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THE INTRODUCTION OF 'COLCRIT': CRITICAL RACE THEORY WITHIN A COLOURED PERSPECTIVE SCHOLARSHIP

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Supervisor:

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DECLARATION

I declare that this dissertation is my own work and that I have not previously submitted it in whole or in part to any university for a degree.

This thesis is up to date as of February 2025.

Nicole Olivier

13 November 2025

ABSTRACT

The Critical Race Theory (CRT) project in South Africa calls for a critical analysis of prevailing perceptions and implications of belonging to a certain racial group in post-apartheid South Africa. It further calls for an examination of the ways in which the said status quo perpetuates 'relations of domination, oppression and injustice' in the present day, as articulated by Joel Modiri. The purpose of my dissertation is to argue for the further advancement in the existing CRT scholarship, that is, a layering of CRT by developing a body of scholarship pertaining to the coloured racial group in South Africa. This stance is taken in order to address the problem that the existing CRT scholarship in South Africa approaches race in essentialist terms, which mainly caters to the black African racial group, to the exclusion of the coloured group. The proposed scholarship provides critical analyses in relation to the two broad aims of CRT mentioned above, focusing on the particular features and needs of the coloured group. This entails the importation of perspective scholarship within South African CRT, defined by Martha Fineman as 'a body of scholarship that is built explicitly upon the assertion of relevant differences among people' and these 'relevant differences' will be used to inform particularised accounts and provide particularised solutions for the coloured group. The proposed scholarship will also address the problem of South African Critical Race Theory being overly theoretical, by arguing for the development of SA CRT towards a more reconstructionist approach, that is, scholarship that transcends theoretical discourse and aimed at proposing more immediately implementable solutions to the identified challenges.

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CHAPTER 1: INTRODUCTION

I. INTRODUCTION AND BACKGROUND

Critical Race Theory in South Africa (CRT in SA/SA CRT) does not account for the distinct experience of the coloured population and accordingly does not address a lot of the challenges and dire needs relevant to that group. This, according to this dissertation, is the reason for the popular lament stemming from the coloured population around the transformation agenda in SA being centered around the 'zebra debate'.[1] This speaks to conceptualising racial dynamics in SA in terms of the black African's experience compared to the white population's experience as opposed to focusing on the distinct experiences of the black African, coloured and Indian population groups within in black collective (defined below) conceptualisation. The aim of this research is therefore to investigate the existing CRT literature in South Africa and to consider the development of 'perspective scholarship'[2] and 'outsider jurisprudence'[3] in SA CRT in order to account for the context and experience of the coloured population. Joel Modiri defines CRT in South Africa as a quest, which seeks to do the following:

> to examine, from a legal perspective, the ways in which prevailing conceptions of race … perpetuate relations of domination, oppression and injustice. In South Africa, the necessity of such a critical engagement with race and law is justified by a long history of institutionalised white supremacy and white racial privilege which today coexists with ongoing (and lingering) forms of anti-black racism and racial exclusion.[4]

The CRT project, therefore, first calls for a critical analysis of prevailing perceptions and implications of belonging to a certain racial group in post-apartheid South Africa. These stem from narratives and structures, entrenched through the legal and political systems, which were perpetuated and enforced by the apartheid administration (and less formally, prior to the apartheid dispensation). CRT secondly calls for an examination of the ways in which the said

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[1] See, for example, contribution by Ronald Dyers of Kullid Foundation on the 'Big Debate on Racism: Has the Rainbow Nation Project Failed in South Africa', available at: https://www.youtube.com/watch?v=jpLFdtSNwpU, accessed on 13 November 2024.
[2] Martha Albertson Fineman *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (1995) p 11 - 12.
[3] Mari Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *MICH. L. REV.* 2320 at 2324.
[4] Joel M Modiri 'The colour of law, power and knowledge: Introducing Critical Race Theory in (Post) Apartheid South Africa (2012) *SAJHR* 405 at 405.

status quo perpetuates 'relations of domination, oppression and injustice'[5], from a legal perspective, in the present day.

CRT in South Africa has largely been explored within the 'Biko black' conception of race, which includes all racial groups designated as 'non-white' under the colonial and apartheid regimes, thus including the 'native' (later referred to as 'bantu' and/or 'black'), 'coloured' and 'Asian'/'Indian' racial groups. It uses the said 'Biko black' conception in an attempt to advance the transformative aims of CRT in favour of all previously disadvantaged subjects in one, unified scholarship. This approach, however, is ineffective as the scholarship tends to generalise the 'Biko black' experience under the black African experience and neglects the experience of the other groups, particularly the coloured racial group for our purposes. Certain features and challenges of the coloured population are entirely distinct from the black African group and thus calls for a subset of the CRT scholarship dedicated to the coloured experience. Naturally certain features and challenges overlap between different racial groups and these would be highlighted in the proposed scholarship. South African CRT further generally appears to argue for a rather complex, yet comprehensive theoretical framework in which CRT should be imported in the South African legal and political landscape. The dissertation examines these bounds of South African CRT as it stands in order to identify and address the gaps within the scholarship.

II. DEFINITIONS

The aforementioned transformative aim/project of CRT, which is referred to throughout this dissertation(also generally referred to as 'transformation' or 'the revolution'), ought to be understood as the aspiration towards a state of 'disenchantment'[6], which entails an acknowledgement that a democratic dispensation and the allocation of rights are not enough to effect substantive equality, but that a more critical approach is needed in order to truly transform society. This would further call for approaches which directly address the pervasiveness of South Africa's past inequality at present day.

[5] Ibid.
[6] Francisco Valdes 'Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities' (1996) *La Raza L.J.* 1 at 6.

The phrase 'coloured identity' in this dissertation refers to the qualities that distinguish the coloured group from others[7] and is used interchangeably with 'the coloured group/population/community'.

The term 'Biko black' is used to refer to the black African[8], coloured and Indian racial groups and is used especially when exploring SA CRT scholarship. It is used interchangeably with 'the black collective'. This is not meant to diminish Biko's progressive goals attached to this term. On the contrary, this dissertation aligns itself with many of the Black Consciousness Movement's tenets and it approaches the Movement with reverence. This term is simply used for pragmatism and ease of understanding as this is a widely used colloquial term.

'Black African' is used to refer to the population group previously referred to as 'native' or 'bantu'.

III. PROBLEM AND PURPOSE STATEMENT

The problem that the dissertation investigates is the underdevelopment of CRT in post-apartheid South Africa in two ways, that is:

(i) The lack of comprehensive, particularised scholarship on the different groups within the 'Biko black' conception; and
(ii) The stagnation of CRT scholarship within the theoretical realm.

The purpose of the dissertation would therefore be to argue for a further advancement in the existing CRT scholarship, that is, a layering of CRT by developing bodies of scholarship pertaining to the different racial groups in the 'non-white' categories. These would provide the critical analyses (in relation to the two broad aims of CRT mentioned above) focusing on the particular features and needs of each racial group.

[7] Cambridge Dictionary definition of 'identity' available at https://dictionary.cambridge.org/dictionary/english/identity#google_vignette, accessed on 13 January 2025.

[8] As used in South African censuses.

This entails the importation of, inter alia, perspective scholarship within South African CRT, defined by Martha Fineman as 'a body of scholarship that is built explicitly upon the assertion of relevant differences among people…'[9] and these 'relevant differences' are used to inform particularised accounts and provide particularised solutions to each racial group within the purview of the law.

The dissertation then starts the project of compiling a particular section of the abovementioned layered body of scholarship, pertaining to the coloured racial group's experiences and features. It provides accounts of the features and formation of the coloured racial identity and experience from a historical and present-day perspective. These accounts are further distilled into comprehensive thematic analyses for easy access, understanding and application. These analyses seek to satisfy the aims of CRT by providing the aforementioned critical analysis of the (overt and covert) realities of belonging to the coloured racial group, and an examination of the ways in which they 'perpetuate relations of domination, oppression and injustice'.[10] Finally, the dissertation explores whether and how the development of such comprehensive accounts for each 'non-white' racial group (with a focus on the coloured racial group again) might be taken from the theoretical to the practical realm and might have a transformative impact on legislation development and reform, as well as on the manner in which cases in South Africa are adjudicated. This dissertation aligns itself with a unified approach to the transformative ends of CRT and does not wish to feed into the divide-and-rule tactics which, amongst other things, informed the allocation of the different racial categories under the apartheid regime. This means the proposed Coloured CRT scholarship is intended to work in alliance with the overall CRT scholarship and is simply a manifestation of the anti-essentialist and intersectional approach being proposed by the dissertation.

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[9] Fineman op cit note 2 at 12.

[10] Modiri op cit note 4.

IV. RESEARCH OBJECTIVES AND RESEARCH QUESTIONS

The research objectives of the dissertation are to analyse the scope of the existing CRT scholarship in South Africa; to explore and establish the gap (which according to my current research and analysis would be the lack of comprehensive scholarship around each 'non-white' race group, particularly the coloured and Indian racial groups); to begin the process of developing such a scholarship with a focus on the coloured racial group and to demonstrate the impact that such a scholarship would have on the legal/justice system.

The specific research questions answered with the view to solving the research problem identified in this chapter are the following:

(i) What are the nature, scope and aims of CRT?

(ii) What are the nature, scope and aims of South African CRT as it stands?

(iii) How can South African CRT be developed to better reflect the diversity of race with a focus on the coloured racial group?

(iv) How would one define and characterise the coloured racial group?

(v) What would a particularised Coloured CRT look like?

(vi) How can we use the said Coloured CRT in practice?

V. METHODOLOGY

This dissertation uses the critical perspective paradigm of research, which describes reality as a social construct that is constantly being influenced. This paradigm takes the position that, in order to understand reality, one needs to dissect societal constructs and power relations.[11] This approach accordingly leads to critical analyses of the status quo to uncover the elements and dynamics which influence reality/the status quo in different ways. The dissertation seeks to assess the manner in which race, as constructed theoretically and historically in South Africa, has affected the differential treatment which the racial groups experience in South Africa in the present day.

[11] Jabreel Asghar 'Critical Paradigm: A Preamble for Novice Researchers' (2013) 10(4) *Life Science Journal* 3121.

The method which I have employed was largely qualitative, desktop research, that is, the collection and study of non-numerical data, which I obtained from existing sources such as books, articles, case law, legislation and theses. I also used quantitative, desktop research in chapter five of my dissertation in collecting and synthesising existing statistics on the coloured population in my endeavour to identify the key and pressing features and needs of the coloured population at present.

The research is conceptual in that it considers and analyses existing information on CRT (generally and in South Africa) in order to delineate its own CRT framing and positioning. It further traverses the different conceptual frameworks which are imported and tailored to the proposed legal scholarship.

It is normative in so far as it assesses the value of CRT and its different tenets as well as its relevance and practicability in the South African context. It also assesses the value of importing perspective scholarship into South African CRT.

It is doctrinal in part, in so far as it examines legislation and case law in assessing the treatment of the black collective racial groups prior to democracy. Moreover, in that it examines the presence and application of certain laws in the present day in assessing the potential for legislative formation and reform as well as the judiciary's decision-making in cases involving coloured parties.

Finally, it is practical in the latter sections in that it illustrates the ways in which the proposed Coloured CRT may have a practical influence in law by informing the legislature and judiciary's consciousness in formulating and reforming legislation and in deciding cases.

VI. CHAPTER OUTLINE

(a) *Chapter Two: Exploration of Critical Race Theory Developed in the United States*

Chapter two addresses the first research question of this dissertation by outlining the nature, scope and aims of CRT generally, that is, from scholarship developed in the United States of America (the US). This forms an introduction to the exploration of CRT and delineates the parts of the general scholarship with which the proposed Coloured CRT (to be coined 'ColCrit') aligns itself and adopts as part of its own theoretical basis, as outlined in chapter six. This chapter further sets the context for the comparison of US CRT to SA CRT in this dissertation's

endeavour to identify the gaps within SA CRT.

(b) Chapter Three: The Development of South African Critical Race Theory

Chapter three addresses the second research question by providing a critical analysis of South African CRT, as it stands, and considers the extent of its development until the present moment. This chapter outlines the direct and indirect contributions made by scholars towards the CRT scholarship in South Africa and the different arguments and debates levelled around the topic. This acts as a springboard for the exploration of its further development, particularly the introduction of perspective scholarship and outsider jurisprudence, as coined by Fineman and Mari Matsuda. This chapter further provides the context for ColCrit's positions on contemporary SA CRT debates.

(c) Chapter Four: Formation and Features of the Coloured Racial Identity, from a Historical Perspective

In developing a comprehensive CRT scholarship from the perspective of the coloured racial group, it is important to outline the formation of the coloured racial identity (and factors influencing such formation) before and during the apartheid era. Important too is the history of the different sub-categories of ethnicities, which were designated to the coloured racial group under apartheid, such as the Khoisan, Griqua and Cape Malay ethnic groups, in order to encapsulate the diversity of the group.

In addition, historical themes such as population size as compared to other racial groups, political and economic power, forced removals, association with whiteness and blackness, assimilationist views and political activity amongst the coloured population are all significant.

Chapter four therefore speaks to the fourth research question, which relates to the definition and characterisation of the coloured racial group by exploring the formation and features of the group from a historical perspective in the abovementioned ways. This serves the purpose of, first, providing a background to the coloured population's present-day challenges in need of addressing and, secondly, justifying the need for a distinct Coloured CRT.

(d) Chapter Five: Features of the Coloured Racial Group in the Present-Day

Chapter five speaks to the fourth research question from a present-day perspective by outlining the challenges faced by the coloured racial group in the present day, many of which stem from the historical formation and features of the coloured population identified in chapter four. It

provides an analysis of the features which rationally remain intact despite the passage of time and transition to democracy, such as the coloured population's association with whiteness and blackness and their assimilationist views/aspirations.

In addition, the chapter presents factual and statistical information regarding the present-day features of the coloured population, such as, inter alia, incarceration rates, gang activity and unemployment rates, in order to demonstrate the contemporary issues facing the coloured population, which are in dire need of addressing. Like with chapter four, the data in chapter five are presented with a view to further justifying the need for a distinct Coloured CRT. This chapter further illustrates the kind of scholarship to be developed under ColCrit which would enable the creation of targeted solutions to the challenges faced by the coloured population.

(e) Chapter Six: The Theoretical Basis of ColCrit

Chapter six answers the third research question as to how South African CRT can be developed to better reflect the diversity of race, by developing the idea that there is a need to import perspective scholarship into the South African CRT space. This scholarship goes hand-in-hand with 'outsider jurisprudence' as coined by Matsuda. As introduced in the 'Introduction and Background' section of this chapter, perspective scholarship denotes 'a body of scholarship that is built explicitly upon the assertion of relevant differences among people'.[12]

Further outsider jurisprudence would call for the attainment of the outsiders'/marginalised groups' specific needs in formulating a scholarship geared towards their aid and empowerment. These scholarships are necessary in South Africa, given the imposition of the different racial classifications under the apartheid regime and the different lived experiences, restrictions and general treatment applied to each racial group. This is because differential treatment under apartheid has naturally led to different features and needs amongst the racial groups, which require specialised and particularised redress today.

[12] Fineman op cit note 2 at 12.

Chapter six further begins to effect one of the key endeavours of the dissertation, that is, the development of a comprehensive body of scholarship from the perspective of the coloured population. This chapter thus addresses the fifth research question as to what a particularised Coloured CRT would look like, by outlining ColCrit's core themes and stances. This chapter further addresses the research problem identified by this dissertation surrounding SA CRT's failure to move beyond the theoretical realm by uncovering why this is the case and suggesting an alternative in order to take SA CRT into the practical realm of enabling more immediately implementable solutions.

(f) Chapter Seven: Piercing the Judicial Consciousness and Informing Policy Formation, Reform and Community Interventions

Chapter seven answers the final research question as to how ColCrit may be used in practice. ColCrit may have a role in piercing the judicial consciousness when deciding and passing obiter dicta in cases which involve coloured people. This chapter provides examples of cases with which ColCrit is aligned for several reasons. These cases also illustrate the kind of considerations ColCrit seeks to inspire.

Chapter seven secondly makes recommendations on policy formation, reform and community interventions to address the challenges faced by the coloured population as identified in chapter five, as an illustration of the kind of solutions to be devised as part of the proposed ColCrit.

CHAPTER 2: CRITICAL RACE THEORY IN THE UNITED STATES

I. INTRODUCTION

Critical Race Theory (CRT) was born in the 1970s when a group of legal practitioners, activists and academics in the United Stated of America (The US) came to the realisation that the progress made by the Civil Rights Movement in the 1960s had not only reached a halt, but was being undone.[1] These critical race theorists, accordingly, arranged workshops, conferences and meetings to address the more nuanced forms of racism experienced by minorities and to develop fresh theories and strategies to address the contemporary experiences of racism. And so CRT was born and enthusiastically developed over time. This chapter addresses the first research question of this dissertation, which asks what the nature, scope and aims of CRT are. It is, therefore, fitting to explore CRT as developed in the US as the country of origin for CRT.

This chapter provides a brief outline of the broad themes of the now extensively developed CRT scholarship, the different arguments advanced within those themes, the internal critique which led to further developments of the theory as well as the general critiques levelled against the theory. The purpose of this chapter is, first, to explore such themes and critique in order to identify a well-considered, comprehensive theoretical framework for the proposed Coloured Critical Race Theory (ColCrit). Secondly, to set the context for the comparison of US CRT to South Africa's existing CRT scholarship with a view to identify potential for development of the South African CRT, which feeds into the third research question of this dissertation which relates to how South African CRT can be developed to better reflect the diversity of race with a focus on the coloured racial group.

II. THEMES OF CRITICAL RACE THEORY

This section presents three major themes of US CRT, as condensed from the exploration of the theory's subject-matter. The first identified theme is race being the central category of analysis of the theory; the second being the call to ground law and rights in marginalised communities' lived experiences; and the final theme speaks to the law and legal system's ability to effect racial justice and equality, as a fundamental aim of CRT. Each theme has several sub-themes to demonstrate the kind of thinking and arguments advanced therein.

[1] Richard Delgado & Jean Stefancic *Critical Race Theory: An Introduction* 4 ed (2023) 4.

(a) Race as the Central Category of Analysis

Race is treated as the central category of analysis in Critical Race Theory. This means that the concept of race and the role it plays in creating and maintaining societal norms and systems is a key point of study within the theory. A further aspect of this study is how race ought to be conceptualised and approached in order to reach the ends of CRT. In CRT scholarship, race is generally seen as a social construct as opposed to a trait with inherent meaning and/or consequences.[2] Jayne Chong-Soo Lee, for example, argues against the essentialisation of race and instead describes it as a concept which has no fixed meaning and which meaning changes with social context.[3] She further argues for an introduction of 'progressive, anti-racist' understandings of race as opposed to its abolition, as this conception may be used as a 'useful tool in the struggle against racism'.[4] This is the conception of race to be assumed in the proposed ColCrit theory. This theme has two subsections, that is, the different approaches to the conceptualisation of racism and the need to introduce racism in philosophy.

(i) Idealism, Racial Realism and Material Determinism

This sub-theme (to be used interchangeably with 'sub-section') pertains to conceptualising what racism is, how it came about, and its impact. A generally accepted starting point and foundational principle of CRT regarding the conception of racism, that is applicable to all frameworks mentioned in this subsection, is the understanding that racism is such an entrenched and normalised system that, before theories such as CRT were formulated, it was neither problematised nor acknowledged as a serious issue in need of addressing.[5] This made it exceedingly difficult to cure.

There are said to be three different ideological frameworks which divide CRT thinkers. The first being idealism. Idealists take the position that 'racism and discrimination are matters of thinking, mental categorization, attitude, and discourse'.[6] They further hold that race is a social construct, as opposed to a biological fact, and that we can annul the said construct and reduce its effects by supplanting the system of 'images, words, attitudes, unconscious feelings, scripts, and

[2] Ibid at 9.

[3] Jayne Chong-Soon Lee 'Navigating the Topology of Race' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 447.

[4] Ibid.

[5] Delgado & Stefancic op cit note 1 at 8.

[6] Ibid at 20.

social teachings'[7] whereby we convey certain conceptions about people who are assigned particular racial categories.

The second framework is racial realism and it asserts that racism transcends the idealist conception thereof. That is, racism 'is a means by which society allocates privilege and status' and that 'racial hierarchies determine who gets tangible benefits' in society.[8] Realists hold that racism originated in the era of slavery and from capitalism's need for labour.

The third framework is material determinism/interest convergence. This school of thought holds that racial relations are determined by the prevailing social, political and economic conditions at different times in history.[9] This thinking further asserts that in the US 'civil rights gains for communities of colour coincide with the dictates of white self-interest'[10], and that both racial progress and regression are determined by the interests and aspirations of the white population. Finally, changing circumstances made it possible for one group 'to seize advantage or to exploit another' and after having done so, the seizing group would 'form appropriate collective attitudes to rationalize what was done'.[11] This rationalisation resulted in the demonisation of the exploited subjects.[12] ColCrit aligns itself with the material determinist conception of racism, which also coincides with the South African Black Consciousness Movement's conception of the rationale behind racism in South Africa. This will be expanded into chapter three.

(ii) Race in Philosophy The Recognition of White Supremacy as An Entrenched System

Charles Mills advocates for the recognition of the centrality of race and of white supremacy as an entrenched system in analysing the status quo. He describes philosophy as notably 'resistant' to such '"multiculturalist" revisions' as 'the very nature of the discipline seems to some practitioners to preclude such innovation: by virtue of its abstractness, philosophy supposedly

[7] Ibid at 21.
[8] Ibid.
[9] Ibid.
[10] Ibid at 22.
[11] Ibid at 21 and 22.
[12] Ibid at 21.

already generally encompasses the human condition'.[13] The writings of well-known 'Euro-American authors' are treated as 'canonical…raceless and universal' and where race is discussed it is drastically confined to particular debates, such as affirmative action.[14] He goes on to state that:

> a recognition of the centrality of race in the encounter between Europe and the non-European world, and its social, economic, political, moral, and intellectual ramifications for both, may be…revolutionary in its implications for rethinking.[15]

The appropriate pathway, according to Mills, is to candidly address the historical construction of race and what the social implications of that construction were and still are. He argues that European expansionism brought race into existence, with the fundamental distinction being made between 'whites' and 'nonwhites'. White people 'have generally had a civil, moral, and juridical standing that has lifted them above the other "races"'.[16] Further, those termed 'nonwhite' have been the object of the white population's expansionist endeavours and this has led to a systemic separation along racial lines. He further asserts that the social dynamics and historical context of the concept of race ought to be recognised to understand its significance. This framework describes race as:

> a pervasive social construction, [and acknowledges] a set of positions in a global structure, for which race will be an assigned category that influences the socialisation one receives, the life-world in which one moves, the experiences one has, the worldview one develops…[17]

Moreover, without this recognition and consciousness in developing the scholarship of philosophy and without acknowledging how race impacts personhood, scholars would implicitly be positioning the persons they describe in their scholarship as 'white persons, culturally and cognitively European, racially privileged members of the West'.[18]

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[13] Charles Mills *Blackness Visible: Essays on Philosophy and Race* (1998) at xii. Although Charles Mills is not formally considered to be a critical race theorist, the content of his work cited in this chapter relates to CRT-based arguments and is thus explored as such.

[14] Ibid.

[15] Ibid at xiii.

[16] Ibid at xiv.

[17] Ibid.

[18] Ibid.

A further key aspect of CRT is the recognition of white supremacy as a system, which keeps the current world order intact. Mills, for one, vehemently affirms the centrality of race in maintaining power relations, which feeds into his argument for the revision of philosophy to consider race. In his book, *The Racial Contract,* he asserts the undeniable existence of white supremacy, he argues that white supremacy ought to be understood and taught as a political system in its own right and that it can be theorised as being the outcome of a contract entered into between white people. He states that the purpose of this racial contract is 'always the privileging of the whites as a group with respect to the nonwhites as a group, the exploitation of their bodies, land, and resources, and the denial of equal socio-economic opportunities to them'.[19] It is this kind of honesty that is required to rethink and reconstruct the existing system.

In sum, Mills argues that 'racial domination should be seen as a kind of political system, whose workings need to be recognized and theorized if normative political theory is to be guided properly'.[20] He argues for the examination and transformation of 'white moral consciousness' in order to effect 'progressive social change in respect to race'.[21] Finally, he argues that if 'blacks will ever be included on fully equal terms in the polities created by the West in the "New World" the issue of race must be honestly faced rather than evaded'[22].

This dissertation aligns itself with the above arguments and affirms that white supremacy ought to be acknowledged as an existing, intentional system and that race ought to recognised as central to the creation and maintenance of the current world order. It further supports the proposition that philosophical scholarship ought to consider race, as this would give life to the recognition of race in the construction of (past and present) reality, human existence and human experience.[23] Finally, it affirms that only once such a radical honesty is adopted can the revolution truly begin.

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[19] Charles Mills *The Racial Contract* (1997) 11.
[20] Mills op cit note 13 at xvii.
[21] Ibid.
[22] Ibid.
[23] Encyclopedia Britannica 'Philosophy' 4 July 2023, available at *https://www.britannica.com/topic/philosophy,* accessed on 24 October 2023.

(b) Grounding Law and Rights in Black Communities' Lived Experiences

The next theme of CRT is that of race consciousness, which Gary Peller defines as understanding racial justice in terms of 'the relations of distinct, historically defined communities'[24] and thus focusing on those distinct (racial) communities, their historical formation, and their present-day features and needs in devising a plan to effect racial justice. In this regard, Charles Mills argued for 'making the black experience…visible, in part through attempting to remove the conceptual and theoretical cataracts on the white eye'.[25] He further argued for the development and defence of a '"black" epistemology'.[26] These arguments are explored in this section – making the black experience seen and heard in the legal and (legal) academic sectors, which have largely been dominated by white outlooks and voices.

(iii)Early Criticism of Integrationist Aspirations

An early manifestation of the need to centre the experiences of black communities can be seen in criticism of the *Brown v Board of Education*[27] case. According to Derrick Bell, *Brown v Board of Education* set in motion the racial integration of American schools – which not only legalised access by African Americans to white schools but provided the assurance that once African Americans gained access to the schools, they would receive schooling alongside white Americans in those schools. The understanding was that this would ensure equal education in the sense that white and African Americans would receive the 'same education'[28]. However, in advocating for this approach and focusing on the ideal of integration, Brown's legal representation did not consider the unencumbered interests of the African American community. Instead, they considered those interests in relation to white American standards. Bell accordingly argues that this approach resulted in a missed opportunity of attaining real redress in the form of securing quality education tailored for African Americans, as opposed to what was achieved, which was the application of the white schools' syllabus to African American communities, with

[24] Gary Peller 'Race-Consciousness' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 150.

[25] Mills op cit note 13 at xvi.

[26] Ibid.

[27] *Brown v Board of Education of Topeka* 1954 (347) U.S. 483 (Supreme Court of the United States).

[28] Derrick A. Bell, Jr. 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 7.

little to no consideration of the content and quality of that education nor the appropriateness of such education for black communities and their needs.[29]

This subsection has demonstrated that, as an early and lasting tenet of CRT, race-consciousness - when pursuing redress and advancements for specific racial groups - means that one should focus on the specific needs of those groups without reference to white standards and without the (perhaps unconscious) assumption that white standards are something to which black communities should aspire. This will certainly be a theme of the proposed ColCrit and will be expanded on in chapter six.

(iv) Critical Race Theory and Critical Legal Studies

A further demonstration of the call to centre black experience in legal academia specifically took place within the Critical Legal Studies (CLS) movement. The CLS movement was founded in 1976 and refers to a group of legal students, teachers and practitioners informally defined as 'leftist intellectuals and activists'.[30] Finding themselves, their needs and interests to be on the fringes of an ostensibly radical group, CRT scholars argued that members of the CLS movement had engaged in 'exclusionary and exploitative conduct with respect to minority scholars'.[31] Although minority scholars, i.e., scholars of colour were called to engage and contribute to the scholarship, that scholarship did not reflect the diversity of the scholars of colour. Accordingly, several critical race theorists (used interchangeably with critical race scholars) called for scholars of colour and white critical legal scholars to work together to strengthen the CLS movement through the importation of the perspectives of those who have experienced the 'falsity of the liberal promise',[32] namely scholars and communities of colour. This denotes the importation of cultural pluralism in legal scholarship, in order to effect a race-conscious approach to such scholarship. This is in alignment with ColCrit's overall philosophy, as outlined in chapter six.

[29] Derrick A. Bell, Jr. 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 5.

[30] Crenshaw, Gotanda & Peller op cit note 3 at 60.

[31] Harlton Dalton 'The Clouded Prism' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 60.

[32] Mari Matsuda 'Looking to the bottom: Critical Legal Studies and Reparations' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 63.

CLS, like CRT itself, has been subject to critique from predominantly black feminist scholars (or femcrits) for its failure to 'move beyond critique to reconstruction'.[33] These critiques suggest that the scholarship ought to include the perspectives of the subjects of oppression both in understanding its form and limits, and in ensuring that the lived experiences of the said subjects may drive the move towards reconstruction.[34] This is a key argument of this dissertation, i.e., that South African CRT scholarship ought to move from critique to advocating for more immediately applicable solutions to the challenges identified. This is expanded on in chapters three and six.

(v) Introducing an Oppositional Voice

Many critical race scholars subsequently took up the idea of introducing an oppositional voice to mainstream scholarship on 'legal and social analysis'.[35] For example, John Calmore argues that critical race scholarship provides 'an oppositional expression that challenges oppression'.[36] For Calmore, oppression is constituted by a lack of viable integration within the US's 'structures of opportunity, power and privilege', as well as forms of 'cultural silencing and invasion, exploitation, structured containment and expendability, and the dominant imposition of a prescribed reality'.[37] In challenging this kind of oppression, Calmore argues that critical race theorists aim to 'undermine dominant, context-setting assumptions and truths' which inform a reality based on the 'white experience and judgment'[38]. Critical race theorists thus reject paradigms informed by such white experience and judgment, against which people of colour are measured. Instead, they present alternative definitions of reality rooted in the 'true existential life' of people of colour, thus advocating for the representation of the different 'experiences, insights and views' held by communities of colour within the law and in redefining reality.[39] In

[33] Anthony Cook 'The Reconstructive Theology of Dr. Martin Luther King, Jr.' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 60.

[34] See Kimberlé Crenshaw 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 119 and Patricia J. Williams 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' in Richard & Jean Stefancic (eds) *Critical Race Theory: The Cutting Edge* 3 ed (2013) 97.

[35] Crenshaw, Gotanda & Peller op cit note 3 at 314.

[36] John O. Calmore 'Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 326.

[37] Ibid at 327.

[38] Ibid at 326.

[39] Ibid at 321.

articulating this true existential life, critical race theorists intentionally foreground the 'outside-Other marginality' of people of colour in order to advance 'advantageous perspective building, intellectual presentment, ideological commitment, and concrete advocacy on behalf of those oppressed by virtue of race and…other interlocking factors'.[40] Finally, Calmore passionately advocates for the representation of the voices of people of colour who can present the 'needs and aspirations' of the community in developing legal doctrine.[41]

Other scholars have focused on legal education, for example, Taunya Banks and Charles Lawrence have both explored the importation of a distinctive voice (representing people of colour) in legal teaching. Banks advocates for more diverse academic staff in order to provide students with the perspectives held by teachers from different backgrounds – specifically perspectives of under-represented groups and consequently, perspectives not represented in the syllabi taught at law schools.[42]

Lawrence encourages black scholars to use their dual consciousness, that is, their awareness of who they are with and without racist and oppressive social constructions of their identity, to enrich their practice of 'the Word', which he defines as, inter alia, a 'struggle against dehumanisation' and a quest of 'raising questions about reasons for oppression'.[43] He further encourages black scholars to employ African-inspired story-telling in articulating the perspective of black people in America so as to expose the 'limitations and distortions of narrowly constructed traditional legal analysis'.[44] This is a particular method of providing the perspective of minorities and/or excluded groups, that is, through storytelling and counter-storytelling, (stories which counter the majority and/or popular version of particular events). These stories and counter-stories are particularly intended to counter narratives which exist in the public sphere and generally in the minds of the dominant group.[45] This refers to the

[40] Ibid at 326.
[41] Ibid at 327.
[42] Taunya Lovell 'Two Life Stories: Reflections of One Black Woman Law Professor' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 329.
[43] Charles Lawrence 'The Word and the River: Pedagogy as Scholarship as Struggle' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 336.
[44] Ibid at 344.
[45] Richard Delgado 'Storytelling for Oppositionists and Others: A Pleas for Narrative' in Richard Delgado & Jean Stefancic (eds) *Critical Race Theory: The Cutting Edge* 3 ed (2013) 71.

storytelling/narrative technique employed by CRT scholars. This technique is revisited in section IV(a)(ii) of this chapter in order to outline critique levelled against it and to outline its role and relevance for the proposed ColCrit. The problem with the narratives held by the dominant group, who make up majority of the legal fraternity, is that they often form the knowledge-base (or lack thereof) about the lives of minority and subjugated populations which further inform relevant legal instruments and practices, such as lawmaking and judicial decision-making.

