissipate the internal tensions that had arisen within the UDF as a result. As far as the actual elections for the Tricameral parliament in August 1983 were concerned, the UDF position was much clearer and cohesive, namely a call for a nationwide boycott of all three race-based elections. This campaign was substantially successful as the election turn out from Indian and Coloured voters was extremely low thus producing the desired effect of immediately putting into question the legitimacy of the 1983 Constitution's race based parliamentary structures.[293] Gregory Houston lucidly captures the fluid or dynamic response demanded of the UDF as it sought to promote unity of purpose whilst also carefully navigating the diversity of its constituent parts.

> The UDF did not make policy for its affiliates nor did it impose particular strategies on them. The affiliates took up campaigns in ways suited to their own activities and constituencies. In many cases tactics arose spontaneously. However, in some instances broad consensus on particular strategies arose among affiliates…Strategies and tactics changed many times and varied from affiliate to affiliate, from region to region, from time to time and with varying degrees of success.[294]

Notably, during the boycott campaign, the UDF started to move beyond merely opposing these *faux* reforms and started to articulate its own vision of what it would take to bring about a democratic South Africa and what an equal non-racial society based on civil rights might

[292] Seekings op cit note 280 at 93-95.
[293] Seekings cautions against solely crediting the UDF with this outcome as several other actors unconnected to the UDF had also campaigned for a boycott.
[294] Houston op cit note 258 at 71.

look like.[295] Likely influenced as it was by the ANC, the UDF's vision of the mechanics of achieving such a new society via constitutional reforms already anticipated the calling of a national convention.[296] Seekings, drawing from UDF National Executive Committee meeting minutes, captures the thrust of what was under discussion in the following terms:

> In an [UDF] NEC meeting in July 1984 'it was noted that calling on people to boycott elections is not enough, the UDF has to offer alternatives.' The NEC therefore called publicly for a national convention, with an accompanying set of preconditions: 'The unbanning of banned organisations: the return of exiles and release of all political prisoners; the demobilisation of the police and army; the suspension of the constitution, and the dissolution of the bantustans; and the repeal of racist and unjust laws, including the pass laws and Group Areas legislation.' The national convention would be elected by all South Africans, would be sovereign, 'i.e. having the power to put into practice the constitution it draws up', and would meet in public not behind closed doors.[297]

4.2.1.3 The Tricameral Constitution and the States of Emergency

The period after the Tricameral parliament was inaugurated into being on 3 September 1984 is one described by Tom Lodge as signifying the start of "the longest and most wide period of sustained black protest against white rule in South African history.'[298] What followed was a period of widespread protests in black townships over, amongst other things, high rentals and municipal services rates; the first of these occurred in the Vaal region, and then spread to other parts of the country. If the movement's future was ever in doubt, this period, after the commencement of the Tricameral parliament, demonstrated that the UDF and its affiliates, in leading the internal resistance, was of signal importance.

[295] Seekings op cit note 280 at 107-111.
[296] Ibid 111.
[297] Ibid 111-112. Here Seekings draws from UDF NEC July 1984 minutes.
[298] Lodge is quoted in ibid 120.

The UDF and its affiliates mounted numerous and frequent campaigns that took different forms and were led by different organisations in different parts of the country, targeting local government structures and local councillors who were widely viewed as collaborators with the system. All this was part of a wider strategy to make the country ungovernable.[299] The government's response to growing civic resistance was for PW Botha to declare a state of emergency on 21 July 1985. Although initially of limited geographical reach focusing on parts of the Transvaal and the eastern parts of the Cape, the effect of this state of emergency was tantamount to suspending much of the UDF's activities as many of its leaders were targeted, detained, or charged with various crimes, including treason. This state of affairs led to many leaders and activists being forced to operate underground.[300]

4.2.1.4 The Rise and Impact of People's Power

According to Seekings, '[a]s the revolt, and repression, continued, there was a subtle shift in the predominant discourses used by UDF leaders from a focus on rights to a focus on power.'[301] This shift in focus to the question of power was a significant one. Less clear, according to Seekings, is the extent to which this shift was the result of fortune or a more deliberate strategy undertaken in recognition of increased incidences of community-based resistance and the need to harness such popular initiatives amidst calls to make the country ungovernable. It was against the background of resistance, a weakening state and a

[299] Houston op cit note 258 at 80 Houston connects this notion of ungovernability with a speech entitled 'Liberation is in Sight' made in early 1984 by ANC President Oliver Tambo. Houston quotes Tambo as saying:

> We must begin to use our accumulated strength to destroy the organs of the apartheid regime. We have to undermine and weaken its control over us, exactly by attempting to weaken its control over us…rendering the enemy's instruments of authority unworkable…creating conditions in which the country becomes ungovernable.

[300] On the 1985 state of emergency and its partial nature see generally http://www.sahistory.org.za/article/partial-state-emergency-july-1985 (last accessed 16 November 2018).

[301] Seekings op cit note 280 at 160.

deepening economic crisis that the powerful idea of 'people's power' emerged as a key element in bolstering evolving ideas of Black resistance and agency.[302]

Madlingozi points out that the practices that came to characterise 'people's power' emerged from 'below, where people were themselves politicised and mobilized.'[303] So whilst it remains uncertain as to who exactly is responsible for characterising the ideas and set of practices that became known as 'people's power' as such, what is largely undisputed is that both the UDF and the ANC were important actors in building upon and developing this idea. In this regard Seekings tells us that both organisations 'played a central role in formulating an organisational strategy of people's power both at a conceptual level and in terms of co-ordination and networking.' [304] In other words, the idea of 'people's power' was deployed internally by the UDF as a 'strategic framework' connecting local struggles and formations to a broader idea intended to empower communities as they worked to weaken state control over their daily lives.

The import of 'people's power' as an idea, strategic formulation and its symbolic significance led former UDF activist and political commentator Raymond Suttner to suggest that the idea should necessarily be associated with the first clause of the Freedom Charter that states that 'the people shall govern'.[305] Suttner adds, further, that with the emergence of 'people's power', 'the period of the UDF represented a form of 'prefigurative

[302] Ibid 166-168. According to Seekings, the formulation of the idea of 'people's power' as a 'strategic framework' arose after UDF consultations with the ANC in Stockholm, Sweden in January 1986 where leaders were urged to "weaken the enemy camp politically'.
[303] Madlingozi op cit note 33 at 83.
[304] Seekings op cit note 280 at 170.
[305] Suttner op cit note 287 at 695.

democracy'.[306] The potency and possibility of this idea is probably best captured in the words of Murphy Morobe, a prominent UDF leader at the time, who wrote as follows:

> [A] democratic South Africa is one of the aims or goals of our struggle. … democracy is the means by which we conduct the struggle. … The creation of democratic means is for us as important as having democratic goals as our objective. Too often models of a future democratic South Africa are put forward which bear no relation to existing organisations, practices and traditions of political struggle in this country. What is possible in the future depends on what we are able to create and sustain now. A democratic South Africa will not be fashioned only after transference of political power to the majority has taken place. … The creation of a democratic South Africa can only become a reality with the participation of millions of South Africans in the process – a process which has already begun in the townships, factories and schools of our land. … Our democratic aim … is control over every aspect of our lives, and not just the right (important as it is) to vote for a central government every four to five years.[307]

4.2.1.5 Increasing State Repression and the Banning of the UDF

Parallel to the strategic, and arguably ideological, developments within the UDF and its coordination of resistance, was an increase in the incidences of state repression and politically motivated violence as many heeded the call to make the country ungovernable. In June 1986 PW Botha declared a nationwide state of emergency that forced the UDF further underground as thousands of activists were detained. In spite of these measures and acting in concert with other forces of resistance such as labour unions and the churches, the UDF was still able to pursue some campaigns that continued to put pressure on the National Party government. This eventually led to the government effectively banning the UDF save for a few administrative activities it was allowed to continue to perform.[308]

During the period of the ban, the UDF forged close alliances with the Congress of South African Trade Unions (COSATU) which was not subject to the same restrictions under the state

[306] Ibid 695-6.
[307] M. Morobe, 'Towards a People's Democracy: The UDF View', *Review of African Political Economy*, 40, 1 (1987), 81–2 quoted in ibid 695.
[308] Seekings op cit note 280 at 227.

of emergency. This alliance culminated in the establishment of a semi-formal structure spearheaded by the two organisations, dubbed the Mass Democratic Movement (MDM).[309] The MDM was to have a significant impact in the period leading up to the unbanning of the liberation movements in 1990 as it increased the range of groups working in unison in resisting apartheid at a period when there was an increase in the momentum pointing towards a negotiated settlement.[310] The MDM was the site of some important debates around the political direction to be taken in opposing the apartheid government and specifically whether the participation of white activists in these structures of resistance contributed or detracted from the struggle. Seekings captures well an important debate in the MDM concerning how the scope and nature of struggle was to be defined as it became apparent that negotiations were an inevitability. In this respect Seekings writes:

> While disaffection among white political and economic elites threw up the possibility of a much broader alliance against apartheid than hitherto, some unions feared that drawing in liberal white South Africans and business groups into an alliance would compromise their commitment to radical social and economic transformation. [311]

This debate was ultimately left unresolved by the MDM and it was deferred to a broad conference dubbed as the Anti-Apartheid Conference (AAC) where strategic and ideological issues faced by those organisations engaged in the anti-apartheid struggle were to have been thrashed out. However, the AAC did not happen as it was, unsurprisingly, declared illegal by the government; in its stead another conference was held in December 1989 under the name

[309] Ibid 229.

[310] Seeking points out that the MDM also brought into the fold 'disaffected white elites' involved in parliamentary politics and some players from within the Bantustan system who were previously barred from participating in UDF politics.

[311] Seekings op cit note 280 at 229. Seeking mentions that in August 1989, 37 MDM leaders met with 40 prominent (presumably white) business leaders and academics and went on to form the Consultative Business Movement which Seeking describes as "a forum for business leaders in favour of political and social change.'

of Conference for a Democratic Future (CDF).[312] The CDF focused on debating the question of negotiations with Walter Sisulu, who, having recently been released from Robben Island after serving 26 years as a political prisoner, was advancing a Charterist position in support of pursuing negotiations, whilst Itumeleng Mosala of the Azanian People's Organisation (AZAPO), from an Africanist perspective, opposed such an approach.[313] At the core of this debate were the ideological lines that had come to characterise the key divisions in black resistance politics going all the way back to the initial breakaway from the ANC by the PAC, then manifesting themselves again in the late 70s and early 80s with the resurgence of the charterist politics as BC was beginning to wane after the 1976 youth revolts.[314]

Ultimately, the position adopted at the CDF conference, endorsing the ANC's 1989 Harare Declaration adopted under the auspices of the OAU, was in keeping with positions long espoused by many UDF and ANC leaders, namely that a negotiated settlement was the favoured route towards a democratic future. In what was, in many ways, a precursor to some of the positions to be taken immediately prior to, and during, the constitutional negotiations, BC aligned organisations present at that meeting opposed this position. According to

[312] The conference attended by over 4000 delegates from over 2000 organisations, reputedly representing over 15 million people, passed resolutions widely regarded as framing a programme of action dealing with, amongst others, negotiations, a constituent assembly, international pressure, the army and education. At its core it was a call for continuing mass action or 'collective action' by "a united front of anti-apartheid forces" as Walter Sisulu dubbed it in his opening address. See Seeking op cit note 280 at 254.

[313] Seekings op cit note 280 at 256.

[314] Seekings attributes the waning fortunes of BC politics and the resurgence of the ANC positions to at least some of the following reasons. Firstly, whilst BC provided a crucial intervention in as far as prioritising 'struggles around culture and identity' it was, as a movement, less effective in mobilising for mass action. Secondly, BC's prevalence in student politics positioned it more as an intellectual response that found appeal more amongst the 'university-educated metropolitan professionals' than the masses of unemployed and uneducated Black South Africans. Thirdly, and more broadly, the permissive broad ideological orientation of charterism towards an 'inclusive nationalism and non-racialism associated with the Freedom Charter and the ANC' as well as its prioritisation of collective action seemed more appealing to the masses as a practical means to challenge the hegemony of the apartheid state than the ideologically radical politics espoused by the BCM. Seekings, op cit note 280 at 29-38.

Seekings, the adoption of this resolution to enter into negotiations, at what was largely an open public event attended by 4600 delegates, was of high symbolic value as it brought into the open that which was already going on in the shadows between the National Party government and the ANC.[315]

4.2.1.6 The Demise of the UDF and the Re-emergence of the Internal ANC

The unbanning of the ANC and other liberation movements in February 1990 alongside the release of many political prisoners in many ways signalled the beginning of the undoing of the UDF. Much of this can be attributed to the fact that the unbanning meant that the UDF's relationship with the ANC now urgently needed clarification as both organisations could now potentially occupy the same political space. Seekings characterises the period between the ANC's unbanning and the UDF's disbanding in March 1991 as that of the latter's 'fading away" as it gave way to the ANC. It was no secret and in fact a widely held belief by many inside and outside both of these organisations that the UDF was regarded as an extension, if not *the* alter-ego, of the ANC in exile.

So the unbanning of the ANC was always going to require some redefining of roles if both organisations were to continue to exist. To resolve this question, according to Seekings, the leadership of both organisations agreed to carve up their individual spheres of action and influence in terms of an understanding whereby the UDF was to 'continue to coordinate socio-economic struggles whilst the ANC assumed responsibility for the political struggles.'[316] The fact that the ANC needed to re-establish itself and capacitate rapidly meant that it 'poached' personnel primarily from UDF structures. Oddly in spite of the obvious costs to the UDF this

[315] Ibid 256-7.
[316] Ibid 261.

strategy made sense as some of its most trusted agents who had experience operating both above ground and underground perceived of themselves as, in any event, ANC members. Seekings crisply captures the operational quagmire as leaders and activists sought to straddle both organisations thus. 'In practice, the attempted parallel development of ANC and UDF structures was both confusing and unworkable. The 'doubling of work' in building the ANC meant that UDF work was neglected, and the UDF's role remained obscure, almost mysterious.'[317]

Ultimately, after series of debates as to the options open to the UDF, the leadership met in March 1991 in KwaNdebele and a resolution was taken to disband the UDF whilst at the same time also committing to encouraging affiliates and activists to work to build the ANC as it prepared to govern. The demise of the UDF must be understood against an insight gleaned from Madlingozi, although he makes this point with reference to the UDF's emergence.[318] His insight is that in order to properly understand the position and significance of the UDF within the broader context of struggle in South Africa, it is important not to see it as an isolated phenomenon, but rather as an organisation that emerges on the back of earlier waves of resistance and repertoires of struggle. Therefore, whilst the demise of the UDF can be understood as representing or symbolising many things, I argue, here, that one of those must be as a precursor to constitutional negotiations, particularly in as far as the mobilising and organisational work of the UDF certainly influenced the balance of power existing at the

[317] See ibid 266. Suttner confirms that the state of affairs was indeed untenable as he describes the position from the perspective of affiliates as follows:

> The self-perception of UDF affiliates, seeing themselves as being under ANC discipline and carrying out its strategies, is one of the reasons why the UDF did not consider continuing to exist after the unbanning of the ANC and SACP. There was a tendency on the part of the UDF to see itself as a 'curtain raiser' before the main team arrived on the field, a type of B team mentality. Suttner op cit note 287 at 699.

[318] Madlingozi op cit note 33 at 82.

time of the negotiations and established networks upon which the ANC would go on to build and claim to be a legitimate voice of the masses.

4.3 External Factors Influencing the Path to Negotiations

The influence of the internal dynamics of resistance and contestation by organisations such as the UDF described above were critical for eroding whatever perceptions of legitimacy that the National Party government may still have feigned to enjoyed immediately prior to, and during, the Tricameral parliament. As far as the liberation movements are concerned, the fact of their being banned and largely operating in exile, essentially dictated that their contribution to the nature and pace of change within South Africa was always going to be impacted upon by events and personalities outside the country. Coupled with this, the depth of the internal crisis and the fact that the policy of apartheid was by now considered indefensible and a crime against humanity served to ensure that international interest was retained with regard to what was transpiring in South Africa.

Externally, the growth of what became known as the international anti-apartheid movement was an important factor that kept the spotlight on South Africa. Through various campaigns, calls for cultural and sporting boycotts, sanctions and divestment in many different parts of the world, the goings-on within South Africa were kept alive in the collective conscience of activists and sympathisers around the world. Further, the occasional interventions of various international organisations such as the United Nations, the Organisation of African Unity and the Commonwealth were also to prove to be significant factors in maintaining pressure on the Pretoria regime.[319] In this section, I, therefore, explore

[319] Klug op cit note 147 at 53-55. Whilst not necessarily a critical factor taken in isolation, the sustained interest and denunciation by the UN of apartheid was a significant factor in the unfolding of the journey towards a

a selection of international events and occurrences from the 1980s in order to demonstrate how these events served to influence the eventual demise of apartheid, including the pace at which things happened, who participated and with what goal in mind.

4.3.1 The Commonwealth Eminent Persons Group

An important source of external pressure exerted on the South African government emanated from a decision by the Commonwealth to institute a fact-finding mission to South Africa whilst it deliberated on the next steps to take against the government of South Africa. The mission was as a result of the Commonwealth Accord on Southern Africa[320] adopted in October 1985 by members of the Commonwealth. Clause 2 of the Accord forthrightly stated as follows:

We, therefore, call on the authorities in Pretoria for the following steps to be taken in a genuine manner and as a matter of urgency:

1. Declare that the system of apartheid will be dismantled and specific and meaningful action taken in fulfilment of that intent.
2. Terminate the existing state of emergency.
3. Release immediately and unconditionally Nelson Mandela and all others imprisoned and detained for their opposition to apartheid.

negotiated settlement. Klug, who carefully details South Africa's descent into pariah statehood in the eyes of the UN, maintains that sustaining the South Africa issue on the UN agenda was a useful mechanism to put and sustain pressure on the South African government.

[320] For the full text of the Accord see http://thecommonwealth.org/history-of-the-commonwealth/commonwealth-heads-government-meeting-nassau-bahamas-16-22-october-1985, (last accessed 16 November 2018).

4. Establish political freedom and specifically lift the existing ban on the African National Congress and other political parties.

5. Initiate, in the context of a suspension of violence on all sides, a process of dialogue across lines of colour, politics and religion, with a view to establishing a non-racial and representative government.

The Accord, despite outward appearances of being a proactive step in anticipation of negotiations to 'dismantle apartheid', was in fact a compromise measure between different groups of Commonwealth member states who disagreed on the subject of the need to impose immediate and harsher economic sanctions on South Africa. Therefore, in terms of the compromise reached, a group called the Commonwealth Eminent Persons' Group (EPG) was assembled with its core aim being 'to encourage through all practicable ways the evolution of that necessary process of political dialogue.'[321] The mooted penalty for the South African government for a failure of the mission was to be the imposition of economic sanctions six months from the date of the signing of the accord. Whilst the EPG did go to Southern Africa and meet many different groups and actors in the region, its mission measured against its own stated aims was unsuccessful. Whilst in South Africa, on the day the EPG was supposed to meet the South African government, PW Botha, in what can only have been as a clear show of belligerence, ordered unprovoked military attacks on South Africa's neighbours, namely Botswana, Zambia and Zimbabwe; thus effectively collapsing the EPG mission.

Despite this turn of events, one useful by-product of the mission was the information gathered, the EPG was able to prepare a detailed report that provided the world with informed independent insights into the, then, prevailing state of affairs in the country. These

[321] Ibid.

findings proved useful in strengthening efforts to further isolate South Africa internationally.[322] The rebuff from the South African government, then served to trigger the enhanced economic sanctions threatened by the members of the Commonwealth, despite British Prime Minister Margaret Thatcher's open opposition to sanctions.

4.3.2 Namibian Independence and the De *Facto* End of the Armed Struggle

Another external factor that was to influence the pace and likelihood of the negotiations was the Namibian war for independence, also known as the Border war, fought primarily in Angola, as it impacted both the NP government and the ANC through their involvement in it. The South African government fought on one side against a coalition of armies that included Angolan troops, Cuban troops, the People's Liberation Army of Namibia (PLAN)[323] and ANC's Umkhonto we Sizwe. The war ended as a result of negotiations involving Angola, Cuba, and South Africa mediated by the United States of America but held under the auspices of the United Nations.[324]

The negotiations resulted in the Tripartite Accord,[325] one of the pertinent terms of which was that South Africa would withdraw its troops from Namibia as the country readied itself for independence. South Africa's acceptance of this term had as its direct corollary, a demand, namely that Umkhonto we Sizwe was to quit its military bases in Angola, thus forcing it to withdraw to its camps in Uganda and Zambia. The implications of this stipulation going

[322] For a useful summary account of the report and the circumstance surrounding the establishment of the Eminent Persons Group see Lawrence, Ralph 'Mission to South Africa: The Commonwealth Report - The Findings of the Eminent Persons Group on South Africa. Available at http://disa.ukzn.ac.za/sites/default/files/pdf_files/resep86.4.pdf (Last accessed on 16 November 2018)

[323] This was the armed wing of the South West Africa's People's Organisation (SWAPO).

[324] Klug Op cit note 147 at 78-9.

[325] The Tripartite Accord between Angola, Cuban and South African signed on 22 December 1988 is available at http://peacemaker.un.org/sites/peacemaker.un.org/files/AO_881222_TripartiteAgreement%28en%29.pdf, (last accessed on 16 November 2018).

forward were most profound for the ANC as it severely curtailed its strategic choices regarding overthrowing the apartheid regime through armed struggle. Coupled with this was the fact that at around the same time the Soviet Union, historically a strong military backer of Umkhonto we Sizwe was beset by its own growing internal crisis, and informed the ANC of its decision to withdraw its military support for the ANC.[326]

The resultant situation was that the ANC now found itself in a predicament completely outside its control. According to Klug, the ensuing demobilization of the troops all but signalled the closure of any possibility (remote as it may have been), of an externally driven armed insurrection to militarily engage, let alone topple the Pretoria regime, which, despite its being mired in crisis and isolated had continued to invest heavily in its army.[327] For the ANC the practical effect of this withdrawal of troops from Angola, the ensuing disarmament and stationing of soldiers in Ugandan and Zambian camps is that it left negotiations as the only viable route towards the deposing of white hegemony in South Africa. The NP government on the other hand was likely well served by its involvement in having had to negotiate the Tripartite Accord and gained valuable experience that would be useful in forthcoming negotiations.

4.3.3 The End of the Cold War and its Reverberating Influence

The events described immediately above are, as suggested not unrelated to, undoubtedly, the most definitive power shift in global politics in the second half of the 20th century, namely the end of the Cold War in 1989-90. The reverberating effect of the end of the Cold War, or, as Francis Fukuyama so famously put it, 'the end of history'[328], signalled

[326] Klug, op cit note 147 at 78.
[327] Ibid 78.
[328] See generally Francis Fukuyama, *The End of History and the Last Man* (1993).

simultaneously: (i) the cataclysmic fall of communism as well as rendered largely impotent much of the associated leftist ideology, and (ii) the triumphalist ascendancy of liberal democracy and capitalism as the dominant systems and frames of thought globally.

From the ANC's point of view, as a liberation movement with strong left allegiances, the fall of communism rendered it substantially exposed politically and ideologically. Meanwhile as far as the NP was concerned, the fall of communism provided some reassurances as it narrowed the spectrum of 'palatable' options and ideas around political and economic organization that would have otherwise been available to the ANC. In fact, a case can be made that the end of the cold war was critical in influencing the timing and boldness of FW De Klerk's famous speech in February 1990 where he first mapped out government's proposed reforms to end apartheid. In his speech what De Klerk said, despite its apparent hyperbole, is worth quoting at some length as it well reflects his admittedly astute political reading of the times which he boldly took as presenting an opportunity to act:

> The year of 1989 will go down in history as the year in which Stalinist Communism expired. These developments will entail unpredictable consequences for Europe, but they will also be of decisive importance to Africa. The indications are that the countries of Eastern and Central Europe will receive greater attention, while it will decline in the case of Africa. *The collapse, particularly of the economic system in Eastern Europe, also serves as a warning to those who insist on persisting with it in Africa*. Those who seek to force this failure of a system on South Africa, should engage in a total revision of their point of view. It should be clear to all that is not the answer here either. [Emphasis mine][329]

[329] FW De Klerk Speech 2 February 1990 available at: https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02104/06lv02105.htm (last accessed on 16 November 2018).

4.3.4 International Political Culture and the Crafting of an Idealized State Form

Closely related to the events leading to the end of the Cold War, there also emerged a push, championed by Western states, as well as multilateral and international non-governmental organisations, towards a coalescence of ideas and practices around what an orderly liberal democratic world order would be like in terms of governance, economic and social policy. In other words, there emerged what Klug refers to as an 'international political culture' which established the rule of law, written constitutions, and a commitment to the human rights paradigm as pivotal normative measures for determining questions of constitutional legitimacy.[330]

The implications of the emergence of this international political culture are that it came to be widely posited as reflecting an idealised global state form, as well as etching out the outer limits of a 'global' constitutional imaginary. In other words, as argued by Klug, this international political culture established an overarching 'globalized normative order' that would, in South Africa's case, ultimately undergird the negotiations as well as 'police' the range of eventual outcomes. So, whilst this did not prevent political parties from negotiating the specifics of the local, they did so within the context of what was the coalescing of a hegemonic liberal intellectual and cultural order, a norm-based rational international constitutional framework, or maybe simply in South Africa's case a version of Klug's international political culture atop an already largely pre-existing legal infrastructure. It was this prevailing state of affairs that led Klug to perceptively argue that:

> South Africa's constitutional transition is best understood as the product of a dialect interaction between a global 'text' constituted by the histories, practices and normative prescriptions of nation-states, international bodies and organisations – such as the United Nations and World Bank - and, increasingly, transnational corporate and

[330] Klug op cit note 147 at 58-59.

non-governmental organisations, and the local struggles and processes through which the new constitutional regime was created and implemented.'[331]

4.4 Post-1994 Intellectual Moorings and Constitutional Traditions

The influence of the external factors discussed above can only tell us so much, as their explanatory power or impact is also limited to the extent to which those factors are internalised or considered in the decision-making of the actors involved in constitution-making. So, whilst these factors exerted some influence or brought pressure to bear, their impact is also dependent on the mind-set, intellectual commitment or ideological disposition of those upon whom they are visited. Therefore, it is pertinent that I introduce into our analysis the prevailing intellectual traditions or impulses that likely influenced the drafters of South Africa's post-1994 constitutions in considering the constitutional forms, choices and norms they preferred or adopted. In other words I will consider the repository of ideas or intellectual traditions the negotiating parties drew from. This is crucial if we are to pursue, with any seriousness, the quest to understand South Africa's constitutions beyond a normative account, but also apprehend the primary intellectual influences, and where possible, identify the underlying commitments with respect to positions taken, in short South Africa's post-1994 constitutional 'DNA'.

