WHY DECOLONISATION AND NOT TRANSFORMATIVE CONSTITUTIONALISM

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Abstract

Paul Mudau and Sibabalo Mtonga proffer 'Extrapolating the role of transformative constitutionalism in the decolonisation and Africanisation of Legal Education in South Africa' to contribute to the ongoing dialogue about South Africa's LLB curriculum, and to make studied comments about the need to shift from colonial modes of knowing, thinking, and doing. Their article does well to study the strides that have been made in this discourse, as they make use of the University of Pretoria's Curriculum Transformation Document as one example of the progress that has been made. Mudau and Mtonga conclude that adherence to transformative constitutionalism may enhance decolonisation and Africanisation, and thus lead to the gradual transformation of legal education in South Africa. This rejoinder sets the argument from a different starting point — it insists that the definitive thrust of the Decolonial Turn in South Africa presents a decided critique of the 1994 constitutional arrangement, therefore rendering transformative constitutionalism a misfit in the quest to decolonise and Africanise South African legal education. This article concludes by asserting that South African law teachers, and anyone interested in the quest to alter colonial pedagogies, should concern themselves with seeking definitional clarity, and the rest shall follow.

1 Introduction

Conversations about decolonising South African higher education, and specifically the LLB curriculum, are long-drawn and nuanced. Paul Mudau's and Sibabalo Mtonga's '*Extrapolating the role of transformative constitutionalism in the decolonisation and Africanisation of Legal Education in South Africa*'[1] is a valuable contribution to this ongoing conversation.

Mudau's and Mtonga's article is divided into three sections — the first section introduces the discussion by synoptically setting out the history of how South African universities have grappled with the question of curriculum transformation in the period post-1994. More directly, the introductory section zones in on the challenges facing the LLB curriculum and identifies the four drivers of curriculum transformation as set out in the University of Pretoria's Curriculum Transformation Document. The four drivers are; (1) responsiveness to social context, (2) epistemological diversity, (3) renewal of pedagogy and classroom practices, and (4) an institutional culture of openness and critical reflection. The second section identifies and addresses some questions related to the decolonial discourse as it relates to legal education. Chief among these questions is the need to construct workable meanings of decolonisation and Africanisation to give them authentic applicability to the discipline of legal education. The third section concludes their article.

Mudau and Mtonga introduce their discussion by noting that South Africa's transition from apartheid to democracy was marked by the adoption of a new constitution in 1996.[2] At the zenith of this new constitutional dispensation is the concept of transformative constitutionalism, whose foundational chassis lays on the desire to create a South African polity based on democratic values, social justice, and fundamental rights.[3] The duo proceeds to unpack the history of South Africa's institutions of higher learning, asserting that the transformative constitutionalist demand was the driver of the efforts to transform, reshape, and rebuild South Africa's higher education landscape. They note the strides that have been made in

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1   P Mudau & S Mtonga 'Extrapolating the role of transformative constitutionalism in the decolonisation and Africanisation of Legal Education in South Africa' (2020) 14 *Pretoria Student Law Review* at 44-57.
2   Note that for purposes of this rejoinder, 'constitution' and 'transformative constitutionalism' will be intentionally written with a small letter 'c' instead of caps. This is in line with rejoinder's central argument against the deification of the constitution. It is also drawn from a similar practice by Mogobe Ramose in MB Ramose 'Towards a post-conquest South Africa: Beyond the constitution of 1996' (2018) 34 *South African Journal on Human Rights* at 326-341, specifically footnote 1.
3   Mudau & Mtonga (n 2) 45.

the quest to transform higher education, but also point towards existing bottlenecks:[4]

> More profoundly, the stagnated transformation of higher education in general and legal education in particular, has made it difficult to overhaul the knowledge systems in the legal discipline at most South African universities which 'remain rooted in colonial and western worldviews and epistemological traditions.

From the onset, the duo set out the objective of their article as one that seeks to assert transformative constitutionalism as the bedrock of transforming the LLB curriculum:[5]

> Thus, the immediate objective of this article is to extrapolate the role and significance of transformative constitutionalism in the decolonisation and Africanisation of legal education in South Africa. In a constitutionally mandated transformative context, the systematic approach to the decolonisation and Africanisation of legal education advanced in this article stems from the following four drivers of curriculum transformation …

This rejoinder will demonstrate that the central thesis of Mudau's and Mtonga's argument is worth a critical inquisition. Mudau and Mtonga claim that the implementation and practical enactment of the objectives of transformative constitutionalism will enhance the quest to decolonise and Africanise South Africa's legal education. This rejoinder departs from Mudau's and Mtonga's claim, instead arguing that (1) there is a very real difference between decolonisation/ Africanisation and transformative constitutionalism, (2) decolonial theory and South Africa's Decolonial Turn precisely rejects and criticises the post-1994 constitutional arrangement, therefore making transformative constitutionalism a misfit in the quest to decolonise and Africanise the LLB curriculum, and (3) the commitment to decolonisation means to embrace a comprehensive rethink of South Africa, including its foundational chassis, the constitution.

The regrettable trend of conflating transformative constitutionalism with decolonisation, or speaking about the two concepts interchangeably, is something that has unfortunately become habitual among various South African law academics.

To illustrate the trend of conflating transformative constitutionalism and decolonisation, it is apt to rely on the South African Law Deans Association commissioned book entitled, 'Decolonisation and Africanisation of Legal Education in South Africa'. The authors of the book's six chapters discuss ideas about decolonising South Africa's legal education, and similarly to Mudau and Mtonga, insist that transformative constitutionalism should be the basis upon which the LLB curriculum is decolonised. The book's

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4   Mudau & Mtonga (n 2) 46.
5   Mudau & Mtonga (n 2) 47.

second chapter is authored by Enos Tshivase, titled 'Principles and ideas for decolonization and Africanisation of Legal Education in South Africa'. Tshivase relies on Canadian scholarship to conclude that decolonisation is a:[6]

> [c]omplex and requires acknowledgement of past and ongoing wrongdoings. It also calls us to action by requiring us to do various things including dismantling assertions made regarding the majority of the population in South Africa who are generally regarded as part of the indigenous people of South Africa.