(vi) Revisionist History

The fourth sub-theme is that of advancing a revisionist history, which 'reexamines America's historical record, replacing comforting majoritarian interpretations of events with ones that square more accurately with minorities' experiences' and 'offers evidence…to support those new interpretations'.[46] This speaks to importing a cultural pluralist approach in analysing and potentially rewriting a country's historical archive to allow it to reflect the perspectives of all sections of society. The storytelling/narrative method is relevant here as well, as it is a method which facilitates the telling of historical events from the vantage point of minority and subjugated groups. This would allow for a more balanced recording of history from various perspectives. It would also make it apparent that history writing is not inherently objective and that history-writers (like all humans) hold certain worldviews, biases and prejudices that inevitably influence their presentation and positioning of historical events. This may result in a necessary, healthy questioning when reading historical material. Balanced historical recording would also allow for more effective, targeted redress for historical wrongs and would provide more accurate context in addressing contemporary issues. This is taken up as a fundamental underpinning of ColCrit, as outlined in chapter six.

(vii) Critique of Legal Liberalism

The final sub-theme is the critique of legal liberalism. Liberalism is defined as:

> a political and economic doctrine that emphasizes individual autonomy, equality of opportunity, and the protection of individual rights (primarily to life, liberty, and property), originally against the state and later against both the state and private economic actors, including businesses.[47]

[46] Delgado & Stefancic op cit note 1 at 24.

[47] Harry K Girvetz, Kenneth Minogue, Terence Ball and Richard Dagger 'Liberalism' *Encyclopedia Britannica* 14 September 2023, available at https://www.britannica.com/topic/liberalism, accessed on 25 October 2023.

Liberalism is generally accepted as a doctrine associated with a willingness to 'experiment with large-scale social change to further their project of protecting and enhancing individual freedom'.[48] However, critical race scholars have been critical of legal liberal arguments, despite its apparent commitment to social change, particularly the arguments in favour of colour-blindness, which has the effect of disregarding race and context in devising plans for aid and redress. Critical race scholars have also been skeptical of the value of rights, as conceived and effected by liberals, in advancing racial transformation. These critiques, which are expanded on in the following paragraphs, once again illustrate critical race scholars' push to ground law and rights within a race-conscious and cultural pluralist framework.

Critical race scholars are said to be 'dissatisfied with liberalism as a framework for addressing America's legal problems'.[49] Specific mention is made of the principles of colour-blindness, neutrality of constitutional law, equal treatment of all individuals despite distinct histories and present realities[50], i.e., formal equality as opposed to substantive equality, as explored in chapter three. These principles are further expanded on by explaining that colour-blindness can have merit when it, for example, prevents government officials from subscribing to common stereotypes in performing their duties. However, critical race scholars argue that colour-blindness can be detrimental where it prevents accounting for difference with the intent of providing aid or redress in certain situations. Finally, critical race scholars argue that colour-blindness 'will allow us to redress only extremely egregious racial harms, ones that everyone would notice and condemn'.[51] However 'if racism is embedded in our thought processes and social structures as deeply as many crits [i.e., critical race theorists] believe, then the "ordinary business" of society – the routines, practices, and institutions that we rely on to do the world's work – will keep minorities in subordinate positions'.[52] According to critical race scholars only 'aggressive colour-conscious efforts' to change the current status quo will be effective in ameliorating the 'misery' of racism.[53] This theme is one which will certainly underpin the

[48] Ibid.
[49] Delgado & Stefancic op cit note 1 at 26.
[50] Ibid.
[51] Ibid at 27.
[52] Ibid.
[53] Ibid.

proposed ColCrit and is one, which SA has been intentional about, for example, through the implementation of extensive affirmative action strategies.

Critical race scholars are also skeptical of the value of rights, which is a cornerstone of liberalism. They hold that in the US system 'rights are almost always procedural…rather than substantive' and that the 'system applauds affording everyone equality of opportunity but resists programs that assure equality of results, such as affirmative action at an elite college or university'.[54] Moreover, critical race theorists hold that rights are more often than not disregarded when they encroach on the interests of those in power and that rights are 'alienating' – separating people, 'rather than encouraging them to form close, respectful communities'.[55] Even with certain landmark and transformative decisions, such as the *Brown v Board of Education* case, it is said that 'the breakthrough [with regards to civil rights] is quietly cut back by narrow interpretation, administrative obstruction or delay'.[56]

Chapter three addresses South African critical race theorists' arguments around the value, potential and effectiveness of rights in the South African context and chapter three indicates ColCrit's stance on the ability of rights in advancing the transformative agenda of CRT.

Liberalism was said to be the greatest obstacle to racial progression, until it was replaced by blatant conservatism around the time that this dissertation was written. Critical race scholars in the US thus shifted their focus to address this conservative tide, which ultimately 'softened' the movement in so far as its discourse was restricted to addressing such conservative arguments.[57]

(c) The Law and Legal System's Ability to Effect Racial Equality and Justice

The third major tenet of CRT speaks to the ability of law and policy to address racism and advance the aims of CRT. Pursuant to this kind of enquiry, critical race scholars have explored ideas of equality, legal definitions and the ability of the US legal system to address racism.

[54] Ibid.
[55] Ibid at 30.
[56] Ibid.
[57] Ibid.

(viii) The Law's Ability to Effect Meaningful Equality

Several scholars have interrogated whether the law can be a vehicle for the attainment of 'meaningful equality' - many have concluded that such equality cannot be obtained through the law alone and that only formal equality can be obtained through the vehicle of the law.[58] Derrick Bell, particularly, has argued that the African American community should no longer idealise the prospect of integration and 'equality under law'.[59] Rather, that the community ought to adopt a realistic, 'hard-eyed' view of racism and their subordinate role in that system.[60] Bell further holds that such a view would inspire strategies to bring about true change and betterment without constraints of aspiring towards integration and the white community's status.

(ix) The Law's Ability to Capture Marginalised Communities' Needs and Experiences

Gerald Torres and Kathryn Milun illustrate the dissonance between legal definitions and Native Americans' definition of a social group, organisation or tribe by examining a specific land claim laid by an Indian tribe in the US. This and cases like it highlight the varied systems of meaning applied by different groups of people, particularly the difference in such systems of meaning applied by ethnic groups versus the legal fraternity. Torres and Milun particularly show the difference in systems of meaning between the Indian ethnic group in the US and the US legal system, and how indispensable context is lost when attempting to translate the Indian language to make it intelligible for English speaking legal practitioners. In analysing the *Mashpee Tribe v. Town of Mashpee*[61] case, they illustrate the dissonance between codified, formal law and the conceptions held by the diverse cultural groups such laws ought to serve and regulate. Moreover, they show how formal law aligns with white norms. Torres and Milun ultimately use their analysis to show how 'legal categories help to construct social reality and, thus, work as important political symbols',[62] therefore signaling the importance of multiculturalism in making the law more effective at actualising racial justice.

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[58] See for example Linda Greene 'Race in the Twenty-First Century: Equality Through Law?' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 292.

[59] Derrick Bell 'Racial Realism' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 308.

[60] Ibid.

[61] *Mashpee Tribe v. Town of Mashpee* 447 F. Supp. 940 (D. Mass. 1978).

[62] Crenshaw, Gotanda & Peller op cit note 3 at 124.

(x) The Law's Ability to Address Racial Injustice

This subsection focuses on the legal system's ability to address racial injustice. More specifically, this subsection addresses the deficiencies in the US legal system regarding its ability to address racism and effect reform. Critical race scholars hold that the US system 'by reason of its structure and [limited] vocabulary [particularly around racism], is ill equipped to redress certain types of wrong'.[63] This deficiency in the US system is demonstrated in four ways below, as outlined by Delgado and Stefancic, and the solutions suggested by critical race scholars are also presented.

a. Tools of Thought and the Dilemma of Law Reform

The first structural problem in the US legal system identified by critical races scholars is that many of the concepts and ideas related to the CRT movement have not entered 'the official vocabulary of law'.[64] This means that not much precedent (judicial and legislative) has been set to advance the goals of CRT. This is the dilemma of law reform - wherein progress is stifled due to a body of law which is incapable of facilitating transformation. In order to attain the aforesaid goals of CRT, then, legal practitioners would need to innovate new pathways and tools of thought instead of applying a 'preexisting rule or category'.[65] In the US a new school of thought entitled 'critical legal research' provides one solution to this state of the law in the following way:

> It teaches first-year law students to consider what is not in the indices as well as what is in them. It teaches to [sic] look for alternative sources in emerging bodies of knowledge. …It teaches suspicion of the very algorithms build [sic] into commercial researching tools and how accepted terms like "illegal alien" channel thought.[66]

This is very relevant in SA, as much of the transformative moves CRT wishes to make are relatively new and not provided for in law or judicial precedent. The abovementioned approach of innovating new pathways to interpreting the law and teaching students to consider content and context beyond codified law would, accordingly, form part of the proposed ColCrit. This is expanded on in chapter six of this dissertation.

[63] Delgado & Stefancic op cit note 1 at 31.
[64] Ibid at 33.
[65] Ibid at 32.
[66] Ibid at 33.

b. The Empathic Fallacy

Delgado and Stefancic provide a second structural problem within the overall US system, which filters into the legal system, and that is the lack of empathy that US residents have for their fellow residents, who differ from them, especially in terms of race, nationality, culture and background. The empathic fallacy, therefore, is the misconception that US residents have a greater capacity for empathy for their fellow residents than they actually do. Therefore, existing conceptions and stereotypes held about certain groups of people (especially false and damaging ones) cannot be undone by appealing to the listener's humanness and empathy and simply offering an alternative narrative perhaps from members of that particular group. This same ineffectiveness of empathy applies to legal practitioners, such as lawyers, judges and prosecutors, and this influences such practitioners' approaches to parties who have a different background to them.

I am aligned with the notion that one cannot undo existing misconceptions and stereotypes simply by appealing to the listener's empathy and offering alternative narratives. What would be effective in changing the listener's understanding of their fellow residents, in my view, is education and sensitisation, and for purposes of this dissertation, such education and sensitisation would need to be applied particularly in the training of legal practitioners either at university level or at the professional level. This is an initiative which the proposed ColCrit will advocate for.

c. Serving Two Masters

Bell has identified a third impediment to reform, that is, that in order 'to litigate a law-reform case, the lawyer needs a flesh-and-blood client'.[67] Further, that (progressive) lawyers and their client or the community they serve often want different remedies. Hence, lawyers are described as (wanting to) serve two masters, the one being the lawyer's own activist ambitions, the other being the desires of the client or community being represented. These conflicts are said to be 'ubiquitous in law-reform situations, haunt the lawyer pursuing social change and seem inherent in… [the US] system of legal remedies'.[68] Legal ethics would require the lawyer to advocate for the remedy sought specifically by the client, which may not align with broader social justice

[67] Ibid at 37.
[68] Ibid.

ends. Thus, litigation is critiqued for not being an apt vehicle for social change and specifically, racial justice. This tenet will be addressed in the proposed ColCrit as a potential impediment to reform, however, it is fitting to note that litigation aimed at social progress, particularly the enforcement of rights, has arguably been more successful in South Africa than in the US. This will be expanded on in chapter three, to explore debates around how rights litigation is fairing in South Africa and to assert ColCrit's stance on litigation's ability to effect social change and how to use it most effectively for that purpose.

d. Race Remedies Law as a Homeostatic Device

Some critical race scholars, such as Derrick Bell and Alan Freeman, have argued that the US system of 'civil rights law and enforcement ensures that racial progress occurs at just the right slow pace'[69] and further that:

> Too slow would make minorities impatient and risk destabilization; too fast could jeopardize important material and psychic benefits for elite groups. When the gap between our ideals and practices becomes too great, the system produces a "contradiction-closing case," so that everyone will think that it is truly fair and just. And on those rare occasions when social conditions call for a genuine concession, such as affirmative action, the costs of that concession are always placed on minorities—in the form of stigma—or on working-class whites…[70]

These scholars are, therefore, of the view that race remedies law (that is, laws which provide remedies for race-based prejudice or wrong-doing) in the US is used strategically and at opportune moments in order to appease and pacify different sections of the population, but that the drawback of enforcing certain progressive policies always fall on the minorities or working-class whites, as opposed to the most privileged in the country. The situation around race remedies law is quite different in South Africa, that is, the presence and implementation of such laws are more constant and intentional, and it takes the form of, inter alia, affirmative action[71] and black economic empowerment.[72] Another factor worth distinguishing between the US and SA is that the black African population constitutes majority of the population and enjoy majority representation in government, meaning, this group's interests are vehemently advanced,

[69] Ibid at 39.
[70] Ibid.
[71] Employment Equity Act No. 19370 of 1998.
[72] Broad-based Black Economic Empowerment Act 53 of 2003.

especially in the abovementioned ways. However, South Africa still experiences the drawbacks mentioned before, that is, the stigma attached to affirmative action and black economic empowerment and, of course, the beneficiaries thereof.[73] This tenet will be further addressed in chapter six in order to express ColCrit's position herein. This tenet will serve to raise caution against developing a similar practice in advancing the aims of CRT in SA.

III. INTERNAL CRITIQUE AND CONSEQUENT DEVELOPMENT OF CRITICAL RACE THEORY

CRT turned its critique inward over the years and reflected on the effectiveness of the conceptualisation of different groups and subjects of oppression. Critical race theorists, particularly femcrits, have reflected on the categories of race, sex, sexual orientation and class, and how they interact in a 'system of oppression'.[74] This means the aforementioned categories engage in very particular ways, depending on the combination of the different categories and the attached status and implications, to form a multilayered experience of oppression. This had been overlooked in the early stages of CRT development until Kimberlé Crenshaw introduced the concept and descriptor of 'intersectionality' in a 1989 article, which considered the different ways in which race and gender engage to form the various layers of black women's employment experiences.[75] A similar development resultant of internal CRT critique is scholarship on essentialism, as introduced by Kimberlé Crenshaw and Patricia Collins in 1989 and 1990. These scholars, among many others, argue against an essentialist approach and advocate for the acknowledgement of the diverse experiences of people who find themselves in the same social grouping.[76] These developments are expanded on below.

(a) Intersectionality

Delgado and Stefancic in 2023 defined 'intersectionality' as 'the examination of race, sex, class, national origin, and sexual orientation [and still other categories] and how their combination plays out in various settings'.[77] They further stated that these categories 'can be separate

[73] Nomfundo Ramalekana 'A Critique of the Stigma Argument Against Affirmative Action in South Africa' (2022) 4 *University of Oxford Human Rights Hub Journal* 1.

[74] Richard Delgado & Jean Stefancic (eds) *Critical Race Theory: The Cutting Edge* 3 ed (2013) 345.

[75] Kimberlé Crenshaw 'Demarginalising the Intersection of Race and Sex' *U. Chi. Legal F.* 139 (1989).

[76] Crenshaw op cit note 75 and Patricia Hill Collins *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (1990).

[77] Delgado & Stefancic op cit note 1 at 59.

disadvantaging factors'.[78] This means that each category gives rise to its own, unique kind of disadvantage and that certain sections of the population, who occupy different categories and accordingly are subject to different forms of disadvantage, simultaneously 'operate at an intersection of recognized sites of oppression'.[79] This not only produces the experience of multiple forms of oppression, but also creates an experience unique to that section of the population. These unique experiences and perspectives often go unnoticed, are unaccounted for and the perspectives of the groups oppressed by just one category tend to be at the forefront of particular movements and/or discourses. This issue rears its head in discrimination litigation and in political movements.

This issue presents itself in litigation in that intersectional experiences are unaccounted for. An apt example would be a black woman experiencing discrimination from her employer on the basis of her being a black woman. If she chooses to sue them for discrimination, she may fail if she chooses to sue on the basis of race, as her employer may show favourable relations with other black employees, who happen to be men. If she chooses to sue on the basis of sex, she may also fail, as the employer may show favourable relations with other women, who happen to be white. There needs to be an awareness of the intersectional experience of the black woman, enough so for complainants to litigate on that basis and for the courts to come to an informed and aptly remedial decision.[80]

The issue presents itself in political movements in that the experiences, perspectives and interests of the 'non-intersectional' section of the particular movement's demographic tend to direct the movement's efforts. For example, racial progression movements tend to be led by the black man's positionality and the feminist movement tends to be led by the white woman's positionality.[81] If led by the said positionalities, the aforementioned movements would indeed address certain concerns held by our black woman complainant, but would miss concerns and needs unique to her intersectional experience. This called for the uncovering of intersectional groups and accounting for their unique, particularised experiences. This is significant because:

[78] Ibid.
[79] Ibid.
[80] Ibid at 60.
[81] Ibid at 60 – 62.

> How we frame them determines who has power, voice, and representation and who does not. Perspectivalism, the insistence on examining how things look from the perspective of individual actors, helps us understand the predicament of intersectional individuals. It can enable us to frame approaches that may do justice to a broad range of people and avoid oversimplifying human experience.[82]

The abovementioned issue (simplified for our purposes) produced targeted critical scholarship known as Critical Race Feminism. Intersectional consciousness and anti-essentialism (as expanded on in the following subsection) has given rise to further critical scholarship, such as Latino- and Asian Critical Thought and LGBTQ Theory, each of which address the particular concerns of the groups they represent – concerns which were overlooked in the broader scholarship.

(b) Anti-essentialism

Another internal critique levelled against the CRT movement by critical race scholars, particularly femcrits, is that it essentialises the features and needs of the groups advocated for by the movement. It is said to entail 'a search for the proper unit, or atom, of social analysis and change'.[83] However, 'the goals of a "unified" group may not reflect exactly those of certain factions within it, yet the larger group benefits from their participation because of the increased numbers they bring'.[84] Large numbers are required in order for the oppressed to 'make their voices heard and felt'.[85] Some questions raised are:

> what about the voices that do not fit squarely into one single category of oppression? Will social progress let them slip through the cracks? The issues are particularly acute regarding inter- and intraminority relations and tensions.[86]

Anti-essentialism fundamentally argues for an intersectional approach to the CRT movement and calls for 'individualized treatment – "context" – that pays attention to minorities' lives'.[87] A counter-argument to the anti-essentialist view holds that 'all minority races should

[82] Ibid at 63.
[83] Ibid at 64.
[84] Ibid.
[85] Ibid.
[86] Ibid at 64 and 65.
[87] Ibid at 66.

compromise their differences and form a united front against racism in general'.[88] The danger in this approach is that different sections of the same group will experience the benefits of the movement to varying degrees and particularised needs of certain subcategories will go unaddressed if they do not coincide with the larger group's needs.

This final theme forms the bedrock of my argument for a Coloured CRT. I shall argue for an anti-essentialist approach to advancing CRT in SA by advocating for the development of particularised scholarship around the 'Biko black' racial subcategories. I shall also advocate for an intersectional lens through which to view and develop the scholarship to ensure the accounting of- and catering to intersectional perspectives.

IV. CRITIQUE LEVELLED AGAINST CRITICAL RACE THEORY

This chapter now considers the critiques levelled against CRT, critical race theorists' responses as well as this dissertation's position and indication on the different critiques' relevance for developing the proposed ColCrit theory.

(a) Early Critiques

(i) CRT's Push for the Inclusion of Minority Scholars' Voices within Racial Liberation Scholarship

Randall Kennedy, an African American scholar, 'challenged the idea that minority scholars enjoyed a certain expertise, or spoke in a unique "voice" about racial issues'.[89] He also criticised the movement for 'accusing mainstream scholars of ignoring the contributions of writers of color'[90] within scholarship around racial liberation. These kinds of arguments made by critical race theorists can be seen in sections II(b)(ii), (iii) and (iv) of this chapter. He argues that scholars of colour do not necessarily have 'subject-matter qualifications'[91] on racial issues and racial liberation by virtue of belonging to the relevant racial categories. Further, he argues that any exclusion of contributions by scholars of colour ought to be attributed to the merit (or lack

[88] Ibid.
[89] Richard Delgado & Jean Stefancic *Critical Race Theory: An Introduction* (2001) 87.
[90] Ibid.
[91] Ibid at 88.

thereof) of the writings; that the proponents of the exclusionary argument failed to consider their premises for making this argument and that they are assuming a victim's position. Critical race theorists responded to Kennedy's position by arguing, in short, that:

> Randall Kennedy himself was guilty of misstatement and an unsympathetic reading of CRT texts. Because Kennedy approached the new movement through conventional criteria, he missed opportunities to help take racial analysis to a new level.[92]

Robin Barnes problematises Kennedy's demand for 'an empirically provable, neatly categorized definition of a minority perspective' as an invalidation of critical race scholars' 'experiential knowledge'.[93] She also notes how this view mirrors the right-leaning, dismissive views held by the Supreme Court of the time.[94]

I would argue that Kennedy's argument clearly indicates a lack of awareness of the reality and systemic nature in which people of colour get excluded in white-dominated spaces, in spite of merit or qualifications. Further, on the point of people of colour not having 'subject-matter expertise' by virtue of belonging to minority racial categories, I am of the view that Kennedy has oversimplified the argument made by critical race theorists. I suggest that scholars of colour play a significant role in advancing CRT scholarship by providing real life experiences, informed perspectives and a powerfully fueled conviction to advance the aims of the scholarship. Kennedy's abovementioned call for a 'neatly categorised definition of a minority perspective' goes against an indispensable element of CRT, that is, the development of the anti-essentialist approach. Scholars, of course, need to be otherwise qualified and committed academics in the field to make a meaningful and sound contribution. And as long as they are so qualified, there is a special kind of insight that scholars of colour can and should offer.

(ii) CRT's Storytelling and Narrative Technique

Daniel Farber and Suzanna Sherry, along with other critics, criticised critical race scholars for using the narrative method to unjustifiably advance the CRT cause and for disregarding established conceptions of truth and merit.[95]

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[92] Delgado & Stefancic op cit note 1 at 103.

[93] Robin D. Barnes 'Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship' (1990) 103 *Harv L Rev* 1870.

[94] Ibid.

[95] Daniel A. Farber and Suzanna Sherry *Beyond All Reason: The Radical Assault on Truth in American Law* (1997) 86.

The point in dispute is CRT's storytelling/narrative technique, as defined in sections II(b)(iii) and (iv) of this chapter. As mentioned there, this technique denotes the telling of personal stories by members from subjugated groups to provide the perspectives of such groups, particularly with the view to providing historical context and present-day insights for legal functions such as lawmaking and judicial decision-making. Critics take issue with critical race theorists' perceived 'nonchalance about objective truth'[96]. Critical race theorists, in the context of social science and politics, understand truth as 'a social construct created to suit the purposes of the dominant group'.[97] Critical race theorists further 'deploy stories and narratives as a means of building cohesion within minority groups and shattering the mindset created by the stories of the dominant group'.[98] Countering this approach critics claim that 'storytelling is a distortion of public discourse…for several reasons'.[99] First, the stories told 'may not be representative of the experiences of the [larger] groups' and are 'intentionally atypical because they seek to attract the attention and arouse the sympathy of the audience'.[100] A second critique is that 'storytelling lacks analytical rigour' in that it is open to interpretation, which diminishes 'the prospect of a productive public debate'.[101] Finally, critics have asserted 'storytelling stifles discussion and debate when the storyteller claims to be in a better position to understand the issue at hand because of his or her background'.[102]

I agree that 'truth' (referring to reality) in relation to conceptions of racism in a country varies depending on who you speak to, as different races have different experiences of racism, by design. This is the kind of 'truth' which is relevant to my work and I accordingly only deal with the argument on truth to this extent. Within these boundaries, the critique on nonchalance about truth is invalid as the conceptions of racism are skewed and informed by experience. Perspective is all-important, especially in informing the meaning, implications, sources and experiences of racism. Further, on the critique of the storytelling method - this is a method I intend using in my ColCrit scholarship as I am of the view that there is merit in airing the views and perspectives of the subjects of ColCrit.

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[96] Delgado & Stefancic op cit note 89 at 92.
[97] Ibid.
[98] Ibid at 91.
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Ibid.

An essential aim of the scholarship is to record and account for different perspectives, especially within the intended intersectional and anti-essentialist framework of ColCrit. ColCrit would advocate for the airing of as many stories as possible and for the analysis of such stories to identify common themes in order to pin-point actual systemic issues in need of addressing. This would address the critique that the method gives rise to the presentation of stories which are intentionally atypical and non-representative of the larger group's experience. It further addresses the critique that storytelling lacks analytical rigour and diminishes 'the prospect of a productive public debate'[103] in that the stories will be subjected to analyses in order to draw reliable insights.

(iii) CRT's Claim that the System Disfavours Racial Minorities

Farber and Sherry have also argued against 'the idea that the deck is stacked against minorities'[104] – a key underpinning of US CRT. They further argue that:

> Jews and Asians are minority groups, yet have succeeded by conventional standards, achieving high levels of educational and occupational success. If these standards are unfair and biased against minorities, as the crits assert, how can one account for the success of these two groups? Did they cheat or take unfair advantage? Are they unimaginative mimics and drones? All possible explanations are unflattering, therefore the critique of merit is implicitly anti-Semitic and anti-Asian.[105]

Critical race scholars responded and asserted that criticising a system for being unfair does not equate to a criticism of individuals who perform well under anddespite that standard. They held that Farber and Sherry appeared to be making such a fallacy.[106] I agree with this response. A comparison can be made with the successes experienced by the 'Indian' population of South Africa despite being a minority and previously disadvantaged group.[107]

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[103] Daniel A. Farber and Suzanna Sherry *Beyond All Reason: The Radical Assault on Truth in American Law* (1997).

[104] Delgado & Stefancic op cit note 1 at 103.

[105] Delgado & Stefancic op cit note 89 at 90.

[106] Ibid.

[107] See for example their tertiary education rates at Department of Higher Education and Training 'Fact Sheet: Highest Level of Education Attainment in South Africa' March 2024 page 8 and their employment rates at Stats SA 'Statistical Release P0211 Quarterly Labour Force Survey' Quarter 4:2023, table 2.1, page 22 and 23.

One cannot conclude that a criticism of the system equates to criticism or disdain towards such groups who succeed despite the system. And one cannot discredit the unfairness of the system by pointing to groups who succeed despite the system. This feeds into an essentialist approach in framing the experiences of subjects of disadvantage pre-1994. This is especially true in the context of the systemised racial hierarchy instituted under apartheid, which applied different treatment and resources according to such a hierarchy. This means not only that different racial groups experienced different forms of disadvantage, but that they experienced disadvantage to different degrees.

(b) CRT Self-Criticism

(i) The Activist Critiques

The activist critique questions the practical worth of CRT. It asks questions such as, inter alia:

> Why is it [CRT] not down in the trenches, helping activists deal with domestic violence, poor schools, and police brutality? Why is it so hard on liberals or so disdainful of existing civil rights statutes and remedies? What is the purpose of critique unless one has something better to replace it with?[108]

Most critical race scholars concur that theory and practice ought to cooperate in order to meet the ends of the movement. They go on to state that:

> Street activists need new theories to challenge a social order that treats minority communities and the poor so badly. By the same token, theorists need the infusion of energy that comes from exposure to real-world problems, both as a galvanizing force for scholarship and as a reality test for their writing.[109]

In response to the reflection that CRT ought to propose an alternative to the system it critiques, and of needing to find a replacement for the system CRT is criticising, critical race theorists have affirmed that they have in fact been- and are continuing to - progressively develop such a replacement system.[110]

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[108] Delgado & Stefancic op cit note 1 at 106.
[109] Ibid at 107.
[110] Ibid.

They have pointed to the works of particular scholars, who have developed theories around, inter alia, cultural and educational self-help; electoral democracy reform; a revised theory of hate speech and intersectional discrimination to evidence their statement. The proposed ColCrit will be rooted in an activist scholarship undertaking, that is, the aim of having a practical impact on the subjects of my research. This self-critique will, therefore, be heeded in formulating ColCrit, as I agree that activism and scholarship ought to work hand-in- hand and that the purpose of critique is practical transformation.

(ii) Critique of the Intellectual Heart of the Movement

A pertinacious self-critique 'accuses the movement of straying from its materialist roots and dwelling overly on matters of concern to middle-class minorities' such as 'microaggressions, racial insults, unconscious discrimination, and affirmative action in higher education'.[111] It is further held that:

> If racial oppression has material and cultural roots, attacking only its ideational or linguistic expression is apt to do little for the underlying structures of inequality, much less the plight of the deeply poor.[112]

ColCrit takes the stance that idealist, middle-class centered, materialist (and other) approaches can be addressed simultaneously. The manifestations of racism are varied and the movement ought to address each of these variations. Granted, some issues may be more pressing than others, however, by focusing on only certain issues, scholars run the risk of oversimplifying the concerns and endeavours of the movement and leaving other crucial matters unaddressed. ColCrit holds that the scholarship should be advanced fully to include all issues and only if faced with the need to choose which issues are more pressing in the practical and/or implementation phases of the movement, should decisions be made around which issues to prioritise.

[111] Ibid at 108.
[112] Ibid.

Another issue that has been raised is that CRT has become 'excessively preoccupied with issues of identity', such as 'the social construction of race, the role of multiracial people…and endless refinements of the antiessentialist thesis'.[113] These are said to be non-central issues in the present age, with the central issue being a 'furious right-wing attack on all people of color and the poor'.[114] The right-wing attack is an issue specific to the US context at the moment. However, the argument may be relevant for our purposes as there may be a general critique of the proposed ColCrit scholarship averring that an anti-essentialist and (arguably) a racially separatist approach (from the perspective of the previously disadvantaged races) to developing CRT in South Africa may be, inter alia, premature in the face of the ongoing plight of black people in South Africa and the quite recent development of CRT in SA. This is addressed when making the argument for perspective scholarship in chapter six.

A final self-critique questions whether CRT adequately considers economic democracy, a question which has become increasingly relevant due to the 'recent series of economic shocks'.[115] Further, as racism is being defined as 'largely economic in nature' and as 'hypercapitalism is increasingly showing itself as a flawed system' this seems to be a fitting issue for CRT to address.[116] I agree that this is a fitting issue, which needs to be addressed in further developing the CRT scholarship.

(c) Exporting CRT to New Fields and Countries

A further series of critiques 'question whether critical race theory or particular tools of analysis remain helpful when exported to areas outside the setting in which they arose (namely, domestic U.S. racism in its late-1980s manifestations)'.[117] Further, many scholars from different fields and countries, while eagerly welcoming the new perspectives brought by CRT, have encouraged caution in adopting the CRT frameworks to new contexts. I agree. US CRT cannot simply be transplanted from one context to another. Perhaps the major themes and the broad ideology may be applicable to a broader scope of circumstances. However, it needs to be assessed for its relevance and applicability to the new context before employing it.

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[113] Ibid.
[114] Ibid at 109.
[115] Ibid.
[116] Ibid.
[117] Ibid.