4.4.1 Commitment to a Human Rights Paradigm

Between the ANC and NP it is notable that leading up to the negotiations both had publicly held positions where they each expressed a commitment to equal human rights as a fundamental pillar upon which to construct a reconstituted South Africa. Read superficially, this fact of a coinciding commitment to equal rights can lead to false conclusions as to how

[331] Ibid 48.

and why human rights came to assume such a lofty position in both post-1994 constitutions. The reality is that the ANC and the NP came at the issue of rights protection from such different places that the apparent coincidence of commitments to a strong rights framework should arouse our interest. In order to really appreciate the distance between the two sides as they came into negotiations we must bear in mind the two parties' historical regard for rights and the underlying interests each sought to advance.

4.4.1.1 The National Party Position

It was with no small measure of irony that FW De Klerk in his famed February 1990 speech spoke of the reform of apartheid hinging on the establishment of a new South Africa premised on equal rights for all. For example, in his speech FW De Klerk states as follows:

> On its part, the Government will accord the process of negotiation the highest priority. The aim is a totally new and just constitutional dispensation in which every inhabitant will enjoy equal rights, treatment and opportunity in every sphere of endeavour - constitutional, social and economic.[332]

The irony, of course, is that for all its years of having presided over the legalised dispossession and oppression of black South Africans on the basis of their assumed racial inferiority, for this effusive embrace of equal rights (on the eve of the fall of apartheid) to be believed necessitated an unimaginable ideological shift, namely a disavowal of some of the base commitments to white supremacy and nationalism. That was clearly not the case in the late 80s and early 90s, simple reference the NPs policies and politics at that time suffice to bear out the point, for example, the then ongoing campaign of state violence confined solely to Black townships. In other words, beyond the NPs warped historically based white-supremacist

[332] FW De Klerk Speech 2 February 1990 available at: https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02104/06lv02105.htm, (last accessed on 16 November 2018).

claim to enjoy some innate exclusive right to rule over all other race groups, as an organisation, it had no history of regarding rights as universally applicable.

Rather, the NP's sudden interest or appeal to the language of rights at the time can, I suggest, be traced back to its duplicitous scheme of *faux* apartheid reform as the realisation of the impending demise of the system of colonial-apartheid set in. Evidence suggests that most likely, the NP government's first serious consideration of rights discourses in a universal sense, with respect to South Africa, was when the government commissioned a study, perhaps unsurprisingly, into minority (group) rights and human rights in 1988.[333] Arguably, this 'progression' by the NP towards a universal rights paradigm as a ready means to articulate its views on a common future with other race groups can, with justification, be understood as, at best instrumentalist, and at worst self-serving.[334]

Therefore, the NP's shift towards embracing a human rights paradigm can hardly be attributed to any long held philosophical, ideological or genuinely held political commitments. Simply put, emerging as it was from being ideologically rooted in a white supremacist paradigm, the notion of equally held human rights were an anathema to the NPs politics, policies, beliefs and practices as the party and government of apartheid. Therefore its opportunistic embrace of the notion of universal rights must be understood against this background. This is not to suggest that genuine moral, ethical or ideological reform is impossible or even improbable, but if one also considers the NP's relatively speedy demise in the late 1990s', it does tend to suggest that its commitment to a human rights framework and

[333] See generally South African Law Commission Project 58 *Interim Report on Group and Human Rights* (1991)
[334] Instrumentalism explains the idea of things or ideas being but a means to an end. In this case, the NP, having dominated and accumulated so much for so long, the appeal of a universal rights framework was that they too would be beneficiaries of such rights.

the weight of its history as a brutal white supremacist political organisation were irreconcilable.[335]

4.4.1.2 The ANC Position

Turning to the ANC, whilst it was forced into exile as a result of this racist state order premised on a denial of equal rights and citizenship, and as negotiations looked inevitable, instead of some perverse revenge-filled agenda of seeking to mete out unequal treatment on the white section of the populations, the ANC propagated a vision of a new society built on a commitment to equal rights, non-racialism and justice in equal measure.[336] Contrasted with the NP, the ANC, by the late 1980s, already had a substantial rights tradition that is traceable back to the African Claims Document that demanded equal rights based on equal citizenship for all South Africans. Further, the centrality of the ANC in the drafting and promotion of the rights based manifesto that is the Freedom Charter in 1955 is well known and documented. Thus when the ANC took the initiative to commence on an intra-organisational conversation about a bill of rights in 1988, at a time when negotiations were still being mooted, it was hardly surprising. Therefore, as far as the ANC was concerned, the internal organisational discussion regarding human rights was never about *whether* to have a bill of rights, but about *what* rights it should contain.[337]

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[335] See generally Christi Van der Westhuizen, *White Power & the Rise and Fall of the National Party* (2007) chapter 7.

[336] For example, in the ANC's Constitutional Guidelines for a Democratic South Africa (1988), it is stated as follows: "There shall be equal rights for all individuals, irrespective of race, colour, sex or creed. In addition, it requires the entrenching of equal cultural, linguistic and religious rights for all". http://www.anc.org.za/content/constitutional-guidelines-democratic-south-africa
(last accessed 16 November 2018).
See also Albie Sachs, 'Towards a Bill of Rights in a democratic South Africa' (1990) 6 *South African Journal on Human Rights* 1; Albie Sachs, *Protecting Human Rights in a New South Africa* (1990)

[337] The 1988 Constitutional Guidelines, amongst many other documents and publications well illustrates this point.

If the NP's approach to the question of rights was expedient and self-serving the ANC's, by contrast, sought to be grounded in some of its longest standing commitments. To further elaborate upon this point, it is worth examining two examples of the ANC and NP's positions on arguably the two thorniest rights questions to face the drafters, namely what a commitment to protecting and promoting equality would entail, and whether or not, and if so, to what extent property should be afforded protection under a bill of rights.

4.4.1.2.1 Equality

On the right to equality, the NP's approach as to how it should be formulated was one that favoured a begrudging formalism. By this I mean that according to this NP approach, the essence of an equal rights protection clause was to ensure equal treatment when it came to state-citizen relations.[338] In accordance with this approach, interactions between citizens in the private realm, were to be unaffected by the operation of the bill of rights, meaning under this conception private discrimination could conceivably remain lawful.

By way of contrast the ANC's position was one that advanced an understanding of equality that demanded more than mere formal equality in order to respond to the specifics of South Africa's historical circumstances. In accordance with this view, equality would have to be understood as empowering government to take decisive affirmative measures where necessary to advance the equality of those previously discriminated against or excluded in both the private and public spheres.[339]

[338]See Klug op cit note 147 at 86-8.
[339] Ibid 87-9.

4.4.1.2.2 Property

The question of the treatment of property, and land in particular, considering the skewed land distribution arising from colonial dispossessions and apartheid era forced removals was also intensely contested. The NP's position, informed as it was by the South African Law Commission (SALC) report on rights, demanded the full protection of private property interests and just compensation in the event of expropriation.[340] Herbst, arguing that the NP won what he terms an 'intellectual 'argument on property' posits that ideologically, 'the worldwide movement against not only communism, but socialism simply overwhelmed the ANC,' therefore the omission of some form of private property protection was unlikely.[341]

According to Klug, the ANC's position was one that evolved over time taking into account various ideological debates as well as strategic considerations.[342] Included in the range of ideas considered within the ANC was, on the one hand, what in the context of a post-cold war world seemed a radical proposition, namely not to provide for any property protection whatsoever; and on the other, a less radical proposition that called for minimalist protection that ended at *personal* property.[343] Unlikely as they were to be successfully taken up considering the then prevailing international conjuncture, what further examination of

[340] South African Law Commission Project 58 *Interim Report on Group and Human Rights* (1991) 357-363, especially where the Commission berates the ANC for its commitments to expropriation and imputes motives on to in, namely that it's views against private property are an attempt to smuggle in nationalization without naming it.

[341] Jeffrey Herbst, 'Prospects for elite-driven democracy in South Africa' (1997) 112 *Political Science Quarterly* 595 at 604.

[342] Klug op cit note 147 at 126-136. Klug gives a useful account of the many conferences organized by the ANC in collaboration with law faculties, civic society organisations and activists on different campuses around the country where they discussed the pressing issues around land and property rights.

[343] ANC Constitutional Guidelines (1988) in clause (t) states a follows: 'property for personal use and consumption shall be constitutionally protected.' http://www.anc.org.za/content/constitutional-guidelines-democratic-south-africa (last accessed 16 November 2018).

these propositions gesture towards is an underlying commitment to the idea that redistribution of property, particularly land remained an imperative as was evident in future ANC proposals regarding the land and property.[344]

Beyond the constitutional provisions enshrining the rights discussed above, there was also going to be a further dynamic to contend with, namely the interaction of these rights with pre-existing common law and statutory law provisions.[345]

4.4.1.3 Legal Continuity

One oft understated intellectual constraint on the range of possibilities around negotiations, particularly as far as constraining the exploration of radical alternatives was concerned, related to the NP's unyielding insistence on the point that the settlement of any negotiated outcomes had to be adopted within the confines of a constitutionally and legally defined regime of continuity. This was despite the colonial-apartheid legal system being regarded as being of questionable legitimacy for its complicity in propping up apartheid.[346] Rather than a matter of convenience or simple administrative exigency, at a more profound level, whether a society decides to retain or overturn a legal system will have profound consequences in as far as delineating the possibilities of change envisaged and whether they are revolutionary or reformatory in nature.

The NPs incontrovertible fidelity to the idea of a regime of constitutional continuity is well captured by Corder who points out that, 'constitutional continuity was a vital element in

[344] Klug op cit note 147 at 134-6.
[345] For useful discussion on the relationship between the constitutional right to property and the common law see Andries Johannes Van der Walt, *Property and Constitution* (2012).
[346] See generally David Dyzenhaus, *Truth, Reconciliation and the Apartheid Legal Order* (1998).

persuading those who have grown accustomed to power to relinquish it.'[347] Continuing, Corder adroitly captures the implications of the NP's unrelenting commitment to this regime of continuity when he tells us that 'while the electoral package and Constitution represents radical socio-political change, there is no legal or constitutional break.'[348]

Whilst not unusual as far as constitutional shifts of power[349], even negotiated ones, the implications of locking in a new dispensation into a (re)constitution based on the fiction of continuous government cannot be gainsaid. By insisting on a regime of constitutional and legal continuity, the NP, beyond the potentialities implicit in rights-based claims, arguably sought to fetter the incoming democratic government's ability to radically alter the nature of established social and legal relationships, legal norms and ultimately the entrenched Roman-Dutch and English law based legal culture with African customary law remaining forever the junior partner.[350]

Therefore, overall, against a background of the global triumph of liberal democracy, the seemingly irresistible influence of international political culture and the notion of legal continuity drawn as a line in the sand, I believe it is fair to suggest that as far as the climate for negotiations is concerned the intellectual coincidences, disagreements or positions

[347] Hugh Corder, 'Towards a South African constitution' (1994) 57 *The Modern Law Review* 491 at 522.
[348] Ibid 522-3.
[349] There is indeed nothing extraordinary about putting in place provisions in a (post-colonial) constitution to the effect that laws previously in place under a previous constitutional dispensation will continue to be in effect at the commencement of the new constitution. For example, s 135 1910 Constitution and s 107 1961 Constitution make provision for the continuation of previously existing laws, conventions and commissions.
[350] In this regard on the theme of a stubborn resistance to change that has been encountered within the South African legal system, and more generally on how the system has reproduced itself despite the meta-constitutional changes ushered in by the 1994 and 1996 Constitutions see: A. J. Van der Walt, 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12 *Fundamina* 1; Dennis Davis and Karl Klare, 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403; Sibanda and Mosaka op cit note 233; Sanele Sibanda, 'When is the past not the past? Reflections on customary law under South Africa's constitutional dispensation' (2010) 17 *Human Rights Brief* 6.

assumed by either parties were not, in the end, ones that can be always be characterised, as strictly speaking, towing a clear ideological line, even in a political sense. Rather, I posit that the positions taken probably should be understood as having been informed by a combination of political, instrumental and pragmatic considerations, including the negotiating position of the other side. This is likely a much harsher judgment than is fair on the ANC considering that it held numerous conferences in which participants debated the pros and cons of positions advanced and opened themselves up to a multitude of ideas and influences. However, in a sense this is also, on some level, confirmation that ideological fidelity may not have been top of mind in terms of determining final positions on issues before, during and after negotiations.

4.5 Negotiating the Dynamics – Prelude to the 'Miracle'

It is generally accepted that by the time negotiations commenced in December 1991 the prevailing situation within the country was a 'no-win situation' for both the ANC and the NP which pointed to the fact that negotiations could not be postponed any longer.[351] With the liberation movements having been unbanned and operational within the country, the Tricameral parliament an unmitigated failure, the apartheid economy in irretrievable crisis and the international geopolitics having been drastically re-ordered by the end of the Cold War, negotiations between the government and the liberation movements seemed all but inevitable. However, the very process of getting negotiations off the ground and sustaining them was itself fraught with difficulty. So, in this section I turn my attention to the actual process to discuss the underlying dynamics that arguably influenced the process and outcomes.

[351] Meer op cit note 313 at 45.

Beyond the obvious tensions, political posturing and manoeuvring of the political actors involved, the negotiations must also be read against a backdrop of ever-increasing incidents of violence around the country that also served to heighten and sustain an air of mistrust and foreboding. The violence was mainly constituted of continuing state repression, state sponsored violence as well as inter-party violence, mainly between the ANC and IFP.[352] Whilst the violence manifested on a national scale, it was generally concentrated in black areas and seemed to be most entrenched in the Natal region.

4.5.1 Participation and the Legitimacy of the Negotiating Process

An issue that was to prove to be a thorny one as far as the credibility, or even the legitimacy, of negotiations goes related to the question of who did or did not participate (and when). This clearly had implications on the overall balance of power in as far as how negotiations unfolded. In this regard the ANC attempted to form a patriotic front comprising of the black liberation movements. Whilst talks between the ANC, AZAPO and PAC to explore the formation of this front did begin; the idea did not hold.[353] This failure to reach an agreement is reminiscent of the previously discussed battle lines between these liberation movements with their roots in the 1960s. Taken together, the legitimacy question around the process, as well as political and strategic differences left the ANC as the main liberation movement to negotiate with the NP government. The PAC and AZAPO ultimately opted not to participate at the commencement of formal negotiations.[354]

The question of participation is closely allied with another controversial one relating to when exactly negotiations began; who participated in these early meetings; what mandate

[352] Ibid.
[353] Corder op cit note 347 at 496.
[354] Meer, op cit note 313 at 45-47.

those participants had; whose interests they represented; what was the nature of the discussions; and what exactly was agreed to there? One fact that is widely acknowledged and now fairly well documented is the fact that from the mid-1980s there were a series of meetings between the ANC and variously configured white organisations, groups and individuals as the internal crisis pointed at the slow but impending demise of apartheid.

Generally regarded as meetings held against the wishes of PW Botha, the state president at the time, these meeting between mainly Afrikaner businessmen, academics and some politicians and the ANC were held in places such as the UK, the USA, Zambia, Senegal and Switzerland. According to Alistair Sparks, between November 1987 and May 1990, there were at least 12 such meetings.[355] Whilst it is beyond the scope of our present discussion to embark on anything resembling a detailed account of these clandestine meetings, it suffices to say that they were incredibly important for at least two reasons. First, they established initial contact and a cordial rapport between what were then enemies at war. And secondly, they provided those participating with an opportunity to give a preliminary sense of what the other side's negotiating position was, including that which was non-negotiable.[356] These 'pre-negotiations' without a clear mandate and conducted in secret with some of the most economically powerful Afrikaners have proven too controversial as they are popularly regarded in some quarters as having delivered a secret pact that reigned over how the economic future of the country would play itself out. In short, beyond the arguable utility of paving the way for negotiations, these pre-negotiations were to, forever, remain tainted by their lack of inclusiveness and their domination by White (particularly Afrikaner) business elites who, it is suggested, were able to effectively take the economic discussion off the

[355] Sparks op cit note 26 at 63.
[356] Ibid 58-67.See also Luli Callinicos, *Oliver Tambo: Beyond the Engeli Mountains* (2004) 578-87.

negotiation table by sewing it up in secret with the ANC elites.[357] Whilst the extent to which this is true is difficult to prove, particularly as the meetings are acknowledged by those who were party to them as having taken place in secret, what is undeniable is that constitutional negotiations, when they did take off formally focused primarily on the political to the exclusion of the economic as shall become evident below.

4.5.2 CODESA I

Hugh Corder records that as negotiations commenced there were 19 political groups that were in attendance and participated.[358] On 21 December 1991 the Convention for a Democratic South Africa (CODESA) was convened to officially commence the negotiations. The opening of CODESA was chaired by the then Chief Justice Michael Corbett who in an apparent attempt to capture the magnitude of the occasion controversially compared CODESA to the all –white, all-male constitutional convention of 1908.[359] It is, of course, difficult if not impossible to speculate as to the Chief Justice's intention or motive nor how those in attendance, particularly from the liberation movements received this comparison, but it bears mentioning that these words must have stung those in attendance as being deeply ironic on an occasion that was surely meant to symbolise the first tentative steps towards a new democratic and inclusive start. If nothing else, the Chief Justice's comparison tends to suggest that the onset of negotiations was not perceived as the result of a defeat or

[357] See generally Michael MacDonald, *Why Race Matters in South Africa* (2006).

[358] Corder tells us as follows: "The two-day event, broadcast live on television, was attended by nineteen political groups, being the Government, parties represented in the Tricameral Parliament and those ruling in non-independent homelands, 'government' delegations from the 'independent homelands' of Transkei, Bophuthatswana, Venda and Ciskei (the 'TBVC states'), the ANC, SACP and the allied Natal/Transvaal Indian Congress." Corder op cit note 347 at 496.

[359] See Corbett CJ's speech available at http://wiredspace.wits.ac.za/handle/10539/14638?show=full. (last accessed on 30 August 2018); Meer, op cit note 313 at 55.

capitulation of white hegemony and the onset of black liberation, rather it suggests some level of comfort with the idea that the white experience, perspective and role in the constituting of the modern South African state remained paramount even at this auspicious historical moment.

Probably the biggest issue dividing the ANC and NP from the outset was the fact that they had quite different ideas as to how apartheid should be brought to an end and a new democratic dispensation ushered in. A closely related question was what legislative body should legitimately bear the responsibility of effecting this change. As far as the ANC was concerned the end of apartheid could only be legitimately ushered in by an elected constituent assembly that would put in place an interim government after suspending the Tricameral constitution and then a constitution being negotiated under the auspices of this interim government.[360] Whereas, the NP government rejected this idea and insisting on legal continuity, took the view that the legitimacy of the process lay in maintaining prevailing institutions (namely the Tricameral Parliament) and negotiations being transacted on these terms.[361] In other words what they were not willing to countenance was a suspension of the constitution or the interruption of the prevailing regime of legality. In essence, this initial CODESA meeting - later dubbed CODESA I – was really about laying the foundations for future

[360] Harare Declaration: Declaration of the OAU Ad-hoc Committee on Southern Africa on the question of South Africa adopted 21 August 1989 Harare, Zimbabwe. This was in essence an ANC document adopted at a meeting held under the auspices of the then Organisation of African Unity. See also: ibid 68; Sparks op cit note 26

[361] See Roelf Meyer's views on this issue in his contribution to *The Codesa Files* wherein he makes it clear that constitutional continuity was a non-negotiable for the NP. Meer op cit note 313 at 232. Roelf Meyer 'Codesa and the so-called stalemate' in Meer op cit 313.

talks and establishing a broad negotiating framework. It culminated in the signing of the Declaration of Intent by the parties in attendance.[362]

4.5.3 The All-White Referendum, 1992

In need of support from its voting base and wanting to counter the rising Afrikaner right wing, the NP initiated a whites-only referendum from which it obtained a negotiating mandate with a 68% majority voting in support of government continuing to engage in negotiations.[363] Whilst a whites-only affair, the ANC took the strategic decision to support the "Yes" vote as a means to make advances on negotiations. Specifically, the ANC saw this as an opportunity to rally some white support and used this occasion to flight one of the critical sunset clauses to secure white buy-in into the impending changes, namely the assurance given to civil servants (said to constitute a third of all gainfully employed whites) that they would not be retrenched when a new government was formed."[364] Interestingly, according to Fatima Meer, the successful referendum vote lead to the hardening attitudes on the part of the NP when it came to the negotiating table as the NP then laboured under the view that they were the only democratically mandated party at CODESA.[365]

4.5.4 CODESA II

On 15 May 1992 CODESA II was convened in an atmosphere of heightened tensions and acrimony as violence around the country continued to escalate. CODESA II was largely

[362] The CODESA Declaration of Intent was signed at CODESA I by all the parties except the government of Bophuthatswana, available at http://peacemaker.un.org/southafrica-codesa-intent1991 (last accessed 16 November 2018).

[363] Meer op cit note 313 at 86-90. The referendum question put to the voters asked: "[d]o you support continuation of the reform process which the State President began on 2 February 1990 and which is aimed at a new Constitution through negotiation?"

[364] Ibid 87.

[365] Ibid 87.

characterised by the establishment of five working groups, each with an individual, although sometimes overlapping, remit. The groups were configured as follows:

1. Working group one was responsible for creating an atmosphere of political participation.[366]
2. Working group two was responsible for formulating the interim constitution on the basis of consensus.[367]
3. Working group three focused on the transition to democracy and sought to craft a road map to elections and the drafting of a new constitution.
4. Working group four was focused on mapping a way for the reincorporation of the TBVC states.
5. Working group five's mandate was a coordinating and supervisory one in the sense that it monitored and reported on the progress of the other groups.

This working group structure was eventually collapsed as the management committee deemed it "cumbersome" and unworkable and took over the process. Commentators, writing during the period, suggest that the fact that CODESA II was doomed to failure was predictable. In support of this view, they point to the conduct of the ANC and NP outside of the process which was antagonistic. Further, incidents of government sponsored violence such as that of the Boipatong massacre committed on 17 June 1992 wherein armed men from a nearby hostel attacked members of the Boipatong community only upped the ante. That attack left 45 dead and scores of others injured.[368] On the back of this attack, the ANC suspended its

[366] This group was focused on addressing issues related to ending political trials, the release of political prisoners, the return of exiles, ending violence, including state sponsored violence, the repeal of laws criminalising free political activity, implementing the peace accord and freeing the airwaves from government control.
[367] This group was central to establishing the overarching framework of negotiations and the path to a negotiated settlement. Therefore, the failure of this group to achieve any level of consensus is what the eventual demise of CODESA II is widely attributed to. See Corder op cit note 347 at 497.
[368] Sparks op cit note 26 at 109-114.

participation in the negotiations, as did many other smaller parties.[369] This effectively brought to an end CODESA II.

The ensuing period saw heightened tensions with increasing violence across the country especially in Natal. The Bisho massacre on 7 September in the homeland of Ciskei only served to further increase national tensions as the break of out a full-scale conflict seemed increasingly imminent. This massacre also marked the end of what was termed the 'Leipzig model' within the ANC – the notion that through mass marches/ mass action the weaker sections of the old regime – the bantustans – could be brought down and thus rendering the white regime increasingly isolated. The fact that the Ciskei army were prepared to use live ammunition on unarmed marchers made it clear that this option would not be plausible – as compared to the demonstrations that brought down the old regime in East Germany.[370]

4.5.5 The Road to the Multi-Party Negotiating Platform

Despite the public exchanges between the NP government and the ANC, it is a generally recorded view that both sides recognised the fact that there was, at that stage, no alternative but to continue to negotiations. So whilst publicly a stalemate prevailed, overtures regarding talks were exchanged between the parties which culminated in the signing of the Record of Understanding by the leaders of the two parties, Messrs de Klerk and Mandela respectively.[371] The purpose of the Record of Understanding was to lay the

[369] Corder op cit note 347 at 499.
[370] Klug, op cit note 147 at103; James Hamill, 'South Africa: From Codesa to Leipzig?' (1993) 49 *The World Today* 12.
[371] Corder op cit note 347 at 500.

foundations for a reopening of negotiations as both sides revisited former commitments, demands and strategies in readying themselves for talks.[372]

It was not long thereafter that the ANC issued its Strategic Perspectives Document ('the Document') on 25 November 1992. The Document recorded the ANC's overarching goal at the time as being the transfer of power in order that it could bring into being 'a united, non-racial, non-sexist and democratic society'.[373] As a primer for how negotiations would unfold, the Document was responsible for introducing the idea of a government of national unity. The Document was not received with universal acclaim as some within the ANC openly opposed it along with many others within the ranks of black resistance movements.[374] Aside from this, the lasting significance of the Document is that it sought to provide a situated realpolitik analysis of where the ANC found itself within the context of the national struggle, what it wanted to achieve and what it needed to do to attain this. In many ways the Document, from the perspective of the ANC, can be read as a pragmatic road map as to the way forward in light of the prevailing balance of powers; negotiations were not, as obviously, about ideals as they were about navigating positions within the greater political terrain, seemed to be the theme underlying the Document.

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[372] Ibid 500.

[373] See "Negotiations: A Strategic Perspective" (as adopted by the National Executive of the ANC, 25 November 1992) in Meer op cit note 313 at 348 Notably, the drafters of the document, after a detailed and careful analysis of the balance of powers and the options the open to the ANC, declared in clause 5.1that:

> The fundamental goal of the National Liberation Struggle is the transfer of power to the people as a whole and the establishment of a united, non-racial, non-sexist and democratic society. This should not be confused with immediate objectives we set for ourselves in each phase of the transition. At the same time, we should ensure that the immediate objectives we pursue do not have the effect of blocking our longer-term goals.

[374] According to the Meer ibid 115-118, from within the ANC substantial figures such as Winnie Mandela, Harry Gwala and Pallo Jordan were some of those who expressed opposition to the Strategic Perspectives document.