Tshivase uses the Canadian Truth and Reconciliation Commission to set out principles for decolonising South Africa's legal education arguing that this is apt because Canada's colonial history comports with that of South Africa.[7] He further argues that decolonial principles should be drawn from the constitution of the Republic of South Africa, 1996 because, '[d]ecolonisation and Africanisation are acts of transformation'.[8] Tshivase points in the direction of the Preamble of the constitution to suggest that the constitution supports the calls for decolonisation and Africanisation. The 'recognise the injustices of our past'[9] clause is the operative phrase upon which Tshivase's argument is based, an odd contradiction considering that he earlier correctly read Caroline Ncube's definition of decolonisation. Ncube understands decolonisation as a call to respond to injustices of the present:[10] the prevailing legacy of colonialism and apartheid which continue to impute social, economic, political, and epistemic violence on the black working-class people[11] of South Africa.[12] Broadly, Tshivase opines that the outcomes of a decolonised

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6   E Tshivase 'Principles and Ideas for the Decolonisation and Africanisation of Legal Education' in E Tshivase, G Mpedi, & M Reddi (eds) *Decolonisation and Africanisation of Legal Education in South Africa* (2019) at 5.
7   Tshivase (n 7) 4.
8   Tshivase (n 7) 4.
9   Constitution of the Republic of South Africa, 1996 (Constitution) second sentence of the Preamble.
10 As this article will later show, it is not entirely wrong to suggest that transformative constitutionalism also focuses on injustices of the past. To be sure, the suggestion that is being made here is that transformative constitutionalism is overly fixated on the post-1994 polity whilst seemingly neglecting the horrors of apartheid, colonialism, and related oppression. It appreciates that the values of social justice, democracy and human dignity exist as a result of a studied reading of South Africa's past, however, these are not accompanied by a comprehensive programme of action as regards, for example, land restitution, and reparations.
11 It is crucial to note that colonialism and apartheid have had an impact on peoples other than black people. For example, there are nuances to be studied on the impact that it has had on queer persons (women specifically), as well as other oppressed and marginalised groups.
12 CB Ncube 'Decolonising Intellectual Property Law in Pursuit of Africa's Development' (2016) 8 *The WIPO Journal* at 34. This definition of decolonisation recognises the 'ongoing' oppression of black people and the prevailing legacy and continued violence on the black body, instead of a definition that suggests that the oppression of black people ended in 1994. Additionally, with the promulgation

legal pedagogy speak to restoring the dignity of Africans and to ensuring the harmonious living of all South Africans.[13]

The book's third chapter is authored by Radley Henrico with the title 'Transformative Constitutionalism and Transformative Legal Education with reference to decolonisation and Africanisation of Legal Education'. The argument advanced in Henrico's chapter is that transformative constitutionalism and Transformative Legal Education may, '[a]ct as vehicles through which the aspirations of decolonisation and Africanisation may be realized'.[14] This is not a novel argument because Quinot has previously proposed Transformative Legal Education as an alternative to current legal pedagogy.[15] Transformative Legal Education is drawn from existing theorising on transformative constitutionalism,[16] and it means that new areas of law must be accommodated in the curriculum with the curriculum shifting paradigms to become constitution-based.[17] Transformative Legal Education represents a move from the conservative legal culture of positivism and formalism in that it transcends merely teaching the content and operation of the law as objective and value-neutral to inculcate diverse methods of reasoning that include aspects of morality, policy,[18] and political sciences.[19]

The book's fourth chapter is written by Jonathan Campbell, titled 'Decolonising Clinical Legal Education'. It argues that law clinics serve as a good starting point to understanding the colonially engineered plight of South Africa's indigent people who are largely forgotten by

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the Constitution, this definition comports directly with the distinction between colonialism and coloniality canvassed by Nelson Maldonado-Torres. See N Maldonado-Torres 'On the Coloniality of Being' (2007) 21 *Cultural Studies* at 4.

13   Tshivase (n 7) 6.
14   R Henrico 'Transformative Constitutionalism and Transformative Legal Education with reference to decolonization and Africanisation of Legal Education' in E Tshivase, G Mpedi, & M Reddi (eds) *Decolonisation and Africanisation of Legal Education in South Africa* (2019) at 17.
15   G Quinot 'Transformative Legal Education' (2012) 129 *South African Law Journal* at 431. Note that although Henrico draws his conceptualisation of Legal Transformative Education from Quinot, Henrico's approach of conflating transformative constitutionalism with decolonisation is something that Quinot does not do.
16   Quinot (n 16) 422. On the concept of transformative constitutionalism, see K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* at 146-188. See also K van Marle 'Transformative Constitutionalism as/and Critique' (2009) 20 *Stellenbosch Law Review* at 286-301.