V. CONCLUSION

This chapter identifies the broad themes of US CRT; outlines the internal critique of the scholarship made by critical race scholars, which led to the further development of the scholarship and finally, the chapter explores the major criticism levelled against CRT thinking. The first consistent theme of CRT is the centrality of race and racism in the theory's analysis of the world-order and consequent approaches to transformation. The second theme is the grounding of legal scholarship, transformative endeavours, historical accounts and legal principles and instruments in the lived experiences of previously subjugated groups. This is needed in order to fuel such practices with much-needed context so as to more aptly inform the transformative agenda. The final theme speaks to the law and the legal system's ability to effect racial equality and justice and specifically focuses on the US legal system's incapabilities in this regard, as an indication of the specific needs with regards to the development of the system. The next section explores the internal critique which resulted in key developments of the theory, that is, the study of intersectionality and anti-essentialism as foundational lenses for the overall approach to and advancement of critical race scholarship. The fourth and final section explores the critiques directed at CRT, some of which were early critiques, others being self-criticism and others still being about the transferability of the theory to other contexts.

The following chapter provides a critical analysis of South African CRT and will consider the extent and bounds of its development until the present moment. This will be done with a view to outlining the broad CRT framework, which will underpin the proposed ColCrit scholarship. It will, secondly, act as a springboard for the exploration of its further development, particularly the introduction of perspective scholarship. In doing so, this dissertation will make particular use of the above exploration in order to identify the gaps in South African CRT scholarship. These gaps will be established in chapter three after exploring the extent of CRT development in South Africa. Thereafter, the theoretical foundation of ColCrit will be outlined in chapter six, and this will be drawn from both US CRT scholarship and SA CRT scholarship explored in chapters two and three respectively. To add a further layer to the proposed ColCrit, this dissertation will identify the challenges unique to the coloured population in chapters four and five, in order to illustrate the need for a particularised critical scholarship and to provide data and context for the practical tools to flow from ColCrit.

CHAPTER 3: THE DEVELOPMENT OF SOUTH AFRICAN CRITICAL RACE THEORY

I. INTRODUCTION

This chapter seeks to address the second research question of this dissertation, which interrogates the nature, scope and aims of South African CRT (also referred to as 'SA CRT'). In addressing this question, this chapter traverses the development of Critical Race Theory in South Africa from both a historical and present-day perspective. It accordingly explores the fundamental thesis of the Black Consciousness Movement (BCM), as I argue that Black Consciousness (BC) is both the predecessor to CRT in SA and forms part of CRT literature due to the extensive overlap in subject-matter. It further presents the major arguments made by contributors to the subject-matter of CRT in the present day, who I refer to as 'critical race scholars' for ease of reference (though they may not be identified, or identify themselves, as such). This is done in order to present the kinds of arguments and debates engaged within the CRT scholarship and thus the general extent to which CRT has been developed in South Africa. This allows me to make informed recommendations as to how to further the development of CRT in South Africa.

I start by exploring Black Consciousness, where it drew its inspiration, its rationale and the tools employed by the movement, for a condensed, yet extensive, exploration of this forerunner to CRT. I then consider the scope of CRT under its formal title as well as arguments and debates which may not be named CRT scholarship or be advanced by overtly identified critical race scholars, but which touch on its substance. I start by outlining the fundamental aim of South African CRT. I then consider arguments around CRT and the law, that is, CRT-informed

critique of the law and its implementation. I then briefly consider debates around the inclusion of CRT scholarship within tertiary legal education in SA as well as utilising CRT in navigating structures of power in the university setting. The purpose of this chapter is to explore the development of SA CRT scholarship and to summarise the current state of such scholarship. This is done with a view to, first, identifying the gaps of SA CRT as it stands, making an informed proposal on the further development of the scholarship and asserting ColCrit's position on CRT's contemporary debates.

II. BLACK CONSCIOUSNESS AND ITS INTELLECTUAL ROOTS

(a) Introduction

Black Consciousness, I would argue, is the predecessor to CRT in SA as well as the inspiration behind certain CRT scholars' works, such as, inter alia, Joel Modiri and Sanele Sibanda.[1] Black Consciousness refers to a movement founded by, amongst others, Bantu Stephen Biko in response to the apartheid regime in South Africa. Black Consciousness essentially called for solidarity among all racial groups oppressed by apartheid, the acknowledgement of the deceitful and harmful messaging perpetuated by the apartheid government in addition to its overall inhumane system, taking pride in one's racial and cultural heritage and putting to bed aspirations of assimilation to whiteness, and assuming agency - as the oppressed - in the liberation of the oppressed.[2] Black Consciousness provides a foundation to CRT, particularly through its

[1] As examples, see Joel Malesela Modiri *The Jurisprudence of Steve Biko: A Study in Race, Law and Power in the 'Afterlife' of Colonial-apartheid (*PhD thesis, University of Pretoria, 2017) & Sanele Sibanda *'Not Yet Uhuru' - The Usurpation of the Liberation Aspirations of South Africa's Masses by a Commitment to Liberal Constitutional Democracy (*PhD thesis, University of the Witwatersrand, 2018).

[2] Excerpts From Steve Bikos Address At A Black Theology Seminar In Pietermaritzburg, 28 August 1971 (Source: Saso Newsletter, September 1971) available at https://www.sahistory.org.za/article/defining-black-consciousness accessed on 1 October 2023.

significant contributions towards scholarship around race, racism, the empowerment, mobilisation and agency of the oppressed and criticism of the status quo. This has undoubtedly aided in shaping CRT and related scholarship in SA (and continues to do so).

In this section, I traverse BC's essential rationale and the practical tools advocated for and effected by BC, with a view to extracting the kind of thinking found in what I deem to be the critical race scholarship of the time. I thus view and depict BC not only as the foundation to CRT, but also as part and parcel of critical race scholarship in SA.

(b) Black Consciousness Rationale

Biko wrote extensively and critically on the state of affairs under apartheid. He wrote with an analytical flair, evaluating the status quo from a political and philosophical perspective. This section starts with an exploration of the rationale behind BC, as extracted from the writing of Biko and Barney Pityana, co-founders of the South African Students' Organisation (SASO) of the BCM. It then briefly outlines the role and presence of gender and feminism within the BCM. Biko described BC as a 'continuous struggle for truth' in which one has to 'examine and question old concepts, values and systems'.[3] Pityana describes the foundations of BC as 'curiosity about human experience'.[4] This speaks to the deeply analytical nature of BC thinking. This section will also point to the scholars from whom Biko, Pityana and other BCM scholars and activists drew their inspiration for a deeper exploration of the BCM rationale.

[3] Stephen Biko 'Black Consciousness and the Quest for a True Humanity' (1978) Vol. 8 Issue 3 *Ufahamu: A Journal of African Studies* 10 at 14.

[4] N. Barney Pityana 'Steve Biko: Philosopher of Black Consciousness' in Adekeye Adebajo (ed) *The Pan-African Pantheon Prophets, Poets, and Philosophers* (2021) 391-409 at 404.

(i) Biko's Definition of Black People

Biko defined black people as all those who were 'by law or tradition, politically, economically and socially discriminated against as a group'.[5] This elucidates the fact that those groups categorised under apartheid as native/bantu, coloured and Indian could collectively be identified as black for purposes of the BCM. However, those groups also had to identify themselves as part of a 'unit in the struggle towards the realisation of their aspirations [of liberation]';[6] thus in order to be identified as black within the BCM one needed to take a political stance and be active in the pursuit of liberation. Biko further acknowledged that this redefinition of black must be understood within the context of South African politics and the aspirations of the BCM.

Biko argued that the BCM's intention in using one collective term for all those oppressed by apartheid is twofold: first, positive self-definition; secondly, unity in liberation work, alternatively, complementarity in such work.[7] The first intention, positive self-definition, refers to the action of reclaiming agency in one's identification and renouncing the apartheid-based racial categories of native/bantu, coloured and Indian and the divide-and-rule tactics inextricably attached to those categorisations. This intention also refers to combatting the negative identification used by the apartheid government to refer to the collective of these racial groups, that is non-white, which Biko described as being deemed 'non-persons'.[8] Defining oneself as black, as defined by the BCM, would thus have the effect of reclaiming the power to identify oneself and thus reclaiming one's identity in general; defining oneself in positive terms;

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[5] South African Students' Organisation Policy Manifesto of 1968 at page 1.

[6] Ibid.

[7] South African Students' Organisation Newsletter September 1970 at page 2.

[8] Ibid.

and countering apartheid's scheme of stratifying the oppressed. The aforementioned second intention was to cultivate unity in liberation work, such that the oppressed would work as a collective and the movement would be more effective by garnering more numbers, working towards a common goal and thus applying more force and diverse strategies in effecting its goals. The alternative would be, at least, to refrain from working against one another's aspirations, misidentifying the enemy of such aspirations and thus avoiding conflict among the black groups, and focusing the wrath of these groups on the true opponent.[9] The term 'black' will henceforth in this chapter be used to refer to the native/bantu, coloured and Indian racial groups collectively, as I shall be exploring the BC ideology and reference to the 'black' population in such BC works most often refers to the Biko black conception. If it is used to refer to the apartheid-based label, that will be made clear.

(ii) BC's Conception of Racism in South Africa

Biko stated that BC developed in response to a racist, exploitative society which is forcefully run by 'power-hungry people whose motive is authority, security, wealth and comfort'.[10] He further argued that racial divisions rooted in racism were introduced for economic reasons: first, the exploitation of resources by the white population to the detriment of the black population and, secondly, to provide a moral justification for such exploitation.[11]

This thinking alludes to the interpretation of racism in South Africa within a material determinist framework. Material determinism's fundamental argument asserts that racial progression and regression serve the white population's interests. Biko's above assessment

[9] Ibid.

[10] Biko op cit note 3 at 10.

[11] Ibid.

squares with material determinism in that, according to Biko, the introduction of racial divisions rooted in racism was introduced to enable the exploitation of resources to the detriment of the black population, thus fulfilling the interests of the white population. Biko's second stated reason for racist divisions, i.e., that it offers moral justification for exploitation, aligns with a further argument of material determinism - the notion that dominating groups tend to demonise their exploited subjects in order to justify their exploitation.[12]

Of the abovementioned institutionalised racism, Biko spoke to the capacity for cruelty of the apartheid government, the harsh laws and relentless legal action against black people. Biko describes the police force's primary function as harassment of the black population. This harassment was so violent that it instilled intimidation and fear in the black group. A further tactic of the apartheid government was to perpetuate the image of the white group as a 'super-race' by means of their force.[13] The government and the police force operated according to a 'golden maxim' – 'if you cannot make a man respect you, then make him fear you'.[14] Biko was of the view that the black population did not and could not respect the white population due to the sheer cruelty of the system and its operation. The psychological state of black people was that of fear, intimidation, powerlessness, hatred of the white population and envy due to their monopoly on resources.[15]

Biko's assessment of the apartheid system led him to draw on German philosopher, Georg Hegel's reasoning in considering how to revolutionise South Africa at the time, that is,

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[12] Richard Delgado & Jean Stefancic *Critical Race Theory: An Introduction* 4 ed (2023) 21-22.

[13] S Stephen Biko 'I Write What I Like' (1978) Vol. 8 Issue 3 *Ufahamu: A Journal of African Studies* 62 at 64.

[14] Ibid.

[15] Ibid at 64 and 65.

how to solve the problem of apartheid and all that came with it. Hegelian reasoning works towards a synthesis of the thesis and antithesis. Biko viewed the thesis (an identification of the state of affairs or the problem to be solved) as a 'strong white racism' and the antithesis (the opposite or negation of the thesis) as a strong solidarity among the black population. The synthesis (the unifier between thesis and antithesis or resolution)[16] was 'a true humanity where power politics will have no place'.[17]

For a full understanding of the thesis, Biko has defined 'racism' not as exclusion of one race by another, but rather exclusion for the purposes of subjugation.[18] To contexualise his thinking, he turns to the contemporary liberal mode of thinking which affirms the thesis as apartheid, the antithesis as non-racialism and the synthesis as integration. Biko problematises the liberal view (as inspired by Frantz Fanon)[19] which, he suggests, places white people at the forefront of liberation movements. He further argues that the ideal (or synthesis) of integration is 'full of unquestioned assumptions that embrace white values', 'a concept long defined by whites and never examined by blacks'.[20] He concludes that liberalism fosters 'the white man's liberation' and remains exploitative, resulting in a state that would breed assimilationist aspirations among black people while widening the wealth gap and inevitably resulting in majority of the black population being on the poor end of the spectrum.[21] Although Biko

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[16] Hegel's Dialectics *Stanford Encyclopedia of Philosophy* 2 October 2020 available at https://plato.stanford.edu/entries/hegel-dialectics/#:~:text=This%20%E2%80%9Ctextbook%E2%80%9D%20Being%2DNothing,into%20a%20second%20concept%20that accessed on 13 March 2024.

[17] Biko op cit note 3 at 12.

[18] Ibid at 19.

[19] Pityana op cit note 4 at 404.

[20] Biko op cit note 3 at 13.

[21] Ibid.

affirmed that white people can form part of the opposition to apartheid, they should not devise the *modus operandi* nor lead such movements due to their position in the apartheid system. He further states that white people cannot analyse the problem of apartheid without considering the impact of the solution on them and the white community. White people therefore tend to misdiagnose the problem and suggest solutions that prioritise their interests.[22]

(iii) The Concept of Consciousness

Reflecting back on BC in 2021, Pityana describes its ideology as radical due to its use of the notion of consciousness to search for explanations for the unfortunate state of 'resignation of conquered black South Africans…in the early 1960s'.[23] The ideology thus set out to provide a fresh perspective on the pursuit of black liberation. Black Consciousness sought to disseminate the message that the psychological state of those oppressed by a system determined the liberation possibilities. The movement thus encouraged black people to take pride in themselves, to denounce the degrading messaging perpetuated about the black population and to take agency in their liberation.

Biko wrote extensively on the psychological condition of subjugation to raise awareness of the denigrating effects of a system which seeks to treat and portray a certain section of the population as inferior. He drew on Fanon's work in asserting that black people had internalised the messaging and values of the apartheid system which led to a psychological state of inferiority, self-devaluation and timidness. This state, according to Biko, stifled the will and

[22] Ibid.
[23] N. Barney Pityana op cit note 4 at 404.

ability to revolt against the system.[24] In this way, black people participated in their own oppression by essentially acquiescing to it.

According to Pityana, Biko further relied on Hegel's conception of consciousness, which denotes a state of being that transcends a mere psychological state.[25] In the context of apartheid specifically, consciousness by its nature sought to conquer the condition of black people, by conquering their psychological state, which was a state of 'being a "defeated" people and distrusting one's collective power'[26]. Black people did not believe in their ability to overcome white racism. Consciousness was thus a tool of psychological empowerment, which would then lead to collective efforts aimed at acquiring wholesale freedom. Consciousness 'in the Hegelian construct is freedom, because it raises the capacity of willing the impossible to become possible, to think out of the box and to shape one's destiny'.[27]

The aforementioned collective efforts involved interrogating and challenging social systems and institutions (such as the media, church and education sector); resisting the messaging coming from those entities which sought to perpetuate apartheid's oppressive and denigrating messaging; and devising one's own knowledge base.[28] Biko also spoke of the inherent and irrevocable value and humanity of black people as an affirmation in response to the system's denigratory messaging and in advancing the notion of black pride. According to

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[24] Ibid at 401.

[25] Ibid.

[26] Ibid.

[27] N. Barney Pityana 'Black Consciousness, Black Theology, Student Activism, and the Shaping of the New South Africa' The Inaugural Steve Biko Memorial Lecture *Europe London School of Economics and Political Science* (9 October 2012).

[28] N. Barney Pityana op cit note 4 at 402.

Pityana, Biko's thinking asserted that 'liberation was the essence of being human'.[29] Thus, the apartheid government was stripping the black population of their very humanity, however, the black population had the power to reclaim their physical liberation by first assuming a state of mental liberation.

(iv) BC and Gender

This sub-section addresses the extent to which BC theory and praxes failed to address gender as an object of analysis and action. According to Mamphela Ramphele, feminism had minimal impact within BC ranks in the early 1970s. It was seen as 'irrelevant to the needs of blacks in South Africa' and as a '"bra-burning" indulgence of bored, rich white Americans'.[30] Feminism was thus far from being seen as an essential element within the fight against racism (contrary to the ideology of intersectionality, as defined in chapter two of this dissertation), but was rather seen as a separate and secondary issue to racism, reserved for the privileged.

Gender was not recognised as a political issue in the BCM despite the noteworthy presence of women within the movement and the launching of the Black Women's Federation (BWF) – founded by women in Natal led by Fatima Meer[31], which acted as a national umbrella for women's organisations in South Africa at the time. The reasoning behind the BWF was to

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[29] Pityana op cit note 4 at 405.

[30] Mamphela Ramphele 'The Dynamics of Gender Within Black Consciousness Organisations: A Personal View' in N. Barney Pityana, Mamphela Ramphele & Malusi Mpumlwana et al *Bounds of Possibility The Legacy of Steve Biko and Black Consciousness* (1992) 214-227 at 221.

[31] South African History Online 'Black Women's Federation' available at: https://www.sahistory.org.za/article/black-womens-federation#:~:text=In%201975%2C%20the%20women%20in,to%20form%20a%20united%20front., accessed on 21 November 2024.

mobilise more women in the fight against white racism, not to address issues of sexism or feminism.[32]

The experience of female activism was characterised by male dominance in leadership positions, confinement of female activists to participation in female organisations and to roles which mirrored females' traditional societal roles, such as, cooking, cleaning, nurturing, deference to men etc. Ramphele found, in her personal experience as a female activist in the BCM, that she never truly garnered respect as a woman. Instead, she gained respect as an 'honourary man'[33] meaning she took up spaces and partook in activities dominated by men and even assumed a 'male-like' persona, despite contestation and undermining received from her male counterparts, and thus, with time and adamance, she was able to escape the traditional female roles and expectations.

This clearly highlights the secondary status ascribed to fighting sexism in the BCM. It also speaks to the perceived fixedness of gender roles at the time, which meant that the only way one could escape such roles was to figuratively 'switch genders' (assuming binarity in gender, as was the case at the time). This stands in stark contrast to the recognition of intersectionality as an essential element of CRT today, at least by some in the CRT movement, as well as its role in my envisioned ColCrit scholarship. The absence of feminist and intersectionality thinking within the mainstream BCM of the 1960s, and its location only in women's organisations, provides important context to later considerations of such scholarship in South African CRT, as well as the propositions which will be made in the proposed ColCrit.

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[32] Ramphele op cit note 30 generally.

[33] Ibid at 220.

This chapter now turns to the praxes of the BCM, as summarised by Pityana, to illustrate its transcendence beyond the theoretical realm.

(c) Practical Tools Employed by the Black Consciousness Movement

The first tool employed by the BCM was the re-imagination of culture - to reclaim black culture(s) from the snares of apartheid's besmirching (of such cultures) as uncivilised and unprogressive. BC envisioned culture as a tool to be used in advancing consciousness, that is, for culture to be reclaimed and owned as a source of pride for the black population. Biko saw this as a mechanism for the black population to reclaim their humanity, as culture formed, and forms, a major part of the black population's sense of identity. The movement thus encouraged black people to take pride in themselves, to denounce the degrading messaging perpetuated about the black population and to take agency in their liberation. Fanon was of the view that culture was of particular significance when it came to the struggle of black people.[34] This reiterates the sentiment that culture has a strengthening force by granting its subscribers with a mental and/or spiritual stronghold, a sense of pride, humanity and unity, which are essential elements needed to fight an oppressive system.

The second mechanism was religion. Biko was 'deeply conscious of the role religion could play in social upliftment, in asserting a common humanity as well as human solidarity'.[35] He was also aware that religion had major pros and cons within the African context, a key pro being that Christianity provided a 'liberating gospel' and the con being that it preached 'an

[34] Frantz Fanon *The Wretched of the Earth* (1963) 235.

[35] N. Barney Pityana 'Reflections on 30 Years Since the Death of Steve Biko: A Legacy Revisited' Lecture to mark 30 years of the death of Black Consciousness leader Stephen Bantu Biko *The University of South Africa* (12 September 2007) 6.

ideology and practice of acquiescence'.[36] He therefore held the position that religion and theology had to be liberated from politics and the missionary machinery. In realising this quest, the BCM created an alliance with the University Christian Movement in establishing the Black Theology Project and worked closely with black churches and theological colleges in performing advocacy work. According to Pityana, an exponent of Black Theology and reverend, as a movement, Black Theology:

> …addresses itself first and foremost to the Church and to Christians, both Black and White. It seeks to arouse the Church from its dogmatic slumber. It is committed to free it from its complicity in the sin of apartheid. It challenges Black Christians, especially, to defend themselves against inhumanity and oppression. It gives notice to the oppressors and 'taskmasters' that injustice will not be tolerated.[37]

Black Theology accordingly sought to raise awareness of religion's complicity in the apartheid system, to make the black population aware of such complicity, to equip them in fending off such tactics and to warn the implementors that their offences will not be accepted. Black Theology is thus a quintessential manifestation of the critical nature of BC as well as its fight for freedom. In this context, such a critical approach took the form of skepticism about the key societal structures of the church and religion, and their role in perpetuating the ideals of the apartheid regime. Further, it took the form of resistance to the oppressive elements of that societal structure and thus resistance to its attempts to confine the freedom (as defined by Hegel, referenced above) of the black population.

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[36] Ibid.

[37] Barney Pityana 'Black Theology and the Struggle for Liberation' (1983) Vol. 12, Issue 5 *Index on Censorship* 29 at 29.

The third tool was social development influenced by, among others, Julius Nyerere (President of Tanzania between 1961 and 1985), Paulo Freire (Brazilian philosopher and educator) and Amilcar Cabral (Bissau-Guinean and Cape Verdean anti-colonial leader). This tool was implemented around the time of the global debates on development in the late 1960s and 1970s, wherein 'the reality of power differentials as [being] determinants of access to economic resources was…under focus'.[38] This sparked critical engagement with the (economic) state of dependency in which the black population in South Africa found themselves, due to poverty and welfarism, and how this impacted the population, particularly from a psychological perspective. SASO thus not only critically analysed the social relations in the South African context at the time, but also committed to active involvement in redressing the situation. This active redress took the form of engagement with black, poor communities to understand their life experience and to collaborate with the community members in devising solutions to the problems they faced. It also took the form of literacy training, running clinics, and building schools and community centres. This was both in an effort to advance community development and to ensure that students maintain a connectedness with their 'social and cultural roots'[39] as opposed to emulating the white elite and thus becoming estranged from their black communities (both culturally and geographically). Through this active redress approach, black students maintained black solidarity by ploughing back into the communities they came from and seeking to empower not only themselves but the black community at large. This empowerment was meant to accompany skills and capacity building for the fostering of a desired status quo within the

[38] Mamphela Ramphele 'Empowerment and Symbols of Hope: Black Consciousness and Community Development' in N. Barney Pityana, Mamphela Ramphele & Malusi Mpumlwana et al *Bounds of Possibility The Legacy of Steve Biko and Black Consciousness* (1992) 154-178 at 155.

[39] Pityana op cit note 35 at 7.

communities. The ultimate goal of community development was self-reliance, meaning development projects had to be run by black people from start to finish, that is idea generation, planning and implementation. Students were encouraged to use their qualifications and choose work options that would contribute towards community development. The intention was further to institute a new model of development for the country in its entirety and not just for the empowerment of the poor. Over and above achieving development itself, these projects were seen as an important affirmation to the black population of their significance and worth by addressing the state of low morale, self-deprecation and inferiority experienced by the black community due to the oppression and subjugation enforced through the apartheid regime.

The above tools illustrate the practical instruments employed by the BCM and how it sought to revolutionise not only the black population's mode of thinking and overall psyche, but also how they viewed the significance and potential of their cultural practices, religion, skills and manpower and how they used these as tools for liberation of the black population and development of the country as a whole. This marks the end of the exploration of the BCM as the predecessor to CRT in SA. Based on the above exploration, this dissertation aligns itself with Tshepo Mosikatsana who investigated the use of CRT ideologies in the struggle against apartheid and found that, although 'not explicitly invoked', 'opponents to apartheid legislation and praxis…highlighted the racial character of law using a panoply of theories, ranging from anti-racist ideologies and liberal interpretations of the rule of law'.[40] He was accordingly of the view that CRT ideologies were invoked in the fight against apartheid though not under the formal title of CRT. And this is what the BCM did. As mentioned earlier in this chapter, BC has provided a

[40] Tshepo Mosikatsana 'Critical Race Theory' in CJ Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 272 at 282.

foundation to CRT through its contributions towards scholarship around race; racism; being critical of the systems in place in society and how they may be contributing towards different forms of oppression; the psychology of racism; the impact of oppression on its subjects; and the importance of the empowerment, mobilisation and agency of the oppressed. Furthermore, this dissertation argues, alongside scholars like Modiri, that Black Consciousness theory and praxes are still relevant in the present day and can be used to bolster the contemporary use of CRT.[41] This chapter now turns to consider the development of CRT post-1994 as the next layer of traversing the development of CRT in SA, with a view to making informed suggestions on how best to further develop such scholarship.

III. THE SCOPE OF CRT POST-1994

Post-1994 is the period in which South African critical race scholars started providing their input under the formal title of CRT, as drawn from US scholarship. This section considers the fundamental aim of CRT in law, as defined by Joel Modiri, a key South African CRT scholar and then engages different debates within South African CRT scholarship, namely, debates on constitutionalism, equality and poverty, rights and legal education.

(a) CRT's Fundamental Aim

Joel Modiri's work is central to outlining what this dissertation deems to be the fundamental aim of CRT in SA. In doing so, this section highlights the definition of CRT, its foundational principles, analytical aims and ways in which CRT holds the potential for transformation.

[41] See generally Joel Malesela Modiri *The Jurisprudence of Steve Biko: A Study in Race, Law and Power in the 'Afterlife' of Colonial-apartheid (*PhD thesis, University of Pretoria, 2017).

Modiri defines CRT in South Africa as a pursuit 'to examine, from a legal perspective, the ways in which prevailing conceptions of race…perpetuate relations of domination, oppression and injustice'.[42] The CRT project, therefore, first calls for a critical analysis of prevailing perceptions and implications of belonging to a certain racial group in post-1994 South Africa. These stem from discriminatory and denigratory (racist, sexist, ableist, queerphobic, etc.) narratives and structures, entrenched in the legal and political systems, which were perpetuated and enforced by the apartheid administration (and often less formally, prior thereto). CRT secondly calls for an examination of the ways in which the said status quo perpetuates 'relations of domination, oppression and injustice',[43] from a legal perspective, in the present day. Modiri further advocates for the introduction of CRT in post-1994[44] South Africa and affirms the need to radically assess the 'centrality of race'[45] within the fabric of the South African society with the aim of addressing this status quo. This dissertation further argues that this status quo ought to be examined from an intersectional point of view so as not to neglect the different sub-categories within the black population and to consider factors such as gender, ability, sexual orientation, and any other relevant factor which influences one's daily reality and experience.

As a general exploration of the aim of CRT, the words of US critical race theorist, John O. Calmore, hold relevance where he states that CRT 'recognises that revolutionising a culture begins with a radical assessment of it'.[46] This is what South Africa needs due to the lingering

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[42] Joel M Modiri 'The colour of law, power and knowledge: Introducing Critical Race Theory in (Post) Apartheid South Africa (2012) *SAJHR* 405 at 405.

[43] Ibid.

[44] Ibid.

[45] Joel Modiri 'Towards a "(post-)apartheid" Critical Race Jurisprudence: "Divining our racial themes"' (2012) 27 *SAPL* 231.

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

forms of systemic oppression and the allocation of wealth, power and resources largely based on race. I, therefore, agree with Modiri that CRT would greatly benefit South Africa in a pursuit to more effectively address the inequalities experienced. This would allow for a blunt recognition of the situation as it stands, without considerations of, inter alia, white, male sentiments around preserving their wealth and position in society and without the need to compromise on the outcomes of the revolution, as was the case in SA in deciding on the terms of the system which would follow apartheid. It would thus allow for the devising of solutions purely dedicated to redress and the attainment of substantive equality, which will be defined and explored under section III(a)(ii) of this chapter.

To further explore the fundamental aim of CRT, this chapter seeks to highlight two 'foundational principles of CRT' articulated by Modiri, and drawn from US CRT as outlined in the section on race being a central category of analysis in chapter two. These principles are the recognition of:

> (1) the *centrality of racism*: that racism is a normalised and ingrained feature of the social order which appears often in nuanced and covert ways; and
> (2) that white supremacy does not refer to rightwing extremist racist hate groups that consciously promote white domination, but rather denotes a *system* (political, legal, economic and cultural) in which whites maintain overwhelming control and power.[47]

Modiri further sets out three analytical foci of CRT in SA, with which this dissertation is aligned:

> a postapartheid CRT should entail an interweaved exploration of at least three points, namely:
>
> (1) a critique of law and legal institutions implicated in perpetuating racist ideology;

[47] Modiri op cit note 42 at 406.

(2) an analysis of the racialised patterns of wealth distribution, economic inequality and poverty (and specifically how they are enabled by law and tolerated within the legal culture); and

(3) an engagement with the dynamics of race (and also culture and identity) in 'post'-apartheid social and political life.[48]

In sum, the fundamental aim of CRT is to acknowledge the role which race, racism and white hegemony play in the way society operates, particularly in terms of power relations and access to resources, and how the law and legal institutions perpetuate that status quo. CRT (for our purposes) further calls for the development of appropriate legal responses to these realities as a means of rectification, recognition and redress. While this dissertation agrees with these aims, it asserts that South African CRT not only essentialises the concept of race within its scholarship, but it also fails to invoke intersectionality in its analysis. ColCrit therefore advocates for the layering of CRT scholarship to include the coloured lived experience within its scholarship so as to devise particularised solutions based on that unique lived reality. It further advocates for inclusion of gender and class lenses, in line with Jackie Dugard and Angela Sanchez[49] as well as lenses such as sexual orientation, which especially alters one's lived experience in SA.

The following sections traverse the debates on CRT and the law in South Africa, particularly academic discourse on CRT and constitutionalism, equality and poverty and the value of rights as a further exploration of the scope of CRT in SA post-1994.

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[48] Ibid at 407.

[49] Jackie Dugard & Angela Maria Sanchez 'Bringing Gender and Class Into The Frame: An Intersectional Analysis Of The Decoloniality-As-Race Critique Of The Use Of Law For Social Change' (2021) 32 *Stellenbosch LR* 24.

(b) CRT and the Law

This section outlines key debates around the law in South Africa and its efficacy in fostering and advancing the aims of CRT. The section first engages critical race theorists' critique of South African constitutionalism – this includes debates on decolonial thinking, transformative constitutionalism and social justice; then debates around equality, its meaning and the potential for its full attainment in SA; and finally debates around rights and their efficacy in meeting the transformative aims set forth by the democratic dispensation.

(i) CRT and South African Constitutionalism

This sub-section engages with those critiques of South African constitutionalism that assume CRT thinking as an intellectual framework, in that they are concerned with accomplishing true redress in SA, which addresses, among other things, racism and racialisation. These critiques accordingly assess the Constitution and constitutionalism in terms of their ability to advance and achieve a state of true redress for the different forms of oppression and disadvantage brought about by colonialism and apartheid.

Non-delegitimising Critique

Early concerns and criticism levelled against the Constitution by both the public and academics do not call into question the legitimacy of the Constitution in its entirety, but rather provide commentary on the Constitution in terms of the interpretation and implementation thereof, its underlying ethos, inspiration, omissions, etc.