It was in the Document that the notion of a two-stage constitution-making process and its related sunset clauses was introduced as an ANC position. In its origins, the idea was the brainchild of Joe Slovo, secretary general of the SACP and member the ANC. Slovo was of the view that in light of the then prevailing stalemate in which neither side was likely to vanquish or be vanquished, it was necessary to have an open negotiating strategy that enabled progress towards a non-racial democracy. This approach entailed a staged process that involved a democratically constituted interim power sharing phase during which a constitution-making body would, guided by agreed upon principles, negotiate a 'final' constitution.[375]

This breakthrough brought about by the adoption of the Document lead to an opening up of space for the ANC and NP government to engage again in a series of bilateral talks that laid the foundations for formal negotiations intended to include other political parties. Pursuant to these bilateral meetings, held between December 1992 and February 1993, there was the resumption of multi-party talks dubbed the Multi-Party Negotiating Platform (MPNP) on 5 March 1993. It was under the auspices of the MPNP and its streamlined processes drawn up in light of the lessons learnt from CODESA II that the interim Constitution of South Africa was to be drafted. This process was not uncontroversial as exemplified by the dominance exercised by the ANC and NP who had the power to resolve disputed or contested questions in accordance with the idea of sufficient consensus between them. Sparks captures the essence and controversy implicit in this idea of sufficient consensus as follows:

> Trying to get maximum agreement without allowing the small parties to obstruct progress, the participants had settled on a novel decision-making procedure which they called "sufficient consensus": the convention should seek consensus, but if this proved impossible the chair had to judge whether there was sufficient agreement among the parties to allow negotiations to move ahead. In practice this meant that

[375] Joe Slovo, 'Negotiations: What room for compromise?' (1992) African Communist

> if the ANC and the government agreed, the issue was considered settled; if not, there would be a deadlock.[376]

Considering that there were 26 parties represented there including parties such as the PAC that had refused to participate earlier in CODESA, this mechanism of sufficient consensus was both useful for progress where obstructionists sought to unnecessarily derail progress and potentially delegitimizing the entire process as its impact on smaller parties was such that some of their objections no-matter how strongly or legitimately held could be dismissed without much more.

4.5.6. Opposition to a Negotiated Settlement

There were liberation movements such as AZAPO that remained resolute and refused to participate in the negotiations for reasons well-articulated below by Strini Moodley:

> AZAPO is neither for nor against negotiations. However, AZAPO realises that at some stage during struggle there may be a necessity to negotiate. However, it is our conviction that you can never achieve at the negotiating table what you have not achieved on the ground in struggle. Any negotiation from a position of weakness is a backward step.[377]

Moodley was convinced that the NP leaders' decision to engage in negotiations at that time was strategic on their part as they realised that their power was on the wane, but at that moment they continued as a party to occupy a position of relative strength. In Moodley's view, the timing of the negotiations was designed to enable the 'enemy' to buy itself some room "to get their breath back".[378]

One issue that brought together an unlikely assortment of organisations in the form of the Zulu-nationalist Inkatha Freedom Party (IFP), the racist right-wing Afrikaner

[376] Sparks op cit note 26 at 103.
[377] Strini Moodley 'AZAPO and Codesa' in Meer op cit note 313 at 246.
[378] Ibid 247.

Conservative Party (CP) and other right-wing groups, as well as the Ciskei and Bophuthatswana homeland governments, was their demand for some form of either federal arrangement, a volkstaat or at least some level of regional autonomy. This group of actors came together during negotiations to form the Concerned South Africans Group (COSAG) which later became the Freedom Alliance and by intermittently joining, threatening to withdraw or actually withdrawing from the MPNP, members of this group were able to eke out some significant concessions as the NP government and ANC did all things reasonable within their means to get them to participate and legitimate the impending settlement.

The participation of these groups, especially that of the IFP, was considered to be critical if the settlement and the ensuing elections were to take, endure and establish the foundations for a peaceful transition. As it happened the IFP almost missed out on participating in the first democratic elections which it had decided to boycott, only to recant this position literally days before the elections. This last-minute reversal produced the anomalous situation where, to ensure IFP's participation, the Independent Electoral Commission had to add a sticker to the ballot paper in order to create a slot in which the electorate could vote for the IFP if it so chose.

4.6 The Interim 1994 Constitution - Ushering in the Non-racial Liberal Democratic Era

The sheer magnitude of the occasion of the adoption of the 1994 Constitution when viewed against the backdrop of the preceding nine decades of South African constitutional history is difficult to overstate. This much is evident from the sheer volume of literature that it produced as many authors have sought to capture in words the nature, causes and extent of the seismic shifts instantiated by the adoption of the 1994 Constitution. As discussed above

the events leading up to this adoption were long and protracted and involved multiple agendas and constituencies that sought to influence the final outcome in ways that ensured that their interests were captured and safeguarded.

4.6.1 Institutional and Structural Shifts and Continuities

Despite frequently being dubbed a 'legal' or 'constitutional' 'revolution' by some authors,[379] South Africa's 'revolutionary' transition, somewhat confoundingly, unfolded atop a regime of legal continuity that entailed the repeal of some of the most egregiously racist laws whilst retaining a host of colonial-apartheid laws; a Eurocentric legal culture accompanied by largely unchanged socio-economic relations. Whilst the massive re-imagining of the racist apartheid state occasioned by the 1994 Constitution introduced for the first time in South Africa, amongst other things, universal adult suffrage, equal citizenship and rights, it must be recalled that this constitution was interim in nature. This fact had substantial implications for what contents were included as well as the institutional and structural shifts and continuities it incorporated and brought into being.

Structurally the 1994 Constitution retained the familiar institutional and structural footprints of previous regimes in that there was a tripartite division of power between Parliament, the Executive and the judiciary atop a federative provincial system; however, after the ruse that was the Tricameral Parliament, the 1994 Constitution re-introduced a bicameral parliament consisting of a national assembly and senate.[380] The national assembly was comprised of 400 members who were elected in accordance with a system of

[379] See for example Currie, De Waal, De Vos et al op cit note 81 at 1; Lourens WH Ackerman, 'The legal nature of the South African constitutional revolution' (2004) *NZL Rev* 633.
[380] S 36 1994 Constitution.

proportional representation; [381]whilst senate was made up of 10 senators from each of the nine provinces elected in terms of a formula based on proportional representation.[382] With the question of the universal franchise having been constitutionally provided for, equally membership of the two houses of parliament was open to all eligible voters and not subject to the listed exclusions.[383]

Under the 1994 Constitution, Parliament also served the extraordinary function of also doubling up as the Constitutional Assembly responsible for drafting what became South Africa's democratically drafted and adopted Constitution in accordance with the 34 constitutional principles negotiated at the MPNP and incorporated into the 1994 Constitution.[384] In terms of the 1994 Constitution, the Constitutional Assembly had two years within which to complete this important task that required a two thirds majority vote and certification by the Constitutional Court.[385] In anticipation of the possibility of the Constitutional Assembly being unable to reach agreement on a draft text, the drafters put in place an elaborate set of arrangements to move the process forward. For example, in the event of complete failure by the Constitutional Assembly to arrive at a text supported by the right majorities and capable of certification by the Constitutional Court, a fresh election would have had to be called.[386] Ultimately the 1996 Constitution was adopted substantially in line with the agreed to processes, with the draft text produced by the Constitutional Assembly being supported by a majority of 86%. The Constitutional Court certified the amended text

[381] S 40(1) 1994 Constitution.
[382] S 48 1994 Constitution.
[383] See ss 42 and 50 1994 Constitution. Examples of exclusions under the 1994 Constitution include convicted criminals serving terms of imprisonment for periods exceeding 12 months; unrehabilitated insolvents; or persons of unsound mind.
[384] S 68 1994 Constitution.
[385] S 73 1994 Constitution.
[386] S 73 1994 Constitution.

on the second attempt, after initially sending it back to the Constitutional Assembly to address objections that the Court had upheld during the *First Certification* case.[387]

With respect to executive authority, the 1994 Constitution established the President as the head of state.[388] The President, under the 1994 Constitution, was elected by the National Assembly.[389] As a result of the comprises of the negotiated settlement that created a Government of National Unity (GNU) the 1994 Constitution provided each party with at least 80 seats in the National Assembly to designate an executive deputy president. The 1994 Constitution established a parliamentary government with a majority of the members of cabinet having to be members of parliament.[390] In addition, in keeping with the GNU, parties in the national assembly holding more than twenty seats were entitled to be allocated at least one seat in the cabinet.[391]

The most far reaching and enduring institutional shift ushered in by the 1994 Constitution was made with respect to the judicial branch of government. It was under the 1994 Constitution that the Constitutional Court came into existence. Therefore, under the new court structure, there were, essentially, two apex courts with the CC and the Appellate Division of the Supreme Court of South Africa exercising independent jurisdictions. On the one hand, headed by a President, there was the Constitutional Court 'as the court of final instance over all matters relating to the interpretation, protection and enforcement of the

[387] See *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa*, *1996* (4) SA 744 (CC) (*First Certification judgment)* and *Ex Parte Chairperson of the National Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) (*Second Certification judgment).*
[388] S 75 1994 Constitution.
[389] S 77 1994 Constitution.
[390] See s 88 1994 Constitution.
[391] S 88 1994 Constitution.

provisions of this Constitution.'[392] On the other hand, headed by the Chief Justice, there was the Appellate Division that was designated as having 'no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court' an apex court for all non-constitutional matters.[393]

The 1994 Constitution made an important intervention in as far as shifting the place and discourse around traditional authorities and indigenous (customary) law. Most significantly, under the 1994 Constitution, traditional authorities were afforded constitutional recognition and afforded recognition.[394] According to Bennett, the recognition afforded to indigenous law under the 1994 Constitution was such that customary law was now recognised as being one of the 'foundation[s] of the South African legal system when it was placed on a level of parity with the common law.'[395] In addition to this, under the 1994 Constitution traditional leaders, despite their occupying essentially hereditary positions, were afforded opportunities to participate in democratically elected provincial and local government structures.[396]

Another institutional shift of the 1994 Constitution was the introduction, in Chapter 8, of independent institutions, constitutionally established to facilitate the protection and promotion of citizen's constitutional rights; namely the Public Protector, the Human Rights Commission, the Commission on Gender Issues and the Commission for the Restitution of Land Rights.

[392] S 98 (2), but see s 98 more generally the CC's jurisdiction under the 1994 Constitution.
[393] S 101(6), but see s 101 more generally for the jurisdiction of the AD and the other divisions of the Supreme Court, 1994 Constitution.
[394] S 181 1994 Constitution.
[395] Bennett op cit note 231 at 77.
[396] Ss 182 and 183 1994 Constitution.

4.6.2 Notable Features of the 1994 Constitution

Institutional and structural continuities notwithstanding, the 1994 Constitution will remain a constitutional milestone in South Africa's history, not only for having been the document that officially captured the rupture between the colonial-apartheid era and the contemporary democratic dispensation, but also for introducing some notable and novel features into South African constitutionalism. I discuss some of these below.

4.6.2.1 Preamble

Capturing the dawn of the new era of the South African polity was the spirit of rebirth or renewal neatly reflected in the preamble of the 1994 Constitution that sought to simultaneously, speak to and, for all South Africans for the first time on a non-racial basis. So, imbued with the spirit of hope and a recognition of the journey travelled till that point, the drafters produced a Preamble that sought to be both historically-informed and visionary:

> We, the people of South Africa declare that-
>
> WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;
>
> AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;
>
> AND WHEREAS it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution; [397]

Therefore, by this act of proclaiming a new constitutional dawn, South Africa took the first steps to fundamentally recreating its own understanding of constitutional selfhood and

[397] Excerpt from the preamble of the 1994 Constitution.

defining who was, henceforth, formally and legally included in within the fold. So, whilst a significant step, in recognition of the compromise around the question of the possibility of the legitimation of a non-racial re-constituting of the South African polity by a racist, essentially illegitimate Tricameral parliament, the preamble also unequivocally acknowledged the transitional (interim) nature of its standing. In essence the preamble was a declaration of sovereignty, democracy, equality atop rights and freedoms, yet it was also cognisant of the fact that it was transitional.

4.6.2.2 Citizenship and Franchise

As a foundational document addressing the reconstituting of South Africa that sought to address the worst vestiges of South Africa's racist past, including bringing the former homelands into the fold, the 1994 Constitution established a unitary South African citizenship.[398] Of no less importance, was the provision for a non-racial, inclusive and unqualified franchise, subject only to age and citizenship qualifications.[399] In many ways this extension of the franchise can be viewed as having ushered in the era of political freedom (non-racial democracy) as it finally allowed the black sections of the population to exercise constitutional political agency by finally being able to participate within the political system as equals. The significance of this should not be underestimated as the attainment of the ballot was the focus of many campaigns and was presented by liberation movements as being the key to unlocking the very possibility of liberation.

[398] S 5 1994 Constitution.
[399] S 6 1994 Constitution.

4.6.2.3 The Supremacy of the Constitution

Again, against the background of the excesses performed under the guises of parliamentary supremacy, widely marked as a prime enabler of the gratuitousness of colonial-apartheid's excesses, the 1994 Constitution ushered in the era of constitutional supremacy. This notion of a supreme constitution is a fundamental feature around which contemporary South African constitutionalism has formed. Under the 1994 Constitution any law or act inconsistent with the Constitution was deemed to be 'of no force and effect to the extent of the inconsistency' of that law or act with the provisions of the Constitution.[400] The decision by the drafters to make the Constitution supreme has had far-reaching implications for how the post-1994 democratic state is configured, operates, as well as defining the parameters of the institutional relationships. In particular, an important deviation from the era of parliamentary supremacy was the introduction of the institution of judicial review that was clearly bolstered by the notion that the 1994 Constitution bound 'all legislative, executive and judicial organs of state at all levels of government.'[401]

4.6.2.4 The Language Provisions

Interestingly, the question of language in keeping with previous constitutional moments in South African constitutional history is one that finds expression in the constituent provisions that formally lay the foundation of the 'new' South Africa. The issue of language,

[400] S 4(1) 1994 Constitution.

[401] S 4 (2) 1994 Constitution. Further unequivocally establishing the institution of judicial review was s 98(5) providing that:

> In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.

having remained a sensitive one since the Union, retained some prominence as the 1994 Constitution, sought to establish a constitutional language provision that recognised the multicultural reality of South Africa's population base and no doubt sought to address some of the racial and (implicitly) the cultural dynamics inherent to the issue of language in South Africa.[402] So it was the case that in pursuit of this balance South Africa ended up with 11 official languages, despite the undoubted disparities in usage and distribution.[403]

The contested nature of the cultural terrain and the desire by the NP, as the party representing white interests, to retain white hegemony where possible finds expression in the privileged place English and Afrikaans were allowed to retain by virtue of a provision guaranteeing that '[r]ghts relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished.'[404] So whilst ostensibly protecting all the official languages and legitimizing their use 'wherever practicable' in public administration, the position of ascendancy of the languages of South Africa's original 'two races' was guaranteed. Notwithstanding the bureaucratic pragmatism of this approach, the cultural symbolism implied by this approach should also not be overlooked as it at once gestures at fostering inclusivity whilst at the same time allowing for the continuation of the *status quo ante* significantly undisturbed.

4.6.2.5 The Bill of Rights

Against the background of South Africa's history of repressive laws that licensed all manner of arbitrary and capricious conduct by the state directed primarily at Black people,

[402] See s 3 1994 Constitution generally.
[403] S 3(1) 1994 Constitution.
[404] S 3(2) 1994 Constitution.

including innumerable acts of gratuitous violence, the inclusion of a constitutionally entrenched bill of rights in in the 1994 Constitution was, virtually an inevitability. Therefore, in spite of disagreements between the main parties at the multi-party negotiating table as to the specifics, ambition and priorities to be pursued through a charter of rights, the existence of a well-established overarching international and regional human rights framework[405] largely rendered the inclusion of a bill of rights uncontroversial. [406] However, what was a more contested exercise was that relating to which specific rights to include or their formulation in a manner that was simultaneously forward and backward looking in that a commitment to correct past wrongs was accorded equal importance with that of safeguarding against potential abuses of state power in the future.

Significantly, the Bill of Rights in the 1994 Constitution whilst binding all legislative and executive organs of state and being applicable to all law and administrative decisions also made provision for juristic persons to enjoy the benefits and protections of rights under this constitution. Beyond the inclusion of the equality provision, its formulation to prohibit direct and indirect discrimination on the basis of 14 listed grounds, as well as providing for affirmative action measures, displayed a monumental commitment to rejecting and overturning the ideology of white supremacy that colonial and apartheid South Africa were founded upon.[407] Recalling the debates discussed earlier in the chapter around the nature of the equality and property protections, probably the most curious facet of the equality

[405] For example the International Covenant for Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.

[406] See generally South African Law Commission *Interim Report on Group and Human Rights* (1991), African National Congress *A Bill of Rights for a New South Africa* (1990) and Nicholas Haysom 'Democracy, Constitutionalism and the ANC's Bill of Rights for a New South Africa' (1991) 7 *SAJHR* 102. For what can only be termed in hindsight as a prescient opposing view see Makau wa Mutua, 'Hope and despair for a new South Africa: the limits of rights discourse' (1997) 10 *Harv Hum Rts J* 63.

[407] S 8 1994 Constitution.

provision is that it was within its provisions that the question of land dispossession was inserted in the 1994 Bill of Rights rather than in the property provision.[408]

The earlier debates, and the concerns espoused by the ANC, around the nature of property protection probably accounts for this situation. Further, alongside the usual array of civil and political rights and freedoms such as freedom and security, privacy, religion, thought and opinion, expression, and political activity, the 1994 Constitution also contained some innovative provisions such as the right to just administrative action, an elaborate list of accused persons' rights and the rights of children. Finally, the inclusion of a limitation clause was also a significant contribution to the Bill of Rights chapter as it provided a framework for adjudication where challenges to law were initiated.

4.6.2.6 The 34 Constitutional Principles

The 34 constitutional principles already mentioned above were a crucial component of the 1994 Constitution. Despite the interim nature of that constitution, premised on the idea that a final constitution would be drawn up by the Constitutional Assembly, the constitutional principles served to drastically curtail the possibility and imagination of the Assembly in as far as what structures, institutions and the nature of the relationships that the 1996 Constitution could be included. Writing during the period at which the 1994 Constitution prevailed, Corder ably captures the equivocal character of the principles:

> These principles come as close as is possible in constitutional law to a written guarantee that, no matter who holds political sway in the National Assembly after a democratic election, certain structures, procedures and interests will be sacrosanct…An extraordinary aspect of South Africa's Constitutional Principles is that

[408] S 8(3)(b) provides as follows: [e]very person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with ss 121, 122 and 123.

> they are self-imposed, the result of a brokered compact, reflective of the balance of political power. In effect, the transitional government agreed in advance to certain curbs on its future constitution-making powers, in order to persuade those formerly in government to relinquish their political power.[409]

Corder continues further:

> [T]he significance of these Constitutional Principles should not be underestimated. They represent the 'political contract' for the transfer of power from those who held it to those who were excluded. They comprise the framework, the skeleton of South Africa's final constitution, and provide a fair degree of predictability of its eventual structures and procedures.[410]

Interestingly, these principles were key to bringing about agreement on the 1994 Constitution as well as the 1996 Constitution in that they simultaneously catalysed and sealed off the possibility and socio-political imaginary of change.

4.7 Teleologically Speaking - The So Called 'Final' Constitution of 1996

Presided over by the 34 principles and the prevailing sense of goodwill and possibility, the Constitutional Assembly successfully completed its task of drafting the 1996 Constitution which was adopted on 10 December 1996. At some point also known quite ominously as the 'Final Constitution', the 1996 South African Constitution has been much studied, spoken about, emulated and quite extensively celebrated and as such I shall give it the lightest treatment. This is also in part a reiteration of the fact that the purportedly new constitution in actual fact builds structurally, institutionally and culturally, on those that preceded it stretching from the colonial-apartheid era constitutions to the Interim Constitution and as such requires minimal engagement. So what I will try and do in the following section is to simply highlight certain distinctive features of the 1996 Constitution that have led to it, with

[409] Corder op cit note 347 at 515.
[410] Ibid 516.

admittedly some justification, being designated transformative in spite of the real demands and limits imposed by, the agreed to, legal continuity on the possibility of radical change.

4.7.1 Institutional and Structural Shifts

Again, institutionally, the 1996 Constitution did not usher in too many drastic changes relative to the 1994 one. One notable change was with respect to the name and make-up of the second house of Parliament. The National Council of Provinces (NCOP), as the Senate came to be known, represented the interests of provincial governments in national legislative processes through *elected representatives* drawn from provincial assemblies; whereas the Senate under the 1994 Constitution was constituted by *nominees* of the various parties represented in the provincial assemblies.[411] Beyond that the institutional interrelationship between the two houses remained substantially unchanged. Equally, the institutional relationship between the legislature and the executive was largely unchanged with the retention of a parliamentary form of government.

In the judicial branch, the most significant change effected by the Constitution relates to the jurisdictional split between the CC and the Supreme Court of Appeal (SCA) (formerly the Appellate Division). It is worth recalling that under the 1994 Constitution both these courts were in essence apex courts for constitutional and non-constitutional matters respectively, yet another compromise.[412] Under the 1996 Constitution, the exclusion of the SCA from the hierarchy of appeal on constitutional matters was done away with, thus

[411] See s 48 1994 Constitution.

[412] For a brilliant discussion of the post-1994 jurisdictional battle between the CC and the SCA and its consequences see generally Frank I Michelman, 'The Rule of Law, Legality and the Supremacy of the Constitution' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2005).

increasing its appeal jurisdiction to include constitutional matters. The CC's jurisdiction, however, was maintained as being exclusively to adjudicate constitutional matters.[413]

Another institution impacted upon markedly by the 1996 Constitution was that of traditional authority. Under the 1996 Constitution, there was a significant rolling back of the powers conferred upon the traditional authorities relative to those they had enjoyed under the 1994 Constitution. Under the 1996 Constitution, rather than a distinct constitutional structure or tier, much of what powers and functions are allocated to traditional authorities are subject to parliamentary control rather than original constitutional powers. This constitutional place and fit of traditional leadership authorities, customary law and institutions has continued to be contested and attract academic interest, often as a problem to be solved which in some ways is reminiscent of the approach taken to the native question.[414]

4.7.2 Some Notable Features and Elements of the Final Constitution

One distinctive feature of the 1996 Constitution that rarely attracts comment or even attention, that speaks to the legitimacy of this constitution is that, as noted by Klug, it is the only South African Constitution that has been adopted democratically as opposed to the negotiated product of compromise that the 1994 Constitution was.[415] Beyond this interesting fact, the 1996 Constitution has noteworthy features that I outline below.

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[413] This has, of course changed since the 17th Constitutional Amendment that came into effect on 1 February 2013. The effect of this amendment is to make the Constitutional Court the 'highest court in South Africa with general jurisdiction to decide constitutional matters and any other matters for which the court grants leave to appeal where there is an arguable point of law of general public importance' according to s 167 (3)(b)(ii).

[414] Apart from the voluminous texts concerned with customary law reform, an important piece of the puzzle is the South African law Commission Project 90 on Customary law that covered conflict of laws, recognition of customary marriages, traditional courts and succession.

[415] Klug, op cit note 244 at 1.

4.7.2.1 Constitutional Values

The 1996 Constitution establishes a set of constitutionally entrenched values that are generally accepted as pivotal to the interpretation, and hence framing, of the 1996 Constitution as these are believed to capture the aspirations of the 'new' South Africa.[416] These values that are axial to the foundation of the 1996 Constitution, when contrasted with earlier periods of South African constitutionalism, are clearly intended to represent a normative rupture from that past era. The eminence of these values within the constitutional scheme is reflected in the fact that as part of the founding provision can only be amended subject to special procedures and majorities being attained in Parliament, in particular a 75 percent majority in the National Assembly would be required to effect an amendment to the founding values.[417]

4.7.2.2 Socio-economic Rights

Beyond the civil and political rights contained in the 1994 Constitution, the 1996 Constitution elaborated upon the socio-economic rights such as the rights to the housing, education, and health care.[418] Although subject to some question as to the wisdom of their inclusion as some perceived them as creating positive obligations that would ultimately

[416] S 1 1996 Constitution reads as follows:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

[417] See s 74(1) (a) 1996 Constitution provides that the values in s 1 can only be amended subject to a supporting majority of 75% of the members of the national assembly and 6 out of the 9 provincial delegations at the national council of provinces.

[418] Ss 26, 27 and 29 1996 Constitution.

render them difficult to adjudicate, the drafters of the Constitution nonetheless included them but made them subject to progressive realization and subject to available resources.[419]

4.7.2.3 Cooperative Governance

Retaining the provincial divisions of the 1994 Constitution, the Constitution introduced a conceptual overlay on the federative division of power in the form of the frame of cooperative governance that ties the local and provincial programmes to a nationally set agenda. In terms of this framework, the Constitution provides for the federal division of power across three tiers or spheres of government, namely national, provincial and local.[420] Under this framework of cooperative federalism rather than competing with each other, the Constitution envisaged a co-operative relationship between the three spheres of government that entails them sharing responsibilities in a mutually supportive fashion.[421]

4.7.2.4 The Property Clause and Land Restitution

In light of South Africa's history of racist dispossession and the contestation around the (non)inclusion of property rights during the constitutional negotiation, the constitutional provision dealing with property was always going to be significant. Section 25 in the 1996 Constitution simultaneously provides for negative protection of property rather than a positive right to individual property alongside providing for a potentially aggressive expropriation regime, permitting the provision of security of tenure and, most significantly it

[419] For a useful and engaging overview of the debates prevailing at the time regarding inclusion or non-inclusion of socio-economic rights see Dennis M Davis, 'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475; Etienne Mureinik, 'Beyond a charter of luxuries: Economic rights in the constitution' (1992) 8 *SAJHR* 464.

[420] See chapter 3 1996 Constitution.

[421] Currie, De Waal, De Vos et al op cit note 81 at 119-120.

establishes the foundations for a land restitution and compensation programme.[422] It is beyond the scope of this chapter to engage with the intricacies of this section, nor seek to capture the debates and contestation around questions of land and property rights more broadly. However, I want to suggest that if the entire constitution is understood to possess transformative potential, then it is surely from this provision that much has come to be expected despite its implicit acceptance of prevailing property rights and the capitalist economic structure that was left substantially unchanged by the 1996 Constitution.