17   Quinot (n 16) 414. This is a perspective that Modiri is diametrically opposed to, insisting that critical legal theory should be a solution to the challenges facing the LLB curriculum, and that this is more expansive than simply affirming the supremacy of the constitution. See JM Modiri 'The crises in legal education' (2014) 46 *Acta Academica* at 10.
18   A van der Walt 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12 *Fundamina Journal of Legal History* at 13.
19   Quinot (n 16) 415.

the system and are usually unable to access decent legal services.[20] To Campbell, decolonisation of higher education means the contextualisation and consequent responsiveness to context; by this, he suggests that there is a '[n]eed to get away from the influence of the former coloniser and to focus on and be responsive to the actual context in which each higher education institution offers its services'.[21] Campbell insists that 'the Constitution enjoins the courts to recognize the role of law in changing a society in order to make it more equitable for all'.[22]

The book's fifth chapter is written by Dawie de Villiers, titled 'Residuary sections, Stare Decisis, Customary Law and the development of common law — How do these concepts affect decolonisation?' The essence of de Villiers' argument is that existing legal concepts are fit for the purpose of decolonising the curriculum and need merely be understood in a transformative way. He studies four legal concepts, namely (1) the practical implications of residuary sections, (2) the doctrine of *stare decisis*, (3) the role of customary law, and (4) the constitutional obligation for courts to develop the common law.[23] The four legal concepts are linked not to decolonisation nor Africanisation, but instead to the constitution, suggesting the outlandish view that decolonisation and transformative constitutionalism share the same meaning, aspirations, and worldview. This belief protrudes conspicuously when he remarks that the constitution 'embodies the spirit of what it means to "decolonise"'.[24] de Villiers further asserts that '[customary law] will continue to evolve within the context of its values and norms consistently with the Constitution'. Indeed, this is telling of de Villiers' opinion that all of the law's development should happen within the confines of the constitution, notwithstanding the fact that

20 J Campbell 'Decolonising Clinical Legal Education' in E Tshivase, G Mpedi, & M Reddi (eds) *Decolonisation and Africanisation of Legal Education in South Africa* (2019) at 33. This is a dominant feature in the neo-apartheid South African reality as illustrated by Tshepo Madlingozi. See also T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* at 128.

21 As above.

22 J Campbell (n 21) 35.

23 D de Villiers 'Residuary sections, Stare Decisis, Customary Law and the development of common law — How do these concepts affect decolonization' in E Tshivase, G Mpedi, & M Reddi (eds) *Decolonisation and Africanisation of Legal Education in South Africa* (2019) at 49.

24 de Villiers (n 24) 76. de Villiers further states that, 'The question on the decolonization of the law cannot be separated from the decolonization of legal education and the latter cannot be divorced from transformative constitutionalism'.

the constitution is in itself a repugnancy clause that stifles the development of African customary/indigenous law.[25]

de Villiers concludes the chapter by insisting that South Africa became an independent republic in 1961 and that what was left to complete the decolonisation project was for it to rid its legal system of colonial (read English) influences.[26] To this end, he observes that '[m]uch has been achieved in decolonising the field of the law of evidence', meaning that many English law influences have been done away with, and therefore decolonisation has been achieved.[27] It would appear from de Villiers' account of political history that South Africa has been decolonising its law since 1961 by trying to gradually eradicate the pernicious English colonial influence on the pure Roman-Dutch common law principles and doctrines − the same law proffered and ardently enforced by racist/colonial Nationalist Party appointments to the bench.[28] The assumption that a court's mere departure from English law constitutes decolonisation[29] is just one example of wayward thinking, based on a thorough misunderstanding of decoloniality that fails to appreciate that the transition from British colonialism to apartheid did not present a break from colonialism, and thus does not constitute decolonisation.[30]

It is against the background laid above that the argument of this rejoinder will be propounded in four sections. Following this

25   de Villiers (n 24) 65. The claim that the constitution is actually a repugnancy clause for the development of African customary and indigenous law is explained with greater depth by Emile Zitzke in 'The history and politics of contemporary common-law purism' where he generally studies the spectre of common-law purism from a critical legal realist perspective. Zitzke decisively argues against the notion that the constitution is an instrument with which to decolonise South Africa. He does so by suggesting that the constitution is a Eurocentric document that acts as a repugnancy clause towards the development of both customary law and the creation of new laws that seek to decolonise the condition of colonised and dismembered black peoples. See E Zitzke 'The history and politics of contemporary common-law purism' (2017) 23 *Fundamina Journal for Legal History* at 218.
26   de Villiers(n 24) 79.
27   de Villiers (n 24) 80.
28   See Zitzke's critique at Zitzke (n 26) 185-230. See also van der Walt (n 19) 1-47. van Marle has shown how both English law and Roman-Dutch law in particular, are responsible for the upkeep of racism within legal culture and how these laws have been integral in developing elite cultural nationalism. See also K van Marle 'The spectacle of Post-Apartheid Constitutionalism' (2007) 16 *Griffith Law Review* at 416.
29   de Villiers (n 24) 54-55
30   This sort of thinking is something that is carefully studied by Zitzke in 'The history and politics of contemporary common-law purism' where he demonstrates the pre-1994 political/ideological differences between English-leaning judges and the Afrikaans National Party leaning judges. For example, he argues that the Afrikaaner judges were largely against English law influences in South African law, and that this tended to present itself as a critique of constitutionalism. Zitzke demonstrates that this Afrikaaner anti-constitutionalism should not be confused with decolonial critiques because decoloniality does not call for common law purism but rather seeks for the dismantling of any form of purism and universality. See Zitzke (n 26) 218.

introduction, the second section defines and discerns between transformative constitutionalism and decolonisation/Africanisation. The third section explores models and conceptualisations of transformed legal curricula that embrace decolonisation without having to rely on transformative constitutionalism and the constitution. The last section concludes this rejoinder.

2   Discerning decolonisation and transformative constitutionalism

Why decolonisation and not transformative constitutionalism? The response to this question is emblematic of the object of this rejoinder. This segment of the article demonstrates that there is a valid definitional variance between decolonisation and transformative constitutionalism. It insists that the claim that the two can be concurrent, joint, and interchangeable tools to decolonise legal education in South Africa is false, regrettable, and unfortunate.