An early critique by Dennis Davis was that the social reality of the South African situation did not match the 'promises' made by the Constitution,[50] a reality Modiri later described as exemplified by 'persistent racial and gender stratification and social exclusion'.[51] As Modiri argues, Davis, along with others such as Karl Klare and Catherine Albertyn do not accredit this discrepancy to the inadequacy of the constitutional provisions themselves, but rather to external factors such as the interpretation of the provisions by the courts, poor or lack of implementation by the government, a conservative legal culture, the lack of transformative jurisprudence etc.[52] These critiques, moreover, gave rise to the enthusiastic support of 'transformative constitutionalism' or the 'transformative law reform and legal development of the colonially imposed common-law rules in select private law fields…as well as a strong emphasis on socio-economic rights and equality jurisprudence'.[53]

These approaches, in turn, gave rise to a number of critical responses. According to Modiri, these approaches rely heavily on Euro-American schools of legal thought for inspiration on how to advance legal theorising, interpretation and adjudication with the goal of actualising the aims of the Constitution, as opposed to problematising it. Sibanda describes the ideas of transformative legal reform and development or transformative constitutionalism as 'court-centric', meaning that the primary mechanism in performing its functions and meeting its aims is

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[50] D Davis 'Transformation: the constitutional promise and reality' (2010) 26 *South African Journal on Human Rights* 85-101.

[51] Joel Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) Vol. 34 Issue 3 SAJHR 300 at 309.

[52] KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253.

[53] Modiri op cit note 51 at 310.

adjudication.[54] He argues that this is a very limited mechanism for social change as it does not assume a disruptive approach aimed at undoing the structures and systems enforced by colonial-apartheid. Sibanda further critiques transformative constitutionalism for not doing any work to make institutional or structural changes beyond adjudication and 'lawyering'.[55] In the same vein Modiri critiques the transformative law approach for not allowing a re-imagining of the Constitution, its goals and the governing social rules. He argues that this approach may expand the meaning and potential of the Constitution, but the Constitution remains constrained by the context in which it was created, the governing political and legal culture and the nature of modern law, i.e., rationalisation, fixity and closure.[56] Modiri and others are also of the view that (early) supporters of transformative constitutionalism did not take time to consider radical alternatives to South African constitutionalism, which takes account of the specific context of South Africa, as opposed to transplanting schools of thought and legal cultures from the Global North which perpetuate the hegemonic status of the Global North and the marginal status of the Global South.[57]

A second major category of critique is proffered by scholars such as Tshepo Madlingozi and Modiri, who argue that having a white dominated social justice sector gives rise to a host of ills. This critique holds that a predominantly white civil society dedicated towards social justice work arranges its work, that is, its activism, litigation and research in a manner that depoliticises and juridifies social emancipation, thus subjecting social emancipation to a set of legal rules and

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[54] Sanele Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) Vol. 24 *Law Democracy and Development* 384.

[55] Sibanda op cit note 1.

[56] Modiri op cit note 51 at 310.

[57] Ibid.

neglecting the moral code of the communities sought to be so regulated and appropriating the experiences of members of the said communities.[58] Furthermore, the white population is able to mask its collective power within South African society as such power is mostly held in the private sphere as opposed to the power held by the black population (with its holders being the minority of the population) which is held in the public sphere, specifically, the executive and legislative branches of government, and is thus more visible to the general public. The power imbalance skewed in favour of white people in South Africa is thus not obvious to the general public and this reality ultimately conceals the ever-presence of white hegemony as a significant contributor to inequality and subordination in South Africa. In addition to this concealment, the publicisation of the public sector and its activities results in the faulty view that the largely black government is the primary sources of South Africa's failures.[59] Moreover, as the courts took on the role as overseers of the democratic dispensation, governed by the Constitution (a mode of operation favoured by the predominantly white civil society), largely white legal practitioners, scholars and activists came to be the 'primary intellectual and moral custodians of constitutional democracy in South Africa'[60] – a reality which has also been criticised as being problematic by BC exponents, as outlined in section II of this chapter.

This chapter will now present a more discrediting wave of criticism levelled against the Constitution and the constitutional order, which attacks the very basis of the Constitution's major claims.

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[58] Tshepo Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123 at 144.

[59] Modiri op cit note 51 at 311.

[60] Ibid.

These critiques assert that the Constitution enables the continuation of key elements of colonial conquest. They also seek to debunk the Constitution's claim that it has ushered in a new order which constitutes a rupture from the past. Further, as Modiri argues, they highlight 'anti- decolonial and non-revolutionary' sentiments entrenched in the Constitution, political culture and scholarship on present-day South African constitutionalism.[61]

Delegitimising Critique

Drawing on the work of Modiri,[62] I explore this under three headings, that is, the critique that there has been an inapt delineation in time periods between colonialism and apartheid in addressing past injustice; the non-recognition of racial hegemony; and a critique of the ideology which informs South Africa constitutionalism.

Inapt Delineation in Time Periods

The first delegitimising critique of the Constitution, as advanced by scholars such as Modiri, is that it inaptly delineates certain time periods which justify the consistently perpetuated notion that we currently live in 'post-apartheid' SA. This notion implies that the advent of democracy signified a fundamental rupture in the overall state of the country (including a rupture from colonialism) and has justified the implementation of non-revolutionary approaches to transformation. The solution to this problem would thus be to redraw these temporal delineations and to view the different shifts in governance more realistically in terms of what they were able to achieve.

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[61] Ibid at 313.

[62] Ibid 313-320.

Modiri provides four reasons for this redrawing of temporal boundaries. Redrawing the temporal delineations would rightfully place focus on 1652 as the starting point for colonial conquest in SA and as a persistent feature in its present-day struggles.[63] Secondly, it would demonstrate that systems of power and its resultant 'material conditions and social realities'[64] can persist despite the abolition of the laws which authorised them.[65] Such conditions and realities would adapt over time to match the conditions of the time, but would not adapt in terms of its force - they remain as forceful as when they were birthed.[66] Thirdly, it would enable a more realistic outlook on the remnants of SA's colonial past in its present day state, that is, for example, 'unredressed asymmetries of power…features of stratification, exploitation, violence, marginalisation, powerlessness and cultural dominance'.[67] Fourthly, recognising the continuation of certain essential features between SA's colonial past and democratic present would allow for the revisiting of scholarship and writing from the past and would thus enable the re-imagining and potential of those works and practices in the present day.[68] In sum, this critique asserts that though many changes have occurred since the advent of democracy in SA, it would be a falsity to claim that there has been a substantial shift in power and resource division, marginalisation, exploitation, etc.

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[63] Modiri op cit note 51 at 313 citing L Ntsebeza 'Land redistribution in South Africa: the property clause revisited' in L Ntsebeza & R Hall (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 124.

[64] J Modiri op cit note 51 at 314.

[65] Ibid at 314 Modiri citing C Mills *Blackness Visible: Essays on Philosophy and Race* (1998) 119-138.

[66] Ibid at 314 Modiri citing J Sexton 'The social life of social death: on Afro-pessimism and black optimism' (2011)

5 *InTensions* 1-47.

[67] Modiri op cit note 51 at 314.

[68] Ibid.

Addressing Racial Hegemony

Following from the above critique, Modiri argues that recognising conquest and colonialism as the starting point of SA's current reality enables the consequent recognition of 'the more comprehensive [racial] injustices of genocidal violence, land dispossession, epistemicide, economic deprivation, super-exploitation as well as psychological degradation'[69] stemming from colonialism. Furthermore, it enables the recognition of 'disenfranchisement, segregation, discrimination and deprivation of civil rights', stemming from apartheid more specifically, as existing issues to be addressed and redressed.[70] Further, recognising the persistent and pervasive nature of the aforementioned issues (among others) stemming from colonisam leads to the understanding that racial power dynamics and injustice have occurred in a structural manner in SA. As Modiri argues, this means that the ideological and socio-political systems that advance racial inequalities exist and continually multiply in the legal, economic, environmental, media, cultural and educational sectors and in individuals' outlooks and are nurtured and supported by, inter alia, 'cultural lag, institutional momentum, accumulated wealth and attitudinal inertia'.[71]

These ideological and socio-political systems were never redressed, even in the transition to democracy. They are very much intact, as the formal abolition of apartheid (due to the sole focus on apartheid-sourced social, political and legal ills) did not address systemic injustice, white hegemony and persistent colonial practices. The solution would be to put these issues back on the table in devising a strategy on how to truly transform the South African society.

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[69] Ibid at 315.

[70] Ibid.

[71] Joel Modiri op cit note 51 at 316.

Constitutional Ideology

The next critique of the overall South African constitutional ideology Modiri brings to light is:

> the ideologically multivalent nature of the 'post'-apartheid constitutional project – that it contains *both* its avowed, progressive and transformative elements (rights, institutional stability, rule of law, accountable government; multiculturalism, democracy and so forth) as well as a set of unavowed or hidden ones (a Eurocentric order of power/knowledge; a relatively undisturbed status quo; secret negotiations and elite power-broking; ANC-centric historiography; anti-blackness).[72]

The unavowed elements are indeed a result of the abovementioned systemic features of white hegemony and racial injustice, which have gone unaddressed and unredressed in the Constitutional text and the constitutional order. These features' propensity to reproduce themselves thus went unchallenged and they continue to remain in place. It is therefore important to recognise the Constitution as an ideological tool in order to recognise that it imposes a particular view of transformation, democracy and equality. Modiri argues that a combination of local and global capitalist interests along with the white population's interests in the aftermath of settler-colonialism, greatly limited the ideological approach of those who fashioned the Constitution and thus the constitutional order.[73] He suggests that this consequently constrained the possibilities and potential of the Constitution itself as the contributors and authors of the Constitution imparted their ideology to the constitutional text.[74]

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[72] Modiri op cit note 51 at 319.

[73] Ibid at 320.

[74] Modiri op cit note 51 at 320 citing S Terreblanche *Lost in Transformation: South Africa's Search for a New Future Since 1986* (2012).

As mentioned above, the Constitution can be subjected to multiple ideological interpretations, which represent '*contested ideological assumptions* and, whether intentionally or not, [these] function to secure and protect certain powers, discourses, interests and investments while eclipsing and negating others'.[75] This is the central point of Modiri's critique.

Radical Constitutional Critique

A more radical class of constitutional critique, as identified by Modiri[76] and advanced by scholars such as himself and Madlingozi, advocates for a frank acknowledgement of injustice and oppression in all its forms and further advocates for theories and practices which effect foundational and substantive change. This approach to transformation recognises that oppressive power 'concedes nothing without demand',[77] meaning it will not change unless challenged. This approach not only seeks to address the root causes of problems (as opposed to their symptoms), but also seeks to redefine what is achievable in terms of transformation and redress. It also does not support the idea that the oppressed ought to be integrated into the existing social order. Rather, the social order, as a whole, ought to be rethought and redone insofar as it is inherently racist, colonial and unequal. The critique denies the legitimacy of compromise and negotiation as tools of social transformation and is opposed to the reconciliation and moderation that, it argues, the black population has been pressured to accept under the current constitutional order.[78] The integrationist tendencies underlying approaches of reconciliation and moderation only serve to preserve white power and affirm the status quo.

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[75] Joel Modiri op cit note 51 at 310.

[76] Ibid at 320 – 323.

[77] Ibid J Modiri at 320 citing S Biko *I Write What I Like* (2012).

[78] Ibid at 322.

The above critiques relate to the 'official and hegemonic varieties of constitutionalism'[79], that is, the current ruling constitutionalism, to the exclusion of the 'constitutionalisms from below' which are constitutionalisms propelled by social movements and disadvantaged communities who use the Constitution and its guarantees to make demands and challenge state power.[80]

This dissertation takes the stance that, while the abovementioned critiques have merit and point to valid flaws in South African constitutionalism, they do not provide a practical way forward, capable of effecting redress under the current system, while the suggested institutional changes are in the process of being effected. The critique proffered, points to fundamental, structural issues ingrained in South African constitutionalism as it stands and these structural issues, by their nature, will take a significant amount of time to address and rectify. This dissertation, therefore, suggests that South African CRT scholars should produce scholarship on how to address such issues to the extent possible under the current system, which can provide more immediate relief while the larger, institutional issues are in the process of being addressed. This will address the second research problem identified in chapter one of this dissertation, that is, the stagnation of South African CRT scholarship within the theoretical realm. This means that the current scholarship does not allow for interim and immediately implementable solutions and redress to the issues identified by the said scholarship – it largely remains within the realm of philosophical debate and long-term systemic shifts.

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[79] Joel Modiri op cit note 51 at 322.

[80] Madlingozi 'Post-apartheid social movements and legal mobilisation' in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-economic Rights in South Africa: Symbol or Substance?* (2013) 92-130.

The suggested solution, therefore, is that the scholarship ought to be developed to devise more immediate redress for the abovementioned flaws in recognition that the solutions to the broader-scale issues would only be seen and felt at a much later stage.

(ii) CRT and Inequality

In this sub-section, I consider debates around the conception of equality found in the South African constitution and which conception would be best suited to meet the ends of transformation in SA. I also consider certain views on poverty eradication as a related topic.

I use the work of Albertyn to outline a brief history of the considerations that informed the notion of equality found in the final constitution and the various ways in which equality may be interpreted today. This is done with a view to outlining the substantively CRT-based arguments found in these debates, again, in order to explore the extent of CRT scholarship development.

Albertyn argues that the core historical contestation over the principle of equality guaranteed by the Constitution was between formal and substantive equality. During the Multi-Party Negotiations Process (MPNP) in 1993 most white parties supported a notion of formal equality, with the 'dominant concerns [being] individual freedoms and equal political and civil rights, with equality seen as non-discrimination and formal protection against race and other forms of differentiation'.[81] As she notes, this would have diminished the reach of positive measures to reallocate wealth and resources and would have limited societal and economic intervention by the State.

[81] Catherine Albertyn 'Contested Substantive equality in the South African Constitution: Beyond Social Inclusion and Towards Systemic Justice' (2018) 34 *SAJHR* 441 at 452.

Ultimately, these parties attempted to use the Constitution and particularly the principle of equality as a mechanism to prevent real change and to preserve white power and privilege.[82]

The African National Congress and its allies, on the other hand, supported the notion of substantive equality, which denoted a 'redistributive and interventionist' equality and sought to address discrimination in both the public and private sectors as well as to equalise power and wealth. The ANC also anticipated the role of the state in realising 'socio-economic transformation'[83] and in meeting all citizens' basic needs, which prompted the inclusion of socio-economic rights in the Constitution.[84] Albertyn concludes that the outcome of the MPNP in terms of the equality principle was the inclusion of a notion of substantive equality (extending to gender equality as well).[85]

The jurisprudence produced by the Constitutional Court, which emerged after the transition to democracy, focused mainly on what exactly substantive equality means and what kind of substantive equality the Constitution envisions. Albertyn suggests that the Court has drawn inspiration in this regard from the works of the 'ANC alliance and women's groups of the […] 1990s, feminist and liberal egalitarian legal scholarship and […] Canadian jurisprudence'.[86]

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[82] Ibid.

[83] Ibid at 453, C Albertyn citing 'Ready to govern: ANC policy guidelines for a democratic South Africa' (1992) para A.3 http://www.anc.org.za/docs/pol/1992/readyto.html RDP.

[84] Ibid at 453.

[85] Ibid.

[86] Ibid at 456.

Substantive equality is defined as being concerned with:

> the actual impact or results of social and legal classifications: the problem is not differentiation, per se, but the (systemic) harm that might flow from it. To evaluate the harm, the matter must be examined contextually, with a clear understanding of the conditions of people's lives and the actual effects of the impugned action.[87]

For Albertyn, the dominant approach to substantive equality by the Constitutional Court is a liberal egalitarian, social democratic approach. This approach invokes the right to dignity envisaged in the Constitution by defining equality as the recognition of the inherent worth of each individual and as the guarantee of 'equal concern and respect'.[88] The Court bases equality on dignity in the aforementioned manner while acknowledging the long durée systemic oppression, marginalisation and impoverishment on the basis of race.[89] This has extended equality rights[90] as well as material benefits to subordinated and marginalised groups but normally in ways that did not disrupt or undo the governing standards and socio-economic state of affairs.[91] Albertyn argues that in liberal egalitarian terms (the approach undertaken in SA) equal concern and equal respect in the context of socio-economic rights strives towards sufficiency, i.e., to meet the basic needs of all members of society through a needs-based provision of resources.

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[87] Ibid at 456-457.

[88] Ibid at 457.

[89] Albertyn op cit note 81 citing the cases of City Council of Pretoria v Walker 1998 (2) SA 363 (CC) paras 46–47 (historic impoverishment of black residential area) and Zondi v Member of the Executive Council for Traditional and Local Government Affairs 2005 SA 589 (CC) paras 39–42 (landlessness and race).

[90] See, as examples, the cases discussed in C Albertyn & B Goldblatt 'Equality' (chapter 34) in S Woolman & M Bishop (eds) Constitutional Law of South Africa 2 ed (2007) 53.

[91] Catherine Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253.

This conception was corroborated by the former Chief Justice Arthur Chaskalson who stated in 2000 that the Constitution does not consider or provide for 'equality of goods or wealth' but does acknowledge the need for a threshold of 'basic needs, such as housing, health-care, food, water and social security'.[92]

The above depiction of liberal egalitarian, social democratic substantive equality is one type of substantive equality advanced in SA (hereinafter referred to as liberal substantive equality). The second is transformative substantive equality, which is defined by Albertyn and Beth Goldblatt as the understanding that transformative substantive equality thus recognises the need for redistribution of wealth and power, not just the provision of basic needs like liberal substantive equality contemplates. [93] Albertyn and Goldblatt attempted to proffer a 'comprehensive and nuanced' conception of equality – one which took account of both:

> social and economic inequalities… structural disadvantage and individual well-being; of the complicated and intersectional nature of inequalities; a relational idea of difference and the recognition that people are at the heart of relations of (in)equality.[94]

They further made the distinction between affording people with a remedy for their material, lived experiences of inequality, which is required by and from transformative substantive equality, as opposed to 'a more abstract idea of individual concern and respect'.[95]

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[92] Albertyn op cit note 81, citing Chaskalson 'The third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *South African Journal on Human Rights* 193 at 202.

[93] Catherine Albertyn & Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 South African Journal on Human Rights 248 at 249.

[94] Albertyn op cit note 81 at 461.

[95] Ibid.

Albertyn has subsequently developed this notion of transformative substantive equality to include the notion of 'equality of condition', drawing on John Baker, Kathleen Lynch, Sara Cantillon and Judy Walsh.[96] She suggest that this notion aspires to transform societal structures as well as their values and practices that produce and reproduce inequality with a view to removing the barriers to meaningful access (of opportunities and resources) and participation (in all spheres of the South African society). This notion of equality would require 'an inquiry into both the actual realities and conditions of inequality, and the social, political and institutional processes that account for its reproduction'[97]. In making this inquiry, Albertyn stresses the importance of including the voices of those living the reality of the inequality being studied, to allow for a richer conception of the said contexts. It would further significantly impact the resolution reached in attempting to address the inequalities.[98]

ColCrit aligns itself with transformative substantive equality in terms of the kind of equality it believes ought to be aspired to. This kind of equality is most compatible with the overall aims of ColCrit as it recognises, amongst other things, the need for redistribution of wealth and power as well as the realities of structural disadvantage and intersectionality within inequality.[99] A strong proponent of transformative substantive equality in South Africa, among others, is Catherine Albertyn and she takes the stance that such equality is attainable, or at the very least should be strived for, within the current constitutional dispensation.[100]

[96] Ibid Albertyn citing J Baker, K Lynch, S Cantillon and J Walsh *Equality: From Theory to Action* 2 ed (2009).

[97] Ibid at 464 Albertyn citing Sheppard Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada (2010) 8-9.

[98] Albertyn op cit note 81 citing H Lessard 'Equality and access to justice in the work of Bertha Wilson' (1992) 15 Dalhousie Law Journal 55 at 60–61.

[99] Albertyn op cit note 93 at 253.

[100] Ibid generally.

This dissertation is in alignment with this approach as it allows for redress to be effected under the current system, again to allow for more immediate solutions, while the greater institutional issues are in the process of being addressed.

(iii) CRT and Poverty

This sub-section considers critical race scholars' views on poverty and SA's approach to addressing poverty. Sibanda raises the question as to whether transformative constitutionalism – which, in his view, is positioned within a liberal democratic paradigm - is capable of instituting the required structural and systemic changes that will empower the poor to become 'true political agents rather than recipients of welfare style handouts that will keep them and future generations "in their place"'.[101] He further states that in order for the Constitution to fulfill its emancipatory potential:

> greater commitment needs to be made towards ensuring that our conception of constitutionalism encompasses significant advances in: (i) mass bottom-up truly participatory democracy in that it allows people to take an active part in the decision-making processes that concern them; (ii) a greater commitment to structural interventions targeted at delivering a more equitable and sustainable distribution of wealth and resources; and (iii) more generally striving towards a more just and fair society that rejects the deepening of the legacies of colonialism and apartheid.[102]

And in this way, there would be a greater likelihood of not only alleviating poverty, but eradicating it, as transformation efforts would be made in the context of the recognition of the realities of the prevailing systemic and structural continuations of colonisation and apartheid as well as the redistribution of wealth and resources along truly equitable lines.

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[101] Sanele Sibanda 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) *Stell LR* 482 at 487.

[102] Ibid at 498.

Sibanda's view on how to effectively go about eradicating poverty, specifically his arguments on the best approach to constitutionalism in the pursuit of poverty eradication, reflects many of the arguments made by scholars such as Modiri and Madlingozi around recognising the continuation of colonialism and apartheid legacies in democratic SA, the nature of inequality and injustice being systemic and structural and thus the need for a radical reconfiguration of society in order to address the real issues faced in SA. It can thus be inferred that because they have this view on what the focus of South African constitutionalism and social justice efforts should be, that view would extend to the approach to poverty (as a fundamental goal of social justice efforts).

This dissertation's view on how poverty ought to be addressed by CRT, mirrors the approach expressed under the CRT and equality subsection. This approach advocates for the implementation of transformative substantive equality, which would allow for structural issues, like racialised poverty (which are going largely unaddressed within the liberal democratic system currently in place) to be more effectively addressed.

(iv) Rights Debates

Marius Pieterse describes 'rights-talk' (as opposed to the actualisation thereof) as empowering as it 'affirms the inherent dignity of rights-bearers and awards political legitimacy to their demands for the satisfaction of their, otherwise overlooked, material needs'.[103] However, the provision of rights in the South African Constitution has generally not received positive reviews from critical

[103] Marius Pieterse 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29(3) *Human Rights Quarterly* 796 at 797.

race scholars in South Africa in terms of the Constitution's transformative capability in actualising the rights. While Pieterse argues that the transformative potential of the rights is stifled as they are 'typically formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo',[104] Madlingozi has critiqued the very notion of 'human rights' as informed by a Eurocentric conception of humanism, which excludes non-European, non-white beings.[105] This Eurocentrism not only informs the manner in which rights were formulated, but also and inevitably how they are interpreted and realised.

Pieterse, among other scholars, has further critiqued the judiciary's interpretation of rights – socioeconomic rights in particular. Pieterse recognises the judiciary's work in validating the justiciability of socio-economic rights, its balancing of watchfulness informed by its constitutional duty of recognition of these rights, with deference required by the separation of powers.[106] However, he critiques the judiciary for its refusal that socio-economic rights entitle holders to 'immediately enforceable individual claims'[107] and its alternative abstract and procedural approach to enforcing rights.[108]

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[104] Ibid.

[105] Madlingozi op cit note 58 at 136.

[106] R Sunstein 'Social and Economic Rights? Lessons from South Africa' (1999) 11 *Constitutional Forum* 123; Frank I. Michelman 'The Constitution, Social Rights, and Liberal Political Justification' (2003)1 *International Journal of Constitutional Law* 13.

[107] Pieterse op cit note 103 at 798.

[108] See for example David Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence' (2003) 19 *SAJHR* 1; Danie Brand 'The Proceduralisation of South African Socioeconomic Rights Jurisprudence, or "What are Socioeconomic Rights For?,"' in Henk Both et al (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33.

This failure on the part of the judiciary is ascribed to the liberal uneasiness with positive rights, which are rights that call for action and entitle holders to immediately enforceable claims.[109] It is secondly ascribed to the 'executive-mindedness' of the South African legal culture, meaning the judiciary too often defers to the executive to execute on certain constitutional obligations, including the enforcement of rights.[110] Pieterse points to a third and final flaw in socio-economic rights adjudication and that flaw refers to the 'empty' interpretation and articulation of the rights, that is, a constrained understanding of what the rights entitle holders to. This constrained understanding is informed by the political, social and economic status quo as opposed to a problematisation and attempted improvement thereof. The way rights are interpreted and articulated in South Africa is therefor said to constrain the realisation of those rights as well as social justice endeavours. The antidote to this tendency would be for:

> …constitutional drafters, legislatures, litigants, activists, academics, and judges [to] increasingly concentrate on clarifying the concrete content of entitlements embodied by socioeconomic rights and on explicitly linking such content to the actual satisfaction of material need.[111]

Socio-economic rights, among South African scholars, accordingly do not have a good reputation in terms of its contribution towards transformation. In the words of Modiri 'constitutional litigation and human rights in South Africa has barely **-** if at all – altered fundamental relations of power in society'[112] and:

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[109] Thomas J. Bollyky, 'R if C > B + P: A Paradigm for Judicial Remedies of Socioeconomic Rights Violations' (2002) 18 *SAJHR* 161 at 182; Marius Pieterse 'Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience' (2004) 26 *Human Rights Quarterly* 882.

[110] Karl E. Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146; Dikgang Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *SAJHR.* 309.

[111] Pieterse op cit note 103 at 799.

[112] Joel Modiri, 'The Time and Space of Critical Legal Pedagogy' (2016) Vol. 27 Issue 3 *Stellenbosch Law Review* 507 at 515.

> …optimism about the Constitution's transformative capacity is not only naive but depends on a structural forgetting and erasure of the lives of those many South Africans - mostly Black - whose powerlessness, experience of marginalisation and daily exploitation have not at all been positively ameliorated in the new constitutional dispensation.[113]

This dissertation agrees that rights assertion and litigation has not altered structural power relations in South Africa, however, it does assert that rights can and ought to be used within the transformative substantive equality framework to bring about changes within that realm, something that is very limited under the liberal egalitarian approach currently undertaken in SA. This approach mirrors Dugard and Sanchez's radical rights-based approach,[114] which further advocates for intersectionality within the approach to rights. The next sub-section will consider the contributions towards the inclusion of critical race theory within tertiary legal education.

(a) CRT and Legal Education

There has been much debate on the suitability of the Bachelor of Laws (LLB) curriculum in South Africa at different points in time. Critical race scholars particularly have argued for the inclusion of critical thinking and scholarship within the LLB curriculum. Modiri, for example, has advocated for the incorporation of CRT literature into tertiary level legal studies and writes about the need to be honest about, inter alia, racial issues in post-1994 South Africa or else institutions 'will do a great injustice to the social reconciliation and transformation project of post-1994 South Africa'.[115]

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[113] Ibid.

[114] Dugard and Sanchez op cit note 49 at 41 – 46.

[115] Joel M Modiri 'The grey line in-between the rainbow: (Re)thinking and (re)talking critical race theory in post-apartheid legal and social discourse' (2011) SAPL 177 at 179.

He further 'restates' the case for critical legal education in a 2016 piece[116] wherein he argues that legal education is out of touch with present-day realities. He critiques the conception that the law is a technical science and that it does not have to adapt to account for present-day realities and politics. He also critiques what can be considered as the more progressive approach of liberalism which avoids 'a clear focus on the social powers of gender, class and race'.[117] He further points to the potential reason for the disregard by universities of 'the pedagogical significance, for their institutional and academic cultures, of the now radically heterogeneous nature of the student population in terms of race, ethnicity, language, religion, gender, sexuality, class background and worldviews'.[118] That reason is a 'nostalgia for a time that is no more'. This implies a lack of enthusiasm for the current status quo and a reluctance to cater to that new reality. Modiri further speaks of the lack of consideration of political dynamics, the impact of such dynamics on how courses ought to be taught and the social, economic, ideological and cultural implications of their teachings. He, moreover, argues for the realisation of a critical legal education, which would entail 'firstly, adopting a *subversive* orientation *towards* the history, practice and theory of law; secondly, problematizing constitutional fetishism; and, lastly, decolonising and transforming the LLB curriculum'.[119]

Scholars have also argued for a critical examination of the institution of the university as a whole and how existing power relations are perpetuated and are affecting the university experience and knowledge production.

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[116] Joel Modiri, 'The Time and Space of Critical Legal Pedagogy' (2016) Vol. 27 Issue 3 *Stellenbosch Law Review* 507.

[117] Ibid at 508.

[118] Ibid.

[119] Ibid at 509.

Rozena Maart for example 'employ[s] critical race theory that draws upon the historical whilst unpacking the contemporary components of social relations in an attempt to examine a society that transitioned from apartheid to democracy for the first time in its history after three hundred and forty-two years of colonialism, and the microcosm of the university'.[120] She further points out what is missing from CRT and specifically previous race theories, that is, 'White Consciousness'.[121] And the issue she has with such White Consciousness, in the university setting particularly, is how the 'beneficiaries of racism…continue to make the site of knowledge production one where they believe race does not matter'.[122] She therefore uses CRT, amongst other lenses, to illustrate how 'acts of racism are perpetuated, reinforced, and reproduced within the university much like outside of it'.[123] This entails the broad arguments made by critical race scholars in SA on including critical race theory in LLB syllabi and in navigating the university structure and experience.

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[120] Rozena Maart 'When Black Consciousness Walks Arm-in-arm with Critical Race Theory to Meet Racism and White Consciousness in the Humanities' (2014) Vol. 21 No. 2 *Alteration* 54 at 56.

[121] Ibid at 73.

[122] Ibid at 74.

[123] Ibid at 54.

This dissertation asserts, in line with Modiri, that CRT literature ought to be incorporated into tertiary legal education.[124] This is to create an awareness of the socio-political situation and history of South Africa amongst the aspirant members of the legal fraternity and consequently to create an understanding of the goals of transformation as a foundation to all legal scholarship and practice that would come from such aspirant members. A further goal of incorporating CRT into tertiary education would be to create a healthy skepticism about the status quo, the law and contexts in which certain laws were drafted. This will be expanded on in chapter six, where the theoretical basis of ColCrit is outlined.

IV. CONCLUSION

This chapter traverses the major contributions made towards Critical Race Theory scholarship in South Africa. These represent the kinds of scholarship engaged within the South African CRT space and addresses the nature, scope and aims of this scholarship. Based on this exploration, this dissertation identifies three major gaps in SA CRT scholarship, all of which are extensively developed in US CRT, as outlined in chapter two of this dissertation. These three gaps are the under-development of intersectionality, non-essentialism and avenues of reconstruction within CRT scholarship.

As demonstrated above, South African CRT has been more focused on debates such as South African constitutionalism, conceptions of equality, the approach to addressing equality and

[124] Joel M Modiri 'The grey line in-between the rainbow: (Re)thinking and (re)talking critical race theory in post-apartheid legal and social discourse' (2011) SAPL 177 and Joel Modiri, 'The Time and Space of Critical Legal Pedagogy' (2016) Vol. 27 Issue 3 *Stellenbosch Law Review* 507.

poverty and the value of rights. SA CRT has further not developed a comprehensive theory, capable of attaining the transformative goals of CRT for all sections of society. It has not developed the themes of intersectionality and essentialism and what they would entail in the context of South Africa, nor has it evolved beyond theoretical critique to suggest ways to address the challenges faced within the South African context more immediately.

These are the gaps which the proposed ColCrit wishes to address and this dissertation, particularly chapter six, does so by proffering the introduction of perspective scholarship and outsider jurisprudence into SA CRT, which argues for both intersectionality and non-essentialism. Chapter six further argues for different ways in which the abovementioned challenges experienced in South Africa can be addressed and/or conceptualised in order to obtain more immediate results.

The following two chapters demonstrate a few of the most pressing challenges faced by the coloured community from a historical and present-day perspective in chapters four and five respectively. This is done with the purpose of, first, demonstrating the unique experience of the coloured population and thus the distinctiveness of that experience from the black African reality, and ultimately justifying the need for a particularised critical scholarship. Secondly, these chapters provide data and context for the theoretical basis of ColCrit as well as for the practical tools to flow therefrom.