4.8 Conclusion

In this chapter I have sought to follow on methodologically from the previous one, albeit that in this one I focus my attention on South Africa's more recent constitutional history over the period 1983-1996. The historical account in this chapter looks beyond the history of the drafting of the constitutional text, considering also the politics of negotiation and compromise that brought into play many different political parties, interest groups, agendas, and ideals that were often in conflict or opposition to each other. I have embarked on this approach as I have sought to demonstrate that whilst compromise prevailed on the political front, in as far as the specifics of the arrangements of power are concerned, on an economic and cultural front the post-1994 period is equally characterised by many continuities that have survived from the colonial-apartheid constitutions.

The main objective of this chapter has been to make the point that whilst it is difficult to deny the importance of the post-apartheid constitutions ushering in a relatively orderly political transition as well as the far-reaching nature of the changes in question *when*

[422] See generally Bernadette Atuahene, *We Want What's Ours: Learning from South Africa's Land Restitution Program* (2014).

compared to the status quo ante; what these constitutions and their underlying intellectual architecture were not designed to do was to bring about a revolutionary overhaul of the extant racialised distributive patterns, and the cultural and epistemic ordering established under colonial-apartheid. Rather the compromise of the day ushered in an ill-defined, somewhat open-ended transformative project largely premised on abstract liberal constitutional values, norms, principles and legal doctrines which have shaped the imaginaries of what followed.

Chapter 5

Transformative Constitutionalism – Pathway to Liberation or a Project of (Post) Liberal Constitutional Legalism?

5.1 Introduction

There are not, within the South African lexicon, many ideas that have so discursively captured the multiple, yet variable, and often conflicting aspirations and apprehensions of a once (and arguably still) deeply divided nation, and yet somehow managed to remain putatively true to the nation's collective set of concerns on virtually all sides of the political, social and racial divides as the idea of 'transformation' in post-1994 South Africa. Encompassing virtually all aspects of South Africa's socio-political sectors; education[423], sports[424], the media[425], business[426], the economy[427], politics[428], language[429], the courts[430], the police[431], the idea of transformation is a familiar one to most South Africans of all persuasions. Transformation is a subject that most will have steadfast views on as to its

[423] Maurice Taonezvi Vambe, 'Opening and transforming South African education' (2005) 20 *Open Learning* 285; Saleem Badat, 'Transforming South African higher education, 1990-2003: Goals, policy initiatives and critical challenges and issues' (2004).
[424] Ashwin Desai (ed), *The Race to Transform: Sports in Post Apartheid South Africa* (2010).
[425] Guy Berger, 'Towards an analysis of the South African media and transformation, 1994-99' (1999) *Transformation* 82; Lynette Steenveld, 'Transforming the media: A cultural approach' (2004) 18 *Critical Arts* 92.
[426] Okechukwu C Iheduru, 'Black economic power and nation-building in post-apartheid South Africa' (2004) 42 *Journal of Modern African Studies* 1.
[427] Sampie Terreblanche, *Lost in Transformation* (2012).
[428] Timothy D Sisk, *Democratization in South Africa: The Elusive Social Contract* (1995); Robert Cameron and Chris Tapscott, 'The challenges of state transformation in South Africa' (2000) 20 *Public Administration & Development* 81.
[429] Victor N Webb, *Language in South Africa: The Role of language in National Transformation, Reconstruction and Development*, (2002).
[430] Jackie Dugard, 'Judging the judges: Towards an appropriate role for the judiciary in South Africa's transformation' (2007) 20 *Leiden Journal of International Law* 965; Cora Hoexter, 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 *SAJHR* 281.
[431] Peter Gastrow and Mark Shaw, 'In search of safety: Police transformation and public responses in South Africa' (2001) *Daedalus* 259.

moral, ethical or political appropriateness in how the affairs of the nation are addressed and often conflicting interests are balanced out.

Writing in 1996 during a period he describes as being marked by 'an uncertain global situation and crisis of perspective'[432], Ronaldo Munck, vividly captures the inherent tension and non-specificity attaching to the term 'transformation' by suggesting that as a political idea it is one whose currency, in the post-Cold-War era, is born out of ideological compromise:

> the very nature and meaning of the term 'transformation' itself is quite unclear...My feeling is that the idea of transformation emerged as a response to the inadequacy of the binary opposition reform/revolution in the post-1990 conjuncture...It is at once a goal and a process which is ongoing. *It does, of course mean many different things to different people, some usages being more innocent than others. At the moment it is tempting to abandon the term altogether given its current (mis)use, and its almost complete devaluation and stripping of meaning.* It seems, sometimes, that transformation and democracy refer simply to the outcome that the user desires. Or, as Lewis Carroll put it in Alice Through the Looking Glass - 'When I use a word, it means just what I choose it to mean'...But, in truth, we cannot drop a term for these reasons as all words are a contested terrain for meaning... (Emphasis added)[433]

The force and utility of Munck's explication is that in the context of South Africa's transition to democracy, which was typified by much contestation, transformation comfortably comports with the nature of the negotiated transfer of power in which neither side lost nor won outright. Rather, as I read Munck to suggest, the appeal of the term as a form of compromise is that it deferred the need to stake a position as to what, in precise terms, transformation would mean then as the future of South Africa's constitutional democracy unfolded. Therefore, it was useful for resolving a deadlock, but of questionable value as far as keeping persons from different ideological persuasions aligned to one conception, especially pursuant to a compromise, despite a shared language.

[432] Ronaldo Munck, 'For a sociology of transformation' (1996) *Transformation* 41.
[433] Ibid 43.

As I suggest above, over twenty years into South Africa's democracy and the country's, social, economic and cultural imagination largely remains captivated by the idea of transformation, despite the palpable dissensus as to what exactly it means or requires in any particular instance or context. On this score, I remain intrigued by how transformation has retained its discursive traction and appeal amongst many scholars. This, of course, to echo Munck, implicitly begs the question of what does it mean to remain committed to the idea of transformation, or more accurately a discourse of transformation considering the mercurial nature, contestation and ideological non-specificity of the term.[434] By this I mean to probe as to *what*, outside of an overarching discursive embrace amongst South Africans,[435] retaining a commitment to the idea of transformation as either a means, measure or goal contributes to actually undoing the multiple depraved legacies of colonial-apartheid. Closing in on my most pressing concern in this chapter, I want to critically examine - from a constitutional standpoint – what has been gained or lost by casting transformation as *the* definitive or core paradigmatic conception of South Africa's past-apartheid constitutionalism as opposed to, say, a discourse of liberation which I discuss in the next chapter.

In this chapter, after very briefly providing some definitional and etymological clarity with respect to transformation, I will proceed to introduce several perspectives and uses of the idea of transformation as conceived of, initially, outside of the constitutional arena. Thereafter, I will turn my attention to how the idea of transformation has been engaged with within South Africa's constitutional discourse starting with how the courts have interpreted

[434] I should of course point out that in some instances one is beginning to note a shift in the discourse, particularly within academic settings, from talk of transformation to that of decolonisation. Examples of this are to be seen in the 2015-16 student protests demanding the decolonisation of university campuses under the hashtag moniker #Feesmustfall.

[435] Even the very idea of South African-ness is itself contested, see for example Ivor Chipkin, *Do South Africans Exist?: Nationalism, Democracy, and the Identity of the People* (2007) .

it and eventually turning my attention to critically examining the emergence and eventual ascendance of transformative constitutionalism as, what I argue, to be the preeminent conception of constitutionalism in South Africa. I will then argue that despite its apparent virtue and ambition, transformative constitutionalism has typified constitutionalism as a narrow juridical concept wherein it posits adjudication as being at the epicentre of meaning-making with courts, in the discourse, superintending over South Africa's post 1994 constitutional project. I mean here that South Africa's conception of constitutionalism as transformative has been distilled primarily into a set of legal concerns as seemingly all constitutional questions are now capable of being reduced to questions of constitutional law.

In this argument I suggest that by construing South African constitutionalism in this way there are several objectionable consequences that arise from this framing:

1. Constitutionalism becomes primarily understood as one of legal interpretation defined and dominated by the members of the judiciary, lawyers and legal academics[436].

2. The identity of who legitimate constitutional actors, capable of impacting the meaning of transformation, is determined within a rule-bounded liberal democratic conception of the state as power being divided between the three branches.

[436]. For example Pieterse tell us

> All in all, the Constitution would seem to require a rather radical departure from the assumptions underlying South African legal culture and accordingly to compel the transformation of this culture and of the manner in which lawyers and judges conceive of their role in society. Far from being passive spectators to constitutionally driven transformation, we have been tasked with active participation in the process.

Pieterse op cit note 3 at 166.

3. Despite claims that transformative constitutionalism is at heart a political project, what the political is, either in ideological or philosophical terms, remains largely ill-defined, with the very constitution that is the subject of interpretation being said to provide the political vision that informs its own interpretation, thus leading to a circular form of reasoning.[437]

[437] Simply put this entails accepting the idea that the Constitution is capable of providing its own underlying logic when it is being interpreted, meaning that it becomes its own primary point of reference and interpretive source. The reasoning going something like this: the constitution is a transformative document that enjoins us to interpret it in a transformative way so that we can attain its vision. So when it is interpreted, the interpreter must be guided by its values which are also abstract and undefined therefore in order to understand those values their meaning must be drawn from the political vision that the constitution itself sets out. Some examples of where this circular type of reasoning has found expression in the literature can be seen in the two excerpts below.
According to Moseneke:

> Few would contest that the imperative of the new legal order is the creation of a society different from our socially degrading and economically exploitative apartheid past. However, the meaning of transformation in juridical terms is as highly contested as it is difficult to formulate. *The legal content of the constitutionally entrenched rights is derived from the foundational values of the Constitution.* The symbiotic relationship between these values and the legal content of the respective rights defies easy definition. This is to be expected because values are normative. *Their worth and hierarchy is variable and contingent upon a given or predetermined value system.* However, in the case of our Constitution a specified set of values informs what is permissible in an open and democratic society based on freedom and equality. *Perforce our constitutional interpretation is set against the backdrop of the values of the South African society. Constitutional adjudication must occur within that 'holistic, value-based framework'. The Constitution is a repository of 'the values which bind its people'.* (footnotes omitted)

Dikgang Moseneke, 'The fourth Bram Fischer memorial lecture -Transformative adjudication' (2002) 18 *SAJHR* 309at 315

On the other hand according to Pieterse:

> Of course, it has been pointed out time and time again that both constitutionalism and adjudication are distinctly political – 'the issue is not whether, but what type of, political values should enter into adjudication.' In South Africa, I would argue, there can be little doubt as to the answer to this question. The South African Constitution, as is common for constitutions in transitional societies, *unashamedly dictates the political vision required from its interpretative community by articulating unequivocally the political goals to which those tasked with its interpretation and concrete application must aspire*. It enjoins them to 'uphold and advance its transformative design' and hence to participate actively in the political project of transformation. This means firstly that South African judges must aim in their judgments to further (or at least not to hinder) the achievement of substantive equality and social justice. This would often require that judges (in interpreting rights in the Bill of Rights, measuring state compliance with the duties these impose and remedying non-compliance with such duties) transcend traditional conceptions of their role under a

4. Where there is an invocation of philosophy, theory and comparative references it is generally the intellectual resources of the Global North that hold sway[438].

5. That it renders unlikely the possibility of developing a more robust democratic politics by its failure to engage constitutional questions beyond or outside of the framework of adjudication.

Ultimately, I will argue that transformative constitutionalism fails to aid us in reimagining South African constitutionalism and its attendant political, social and cultural dynamics in a more democratic and people-centred way. Rather what it does is enable another form of elite capture by empowering courts and lawyers more broadly (especially academics) without expanding the possibilities of greater democratic participation in the project of constitutional meaning making. This failure thus locks South Africa into a modified version of (post)liberal constitutional legalism without ever scrutinising the appropriateness of such foundations that produce constitutional supremacy as equating constitutional infallibility.

5.2 Contemplating the Meaning of Transformation

Before proceeding further and starting to engage with the substance of the discussion at hand, I think that it is apposite to clear the air a little by way of addressing some definitional issues with respect to how transformation is understood and deployed. It is notable that that very few scholars or writers ever bother to define what they mean by

liberal model of separation of powers – a transition for which the provisions of the Constitution discussed above well equip them. (emphasis mine)(footnotes omitted).

Pieterse op cit note 3 at 165.

[438] There is indeed some interesting comparative work between South Africa and other countries in the Global South, however little of that work is critically engaging the hegemony of liberal constitutionalism or its Western philosophical foundations.

transformation. Without unnecessarily belabouring the matter, I believe it is useful for us to start from a point of consensus, namely that the noun transformation is etymologically derived from the verb transform.[439] Transform has several meanings, namely '1. to change in form, appearance, or structure; metamorphose; 2. to change in condition, nature, or character; convert; 3. to change into another substance; transmute.'[440] Deriving from that transformation means the following: '1. the act or process of transforming. 2. the state of being transformed. 3. change in form, appearance, nature, or character.'[441]

What is self-evident from this definition is that there is no implicit value judgment or normative proposition in the word or idea; it is altogether neutral when viewed in the abstract. Even in literature that does not explicitly make this point or attempt to make this point directly, it does not require a close reading to realise that transformation carries no implicit normative meaning. Even where the notion or idea is not contextualised, explained nor elaborated upon, it is fairly obvious that a person using the term will bring to it certain prevailing assumptions as to the idea of transformation and the circumstances that render transformation necessary.

5.3 The Broader Context and Reaches of South Africa's Transformation Discourse

Whilst accepting that my focus here is in the realm of constitutionalism, where the topic of transformation - broadly conceived - is concerned, it is necessary to locate our

[439] It could also be interesting to get the history of its usage in political lexicon. The etymology of the word transformation is as briefly follows: 'Transform - mid-14c., "change the form of" (transitive), from Old French transformer (14c.), from Latin transformare "change in shape, metamorphose," from trans- "across" (see trans-) + formare "to form" (see form (v.)). Intransitive sense "undergo a change of form" is from 1590s' taken from Online etymology dictionary - http://www.etymonline.com/index.php?allowed_in_frame=0&search=transform&searchmode=none (last accessed 30 August 2018).

[440] http://dictionary.reference.com/browse/transform?s=t (last accessed 30 August 2018).

[441] http://dictionary.reference.com/browse/transformation?s=t (last accessed 30 August 2018).

discussion within a wider discourse of transformation that, as suggested earlier, touches upon virtually all aspects of public life, as well as the many aspects of that which is thought to be private in South Africa. Locating the idea of transformation within this broader context forces us to consider the meaning(s) of transformation, how it is understood, its contested nature and how the concept is deployed. The main aim here is to provide a snapshot of the mixed bag of views and uses of the term transformation in South Africa. What I am hoping to achieve by this is to demonstrate that in practice transformation - despite there being no real consensus as to its scope, meaning or range - retains a cross cutting appeal and is subject to numerous readings as to what it connotes in a South African context. More pointedly, I seek to demonstrate the intrinsic instability of the term and its contingent nature when used by different persons approaching it from different perspectives and advancing their own interests or ideological positions.

5.3.1 Perspectives on Transformation Prior to the 1994 Political Transition

The introduction of the idea of transformation into the South African political vocabulary precedes the 1994 transition to democracy. This is, of course, hardly surprising as it has, by now been demonstrated that discussions concerning the negotiated settlement had their history in the 1980s. As such some of the early scholarship leading up to the fall of colonial-apartheid is known to have engaged the idea of transformation and what it would mean for a future democratic South Africa. Interestingly, some scholars like Stephen Stedman, writing prior to the transition and therefore in anticipation of colonial-apartheid's

demise, deployed the idea of transformation to describe certain key events that occurred in South Africa in the 1970s and 1980s.[442]

Stedman's appeal to the idea of transformation is interesting in that he seems to simply deploy it descriptively to signify major changes of political significance as qualifying for designation as being instances of transformation. Notably the events to which he refers as being transformative are (1) the success of South Africa's economy in the 1970s, (2) the insurrection of the 1980s, the resultant ungovernability and the ensuing states of emergency, and (3) the emergence and consolidation of black civil society. In Stedman's words:

> What then can be said of the transformations of the 1980s? In sum, the transformative changes of the last decade leave a mixed legacy**.** There should be little doubt that changes in society and the economy have created an opening for democratic transition.[443]

What is clear is that transformation, as used here, is not a term of art or an idea that is necessarily imbued with ideological content; instead it is used as a descriptive term emblematic of particular political and economic shifts. So even at the point of writing on the eve of South Africa's democratic transition, Stedman presents South Africa as having already experienced some transformation whilst simultaneously proceeding towards a transition from one historical epoch to another. Interestingly, Stedman, later on in the same chapter, again invokes the idea of transformation only then in reference to the future, in this respect he cautions that 'decisions taken during the transition of South Africa will either make it easier to carry out transformation or will close of possibilities for transformation.'[444] This dual usage

[442] Stedman writes as follows, 'key transformations of South African society in the 1970s and 1980s created a disjunction between South Africa's formal political institutions of apartheid and herrenvolk democracy and the substructure of domination on which those institutions once rested.' Stephen John Stedman, 'South Africa: Transition and transformation' in Stephen John Stedman (ed), *South Africa: the political economy of transformation* (1994) 10-11.

[443] Ibid 14.

[444] Ibid 17.

of the transformation to represent a previous epoch (transformation 1)[445] and a then unknown future (transformation 2)[446] is, I suggest, no mere slippage, rather it is reflective of what Stedman terms as a 'dialectic at work in the creation of a stable democracy.'[447] Stedman's variable deployment of transformation here suggests that we understand the idea as speaking to social, political and economic changes and that for those particular changes to have meaning they must be construed in relation to another concern, in this instance democratic transition.

By way of contrast, also writing in the pre-democratic era, anti-apartheid activist and radical scholar Neville Alexander's engagements with the idea of transformation were more radical, ideologically-driven and material. Whilst not defining the concept of transformation in explicit terms, his pronouncements of what he believed would be reflective of transformation in higher education are instructive more generally for another way of understanding transformation.[448] Implicit in Alexander's pronouncements is that for the shift in education in South Africa to be up to the demands of liberation as he understood it, the nature of the requisite transformation should be nothing short of radical change. In order to capture the profundity of his demands on the nature of the transformative project it is necessary to allow Alexander to express these views in his own words at some length:

> on the concept of a "People's University', as long ago as March 1988, well before de Klerk had set foot on his road to Damascus, I sketched what I thought a radical strategy for the transformation of the university in South Africa should be… I repeat

[445] Ibid 24. Stedman characterises 'transformation 1' as "changes in society, culture and the economy.' By this he is clearly referring to those changes that he identifies as having occurred in the 1970s and 1980s. These changes, in Stedman's view, are too narrow to lead to a democratic transition.

[446] Ibid 24 Stedman characterises 'transformation 2' as 'progress toward eliminating economic inequality, the creation of a culture of tolerance, and the building of a healthy civil society that will then support and sustain democracy.'

[447] Ibid 24.

[448] See Neville Alexander, 'The Politics of National and Institutional Transformation', in *Some are more equal than others - Essays on the Transition in South Africa* (1993).

> that we have to adopt the approach that there are both possibilities and limits to what can be done in promoting an *anti-Establishment, anti-capitalist project* at any university in South Africa. (Emphasis mine)[449]

Alexander elaborates further:

> Suffice it to say that anti-racist, anti-sexist, anti-elitist, anti-classist, anti-authoritarian, anti-conformist educational practices, new methodologies, new syllabi, new ways of assessment, new attitudes towards language, in short a new concept of the university must needs be realised if we are to break out of the suffocating embrace of the intellectual, political, social and cultural barbed wire which surrounds all universities in South Africa today.[450]

So whilst, not defining the notion transformation in precise terms, Alexander is unequivocal on what, in his view, transformation in the ensuing democratic transition would entail in terms of the substantive institutional, structural, cultural and pedagogical shifts needed. In short, for Alexander transformation would entail nothing short of a radical ideological shift that fundamentally changes universities so as to entrench a reimagined understanding of what a university means and represents to a liberated people-centred society. Writing as he was doing at the height of the constitutional negotiations, it is, of course, only fair to record Alexander's openly held scepticism at the possibility of attaining this vision, for his views on the democratic transition were less than hopeful owing to what he rightly perceived as the elite dominated nature of the process.[451] He harboured deep apprehensions about negotiations towards transition being to the advantage of the elites at the expense of the masses.

For Alexander, the question of transformation was deeply connected with the question of power and who wields it. According to Alexander, it should be those wielding

[449] Ibid 8.

[450] Ibid 8.

[451] See further Neville Alexander, 'Problems of democratisation in South Africa' in *Some are more equal than others - Essays on the Transition in South Africa* (1993).

power[452], not the mere occupiers of high office, who determine the narrative and pedagogy of the transition. Alexander was fairly certain that the mere transfer of power would not shift the balance of power to allow for the transformation he believed necessary as had been the case in other states where neo-liberal logic prevailed and placed strictures on the possibilities for change. In sum, Alexander's conception of transformation demands nothing short of a radical turn away from the practices and prevailing ideas under the *ancien regime* premised on racist, patriarchal and capitalist ideas. It can be justly concluded that in light of Alexander, transformed spaces demand that substantive institutional, structural, cultural, epistemic and pedagogical changes are a *sine qua non.* Significantly for Alexander, the question of embarking on any process of transformation required that one also grapples with the question of power and what the power configuration would be after the fall of colonial-apartheid as this would profoundly influence the realms of the possible as far as change was concerned.

5.3.2 Perspectives on Transformation in the Post 1994 Democratic Dispensation

Moving into the post 1994 democratic period, I will consider a few other instances of different deployments of the idea of transformation in order to give a further sense as of the heterogeneous perspectives and uses to which the idea of transformation is put. The aim here is not to seek to be comprehensive, if that is at all possible, rather it is to demonstrate the malleability or fluidity of the idea of transformation that renders it difficult to pin down conceptually or materially across the board in terms of usage and comprehension beyond its core meaning in as far as it relates to change. I will start by looking at how Sampie

[452] I read Alexander to be referencing those with economic power and exercising excessive access and influence over a country's political leadership; a gesture towards the prevalence of the neo-colonial state as the typical post-colonial state that continues to exist in a paradigm of coloniality.

Terreblanche engages with transformation in his seminal text *A History of Inequality in South Africa.*[453] In this, rightly much celebrated text*;* transformation occupies a central place in the narrative and in how Terreblanche evaluates the gains of the end of colonial-apartheid and his sense of the perceived failings at the time he was writing his book.

As with most commentators the momentousness of South Africa's 'miracle' transition is not lost on Terreblanche; however, whilst the fall of colonial-apartheid brought about a much-needed political transformation, he remains critical of the lack of socio-economic transformation that is necessary to address inherited deep systemic inequalities. Terreblanche argues astutely that the perpetuation of systemic economic exploitation and exclusion, in spite of democratic gains, are the result of a failure to transform the nature of power. Terreblanche calls for a deeper transformative power shift premised on ideologically driven socio-economic policy changes designed to usher in an era of social-democracy. [454] In essence, for Terreblanche, transformation, properly understood, is necessarily multi-dimensional, encompassing, at least, the political, the social and the economic. Ideologically driven transformation, according to Terreblanche, is pivotal for mapping out the substance and method of displacing the prevailing liberal paradigm of democratic capitalism adopted by the ANC government post-1994.

According to Terreblanche, whilst succeeding in delivering on the democracy part, the ANC government failed to establish a proper balance between the democratic and capitalist parts of its commitments to this system of governance by allowing its capitalist orientation to override the democratic commitments.[455] Writing in 2002 after the premature demise of the

[453] Terreblanche op cit note 5.
[454] Terreblanche op cit note 423 at 18-20, see also Terreblanche, op cit note 5 at 419-423.
[455] The problem being that for the system to operate optimally the two must, because of their interdependence, balance each other out.

much vaunted potentially game-changing Reconstruction and Development Programme (RDP)[456] and its replacement by the neoliberal Growth, Employment and Redistribution policy (GEAR)[457], Terreblanche expressed deep scepticism that the, then prevailing, balance of power would shift as capital had negotiated a deal for itself that placed it in a position of ascendancy vis a vis the government and the other social partners. In short, a transition that should have resulted in political and socio-economic transformation has only managed to deliver the former according to Terreblanche, a position that he rightly deems unacceptable for its continuing failure to address the systemic inequalities deriving from previous historical arrangements that have continued into the present.[458] In his own words, Terreblanche puts it as follows:

> Given the severity of the political, social and economic problems eight years after the political transition, we should *reconsider the appropriateness* not only of the new government's social and economic policies, but also the liberal capitalist version of democratic capitalism introduced after 1994. (emphasis mine) [459]

According to Terreblanche, in order to understand how the systemic exploitation and exclusion have been perpetuated one needs to examine the nature of South Africa's historical power shifts. He distinguishes primarily between two types: (1) transfers of political power and (2) a deeper more transformative power shift that entails socio-economic and ideological changes. This latter movement necessarily entails a change in the nature of power, which

[456] Reconstruction and Development Programme: A Policy Framework available at http://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf (last accessed 30 August 2018).

[457] Growth, Employment and Redistribution A Macroeconomic Strategy available at http://www.treasury.gov.za/publications/other/gear/chapters.pdf (last accessed 30 August 2018)

[458] Terreblanche condemns this failure in the following terms 'The terms of this settlement were such that the poorest half of the population has over the last eight years become entrapped in a new form of oppression: a state of systemic exclusion and systemic neglect by the democratically elected government and the modern sector of the economy respectively.' Terreblanche, op cit note 5 at 18. This state of affairs arguably continues to prevail largely unabated.

[459] Ibid 20.

Terreblanche argues has not taken place in post-1994 South Africa. Concluding from his analysis that transformation is failing on the socio-economic front, Terreblanche ultimately argues that in order to achieve the necessary change South Africa must move in a social democratic direction. This move, according to Terreblanche, would necessitate an ideological shift to establish a basis for the structural changes needed to bring about lasting socio-economic transformation. [460]

For Terreblanche, the question of transformation in South Africa, in as far as addressing the country's historical legacy demands a focus on the political, the economic, the social and the interplay between the three. Also integral to how, or the terms on which, transformation occurs are questions of ideology and its influence on, or ability to determine, the types of political and socio-economic outcomes or systems that they give rise to. According to Terreblanche's conception of transformation, whilst the taking of power is important, so too is initiating and entrenching an ideological shift that becomes the basis for economic and social policy.