It cannot be denied that there are overlaps in certain core values that underpin both decolonisation and transformative constitutionalism.[31] However, the epistemic and ontological starting points differ considerably. For example, decoloniality frames the starting point of decolonisation as studying the three localities of coloniality, namely the coloniality of Being, Power, and Knowledge. To be sure, the coloniality of Being has to do with how the coloniser dismembered the 'Being' of colonised bodies, using the Descartian ontological axiom that says, 'I think, therefore I am'. The coloniser

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31   For example, it could be argued that 'equality' is a value that is embodied by both the constitution and as well as decolonisation, but upon closer inspection, there are operative divergences between how decolonial theory and transformative constitutionalism conceptualise equality. Equality before the law appears to be a decolonial value, until you ask questions about the epistemic (in)justice of the law itself. Indeed, the positing of equality before the law as a decolonial value does not take into account the critique of the law, most certainly the constitution, as one that continues the colonial onslaught on the black people of South Africa. Equality before the law is a thorny issue because decoloniality posits that equality can only be attained among Beings (humans).The persisting colonial order renders the colonised as non-humans because their epistemic and ontological concerns were not taken into account when the constitution was discussed and agreed upon in the period between 1990 and 1996. The epistemic and ontological concerns of the colonised include the paying of reparations, returning stolen land without compensation, social justice, an equitable share in the country's mineral wealth, and the re-membering of the dismembered knowledge(s) of the colonised. Indeed, these are some of the ingredients that are needed to re-humanise the de-humanised. As a result, the constitutional demand of equality is as good as placing the cart before the horse, because the question of equality naturally arises only after the de-humanised and have been re-humanised. In a nutshell, there can never be equality between beings and non-beings.

inverted this axiom, effectively asserting that black people (and the subaltern) are not Beings because they do not think.[32]

The dismembering of the colonised body's Being continues to prevail in legal academy, not as a mistake of history but because the academy persists to embrace the colonial logic that insists that alternative epistemologies have no space in the academy precisely because of their assumption that colonised bodies are not Beings and cannot think or produce knowledge.[33] The decolonial lens insists that prevailing coloniality relegates black (and all colonised) persons to non-Beings. Decoloniality embraces the three localities to demonstrate that the continued dehumanisation of black (colonised) people at a grand scale is seen in the reality of their social death,[34] rampant poverty, and related non-human dwelling.

Transformative constitutionalism, on the other hand, assumes that all persons are equal and are duly humanised by the promulgation of the constitution.[35] This constitutionalist assumption is borne from the equality, human dignity, and right to life demands contained in the Bill of Rights. Transformative constitutionalism assumes that the constitution and the 1994 episode present a break from colonial oppression, whereas decoloniality construes the constitutional era as the continuation of a subtler form of colonialism, aptly referred to as coloniality. Unlike scholars of transformative constitutionalism,

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32   W Mignolo *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (2012) at 12. Mignolo explains that in the 16th century Spanish missionaries came into contact with people from the Global South and declared that people shall be judged (engaged with) on the basis of their (in)ability to read and write, and use alphabet. At 3, he explains that towards the 18th century and the beginning of the 19th century, the yardstick was no longer the ability to read and write in alphabets, but rather 'history'. The resultant effect of this was that those who could read/write in alphabet were said to have had a history, and those who could not read/write in alphabet had no history. To be sure, the function of relegating the people that could not read/write to 'sub-human' and declaring that their inability to read/write in alphabet also meant that they do not have a history is at the centre of the coloniality of knowledge, and it is what Mignolo refers to as the 'subalternization of knowledge'.

33   For a deepened study of the three localities of coloniality, see generally R Grosfoguel 'Colonial difference, geopolitics of knowledge, and global coloniality in the modern/colonial capitalist world-system' (2002) 25 *Review Fernand Braudel Center* at 203-224; R Grosfoguel 'Decolonizing post-colonial studies and paradigms of political-economy: Transmodernity, decolonial thinking, and global coloniality' (2011) 1 *Journal of Peripheral Cultural Production of Luso-Hispanic World* at 1-37; S Ndlovu-Gatsheni 'Perhaps decoloniality is the answer? Critical reflections on development from decolonial epistemic perspective' (2013) 43 *Africanus: Journal of Development Studies* at 1-12; S Ndlovu-Gatsheni 'Decoloniality in Africa: A continuing search for a new world order' (2015) 36 *Australasian Review of African Studies* at 22-50.

34   On the concept of social death, and in the context of decolonial theory, see, generally, I Yousuf 'Burdened by a Beast: A brief consideration of social death in South African universities' (2019) 1 *Journal of Decolonising Disciplines* at 82-94.

35   Although this claim stands, it is crucial to assert that it does not mean that it is transformative.

decolonial scholars illustrate these epistemic contradictions by differentiating between colonialism and coloniality.[36]

Decolonisation is thus a response, not to colonialism per se, but to the coloniality that lingers in postcolonial societies after the formal cessation of imperial quests. This distinction is crucial to clarify because Mudau and Mtonga's claims deify the constitution under the unfortunately incorrect assumption that it emerges as a post-apartheid remedy that aims to undo the past in a manner similar to decolonisation.