CHAPTER 4: FORMATION AND FEATURES OF THE COLOURED RACIAL IDENTITY, FROM A HISTORICAL PERSPECTIVE

I. INTRODUCTION

This chapter addresses the fourth research question of this dissertation, which relates to defining and characterising the coloured racial group, from a historical perspective. The aim is to consider the distinct features of the coloured population, which formed from its historical development and evolution, in order to demonstrate and argue for the need for a distinct Coloured Critical Race Theory, which will be used to address such particularised and often under-prioritised needs.

This chapter starts by defining the term 'coloured' and providing a brief overview of the historical formation of the coloured identity (which refers to the qualities that distinguish the coloured group from others[1] and is used interchangeably with 'the coloured group' and 'coloured community'). The chapter then summarises how the formal classification emerged, in order to outline the background and context to identifying the features of the coloured group formed through historical circumstances. The chapter then points to five such features: first, the group's diverse heritage, which was deeply stigmatised throughout history; secondly, coloured people's intermediate and marginal status; thirdly, the group's assimilationist aspirations; fourthly, negative associations and stereotypes perpetuated about the group; and finally, the fact that the coloured identity is a result of creolisation.

[1] Cambridge Dictionary definition of 'identity' available at https://dictionary.cambridge.org/dictionary/english/identity#google_vignette, accessed on 13 January 2025.

II. THE FORMATION OF THE COLOURED IDENTITY

(a) Definition of the Term 'Coloured'

The term 'coloured', in the present-day, refers to a 'phenotypically diverse group of people descended largely from Cape slaves, the indigenous Khoisan population…other people of African and Asian descent…[and] European settlers'.[2] The coloured population in South Africa thus refers to a group of people who are largely the product of a 'mixture' of (two or more of) the abovementioned population groups and who, under apartheid, physically appeared to be neither 'purely' black (used interchangeably with 'black African' in this dissertation), white or Asian/Indian. Below, under 'Miscegnation' I expand on why I choose to place words and phrases alluding to 'racial/blood mixing' (as opposed to phrases alluding to mixed descent) and 'racial purity' in inverted commas. Despite a history of 'racial mixing', Tessa Dooms and Lynsey Chutel state that:

> Identifying as Coloured is more complex than having a racially mixed heritage: Colouredness is a spectrum of identities with varied origin stories that intersected during apartheid to create a cluster of complex communities brought together by historical circumstance.[3]

This means, firstly, that you do not need to be of mixed descent to personally identify as coloured. Secondly, you may be of mixed descent and not identify as coloured.

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[2] Mohamed Adhikari 'Hope, Fear, Shame, Frustration: Continuity and Change in the Expression of Coloured Identity in White Supremacist South Africa, 1910-1994' (2006) 32 *Journal of Southern African Studies* 467 at 468.

[3] Tessa Dooms and Lynsey Eboney Chutel (ed.) *Coloured: How Classification Became Culture* (2023) 75.

Finally, these two points allude to the fact that, in the present-day, colouredness refers more to a cultural identity as opposed to a racial one. (Although, it will be made clear in this chapter that a coloured racial identity had and could never be clearly defined.) Historically, however, it referred to people of mixed descent, and specifically under apartheid, it referred to people who could not be placed in any of the other racial categories, which were determined according to, inter alia, physical features, language and cultural practices. The coloured racial category, thus, became a catch-all category and this further diversified the coloured population. As alluded to, the coloured identity was historically defined by the colonial and apartheid systems as a distinct racial group and later assumed a more cultural and thus a more personal character. Despite this personal element to identifying as coloured in the present-day – because this chapter explores the identity of the coloured population from a historical perspective – 'identity' and 'group' are used interchangeably to refer to the more objective qualities of the population.

The following sub-section briefly explores the historical formation of the coloured racial category, as a background for deducing and exploring the features of the coloured (racial and cultural) identity, which stemmed from its historical context.

(b) A Brief Overview of the Historical Formation of the Coloured Identity

Mohamed Adhikari argues that the coloured racial group is a product of colonisation itself.[4] This is an apt observation as, firstly, race is a social construct, as outlined in the introduction to this dissertation. Secondly, the coloured population came to be as a result of 'racial mixing' between

[4] Adhikari op cit note 2 at 467 – 475.

European settlers and African and Asian inhabitants and slaves. Hence, it came about as a direct result of white settlement and the importation of slaves. Further, the coloured categorisation came to be as widely accepted and used throughout history until present, due to its instrumentalisation by the (colonial and apartheid) authorities. This construction and use of the coloured racial category is expanded on in this sub-section.

Because the coloured population originated from the mixing between European settlers and African inhabitants (before other African and Asian slaves were brought into the Cape), this historical account will start in 1652. This is when Jan van Riebeeck of the Dutch East India Company (VOC) established a refreshment station at the Cape of Good Hope, soon to be the first permanent European settlement in South Africa,[5] which bore the most accounts of interracial relationships and resulted in offspring which would, today, be classified as coloured. Upon the Dutch settlers' arrival at the Cape, they encountered early inhabitants of the Cape, that is, the Khoi and the San. This led to relationships and marriages between European men and indigenous women, which resulted in children of mixed descent.[6] At this point a racial hierarchy was already in place in which the Khoi and San were at the bottom tier of the hierarchy, however, their 'half-European' offspring held a higher position in this hierarchy due to their patrilineal kinship with the European settlers.[7]

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[5] Richard Reid *A History of Modern Africa: 1800 to the Present* (2020).

[6] Richard W Johnson *South Africa: The First Man, The Last Nation* (2004).

[7] Sara Nilsson *Coloured by Race: A Study About the Making of Coloured Identities in South Africa* (unpublished Masters' Thesis, Uppsala University, 2016).

Later, in 1658, the first slaves were imported into South Africa to meet the labour needs of the ever-expanding society at the Cape.[8] Slaves were thereafter imported (in various quantities) from Angola, Ghana, Indonesia, India, Madagascar, Malaysia and Mozambique.[9] This led to further interracial relationships and marriages, which resulted in 75% of children born to enslaved women having white fathers by 1672.[10] Moreover, between 1652 and 1795 more than 1 000 native and formerly enslaved women married European settlers, as interracial marriages were encouraged by the VOC to maintain numerical presence at the Cape.[11] By the time slavery ended in 1838, the slave population amounted to approximately 38 000.[12] The offspring of the aforementioned interracial relationships and/or relations 'became the Black labour class of emancipated Khoe, San and other enslaved people in the first half of the 19th century, who continued to build the colony'.[13] This labour class was diverse both phenotypically and culturally and:

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[8] Carohn Cornell *Slaves at the Cape: A Guidebook for Beginner Researchers* vol 2 (2005).

[9] Ibid.

[10] C Ziervogel *Brown South Afric*a (1938).

[11] Paul Maylam *South Africa's Racial Past: The History and Historiography of Racism, Segregation and Apartheid* (2001).

[12] Helena May Raddock 'The Construction of Coloured Identities: Apartheid Nostalgia and the Politics of Memory' (Honors Thesis, Bates College, 2024) 20.

[13] Dooms and Chutel op cit note 3 at 41.

> …already the rulers of the colony had created a division between them and South Africa's indigenous tribes for the purposes of political control and capital gain. [The abovementioned Black labour class] was a group of Black people created by colonialism itself. Their White overseers referred to them as 'half-caste', 'bastards, 'off-whites', 'Cape Boys', and the terms that would stick: 'Coloureds'.[14]

Between 1835 and 1846 Dutch-speaking colonists moved in large numbers into the interior of southern Africa to escape British rule and live independently. Because the Great Trek started 3 years before slavery was abolished, one can infer that the Dutch-speaking colonists who moved between 1835 and 1838, moved with their slaves, thus spreading the coloured population into the interior. This also would have led to further interracial relationships, marriages and relations resulting in mixed or coloured offspring in the interior.[15] A further impetus was the discovery of gold and diamonds in the interior between 1870 and 1902, which further led to the influx of European immigrants and racial mixing.[16] As societies grew and became more complex and industry grew, so did competition among the (black and coloured) working class. This

[14] Ibid at 41 and 42,

[15] Dooms and Chutel op cit note 3 at 25 as an example of interracial marriages.

[16] Leonard Monteath Thompson and Alan S. Mabin 'Diamonds, Gold, and Imperialist Intervention (1870-1902)' *Encyclopaedia Britannica* 12 January 2025 available at https://www.britannica.com/place/South-Africa/Diamonds-gold-and-imperialist-intervention-1870-1902, accessed on 13 January 2025.

resulted in coloured workers actively calling themselves by the classifications given to them by the white authorities, so as to assume the slightly higher status attached to the 'coloured' category and thus to obtain a competitive advantage in acquiring work and resources.[17] This is said to be the first instance of the coloured population naming themselves by this racial descriptor.[18]

The next sub-section considers the formalisation of racial classifications in the early twentieth century and under apartheid, with specific focus on the coloured classification in South Africa. The historical conditions of apartheid are referenced under the section considering the features of the coloured identity.

(c) How the Formal Classification Emerged

The earliest legal formalisation of the segregation within what was previously known as the black labouring class, that is, between coloureds and black Africans (also termed 'natives', which is defined in later in this sub-section) can be found in the 1911 Census of the Colony of the Cape of Good Hope, which separated the population into three racial groups – European, Native/Bantu and Coloured.[19] Furthermore, an early manifestation of the differential treatment applied to the coloured and black African groups in recent history can be found in the Colour Bar Act of 1926. This Act excluded black Africans and Indians from 'skilled work' and 'certificates of competency' were only allowed to be issued to the white and coloured populations in certain occupations.[20] This, along with Acts

[17] Ibid at 41.

[18] Ibid.

[19] Anthony J Christopher 'A South African Domesday Book: The First Union Census of 1911' *South African Geographical Journal* (2010) 92(1) 22–34.

[20] Mines and Works Amendment Act 25 of 1926.

of similar purport, affirmed coloured people's inclination towards African rejectionism, that is, the tendency to emphasise their similarities to the white culture and distance themselves from black African culture, in order to gain favour in the eyes of the white community and authorities with the intent to (hopefully) secure more favourable benefits in the white-run society.[21] This is further explored in section III of this chapter. This differentiation and discrimination became more and more tightly legislated and regulated with the instantiation of the apartheid order, in particular, by the Population Registration Act of 1950 which defined the different racial groups and provided for the compilation of a Population Register.

> In 1951, the census lists as population groups 'White', 'Bantu', 'Coloured' and 'Asian'. But even then, Coloured people are further divided, into 'Malay' and 'Other Coloured', and later into 'Cape Coloured' and 'Griqua'...[22]

According to the Act, 'white person' is defined as 'a person who in appearance obviously is, or generally accepted as a white person…'; a 'native' is someone who 'in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa'; while a coloured person is defined as someone who 'is not a white person or a native'.[23]

These racial categories were assigned to people at Population Registration Offices in which:

> bureaucrats would fire off a series of questions about height, weight, ancestry, religion, food…your name[as well as] levels of education, where you lived, the language you spoke and the accent with which you spoke it…whether men drank spirits or home-brewed beer, if

[21] Dooms and Chutel op cit note 3 at 42.

[22] Ibid at 43.

[23] Population Registration Act 30 of 1950 at 277.

> their wives cooked pap or rice with their meat, and even a sense of how you behaved were all markers of racial classification.[24]

Significantly, the Population Registration Act defined 'coloured' in negative terms, thus suggesting that it was a catch-all category for those who would not be classified as either white, black or Asian/Indian. This is explored further section III. However, as Dooms and Chutel argue, greater clarity was provided when defining the sub-categories of 'coloured', which demonstrate a fuller understanding of the coloured classifications under the apartheid regime. Malay coloureds were 'those considered to be direct descendants of enslaved Malay with no apparent mixed heritage'.[25] 'Cape Coloured' referred to those 'who were thought to be descendants of a mixed heritage that included Cape colonists, enslaved Malay and indigenous African people like the KhoeKhoe, San or amaXhosa'.[26] It is said that 'even people with no mixed heritage who came from this region and matched the physical or cultural traits of any of the groups not easily classified as White would be classified as Cape Coloured'.[27] 'Griqua' people were 'mainly found in…the Northern Cape…whose heritage was mixed between European colonists and the Nama people, a subset of the KhoeKhoe who in the 1800s lived nomadically between Namibia and the western parts of South Africa'.[28] Finally, '"Other Coloureds" were not easily identifiable as White, Black, Chinese or Asian, and were not from Cape regions'.[29] This illustrated the apartheid government's inability to package colouredness into fixed categories based on factors such as biology and geography, like with the other racial groups.

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[24] Dooms and Chutel op cit note 3 at 45.

[25] Ibid at 67.

[26] Ibid.

[27] Ibid.

[28] Ibid at 68.

[29] Ibid.

With this background and context of the formation of the coloured racial identity, this chapter now moves on to consider different features of the coloured identity (which are relevant in the present-day to varying degrees) which emerged from its historical formation and treatment.

III. THE FEATURES OF THE COLOURED IDENTITY FROM A HISTORICAL PERSPECTIVE

This section outlines five distinct features of the coloured group, which formed from the historical evolution of the group. This is done with a view to identifying contemporary features and issues which need to be addressed, in order to advance my argument for the need for a particularised Coloured CRT.

(a) 'Miscegnation'

The history of the 'Cape Coloured' and 'Griqua' racial sub-categories of the coloured category is informed by the idea of 'miscegnation', which denotes a sexual relationship between a white person and a person of another race.[30] This feature is drawn from the works of coloured scholars Adhikari, Zimitri Erasmus and Vernon February, as well as white authors who have written in favour of racial purity, such as Sarah Millin and J.H. Vorster. This 'racial mixing' has been a source of much shame among coloured people of these sub-categories, but also for coloured people in general as the idea of racial mixing is socially projected onto the group, as a whole.[31] This shame is linked to the eugenic schools of thought, which is a (failed) field of study which

[30] Merriam-Webster Oline Dictionary available at: Miscegenation Definition & Meaning - Merriam-Webster, accessed on 19 July 2024.

[31] Mohamed Adhikari 'From Narratives of Miscegnation to Post-modern Re-imagining: Towards a Historiography of Coloured Identity in South Africa' in Mohamed Adhikari (ed) *Burdened by Race: Coloured Identities in Southern Africa* (2013) 1-22.

suggests that certain groups of people have more desirable genes, for purposes of producing offspring and populating the earth.[32] European/white genes were seen as more desirable in the context of South Africa.[33] Thus, the perception within certain schools of thought is that racial mixture between white people and any other race would sully the superior genes of the white parent and was thus scorned.[34] Hence, the use of inverted commas in this chapter when referring to racial mixture, as used historically – because the term and/or concept is imbued with notions of white disdain, immorality and shame. Similarly, I use inverted commas with terms referring to 'racial purity' because it is imbued with undue esteem stemming from white eugenist sentiments.

In the past, certain white authors have been explicit in their views on miscegenation and, particularly, the product of this act – the mixed children, which gave rise to a particular racial group and identity, that is, the coloured identity (or rather a section thereof). Sarah Gertrude Millin, for example, opined that 'white children [with "black blood" came] into the world with shame and sorrow in their blood'.[35] 'Blood mixing' was further seen as leading to 'degeneration and loss of moral values' of white people engaging interracial sexual relations.[36] This illustrates the extent of the moral repugnance attached to the idea of blood mixing. This repugnance led to the legislation of South Africa's racial hierarchy and white hegemony, as well as material losses, discrimination and dispossession attached to being anything other than 'pure white'.

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[32] Philip K. 'Wilson Eugenics' available at Eugenics | Definition, History, & Facts | Britannica, accessed on 19 July 2024.

[33] Adhikari op cit note 31.

[34] Ibid at 7-8.

[35] Sarah Gertrude Millin *God's Stepchildren* (1924).

[36] Zimitri Erasmus *Coloured by History, Shaped by Place: New Perspectives on Coloured Identities in Cape Town* (2001) 17.

Due to the stigmas attached to interracial mixing, the white population idealised the notion of racial and cultural purity. This led to the careful safeguarding of the white classification under apartheid. Expanding the definition of a white person above, the Population Registration Act explicitly excludes 'a person who, although in appearance obviously [is] a white person, is generally accepted as a coloured person'.[37] Now, because of the phenotypical diversity of the coloured population, some coloured people could 'pass' for white if tested purely based off physical features. The apartheid government, therefore, created a mechanism to exclude such people, who may be characterised as white by their physical features, through this definition and racial screenings at the Population Registration Offices.

Afrikaner Nationalists, in particular, have taken up the ideal of white purity. One example of this is the appropriation of the Afrikaans language as exclusively their own. Afrikaans is commonly defined as a 'West-Germanic language…developed from 17th-century Dutch…by the descendants of European colonists…indigenous Khoisan peoples, and African and Asian slaves in the Dutch colony at the Cape of Good Hope'.[38] It is even said that it is an 'indisputable fact that the Khoi, the slaves, and later on the "Cape coloured", have all contributed to the rise of Afrikaans as a language'.[39] Yet, white Afrikaners sought to exclude any 'non-whites' from the centenary celebrations of the Afrikaans Language Movement in 1975, despite the indispensable contributions made by coloured people to the evolution of the Afrikaans language. This not only illustrates a rejectionist attitude held by the white population towards the coloured population, but also illustrates the non-recognition of coloured capabilities and contributions.

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[37] Population Registration Act op cit note 23 at 277.

[38] The Editors of Encyclopaedia Britannica 'Afrikaans Language' available at Afrikaans language | Origin, History, & Facts | Britannica, accessed on 19 July 2024.

[39] Vernon February *Mind Your Colour: The 'Coloured' Stereotype in South African Literature* (1981) 20.

A further feature of miscegenation perpetuated by white authors in the literary space, and widely accepted socially, is the notion that coloured people are '*by nature* [sic] lazier and more work shy than the Bantu'.[40] This, by inference, suggests that people of mixed descent (which are known to be coloureds in South Africa) are half-caste not only in genetic material, but in ability. That is, they neither have the superior genetics of their white parentage, nor the work ethic (amongst other things) of their black parentage.

In conclusion, the notion of miscegenation and its associations with inferior genetics, moral degeneration, non-recognition, half-ability and mediocrity attached to the coloured identity have been a source of shame experienced within the coloured community. This has deeply affected the group's self-perception and sense of self-worth.

(b) Intermediate and Marginal Statuses

The next feature refers to the different historical statuses applied to the coloured racial group, explicitly identified as features of the coloured identity by Adhikari.[41] The first refers to its intermediate status in the South African racial hierarchy. The coloured population 'experienced the South African racial hierarchy as a three-tiered system in which they held an intermediate position between the dominant white minority and the numerically preponderant African majority'.[42] Before and during the apartheid era, coloured people felt insecure about their position as a numerical minority, their political defenselessness and the country's escalating segregation.[43] This insecurity led to the fear that their status would be lowered to that of black

[40] Colonel J.H. Vorster in *Cape Herald* (23 November 1976).

[41] Adhikari op cit note 2.

[42] Ibid at 477.

[43] Ibid at 478.

Africans. This led to the assumption of a more proactive separatist attitude by coloured people in relation to black people, as they were trying to avoid being relegated to the status of black people by asserting themselves as separate and better (according to European, white standards) than black people. This then led to a number of public and political dissociations by coloured people from black Africans.[44]

This intermediate status, also known as 'a category midway between black and white' was institutionalised by according coloured people an ambiguous position in racial policies, particularly under apartheid.[45] According to these policies, coloured people were denied full citizenship on the basis of race, but were treated as 'partially privileged subjects' because they did not fall within the same category as black Africans.[46] This status led to the perpetual distancing of the majority of coloured people from Africanness and, on the other hand, the perpetual relation to whiteness in order to maintain and hopefully bolster their position of relative privilege.

In addition to an intermediate status, according to Adhikari, the coloured population held a marginal status, due to their numerical minority standing, with coloured people forming no more than 9% of the population throughout the twentieth century. Moreover, 'a heritage of slavery, dispossession and racial oppression ensured that coloured people lacked any significant economic or political power as a group and that by far the greater majority consisted of a downtrodden proletariat.'[47] Many of the coloured population's attempts at driving political

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[44] Ibid.

[45] Erasmus op cit note 36 at 18.

[46] Ibid.

[47] Adhikari op cit note 2 at 485.

change before and during apartheid failed, which affirmed the majority's downtrodden psyche.[48] Adhikari argues that this marginality led to a very specific approach to their political strategies, which involved pragmatism, opportunism and incrementalism.[49] This pragmatism denoted a 'realistic approach' to petitioning for the interests of coloured people in the political arena. This resulted in minimal combatting of the apartheid regime and, instead, complicity with the system in an attempt to emphasise similarities between the coloured and white groups so as to justify affording greater privileges to the coloured group. This also speaks to the opportunism mentioned above, that is, taking the opportunity, through political involvement, to bolster the status of coloured people within the apartheid racial hierarchy and overall political system.[50] And this (rather grand) endeavour was executed in a slow, incrementalist manner, with the goal being the attainment of minimum disadvantage applied to the coloured population. There were, of course, more progressive political movements and associations which, for example, encouraged the coloured community to unite with the black population in combatting the apartheid system; however, 'the majority of coloured people felt vulnerable and alienated from the African majority', thus such movements never gained traction amongst the majority of the coloured population.[51]

(c) Assimilationism

The next feature derived also from the work of Adhikari is a tendency towards assimilation to whiteness, which is woven into the previous feature as one of the major outcomes of the

[48] Ibid.

[49] Ibid.

[50] Ibid at 486.

[51] Ibid.

historical intermediate and marginal status of coloured people. This chapter identifies assimilationism as a separate feature of the coloured population, due to its significance as an attitude and aspiration. To 'assimilate' means 'to absorb into the cultural tradition of a population or group'.[52] However, coloured assimilationism was seen as 'less an impulse for acculturation than a striving for acknowledgement of the worth of coloured people as individuals and citizens, and inclusion within the dominant society on the principle that it was "culture" and "civilisation" rather than colour that mattered'.[53]

> This assimilationism, which has sometimes been misconstrued as the mere rationalisations of self-seeking sycophants and collaborationists, was rooted in a *Weltanschauung* informed by nineteenth-century Cape liberal values and environmentalist conceptions of racial difference. For much of the twentieth century, moderate coloured political opinion continued to cling to a progressionist world-view imbued with these ideals. The key assumptions of this Utopian outlook were first, that humanity was on a path of inevitable progress towards the ultimate attainment of an Elysian future of social harmony and prosperity. Second, it was assumed that all people, no matter what their current condition, were capable of self-improvement and the attainment of 'civilisation', which in the minds of the coloured elite equated to western bourgeois culture. These assumptions were reinforced by deeply held religious beliefs that not only posited the equality of all humans in the eyes of God but also fed the progressionist vision with ideas about the ultimate redemption of humankind and about its destiny being directed by the guiding hand of a just God.[54]

The meaning behind these assimilationist aspirations instilled a stubbornness to which coloured leaders and the majority of coloured communities clung and worked towards.[55]

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[52] Merriam-Webster Online Dictionary available at Assimilate Definition & Meaning - Merriam-Webster, accessed on 19 July 2024.

[53] Adhikari op cit note 2 at 475.

[54] Ibid at 476.

[55] Ibid.

Even the deepening of segregation and overt mechanisms adopted to exclude coloureds from whiteness were seen as temporary setbacks and reason to work harder towards 'self-improvement' and 'civilisation'.[56] This emphasises the deeply entrenched psychological state of inadequacy, needing to toil for one's worth to be recognised, awaiting the validation of self from an external party and perpetual comparison to 'the optimal state'.

(d) Perpetuated Perceptions and Prejudice

This sub-section addresses negative associations, perceptions, as well as stereotypes perpetuated about the coloured population and how they have affected the group's self-perception. These are taken from the work of Erasmus, Adhikari, February, Dooms and Chutel. The first negative association with colouredness was its perception and definition not as an identity in its own right, but as a group relative to the larger groups (in terms of number and influence). As mentioned earlier, 'coloured' was defined as someone who was neither black or white. It was, therefore, defined negatively, in terms of what it was not. As Erasmus stated, it was defined 'in terms of "lack" or taint'.[57] Further, according to Erasmus, colouredness was defined 'in terms of "remainder" or excess which does not fit a classificatory scheme'.[58] This refers to the fact that the coloured racial category was essentially designed to encompass all 'races' which could not be defined as black, white or Asian/Indian. This reinforced the notion that coloured people did not hold the same status as the other groups – that they were somehow deficient as a unit (generally defined in terms of nationhood, as was the standard at the time).[59] This caused the internalisation,

[56] Ibid at 476 and 477.

[57] Erasmus op cit note 36 at 17.

[58] Ibid.

[59] Adhikari op cit note 2 at 481.

amongst coloured people, of ideas of a lack of cultural authenticity and integrity as well as feelings of inherent deficiency and not belonging.[60]

The coloured identity was further reactively defined and 'shaped by the need to contend with white racism and the state's segregationist policies'[61] as opposed to being shaped and defined proactively and positively. This reactive definition is a fragile one, for where something is defined in response to another, the former would inevitably need to undergo changes when the latter does. This means that the group's entire sense of self is dependent on the constancy of the other groups, which constancy was rightly shattered upon the advent of democracy. This, therefore, calls for a redefinition of the coloured identity, as a whole. This will be explored in chapter six, which will deal with present-day features of the coloured racial identity and how to address them.

A further marker of negative perceptions perpetuated about the coloured population was the plethora of literature produced about coloured people from as early as the eighteenth century, in which coloured characters would often be used as 'comic embellishment',[62] depicted in ridiculous and often chaotic scenarios. Key themes surrounding coloured characters were their 'love for liquor', their short temperedness which inevitably led to fights, 'moral looseness' and their linguistic inaptitude.[63] Further negative associations with the coloured identity are 'immorality, sexual promiscuity, illegitimacy, impurity,…untrustworthiness',[64] 'propensities to

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[60] Ibid.

[61] Ibid at 484.

[62] February op cit note 39 at 26.

[63] Ibid.

[64] Zimitri Erasmus op cit note 36 at 17.

criminality, gangsterism, drug and alcohol abuse, and vulgar behaviour'.[65] This was a source of great shame for the coloured community and was counteracted by an expectation of moral impeccability and respectability (particularly amongst women).[66]

(e) Creolisation

The fifth and final feature of the coloured population group is that of creolisation, drawn from the works of Adhikari and Erasmus.[67] Creolisation denotes 'the process of two or more cultures that were originally from different parts of the world mixing to produce a new culture'.[68] This is precisely what happened with the coloured group – its (general) history of 'racial mixture', as mentioned above under the feature of 'miscegnation', gave rise to a combination of the various cultures, which culminated into the coloured culture and identity. This culture comprises, inter alia, shared geography (entrenched under apartheid), common musical interest, cultural cuisine, fashion sense,[69] hairstyling and language use.[70]

The coloured group became most entrenched as a unit under apartheid when the population was forced into the residential areas designated to coloured people by the Group Areas Act of 1950. This Act gave rise to forced removals which – as alluded to by its name – saw the mass violent removal of coloured (among the other 'non-white' racial groups) people from their homes to areas designated to coloured people by the apartheid government. This process not

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[65] Adhikari op cit note 2 at 482.

[66] See Dooms and Chutel op cit note 3 at chp 7.

[67] See for example Adhikari op cit note 31 at 16 and Eramus op cit note 36 at 16.

[68] The Cambridge Online Dictionary available at: CREOLIZATION | English meaning - Cambridge Dictionary, accessed on 21 July 2024.

[69] See Dooms and Chutel op cit note 3 at 62.

[70] Zimitri Erasmus op cit note 36 at 22.

only resulted in the loss of coloured people's homes, but for certain sections of the population, gave rise to the loss of culture.[71] There are many stories of how first-generation, mixed-race persons who were raised within the cultural practices of either parent, particularly if the family's cultural practices resembled black practices, were forced to abandon such practices out of fear of being classified as black under the formalised apartheid racial categorisation.[72] This meant that certain sections of the coloured community consciously gave up their native languages, cultural practices and even their names in order to classify and move through the world as coloured people, with the view to improving their and their families' life chances, given the higher status accorded to coloured people compared to black people.[73]

Furthermore, the fact that the coloured racial category was a 'catch-all' category - in which all those who were not categorised as white, black or Asian/Indian were categorised as coloured and integrated into the coloured 'mixed masala'[74] - resulted in the coming together of a wide range of cultural influences. Due to the collective experience of loss in varied ways, coloured people may be described as social orphans,[75] meaning they experienced a collective lack of belonging. This, arguably, created the need within coloured communities to cultivate a sense of belonging and family amongst each other and this would have created further impetus to create a collective identity in both conscious and subconscious ways. This feature highlights the 'creativity and agency'[76] taken by coloured communities in creating a distinct culture and identity.

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[71] Dooms and Chutel op cit note 3 chp 1.

[72] Ibid.

[73] Ibid at 32.

[74] Adhikari op cit note 2 at 479.

[75] Erasmus op cit note 36 at 22.

[76] Ibid at 23.

IV. CONCLUSION

This chapter concisely outlines the formation of the coloured identity from a historical perspective in order to provide context for the identification of features distinct to the coloured racial group. The first feature identified is that of 'miscegnation', which refers to the sexual relationship between a white person and a person of another race. I have argued that the notion of miscegenation and the associations of inferior genetics, moral degeneration, non-recognition and mediocrity, attached to the coloured identity as a result of the concept of miscegenation, have been a source of great shame experienced by the coloured community. Furthermore, this has deeply affected the group's self-perception and sense of self-worth. The second feature is the intermediate and marginal status of the coloured population, which led to the perpetual self-distancing of coloured people from blackness and Africanness, the aspiration to whiteness and European standards and thus complicity by the coloured population with the apartheid divisive agenda.

The third feature is assimilationism, that is, coloured people wishing to assimilate to white or European standards. The argument is made that the coloured population's assimilationism emphasises the deeply entrenched psychological state of inadequacy within the group. The fourth feature speaks to negative associations and stereotypes perpetuated about the coloured population, which led to the damaging expectation of moral impeccability and respectability within the group. The final feature is that the coloured identity is a product of creolisation and is thus a distinct identity.

This chapter depicts the unique history of the coloured group and the unique forms of prejudice and discrimination they faced, many of which remain intact in the present-day. This serves the purpose of demonstrating the distinctiveness of this group's characteristics and

consequent challenges and needs, which justifies the need for a distinct CRT scholarship about the coloured group. Many of the features identified in this chapter remain intact in the present day and are further explored in chapter five. This chapter also provides context for the contemporary challenges faced by the group, outlined in chapter five.

CHAPTER 5: FEATURES OF THE COLOURED RACIAL GROUP IN THE PRESENT-DAY

I. INTRODUCTION

This chapter considers the endemic problems faced by the coloured population in the present-day. This answers the fourth research question on how one would define and characterise the coloured group from a present-day perspective. It first outlines the historical issues explored in chapter four that remain intact. This particular section explores why and how these issues remain relevant in contemporary South Africa. Secondly, this chapter outlines the challenges faced by the coloured population which are particularly dire in the present-day. This section uses data and statistics to demonstrate some of the particularly intractable issues faced by the coloured population after the advent of democracy in South Africa, which are linked to the history of the group. These are gang involvement, high incarceration rates, the prevalence of violence and substance abuse and low (tertiary) education levels in the coloured community. This section explores the nature and causes of these challenges, while recommendations on how to effectively address them are provided in chapter seven. These challenges are outlined with the view to demonstrating the distinctiveness and severity of the issues facing the coloured population, and to ground my arguments for the need for a distinctive Coloured Critical Race Theory as a subset of Critical Race Theory in South Africa. This exploration further illustrates the kinds of analyses and scholarship to be developed as part of ColCrit with the purpose of devising practical solutions to the challenges of the population.