Another thoughtful engagement with transformation is that of John J. Williams, who approaches the question of transformation from a spatial and material perspective. According to Williams in attempting to solve South Africa's 'transformation puzzle', it is imperative that the 'Apartheid-City' be properly recognised as one of the key facets of apartheid South Africa's legacy that must be addressed if South Africa's transformative vision is to be actualised.[461] For Williams, omitting to do this would be to fail to take into account the deliberateness with which Hendrik Verwoed went about designating the cities primarily

[460] Terreblanche op cit note 427 at 18-20.
[461] John James Williams, 'South Africa: Urban transformation' (2000) 17 Cities 167.

as white zones with black zones at the periphery where they could be kept separate.[462] Williams rightly argues that it was racially based space-planning that determined the fates and possibilities of many South Africans that must be acknowledged and understood in order to go about successfully transforming South Africa.[463]

In other words, Williams's argument is that successfully achieving South Africa's social, economic and political transformation is intricately connected to how the question of the transformation of the city is addressed, because, he suggests, the city is emblematic, in many ways, of the calculated evils perpetuated by the apartheid government. This is because, in his view, the future of South Africa will largely be determined by how the country's socio-spatial arrangements are transformed so as to bring about equitable access and more generally far reaching changes in South Africa, or as Williams puts it 'national economic success depends on urban success.'[464] As for transformation, Williams characterises it as follows:

> The concept "transformation" is central to social change in South Africa. This means, amongst other definitions, that sectorally, its differentiated substance, form and dimensions, impact directly on the extent to which there is a structural shift from the dominant, exclusionary relations of power of successive colonial-cum-apartheid regimes to the more equitable, inclusive dispensation of the "new" South Africa. Transformation, however, does not merely have formal/nominal constitutional validity. On the contrary, its substantive content vis-à-vis policy formulation and implementation is contingent on the particular interpretation attached to it as a popular discursive/visionary framework on the one hand, and as a practical, legally enforceable guide on the other (in the quest to effect meaningful change in the South African society at large). Whilst interpretation of transformation is problematic – there are potentially as many divergent/convergent meanings as there are potential interpreters/decoders of the term – nonetheless, it can still be suggested as a defining concept of the new order in South Africa.[465]

[462] Ibid 167. See in particular the summary bullet points provided of Hendrik Verwoed's speech to Parliament where he set out his plan for how space would be regulated in the city in accordance with apartheid's grand plan of racial separateness.
[463] Ibid168.
[464]Ibid168.
[465] Ibid 168-9.

Williams' take highlights transformation's highly contingent and contextual nature as he demonstrates how it is primarily understood on a sector by sector basis. Significantly, according to Williams, it is such sector by sector framing that delimits what is thought possible as far as structural change is concerned in any given instance. In being so constituted by both 'formal/notional' and 'substantive' elements and demanding a balance between its popular discursive usage and its forensic legal application, Williams dubs the 'interpretation of "transformation" as problematic' whilst accepting that in practice transformation is 'a defining concept of the new order in South Africa'.[466] By further elucidating on the concept of transformation via a somewhat taxonomical analysis of various dimensions of transformation[467] – such as the epistemological; conceptual; historical; moral; empirical, institutional; managerial, and programmatic/practical – Williams reveals the 'multiple tensions, contradictions, conflicts and struggles' that are attendant to its interpretation, thus leaving him to conclude that 'transformation is a multi-dimensional, open-ended, fluid process of change, organically linked to the past, present and the future.'[468]

Whilst firmly keeping in mind that Williams locates his interventions within the frame of urban planning and development, a few facets of his views on transformation are of particular interest for present purposes and, I suggest here, should illuminate our broader understanding of transformation. The first, though possibly somewhat, banal point, but one that has profound implications when the various dimensions of transformation are brought to bear on multiple perspectives from which transformation as a concept can be approached, namely that how we understand transformation is contested, contextual and contingent.

[466] Ibid 168.
[467] Ibid 169-171.
[468] Ibid 180 (references omitted).

Such that even from an urban planning point of view where one starts from (philosophically, politically, morally etc.) when thinking about transformation will necessarily influence what s/he conceives of as either desirable, justifiable or achievable outcomes.

Second, by characterising transformation as a 'multi-dimensional, fluid, open-ended, process of change' Williams succeeds in positing transformation as a socially laudable goal directed at achieving what he terms as 'people-centred development,'[469] whilst simultaneously leaving room for the idea to be developed and achieved over time through the negotiation and contestation of prevailing power relations rooted in colonial-apartheid. Although this later observation is capable of a sanguine reading, I suggest here that this reading also hints at some of the conceptual instability of the idea when framed as something gesturing towards more than *very* broad, often ill-defined change that can be a moving target and subject to its content being determined by those who wield power at a particular point whether in government or outside of it. Ultimately, Williams recognises that transformation has as many divergent/convergent meanings as there are potential interpreters/decoders of the term' which fact he considers to be a serious limit to the possibilities that it realises.[470]

Ultimately, these different expressions of transformation briefly explored above are but a sliver of the various context, discipline, ideological or process specific conceptions of transformation that are circulating and framing debates about what the fundamental or overarching nature of change in South Africa at any specific moment and place could or should be. They serve here to give us a sense of the range of views and perspectives in the discursive space occupied by transformation that renders it an unstable concept when taken

[469] Ibid 172-175.
[470] Ibid 168-9.

at face value without interrogating or reflecting upon a writer's underlying motives or assumptions. In other words, what I have sought to do in this section is to illustrate that rather than an idea capable of assumptive meaning, it is one that is constantly in need of decoding and therefore of highly questionable value as a core directive concept that seeks to define policy, legislature or constitutional commitments.

5.4 From a Discourse of Transformation to a Constitutional Imperative

As in other spheres of thought and life, from early on in South Africa's constitutional project the pre-eminence of the notion of transformation as being at the heart of the project has been evident in the literature that has been generated on the nature of the transition from pariah apartheid state to the 'miracle' of the 'new' South Africa. The notion of transformation or transforming has also on occasion found its way into the Constitutional Court's judgments, for example when it was approvingly invoked in arguably one of the most important, yet controversial decisions,[471] namely *Azanian People's Organization (AZAPO) v President of South Africa* wherein Mohamed DP reasoned as follows:[472]

> The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, *the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconciliation and reconstruction"* which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue."[473]

AZAPO is a decision concerning a challenge to the amnesty provisions of the Promotion of National Unity and Reconciliation Act 34 of 1995 which was also responsible for

[471] See generally the many essays written in the following collection reflecting upon the *AZAPO* judgment Karin Van Marle and Wessel Le Roux (eds), *Law, Memory, and the Legacy of Apartheid: Ten Years After AZAPO v. President of South Africa* (2007).
[472] 1996 (8) BCLR 1015 (CC).
[473] Para 17 (emphasis mine).

establishing the Truth and Reconciliation Commission. In terms of its remit, this Act represented an important piece of the puzzle in as far as providing a framework for the difficult task of balancing the goal for a peaceful transition without allowing for past atrocities to go unaccounted for. So, in numerous ways, as a piece of legislation, it bore much of the weight of bringing to life the transformative commitments and aspirations of South Africa's negotiated Interim Constitution. Therefore, when Mohamed DP gestures towards the notion of transformation here it is against this background and his primary concern is with respect to the Act being a catalyst for transforming the relations prevailing between perpetrator and victim in order that such relations can be deliberately structured and directed towards reconciliation and reconstruction as envisaged by "the historic bridge" analogy of the Interim Constitution.[474]

In a later case, *Bato Star Fisheries v Minister of Environmental Affairs and Tourism*[475], the Constitutional Court was called upon by the factual matrix and legislative context of that case to engage at some length and some depth with the idea of transformation. This case concerned the transformation of the fisheries industry in which there was both a policy commitment and a legislative injunction to bring about transformation of that industry through the introduction of new players as well as the restructuring of the rights held by older players.[476]

O' Regan J, in the main judgment, whilst not providing an express articulation of how she understood transformation, clearly demonstrates the contextual nature of

[474] See AZAPO para 18. For a critical appraisal of this linear notion of transformation (as transitioning between two points) premised on a bridge that takes both victims and perpetrators together from a bad place to a good place as is suggested by Mohamed J, see Michael Bishop, 'Transforming memory transforming' in Le Roux and Van Marle (eds) op cit note 471 at 34-36.

[475] 2004 (4) SA 490 (CC).

[476] paras 1-12.

transformation,[477] how it can simultaneously be understood as a process and a goal,[478] and the court's limited (deferential) role in as far as reviewing decisions made by the executive in determining whether particular milestones of transformation have been met or not.[479] In other words, O' Regan recognises that it is not the court's role to define the metrics of transformation in their adjudication.

The more substantive account of transformation in this case in offered by Ngcobo J in a unanimous concurring decision.[480] Ngcobo sets out his understanding of transformation as to broadly refer to 'redressing the historical imbalances caused by unfair discrimination.'[481] Transformation, according to Ngcobo, must necessarily be located within the context of South Africa's constitutional democracy whilst also paying due cognisance of the fact that South Africa is a transitional society.[482] Ngcobo writes as follows:

> The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one "in which there is equality between men and women and people of all races" ... Our Constitution

[477] Para 10 and 41.

[478] Para 35.

[479] In this regard O'Regan J writes as follows

> 'On an overall reading of the provisions of the Act, decision-makers, in allocating fishing rights, must seek to give effect to the objectives of the Act and, in particular, must ensure that a process of transformation takes place. To meet the obligations imposed in this regard by subsections 2(d), (j) and 18(5), there must, in the first place, be a recognition of the fact that Parliament required these needs to be fulfilled and that steps must be taken to ensure their fulfilment in time. At the very least, some practical steps must be taken in the process of the fulfilment of these needs each time allocations are made if possible. If no step is taken during a particular round of allocation, the decision-maker cannot be said to have paid due regard to these needs unless there is a reasonable explanation for the absence of such practical steps. *A court will require such explanation and will evaluate it to determine whether or not it meets the obligations imposed on the Minister. But so long as the importance of the practical fulfilment of these needs is recognised and a court is satisfied that the importance of the practical fulfilment of ss 2(j) and 18(5) has been heeded, the decision will not be reviewable*. (emphasis mine) Para 40.

[480] O'Regan J and the other 9 judges as a matter of fact all concur with Ngcobo J's judgement, as do Ngcobo J and the other 9 judges concur with O'Regan J's main judgment.

[481] See para 71 footnote 3.

[482] Para 71.

> recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result.[483]

Ngcobo adds further that:

> But transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution.[484]

The Constitutional Court's account of transformation as detailed by Ngcobo J, here presents transformation within the constitutional setting as having a distinct goal, namely that of achieving (racial) equality, and at the same time being a process, albeit a fraught one. In all this the Court envisions the Constitution as being pivotal to determining what both the goal and process of achieving it should be. That said the court was also cognisant of the need to not overstep the limits of its own competence in as far as determining what the constitutional imperatives of transformation, in any particular, context required. According to Ngcobo J:

> The duty of the courts in this regard, however, does not extend to telling the functionaries how to implement transformation. That must be left to the functionaries concerned. The transformation can take place in various ways: by allocating quotas to new companies controlled by historically disadvantaged groups, by insisting on internal transformation of existing companies, by insisting upon employment policies that bring historically disadvantaged groups into senior administrative positions, possibly by schemes designed to build capacity in other fishing activities until the new entrants have the financial and operational stability necessary for the deep-sea hake industry, to mention some. Exactly how this is to be done is complex and difficult and ultimately a matter of policy.[485]

[483] Para 74.
[484] Para 76.
[485] Para 104.

The Court, taking due cognisance of the limits of its competence arising out of a lack of clearly discernible judicial standards as far as transformation is concerned, thus deemed it appropriate to defer to the executive in this matter and declined the opportunity to become enmeshed in the transformation 'calculus' of deciding how the allocation of the fishing rights was the appropriate amount as this was 'not within the province of the courts to tell government how much should be allocated for transformation.'[486]

The main significance of the Court's views on transformation in Bato Star is in its interpretation of transformation that starts to infuse the concept with substantive content whose implicit source is the Constitution. Transformation, unfolding as it is in a South African socio-political context, is not neutral, but decidedly positive and characterised as advancing the greater good, particularly the interests of those designated as being "historically disadvantaged."[487] In short, Bato Star's lasting significance is that it seeks to constitutionalise transformation by defining it in positive and functional terms which purport to be emblematic of the entire nation's understanding of the term as it is premised on the promised social, political and economic change said to have been brought to life by the constitution.

5.6 From a Constitutional Imperative to a Hope-filled Discourse of Transformative Constitutionalism

Beyond the courts, but still within the realm of legal discourse, the notion of transformation has attained a near ubiquitous status resulting in its running the risk of becoming what Marius Pieterse describes as a 'popular buzzword.'[488] However, despite this

[486] Para 111.
[487] Para 111
[488] Pieterse op cit note 3 at 155.

concern, Pieterse like many others also approvingly acknowledges the utility, timeliness and substantive intentions of those who employ it in engaging the constitution's transitional and transformative commitments.[489] Scholars Cathi Albertyn and Beth Goldblatt are quite emphatic in the opening salvo of their article arguing that the Constitution is foundational in as far as encapsulating South Africa's transformative ambitions as well as the methods by which this transformation is to be achieved. They tell us as follows:

> The Constitution is the political and legal foundation for the democratic transformation of South Africa. Enshrined in its text are both means and end. It articulates the vision of a new society and it invites us to engage actively with the values and rights contained in the Constitution to build that new society. Hence the Constitution describes itself as a 'supreme law' which provides 'we, the people of South Africa' with the means to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.[490]

Whilst acknowledging the contested nature of transformation as a means to an end, what Albertyn and Goldblatt are unequivocal about is that the Constitution mandates, if not demands, transformation whilst also prescribing the nature of that transformation which is captured by this oft-cited account of what they understand constitutional transformation to entail:

> [W]e understand transformation to require a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relations.[491]

Whilst Albertyn and Goldblatt's conception of transformation can be read as conveying far-reaching and potentially radical transformative constitutional possibilities, the actual limits of

[489] Ibid.
[490] Cathi Albertyn and Beth Goldblatt, 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248 248.
[491] Ibid.

their conception can be discerned from locating it within the context of their article which is primarily focused on the development of an 'indigenous jurisprudence of equality'.[492]

So, whilst the understanding of transformation espoused makes radical or even revolutionary sounding pronouncements, the subsequent focus and emphasis on constitutional values, rights, litigation and adjudication is nothing short of striking. One plausible reading of their contribution is that at its heart transformation is about the attainment of substantive equality which, in and of itself, need not be understood as being problematic; however it is the framing of this notion of equality almost exclusively as a juridical concept that raises questions about who the 'us' is when Albertyn and Goldblatt posit that '[i]t articulates the vision of a new society and it invites *us* to engage actively with the values and rights contained in the Constitution.' Is the project of transformation a national one in which all have a say, or is it a project that is exclusively the preserve of the powerful? If the latter, is it also one where those professionally trained in constitutional interpretation having a greater, if not the final, say over its meaning, especially the courts.

As far as transformative constitutionalism is concerned, it was the seminal article by Karl Klare that placed the concept or idea of "transformative constitutionalism" firmly within the lexicon of South African constitutional discourse.[493] The term has arguably become the most frequently and approvingly used in South African constitutional discourse to describe South Africa's project of constitutionalism.[494] Both as a conception of constitutionalism and

[492] Ibid.

[493] Klare op cit note 32 at146.

[494] Roux makes a similar point. Roux op cit note 52 at 258-259 However, a few more examples well illustrate the point: Moseneke op cit note 433 at 309; Pieterse op cit note 3 at 155; Pius Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351; S Liebenberg "Needs, Rights and Transformation: Adjudicating Social Rights" (2006) 17 *Stell LR* 5; Karin van Marle "Transformative Constitutionalism as/and Critique" (2009) 20 *Stell LR* 286; Liebenberg op cit note 28 see chapter 2.

as a term seeking to define South Africa's constitutional project, transformative constitutionalism has, arguably, assumed near hallowed status as a descriptor and conceptual framing of the current South African project of constitutionalism.[495] It is, admittedly, not without good reason that this is the case, as Klare's articulation of transformative constitutionalism has resonated with many within the judiciary, the academy and the legal profession alike. In his own, oft-quoted words, Klare puts forward the concept of transformative constitutionalism as entailing:

> a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word. [496]

Resonating somewhat with Albertyn and Goldblatt's more general depiction of constitutional transformation, Klare's conception of transformative constitutionalism is similarly a bold and expansive notion whose concerns appropriately span democratic politics, social and

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[495] An example of the prevalence of the notion of transformative constitutionalism is demonstrated in the fact that when the Council for Higher Education (CHE), a statutory board, undertook a review of the LLB degree as taught across South African law faculties and schools, one of the quality measures was the extent to which the teaching at each campus adequately reflected upon transformative constitutionalism. In its press statement after one stage of its proceedings, the CHE stated as follows:

> Central to the standard against which the individual programmes *were evaluated was the ideal of "transformative constitutionalism"*, stemming from the premise that legal education, as a public good, should be responsive to the needs of the economy, the legal profession and broader society. From a transformative standpoint, a programme is required to demonstrate how it cultivates the capacity, agency and accountability of the legal practitioner in shaping the legal system, and promoting the social justice goals of fairness, legitimacy and equity in the legal system. (emphasis mine)

PRESS STATEMENT [23 November 2017] The CHE's National Review of the LLB. http://www.che.ac.za/sites/default/files/CHE%20STATEMENT%20-%20LLB%20REVIEW%20FINAL%2023%20November%202017.pdf (last accessed 16 November 2018).

[496] Klare op cit note 32 at 150.

institutional power relations and broadly touches on questions of distributive justice. Sandra Liebenberg echoes similar sentiments, namely that transformative constitutionalism 'implies fundamental changes to unjust economic and social structures', whilst at the same time seeking 'to achieve a more equitable distribution of social and economic resources.'[497] On such an understanding transformative constitutionalism, I have suggested previously, manifests, at least at a conceptual level, as one of the most hope-filled framings of South Africa's post-1994 constitutionalism. [498]

Strikingly whilst positing expansive and arguably radical notions of change, proponents of transformative constitutionalism (led by Klare[499]) frame South African constitutionalism primarily in juridical terms with courts being afforded a central role in giving meaning to, and determining the parameters of, constitutional transformation. Whilst unlikely that it was Klare's intention to limit the conception of transformative constitutionalism to narrow court-centric terms at the expense of cultivating or instilling more popular democratic and egalitarian ideals, transformative constitutionalism as a distinct discourse has evolved in such a way that it is almost entirely focused on socio-politically infused constitutional adjudication.

Commenting on the notion of transformation as a constitutional imperative within the context of adjudication, Deputy Chief Justice Moseneke, writing extra-curially, boldly asserts that "the judiciary is commanded to observe with unfailing fidelity the transformative mission of the Constitution."[500] In a similar vein, Pieterse – in addressing the meaning of transformative constitutionalism – has located its imperatives in the text of the Constitution

[497] Liebenberg op cit not 28 at 447.
[498] Sibanda op cit note 15 at 487-8.
[499] Klare op cit note 32 at146.
[500] Moseneke op cit note 437 at 319

via a collective reading of some provisions of the Constitution that "indicate a marked departure from 'traditional' liberal conceptions of constitutionalism".[501] In particular, Pieterse points us[502] to the following provisions, namely:

1. the founding values;[503]
2. the duty placed on the state to "respect, promote, protect and fulfil the rights in the Bill of Rights";[504]
3. the extension of applicability of the Bill of Rights to private relations;[505]
4. the substantive conception of the right to equality, including the prohibition of private discrimination;[506]
5. the inclusion of social and economic rights;[507] and
6. the limitation clause.[508]

Of course, transformative constitutionalism, or even transformation as an idea, as already discussed, is not uncontested as to its scope or meaning; quite the contrary, such contestation is readily acknowledged by those engaging in constitutional discourse. This contestation as to the meaning of transformative constitutionalism is, arguably, one of its primary limitations. I turn to consider some of these limits below.

[501] Pieterse op cit note 3 at 161.
[502] Ibid 161-163.
[503] S 1 1996 Constitution.
[504] S 7(2) 1996 Constitution.
[505] Ss 8(2) and (3) 1996 Constitution.
[506] S 9(2), (3) and (4) 1996 Constitution.
[507] Ss 26, 27 and 28 1996 Constitution.
[508] S 36 1996 Constitution.

5.6.1 The Limits of Transformative Constitutionalism

To the credit of proponents of transformative constitutionalism, they have recognised the limits of a legalistic adjudication driven conception of constitutionalism.[509] Klare is mindful to point out the "disconnect or chasm between the Constitution's substantively transformative aspirations and the traditionalism of South African legal culture".[510] According to Klare, if there is a threat to the success of the transformational constitutional project it is the imbedded traditionalism and conservatism that is characteristic of South African legal culture. Legal culture, according to Davis and Klare, comprises 'the characteristic legal values, habits of mind, repertoire of arguments, and manners of expression shared by a group of lawyers at a given, historically situated time and place.'[511]

The danger, Klare cautions lies in the political nature of the project, meaning that transformative constitutionalism's reliance on politically progressive interpretation will always leave it at risk of being undermined by those who believe that political goals should not be pursued through adjudication.[512] Also wise to this threat is Pieterse, who contends as follows:

> [I]t is in this third contribution to transformation [namely, the need for the provisions of the Constitution to be interpreted to accord with the transformative vision] that the Constitution poses the most significant challenge to the South African judiciary and legal community. Constitutional provisions come alive mainly through interpretation and by being applied in particular concrete contexts. *This becomes controversial when the provisions that are to be interpreted and applied require that those tasked with interpretation and application aspire to achieve political goals embodied by the provisions.*[513]

Pieterse adds further:

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[509] Klare op cit note 32 at 170.
[510] Ibid 170.
[511] Davis and Klare op cit note 350.
[512] Klare op cit note 32 at 171-2.
[513] Pieterse op cit note 3 at 164 (emphasis original).

> South African legal culture with its pronounced preference for 'political neutrality' in adjudication (which requires lawyers and judges to remain 'neutral' in their interpretation and application of legal texts by abstaining from interpretations or orders that have 'political' (or social and economic) significance or consequences) has…rightly been accused of masking a strong preference for the political structures and rights discourses associated with classic liberalism…and accordingly of condoning the inequalities occasioned, reinforced and sustained by the unfettered operation of classical liberal economic and social structures.[514]

Therefore, the main challenge facing transformative constitutionalism identified by Klare, Pieterse and others[515] is that adjudicators may, owing to the prevailing legal culture and/or their politics, interpret and enforce the Constitution in ways that subvert the progressive and egalitarian social and political vision of transformation.[516] This challenge is well illustrated by Andre van der Walt who has lucidly captured this conservative trend. In his discussion of those within the legal community who have sought to preserve the common-law tradition in its pristine condition by the exclusion of politics in legal interpretation, Van der Walt highlights this problematic approach as follows:

> [T]he idea is that law is (or should be) neutral and free of political influence; the issue (as far as transformation is concerned) is to eradicate the political legacy of apartheid and not change the politics of law. Accordingly, law without politics – that is law that has been cleansed of the pernicious influence of apartheid politics but that is also free from reform politics – will necessarily serve the process of transformation better than a politically influenced process.[517]

Van der Walt's observation best demonstrates this conservatism, that while accepting that transformation may be important, there is the additional demand that it be achieved while maintaining a clear law and politics divide. The irony, of course, is that it was on the basis of this law and politics dichotomy that the apartheid courts were able to play the dubious role

[514] Ibid 164 (references omitted).
[515] See also Dugard op cit note 430 at 214.
[516] See also Moseneke op cit note 437 at 315-316.
[517] Van der Walt op cit note 350 at 7.

of being largely unquestioning executive-minded enforcers of patently racially discriminatory and politically-charged laws while purportedly 'staying out of politics'.[518]

Davis, in a critique of the progression of South Africa's project of transformation, has sought to demonstrate the impact of South Africa's "untransformed" or traditionalist legal culture. In this appraisal, Davis argues that despite an ambitious and enabling constitutional text embodying the possibility of a far-reaching transformation of South African society, its economy and indeed its legal principles, what has happened instead is a narrowing of this vision to a very formalised and legalistic conception of transformation.[519] Further, Davis argues that instead of the courts seizing upon the possibilities created by the Constitution to take South Africa forward in pursuit of a "social democratic" vision, the courts have retrogressed[520] and allowed for the "traditional laissez faire norms of a minimalist state"[521] and "traditional legal techniques"[522] to prevail in their adjudication. Davis, in his critique, airs his disappointment with this failure to fully exploit the constitutional text in line with the demands of the transformation as follows:

> The [constitutional] text may have been seen as a bridge between apartheid and a democratic society but given the prevailing political discourse, the democratic society promised by the Constitution which, in part at least, would have required a radical transformation of the legal concepts which underpinned the entire society was replaced by a narrow vision: the eradication of what admittedly was a significant cancer in the body of the legal system prior to 1994."[523]

[518] See Klug op cit note 26 at 225-229.
[519]Dennis Davis, 'Transformation: The constitutional promise and reality' (2010) 26 South African Journal on Human Rights 85 at 99-101.
[520] Please note that this is my term to characterise what I deem to be the essence of Davis' critique rather than a term used by Davis.
[521] Here Davis is referring to the courts' interpretive practices with respect to the law of contract. Davis op cit note 519 at 93.
[522] Here Davis is referring to the courts' interpretive practice of conducting a reasonableness review of socio-economic rights that is grounded in the old administrative review which in turn encourages the courts to take a deferential stance *vis à vis* the executive. Ibid 97.
[523] Ibid 101.

Davis' lament is well made and I would tend to concur with the general tenor of his views; and more generally with his assessment that details the disappointing, counter-transformative jurisprudence that was emanating from the courts at the time he was writing.

That said, in this chapter it is my purpose to take matters further and suggest that beyond what may be termed as retrogressive interpretation,[524] the root of the problem may well be the liberal democratic paradigm in which the project of transformative constitutionalism is imbedded and operates. This fact, as will be argued below, is one of the more serious pitfalls of transformative constitutionalism that I argue locked South Africa into an overly legalistic or juridified conception of constitutionalism whilst eschewing other facets of what is at stake when constituting society, particularly how to navigate social, economic and cultural questions that have been produced through modes of constitutionalism rooted in colonial apartheid.