Decoloniality construes the colonial project as ongoing. The prevailing nature of coloniality is operative. Unlike decoloniality, a prominent feature in transformative constitutionalism scholarship is the fixation with 'correcting injustices of the past', whereas decoloniality is concerned with the injustices of the present. This has the unavoidable epistemic consequence of making the decolonial and transformative constitutionalism discourses divergent ideological tools of analysis and worldview, regardless of their perceived shared aspirations.[37]

Mathebula defines decolonisation '[a]s a deliberate, explicit and individual activity, decolonisation is part and parcel of philosophy as a science of questioning—including itself through analysis, synthesis and improvement'.[38]

Decolonisation and Africanisation have distinct meanings. As explained earlier, the former bases its theorisation on the enquiry about the three localities of coloniality, that are Being, Power, and Knowledge. While it is possible to decolonise the curriculum by way of Africanisation, it is incorrect to assume that decolonisation and Africanisation mean the same thing. For example, Zitzke proposes a

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36 N Maldonado-Torres 'On the Coloniality of Being' (2007) 21 *Cultural Studies* at 4, 'Coloniality is different from colonialism. Colonialism denotes a political and economic relation in which the sovereignty of a nation or a people rests on the power of another nation, which makes such nation an empire. Coloniality, instead, refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus, coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of people, in aspirations of self, and so many other aspects of our modern experience'.

37 Klare (n 17) 150. Karl Klare defines transformative constitutionalism as 'a long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'. Klare n 17?

38 T Mathebula 'African Philosophy (of Education) and Decolonisation in Post-apartheid South African Higher Education' in C Manthalu, & Y Waghid (eds) *Education for Decoloniality and Decolonisation in Africa* (2019) at 5.

decolonial turn in the LLB curriculum, defining decolonisation as, '[a] commitment to Africanization through conceptual decolonization'.[39] Zitzke does not posit that decolonisation means Africanisation, instead, he proposes Africanisation as a way to enact the 'decolonial turn'.[40] Seepe defines Africanisation as follows: [41]

> Africanisation of knowledge ... refers to a process of placing the African world view at the centre of analysis ... [and] advocates for the need to foreground African indigenous knowledge systems to address [Africa's] problems and challenges.

The centering of African knowledges, as per the operative function of Africanisation, overlaps with the decolonial demand for the reversal of epistemicide, and the othering of the knowledge systems of the colonised. It, therefore, follows that one of the goals of decolonisation is indeed Africanisation, however Africanisation in itself is not decolonisation.

The 'Othering' of the knowledge(s) of the colonised, is the essence of epistemicide that Boaventura de Sousa Santos defines as:[42]

> The energy that propels diatopical hermeneutics comes from a destabilizing image that I designate epistemicide, the murder of knowledge. Unequal exchanges among cultures have always implied the death of the knowledge of the subordinated culture, hence the death of the social groups that possessed it. In the most extreme cases, such as that of European expansion, epistemicide was one of the conditions of genocide. The loss of epistemological confidence that currently afflicts modern science has facilitated the identification of the scope and gravity of the epistemicides perpetrated by hegemonic Eurocentric modernity.

At the heart of decolonisation is thus an appreciation that post-colonial South Africa, including its laws (specifically the constitution), is a sum total of the killing and othering of the knowledge(s), intellectual traditions, and epistemic development of indigenous peoples. Following the study of the three localities of coloniality, the praxis of decolonisation rests on the need to reverse the epistemicidal legacy.

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39 E Zitzke 'A decolonial critique of private law and human rights' (2018) 24 *South African Journal on Human Rights* at 494.
40 W Mignolo 'Epistemic Disobedience and the Decolonial Option: A Manifesto.' (2011) 1 *Transmodernity* at 48. The 'decolonial turn' is defined as follows: 'The decolonial turn is the opening and the freedom from the thinking and the forms of living (economies-other, political theories-other), the cleansing of the coloniality of being and of knowledge; the de-linking from the spell of the rhetoric of modernity, from its imperial imaginary articulated in the rhetoric of democracy'.
41 S Seepe 'Black perspective(s) on tertiary institutional transformation' in P Higgs, NCG Vakalisa, TV Mda, & NT Assie-Lumumba (eds) *African voices in education* (2000) at 119.
42 B Santos *Epistemologies of the South: Justice against epistemicide* (2014) at 92. See also at 152-153 where Santos argues that the knowledge(s) of the coloniser are embodied in 'modern science', and that the knowledge(s) of the colonised are dismissed as myth or ignorance.

The undoing of epistemicide seeks to create a society that embraces the pluriversal epistemic traditions of the global South. Epistemic Pluriversality is concisely defined by Arturo Escobar as 'a world where many worlds fit'.[43] Escobar understands that an analysis of all the varying challenges that are facing the world today point to the anomaly of a 'single world'. Simply put, the problem with industrialism, capitalism, modernity, neoliberalism, rationalism, patriarchy, and secularism is that they all assume that humans reside in a single world.[44] The 'single world' is a product of the Euro-American historical experience and worldview, exported to the many worlds in the last 600 years through colonialism, development, and globalisation.

Escobar explains that the pluriverse is a vision of the world that echoes the autopoietic dynamics and archive of earth, underscoring the indubitable fact that no living being exists independently on earth and that the world is inherently plural. Escobar explains that there is no single answer for a single question — the different cultures and traditions respond to questions differently, and all these responses are valid, genuine, and legitimate.[45]

Mudau's and Mtonga's desire to speak of the constitution as a means to decolonise insinuates that the constitution gains decolonial legitimacy when it is invoked as a decolonial instrument.[46]

The conflation of decolonisation and constitutionalism emerges prominently in a debate between Tshepo Madlingozi and Tembeka Ngcukaitobi, wherein the latter argues that the constitution was drafted with the intention to decolonise a colonised South Africa, while the former rejects this argument, presenting alternative narratives about the history of the processes that led to the final constitution. Madlingozi also strongly argues that the constitution is actually a document meant to cement the gains of colonialism and to further entrench coloniality.[47]