II. HISTORICAL FEATURES STILL INTACT

This section addresses the issues faced by the coloured community which remain intact despite the passage of time and transition to democracy, and which still influence the coloured population today. These issues – in addition to those which are listed in section III of this chapter – require national attention and resolution.

(a) Intermediate and Marginal Statuses

The effects of intermediate and marginal statuses, identified by Mohamed Adhikari, accorded to the coloured population under apartheid, as mentioned in chapter four, remain intact in various ways. As previously mentioned, the intermediate status led to a separatist attitude assumed by the coloured population in relation to the black African population, as a means of affirming and

maintaining the privileges accorded to the coloured population by virtue of the racial hierarchy which placed them above black Africans.[1] This attitude further led to perpetual attempts at relating to whiteness and painting the coloured way of life as being in close proximity to that of the white population.[2]

The marginal status, similarly, led to political approaches which, if successful, would yield the most (immediate) benefit for the coloured population. These approaches, moreover, took the form of complicity with the apartheid system and attempts at emphasising the proximity of coloured customs to white customs in order to secure greater privileges and minimal disadvantage for the coloured population.[3]

In conclusion, these statuses led to the overall attitude of separatism from blackness, aspiration towards whiteness, and needing to prove oneself as worthy of recognition and acceptance by the white population. One can infer that these attitudes remain intact in the present-day as outlooks and beliefs are passed down between generations,[4] thus becoming entrenched and difficult to unlearn.[5] These beliefs need to be addressed in order to obtain more tolerant, inclusive and unbiased worldviews within the coloured community.

(b) Assimilationism

Much like the abovementioned worldviews, assimilationism is another attitude which has not been undone, particularly because of its subconscious nature. Assimilationism has deep roots in beliefs and aspirations around the progression of society towards civilisation, which was believed to denote western bourgeois culture.

Variations (overt or not) of the attitudes related to status and assimilation were embodied in the population's goals and actions during apartheid and were most likely passed onto the following generations due to the nature and strength of intergenerational value transmission.[6]

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[1] Mohamed Adhikari 'Hope, Fear, Shame, Frustration: Continuity and Change in the Expression of Coloured Identity in White Supremacist South Africa, 1910-1994' (2006) 32 *Journal of Southern African Studies* 467at 477-480.

[2] Ibid.

[3] Ibid at 484-486.

[4] Joohong Min, Merril Silverstein and Jessica P. Lendon 'Intergenerational Transmission of Values Over the Family Life Course' (2017) 17 *Advances in Life Course* Research 112.

[5] Duarte Gonçalves, Jonathan Libgober and Jack Willis 'Learning Versus Unlearning: An Experiment On Retractions' (2022) *National Bureau Of Economic Research Working Paper Series* Working Paper 29512.

[6] Min, Silverstein and Lendon op cit note 4.

Adhikari adds that these attitudes were likely passed on in most households as the majority of the coloured community were either not exposed to or did not accept alternative political views.[7] Furthermore, in order to unlearn views passed down from one's parents and forebears, one would need to bring such views from the subconscious to the conscious mind and actively combat the feelings and actions which stem from the subconscious and replace them with new, intentional thoughts and actions.[8]

Put differently, the process entails introspection, learning and unlearning, and ultimately reprogramming.[9] Moreover, because the unlearning of these attitudes requires this level of emotional intelligence, most often catalysed by psychological understanding and services, they remain largely intact in the present-day. This is due to the restricted access to mental health resources in South Africa[10] as well as the attitudes towards mental health aid held by South Africans.[11]

The views mentioned in this subsection ought to be addressed specifically in order to bring healing to the coloured community, to create a platform for an acknowledgement of their role in the rift experienced between the black and coloured populations and to foster a sturdier alliance between the black and coloured populations. This is expanded on in chapter seven.

(c) Stereotypes

The third lasting challenge of the coloured population is that of perpetuated stereotypes and narratives about the population that continue to exist in the public domain. These stem, first, from historical perceptions around coloured people being the product of miscegenation, which was seen as an immoral act with unwanted consequences.[12] Secondly, these stereotypes stem from the term 'coloured' being defined in negative terms – in terms of 'lack or taint',[13] as a

[7] Adhikari op cit note 1 at 486.

[8] Jennifer Delgado Suárez 'The Art of Unlearning: How to Change Limiting Beliefs?' *Psychology Spot*, available at: h=ps://psychology-spot.com/how-to-change-limi+ng-beliefs/, accessed on 13 December 2024.

[9] Ibid.

[10] Sumaiyah Docrat, Donela Besada, Susan Cleary, Emmanuelle Daviaud and Crick Lund 'Mental Health System Costs, Resources and Constraints in South Africa: A National Survey' (2019) 34 *Health Policy and Planning* 706.

[11] R Kakuma, S Kleintjes, C Lund, N Drew, A Green and AJ Flisher 'Mental Health Stigma: What is Being Done to Raise Awareness and Reduce Stigma in South Africa?' (2010) 13 *African Journal of Psychiatry* 116.

[12] See for example Sarah Gertrude Millin *God's Stepchildren* (1924) and Zimitri Erasmus *Coloured by History, Shaped by Place: New Perspectives on Coloured Identities in Cape Town* (2001) 17.

[13] Erasmus op cit note 12 at 17.

catch-all category, and being defined relative to the white and black populations, that is, being defined in terms of what the group is not as opposed to a positive definition.[14] Finally, these perceptions were perpetuated in literature[15] and spoke to the coloured population's propensity towards substance abuse, likelihood to engage in arguments and physical fights and morally repugnant behaviour, their linguistic inaptitude, illegitimacy as a group, etc.[16]

This plethora of stereotypes still deeply affects the coloured population's collective psyche, self-perception and self-worth.[17] It also affects the population's perception of itself as a self-standing identity. This is addressed in the following sub-section. As demonstrated above, such internalised attitudes need to be very intentionally undone and this process requires greater access to mental health resources in the coloured community. Specific and further interventions needed to address the perpetuations of these negative perceptions and the internalisation thereof are addressed in chapter seven.

(d) Creolisation – A Self-standing Culture

The final feature of the coloured community, which remains relevant today, is that the term 'coloured' no longer just denotes a racial classification assigned under the apartheid regime. For many within the coloured community, it denotes a culture in its own right.[18] As mentioned in chapter four, the coloured community comprises of a fusion of various ethnic backgrounds, beliefs and practices, which gave rise to a unique collection of beliefs and practices, and overall culture.[19] This is a noteworthy feature as much work needs to be done in order to legitimise the coloured community as a self-standing culture, given the widespread debates around whether or not that is the case and given the perception and internalisation of the notion that the coloured community is deficient and lacks cultural authenticity and validity.[20] Such work would go a long way in strengthening the community's sense of self-worth and belonging.

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[14] Adhikari op cit note 1 at 480-481.

[15] Vernon February *Mind Your Colour: The 'Coloured' Stereotype in South African Literature* (1981).

[16] Erasmus op cit note 12 at 17.

[17] Adhikari op cit note 1 at 481; Tessa Dooms and Lynsey Eboney Chutel (ed.) *Coloured: How Classification Became Culture* (2023) 32 and Amanuel Isak Tewolde 'Experiencing Negative Racial Stereotyping: The Case of Coloured People in Johannesburg, South Africa' (2024) 13 *Social Sciences* 276.

[18] Dooms and Chutel op cit note 17 generally.

[19] Adhikari op cit note 1 at 16 and Eramus op cit note 12 at 16.

[20] Ibid.

The policy, legislative and potential community intervention recommendations in response to the problems listed in this section are proffered in chapter seven of this dissertation. This chapter now considers further contemporary challenges facing the coloured community in need of addressing.

III. PRESENT-DAY CHALLENGES

This section identifies five endemic and inter-related problems faced by the coloured population in democratic South Africa. These issues pertain to gangsterism, incarceration rates, violence, substance abuse and education levels in the coloured community and stem directly from the history of coloured experience and circumstances. They are explored with the view to informing further recommendations on actions to be taken to address the state of the coloured population in present-day South Africa.

(a) Gang Involvement

The first modern-day issue faced by the coloured population, identified by this dissertation as one of the most pressing issues, emerged before the advent of democracy and is an ongoing challenge today. That is the prevalence of gangsterism, particularly in the Western Cape,[21] which is home to majority of the national coloured population.[22] Gangsterism has been conceptualised as a response to particular circumstances in which desired outcomes cannot be obtained through traditional means.[23] This is the case in the Western Cape, particularly Cape Town, 'where high unemployment has led to a self-perpetuating drug economy, filling the vacuum of opportunity'.[24] Members of these communities, therefore, seek out alternative means to obtain an income and provide (materially) for themselves and their families and these means are often criminal activity/common gang activities such as theft, drug sales, etc. Gangsterism is of course a complex issue and this dissertation will only touch on a few aspects thereof.

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[21] See generally Tove van Lennen 'Cape Town Gangs: Political Dimensions' *The Helen Suzman Foundation*, available at Cape Town Gangs: Political Dimensions — Helen Suzman Foundation (hsf.org.za), accessed on 21 August 2024 and South African Police Service 'Minister Bheki Cele: Third Quarter Crime Statistics 2023/2024' *South African Government Website* 16 February 2024, available at Minister Bheki Cele: Third Quarter Crime Statistics 2023/2024 | South African Government (www.gov.za), accessed on 21 August 2024.

[22] Census 2022 Statistical Release *Stats SA* page 7, available at https://census.statssa.gov.za/assets/documents/2022/P03014_Census_2022_Statistical_Release.pdf, accessed on 21 August 2024.

[23] Van Lennen op cit note 21.

[24] Ibid.

An important root cause of gangsterism is the community's sense of social dislocation. This refers to the experience of being severed from one's culture or identity and bears the features of isolation, a lack of purpose and hope.[25] The aforementioned experience of severance is quite widespread in the coloured community in the following ways: first, this severance presented itself in the history of slavery, that is, the violent and non-consensual removal of humans for free labour from their home countries and taking them to unknown lands.[26] This was the very first major dislocation. Secondly, this severance manifested itself in the forced removals effected by the apartheid government, which forcibly relocated the different racial groups (barring the white population) to areas designated to their racial category by the apartheid government.[27] This geographical dislocation naturally led to a strained sense of home, belonging and connectedness to one's culture. Thirdly, severance took the form of certain sections of the coloured population needing to forego the customs with which they were reared, where those customs were more closely related to black ways of living as opposed to white and European modes of operation.[28] As mentioned in chapter four, this was a means of securing their status as 'coloured' and thus securing a better lived reality under apartheid for their families. The fourth manifestation identified in this chapter is the fact that 'coloured' was a catch-all category, meaning people who did not personally identify as coloured or with the culture at the time, were banded together with this population[29] and this likely resulted in the diminishment of such members' cultural connectedness and sense of identity. This sense of dislocation remains today, as most coloured people do not know their ethnic and cultural roots[30] as much of this had to be abandoned or forgotten in order to blend in with what was perceived to be the intermediate between blackness and whiteness and also as a natural part of creolisation. Gangs, therefore, are appealing in communities who experience social dislocation as they offer that sense of community, belonging and solidarity that the population may be missing.[31] This missing sense of

[25] Ibid.

[26] South African History Online 'History of Slavery and Early Colonisation in South Africa' available at History of slavery and early colonisation in South Africa | South African History Online (sahistory.org.za), accessed on 17 July 2024.

[27] Group Areas Act No. 41 of 1950.

[28] Dooms and Chutel op cit note 17 chp 1.

[29] Adhikari op cit note 1 at 480-481.

[30] Dooms and Chutel op cit note 17 chp 1.

[31] Van Lennen op cit note 21.

belonging and solidarity feeds into similar challenges surrounding self-perception, self-worth and group legitimacy, which stem from the abovementioned historical features.

The final cause of gangsterism to be explored in this subsection is the 'state vacuum that has existed in the townships for many generations'.[32] This means that the presence of the state and its laws have not been felt in townships, thus giving rise to a gap in such authority, which gap was filled by gang leadership. This gap has been experienced material ways because until recently the police force would avoid interfering with the operation of the townships. Furthermore, this anarchy 'afforded gangs the opportunity to monopolise violence and has provided them with the revolutionary invocations necessary to legitimise criminal behaviour – particularly to their own members'.[33] This 'live and let live' approach was discarded when President Cyril Ramaphosa launched the government-led Anti-Gang Unit in November 2018, which was tasked with dismantling gangs and their operations.[34] This included searching gang strongholds and making arrests. I address the effectiveness of the Anti-Gang Unit where I make recommendations as to the solutions to gangsterism in the coloured community in chapter seven of this dissertation.

(b) Incarceration Rates

The second modern-day challenge faced by the coloured community is high incarceration rates - the coloured community has the highest proportion of its national population imprisoned. Moreover, out of an average total of 161 054 inmates recorded in the 2016/2017 financial year, 28 568 or 18.2% of those were from the coloured population group.[35] Further, according to the results of the Community Survey of 2016 released by Statistics South Africa, there are 55,7 million people in the country and 4,9 million of those people fall within the coloured population.[36] Thus, a population group which constitutes approximately 8.8% of the national population makes up 18.2% of the prison population. This is the population group with the highest representation in prison, compared to the black population, which comprises 80.6% of

[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Gopolang Makou, Ina Skosana and Ruth Hopkins 'Fact Sheet: The State of South Africa's Prisons' *Africa Check* 18 July 2017, available at FACTSHEET: The state of South Africa's prisons - Africa Check, accessed on 22 August 2024.
[36] Stats SA Media Release: Community Survey 2016 Results 30 June 2016, available at Media Release: Community Survey 2016 Results | Statistics South Africa (statssa.gov.za), accessed on 22 August 2024.

the population and makes up a similar proportion of the inmate population – 79.6%. The white population comprises 8.1% of the population and makes up only 1.6% of the prison population and finally, the Indian population comprises 2.5% of the population and makes up 0.6% of the prison population. This means that coloured people are approximately 2 times more likely to be imprisoned relative to their proportion in the national population.

Such high incarceration rates lead to the over-exposure of the community to correctional facilities which are too overpopulated to take a rehabilitative approach. As a result, prisoners face:

> being subject to the violence of gangsterism, drugs, and the possibility of being sexually assaulted while in custody. The effects of this victimisation may lead to further violence upon release. Being incarcerated may also lead to life-long gang allegiances that keep inmates locked into criminal lifestyles even after release.[37]

The culture of gangsterism, substance abuse and violence (the latter two are dealt with later in this chapter) are therefore reinforced through the prison system. It further sustains a perpetual cycle of imprisonment and criminal behavior, and shows the interconnectedness of the problems experienced within the coloured community. The following subsection considers the engagement of violence in the coloured community as a distinct challenge to be addressed.

(c) Violence

Violence is perpetrated and experienced within the coloured community in various ways and at higher rates than other communities. For example, Statistics South Africa has established that coloured households are more than twice as likely to experience assault compared to black households.[38] The murder of family members and acquaintances by coloured perpetrators are also greater in number than in the black population.[39] For every 100 000 individuals classified as

[37] Ted Leggett 'Still Marginal: Crime in the Coloured Community' *SA Crime Quarterly* No 7 (March 2004) at 22.

[38] StatsSA 'Statistical Release: P0341 Victims of Crime' *Governance, Public Safety and Justice Survey GPSJS* 2018/19

[39] Richard Matzopoulos, Lea Marineau, Shibe Mhlongo et al 'Who Is Killing South African Men? A Retrospective Descriptive Study of Forensic and Police Investigations into Male Homicide' *BMJ Glob Health* (2024) 9(4) e014912, available at Who is killing South African men? A retrospective descriptive study of forensic and police investigations into male homicide - PMC (nih.gov), accessed on 22 August 2024.

coloured, about 3 murders involve family members. Furthermore, for every 100 000 coloured individuals, approximately 13,4 murders involving acquaintances occur. This aligns with a study performed in 2009 which demonstrated a higher homicide risk for coloureds than blacks particularly in metropolitan areas.[40] Coloured men are also more likely to be murdered by family and acquaintances than black men, that is approximately, 7 men per 100 000 coloured persons as opposed to about 3,1 black men per 100 000 sample.[41] The murders of family and acquaintances were also associated with a high rate of alcohol use by the perpetrators.[42] This shows the link between substance abuse and violence, the former of which is addressed in the next subsection.

A further cause of violence in the coloured community is the existence of gangsterism. Coloured communities' populations have remained relatively stable in terms of numbers and members' residency. This limited mobility has resulted in the perpetration of crimes by community members on other members. However, perpetrators are deterred from picking familiar victims in their immediate surroundings. They, therefore, pick victims in further-out sections of the community and this gives rise to the development of 'turfs', that is, demarcated areas run and fiercely protected by select groups. This protective behaviour encourages further violence in order to assert authority and control over the different turfs.[43] The illicit drug trade, which is present within coloured communities and is explored in subsection III(d) below, provides further impetus for turf wars, that is, violence perpetrated in order to secure and maintain dominion over certain turfs in order to ensure profitability.

The final cause to be explored in relation to the violence perpetrated in coloured communities, particularly by men, is the shame-anger cycle, as explored by authors such as Kaymarlin Govender and Duncan Cartwright This cycle denotes that factors such as social dislocation, historical trauma and economic strife cause a deep-set sense of shame and dishonour, which in turn leads to anger and the perpetration of violence as a coping mechanism and as a means of asserting the honour and respect, which society has stripped one of.[44] This shame is

[40] Chandré Gould 'Beaten Bad - The Life Stories of Violent Offenders' *Inst Secur Stud Monogr* (2015) 2015(192) 1–144.

[41] Matzopoulos, Marineau, Mhlongo et al op cit note 39.

[42] Ibid.

[43] Leggett op cit note 37 at 24.

[44] Kaymarlin Govender and Duncan James Cartwright 'Hegemonic and Shamed Masculinities: Implications of Traumatic Historical Impacts on Black Men in a Post Democratic South Africa' (2021) 61 *PINS* 54 – 79.

largely unacknowledged and unprocessed and because behaviour is learnt through observation and mimicking, generations that follow assume the same kind of tendencies, even if certain sections of them do not experience the same level of hardship as their parents and forebears. This keeps the cycle of violence intact within the coloured community even when sections of the community (which are in the minority) are removed from the immediate circumstances which may lead to the shame-psyche. Nevertheless, the majority of the coloured population remain in circumstances of, inter alia, economic hardship and gang culture, which continues to reproduce the shame-psyche in the present-day. The solutions to the prevalence of violence within the coloured population are explored in chapter seven.

(d) Substance abuse

The fourth challenge of the coloured population is the high rate of substance abuse within the community, that is, narcotics and alcohol abuse. This subsection deals first with alcohol abuse. Historically, many coloured people worked in vineyards in the country's wine growing areas and were subject to the 'dop system', which meant that workers were paid part of their wages in wine.[45] This naturally led to the excessive consumption of wine on a consistent basis and ultimately led to addiction. Studies found that the dop system was still being utilised as recently as 1995 on 9.5% of Stellenbosch farms.[46] And of course, alcoholism outlived this system and haunts the community until this very day as many farmworkers subjected to this system are still alive and, as previously mentioned, habits are inherited by children and the legacy of alcoholism continues. Moreover, 'the *dop* system [was] diabolical in its ability to keep labour submissive and dependent, and…had the side effect of promoting violence, dysfunctional families, and foetal alcohol syndrome.'[47] Foetal Alcohol Spectrum Disorder (FASD) rates in South Africa are reported to have increased in a 2023 report with South Africa holding the highest FASD rates globally. The regions in the Western Cape and Northern Cape, provinces with the highest proportion of coloured people,[48] have recorded rates as high as 31% and 28% of children born

[45] Leggett op cit note 37 at 24.

[46] JM Te Water Naude, K Charlton, R Sayed et al 'The Dopstop Association – Promoting Health on Farms' (2000) 53 *Health Promotion Update*.

[47] Leggett op cit note 37 at 24.

[48] Statistics South Africa *Census 2022* Statistical Release P0301.4.

with FASD respectively.[49] This suggests that alcoholism in the coloured community remains prevalent in the present-day.

The coloured population also has high rates of narcotics usage. The country's rate of drug use has gone up significantly between 2002 and 2017, for example the use of cannabis is said to have increased from 1.5% to 7.8% (this is before marijuana was decriminalised) and the use of cocaine went up from 0.02% to 1.8%. The study further found that the Cape Coloured population was the most affected by the increase in drug use.[50] Mandrax, also known as 'the white pipe', has particularly plagued the national population and the coloured population most dramatically. As reported in 2002:

> More than 85% of Mandrax (methaqualone) used in South Africa is consumed in the Western Cape, where the drug is closely associated with Cape Flats gangs that use the white pipe for rituals and as a source of income. And South Africa is the leading consumer of Mandrax worldwide, with between 70% and 80% of the drug ending up in this country.[51]

As reported in 2019, the use of Mandrax is particularly well established in the Western Cape 'where it is consistently the third most frequently reported substance of abuse among persons entering specialist substance abuse treatment facilities'.[52] Mandrax 'has been one of the primary commodities traded by gang members since the mid-1980s, and its dis-inhibitive effects may be associated with violence.'[53] As mentioned in subsection III(c) above, the drug trade within coloured communities provided further stimulus for violence within such communities in the form of turf wars. The Mandrax trade laid the foundation for the trade and dealing of narcotics such as crack cocaine and crystal methamphetamine.

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[49] Bongisipho Magcaba 'South Africa Sees Alarming Spike in Fetal Alcohol Disorder Rate' *SABC News* 11 September 2023, available at South Africa sees alarming spike in Fetal Alcohol Disorder rate - SABC News - Breaking news, special reports, world, business, sport coverage of all South African current events. Africa's news leader., accessed on 23 August 2024.

[50] Jesse Copelyn 'Large Increase in Drug Use Over Last Two Decades in SA, Study Finds' *Spotlight* 6 March 2024, available at Large increase in drug use over last two decades in SA, study finds • Spotlight (spotlightnsp.co.za), accessed on 23 August 2024.

[51] 'High on The White Pipe' *Mail & Guardian* 5 July 2002, available at https://mg.co.za/article/2002-07-05-high-on-the-white-pipe/, accessed on 23 August 2024.

[52] S Dada, N Harker Burnhams, J Erasmus et al 'Research Brief: Monitoring Alcohol, Tobacco, and other Drug Abuse Treatment in South Africa: July - December 2019 Phase 47, 2019' (2020) *South African Community Epidemiology Network on Drug Use.*

[53] Leggett op cit note 37 at 24.

As demonstrated, the coloured population and regions of the country with the highest proportions of coloured people experience the highest rates of narcotics use. The causes appear to be the illicit drug trade in coloured communities as a means of making a living in a country with high unemployment rates and with limited access to decently paying jobs. A further reason might be misconceptions within the community on the reality of mental health issues and the limited education on mental health and how to address it constructively. This then leads to the use of substances as a means of coping with mental illness, trauma, emotional difficulty and so on. The prevalence of substance use and abuse in coloured communities naturally lead to the cyclical use/abuse due to easy access and perceived normalcy of such use.

(e) Education Levels

The final endemic problem to be explored in this dissertation, is the education levels of the community. The coloured community has the highest likelihood of not attaining tertiary education, with only 4.8% of the population having attained a degree; compared to 5.2% of the black population, 20.6% of the Indian/Asian and 28.6% of the white population.[54] This means that the majority of coloured people remain in low skill, low paying jobs or are simply subjected to unemployment, as unemployment rates have been shown to consistently decrease as education levels rise in South Africa.[55] This reinforces gangsterism as a means of making a living and obtaining status. This consequently reinforces all the other factors afflicting the population, as outlined in this chapter, that is, violence, substance abuse and incarceration rates. The issues which are particularly alarming in the coloured population seem to feed into each other to a large extent. These issues require prioritisation in order to bring relief to these issues and empower the community alongside all other previously disadvantaged groups.

[54] Department of Higher Education and Training 'Fact Sheet: Highest Level of Education Attainment in South Africa' March 2024 page 8.

[55] Stats SA 'Statistical Release P0211 Quarterly Labour Force Survey' Quarter 4:2023.

IV. CONCLUSION

This chapter outlines the contemporary issued face by the coloured population, starting with those which remained intact from before the advent of democracy. These issues are the intermediate and marginal statuses of the coloured population, which led to a separatist attitude being assumed towards blackness, an aspiration towards whiteness, and the need to obtain recognition and acceptance by the white population. The second issue is assimilationism, which, similar to the aforementioned statuses, remains intact due to the sustenance of outlooks and biases over generations. The next challenge is the longevity of stereotypes and its impact on the group's collective self-perception. The final challenge in this class is that of creolisation, as the culture continues to evolve and strengthen and consequently needs to be legitimised.

The second class of challenges pertain to gang involvement, incarceration rates, violence, substance abuse and education levels. First, it has been shown that gangsterism is rife in the coloured community as it became a means of making a living in the context of strained economic opportunity. It is also a response to the social dislocation of the coloured community and the absence of state authority within these communities. Secondly, the community has the highest incarceration rates of all other racial groups in South Africa, which over-exposes them to a perpetual culture of gangsterism, substance use and violence, given the approach of the South African prison system. The third issue is that of violence within the community. Coloured people have a high likelihood of being assaulted and/or murdered in general and specifically by a family member or acquaintance. This illustrates an internal culture of violence within the community, The causes are alcohol use, gang culture and the shame-anger cycle experienced by dishonoured coloured men. The fourth problem is the prevalence of substance abuse, that is, alcohol and narcotics abuse. Alcoholism in the coloured community has roots in the 'dop system' and has led to national issues such as high (and still growing) rates of Foetal Alcohol Spectrum Disorder. Moreover, the coloured population and regions with the greatest coloured populations, experience the highest rates of narcotics use. This is due to the illicit drug trade in coloured communities and inadequate mental health education. The final challenge is that coloured people have the lowest proportion of university graduates than any other group, which consequently lessens their chances of employment, thus reinforcing the need to resort gangsterism, which in turn reinforces violence, substance abuse and over-incarceration.

This chapter identifies the problems unique to the coloured population that require addressing. This serves two functions – first, it demonstrates the unique issues faced by coloured community, which justifies the need for a distinct Coloured Critical Race Theory. Secondly, it demonstrates the kind of scholarship that ought to be produced as part of ColCrit scholarship, which is meant to be further developed as this dissertation focuses only on particular challenges due to limited capacity for exploration. The ultimate aim of such scholarship is to air the particularised issues faced by the population so as to propose practical, targeted solutions, which ought to be implemented by the judiciary, legislature, community leaders etc. The solutions to the challenges identified in this chapter are suggested in chapter seven.

The next chapter, that is, chapter six outlines the theoretical foundation of the proposed Coloured Critical Race Theory, its foci and specific approaches.

CHAPTER 6: THE THEORETICAL BASIS OF COLOURED CRITICAL RACE THEORY

I. INTRODUCTION

This chapter presents the theoretical foundation of the proposed Coloured Critical Race Theory (ColCrit). This chapter addresses two research questions, namely, how South African CRT (SA CRT) can be developed to better reflect the diversity of race with a focus on the coloured racial group; and what a particularised ColCrit would look like. The first-mentioned research question is addressed through the introduction of perspective scholarship and outsider jurisprudence into SA CRT. The second research question is addressed by the remainder of the chapter, that is, by outlining the theoretical foundation of ColCrit. In doing so, this chapter presents ColCrit's fundamental aim; its background; its stance on CRT's fundamental aim; its stance on how the law may be used as a vehicle to realise the aims of CRT and ColCrit; as well as its stance on major SA CRT debates.

The aim of this chapter is to address the problem of the lack of comprehensive, particularised scholarship on the different groups within the 'Biko black' conception (used interchangeably with 'black collective'), by introducing two theories premised on the inclusion of subjugated and excluded groups, particularly in the formulation, interpretation and application of the law. It also begins the process of developing a body of scholarship pertaining to the coloured racial group in order to address the aforementioned problem and gap, from the perspective of the coloured population. This chapter also addresses the problem that SA CRT has not moved beyond the theoretical realm into the practical, by addressing how this problem presents itself in the scholarship and suggesting how to make the shift towards producing scholarship that can present immediately implementable solutions that would still achieve the transformation sought by CRT.

II. THE THEORETICAL FOUNDATION OF COLOURED CRITICAL RACE THEORY

(a) The Introduction of Perspective Scholarship and Outsider Jurisprudence into SA CRT

Perspective scholarship, according to Martha Fineman, is 'the term applied to a body of scholarship that is built explicitly upon the assertion of relevant differences among people,

whether they be found in race, class, sexual orientation, social situation, or gender'.[1] It is also said to encompass:

> an ever-growing body of work connected by the fact that it challenges the traditional notion that law is a neutral, objective, rational set of rules, unaffected in content and form by the passions and perspectives of those who possess and wield the power inherent in law and legal institutions.[2]

It is further said to encompass a skepticism about the impartiality and neutrality of the law and its institutions - much like legal realism, as defined in chapter two. Perspective scholars acknowledge and consider cultural, political and social influences in order to contextualise and understand the functioning and effect of law in society, in both its codified form and its application. Perspective scholars further describe law as a product of society, influenced by and responding to culture and politics. A unique addition to the legal realist school of thought is the consideration of a multiplicity of perspectives in interpreting and applying the law.

Furthermore, perspective scholarship is said to be premised on the fact that specific sections of the population have been excluded, partly or holistically, from the codification, interpretation and implementation of the law – leading to a legal system geared towards the consideration of only particular groups of people. Moreover, perspective scholars argue that those excluded groups have distinct outlooks and experiences that are relevant and ought to be included within the law's purview. Perspective scholarship seeks to provide an enhanced, diverse and complete set of data in redefining what law is and what roles and functions law plays and ought to play in society.[3]

This dissertation vehemently advocates for this approach within the South African context and, to a large extent, this had been implemented during the transition to democracy. However, this dissertation argues that the different branches of government did not, in the transition to democracy, nor do they currently pay enough attention to the distinction between the black African and coloured groups' experiences and distinctive needs. This is evidenced by the fact that many of the challenges identified in chapter five have either gone unaddressed,

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[1] Martha Albertson Fineman *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (1995) p 11 - 12.

[2] Ibid at 24.

[3] Ibid at 25.

have been addressed inconsistently or have only recently gained national attention.[4]

The second school of thought which ColCrit proposes to be introduced into SA CRT is outsider jurisprudence. It is also described as realist, but not quite nihilist. This theory gives rise to 'a methodology grounded in the particulars of [the outsiders'] social reality and experience'.[5] This speaks to accounting for specific contexts and its impact on subjects, a method advanced in SA CRT, particularly equality jurisprudence, as explored in chapter three.[6] This method is intentionally historical and revisionist, like the revisionist history theme under US CRT. This is a key theoretical underpinning of ColCrit, as illustrated in the following subsection, that is, looking to familiarise itself with history in its complete, unbiased form from the vantage point of all sections of society. This approach would require the consideration of those sources which are often disregarded such as, inter alia, poems, personal journals and oral historical accounts. This is a pivotal aspect of ColCrit's aim, that is, to account for history from all perspectives, particularly the coloured perspective, in order to enable the accurate the identification of challenges and consequently, the formulation of particularised, effective solutions.

This methodology 'rejects presentist, androcentric, Eurocentric, and false-universalist descriptions of social phenomena [and in doing so] offers a unique description of law'.[7] It questions the context in which laws were drafted and the political views of the drafters. It further acknowledges law as political, as a tool of social change and peaceful co-existence. It also views law as both a product and facilitator of the social and political status quo.

A further characteristic of outsider jurisprudence is the focus on the effects of a system of oppression and discrimination with the view to addressing the more complex root causes thereof.[8] Such focus entails the search for formal laws and procedures which would have a progressive effect, as opposed to applying existing neutral principles which only work to

[4] Chapter 7 of this dissertation provides sources for the manners in which the challenges in chapter 5 have been addressed and demonstrates why they are insufficient.

[5] Mari Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *MICH. L. REV.* 2320 at 2324.