5.6.2 The Pitfalls of a Discourse of Transformative Constitutionalism

While acknowledging that transformative constitutionalism has some virtues and is well-meaning, as I have pointed out above, it is subject to certain limitations, such as those identified by its proponents, namely that South Africa's conservative legal culture and its over-reliance on the 'correct' legal interpretation. What I want to suggest here is that transformative constitutionalism presents certain immanent limits that leave it susceptible to the charge that it promises more than it can actually deliver. Considering the contested nature of the idea of transformation, I am suggesting that this promise is likely to materialise only in a political and legal community where there is a shared sense of a *particular*

[524] Again, please note that this is my term to characterise what I deem to be the essence of Davis' critique rather than a term he uses.

ideologically laden transformative consciousness, alongside a value-laden, forward-looking, and purposive interpretive approach by a transformed legal community as presumed by proponents of transformative constitutionalism. Within such an approach, informed by a shared transformative consciousness, so to speak, the possibilities of establishing a truly transformed society would be, within the bounds of reason and the constitutional text, virtually limitless.[525]

However, in a political and legal community in which the vision of transformation is contested, where there is no agreement as to its core meaning nor how it is to be applied in practice, the overriding dependence of transformative constitutionalism on the *right* kind of legal interpretation also becomes fatal weakness. In other words, if the entrenchment of transformative constitutionalism, beyond disparate constitutional provisions that demand a collective reading as suggested by Pieterse above,[526] is primarily through interpretation by lawyers, legal academics and judges of different political persuasions and inclinations, then the goals of transformation will always be at risk of being undermined or reduced to being merely of rhetorical value. Without the translation of the goals of transformation into explicitly entrenched constitutional provisions that legislate reconstruction, redistribution and more deeply democratic popular participation that go beyond the Bill of Rights and judicial interventions, it is arguable that transformative constitutionalism was always going to struggle to entrench itself, particularly in light of the overall constitutional scheme which is a liberal democratic one.

[525] "Limitless" in this particular instance is used to convey the idea that the number of different contexts or situations to which transformative constitutionalism, as an idea, ideal and even interpretive approach can be applied are immense.

[526] Pieterse op cit note 3 at 161-163.

I make this claim based on the fact that methodologically, in a constitution that structurally and institutionally accords with the basic tenets of liberal democratic constitutionalism (a few innovations notwithstanding),[527] transformative constitutionalism would, in a practical sense, only appear to be achievable through sustained and purposeful legal and judicial interpretation demanding a shared consciousness. Therefore, it is my contention that within the context of South Africa's prevailing conservative legal culture, the *extent* to which the success of transformative constitutionalism, as an enterprise, depends on legal and judicial interpretation leaves the project in danger of remaining incomplete at best. At worst, it runs the risk of failing to deliver the envisioned extensive social change by promising that which many charged with delivering it are not committed to, owing to its potential to undo already entrenched elite or middle-class interests. Closely related to this, and potentially the most significant threat limiting the possibilities of transformation is, in my view, the prevailing understanding of constitutionalism (including transformative constitutionalism) within South African constitutional discourse that is deeply imbedded in liberalism and frames its conception of constitutional legitimacy accordingly whilst paying mere lip service to whether as a practical matter colonial-apartheid's material legacies are actually being undone.

The point I am making here is that if transformative constitutionalism is, as it appears, at its heart an interpretive enterprise that can be undermined by a conservative legal culture, then what is one left with when such erosion of the Constitution's transformative vision

[527] By this I mean that structurally the South African Constitution retains many of the same structures and institutions that one might find in a classic liberal democratic constitution. It contains, among other things, a bill of rights (admittedly one that goes beyond classic civil and political rights); makes provision for the three branches of government; separation of powers; provides for a further federative division of power; and establishes a democratic state with periodic elections. This fact, read in conjunction with the clearly expressed goals of transformation in the Constitution, led Klare to describe the South African constitution as "post-liberal".

occurs? What one is left with, I suggest, is, rather than the radical structural and systemic changes claimed in the name of transformative constitutionalism, is the prevailing system of liberal democratic constitutionalism with its emphasis on liberal norms deriving from the European Enlightenment, procedural democracy in the form of free and fair elections and the balancing of institutional power dynamics between the branches of government.

5.6.3 Transformative Constitutionalism as an Enlightened Legal Liberalism

In some earlier work wherein I set out what I identified as the limits of transformative constitutionalism, I admit to being capable of being read as leaving little room for its possible redemption as a vehicle for some emancipatory change.[528] However, with the passage of time and what I believe to be the failure of transformative constitutionalism to develop in a way that offers some meaningful critical insights into South Africa's deepening political, economic, social, cultural and epistemic crisis, I am decidedly unconvinced that transformative constitutionalism offers much beyond a jurisprudence grounded in balancing tensions between mainly government policy, programs or conduct and entrenched constitutional rights in line with its discursive origins in a liberal constitutionalism.[529] Holding this view I believe it necessary to ask what does the discourse of transformative constitutionalism offer beyond what in practice has ossified into a juridified conception of constitutionalism in spite of its radical rhetorical claims. And what or whose interests are served by its prevailing dominance over how South African constitutionalism has come to be construed?

[528] Sibanda op cit note 15; Sanele Sibanda, 'Not quite a rejoinder: Some thoughts and reflections on Michelman's" Liberal Constitutionalism, Property Rights and the Assault on Poverty'" (2013) 24 *Stell LR* 329

[529] With respect to socio-economic rights as an exemplar see Langford, Cousins, Dugard et al op cit note 27.

Before advancing my critique of transformative constitutionalism further, a brief recap of the core claims and features of transformative constitutionalism as *a particular conception of South African constitutionalism* will better contextualize the arguments I set out below. At its core, transformative constitutionalism, at least according to its proponents, is a constitutional project that is:

1. committed to transforming the historically determined political, economic and social institutional power relationships in democratic, participatory and egalitarian ways;
2. political in its nature with its vision of political social and economic change deriving from the Constitution and the history of its making;
3. post-liberal in its orientation, in that it self-consciously departs from 'traditional' liberal conceptions of constitutionalism; and
4. ultimately, is a 'legal enterprise' under a supreme constitution wherein courts are the central constitutional players and have the final say on constitutional meaning-making.

In this section that follows I argue that whether by design or chance proponents of transformative constitutionalism, whilst claiming radical far reaching ends, have conversely set it limited intellectual and programmatic horizons that are more in keeping with the normative prescripts of the international political culture described in the previous chapter. For in practical terms, I argue here, transformative constitutionalism has done little to take us beyond what might be described as an enlightened liberal legalism. In other words, the radical claims propounded by its proponents have not translated into much more than rights or law-based approaches to driving change with little evidence of other work within the discourse directed at inculcating social, economic or cultural institutional or structural power

shifts or innovations beyond the courts. So whilst it's certainly arguable that transformative constitutionalism has successfully established some measure of internal discursive coherence, I argue that this has been possible largely through proponents focusing their discursive interventions on institutional, rights and poverty related litigation, whilst failing to further problematize the constitutional impact of South Africa's largely undisturbed racial, social, cultural and epistemic hierarchies on the growing sense of disillusionment with respect to the Constitution and its promise.

I return briefly to what proponents of transformative constitutionalism consider to be its Achilles heel, namely what they typify as an impeding traditionalist and conservative South African legal culture. Assuming that one accepts this proposition of a debilitating legal culture as potentially fatal, then it surely follows that a likely solution, or an integral part of it, has to be to work to negate the deficiencies of *this* culture by attending to, amongst other things, 'transformative' legal education, legal reasoning and adjudicative techniques.[530] If this sounds overly simplistic that is because it is and exposes a serious shortcoming in transformative constitutionalism's framing of what is at stake as far as the project of (re)-constituting South Africa is concerned.

By framing transformative constitutionalism's main limitation as being regressive interpretation owing to the prevalent legal culture without taking, what seems to me, to be the next most logical step, namely that of problematizing transformative constitutionalism within the context of a larger more pervasive hegemonic Eurocentric culture that overlaps neatly with a capitalist system rooted in colonial-apartheid, proponents of transformative

[530] Klare op cit note 32; Deeksha Bhana and Marius Pieterse, 'Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited' (2005) 122 *SALJ* 865 Geo Quinot, 'Transformative legal education' (2012) 129 *SALJ* 411; Dikgang Moseneke, 'Transformative constitutionalism: Its implications for the law of contract' (2009) 20 *Stell LR* 3.

constitutionalism undermine its possibilities that clearly purport to extend beyond the realm of the legal. As a result of this, proponents of transformative constitutionalists have, despite best intentions, contributed to the perpetuation of white cultural and economic dominance despite promises of radical, deep-seated change. In other words by focusing predominantly on legal culture, proponents of transformative constitutionalism, omit or fail to confront, what I argue, are South Africa's most pressing and urgent questions of reconstituting South African society, such as how to dislodge the well preserved, largely racialised hierarchies of being, as well as the underlying systems, institutions and networks of knowledge, customs, social norms and practices that an adjudication centred conception of constitutionalism *cannot,* in the ordinary course of events, reach let alone impact in a structurally cohesive, strategic and timeous manner.

Writing in a slightly different context, Joel Modiri has poignantly captured the inadequacy of law driven change by remarking that 'while the laws of the country have changed considerably, the architecture, framework and logic of *colonialism-apartheid* remains. It refuses to fade.' (emphasis original)[531] From within the discursive corridors of transformative constitutionalism, there is little evidence of a serious or sustained engagement with the deepening lines of socio-economic or political tensions. For example, it would be important and welcome to hear a transformative constitutionalist perspective on the 2015 and 2016 student protests in South Africa, namely what has come to be known as the #feesmustfall movement. How would transformative constitutionalism help us make sense of the fallists' call for free education whilst also often calling into question the constitution's very legitimacy?

[531] Modiri op cit note 65 at 225.

Or the fallists' demands for greater access to the corridors of knowledge that are universities whilst simultaneously denouncing these very same spaces on the grounds that they retain racist, gendered, alienating and assimilationist institutional cultures that have arguably been the catalysts for many of the "domestic" campus protests that often preceded the coalescence of these protests into the nationwide #fallism movement. The #fallism movement, more than being about unaffordable fees, raises probing questions about the very nature of our 'transforming' society; what it means to have a place in it and who gets to participate in shaping what it becomes. These are not questions that lend themselves to adjudicative processes or framing, rather they are questions concerning how we choose or work to constitute a liberated democratic society, what its priorities are and how the constituent powers within it are used to achieve a particular vision.

Following on from the above I argue further that transformative constitutionalism betrays its own claims and stated ambitions in that by overly privileging the adjudicative role of the courts as *the* idealised site of contesting, determining and enforcing the meaning of the constitution, it then can be read as arrogating to the courts the power and right to ultimately control the ebb and flow of all constitutional politics. For instance, even where consideration is given to what a transformative role for other branches and state institutions might be under what Sandra Liebenberg terms a 'reconceptualised separation of powers'[532], that role seems to oscillate around that of the courts and their powers to determine final constitutional meaning (influenced, no doubt, by a small, but influential, group of constitutional law litigators, public interest law groups and behind them legal academics). Considerations of constitutional supremacy and counter-majoritarianism notwithstanding,

[532] Liebenberg op cit note 28 at 66.

little attention seems to be paid to justifying why the privileging of courts and adjudication is either necessary or desirable. Crucially, this court-centric bias has produced, I suggest, the natural result of tending to diminish, if not sometimes negate the critical role of democratic politics; other branches of government; constitutional institutions; civil society and not least the populace, in the framing and development of the constitutional project.[533]

More profoundly in a society where to engage in sophisticated constitutional litigation depends not only on wealth, but also significantly on social and cultural capital, this bias towards adjudication poses difficult questions about how within the discourse of transformative constitutionalism we conceive of constitutional politics; where and how those politics 'legitimately' play themselves out; and no less significantly who is deemed to be a worthy political subject or agent in as far as contesting and deciding what a 'transformed' South Africa should look like or aspire to. Considering that, as Terreblanche so correctly observed earlier, the 'political transformation' ushered in by the Constitution has largely failed to disrupt the racialized disparities of wealth, income, living conditions or life opportunities, I argue here that we must interrogate the value or the cost of an overly juridified conception of constitutionalism particularly in light of South Africa's larger structural questions around prevailing redistributive (in)justice and continuing patterns of exclusion and marginalization.

5.6 Conclusion

To the extent that the discourse of transformative constitutionalism is primarily framed as an adjudication centred conception of constitutionalism that has, thus far, failed to

[533] See Firoz Cachalia, 'Judicial Review of Parliamentary Rulemaking: A Provisional Case for Restraint' (2015) 60 *NYL Sch L Rev* 379

offer any enduring critique of the largely undisturbed patterns of white or Eurocentric economic, social, cultural and epistemic domination, then its prevailing discursive pre-eminence as the vehicle for claimed radical possibilities almost 25 years on must be called into question. It is worth noting that transformative constitutionalism's dominance as a discourse has largely been in parallel with growing disillusionment and a heightened calling into question the compromise that underwrites the Constitution. The discourse's conspicuous absence from contemporary debates regarding the growing political, social, and economic unrest that gestures towards the unravelling of the constitutional compromise of the 1990s surely raises questions about the very conception of constitutionalism that underpins transformative constitutionalism.[534]

As I argue in this dissertation, this issue is important because how we engage constitutionalism from a conceptual standpoint has grave implications for our understanding of the social, political, economic and cultural ambition and ultimately approach to how we imagine a constitutional order being brought to life and prevailing over and within national life. As with transformative constitutionalism, whatever the chosen approach or model, its underlying philosophical commitments and tenets will determine what is regarded as falling within the parameters of (i) legitimate constitutional concerns, (ii) appropriate constitutional forms and means, and (iii) who are the recognised (and privileged) subjects and/or institutions with respect to constitutional meaning making.

There is at least one lingering thought as I conclude this chapter. With the many signs of growing tension in South Africa that surely gesture towards the progressive unravelling of

[534] For example, I refer here to the ever-increasing number of civic protests in South Africa around housing, democratic representation, water, access to education, municipal and provincial demarcations, most recently the decolonization of universities and the demand for free higher education.

the compromise, can a discourse that eschews overtly staking out its ideological commitments withstand the erosion of the compromise without itself either collapsing completely or ossifying into a quasi-religious liberal constitutional orthodoxy that is out of synch with the needs or demands of large sections the society over which it prevails?

Chapter 6

Liberation Revisited – Constitutional Episode or Continuing Ideal?

6.1 Introduction

In the previous chapter I sought to demonstrate that whilst transformative constitutionalism is well intentioned and has much to commend itself in the abstract, I also demonstrated that it is, nonetheless, subject to some far-reaching pitfalls that bring into question its aptness in as far bringing into being the imagined liberated society aspired towards during the struggle against colonial-apartheid. As we draw towards the close of this study, there remains one key question that is yet to be addressed. Which is why is there such a stark discursive disjuncture between South Africa's constitutional discourse and the discourse of liberation that served as the ideological pivot of the struggle to bring about South Africa's 'liberation' in 1994?

Prefacing this question is the largely undisputed fact that the struggle against colonial-apartheid is generally accepted as having been essentially an anti-colonial one for the liberation, not only of the state from colonial conquest, but most importantly that of the people from the multiple legacies of colonial conquest. (This is an important distinction that must be kept top of mind as it shall permeate the arguments, observations and analyses that follow). Therefore, if one accepts this position with respect to the fundamental nature of what constituted the mission of the liberation struggle, it follows then that one must ask *why it is that liberation as an idea or set of ideas seems to have either played no part or exerted little obvious influence in framing how post-apartheid South Africa's constitution-making processes or more generally how South Africa self-comprehends constitutional terms.* Thus far, a few isolated instances notwithstanding, there is little evidence that points to much energy or

effort being put into interrogating the relationship between liberation, the constitution and constitutional transformation more broadly.[535]

In turning my attention to the question at the centre of this chapter, I do not want to be understood to be suggesting that the subject of liberation has not received sustained treatment or consideration in South African discourses in the post-apartheid era. On the contrary there are innumerable scholarly accounts that either consider the struggles to free South Africa from colonial-apartheid or that detail the path to the formation of the post-apartheid democratic state wherein liberation as a part of the narrative of struggle, as waged by various political organisations such as the ANC or the PAC, is common place. This characterization of the anti-colonial struggle as being one of liberation is largely uncontroversial as there is a general level of consensus around the idea that when most anti-colonial movements were formed with the view in mind that attaining self-determination or independence, they were in essence pursuing the cause of (national) liberation.[536]

A more puzzling matter is how best to understand or characterise the notion of liberation relative to the end of colonialism and the constitution-making processes that ensued when liberal constitutions were almost invariably the order of the day. For instance, is liberation to be best understood as an event or set of events as they relate to the attainment of power from a colonial authority and its transfer to a national liberation movement?

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[535] See M. B. Ramose, 'Philosophy and Africa's struggle for economic independence' (2006) 25; *Politeia: Journal for Political Science and Public Administration* 3; Sibanda op cit note 15; Ndumiso Dladla, 'Towards an African critical philosophy of race : Ubuntu as a philo-praxis of liberation' (2017) 6 Filosofia Theoretica: Journal of African Philosophy, Culture and Religions 39; Tshepo Madlingozi, 'Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stell LR* 123.

[536] For a useful account on the nature of political liberation and its contradictions when navigating closing the door on an oppressive past and birthing a common future in religiously divided societies, albeit focused on Algeria, India and Israel see Michael Walzer, *The Paradox of Liberation: Secular Revolutions and Religious Counterrevolutions* (2015).

Or is liberation a more substantive notion with philosophical foundations and analytical purchase against which we can measure the successes or failures of the states and societies that came into being, including, but not limited to, the practices of the political movements at their helm? In much of the literature addressing itself to liberation in the realm of anti-colonial struggles, it appears that the idea of liberation is sometimes deployed as a mix of these ideas or a conflation of them. That is to say that liberation in much of the literature, particularly in the fields of political studies and history, is often approached as being episodic and analytically focused on the state, national politics, democratisation and development under the stewardship of national liberation movements, particularly that phenomenon called the 'ruling party'.

Whilst not the aim of this chapter, in a strict sense, to engage directly in a comparison that contrasts the claims, ambitions, and commitments of the transformative constitutional project against those of a project of liberation; an underlying objective of this chapter is to raise to the surface a lingering question as to why and how the amorphous discourse of transformation displaced that of liberation after 1994.[537] Could this be understood to suggest that transformational constitutional discourse is capable of being readily equated to that of liberation, if not in words then in terms of commitments? For example, if the question was put to proponents of transformative constitutionalism, would they, or indeed could they, ably argue that transformative constitutionalism substantially overlaps or bears enough similarity,

[537] This is, of course, not a phenomenon peculiar to South Africa, but rather a common phenomenon across the African continent where the intellectual impetus fuelling anti-colonial struggles was that of liberation thought in its various guises. However, at the point of attaining independence the main modes of constituting the societies emerging from colonialism tended to focus on transfers of power under institutions and structures inherited from former colonisers rather than the fashioning of new purpose made institutions.

in terms of its ideals, to have rendered a continuing regard or engagement with liberation redundant?

Or would said proponents argue that transformative constitutionalism is an advanced and entirely different enterprise in terms of its value propositions and commitments to that of a project of liberation, that no worthwhile comparison is warranted, justified or possible? Said, proponents might, of course, put forward a myriad of more delicately or carefully framed answers of varying complexity, as ultimately individual answers will depend on many things, not least how liberation is understood and whether it is perceived of as being of any continuing relevance in how South Africa is constituted. Of Interest either which way would be that the justifications proffered would serve to reveal the views of the individuals concerned regarding the perceived relevance or contribution of the liberation tradition to how we understand or frame South African constitutionalism.

In light of the discursive disjuncture I identify above, I revisit in this chapter the idea or notion of liberation in an attempt to reveal its potentialities in as far as it has political, social, economic, and cultural dimensions that are constitutive of it when it is understood as a fulsome liberatory notion. In doing so my intention is to briefly set out what is and has been at stake as revolutionaries, activists, scholars and theorists alike have imagined, reflected upon and crafted visions of liberated societies and states that transcend their colonial histories. In simple terms, what I embark upon in this chapter is to provide an exploratory account of what a fulsome liberation entails when approached with the mission of overcoming imperial domination in its many guises as colonialism, post-colonialism, neo-colonialism or coloniality and constituting imposed liberal democratic societies.

6.2 Failure or Betrayal? The Oft Precarious State of 'Liberation' in South Africa's Post-1994's Political Discourse.

As discussed previously in the introductory chapter, it is a widely held view that life in post-apartheid South Africa has been an amalgam of undeniable democratic and human rights gains and socio-economic failings under a much-touted constitution. As far as evaluations of what this suggests in relation to the state of liberation in the post-apartheid era, it depends on who you ask, although there exists a discernible sense amongst some commentators that liberation has either failed, been betrayed or subjected to elite capture. For instance, Roger Southall whose work critically engages with the achievements of national liberation movements in Southern Africa, focuses on what he terms as the "post-liberation" period that he argues has been characterised by disappointment and disillusionment.[538] John Saul, who has also written extensively about liberation in Southern Africa, expresses a similar sentiment to Southall's with respect to national liberation movements as he woefully describes them as "hav[ing] come to preside over the death of the promise that they were once thought to epitomize".[539] In later work Saul argues that Southern Africa is actually in the throes of a process of recolonisation; here Saul cynically speaks of 'a flawed freedom'.[540] (Emphasis mine) Implicit in this apparent paradox is the idea that liberation can be conceived of either narrowly in formal power political terms or expansively in substantive terms depending on where one choses to focus.

The fate of liberation has also been decried by prominent activist and leader of the well-renowned shack dwellers movement, Abahlali Basemjondolo leader, S'bu Zikode. Zikode

[538] Roger Southall, *Liberation Movements in Power: Party & State in Southern Africa* (2013) 10-12.
[539] John S Saul, *Decolonization and Empire: Contesting the Rhetoric and Practice of Resubordination in Southern Africa and Beyond* (2008) at 148.
[540] See John S Saul *A Flawed Freedom: Rethinking Southern African Liberation* (2014).

lamenting what he typifies as the betrayal of the liberation promise describes what has occurred in post-apartheid South Africa as the 'privatisation' of liberation. Zikode proffers the view that South African society, despite its democratic gains, has failed the poor and benefitted the rich who have been able to retreat quietly into their exclusive domestic enclaves behind high walls and gated communities that have brought into being another form of separateness, this time no longer on constitutionalised and legislated racial lines but material ones.[541]

What I have set out above are but a few variations on the same theme, namely a view shared by many that the end of a racialised system of oppression and exploitation through an anti-colonial struggle waged in the name of liberation by nationalist movements has led to a 'flawed', 'failed' or 'failing' liberation. A common thread running through some of these characterisations of liberation as either a failed or failing project is a statist focus on the actions of liberation movements, political elites and more generally on the politics of the 'post-liberation' state. Whilst not in any way suggesting that these analyses lead us to inconsequential conclusions, what I am suggesting here is that this apparent consensus of the 'failure' or betrayal narrative can lead to an elision of the differing perspectives informing the analysis concluding that there has been failure or betrayal. For example, Southall and Saul tend to focus on the politics of liberation and the failings of national liberation movements in power; whilst Zikode's conclusions are informed by a failure to bring about the material reconfiguration of a society built on racial capitalist exploitation that has allowed the wealthy to capture the 'dividends' of liberation.

[541] Zikode in Nigel C Gibson, *Fanonian Practices in South Africa: From Steve Biko to Abahlali baseMjondolo* (2011) viii.

While on the other hand Gibson points out crucially that the 'failures are not only material, but also epistemological.'[542] A consequence of what I refer to here as a 'false consensus', is that it leaves us unclear as to what exactly the nature of liberation is. Or where exactly our attention should be focused when evaluating liberation's gains or failures. Or whether it is the idea or ideals of liberation that are ill-defined or irredeemably lacking in substance so as to be incapable of 'implementation'. In short, although the narratives of failure cannot be simply dismissed, it is equally important to note that they also do not cohere into a compelling critique of liberation.

Even as we note the differing points of departure and intellectual moorings of the different voices that characterise the project of liberation as either failing or betrayed, the fact of this framing being a commonly held perspective amongst scholars of differing disciplines and ideological outlooks carries with it several implications that I elaborate upon further.

First, the focus on the idea of a failure of liberation tends to concentrate our attention on recent history or the 'post-colonial' experience and necessarily foregrounds actors, such as liberation movements and personalities rather than the vision and ideas that are central to defining the liberation tradition. Secondly, the focus on national liberation movements and personalities prioritises issues of politics and the contestation for power, whilst paying little attention to, nor questioning the appropriateness of, economic, political and constitutional forms fashioned from liberal and capitalist models usually adopted wholesale from former imperial masters. In other words, an unspoken assumption in many accounts propagated by the failure or betrayal narratives is that inherited incumbent political, constitutional, social,

[542] Ibid 4.

economic and cultural structures, systems and norms are a given whose basics or fundamentals are unshakeable (ideological heckling notwithstanding), rather the 'failure' of liberation is related, in the main, to issues of agency and leadership.

Thirdly, the failure or betrayal narrative effectively produces, as already mentioned, a false consensus owing to the fact that the different narratives pointing to varying points of tension and fracture fail to yield a clear common basis upon which liberation is said to have failed. A consequence of this is that as a discursive intervention, this framing of liberation does not take us any further in identifying that which would have to be addressed in order to craft a vision or a composite imaginary of a state of liberation as opposed to a sovereign or 'liberated' post-colonial nation-state. In short, whilst various narratives pointing to failure individually tell us something about the state of liberation, I argue here that they generally do not work together to form anything resembling a cohesive critical perspective that assists us to better apprehend the core themes at the heart of the liberation tradition.

In the next section I start to suggest that as we continue to think through questions of the relationship between constituting a society (or constitution-making) and liberation rather than focusing on the failure or betrayal side of the narrative and its emphasis on the politics and power, we need to develop some clearer thematic articulations of what anti-colonial liberation commits to and demands of us in order to be able to imagine what this means, loosely speaking, in constitutive terms or more precisely with respect to constitution-making in its broadest most democratic sense.