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43   A Escobar 'Transiciones: A space for research and design for transitions to the pluriverse' (2015) 13 *Design Philosophy Papers* at 5.
44   As above.
45   As above.
46   See, for example, Mudau & Mtonga (n 2) 48, 'The main question in this discourse interrogates the role of transformative constitutionalism in the decolonisation and Africanisation of legal education. Subsequently, a further three faceted inquiry is crafted with the aim of developing the primary question by firstly, interrogating the definition of a 'decolonised' and 'Africanised' legal education, secondly, evaluating whether the UP Curriculum Transformation Document provides a suitable lead on how to properly design the transformative framework for the decolonisation and Africanisation of legal education in South Africa and finally, investigates the possible implications for the decolonisation and Africanisation of legal education'.
47   T Madlingozi 'South Africa's first black lawyers, *amaRespectables* and the birth of evolutionary constitution — a review of Tembeka Ngcukaitobi's *The Land is ours*: *South Africa's First Black Lawyers and the Birth of Constitutionalism*'(2018) 3 *South African Journal on Human Rights* at 32

Manthalu and Waghid lean towards Madlingozi's argument as regards the essence of the South African constitution:[48]

> The epistemology underlying the law in South Africa leads to alienation of justice and contestation by the people of the conventional legal institutions, especially the constitution, which in principle have subordinated the law of the indigenous people into a Eurocentric one … [t]he global economy that is at the core of global interconnectedness is founded on the "ego-centred" rationality of the fundamentalism of the market that now shapes global and African public institutions.

These debates about the legacy of the constitution, in relation to decolonisation, show that there is a definite distance between the true meaning of justice as interpreted through a decolonial prism, and as it is understood by most South African-trained law academics and practitioners (such as Mudau and Mtonga).

Transformation is the first image in the transformative constitutionalism paradox, as noted by Heyns; she posits that transformative constitutionalism presents a paradox between change and stability, arguing that transformation requires change whereas constitutionalism assumes stability − ideologically contradictory ideals which may lead to varying outcomes.[49]

Scholars such as Dennis Davis, Karl Klare,[50] Karin van Marle, and many others, have done the academy a great service by giving cogent analysis, critiques, and scholarly theorisations about transformative constitutionalism, showing its importance and applicability to the South African body politic. None of these scholars have ever spoken of transformative constitutionalism and decolonisation in interchangeable terms; the furthest they have ventured is to suggest that transformative constitutionalism should not only be construed as merely a means towards transforming society, but also as a critique of existing power, and racial and socio-economic dynamics that define the new South Africa.[51] This reads as an unusual interpretation of transformative constitutionalism considering that it suggests a continued critique of society,[52] as opposed to the misplaced

48   C Manthalu & Y Waghid 'Decoloniality as a Viable Response to Educational Transformation in Africa' in C Manthalu & Y Waghid (eds) *Education for Decoloniality and Decolonisation in Africa* (2019) at 28.
49   A Heyns 'The inoperative Community of Law Students: Rethinking foundations of legal culture' (2014) 46 *Acta Academica* at 85.
50   D Davis & K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* at 406.
51   van Marle (n 17) 288.
52   van Marle (n 17) 297. van Marle posits: '[transformative constitutionalism] must be a site of active political action and struggle, of active engagement with law; a site that entails an unsettled and unsettling approach'.

optimism[53] of Mudau and Mtonga about the prospects of growth and development in light of South Africa's internationally acclaimed constitution.[54]

When studying South Africa's Decolonial Turn, likening decolonisation to transformative constitutionalism is inimical to the efforts of the #FeesMustFall protesting students, who called for decolonisation as a revolutionary shift from the politics of the establishment, effectively calling for the undoing of the neo-colonial compromises that led to the promulgation of the constitution of the Republic.[55]

A candid reading of the demands of students shows that decolonization, *inter alia*, means embracing all notable critiques and rejections of the constitution and seeking new ideas, rooted in indigenous African thinking and reflecting contemporary African cultures, to liberate the othered black working-class people of South Africa. The voices of students are reflected by Mabasa, who points out that students were calling for a complete overhaul of the education system,[56] and sought a meaning of decolonisation that dismantles the constitutional order.[57]

The period post the #FeesMustFall protests has seen a sharp increase in the criticism of South Africa's constitution. For example, Modiri makes scathing remarks about how the academy has fetishised the constitution.[58] He problematises the constitution's inability to reflect, account for, and address the deep terrors of colonial apartheid, especially as these relate to race, land, and culture.[59] He

53   van Marle (n 17) 300. In place of constitutional optimism, van Marle instead understands transformative constitutionalism to mean new thinking, which encompasses 're-imaginings, re-figurings and re-orientations'.
54   van Marle (n 17) 288. van Marle locates this constitutional optimism in liberal politics and liberal approaches to law.
55   For example, see L le Grange 'Decolonising the university curriculum' (2016) 30 *South African Journal of Higher Education* at 2 where Le Grange relays the voices of leading #FeesMustFall student activists in articulating their chosen definition of the meaning of decolonisation. Le Grange specifically quotes EFF student leader (and now member of Parliament, and a national spokesperson) Vuyani Pambo, who argues that decolonisation means a complete overhaul of the system. Pambo's definition is at odds with the definition used by Mudau and Mtonga because the latter articulates decolonisation to be something that can be achieved within the constitutional system. Pambo adds, 'We don't want to treat the symptoms, we want to decolonise the university — that is at the heart of the cause'. Pambo's statement comports with that of his comrade, Alex Hotz, who asserts that 'As a law student, [she] believe(s)sic decolonising the law faculty goes beyond the faculty and the institution. It speaks to what the law is and how it is used within society'.
56   K Mabasa 'The rebellion of the born un-frees: Fallism and the neo-colonial corporate university' (2017) 39 *Strategic Review for Southern Africa* at 101.
57   C Himonga & F Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20 *Potchefstroom Electronic Law Journal* at 2.
58   JM Modiri 'Conquest and Constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* at 308.
59   As above.

argues that this fetish constitutes part of 'colonial unknowing' which disavows, disassociates, and normalises the horror of land dispossession, white domination, and racism.[60] Dladla also problematises the triumph of liberal intellectual traditions in South Africa, arguing that these can be attributed to 'one of the most progressive liberal democratic constitutions in the world', yet such a constitution is not progressive for '[t]he indigenous people conquered in the unjust wars of colonisation'.[61]

3   Critical formulations outside of transformative constitutionalism

This section briefly presents three seminal works that comprehensively present decoloniality as a decisive alternative without relying on the constitution and transformative constitutionalism. These works are that of Tshepo Madlingozi,[62] Joel Modiri, and Ntando Sindane. The operative function of this section of the rejoinder is to demonstrate to Mudau and Mtonga that it is indeed logical and intellectually sound to ponder upon transforming legal education purely by way of decolonial approaches, without having to rely on the constitution and transformative constitutionalism.