[6] See, for examples, Catherine Albertyn 'Contested Substantive equality in the South African Constitution: Beyond Social Inclusion and Towards Systemic Justice' (2018) 34 *SAJHR* 441.

[7] Matsuda op cit note 5 at 2324.

[8] Patricia Williams 'The Obliging Shell: An Informal Essay on Formal Equal Opportunity' (1989) 87 MICH. L. REV. 2128.

maintain the existing status quo.[9] In addressing such effects, the legal system would need to take account of the experiences of those who are subjected to oppression and discrimination. That is, those who have experienced the adverse effects of the existing, 'neutral' laws and their ineffectiveness in providing redress. These perspectives can also 'assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice'.[10] This means that the said perspectives can be used to understand how the legal system truly operates and to define justice and what it ought to entail. This can only be illuminated by accounting for the lived experiences of those whom the current legal system does not serve.

Like perspective scholarship, outsider jurisprudence had arguably been implemented during the transition to democracy and much scholarship has been produced advocating for the provision of the needs of the black group, but again, without sufficient focus on the distinction in realities between the black African and coloured groups. A fundamental aim of ColCrit is to codify the accounts of the experiences of the coloured group from an intersectional perspective, that is, the historical experiences as mentioned above, but also present-day experiences under democracy. This would paint a realistic picture of the group's experiences and would guide the legislature and executive on the effectiveness of existing laws and how to adapt such laws so as to address the issues faced on the ground.

This section now moves on to consider the fundamental aims and positions taken by the proposed Coloured CRT, including how it seeks to incorporate perspective scholarship and outsider jurisprudence into the theory.

(b) Coloured Critical Race Theory

(i) ColCrit's Fundamental Aim

The fundamental aim of ColCrit is to account for the lived experiences of the coloured population group for two reasons. First, because the coloured population was subjected to a very specific set of circumstances historically, which resulted in equally particularised realities in the present-day, as explored in chapter four and five. Secondly, because the current SA CRT

[9] Christine Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review) (1989) 41 STAN. L. REV. 751 at 770.

[10] Mari J. Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22(2) Harvard Civil Rights-Civil Liberties Law Review 323 at 324.

scholarship does not account for the different racial groups within the black group and largely applies its focus to the realities experienced by the black African population as opposed to the realities unique to each racial group within the larger black collective. It, therefore, works with a monolithic conception of racism, oppression and disadvantage. Chapter three illustrates the kinds of intellectual discussions and discourse present and ongoing within SA CRT scholarship and such work has not included scholarship around the unique realities of the diverse groups within the black collective. This is the gap ColCrit seeks to fill in the existing SA CRT.

ColCrit, accordingly, wishes to introduce perspective scholarship and outsider jurisprudence with the specific goal of accounting for the realities of the coloured racial group. ColCrit seeks to advance a body of scholarship rooted in the unique contexts and experiences of the coloured community as well as the cultural, political and social influences which may have been excluded in the drafting, implementing and enforcing of laws and which would impact the functioning and efficacy of the law and its institutions. These contexts and experiences presented in the scholarship ought to come from members of the coloured population itself in order to obtain accounts rooted in actual experience and truth.

ColCrit further asserts that the current SA CRT essentialises the features and needs of the racial groups in the black collective by focusing solely on the features and needs of the black African racial group in outlining the issues to be addressed by CRT. Anti-essentialism ultimately calls for the consideration of the unique contexts of all sections of society. ColCrit further advocates for the consideration of the intersectional experiences of different members of the coloured population, which takes account of the distinctive lived reality of sections who experience multiple forms of oppression.

As outlined in chapter two, a counter-argument to the anti-essentialist view holds that 'all minority races should compromise their differences and form a united front against racism in general'.[11] I wish to reiterate ColCrit's response that there is a grave danger in this approach in that different sections in a particular group would experience the benefits of the movement to varying degrees and particularised needs of certain subcategories will go unaddressed if they do not coincide with the larger group's needs. There has been a related critique of the development

[11] Richard Delgado & Jean Stefancic *Critical Race Theory: An Introduction* 4 ed (2023) 66.

of CRT in the US which states that CRT has become 'excessively preoccupied with issues of identity…and endless refinements of the antiessentialist thesis'.[12] This argument may be relevant for my purposes as there may be a general critique of the proposed ColCrit scholarship averring that an anti-essentialist and (arguably) racially separatist approach to developing CRT in South Africa may be, inter alia, premature in the face of the ongoing plight of black African people in South Africa. ColCrit's response to this is that without particularised redress, there is no redress - no true addressing of the issues that actually impact the relevant group. ColCrit, therefore, argues that the development of perspective scholarship and outsider jurisprudence is, in fact, a pressing issue. In sum, ColCrit does not assume a separatist approach to the black collective's challenges and goals. On the contrary, it seeks to work in alliance with the scholars, activists and practitioners advancing the black collective's interests. It is simply advocating for more particularised scholarship within the collective transformative endeavour in order to account for and cater to the differences within the collective.

Finally, ColCrit assumes a 'consciously activist' approach to its scholarship and social justice work, that is, to work in partnership with the communities it seeks to serve in more than a '(merely) theoretical or abstracted way'.[13] ColCrit 'must be informed by and directed at the lived experiences of the people who constitute and populate these communities'.[14]

(ii) Background to ColCrit

The background to Coloured Critical Race Theory is the Black Consciousness Movement (BCM). ColCrit aligns itself with the fundamental tenets of the BCM and seeks to use such tenets and praxes as part of its own transformative goals. BC scholarship's fundamental approach is that of 'curiosity about human experience',[15] that is, the deep analysis of the experiences of subjects of interest and how to aptly respond to such experiences. Biko defined apartheid as the outcome of the white population's desire for economic prosperity, meaning, the white population (who held economic and political power at the time) codified racial segregation and subjugation

[12] Ibid at 108.

[13] Francisco Valdes 'Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities' (1996) *La Raza L.J.* 1 at 15.

[14] Ibid.

[15] N. Barney Pityana 'Steve Biko: Philosopher of Black Consciousness' in Adekeye Adebajo (ed) *The Pan-African Pantheon Prophets, Poets, and Philosophers* (2021) 391-409 at 404.

in order to justify their historic and ongoing racism and exploitation of the black population.[16] This reflects a material determinist conception of racism, as defined in chapter two and three, with which ColCrit is aligned.

As mentioned in chapters one and three of this dissertation, BC scholarship labelled the black African, coloured and Indian racial groups collectively as 'black' as a symbol of their unity in the fight against apartheid. This dissertation concurs with this approach under apartheid as the aims of that liberation struggle were against an overt, oppressive regime as opposed to the current endeavours being attainable under the current dispensation. A key argument of this dissertation is that this collective approach to redress under democracy leads to the essentialisation of the experience of oppression in democratic South Africa. This further leads to certain forms of oppression, particularly those experienced by the minority sub-groups, being overlooked and going unaddressed.

Similar to the BCM, ColCrit seeks to assume a deeply analytical approach to the status quo in order to assess the extent of transformation experienced in South African society, particularly from the perspective of the coloured population. ColCrit advocates for the analysis of the treatment and lived experiences of the coloured community with the view to finding targeted, effective solutions to such experiences and needs.[17] Moreover, ColCrit aligns itself with the BC messaging that the psychological state of 'the oppressed' determines their liberation possibilities. The solution is taking pride in oneself and one's background, denouncing the degrading messaging perpetuated and taking agency in one's own liberation. This speaks to assuming a state of consciousness, which denotes a rejection of the messaging perpetuated by society's key institutions that white norms and customs are superior and that those of the coloured population are inferior. Such messaging naturally became internalised by the population due to the persistence and ever-presence of such messaging. Consciousness, accordingly, denotes becoming aware of what is often an unconscious self-denigration, and combatting that by acknowledging the oppressive intent behind such messaging, choosing to see the value and take pride in one's own cultural norms and customs. This approach would address the challenges

[16] Stephen Biko 'Black Consciousness and the Quest for a True Humanity' (1978) Vol. 8 Issue 3 *Ufahamu: A Journal of African Studies* 10 at 10.

[17] Pityana op cit note 15.

regarding self-perception and self-worth as explored under the features of the group's marginal and intermediate status, assimilationism and stereotypes perpetuated.

ColCrit aligns itself with two of the tools employed by the BCM, that is, the reclamation of culture, as inspired by Fanon, and social development, as inspired by Julius Nyerere, Paulo Freire and Amilcar Cabral. The reclamation of culture appears to be an extension of the notion of consciousness, particularly the aspect of recognising the value of and taking pride in one's culture. This involves rejecting the perpetuated idea of black cultures being uncivilised and unprogressive, recognising their beauty and reclaiming them as a source of pride. Biko saw this as a mechanism for black communities to reclaim their humanity, as culture is an integral part of one's sense of identity. Frantz Fanon, who inspired much BC thinking, was further of the view that pride in one's culture has the potential to grant its subscribers with mental/spiritual fortitude and unity - both necessary elements in combatting an oppressive system.

Because this tool was implemented under apartheid, it can be inferred that the aforesaid reclamation of culture would have been the reclamation of the broad 'Biko black' culture. However, this dissertation advocates for the more in-depth study of the distinctive cultures of each sub-group in the 'Biko black' grouping and particularly the culture of the coloured group so as to foster a sense of self-knowledge, self-awareness and consequent pride and a stronger sense of self. This would then result in the outcome described by the BCM, that is, the mental and spiritual fortitude and unity to combat the oppression currently being experienced and to advocate for and pursue redress.

The second tool is that of social development which under the BCM denoted a state of self-reliance. ColCrit aligns itself with the value of agency in pursuing transformation within the coloured community - this approach was fitting under the circumstances produced by apartheid and holds relevance today with regards to its call for citizens to take an active approach in seeking redress for the denigratory circumstances they find themselves in. ColCrit, therefore, encourages such an active redress approach, particularly in addressing the structural issues and deficiencies within the community.

(iii)ColCrit's Stance on CRT's Fundamental Aim

ColCrit aligns itself with Joel Modiri's description of CRT as the pursuit to critically analyse the prevailing perceptions and implications of belonging to a certain racial group in post-1994 South

Africa. These stem from narratives and structures, entrenched in and through the legal and political systems, which were perpetuated and enforced by the apartheid administration (and less formally, prior thereto). CRT secondly calls for an examination of the ways in which the said perceptions and implications perpetuate 'relations of domination, oppression and injustice',[18] from a legal perspective, in the present day. It is ColCrit's objective to produce such an analysis of the coloured population's lived experiences. Such an analysis has briefly been done in chapter four and five by analysing the implications of belonging to the coloured group – the historical formation and implications of that formation and resultant present-day challenges faced the coloured population.

ColCrit further affirms Modiri's identification of two foundational principles of CRT, which are, first, the recognition of the prominence of racism, that is, 'that racism is a normalised and ingrained feature of the social order which appears often in nuanced and covert ways'.[19] ColCrit, however, advocates for an intersectional and anti-essentialist approach to the recognition of power relations so as to account for multiple forms of and simultaneous experiences of oppression. Secondly, white supremacy denotes a system in which the white population maintains majority control and power, as opposed to denoting 'rightwing extremist racist hate groups that consciously promote white domination'.[20] As mentioned in chapter two, ColCrit affirms the stance that white supremacy ought to be acknowledged as an existing, intentional system that keeps the current world order intact and that only once such an acknowledgement is made, can the system be undone and remade. Within the South African context, there are multiple experiences of racial oppression, meaning within the typical 'black/white' divide, there are several different types of 'black oppression' and it is ColCrit's goal to hone in on each type of such oppression, specifically the coloured experience, in order to provide for targeted relief. This section now considers how ColCrit seeks to incorporate perspective scholarship and outsider jurisprudence into the theory in the following two subsections.

[18] Joel M Modiri 'The colour of law, power and knowledge: Introducing Critical Race Theory in (Post) Apartheid South Africa (2012) *SAJHR* 405 at 405.

[19] Ibid at 406.

[20] Ibid.

(iv) Grounding the Law in the Outsiders' Experiences

Both Perspective Scholarship and Outsider Jurisprudence advocate for the healthy questioning of the law as it is and how it operates in society. These theories further advocate for the acknowledgement that the content of the law, its interpretation and implementation are dependent on the context of its formulation and operation and on the background and political opinions of those formulating, interpreting and implementing them. Both theories also advocate for the accounting of the perspectives and experiences of those sections of the population who were historically oppressed and excluded in the making of the law; and using the said perspectives and experiences to enrich the interpretation and application of the law in order to serve such sections of society in the present day. This reflects the US-based approach, described in chapter two, around grounding law and rights in the actual contexts and experiences of the subjugated and disadvantaged groups. Such grounding would include the consideration of personal stories, historical accounts, poems and the like from members of the said population groups in order to obtain a true sense of a culture and reality and, in turn, to obtain a true sense of the needs of such groups.

ColCrit certainly agrees with this position, as the very foundation of CRT is the recognition of race as a central category of analysis, as recognised by both US and SA CRT, and what flows from this analysis ought to be laws, scholarship, literature and discourse informed by and targeted at the inclusion of- and redress for the previously subjugated communities. As taken from US CRT, part of such inclusion and redress ought to be setting standards for such communities, which are unaffected by the white standards already in place and to avoid unconsciously aspiring to such white standards.[21] Further, such analyses ought to be made by (appropriately qualified) members from the coloured communities to oppose paradigms set by white practitioners and scholars, who have historically dominated the space. Coloured practitioners and scholars are also significantly more likely to be in tune with the needs and aspirations of the black community, particularly those who experience or have experienced those realties personally.[22]

[21] John O. Calmore 'Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 321.

[22] Ibid at 327.

(v) The Law's Inability to Facilitate CRT's Transformative Goals

Both perspective scholarship and outsider jurisprudence further speak to the law's inability to effect transformation in its current state, due to the fact that it does not account for the realities and needs of all sections of society. This sentiment reflects one offered by US CRT scholars around the law's inability to facilitate the realisation of CRT's transformative goals. One such deficiency pertains to the fact that, because CRT thinking has emerged in the recent past and is not universally accepted, its logic and goals are not contained within legal instruments as yet.[23] One suggested solution is to teach first year students to interpret the law in a manner that would indeed facilitate such transformation. ColCrit agrees with this approach and seeks to further it by suggesting that such training be done not only for university students, but also for practitioners who have completed their required legal education. Such training would equip students and practitioners with the awareness that the black letter law does not always directly allow for the actualisation of CRT goals and may even hinder such actualisation. It would further teach that the law can, however, be interpreted to enable the materialisation of CRT goals or that alternative sources may be used to allow for such materialisation.

The second deficiency of the law in effecting the goals of CRT, identified by US critical race scholars, is human beings' (and for our purposes legal scholars and practitioners') capacity to empathise.[24] Specifically, scholars and practitioners' ability to unlearn misconceptions and stereotypes held about a certain group through evoking their empathy towards such groups. US crits are of the view that appealing to humans' capacity to emphathise would not work in this case. ColCrit suggests sensitisation courses in order to educate legal scholars and practitioners in this regard, as an understanding of different populations and objectivity is required where professionals have the power to advocate for or make pronouncements on people's and communities' lives. That being said, ColCrit acknowledges that even with extensive sensitisation, there may still be room for biases. This solution, therefore, ought to go hand-hand with realising a diverse legal profession to ensure all views and communities are as equally represented as possible.

[23] Richard Delgado & Jean Stefancic *Critical Race Theory: An Introduction* 4 ed (2023) 33.
[24] Ibid at 37.

A third deficiency is that litigation is not an apt vehicle for the realisation of social justice goals, as such goals often do not align with the client's desired outcome. ColCrit seeks to flag this as a potential hindrance to such realisation and that litigation ought not be the primary vehicle to meet social justice ends, despite it being able to play a crucial supporting role in effecting these goals. This reflects Sibanda's view that the transformative approach to law reform and legal development is overly 'court-centric' in South Africa.[25]

The fourth and final deficiency in the legal system, identified by US critical race theorists, is that law reform and redress only happen to prevent major political unrest, that is, to keep the peace and, even when it does happen, it gives rise to stigma inflicted upon the very group experiencing the subjugation. ColCrit seeks to warn against this kind of practice and advocates for a proactive approach in effecting law reform and redress as opposed to waiting until there is unrest to do so. ColCrit is further of the view that steps ought to be taken to prevent the widespread development of stigma, in the form of, inter alia, campaigns, sensitisation courses becoming the norm in university and professional training.

(vi) ColCrit's Stance on Major SA CRT Debates

This subsection presents ColCrit's stance on the major SA CRT debates. Firstly, ColCrit positions itself within a theoretical framework which questions the current status quo not only for its racialised and racist tendencies (within an intersectional framework), but also for the fact that the existing systems and structures (though intended to effect transformation) may enable a continuation of the country's colonial-apartheid legacy, constitute an unjustified transplant from Global North contexts and be imbued with white notions and vehicles to achieve justice and equality.[26] ColCrit can, therefore, resonate with arguments made by scholars such as Modiri, Sibanda and Madlingozi that attaining the kind of transformation envisioned by CRT may necessitate envisioning all systems and associated instruments anew, as they are likely to have been born within contexts which either were defined

[25] Sanele Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) Vol. 24 *Law Democracy and Development* 384.

[26] See generally Sanele Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) Vol. 24 *Law Democracy and Development* 384; Sanele Sibanda *'Not Yet Uhuru' - The Usurpation of the Liberation Aspirations of South Africa's Masses by a Commitment to Liberal Constitutional Democracy (*PhD thesis, University of the Witwatersrand, 2018); Joel Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) Vol. 34 Issue 3 SAJHR 300.

by racism or which had considerable constraints in theorising and effecting transformation. However, this dissertation is of the view that the transformation envisioned by CRT can still, at least to some extent, be attained under the current constitutional dispensation due to the transformative potential of the provisions of the Constitution and through applying tools and conceptions such as transformative constitutionalism[27] and transformative substantive equality.[28]

This dissertation, therefore, affirms that the goals of CRT ought to be pursued under the current system and that more scholarship ought to be produced on how exactly to execute on that. This is because the kind of changes advocated for by the abovenamed scholars entail wholesale, institutional shifts, which would take a significant amount of time to effect, thus delaying and potentially even preventing transformation because of the contested nature of the changes sought. Transformation, therefore, ought to be pursued under the current system while simultaneously pursuing the aforesaid institutional changes to ensure more immediate redress, while seeking overall systemic change. In sum, this dissertation is of the view that the above approach taken by certain South African CRT scholars is overly theoretical and lacks practicality and thus does not provide immediate solutions to the challenges faced by the black collective under democracy. This reflects the US CRT critique of the Critical Legal Studies (CLS) movement, advanced predominantly by black feminist scholars for its failure to 'move beyond critique to reconstruction'.[29] As mentioned in chapter two, these critiques suggest that CRT ought to include the perspectives of the subjects of oppression in ensuring that the lived experiences of the said subjects may drive the move towards reconstruction.[30] Such lived experiences denote intersectional and non-essentialist experiences, as further advanced by South African feminist

[27] Justice Pius Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch LR* 351.

[28] Catherine Albertyn 'Contested Substantive equality in the South African Constitution: Beyond Social Inclusion and Towards Systemic Justice' (2018) 34 *SAJHR* 441.

[29] Anthony Cook 'The Reconstructive Theology of Dr. Martin Luther King, Jr.' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 60.

[30] See Kimberlé Crenshaw 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 119 and Patricia J. Williams 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' in Richard & Jean Stefancic (eds) *Critical Race Theory: The Cutting Edge* 3 ed (2013) 97.

scholars such as Catherine Albertyn,[31] Angela Sanchez and Jackie Dugard.[32] This argument also reflects the gap in SA CRT, identified in chapter three, which states that SA CRT has not evolved beyond theoretical critique to propose ways to address the challenges faced within the South African context more immediately.

ColCrit agrees that focus ought to be placed on the realities which were in place before apartheid and to be more realistic about what different changes in governance (from colonial to apartheid to democratic rule) were able to achieve.[33] This is in line with Modiri's critique that constitutionalism in South Africa perceives the democratic era to be more revolutionary than it is/was in reality, thus giving rise to less rigorous approaches to transformation in the present-day. Furthermore, it aligns with Modiri's critique that the current constitutionalism does not account for the systems and legacies of colonialism and its associated dynamics and ideologies, such as white hegemony and anti-blackness, which were ultimately reproduced within the constitutional text and order. ColCrit also recognises the context in which the current constitution was drafted – the Convention for a Democratic South Africa and Multi-Party negotiations, which conceivably led to concessions, by its nature, and which led to a relatively undisturbed status quo in terms of power and resource allocation.[34] This could not have led to the transformed society CRT envisions. This dissertation, accordingly, recognises that the advent of democracy is not the pinnacle of transformation in South African society – the circumstances that led to the transition and the (lack of) appetite for decolonisation did not allow for that. And these are precisely the kind of issues that the proposed development of SA CRT can address as empowered through transformative approaches to the Constitution, policy and law. Examples of such solutions would be the redistribution of land to address spatial inequality - specifically for the coloured population, adjusted educational curriculum, greater access to healthcare etc.

ColCrit further takes the position that the social justice sector ought to be led by those members of society who are the subjects of disadvantage, as such individuals would understand

[31] See for example Catherine Albertyn 'Feminism and the Law' in Christopher Roederer & Darrel Moellendorf *Jurisprudence* (2004) 291.

[32] Jackie Dugard & Angela Maria Sanchez 'Bringing Gender and Class into the Frame: An Intersectional Analysis of the Decoloniality-As-Race Critique of the Use of Law for Social Change' (2021) 32 *Stellenbosch LR* 24.

[33] Ibid (Joel Modiri).

[34] Ibid at 319.

the plight and needs of such communities, as vocalised by the BCM, Madlingozi and Calmore, that is, both US and SA CRT. This could denote active roles such authoring scholarship, legal representation, adjudication, or advisory roles, such as providing perspectives for the aforementioned more active roles. The aim would be the representation of the subjects' 'experiences, insights and views' which can identify the 'needs and aspirations' of the relevant communities more accurately.[35] ColCrit also advocates for the gathering of a broad range of perspectives from different locations and sub-cultures in order to provide visibility to the diverse perspectives within a particular population group. As expressed above, this is a fundamental aim of ColCrit – accounting for the lived experiences of the coloured group and further having coloured people lead the social justice sector in various capacities in order to account for the group's experiences in the most authentic, accurate manner possible. Again, this would allow for, not only visibility and recognition of the challenges, but also for the most suitably tailored solutions thereto.

Finally, on the role of CRT within South African legal education, ColCrit asserts, in line with Modiri and what is said in chapter three, that CRT literature ought to be incorporated into tertiary legal education.[36] This is to create an awareness of the socio-political situation and history of South Africa amongst the aspirant members of the legal fraternity and, consequently, to create an understanding of the goals of transformation as a foundation to all legal scholarship and practice by such aspirant members. A further goal of incorporating CRT into tertiary education would be to create a healthy skepticism about the status quo, the law and contexts in which certain laws were drafted. As mentioned earlier in this chapter, ColCrit further advocates for sensitisation courses to be included within legal education in order to expose students to the lived realities which the relevant laws ought to impact and redress so as to create awareness and build empathy and conviction to act in favour of such communities. Such sensitisation ought to be extended to university staff and students alike in order to further create awareness of and begin the process of alleviating the 'acts of racism [that] are perpetuated, reinforced, and

[35] John O. Calmore 'Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life' in Kimberlé Crenshaw, Neil Gotanda, Gary Peller et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 326.

[36] Joel M Modiri 'The grey line in-between the rainbow: (Re)thinking and (re)talking critical race theory in post-apartheid legal and social discourse' (2011) SAPL 177 and Joel Modiri, 'The Time and Space of Critical Legal Pedagogy' (2016) Vol. 27 Issue 3 *Stellenbosch Law Review* 507.

reproduced within the university much like outside of it',[37] as highlighted by Rozena Maart.

III. CONCLUSION

This chapter introduces perspective scholarship and outsider jurisprudence as its contribution towards the development of SA CRT. It then provides the theoretical backing of the proposed subset of South African Critical Race Theory, that is, Coloured Critical Race Theory. In so doing, it outlines ColCrit's fundamental aims. It then provides the background to ColCrit, drawn from the Black Consciousness Movement and, further, ColCrit's stance on what the fundamental aim of CRT in SA ought to be. This chapter then highlights two foundational principles of perspective scholarship and outsider jurisprudence, that is, first - the call to ground the formulation, revision, interpretation and application of the law in the outsider's lived experiences. Secondly, these theories speak to the law's inability to effect transformation on its own and this chapter presents such incapacities (as argued by US critical race scholars), ColCrit's stance on them and proposed solutions thereto. In conclusion, this chapter presents ColCrit's positions on the major SA CRT debates as explored in chapter three.

This chapter ultimately argues for the further development of SA CRT in two ways. First, it include scholarship and analyses on the coloured population, as demonstrated in chapters four and five. This chapter presents the theoretical foundation of such a scholarship, which also ought to be further developed. Secondly, this chapter argues for the development of SA CRT towards a more reconstructionist approach, that is, scholarship that transcends theoretical discourse and aimed at proposing more immediately implementable solutions to the identified challenges.

Chapter seven answers the final research question as to how ColCrit may be used in practice. It, therefore, uses the different elements of the scholarship illustrated in chapters four to six to inform and demonstrate the kinds of judgements ColCrit seeks to inspire. It also evaluates and suggests alternatives and/or supplementation to the tools that are in place to address the issues facing the coloured population, as identified in chapters four and five.

[37] Rozena Maart 'When Black Consciousness Walks Arm-in-arm with Critical Race Theory to Meet Racism and White Consciousness in the Humanities' (2014) Vol. 21 No. 2 *Alteration* 54 at 54.

CHAPTER 7: PIERCING THE JUDICIAL CONSCIOUSNESS AND INFORMING POLICY FORMATION, REFORM AND COMMUNITY INTERVENTIONS

I. INTRODUCTION

Chapter seven aims to address the sixth and final research question on how ColCrit can be used in practice. First, ColCrit is intended to inform the judiciary's approach in deciding cases which affect the coloured population in some way. It is meant to provide a knowledge base of the coloured population's general data, challenges, needs and aims so as to guide the kind of arguments made by attorneys and advocates as well as to guide the kind of pronouncements and outcomes made in cases which deal with issues pertaining to the coloured population. Secondly, ColCrit is aimed at proposing and devising practicable solutions to the issues identified in its scholarship. It further addresses one of the two problems set out to be investigated by this dissertation, that is, the stagnation of CRT scholarship within the theoretical realm. This dissertation takes the position that the current SA CRT scholarship performs extensive theoretical critique of the current South African order and its ability to effect redress, but does not provide explicit guidance as to how to effect practical change despite such a 'faulty system'.

This chapter starts with providing two examples of past cases dealing with employment equity and rulings on the status of Afrikaans medium of instruction teaching at tertiary education institutions. The employment equity case was chosen because it affected coloured parties and sets powerful precedent in the employment equity sphere. Furthermore, the language case was chosen as the outcome of the case greatly affects coloured youth and their prospects of receiving tertiary education in their home language. Section II provides a brief summary of the cases and their relevant issues. It then provides a perspective on the reasoning and outcome of the matters based in ColCrit's fundamental aims as well as whether the judgment (in part or as a whole) is one which ColCrit seeks to inspire and/or aligns itself with. Section III makes proposals on potential solutions to the issues faced by the coloured population, as identified in chapter five. These solutions include policy formation, reform and community interventions, as a starting point by way of illustrating the kinds of interventions that would address the challenges facing the coloured community, with a thorough understanding of the population's context and complexities.

II. PIERCING THE JUDICIAL CONSCIOUSNESS

This sub-section analyses South African cases with the view to demonstrating the impact that knowledge of, and attention to, context may have in the adjudication of cases which hold the potential to set empowering and transformative precedents for the coloured population. This certainly is a major aim of ColCrit, that is, to provide a knowledge-base for the judiciary, which can inform pronouncements which would positively affect the coloured community and set empowering precedent. This is what this dissertation means by 'judicial consciousness', that is, consciousness on the part of the judiciary regarding the coloured population's context and needs to enable targeted outcomes and obiter dicta.

(a) Solidarity & Ten Others v Department of Correctional Services & Three Others.

The first case to be analysed is *Solidarity & 10 Others v Department of Correctional Services & 3 Others.*[1] The applicants are Solidarity, a registered trade union, along with 10 employees of the Department, who are members of Solidarity and who brought the initial application. The Respondents are the Department of Correctional Services ('the Department'), its Minister and National Commissioner as well as the Minister of Labour. The high-level issue was whether the Department's Employment Equity Plan for the period of 2010 to 2014 ('2010 EE Plan') was invalid and whether 'the Department's refusal to appoint the second and further applicants to certain posts constituted unfair discrimination [on the basis of either race or gender] and [thus constituted] unfair labour practices'.[2] This is expanded on below.

An EE Plan is a plan authorised by section 20(1) of the Employment Equity Act, which tasks an employer to draft, formalise and effect a plan intended to attain employment equity in its relevant workforce, that is, for its workforce to ultimately represent the demographics of the country in terms of race, gender and disability.[3] Seven of the ten applicants were coloured and were suitably qualified for the roles they applied for, but were not appointed because, according to the Department, their appointments would not have complied with the EE Plan, i.e., their appointment would have resulted in the over-representation of employees with their profiles, particularly in terms of race and gender. However, such perceived over-representation was based

[1] *Solidarity v Department of Correctional Services* 2016 (10) BCLR 1349 (CC).
[2] Ibid at para 1.
[3] Public Service Act, 1994, section 11 and the Correctional Services Act 111 of 1998, section 96(3)(c).

on national targets, not regional targets, which were vastly different especially from a racial perspective in the Western Cape. For greater context, the national target set for the coloured population in the 2010 EE Plan was 8.8% while the Western Cape's population consisted of48,78% coloured people as at 2011.[4] This means that, assuming the Department had been following national population statistics as a guideline, there would have been a gross under-representation of coloured workers in the provincial department. Given the aforementioned information:

> The Labour Court concluded that the 2010 EE Plan did not comply with certain provisions of the Employment Equity Act (EE Act) but had not declared the 2010 EE Plan invalid. It had also concluded that the Department's decisions not to appoint certain of the individual applicants constituted unfair discrimination but did not grant the individual applicants any individual relief.[5]

The Labour Court accordingly 'ordered the Department to take immediate steps to ensure that both national and regional demographics are taken into account in respect of members of designated groups when setting equity targets at all occupational levels of its workforce'.[6]

The applicants appealed against the Labour Court's decision not to grant individual relief to the applicants and its decision not to declare the 2010 EE Plan invalid. The respondents further cross-appealed the decision that 'the 2010 EE Plan did not comply with the EE Act because it did not take into account regional demographics in setting numerical targets.'[7] The Labour Appeal Court concluded that 'the 2010 EE Plan passed the test required in terms of the EE Act reading it together with the Constitution. It, accordingly, dismissed the appeal,'[8] including the cross-appeal, for various reasons, however only the relevant pronouncements will be addressed at the end of this sub-section.

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[4] Statistics South Africa *Census 2022* Statistical Release P0301.4 page 6.
[5] Ibid at para 1.
[6] *Solidarity v Department of Correctional Services* op cit note 1 at para 23.
[7] Ibid at para 24.
[8] Ibid at para 33.

The matter was then brought before the Constitutional Court and it focused on the discrimination issue, in line with the matter's pre-trial minute. The Court found that the Department acted unlawfully in failing to consider the regional demographic profile of the economically active population in setting its targets for the EE Plan. The Department's omission and thus unlawful conduct means that its refusal to appoint the applicants on the basis that they were coloured and/or female had no legal grounding. Finally, on this score, the Court found that the Department failed to show that the discrimination was rational, fair, or otherwise justifiable.

This is the kind of context which ColCrit seeks to expose and to see utilised in judgements. In all three Courts, the judgements explore coloured demographics and advocate for equitable representation per region. This is especially necessary in the Western Cape and Northern Cape, as the provinces with the greatest proportion of coloured people.[9] Without particularised targets for these provinces, the coloured population as a whole will not experience equitable representation in the workforce. The ultimate goal is simply contextual decision-making in cases, that is, decision-making based on an awareness of the facts, challenges and needs of the coloured population.