6.3 Liberation's Constitutive Dimensions - Taking Seriously the Idea of a Distinct Liberation Tradition

In an extensive study on the 'proletarianization of blacks' in South Africa and the influence black consciousness exerted on those processes, C.R.D. Halisi prefaces his concluding remarks by questioning the resistance within mainstream academic discourse to the idea of the emergence of a distinct 'black political tradition'. It is with this in mind that Halisi causes us to pause and reflect on the issue of what actually constitutes a tradition of thought and by extension 'a legitimate field of intellectual inquiry'. In this respect he tells us:

> The notion of a 'political tradition' denotes a set of enduring intellectual issues, questions, and problems which concern a related group of thinkers, no matter how defined. A theoretical tradition suggests a continuity of issues within a diversity of contexts.'[543]

The ideas expressed by Halisi offer an important point on which to pivot as I embark upon a brief thematic exposition of what I understand to be the core dimensions of liberation beyond political freedom, as well the implications of thinking with such dimensions in mind when we engage with the idea of constitutionalism. Informing my approach is the understanding that beyond the 'false consensus' that manifests as a result of the narrative of betrayal or failure with its distinct political and statist bias, not enough work has sought to excavate the archive of anti-colonial liberation thought with the view in mind of teasing out other core themes that constitution-makers should actively engage or respond to. What I am suggesting is that in looking to the liberation archive I want to identify what, according to Halisi above, are 'a set of enduring intellectual issues, questions and problems' that preoccupy actors and thinkers working in the liberation tradition as they imagine how a society aspiring towards establishing a state of liberation might be constituted. What this approach gestures towards is that in

[543] CRD Halisi, 'Dividing lines: Black political thought and the politics of liberation in South Africa', (1988) 373

much the same way that the liberal tradition has articulated clearly identifiable sets of concerns, priorities and commitments that emerge in advance of a liberal democratic framework, we also need to be clear as to what the core concerns, priorities and commitments of liberation are before we are convinced that the narratives of failure and betrayal signal an end to the possibilities of liberation.

6.3.1 Liberation as Political Freedom

As indicated above, there is wealth of literature on African liberation struggles and movements that has provided detailed accounts of the history of struggle, the process of decolonisation as well as the state of politics that emerged in the aftermath of the colonial period. In many of these accounts liberation, as previously discussed, is framed as a process that is primarily concerned with bringing about the end to European colonial rule on the one hand, and African self-determination, through universal adult suffrage, on the other. In other words, the idea of liberation has come to be first and foremost associated with the coming into being of post-colonial states characterised by the extension of the franchise on a one person-one vote basis which included Africans as full citizens for the first time since the advent of colonialism.[544] In this respect I suggest that it is fairly uncontroversial that writers in the liberation mould tend to agree that propagating the ending of the racist colonial state and the ushering in of inclusive democratic practices is a core feature of anti-colonial liberation. In other words, liberation must, as Southall points out, entail the coming into being of political freedom which, in a colonial context can only be said to have come into being with the formal legal termination of the colonial state.[545] In terms of this conception or framing,

[544] See Walzer's account of the journey of Algerian and Indian liberation. Walzer op cit 536.
[545] Southall op cit note 538 at 7-8.

liberation is usually understood as referring to a specific event, set of events or the culmination of a process that ushers in a period of democratic self-rule. As a consequence, commentators tend to lay the emphasis on issues relating to democratization, political inclusiveness and state sovereignty. In other words the tendency is to place precedence on the political, particularly in as far as it relates to the status, structures, institutions, and systems of the state in question rather than the social, economic or cultural dynamics which are left in large part as 'discretionary' issues for an incumbent government to determine through elections, law and policy.[546] This conception of liberation tends to oscillate around questions of political and social stability and sovereignty that are posited as the central concern of the democratic state. The nature of the emancipatory claims embodied under this framing of liberation tend to be formal or rights based in nature with a focus on the citizens' rights' claims relative to the functioning of the state and its capacity to deliver within the limits of a liberal constitution framework, in other words the deracialised colonial 'inheritance'. This is admittedly a somewhat thin version of liberation as political freedom, however, I submit that it is characteristic of much of the way in which liberation is analysed when emphasis is placed almost exclusively on the post-colonial period and the records of national liberation movements.

Admittedly the thin version of liberation as political freedom described above is not the only way in which scholars and commentators conceive of liberation as political freedom. A richer conception of political freedom that encompasses a commitment to deep, inclusive systemic popular democracy is in all likelihood an ideal that few who engage with the idea of liberation tradition would quibble with. However, my point here is really to highlight that by

[546] This would go some way toward explaining the centrality of liberation movements and the personalities within them as well as their ideological politics in the analysis of liberation.

setting one's analytical focus solely on the political, presents a one-dimensional perspective of what liberation is. Therefore, the failure or betrayal narrative may be criticised for either (i) being premature in its judgment if it is understood to be directed at the possibilities of the idea of liberation when conceived of in a fulsome way, or; (ii) focusing our attention too narrowly on the political failings of liberation movements without locating their failures within a broader corpus of liberation thought before declaring the terminal demise of liberation.

A view that I believe probably best captures the state of liberation in South Africa is Gibson's that terms what has happened in South Africa post-1994 to be an 'incomplete liberation' that has manifested as 'an elite project of capturing the state' which has become characterised by a 'tremendous gap between the elite-driven, wheeling and dealing politics of transition, and the goal of the masses.'[547] In Gibson's view, South Africa in the post-apartheid era has emerged as a post-colonial caricature that is quintessentially 'a product of the failure of decolonisation' with governing party elites having led the country down a neoliberal developmental trajectory that is simply incapable of delivering on the promise of liberation.[548] However, for Gibson this is not cause for despair, rather it is a reason to reach back into the archive of liberation thought and (re)imagine ways to rescue and advance the cause of liberation in light of contemporary setbacks. Gibson rightly laments a dearth of 'liberatory ideology' that addresses the different dimensions of liberation that need to be attended to if a state of liberation is to be attained with the necessary philosophical foundations, systems and structures. I elaborate on these dimensions below.

[547] Nigel C Gibson, *Fanonian Practices in South Africa: From Steve Biko to Abahlali baseMjondolo* (2011) 2.
[548] Ibid.

6.3.2 On the Philosophical Foundations of Liberation

Writing in a slightly different context, Mogobe Ramose eloquently captures the notion that whilst the political kingdom Kwame Nkrumah spoke of is correctly come to be regarded as *sine qua non* at the forefront of anti-colonial liberatory politics, an exclusive focus on the political by itself cannot guarantee liberatory outcomes without reference to a set of anterior ideals with respect to which the political vision is calibrated. Ramose in his own words captures this notion thus:

> I have noted that the primacy of the political kingdom was self-justifying. It opened up the political kingdom as a plain on which everyone could play their own game, paying exclusive attention to their own survival. The political kingdom became a civilised jungle. *A corrective to this is the recognition of the need to have a yardstick with which to determine the character of the political kingdom and to measure its competences and scope*. This need may be fulfilled by the philosophy of Ubuntu. (Emphasis mine)[549]

Rather than his critical stance on the oft self-serving nature of practical politics or his specifically identifying with a philosophy of Ubuntu as a yardstick, the most profound idea that Ramose introduces here for my purposes is his treatment of the political as not constituting some pristine realm lording over all else nor as an end in itself. Rather, in order to regulate or make sense of its practice and outputs there must of necessity be a philosophical yardstick against which to measure the successes or failures of what happens in the political kingdom as well as what is added after.

The implications of this are that if we accept, as I suggest we should, that the political dimension of liberation is a response to the reality of colonialism, its legacies or even coloniality more broadly, then taking Ramose's caution seriously demands that we also consider the importance of foregrounding the philosophical dimension of liberation. For

[549] Ramose op cit note 531at13.

Ramose, the philosophical is not about a turn to abstraction nor is it about the academic preoccupation of the professional philosopher, namely the 'rigorous clarification of concepts'.[550] On the contrary for Ramose 'philosophy is the critical engagement of the philosopher in the reality and problems of the time.'[551] In Ramose, I discern the echoes of Enrique Dussel, who, when introducing his articulation of a philosophy of liberation, poignantly makes a similar point when he remarks as follows:

> Philosophy, when it is really philosophy and not sophistry or ideology, does not ponder philosophy. It does not ponder philosophical texts, except as a pedagogical propaedeutic to provide itself with interpretive categories. *Philosophy ponders the nonphilosophical; the reality*.[552] (Emphasis mine)

As far as an explicit articulation of a philosophy of liberation is concerned, Latin American philosopher Enrique Dussel's is arguably one of the most ambitious projects to embark on 'a substantive, explicit philosophy of national anti-colonial emancipation'. [553] In *Philosophy of Liberation*, Dussel's project is to set out what he understands to be liberation's philosophic attributes and reaches against the background of a colonial world in which philosophy has become 'the exclusive patrimony' of the 'center', namely Europe or the West. Moving from this premise, Dussel's account performs a detailed but trenchant critique of the 'center's

[550] Ibid 3.
[551] Ibid 15.
[552] Enrique Dussel, *Philosophy of Liberation*, *trans* (1985) 3.
[553] Ibid 13 at para 1.2.5.1 Broadly speaking, Dussel's work on a philosophy of liberation emerges from within an emerging Latin American philosophical tradition that was grappling with the core question as to whether there was in fact something that could be referred to as Latin American philosophy which existed as distinct from European or Western philosophy. For an overview of the emergence of the field of philosophy of liberation a very useful introduction that traces developments in the field as well as roots in a broader Latin American philosophical movements. Euduardo Mendieta. "Philosophy of Liberation." in Edward N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (2016) available at https://plato.stanford.edu/entries/liberation/, (last accessed on 17 November 2018). See also Linda Alcoff and Eduardo Mendieta, *Thinking from the Underside of History: Enrique Dussel's Philosophy of Liberation* (2000).

'colonial philosophy' that he correctly charges with having sought to displace all other knowledges, realities, truths or ways of knowing in the colonies.[554]

According to Dussel, central to the mission of formulating a philosophy of liberation is making self-evident the case for effecting a decisive break from Western philosophy, particularly as received in the colonies. Dussel argues strongly that the prevailing image of the world in the colonies has emerged in accordance with Western epistemology and ontology as the centre of knowing and being. Whilst in this system of knowing the rest of the world is consigned to what he terms the 'periphery'; it is the 'center' that makes and determines the 'truth' and as such is actually responsible for bringing into being the 'periphery' in accordance with that 'truth'. According to Dussel, it is thus, from this space of 'truth', that a philosophy of liberation *must* emerge and this is only possible premised on a clear understanding of the 'historico-ideological genesis of western philosophy'.[555] In short, Dussel argues that without a thoroughgoing historicization of how the world of philosophy has developed or explained the world, a philosophy of liberation will not be possible as the necessity for it would not be apparent were the realm of 'truth' and reality to remain confined to that which the 'center' has bestowed on the world.

It is beyond the scope of this study to provide anything resembling a detailed synoptic account of Dussel's philosophy of liberation, nor, strictly speaking, is it necessary to do so in order to make the point I seek to make. That point is to use Dussel's conception as an example that highlights some of the most salient features of what a systemic philosophical account of liberation developed from outside the hegemony of western philosophy would address,

[554] Ibid.
[555] Ibid at 1.

particularly with respect to framing a truth and reality that is not premised on a logic of 'center' and 'periphery' whose implications I will unpack shortly.

The importance of Dussel's account is to demonstrate that for liberation to generate real emancipatory possibilities and imaginaries it is necessary that it generate its own distinct foundations upon which it stakes a claim of space in the world for the emergence of a liberatory philosophy that exists unapologetically in opposition to Western liberal philosophy whose emancipatory potential in the colonies is negated by the fact of its complicity in the subordination and destruction of other ways of being and knowing. Dussel's philosophy of liberation is of such import that it is worthwhile to discuss some of the most salient features in some detail:

1. In Dussel's view, key to imagining and making self-evident the need for a philosophy of liberation entails embarking upon and constructing a critical historiography of the philosophy of the 'center'. His aim is to expose its problematic relationship of displacing or subordinating other histories whose own specificities and dynamics are key to apprehending the need for a philosophy of liberation. Implicitly raising questions of epistemology and what has been posited as a monopoly on truth and knowledge by philosophers of the 'center', this 'historico-ideological account' serves to reveal how Western philosophy has remained at service to the imperial project of colonisation, particularly with respect to the construction of geopolitical space whose defining lines of division between 'center' and 'periphery' were extended to determine which of the earth's populations were constructed, almost

exclusively along racial lines, as rational beings versus those constructed to be non-rational beings.

2. Dussel's profound critique of the construction of beingness and non-beingness in the philosophy of the 'center' importantly also takes on the problematic question of ontology, particularly the notion that it is only those at the 'center' who are regarded as possessing rationality and therefore 'an ontology'. An important consequence of this, Dussel vividly demonstrates, is that the world, as decreed by philosophers of the 'center', was therefore divided into that of humans and non-human, in other words those with an ontology, 'beings' of white European descent and those subject to them, the 'other', descended from a motley assemblage of the darker races, those devoid of an ontology. In the following remark, Dussel demonstrates the centrality of 'the ontology' in the drawing of these lines in European philosophy:

> Ontology, the thinking that expresses Being - the Being of the reigning and central system - *is the ideology of ideologies, the foundation of the ideologies of the empires, of the center*. Classic philosophy of all ages is the theoretical consummation of the practical oppression of peripheries.[556]

The gist of Dussel's line of argument for my purposes is that the implications of centering the being, or the ontology, in western philosophy has profound consequences for the nature of ethical relations that are possible within the confines of its logic. It is this logic that sees the philosophy of the 'center' arranged on the basis of what Dussel terms a 'person to nature relationality', with Europeans - possessing of an ontology - being humans within that system of thinking and the 'other' being regarded as part of nature (or at least in a

[556] Dussel op cit note 548 at 5 at para 1.1.4.4 (emphasis mine).

state of nature) with the rest of the natural world. Therefore, against this history of the emergence of the being, Dussel correctly suggests, that the divide between the 'center' and the 'periphery' can never be transcended without first exposing the roots of this philosophical world, its commitments and its role in enabling and propping up imperial domination and exploitation through the construction of the 'other' without an ontology.

3. In contrast to the above, a philosophy of liberation, according to Dussel, posits a different point of origin for engaging and interacting with the world. Dussel proposes that we approach the world in dialectical terms from the perspective of person-to-person experiences that bring and keep us in proximity. A philosophy of liberation emphasises a human connectedness to other humans, to nature, to the world. In essence Dussel is saying, we are not born into this world alone, our very arrival into the world thrusts us immediately into a relational situation of proximity. One is born into a world that is already made up of people, cultures and histories fashioned by our predecessors which must all then be recognised as anterior to the world of any one individual or 'the being'. Deriving from this idea of connectedness, is the notion that a philosophy of liberation is characterised by a responsibility for 'the weak' shared by all, which responsibility is anterior in priority to the self. Dussel expresses this idea neatly as follows:

> Anterior to the world is the people; anterior to Being is the reality of the other; *anterior to all other anteriority is the responsibility for the weak one*, the one who as yet is not - a responsibility of those who procreate new persons (parents) or new systems (heroes and liberating teachers).[557]

[557] Ibid 19 at para 2.4.1.2

Further, according to Dussel,

> Proximity is the root of praxis and the point of departure for all responsibility for the other. Only those who have lived proximity in justice and joy accept responsibility for the poor, desire for them the proximity of equals.[558]

In sum, Dussel makes a compelling case for a philosophy of liberation as a necessary philosophy that thinks from the periphery; this philosophy emerges, Dussel notes, in opposition to an 'ideological' European philosophy. Dussel captures well, the impetus of this subversive liberatory philosophy when he tells us '[o]ur thought sets out from non-Being, nothingness, otherness, exteriority, the mystery of no-sense. It is, then, a "barbarian" philosophy.'[559] For Dussel, driving a philosophy of liberation is not a desire to rethink or recreate 'the ontology', rather it is essentially about formulating a 'metaphysics', that is, 'knowing how to ponder the world from the exteriority of the other.'[560] In other words, a philosophy of liberation is not about seeking inclusion in, but rather it is about fashioning a different way of relating to and seeing one another in a world wherein our obligations to the other are natural to our ways of knowing and being. Central here is the notion of displacing the logic of the 'center' as that which also determines the way in which those excluded at the 'periphery' self-comprehend and experience their own existence from outside of themselves.

Dussel's is, of course, but one approach to a philosophical reading of liberation, albeit an important one whose influence on Latin American philosophy and African philosophy is irrefutable. In South Africa there is also a growing scholarship that can be seen in the frame of the liberation philosophical tradition. One example would be the works of Mogobe Ramose, already referred to above, whose work tracks the main issues, themes and questions

[558] Ibid 20 at para 2.1.5.4.
[559] Ibid 14 at para 1.2.6.2.
[560] Ibid 48 at para 2.4.9.1.

that are at the heart of the anti-colonial liberation tradition.[561] Another example is Ndumiso Dladla, who self-evidently locates his work in a liberation tradition in his article *Towards an African critical philosophy of race: Ubuntu as a philo-praxis of liberation.*

Dladla builds on Ramose's work and makes a case for Ubuntu philosophy being considered as a foundational source for how a philosophy of liberation would be constituted, particularly from a Southern Africa point of view. There is evidence of a growing concern and interest in developing a philosophy of liberation that, whilst in conversation with the Latin American philosophy of liberation tradition remains true to the reality and specificities of Southern Africa's historical experiences with respect to the specific effects of imperial expansion and its imposition of domination.

6.3.3 Liberation and the Materiality of Being

The economic motive as an impetus for colonization can hardly be gainsaid when one considers the history of dispossession, exploitation and subjugation that was characteristic of imperial expansion generally and the consolidation of white rule under the Union and subsequent South Africa constitutions.[562] As discussed in earlier chapters through a slew of racist legislation and policies, one of the lasting legacies of colonial-apartheid was deeply entrenched structural inequality characterized by racially skewed patterns of material or economic distributions that had a strong irrefutable correlation more, with racial identity than with individual enterprise, talent or ability. As Fanon so crisply put it, 'in the colonies, the

[561] For example see Ramose op cit note 535; See also Ramose op cit note 124.

[562] See Setai op cit 5 who, in a richly detailed archival study that discusses South Africa's political economy from the late 1880s, makes the important point that South Africa's history largely 'reflects struggles for land and resources.' See also Terreblanche op cit note 5 an underlying theme of whose work makes similar observation, namely that South Africa's economic system developed into one of 'racialized systemic exploitation and exclusion' favouring the white populace and at the expense of their black counterparts.

economic substructure is also a superstructure. The cause is the consequence; you are rich because you are white, you are white because you are rich.'[563]

The end of the colonial period whilst bringing about a dismantling of the most egregious of the racist laws and policies, did not bring about material redistribution or an economic rearrangement to mirror democratic changes. Instead, the period that followed the attainment of 'the political kingdom' often resulted in the establishment of what Nkrumah would later term 'neo-colonialism' wherein political freedom ended the era of external political control, but failed to do the same with respect to the economic relations that continued to be dominated and structured to the benefit of former colonisers and international finance capital. Nkrumah argues cogently that the granting or negotiation of independence focused almost entirely on the political power, whilst the colonial powers retained and, in fact, further enhanced their economic domination of the former colonies to the detriment of the newly independent states.[564]

Ramose well captures this dilemma of the process of decolonisation that focused on redefining the political relations between colonized and colonizer whilst leaving intact economic relations skewed along racial lines. Perceptively, Ramose points out that:

> [f]or as long as the political kingdom remains the prisoner of economic bondage it will remain testimony to Africa's irresolution to release herself from the prison of preventable and deadly poverty.[565]

The aim here is not to detail the dire consequences of this failure to institutionalise the undoing of skewed and exploitative economic relations at the end of colonisation, rather it is to argue that the economic or material realms have long been recognised as being a central

[563] Frantz Fanon *The Wretched of the Earth (Reprinted.)* (1990) 31.
[564] Nkrumah op cit 109.
[565] Ramose op cit note 535 at 11.

node of imperial domination and therefore necessarily a core tenet around which bitter contestation in the struggle for liberation have occurred. That at the point of independence it was often left untouched in how the new states were constituted is a problematic that has long been recognised as will be more fully set out below.

In what follows I will elaborate on the notion central to those thinking and working within the liberation tradition, namely that a necessary dimension of liberation is that of the economic or material emancipation; or put otherwise, the exercise of economic constituent power as discussed in chapter two. Underlying this framing, is the realization that primarily focusing on a political transfer of power without addressing the maldistribution of wealth and property - especially land - occasioned by colonialism fails to address the substance of one of the most pernicious and seemingly indelible effects of colonialism. Rather, as I argue, this failure to institutionally and structurally address questions of material distribution in the structuring of society has also been a factor in enabling the emergence of often deracialised new elites and the continuation of economic and social hierarchies as of old, under neo-colonial conditions.

Therefore, approached with this dimension in mind, liberation is necessarily concerned with questions of distributive justice that envisages a society that works towards radically restructuring and reimagining economic relations in the direction of a more equitable distribution of the material benefits *and costs* generated within a particular political community without negating the commitment to individual liberation existing at the heart of the agency recognised in political liberation. In unpacking the significance of the economic dimension of liberation, I will turn to an important thinker on liberation to help us understand what is at stake. In his well renowned essay entitled “The weapon of theory”, Amilcar Cabral

a revolutionary theoretician and a leading figure in anti-colonial struggles helps us to think through the importance of addressing material questions in bringing about and sustaining a state of liberation.

To fully appreciate the course that must be taken in the striving for (national) liberation beyond the political, according to Cabral, demands that one also examine the history of class formation in the colonies and how it is produced by the racist imperial hierarchical social structure of citizens versus natives. In Cabral's own word's it is critical that we develop a sound understanding of *'the presuppositions and objectives of national liberation in relation to social structure,'* as we make sense of the impact of the development of class arrangements in society on distributive patterns and possibilities. [566] Cabral's deep insight on this score is that he extends his analysis beyond the colonial era and shines light on how elite transfers of power in the post-colonial phase are equally deserving of our close scrutiny as it is such 'productive forces' that operate as the 'motive force of history' irrespective of who controls them. Simply put, Cabral's analysis, as we unpack what a fulsome liberation entails, grapples unapologetically with the idea that economic domination under colonial, post-colonial or neo-colonial conditions necessarily translates into the power to determine, a given society's structure, who presides over it and on what terms, broadly speaking. [567]

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[566] Amílcar Cabral, *Unity & Struggle: Selected Speeches and Writings* (2008) 154 (emphasis original).

[567] Cabral makes this point extremely well as he demonstrates the class structure of the post-colonial state with urban and rural elites working hand in glove to maintain dominance control and distribution of resources. In his own words Cabral well captures this notion that liberation must be forward looking and concern itself with the future when he states that:

> Bearing in mind that the essential characteristics of the present-day world economy, as well as experiences already gained in the field of anti-imperialist struggle, the principal aspect of national liberation is the struggle against what is conventionally called neocolonialism.

Ibid 161.

Cabral, thus with painstaking precision, illustrates how 'imperialist domination' through economic exploitation and control of the colony, its resources, including its people, has structured colonial (and subsequently neo-colonial) society to be at service to the interests of the (neo)colonial powers and their agents. Therefore, against this background of a structural political, economic and social analysis, Cabral clearly demonstrates the material nature of colonial domination as well as the corollary liberatory idea that central to the pursuit of a fulsome liberation is a foregrounding of this economic dimension.

In his own words in another important essay entitled *National liberation and Culture*, Cabral illustrates the importance of the economic dimension in how he frames his conception of liberation:

> The aim of national liberation is therefore to regain this right, usurped by imperial domination, namely: the liberation of the process of development of the national productive forces. So national liberation exists when, and only when the national productive forces have been completely freed from all kinds of foreign domination. The liberation of productive forces and consequently the ability freely to determine the mode of production most appropriate to the evolution of the liberated people, necessarily opens up new prospects for the cultural process of the society in question, by returning to it all its capacity to create progress.[568]

Without allowing ourselves to be distracted by the somewhat terse turn of phrase or what might be described derisively as terminology that has a distinct leftist doctrinaire leaning and might sound anachronistic in the post-cold war era,[569] crucial for us here is how Cabral conceives of liberation as manifestly substantive, material and best understood contextually within the historical trajectory of imperial domination (colonial and post-colonial) rather than in the abstract. Such a reading also helps to explain why Cabral viewed the pursuit of

[568] Ibid 173-4.

[569] It must be recalled that Cabral was a revolutionary (in the truest sense of the word), who imagined armed struggle as an integral component of the process of decolonization and indeed put in motion the building of a people centred movement to remove the Portuguese as colonisers of Guinea-Bissau and Cape Verde.

liberation as not being time or event bound and extending into the post and neo-colonial phases.

In essence then, Cabral rightly illustrates that liberation must be grounded in an understanding of the concrete historical reality or conjuncture that it seeks to overturn. In short, liberation, particularly in material terms is a response to a historically constructed reality. Cabral, like others working within the liberation tradition, clearly characterises liberation as an evolving historical process that is concerned with redefining, reframing and reimagining not only political relations and structures but, most importantly, economic ones too within the frame of constituting society. For Cabral liberation cannot be properly understood as an event which by mere proclamation comes into existence at the lowering of the colonial flag; rather for Cabral liberation demands the end of material exploitation and subordination by replacing that with just economic relations that take seriously past and present distributive injustices.

Steve Biko echoes Cabral's characterisation of liberation as having, amongst other emancipatory drivers, a material basis that is crucial to the future possibilities of (re)constituting the structure and relations of a liberated society. In what can only now be apprehended as prescient words over twenty years after political freedom was attained in South Africa, Biko tells us:

> Yes, I think there is no running away from the fact that now in South Africa there is such an ill distribution of wealth that *any form of political freedom which does not touch on the proper distribution of wealth is meaningless*. The whites have locked up within a small minority of themselves the greater proportion of the country's wealth. If we have a mere change of face of those people in governing positions what is likely to happen is that black people will continue to be poor, and you will see a few blacks filtering through into the so-called bourgeoisie. Our society will be run almost as of yesterday. So, for meaningful change to appear there needs to be an attempt to reorganising the whole economic pattern and economic policies within this particular country.[570] (Emphasis mine)

[570] Biko op cit note 261 at 169.

In the excerpt above, Biko with simplicity and clarity probably best captures the material imperative of liberation as well as the likely implications of failing to address it in the reimagined organisation of society. Fundamentally, Biko like Cabral recognises that the attainment of political freedom without also addressing economic or material questions will result in an inchoate project of liberation. In fact, this is decidedly the case in a post-cold-war world where colonialism is all but dead in a formal sense and neo-colonialism exists propped up by a strange amalgam of the prevailing geo-political power of industrialised states, highly mobile international finance capital and the ever-growing influence of international multi-lateral institutions directed from Dussel's 'center' or the Global North as it is currently known.