Madlingozi authors a PhD thesis titled 'Mayibuye iAfrika?: Disjunctive inclusions and black strivings for constitution and belonging in "South Africa"'. In this thesis, Madlingozi analyses the strivings for constitution and belonging from the perspective of an African.[63] The central thesis of his argument is two-fold, (1) that the perennial protest by marginalised communities are impelled by the fact that the constitution does not rise to the demand of decolonisation, and (2) that the constitution's failure to live up to decolonial demands can be understood from studying the

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60   As above.
61   N Dladla 'Contested Memory: Retrieving the Africanist (Liberatory) Conception of Non-racialism' (2017) 64 *Theoria* at 124.
62   T Madlingozi 'Mayibuye iAfrika?: disjunctive inclusions and black strivings for constitution and belonging in "South Africa"' Unpublished PhD thesis, Birbeck University of London, 2018.
63   Madlingozi's PhD thesis adequately mirrors and is a reflection of a lifetime of his scholarly interventions. These include, but are not limited to, T Madlingozi 'On Transitional Justice Entrepreneurs and the Production of Victims' (2010) 2 *Journal of Human Rights Practice* at 208-228; T Madlingozi 'Post-Apartheid Social Movements and the Quest for the Elusive "New" South Africa' (2017) 34 *Journal of Law and Society* at 77-98; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism : critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* at 123-147; T Madlingozi 'South Africa's first black lawyers, *amaRespectables* and the birth of evolutionary constitution — a review of Tembeka Ngcukaitobi's *The land is ours: South Africa's first black lawyers and the birth of constitutionalism*'(2018) 34 *South African Journal on Human Rights* at 517-529.

ambivalence, racial melancholia and the double-consciousness of South Africa's political elite.

The focus on political elites, whom Madlingozi accordingly labels 'exceptional natives' and '*amakholwa*', is important because they were instrumental in South Africa's constitutional dialogues between 1989-1996. The constitution thus becomes, not a product of a people coming together, but rather a pact between colonisers and native elites who assimilated and were co-opted into whiteness and the white-dominated world.

Madlingozi posits that the 'quest for post-colonial constitution-making ought to be geared towards remembering and (re)constituting the historically-colonised world on spiritual, social and material planes — the three realms of African belonging in the world.'[64] Madlingozi's PhD thesis is an extraordinary account of discourse towards re-thinking South Africa's colonial positions — most importantly, it relies on purely decolonial and African approaches, and not the constitution. This reading of Madlingozi helps us to comprehend that although the constitution is transformative, it is not decolonial.

Modiri authors a PhD thesis titled 'The Jurisprudence of Steve Biko: A study in race, law, and power in the "afterlife" of colonial apartheid'.[65] In this thesis, Modiri critically analyses the epistemic, spiritual, political, and social conditions that define South Africa's reality after the 1994 episode.[66] He specifically chooses Steve Biko's philosophy of Black Consciousness as a lens through which to observe the South African reality and to develop an alternative approach to law and jurisprudence as a response to race and racism that continues to bedevil this country post-1994.

Modiri briefly unpacks the title of his thesis by explaining that he uses 'afterlife' instead of 'aftermath' because the latter suggests that colonial apartheid is over, whereas the former decisively insists that colonial apartheid continues to prevail long after its formal death,

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64 T Madlingozi (n 63) 3.
65 Modiri's PhD thesis adequately mirrors and is a reflection of a lifetime of his scholarly interventions, these include, but are not limited to, J Modiri 'Law's Poverty' (2015) 18 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* at 224-273; J Modiri 'Towards a "(post-)apartheid" critical race jurisprudence : "divining our racial themes"' (2012) 27 *Southern Public Law Journal* at 231-258; J Modiri 'The grey line in-between the rainbow: (re)thinking and (re)talking critical race theory in post-apartheid legal and social discourse' (2011) 26 *Southern African Public Law Journal* at 177-201.
66 It is important to note that Mudau & Mtonga refer to Modiri without acknowledging Modiri's general rejection of transformative constitutionalism. This may allude to a misreading of Modiri, or even a complete misunderstanding of his critique of post-apartheid constitutionalism. See for example, Mudau & Mtonga (n 2) 46, 'More so, in post-apartheid South Africa, legal education "remains firmly in the grip of restricted jurisprudence", which entails having the majority of law courses which Modiri perfectly described'.

thus having an 'afterlife'.[67] This analysis, although worded differently, comports with the earlier decolonial differentiation between coloniality and colonialism.

As a point of entry, Modiri distinguishes between the two dominant approaches to South Africa's colonial/racist problem, the first is what he calls the legalist/constitutionalist approach,[68] and the second is what he calls the critical political/leftist approach.[69] He defines the former as follows:[70]

> ... the liberal legalist approach to race and law is rooted in a traditionally liberal jurisprudence. Liberal jurisprudence presumes the legitimacy of a state in which we are all guaranteed equal protection before the law, and in which rights are said to facilitate individual freedom.