ColCrit is further aligned with the obiter dicta passed in considering whether the demographics used previously were the most suitable data to use. The Labour Court extensively considered the principles of equality, unfair discrimination and dignity and found that the most appropriate outcome would be to apply provincial demographics in upholding fairness, equality and the dignity of the coloured population.[10] This, again, illustrates the significance of considering context and relevant data in deciding cases affecting the coloured population.

(a) Gelyke Kanse and Eight Others v Chairperson of the Senate of The University of Stellenbosch and Two Others

The applicants in this case sought to have the 2016 Language Policy ('2016 policy') of Stellenbosch University set aside on several grounds [11]. The most relevant ground for our purposes is the argument

[9] Statistics South Africa *Census 2022* Statistical Release P0301.4.

[10] See para 29.22 – 26 of the Labour Court judgment.

[11] *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* (2019) ZACC 38.

that the 2016 policy infringed upon Afrikaans home-language speakers' rights in terms of sections 29(2), 6(2) and 6(4) of the Constitution of South Africa, 1996, that is the right to receive education in the language of the student's choice and the obligation of the State to progress the use and parity of the indigenous languages of South Africa.

The 2016 policy gave rise to 'three language specifications – parallel, dual and single medium'.[12] Parallel medium means separate classes of the same subject in both English and Afrikaans. Dual medium means teaching in English with Afrikaans translation (not real-time interpretation with devices such as earphones). Single medium refers to only English teaching. In effect (briefly), this means that all classes would be offered in English and not all would also be offered in Afrikaans, meaning Afrikaans-speaking students would inevitably receive some teaching in English. According to Justice Cameron, writing for the majority 'the 2016 Language Policy does maintain and preserve Afrikaans, but – crucially – this is now subject to demand and to available resources'.[13] The High Court had found that the 2016 policy conformed with the 'reasonably practicable' criterion of section 29(2) of the Constitution. On this score, the Constitutional Court held that:

> At the outset, it is important to note two salient features of the right to language. One is that respect for language preference, where appropriate and reasonable, entails no special concession or privileged treatment…Second, it is established in international human rights law that the way in which that respect is practically realised must depend on what is appropriate and reasonable.[14]

The Court further found that the 2016 policy is indeed appropriate and reasonable as the evidence demonstrates that 'near-universally' first year Afrikaans-speaking students are capable of being taught in English and that 'a significant minority' of the total first year cohort generally is not able to receive tuition in Afrikaans, with such minority constituting mostly black African students.[15] It, therefore, followed that the most appropriate and reasonable solution would be to

[12] Ibid at para 4.
[13] Ibid para 6.
[14] Ibid para 21 and 22.
[15] Ibid para 26 and 27.

provide primacy to English teaching as opposed to Afrikaans. Gelyke Kanse, the first applicant and 'a voluntary association committed to equal chances for Afrikaans and all indigenous languages',[16] however, argued for greater parallel medium teaching. The Constitutional Court decided that it was not reasonably practicable, per the standard set in section 29(2) of the Constitution, to introduce wholesale parallel medium teaching and incur the high financial costs thereof for the purpose of maintaining the status of Afrikaans. The 2016 language policy, therefore, remained intact and the appeal was dismissed.

The relevance of this case for our purposes is the consideration of 'brown', i.e., coloured people in deciding how to split classes between English and Afrikaans teaching. Such consideration was indeed necessary as coloured people make up a significant portion of the provincial population[17] with Afrikaans being the first and home language of 75,8% of the national coloured population, as reported in 2024.[18] The Western Cape and the Northern Cape, the provinces with the greatest coloured populations,[19] congruently have the greatest population of Afrikaans-speakers, i.e., 49,7% in the Western Cape and 53,8% of the Northern Cape.[20] The outcome of the case, therefore, significantly affected the coloured population and their opportunity to receive tertiary education in their home language and arguably to be more successful therein. It would certainly affect the coloured population more than the white population based on national statistics as only 60,8% of the white population speak Afrikaans as their first language[21] as opposed to 75,8% of national coloured population, as stated above.

The considerations made in the Constitutional Court judgment demonstrated an acute sense of the context and plight of coloured people. This is particularly clear from Justice Froneman's pronouncements in which he held:

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[16] Ibid para 1.

[17] Statistics South Africa *Census 2022* Statistical Release P0301.4.

[18] Mary Alexander 'The 11 Languages of South Africa' *South Africa Gateway* 11 November 2024, available at: https://southafrica-info.com/arts-culture/11-languages-south-africa/, accessed on 13 November 2024.

[19] Statistics South Africa *Census 2022* Statistical Release P0301.4.

[20] Mary Alexander 'What Languages are Spoken in South Africa's Nine Provinces?' *South Africa Gateway* 11 June 2021 available at https://southafrica-info.com/infographics/animation-languages-south-africas-provinces/, accessed on 13 November 2024.

[21] Alexander op cit note 18.

> The evidence before us shows that Afrikaans is the home language of a significant proportion of brown people in the Western Cape (and also the Northern Cape). It also shows that they are predominantly working-class people and that many of them are not proficient in English. Statistically they are the smallest of all population groups proceeding to tertiary education. Poverty means that it is more difficult for them than for most even to aspire to tertiary education. And if they do get that far, they have only one university to go to in the Western Cape where Afrikaans may be chosen as a medium of instruction. Now, when they arrive at Stellenbosch, they will find that their choice of medium of instruction is not as comprehensive as those more privileged students who choose English. The grim message that seems to be sent to this segment of extremely marginalised brown people, is that, if they are [to] be accommodated, they need to grow out of poverty and learn English fast.[22]

The above pronouncement by Justice Froneman speaks to the grave effect that English medium of instruction tertiary education would have on the coloured population. Despite this, the most equitable outcome for all was still to prioritise English as the main medium of instruction because, as demonstrated in the case. Although it may be optimal to receive education in one's first language, where one language - which is most common amongst a diverse group of people - has to be chosen as a medium of instruction due to resource constraints, second language and general capability (though at lower proficiency) must be considered. The Constitutional Court found that nearly all university entrants have some level of proficiency in English and a lesser proportion of such entrants had such proficiency in Afrikaans. The Court, therefore, concluded that English ought to be the medium of instruction, as this outcome would cause the least amount of hardship on all populations collectively.

The effect of this judgment on the coloured population is truly unfortunate, especially due to the population's already constrained chances of attaining tertiary education.[23] This accordingly goes against the basic aim of ColCrit, that is, the empowerment of the coloured population and particularly addressing an endemic challenge such as the restrained educational levels within the

[22] *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* op cit note 11 para 78.

[23] Department of Higher Education and Training 'Fact Sheet: Highest Level of Education Attainment in South Africa' March 2024 page 8.

group, as identified in chapter five. However, as mentioned in chapter six and above, ColCrit's aim is to empower the coloured population, but always with a consciousness of the relevant measures' effect on the rest of the black collective. In this case, what was best for the collective went against what was best for the coloured group and that is just the reality of the matter. This judgement illustrates this reality which is often found in redress work, but also illustrates how one can take an opportunity - despite the outcome of a case - to make certain pronouncements about a particular community as a means to air the reality of that group's lived experience. This brings that information into the legal and redress domain, which may be used in future. This is the kind of judgment that ColCrit seeks to inspire - one that raises awareness of the needs of the community with the view to inspiring redress for that community, despite the outcome of the case being unfavourable for that particular community.

III. INFORMING POLICY FORMATION, REFORM AND COMMUNITY INTERVENTIONS

This section of the chapter suggests solutions to the challenges faced by the coloured population, as outlined in chapter five of this dissertation. It starts with presenting the suggested solutions to the historical features which have remained intact within the community despite the passage of time. Thereafter, it presents the suggested solutions to the major present-day features of the coloured population. This further answers the final research question as to how ColCrit can be used in practice. These solutions either take the form of community interventions, suggestions for policy formulation or reform. It illustrates the kinds of targeted solutions which could come about where there is extensive scholarship on the realities and needs of a particular population. Not all solutions are based on ColCrit tenets – some are reached rationally based on the specific needs. This section constitutes a brief exploration of such solutions by way of illustration and such scholarship ought to be further developed by the relevant subject-matter specialists as part of the ColCrit scholarship.

(a) Solutions to Historical Features of the Coloured Community Which Remain Intact

The solutions under this subsection constitute community interventions, based on the ColCrit tenet of consciousness, as drawn from the Black Consciousness Movement (BCM). The first major community intervention, which ought to be applied to all races, 'Biko black' and white groups alike, is the introduction of compulsory and a more objective teaching of South African history as history is currently an optional subject and takes a more generalist approach to the teaching of apartheid as a historical occurrence.[24] Included in such education ought to be the teaching of the different racial and ethnic groups' histories and customs. This speaks to the aim of consciousness of becoming aware of what is often an unconscious self-denigration, and combatting that by acknowledging the oppressive intent behind such messaging, choosing to see the value and take pride in one's own cultural norms and customs for the 'Biko black' populations. This would aid the white population in understanding the dire effects of apartheid and would further aid in sensitising all these diverse groups to each another from an earlier age. This could be an effective method in reprogramming the youth before certain biases and an aversion to empathising with certain groups become entrenched. It would further teach learners about their history in order to cultivate a sense of pride in one's heritage. For the coloured group, specifically, it would reveal the nature of colonial conquest and white hegemony and its lasting effects on not only the current structure of the South African society, but also on their psyche in the form of their assimilationist aspirations, distancing from blackness, self-perceptions of inadequacy etc.

A further segment of this educational endeavour would be to introduce the subject of self- development, that is, concepts such as self-awareness, unlearning and reprogramming one's mental and emotional states. This might enable a questioning attitude towards the aforementioned views and the opportunity to unlearn and cease the perpetuation thereof. This dissertation acknowledges the presence of self-awareness, self-esteem and self-development

[24] Department of Education of the Republic of South Africa National Curriculum Statement Grade 10-12 (General): History.

teachings within the Life Orientation curriculum,[25] however, ColCrit advocates for a more in-depth and politicised teaching of self-development aimed at addressing the complexes created by the past racial and racist systems. A specific outcome of this education ColCrit advocates for is the acknowledgement that assimilationism equates with separatism from blackness and this, in turn, strengthens white hegemony and creates incongruence between the black African and coloured communities. ColCrit holds that the coloured community ought to acknowledge the said role they may be playing and to denounce assimilationism in favour of a position wherein the inherent worth of all groups is recognised and the objectives of transformation assumed. Such objectives of transformation would include cultivating a sense of pride within all population groups, mending pierced relations between such groups and building unity in pursuing a substantive rupture from the past.

The second intervention ought to be the (compulsory and consistent) allocation of mental health resources in schools, universities and community centres. This dissertation acknowledges the presence of organisations, such as the South African Depression and Anxiety Group,[26] which provide free mental health services. ColCrit, however, advocates for a greater presence than what the SADAG is able to provide. ColCrit advocates for the presence of mental health services in all schools. This would be to address the deeply psychological nature of the programming of assimilationism, self-perceptions of inadequacy, diminished self-worth, shame and feelings of social disclocation, thus aiding in consciousness' aim of becoming aware of and addressing the aforementioned challenges. With mental health being a persistent driver for many of the coloured population's ills, such as the shame-anger cycle mentioned in chapter five as well as violence within the community and high rates of alcohol and narcotics abuse, these services would certainly increase the community's chances of ceasing the continued perpetuation of the said ills.

[25] National Curriculum Statement Curriculum and Assessment Policy Statement: Life Orientation.

[26] South African Depression and Anxiety Group website, available at: https://www.sadag.org/, accessed on 26 March 2025.

The third intervention stemming from ColCrit scholarship is the legitimisation of colouredness as a self-standing culture and identity as opposed to the notion that colouredness is simply a construct of South Africa's colonial and apartheid past that should be rejected post- 1994.[27] This speaks to the reclamation of culture tool of the BCM, which, as mentioned in chapter six, is an extension of the notion of consciousness. This refers to legitimisation by the coloured population themselves and by the country at large. This is not to say that all members who would be classified as coloured ought to buy in to the categorisation or identity, but ColCrit does advocate for the validation of the distinct identity (for the benefit of those who do identify as such) as it speaks to a large section of the population's accepted identity. Granted, there arguably is no one unified set of customs and beliefs among all coloured people across the country, but there may be greater unification among coloured people who share geography and this might further give rise to the fusion of a unique set of customs, such as cuisine, hairstyling, language use etc.[28] Such customs form the bedrock of people's sense of self and they constitute very real expressions of colouredness.[29] That cannot be denied, or else such a rejection might further feed into the notion that the coloured identity is non-existent, devious (due to the reasons for its construction) and/or deficient. Instead, it should be validated as a newly blended culture and identity (though perhaps varied between factors such as location). ColCrit does, however, advocate for the reclamation of the term 'coloured' in order to shed it of its negative associations of, for example, assimilationism and rejection of blackness, and to allow the coloured population to define the culture and legacy thereof for itself through its present-day values, actions and aspirations. This dissertation acknowledges the work done by the Kullid Foundation[30] in this regard and seeks to continue such work and possibly collaborate with this and other similar organisations.

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[27] See for example Dennis Cruywagen 'I reject the racial construct "coloured" and its stranglehold on people's lives' *The Daily Maverick* 29 September 2024, available at https://www.dailymaverick.co.za/opinionista/2024-09-29-i-reject-the-racial-construct-coloured-and-its-stranglehold-on-peoples-lives/?utm_source=Sailthru&utm_medium=email&utm_campaign=first_thing, accessed on 25 October 2024.

[28] Tessa Dooms and Lynsey Eboney Chutel (ed.) *Coloured: How Classification Became Culture* (2023) 62 and Zimitri Erasmus *Coloured by History, Shaped by Place: New Perspectives on Coloured Identities in Cape Town* (2001) 22.

[29] Ibid.

[30] Kullid Foundation Facebook page, available at: https://www.facebook.com/groups/476226732450444/, accessed on 26 March 2025.

(b) Solutions to the Coloured Population's Present-day Features

This subsection makes proposals for policy formation and community interventions that would address the contemporary issues faced by the coloured community, as outlined in chapter five. Many of the listed issues feed into each other, meaning that, addressing gangsterism, would indirectly address the features of violence and incarceration rates as gangsterism is a leading cause for both these features. Similarly, addressing substance abuse would also address the features of violence as substance abuse along with gangsterism are key drivers of violence in the community. The education rates in the community are also addressed under the gangsterism feature as its correlating feature of (low) employment rates is addressed thereunder. The key sub-subsections created hereunder are gangsterism and substance abuse since, as explained, addressing these two drivers, addresses the remainder of the features identified under chapter five, those remaining features being violence, incarceration rates and low education rates. The solutions presented hereunder are logically reached, based on the kind of deep understanding of the challenges faced by the coloured community that Colcrit requires. The suggested solutions are located within the broader scholarship on this topic and illustrate the kinds of focused interventions which flow from a particularised scholarship on a specific section of the population.

(i) Gangsterism

As mentioned in chapter five of this dissertation, one major cause of gangsterism in the coloured community is high unemployment within the community. ColCrit seeks to argue that the unique drivers of unemployment in the coloured community are low educational attainment and the cyclical nature of gangsterism. To expand on the latter, as identified by Van Lennen, gangsterism, particularly relating to the drug trade, was a response to unemployment, i.e., mass unemployed coloured citizens opted to partake in the drug trade as a means of earning an income to support themselves and their families.[31] However, at present, ColCrit argues that gangsterism and the opportunities it offers to make a living may provide strong motivation to coloured youth to choose gangsterism instead of pursuing further education and formal

[31] Tove van Lennen 'Cape Town Gangs: Political Dimensions' *The Helen Suzman Foundation*, available at Cape Town Gangs: Political Dimensions — Helen Suzman Foundation (hsf.org.za), accessed on 21 August 2024.

employment. This may be so because, for such coloured youth, further education and formal employment may not be as accessible and that path may not be as prevalent or glamourised within the community as opposed to gangsterism and its associated prospects.

The solutions which ColCrit wishes to offer to the aforesaid low levels of education, particularly tertiary education in the coloured community, are as follows: first, primary and high school learners need to be informed of the dangers and risks associated with gangsterism, the harm caused by drug use and abuse, the inevitable violence involved and the almost inescapable criminal lifestyle gangsters adopt. Secondly, learners across socio-economic status need to be informed of the different career options available to them, i.e., the different tertiary institutions, different courses, degrees, diplomas and certifications on offer, the different career paths available and so on. They should also be informed of the different application processes, admission requirements etc. This information is often not made available in lower-income schools due to their lack in resources. Further, students should receive assistance in finding and applying to suitable scholarships and student funding schemes. Learners ought not only be informed and encouraged to further their studies and pursue formal employment, they also ought to be supported in pursuing these avenues, i.e., assisting them in deciding on a path and with the application processes. These ought to be compulsory and routine interventions implemented in all schools to make known the reality of gangsterism, to de-glamourise it and further to combat a lack of awareness of the options after high school and to provide learners with the necessary support in pursuing tertiary education.

The second cause of gangsterism identified in chapter five is that of social dislocation, i.e., the experience of severance from one's culture or identity which gives rise to feelings of isolation, purposelessness and hopelessness. These states rationally affect the group's collective psyche and mental health. ColCrit's proposals addressing the group's experience with mental health can be found under section III.a. above.

The third and final cause of gangsterism addressed in chapter five is the absence and reluctance of intervention by the state, which created space for gangs to essentially govern coloured communities, largely by way of violence. Recently, the government has taken a more active role in attempting to address gangsterism and its associated criminal behavior. In 2018, specifically, the government launched the Anti-Gang Unit ('AGU') in order to dismantle gangs and their operations. The AGU has executed on, inter alia, gang-related arrests, uncovering gang

strongholds, studying gang operations, confiscating weapons and vehicles and conducting investigations.[32] President Ramaphosa has also recently signed a Cooperation Agreement for Safety and Policing in the Western Cape which seeks to unite national, provincial and local government, the South African Police Service, the City of Cape Town, community organisations and private security companies in the pursuit of combatting crime in the Western Cape. Further, the 'agreement is [said to be] part of efforts to improve policing and community safety for all the residents of Cape Town'.[33] The President also references the AGU in reporting on the government's work done in attempting to address the high crime rates in the Western Cape and states that their work is ongoing.[34]

ColCrit applauds the instantiation of the AGU and the government's commitment to working with different levels of leadership in addressing gangsterism and crime. Working with such different levels of leadership may ensure more effective monitoring, more accurate identification of contemporary issues and better suited responses. ColCrit, however, wishes to critique the AGU for, firstly, taking a reactive approach as opposed to a proactive approach. The government ought to have responded to the growing gang culture before it rose to the levels it did. The second critique of the AGU is targeted at what appears to be an approach grounded in increasing arrests and sentencing, which ultimately leads to increased jailtime for more gang-related criminal perpetrators. Although it is understood that this approach seeks to remove these perpetrators from the public sphere to create a safer environment and further to act as a deterrent for other perpetrators, what is also required is rehabilitation of those involved with gangsterism. Without rehabilitation, we simply condemn perpetrators and incorrectly identify them as the root cause of the relevant criminal activity. The true root causes ought to be addressed, which are addressed throughout this chapter and chapter five and further, gangsterism and the people who

[32] Saam Niami Jalinous 'Police Minister Declares Anti Gang Unit a Success in its First Month' *GroundUp* 29 November 2018, available at: Police minister declares anti gang unit a success in its first month | GroundUp, accessed on 14 November 2024 and South African Government News Agency 'National Gang Unit Making Inroads' 12 February 2019, available at: National Gang unit making inroads | SAnews, accessed on 14 November 2024.

[33] South African Government News Agency 'Remarks by President Cyril Ramaphosa at the signing of the Western Cape Cooperation Agreement for Safety and Policing, Belhar, Cape Town' 30 August 2024, available at: President Cyril Ramaphosa: Signing of Western Cape Cooperation Agreement for Safety and Policing | South African Government, accessed on 14 November 2024.

[34] Ibid.

practice and maintain it, ought to be seen for what they are – victims of circumstance. Certain circumstances and systems, as explored in chapter five, caused them to turn to the means that they have in order to make a living and protect their community. They ought to be rehabilitated to unlearn such means, realise the wrongfulness of their actions and that there are alternative paths. Prison systems also need to be rethought and restructured in order to incorporate such a rehabilitative approach and to remove the continuation of gang activity, ranking and violence within the system. Without this, these individuals will fall into an endless cycle of criminality, violence and deteriorated mental health.

(ii) Substance Abuse

As mentioned in chapter five, the coloured community has remarkably high rates of alcohol and narcotics use. The solutions to these issues, which the state could assist with, are education and increased rehabilitation resources. A ColCrit approach would require that learners within vulnerable communities be educated on the statistics of substance use and abuse, the dangers and adverse effects thereof and the risk of addiction. Children, especially those who come from areas with high rates of substance use, ought to be informed of non-detrimental ways in which to use social substances such as alcohol and tobacco as such approaches to substance use would likely not be modelled to them by their parents and family members. Children should also be informed that substance use (even non-detrimental use) is always a choice. ColCrit views this as a more realistic approach than advocating for complete abstinence as abstinence, especially among teenagers, can have the effect of making the relevant act even more attractive. Information sessions around non-detrimental use and the dangers of abuse also ought to be run in communities for adults. Finally, ColCrit advocates for greater access to rehabilitation centres in order to facilitate the rehabilitation and subsequent support of recovering addicts. This would mean more state-funded, high-quality centres with a greater range of services offered. Affordability should never preclude recovering addicts from reaching their (life-preserving) goals. This dissertation acknowledges the presence of public substance abuse treatment centres,[35]

[35] Substance Abuse Public Treatment Centres, available at: https://www.gov.za/sites/default/files/Substance_abuse.pdf, accessed on 21 January 2025.

which provide between one and three treatment centres per province. ColCrit advocates for a greater presence of centres per province in order to increase accessibility. It further advocates for higher-quality centres with a greater range of services offered, as mentioned above.

IV. CONCLUSION

This chapter identifies *Solidarity & Ten Others v Department of Correctional Services & Three Others* as a relevant case as it deals with the non-appointment of coloured parties to certain positions due to employment equity requirements. The Constitutional Court (after two appeals) found the employment equity plan to be unlawful as it did not account for the regional demographics in setting targets for representation based on race, gender and ability, which ultimately led to the understaffing of coloured employees. ColCrit aligns itself with the ruling by the Constitutional Court and wishes to inspire lower courts to make similar rulings. The second and final case dealt with is *Gelyke Kanse and Eight Others v Chairperson of the Senate of The University of Stellenbosch and Two Others* pertains to Stellenbosch University's 2016 Language Policy which essentially grants primacy to English medium of instruction teaching at the university. ColCrit aligns itself with the outcome of this case and the considered approach taken to the impact of the language policy on the coloured community - the population with the greatest percentage of Afrikaans speakers in the country. ColCrit further agrees with the manner in which the Court balanced the relative needs among the black collective.

Section three of this chapter proposes the kind of solutions that Colcrit would require to the historical issues faced by the coloured community which remain intact as well as solutions to the coloured population's present-day challenges. To the former, it suggests first, objective teaching of South African history to all racial groups in order to foster deep empathy between the different groups. For the coloured group it would foster pride in the group's heritage, knowledgeability of the complexities of their history and its aftermath. The educational programmes ought also to incorporate self-development content with the view to providing the coloured community with the tools to acknowledge the impact of their complicated history on their psyche and the possible roles they may be playing in hindering the transformative project. It ought also to inspire the community to take steps to advance the said transformative project. Secondly, it proposes greater access to mental health resources to address the psychological impacts of colonial-apartheid and its aftermath. Thirdly, ColCrit suggests ways in which to

legitimise colouredness as a self-standing culture/identity. Regarding the second-mentioned tier of solutions offered, ColCrit suggests solutions to gangsterism and substance abuse in the coloured community. The solutions around gangsterism pertain to low education levels, the cyclical nature of gangsterism, social dislocation and the absence and/or reluctance of state intervention. The solutions to substance abuse pertain to educating the youth and making rehabilitation centres and resources more accessible.

Chapter eight, that is, the conclusion to this dissertation reflects on the way forward regarding the further development of ColCrit scholarship and this includes scholarship on its theoretical foundation; the coloured population's context and needs; and solutions to such challenges.

CHAPTER 8: CONCLUSION

I. INTRODUCTION

The problem that this dissertation investigates is the underdevelopment of CRT in post-1994 South Africa in two ways, that is:

(i) The lack of comprehensive, particularised scholarship on the different groups within the 'Biko black' conception; and
(ii) The stagnation of CRT scholarship within the theoretical realm.

The purpose of the dissertation would, therefore, be to argue for the further advancement of the existing CRT scholarship, that is, the layering of CRT by developing bodies of scholarship pertaining to the realities of the different racial groups within the black collective, particularly for the coloured and the Indian populations as the current scholarship centers on the black African experience. The focus of this dissertation is, of course, the coloured population. This entails the importation of, inter alia, perspective scholarship within South African CRT, defined by Fineman as 'a body of scholarship that is built explicitly upon the assertion of relevant differences among people…'[1] and these relevant differences are used to inform particularised accounts and provide particularised solutions to each racial group.

The specific research questions answered with the view to solving the research problem identified in this chapter are the following:

(i) What are the nature, scope and aims of CRT?
(ii) What are the nature, scope and aims of South African CRT as it stands?
(iii) How can South African CRT be developed to better reflect the diversity of race with a focus on the coloured racial group?
(iv) How would one define and characterise the coloured racial group?
(v) What would a particularised Coloured CRT look like?
(vi) How can we use the said Coloured CRT in practice?

[1] Martha Albertson Fineman *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (1995) 12.

II. SUMMARY OF CHAPTERS

(a) Chapter Two

Chapter two addresses the first research question of this dissertation which questions what the nature scope and aims of CRT are by exploring CRT as developed in the United States of America (the US), which is the country of origin for CRT. This chapter provides a brief outline of the broad themes of the now extensively-developed CRT scholarship, the different arguments advanced within those themes, the internal critique which led to further developments of the theory as well as the general critiques levelled against the theory. This chapter explores US CRT and identifies the themes and arguments with which ColCrit is aligned and which will form part of the theoretical framework of ColCrit. The chapter further outlines the scholarship against which SA CRT is compared in assessing the ways in which it ought to be developed to meet the aims of ColCrit and similar scholarship.

(b) Chapter Three

Chapter three addresses the second research question which interrogates what the nature, scope and aims of South African CRT are. In addressing this question, this chapter traverses the development of CRT in SA from both a historical and present-day perspective. It accordingly explores the fundamental thesis of the Black Consciousness Movement (BCM), as I argue that Black Consciousness (BC) is both the predecessor to CRT in SA and forms part of CRT literature due to the extensive overlap in subject-matter. It further presents the major arguments made by contributors to the subject-matter of CRT in the present day. This is done in order to present the kinds of arguments and debates engaged within the CRT scholarship and thus the general extent to which CRT has been developed in South Africa. This exploration led me to the conclusion that SA CRT has not developed a comprehensive theory, capable of attaining the transformative goals of CRT for all sections of society. It has not developed the themes of intersectionality and essentialism, nor has it evolved beyond theoretical critique to suggest ways to address the challenges faced within South Africa more immediately.

(c) Chapter Four

Chapter four addresses the fourth research question, which relates to defining and characterising the coloured racial group, from a historical perspective. This chapter considers the distinct

features of the coloured population, which formed from its historical development and evolution, and accordingly aids in making the argument in favour of the need for a distinct Coloured Critical Race Theory. Such historical development and resultant features and challenges will thus be used to inform the kinds of interventions to be implemented in order to address the unique needs of the coloured population. This kind of scholarship also illustrates the kind of accounts to be included in the proposed ColCrit scholarship.

(d) Chapter Five

Chapter five addresses the fourth research question from a present-day perspective and considers the endemic problems faced by the coloured population as experienced in the present-day. It first outlines the historical issues explored in chapter four that remain intact. Secondly, this chapter outlines particularly pressing challenges faced by the coloured population in the present-day. This scholarship consolidates this dissertation's argument for the need for a distinct ColCrit. Again, the data presentation and analyses performed in chapter five illustrates the kind of scholarship to be included within ColCrit theory, with the goal of catalysing practical gains for the population through legislative formation, reform, community interventions and transformative adjudication.

(e) Chapter Six

Chapter six presents the theoretical foundation of the proposed ColCrit. This chapter addresses two research questions, namely, how SA CRT can be developed to better reflect the diversity of race with a focus on the coloured racial group; and what a particularised ColCrit would look like. The first-mentioned research question is addressed through the introduction of perspective scholarship and outsider jurisprudence. The second-mentioned research question is addressed by presenting the theoretical foundation of ColCrit.

This chapter ultimately argues for the further development of SA CRT to, first, include scholarship and analyses on the coloured population, as demonstrated in chapters four and five. This chapter presents the theoretical foundation of such a scholarship, which also ought to be further developed. Secondly, this chapter argues for the development of SA CRT towards a more reconstructionist approach, that is, scholarship that transcends theoretical discourse and aimed at proposing more immediately implementable solutions to the identified challenges.

(f) Chapter Seven

Chapter seven addresses the final research question on how ColCrit can be used in practice. First, ColCrit is intended to inform the judiciary's approach in deciding cases which affect the coloured population. It is meant to provide a knowledge base of the coloured population's general data, afflictions, needs and aims so as to guide the kind of pronouncements and outcomes arrived at in cases which deal with issues pertaining to the coloured population. Secondly, ColCrit is aimed at proposing and devising solutions to the issues identified in its scholarship, as illustrated in chapters four and five.

This chapter, therefore, provides two examples of cases affecting the coloured population to illustrate the kind of obiter dicta and judgments which ColCrit seeks to inspire. The chapter then makes proposals on potential solutions to the issues faced by the coloured population in the present-day, as identified in chapter five. These solutions include policy formation, reform and community interventions and are an illustration of the kinds of solutions needed by the population and further, which ought to be further developed in taking CRT into the practical realm and making it more immediately practicable.

III. INSIGHTS AND FURTHER DEVELOPMENT OF COLCRIT

The insights drawn from my research is first, that there is a major gap in the South African CRT scholarship, as it stands. This scholarship currently essentialises the 'black' experience. The 'black' population, as used in SA CRT, is said to include the black African, coloured and Indian populations. Instead, SA CRT focuses on a more generalist experience of oppression and disadvantage, skewed towards the black African experience. This inevitably overlooks more particularised and unique features and challenges faced by the coloured and Indian populations. This dissertation, therefore, suggests the further development of the scholarship by further advancing the preliminary assertion made in this dissertation that the current CRT scholarship does not adequately engage with essentialism and intersectionality, to then develop such engagements and further to include accounts of the paricularised realities of the coloured population (for our purposes).

The dissertation then begins the process of providing such a particularised account of the coloured population by exploring its historical development and consequent features. It also

explores the group's present-day challenges, which stem from its historical evolution. This constitutes one section of the proposed ColCrit, which ought to be further developed to explore the features and challenges of the coloured population comprehensively.

The next section of ColCrit constitutes the fundamental themes and positions which underpin the theory and this also ought to be further developed. This dissertation finally illustrates the kinds of judgments this dissertation envisions ColCrit to inspire as well as the kinds of policy changes and community interventions it wishes to be catalysed by ColCrit scholarship. The policy changes and community interventions ought to be developed as part of ColCrit scholarship and this would hopefully be implemented by the legislature. The section of judicial consciousness is simply meant to be an illustration of the kind of judgments and obiter dicta which ColCrit seeks to inspire and therefore needs to be further developed. This section ought to be developed particularly to include the work on intersectionality authored by scholars such as Kimberlé Crenshaw in order to deepen and further advance the engagement around the manner in which the judiciary ought to approach cases that would affect different racial groups.

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