6.3.4 Liberation as an Act of Culture

Beyond the political, philosophical and the economic dimensions of liberation, another dimension of liberation that demands our attention is that relating to cultural emancipation. As against a background of a well-entrenched Eurocentric cultural hegemony, Oliphant observes that Biko, Cabral and Fanon, as the three foremost thinkers on liberation in the African context, held in common the view that liberation necessarily entails "overthrowing the political, economic and social order; in other words, the entire colonial dispensation, its material foundations and the cultural edifice imposed on colonised societies".[571] The notion of 'cultural edifice' invoked here by Oliphant rightly evokes imageries of culture as forming the well-constructed, crafted and aesthetic milieu within

[571] Andries Oliphant, 'A human face: Biko's conceptions of African culture and humanism' in Andile Mngxitama, Amanda Alexander and Nigel Gibson (eds), *Biko Lives!: Contesting the Legacies of Steve Biko* (2008) 216.

which the social, political, economic and legal relations of colonial society played themselves out.

This approach to culture is one that I suggest is constitutive in that it treats or regards culture as capable of being an instrument in the production of (colonial) social structures, formations and relations, in contrast to culture simply being regarded as the product of human or social relations. Or as Oliphant puts it 'culture, then, is not just a matter of language, religion, forms of art and customs, but the totality of a specific social formation.'[572] In brief, what is being suggested here is that the idea of culture must be understood in a manner that is mindful of the work it does within the colonising enterprise, namely to oversee and police those aspects of social, political and economic life that were not always readily amenable to regulation through racist laws or policies.

Therefore, culture as a constitutive element of colonial domination was operationalized through a combination of legal and extra-legal mechanisms of displacement, co-optation and evisceration such that the racial hierarchy was reinforced by a cultural hierarchy in which European culture was installed and heralded as the standard. Fanon captures the then prevailing state of affairs when he tells us 'there is on the one hand a culture in which the qualities of dynamism, of growth, of depth can be recognized. As against this, we find characteristics, curiosities, things, never a structure.'[573] Biko speaking directly with reference to the South African context describes the situation as follows:

> The advent of the Western Culture has changed our outlook almost drastically. No more could we run our own affairs. We were required to fit in as people tolerated with great restraint in western type society. We were tolerated simply because our cheap labour is needed. Hence, we are judged in terms of standards we are not responsible for. Whenever colonisation sets in with its dominant culture it devours

[572] Ibid 216.
[573] Frantz Fanon, *Toward the African revolution* (1970) 35.

> the native culture and leaves behind a bastardised culture that can only thrive at the rate and pace allowed it by the dominant culture.[574]

These characterisations well capture the social, political and economic organisation of a colonial society from the perspective of culture; arguably in many ways it continues to characterise the situation in many post-colonial settings.[575]

The use or deployment of culture in enabling the concretization of colonial domination cannot be overestimated in as far as it contributed to giving structure, form and substance to the workings of the colonial state, its social structure and its systems of governance.[576] Through a process that Fanon termed as 'deculturation', colonialism, therefore, successfully produces enduring forms of political, social and cultural alienation between colonizer and colonized. Therefore, what should at this stage be self-evident is that as we proceed to imagine how a new liberated society might be constituted, it is crucial that the role of cultural domination be recognised as a constitutive element of colonial conquest that is no less pivotal to the retention or overturning of the colonial project as are economic, political and epistemic domination.

Accepting, as clearly intimated above that the successful entrenchment of an enduring colonial dominance depended on institutionalising the pre-eminence of European culture as well as the concomitant subordination (and co-optation) of the culture of the colonized, I argue here that it stands to reason that a project of liberation that fails to embrace the

[574] Biko op cit note 261at 51.
[575] For example, in the realm of customary law where the recognition of customary law practices has been effected through reproducing such laws in a manner that mirrors their common law analogues. See Sibanda op cit note 350, Chuma Himonga, 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' (2005) *Acta Juridica* 82.
[576] See Sibanda and Mosaka op cit note 233 and Mamdani op cit note 129.

imperative of cultural emancipation as fundamental will not achieve its stated aims. On this score Cabral is unequivocal:

> A people who free themselves from foreign domination *will not be culturally free* unless, without underestimating the importance of positive contributions from the oppressor's culture and other cultures, *they return to the upwards paths of their own cultures*. We see therefore that, if imperialist domination has the vital need to practise cultural oppression, national liberation is necessarily an *act of culture.*[577] (emphasis added)

The implications of Cabral's insights are far-reaching in as far as imagining what the demands of liberation are; that is to say, according to Cabral, one cannot talk about having attained liberation whilst living under the cultural dictates of a former oppressor. Liberation conceived of as 'an act of culture' therefore responds to an often intangible facet of colonial oppression that has with relative ease in some residual depoliticised form survived (and thrived since) the demise of formal colonialism. Here I am referring to Eurocentric cultural ascendancy that continues to manifest as imbedded or implicit in constitutional, institutional, social, legal and economic practices, symbols, rituals and modes of self-understanding that have displaced indigenous cultures to the very margins, in spite of the formal decolonisation.

Of course, it is possible to reduce the call to cultural emancipation as being tantamount to the harking back to a romanticised bygone era that has been largely desecrated or erased by colonial conquest, then more recently exoticised by the discourses of modernity and globalisation. This would be a gross misreading of what the demands of this particular dimension of liberation entail and what its proponents advocate. Cabral, for example, cannot properly be understood to propagate the view that cultural emancipation in any way suggests a return to some idyllic notions of a 'pure' pre-colonial culture.[578] Cabral,

[577] Cabral op cit note 560 at 173-4.

[578] This position must not be confused with Cabral's characterisation of liberation in his essay entitled 'The Weapon of Theory' wherein he says 'the national liberation of a people is the regaining of the historical personality of that people, its return to history through the destruction of the imperialist domination to which it was subjected.'

like other thinkers on liberation, quite readily accepts that there will be positive elements that can be drawn from colonial culture as well as the fact that the times, means of production and social priorities have shifted, therefore the key issue turns upon the terms on which such retention of elements of colonial culture occurs without compromising the (re)emergence and reimagining of indigenous cultural life.

Ahluwalia and Zegeye correctly record that Fanon, like Cabral, decries the very idea of a romantic return to some 'pure culture' as he too accepted that no such exists. In line with this position, Ahluwalia and Zegeye point out that Fanon also held the strong view that a process of decolonisation that does *not* entail some special regard to culture and history cannot deliver liberation. Ahluwalia and Zegeye, capture the rub of Fanon's thinking on this issue when they tell us that '[i]n order (for the colonised) to reclaim their history, it is not enough that the colonial power be defeated. A new consciousness that is part of the national culture is required.'[579] Therefore for Fanon, the cultural dimension of liberation was not an act of cultural resurrection or resuscitation of a 'mummified' culture,[580] rather cultural emancipation (re)presented an opportunity for the coming into being of a culture of liberation that allows for the co-existence of different cultures without one aspiring to displace, subordinate or replace the other. For Fanon, 'the two cultures can affront each other, enrich each other' and in the final analysis 'universality resides in this decision to recognize and

The important notion of 'a return to history' here speaks to the idea that for the formerly colonised to be able to justly claim to be liberated demands that they rise above their reduction to objects of history as per the designation assigned to them in narratives of conquest and become makers of their own history. So the 'return to history' is, in short, returning from the ignominy that colonial conquest assigned Africans, to becoming makers of their own destiny and in essence making their own history as they made their futures.

[579] Ahluwalia and Zegeye op cit note 262 at 458.

[580] Fanon op cit note 570 at 34.

accept the reciprocal relativism of different cultures, once the colonial status is irreversibly excluded.'[581]

6.4 Conclusion

In chapter 6 I embarked upon an elaboration of liberation as a central idea and ideal in order to explore what it entails philosophically, politically, materially and culturally as well as to account for its historical roots in anti-colonial struggles and what it sought to respond to. This will serve the purpose of not only providing a philosophical account of liberation, but also make the argument for the continuing relevance and utility of the of liberation thought as an ideological foundation for generating an alternative basis upon which a society may be imagined and ultimately constituted in ways that deliberately attend to questions of the social, the political, the material and the cultural from the perspective of the oppressed masses and not elite actors.

An underlying objective of this chapter is to raise to the surface a lingering question as to why and how the amorphous discourse of transformation displaced that of liberation at the point of achieving an inclusive non-racial democracy (led by a black majority). Could this be understood to suggest that transformational constitutional discourse is capable of being readily equated to that of liberation, if not in words then in terms of commitments? For example, if the question was put to proponents of transformative constitutionalism, would they or could they ably argue that transformative constitutionalism substantially overlaps or bears enough similarity in terms of its ideals to have rendered a continuing regard or engagement with liberation redundant? Or would said proponents argue that transformative

[581] Ibid 44.

constitutionalism is an advanced and entirely different enterprise in terms of its value propositions and commitments to that of a project of liberation, that no worthwhile comparison is warranted, justified or possible?

Proponents might, of course, put forward a myriad of more delicately or carefully framed answers of varying complexity, as ultimately individual answers will depend on many things, not least how liberation is understood and whether it is perceived of as being of any continuing relevance in how South Africa is constituted. Of Interest either way would be that the justifications proffered would serve to reveal the views of the individuals concerned regarding the perceived relevance or contribution of the liberation tradition to how we understand or frame South African constitutionalism.

In light of the discursive disjuncture I identify above, I revisit in this chapter the idea or notion of liberation in an attempt to reveal its potentialities in as far as it has political, social, economic, and cultural dimensions that are constitutive of it when it is understood as a fulsome liberatory notion. In doing so my intention is to briefly set out what is and has been at stake as revolutionaries, activists, scholars and theorists alike have imagined, reflected upon and crafted visions of liberated societies and states that transcend their colonial histories. In simple terms, what I embark upon in this chapter is to provide an exploratory account of what a fulsome liberation entails when approached with the mission of overcoming imperial domination in its many guises as colonialism, post-colonialism, neo-colonialism or coloniality and constituting imposed liberal democratic societies.

Chapter 7

Conclusion

Towards Decolonising the Constitutional Imaginary and Constituting Liberation

> It is what is imagined that posits the 'natural', that is, the normal, the fixed and unchanging. Seeming to exist in a historical forever, this is nevertheless framed by the present. To put it in another way, imagination is socially created and follows, not precedes, the structure of social relations.[582]

Writing several years ago whilst engaged in a robust but, cordial, exchange with Frank Michelman, I had occasion to express my misgivings about the emancipatory potential - in a post-colonial setting such as South-Africa - of an approach to constitutionalism premised on social liberalism – a variant of liberalism that Professor Michelman contends is the philosophical foundation of the South African Constitution.[583] Informing my misgivings was, I argued, the fact 'that social-liberalism's location within a broadly hegemonic liberal constitutionalist paradigm produces a constraining effect on our *very imagination* as to what it means to be a liberated or emancipated society beyond political freedom.'[584] At that time, informed by Jan Nederveen Pieterse and Bikhu Parekh's call for a "*decolonisation of the imagination*", what had become apparent to me was that the prevailing failure to recognise the soporific effects of constitutional transplantation and mimicry on the possibility of imagining new futures rooted in anti-colonial liberation thought were more pervasive and profound than many realise or are willing to acknowledge.

Quite simply, what I was lamenting then and continue to lament in this dissertation is what can aptly be characterised as a post-colonial constitutional crisis of imagination. At the

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[582] M O'Callaghan 'Continuities in Imagination" in J Nederveen Pieterse & B Parekh *The Decolonization of Imagination: Culture, Knowledge and Power* (1995) 22.
[583] Sibanda op cit note 528. See also Michelman op cit 149 and Sibanda op cit note 15 for further context.
[584] Sibanda op cit note 528 at 340.

heart of this crisis as is suggested in this dissertation is a failure to move beyond borrowed constitutive ideas and ideals, thus producing what in many post-colonial societies has become a perennial crisis of constitutional legitimacy as liberal democratic constitutionalism or modern constitutionalism has failed to gel with the needs and aspirations of the peoples over whom it lords. In the briefest of terms, informing my misgivings then and now is the idea that what the post-colonial era has failed to do is to live up to is Fanon's call that we must invent and we must make new discoveries' as well as 'work out new concepts' if decolonisation is to successfully lead to a state of liberation.[585]

Of course, one could well ask why the era of 'miracle' constitutionalism, which has matured into the hope-filled discourse of transformative constitutionalism does not, to my mind, constitute new imaginaries falling within the realm of new 'inventions', 'discoveries' or 'concepts'? My answer would be that on the evidence that we have before us, namely the current state of South Africa and on the basis of the historical accounts and arguments I have presented in this dissertation, what should, by now, be fairly self-evident is that although there were many changes ushered in by the deracialisation of the state, there are equally many pernicious colonial-apartheid legacies that continue to hold sway along the axes of race, gender, culture, class, economic status and social positioning. In short deep gross inequality that is the product of a particular racist history!

Therefore, despite the fact that the 'new era' of constitutionalism undeniably 'transformed' South Africa from what it was at the height of white domination and black exclusion, there remain distinct and visible lines of bifurcation within South African society that closely mirror those instantiated and constituted by the structures and systems of

[585] Fanon op cit note 557 at 254-5.

colonial apartheid. In other words, whilst South Africa's transformational conception of constitutionalism rooted in liberalism has, through synthesis occasioned by the constitutional compromise, delivered a formally non-racial, non-sexist human rights society committed to the values of equality, dignity and freedom, what it has failed to do is to put an end to the alienation that was characteristic of colonial-apartheid's social, political, economic and cultural relations. As I have sought to argue above, the ability of transformative constitutionalism to co-exist with relative comfort with the logics of bifurcation that evidence the continuation of coloniality causes me sincere doubt about the possibility of constituting liberation as long as we continue to approach the idea of constitutionalism in terms of disconnected 'universal' norms.

A core premise of this study is, therefore, that there exists in post-apartheid South Africa a stark discursive disjuncture between what has emerged as a hegemonic liberal democratic constitutional discourse and the discourse of liberation that served as the ideological pivot of anti-colonial struggles. It is this premise that has given rise to the question at the heart of this dissertation, namely why it is that liberation as a framing set of ideas has either played no part or exerted so little obvious influence on how post-apartheid South Africa self-comprehends and organises itself in constitutive terms? This question that seeks to understand how we arrive at the present moment of constitutional anxiety in an attempt to open pathways for different imagined futures has necessarily demanded a resort to critical methods, especially critically revisiting South Africa's constitute/ive/ional history.

In many ways the critical methods, approaches and engagements embarked up in this dissertation are motivated by a commitment to trying to fashion out new ways of seeing, being and relating to the past in order to be able to seek out and constitute new futures. This

I have sought to do by interacting with history in ways that on the one hand resist the idea of being imprisoned by colonial and neo-colonial historical narratives, whilst at the same time also insisting on revisiting those same histories in order to understand how they might inform how we imagine different futures.

Continuing to reflect on the importance of revisiting the historiography of South African constitutionalism, even as I conclude it is worthwhile to draw some insights from Sekyi-Otu's reading of Fanon wherein he observes that Fanon clearly rejected the notion of dwelling in or taking refuge in the past with some latent wish of recovering it. Rather, according to Sekyi-Otu as far as Fanon was concerned, freedom necessitates being open to the future and its possibilities, but this also necessitates an unequivocal critical engagement with history that properly condemns and displaces colonialism's racism and denigration of black existence. This idea gestures towards a refusal to be held captive by this past that nonetheless needs to be confronted frontally in order to be able to construct a vision of a different future, some version of a liberationist inclusive utopia.

Implicit here is the idea that in order to transcend coloniality and birth a new society the past must be engaged and then those alienating oppressive elements negated in order to invent, create and fashion a 'new society' on top of the old rather than to seek to simply ameliorate it. In brief, in order to constitute liberation, what is required is an overall commitment to the negation of that which under colonial-apartheid permitted and perpetuated superiority/inferiority; privilege/disadvantage; enrichment/impoverishment; or domination/subordination. Of course, a programme of negation will not by itself deliver liberation, however what should also be clear as I conclude this thesis is that without it the possibility of disrupting the continuities of colonial-apartheid in order to allow for there to be

space to develop new concepts, new futures and new decolonised, liberated societies is rendered unlikely.

It is clearly beyond the purview of this study to articulate the exact terms or parameters of what a constitution conducive to delivering a liberated society or a liberation conception of constitutionalism would look like; that was not my objective. Rather the central overarching objective with respect to South Africa post 1994 has been to cause us to reflect critically on questions relating to what is at stake when constituting a society, who determines this, with respect to what frames of reference do we determine the legitimacy of constitutive documents, and in whose interests are they made to operate? I have sought to do this through critically engaging with the idea of constitutionalism, colonial-apartheid constitutional histories, transformative constitutionalism and more broadly wanted to put these into conversation with liberation thought.

In particular, deploying critical methods I have sought to go against the grain as a means to liberate myself from the confining strictures of the legalistic culture of constitutional scholarship that has come to typify South African constitutional discourse with its sometimes, uncritical, privileging of the courts, litigation, adjudication and lawyering more generally when it comes to questions of giving meaning to the Constitution and constitutionalism more widely. By seeking to lay bare the many different dimensions of what constituting a society entails, I hope this dissertation contributes to a constitutional scholarship that is more open to recognising the perils of a universalising, hegemonic legalistic and normative discourse of constitutionalism. In the long run, I hope that my work contributes to a shifting of our constitutional discourse and contributes to the formulation of a new research agenda.

What is most likely the most distinctive aspect of this study is centralising an idea whose meaning, content, scope, history, theorisation we largely take for granted; constitutionalism. By focusing on this constitutionalism, critiquing and problematizing the way it is understood, its history, how it is deployed and has circulated, I have sought to interrogate the universality of the prevailing hegemonic approach to it. I have posited that the formal end of colonial-apartheid as a system in 1994 brought about a seismic shift in the country's constitutional discourse as the idea of constitutionalism took centre stage. Further, I have argued that despite the intense ideological contestations and posturing for position between the racist National Party government and the national liberation movements that culminated in a constitutional compromise, extensive deployment of the idea of constitutionalism in public and academic discourse has tended to suggest that the notion itself is uncontroversial, uncontested and subject to universal consensus as to its import, connotations and underlying assumptions. The significance, I suggest, is that the emergence of this largely uncontested notion of constitutionalism is that it has defined the parameters of the act of constituting South Africa's post-apartheid society, its constitutional discourse, and more generally the modes of political, social, economic and cultural contestation.

As a result, I have asserted that, rather than on philosophical or ideological lines, the battle lines around constitutionalism have in the main largely been confined to academic hermeneutic jurisprudential contestations about adjudicative method and determining an appropriate institutional role for the courts within a hegemonic overarching liberal democratic paradigm. The implications of this fact have, as I have sought to demonstrate, been profoundly limiting in as far as what has proven to be possible when undoing colonial-apartheids pernicious legacies are concerned. In this regard questions of around property and equality are examples explored briefly in the study.

Against this background I have sought to argue that how we approach or understand constitutionalism has implications for our conception of the function, scope, ambition and possibility of the constitution as a document that a given society holds up as a shaper of its reality and a mirror with which it sees itself. It is on the basis of this understanding that I have mounted my critique of the predominant South African conception of constitutionalism for the manner in which it has largely and uncritically established liberal democratic constitutionalism as a hegemonic paradigm and discourse without systemically interrogating its historical origins, its intellectual commitments, more generally its fitness for purpose, and hence its continuing legitimacy.

In order to avert the consequences of the conceptual confinement that I argue a hegemonic liberal conception of constitutionalism has bequeathed to South Africa. I contend that to avert its constitutive fetters we must strive to frame the idea of constitutionalism, conceptually speaking, as one that is capable of being understood outside any particular ideological frame if it is to serve some analytical purpose that helps us understand the possibility and purpose of constitutions, their role in structuring and ordering society as well as why they have become a *sine qua non* with respect to determining questions of legitimacy. Crucially, I argue, a historically sensitive, yet non-ideological understanding of constitutionalism is necessary if the work and worth of constitutions of different types and thrusts is to remain open to critique whilst also leaving space for debate concerning the possibility of constituting new forms of society or social ordering.

Another vital point of my engagement is that I reject the idea of constitutionalism being understood teleologically as the pursuit and attainment of predetermined 'universalising' norms. It should, I insist, rather be understood as expressing the decisions and choices arising out of a society's struggles to self-define, self-comprehend and self-

regulate, in other words constitute itself. I have sought to illustrate my point by providing a brief historical account of the emergence of modern constitutionalism which is rooted in the political contestations of Europe and from which emerged constitutional norms that have assumed a strangely unassuming naturalness or universal status in constitutional discourses.

Further, I have sought to illustrate that the circulation of the norms of modern constitutionalism despite their presumed 'naturalness' was the work of colonial expansion and they innocuously served the extractive and rapacious interests of empire. In so doing I have also attempted to highlight that if one is true to the historical evolution of the idea of constitutional models and forms then it is an expression of choices made by those collectively responsible for establishing a particular system or mode of constitutionalism. This I argue and demonstrate exceeds a concern only with politics and governance, but also recognises the place of matters economic and cultural in the power mapping and regulatory aspects of constitutionalism.

Ultimately, I suggest in this study that a useful working understanding of constitutionalism is one that, building on the work of Upendra Baxi's and describes it as a system, primarily of governance, that is established to, amongst other things, regulate power in its many guises, the practices surrounding the use of that power as well as mediate the space for the contestation of ideas and practices concerning justice, rights, development, and individual/associational autonomy. Implicit here is the idea that each constitution, because of its peculiar historical, social, economic, cultural and epistemic circumstances as it emerges in its own context has an identifiable constitutive or constitutional 'DNA'.

This argument that essentially drives the thesis, in sum suggests that how we approach and frame our conception of constitutionalism does indeed matter. Omitting to specify our conceptual framing of constitutionalism is problematic in that by focusing on norms and

managing institutional relations it tends to occlude any discussion as to what constituting a society entails, the contestations involved, or the nature of the competing interests at play. This is an especially crucial issue in a post-colonial setting like South Africa's where the historical questions of justice that must be addressed by way of the constitutional ordering demand clarity as to what their legitimating premises are. Therefore, I argue, by adopting a predominantly normative approach to constitutionalism which prescribes form, structure and substance from a 'universal' template, as South Africa has done, it becomes too easy to lose sight of what the specific social, economic, cultural and political imperatives were at the heart of (re)constituting.

In order not to lose sight of the specifics that the (re)constitution of South Africa needs to attend to, as well as to gain a detailed sense of what has been transformed and what has remained in a state of continuity, as discussed above, I have embarked upon a critical historiography of South African constitutionalism from the 1910 Union constitution to the present. This critical historiography was embarked upon to demonstrate that some of the current challenges faced, if not a direct product of, are profoundly influenced by, legal, structural, cultural and economic continuities rooted in the past, with race being a central axis around which South African constitutionalism has been imagined, enacted, opposed and resisted. In so doing, I have sought to show that despite the indisputable paradigmatic shift ushered in by the fall of colonial-apartheid, that shift has been unable to transform, let alone fully displace or disrupt the many continuities that remain stubbornly etched into South Africa's constitutive DNA as inherited from earlier racially exclusive and exploitative constitutional expressions.

It is against this background that the dissertation critiques the emergence and eventual ascendance of transformative constitutionalism as arguably the mainstream

conception of contemporary South African constitutionalism. At the core of the critique is a point of view that suggests that whilst claiming radical far reaching means and ends, transformative constitutionalism offers little beyond tinkering at the edges of liberal constitutionalism through its limited intellectual and programmatic horizons that focus on the courts and its jurisprudence. I also argue that proponents of transformative constitutionalism have made a rather limited contribution to enabling a (re)imagining of South African constitutionalism and its attendant political, social and cultural dynamics in more emancipatory and inclusive ways that go to any significant length to disrupt inherited distributions of power along economic, cultural and epistemic axes.

As I close, in light of the discursive disjuncture that lies at the heart of this dissertation, I conclude by making a preliminary case for beginning to think through another mode or way of framing a project of imagination that simply asks how we might (re)constitute South Africa whilst centering liberation thought. Whilst it has not been the aim of this study to construct a fully-fledged alternative conception of *liberation constitutionalism*, I hope that I have managed to expose liberation thought's constitutive potentialities through its political, philosophical, economic, and cultural dimensions that exist as the epistemic underpinnings of the visions of liberated societies and states as imagined and proposed by the likes of Steve Biko, Amilcar Cabral and Frantz Fanon amongst many others.

Finally, this dissertation may, with some justification, be accused of being overly ambitious and not being adequately focused as it has sought to make explicit the vast terrain that is necessarily of concern when one thinks about what goes into constituting of a society. Like other studies in constitutional law I could have simply focused on the relationship between colonial apartheid constitutions and the post-1994 ones and case law as I teased out the theme of continuity as I made my case. Or I could have focused simply on a critical

appraisal of the shortcomings and contradictions inherent in the constitutional discourse framed around the mercurial idea that is transformation – seemingly an idea for all seasons. However, to achieve my previously stated aims has necessitated the use of eclectic critical methods that have had as their objective making visible the current hegemonic power exerted by liberal democratic constitutionalism and its foreclosing effects on what we imagine to be possible, whilst at the same time with care and deliberateness conceptually unhinging constitutionalism. Ultimately, as I close what some might describe as a utopian, project, an evocative excerpt from Fanon's *The Wretched of the Earth* seemly entirely apposite for purposes of recalling the vision and inspiration that birthed and sustained this dissertation.

> So, comrades, let us not pay tribute to Europe by creating states, institutions, and societies which draw their inspiration from her.
>
> Humanity is waiting for something from us other than such an imitation, which would be almost an obscene caricature.
>
> If we want to turn Africa into a new Europe, and America into a new Europe, then let us leave the destiny of our countries to Europeans. They will know how to do it better than the most gifted among us.
>
> But if we want humanity to advance a step further, if we want to bring it up to a different level than that which Europe has shown it, then we must invent and we must make discoveries.
>
> If we wish to live up to our peoples' expectations, we must seek the response elsewhere than in Europe.
>
> Moreover, if we wish to reply to the expectations of the people of Europe, it is no good sending them back a reflection, even an ideal reflection, of their society and their thought with which from time to time they feel immeasurably sickened.
>
> For Europe, for ourselves, and for humanity, comrades, we must turn over a new leaf, we must work out new concepts, and try to set afoot a new man.[586]

[586] Ibid 254-5.

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