He then defines the latter as follows:[71]

> ... a critical political or leftist approach to race and law takes its bearing from what it conceives of as deficiencies in the liberal approach, from that which liberalism elides. A critical political or left understanding of race thus begins with a critique of liberalism — both as an ideology and as a social order — and attempts to map and expose the social powers (other than law) which produce, govern, and stratify subjects.

The distinction that Modiri makes is worth a brief comment — the separation between the legalist/constitutionalist approach and the critical political/leftist approach helps us understand that decolonisation and Africanisation fall into the latter category, whereas transformative constitutionalism falls into the former category. This is something that would be incredibly useful to nuance Mudau's and Mtonga's reading/thinking about questions surrounding the transformation of legal education — to be sure, they would be able to theoretically appreciate why decoloniality and transformative constitutionalism cannot be used interchangeably in the quest to transform legal education.

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67   Modiri's distinction between aftermath and afterlife is incredibly important for the argument that is being advanced in this article. Whereas decolonial scholars make the distinction between colonialism and coloniality, Modiri's afterlife-aftermath conceptualisation gives context to decolonial theorisation and makes it attentive to South Africa's situation. In essence, 'aftermath' may be an image preferred by adherents of transformative constitutionalism because it assumes that apartheid colonialism disappeared in 1994 because the constitution of 1996 was promulgated and thus ushered South Africans into a decolonised reality. Decolonial thinkers would align themselves to 'afterlife' because 'life' correctly supposes that colonial apartheid did not disappear in 1994 but rather transmuted from life to an 'afterlife' and thus coloniality.

68   JM Modiri 'The Jurisprudence of Steve Biko: A study in race, law and power in the "afterlife" of colonial apartheid' Unpublished PhD thesis, University of Pretoria, 2017 at 42.

69   Modiri (n 69) 45.

70   Modiri (n 69) 42.

71   Modiri (n 69) 45.

Sindane authors an LLM thesis titled 'The call to decolonise higher education: Copyright law through an African lens'.[72] In this thesis, Sindane considers questions about decolonisation of higher education broadly, and at a much more narrowed level, he focuses on the copyright law curriculum as taught in South African law faculties.[73] Although the introductory parts of this thesis allude to transformative constitutionalism as a valuable critique in the quest to transform legal education, he decisively opts for decoloniality as the most viable approach to curriculum transformation.

Having defined decolonisation in the context of copyright law, Sindane argues that studying the three localities of coloniality is the basis upon which copyright law can be decolonised. He then proceeds to critically deconstruct extant intellectual property law justificatory theories, the requirements for authorship, the meaning of moral rights in a decolonised articulation of copyright law, the role that copyright law can play in defeating cultural appropriation, copyright law exceptions, and others.

The hallmark of Sindane's study rests in his departure from liberal constitutionalist approaches and instead embracing unfettered decolonial theory as an operative tool in transforming the LLB curriculum.

4   Final analysis

This rejoinder has carefully demonstrated the epistemic cleavage between decolonisation/Africanisation and transformative constitutionalism, and allows for a critique of Mudau's and Mtonga's central claim. It further gave examples of recent intellectual interventions in the decolonial discourse that have departed from constitutional reasoning(s).

There is no need to mask difficulties where they exist because this does not solve any epistemic, pedagogical, or intellectual problems that face law faculties today. The eagerness to conflate transformative constitutionalism with decoloniality and Africanisation does not do justice to any of these concepts; instead, it denies the academy an opportunity to deduce the epistemic nuances that all of these concepts present.

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72   N Sindane 'The call to decolonise higher education: Copyright law through an African lens' Unpublished LLM thesis, University of South Africa, 2020 at 1-155.
73   This appears to be a theme that Sindane seeks to develop in his scholarly works. For example, in N Sindane 'Morena Mohlomi le Badimo: Reading decolonial articulations into the intellectual property law curriculum' (2020) 2 *Journal of Decolonising Disciplines* at 1-26, where he weaves together a narrative about the need to decolonise the curriculum by way of decolonial theory outside of liberal constitutionalist sensitivities.

The deification of the South African Constitution is something that law teachers should be reflectively attentive to,[74] because such approaches belong to conservative apartheid traditions rather than the constitutional era, especially under the transformative constitutionalism prescript of justification over authority.[75] The continued attitude of merging these ideas to mean one thing presents a misnomer and conceptual conflation that should be rejected as both ahistorical and intellectually dishonest.

In summation, it is important that law teachers and thinkers focus on seeking deeper truths and hidden meanings as they work towards decolonising the LLB curriculum — a crucial aspect of this exercise includes having a deeper appreciation of the need for definitional clarity.[76]

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74 Modiri (n 59) 308.
75 The constitutional era presents a shift/bridge from a culture of authority to a culture of justification. See generally E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* at 31-48.
76 Ascertaining definitional clarity is very important in the quest to bring about alternative epistemic systems. Siyabulela Tonono remarkably demonstrates this in 'Crafting a Decolonial Economic Order for Re-Afrikanisation in the Context of South' where he argues that colonialism was anchored by capitalism. He probes whether decolonisation can be achieved within a capitalist order and responds to this question by insisting that decolonisation should be understood as a 're-Afrikanisation' project. For him, 're-Afrikanisation' means to turn towards socialism with African characteristics. At a practical level, Tonono posits that decolonial re-Afrikanisation is embodied in the isiXhosa principle of '*Inkomo Yenqoma*' because of this principle's two inherent features: (1) radical inclusiveness and socialisation of the means of production, and (2) production of goods and services is based within the community and driven by the needs of the community. See generally, S Tonono 'Crafting a Decolonial Economic Order for Re-Afrikanisation in the Context of South' (2018) 48 *Africanus: Journal of Development Studies* at 1-14.