

MOVING BEYOND THE ABYSSAL LINE: THE POSSIBILITY OF EPISTEMIC JUSTICE IN THE 'POST'-APARTHEID CONSTITUTIONALISM

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Abstract

In this article, I reflect on the idea of a 'post'-apartheid South African constitutionalism and the related and implicated notion of Transformative Constitutionalism by emphasising its continued bondage to a colonial and apartheid past. In an effort to critically explore the 'post'-apartheid transformative constitutional framework, I examine the endurance of colonialism as colonality in the manner it has unfolded in the South African context. This exploration involves highlighting three constitutive elements of this endurance: linear historicism as observed in Hobbes' social contract; the geography of reason as theorised by Schmitt; and the lines within South African society and knowledge systems as a result of what De Sousa Santos calls 'abyssal thinking'. Although the endurance of historical colonialism as colonality can be described in a number of ways, I deal with these specific constitutive elements in order to argue that the doctrine of

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transformation, which includes Transformative Constitutionalism, has largely been ineffective in its attempt to eradicate coloniality as it has failed to achieve epistemic justice for the majority of (South) Africans. I conclude by suggesting that the doctrine of transformation and, as such, Transformative Constitutionalism has served to further exclude and marginalise the knowledge of indigenous (South) African people in the 'post'-apartheid constitutional dispensation. The project of transformation has sustained the abyssal line as it has been internalised through coloniality. As such, the 'post'-apartheid South African dispensation remains divided by this line – essentially discarding indigenous (South) African people and their knowledge systems to the abyss. I further argue that the persistence of coloniality, sustained by the abyssal line, requires a project of conceptual decolonisation if coloniality and epistemic injustice is to be undone. In this sense, a true (South) African dispensation may be disclosed.

For us, the problem is not to make a utopian and sterile attempt to repeat the past, but to go beyond.¹

1 Introduction

South Africa has an extensive history of European colonialism. Colonialism as a historical occurrence may be understood as the political and economic relation established by the power of one nation over another in a manner that ensures the sovereignty of the former.² Throughout South Africa's history of colonialism, its indigenous people have been subjected to injustice and violence through countless instances of economic and political exclusion, wars of dispossession, racial discrimination and segregation, forced displacement and epistemic injustice.

Through a long and violent liberation struggle, South Africa eventually reached political liberation with the formal end of apartheid in 1994. South Africa entered a new era of democracy founded on a supreme constitution, promising the protection of South Africans' fundamental human rights. However, in 'post'-apartheid South Africa, the remnants of colonialism, which I refer to as coloniality, remain visible in its economic, social, legal, political, and moral spheres. It remains commonplace that European multinational companies own the majority of South African mines, and business is conducted on the basis of Western individualism; societal values are based on Eurocentric ideas of civilisation; the Constitution of the Republic of South Africa, 1996 ('the Constitution') contains a Bill of Rights which is based on Eurocentric principles of freedom, and the

1 A Césaire *Discourse on colonialism* (1950) at 52.

2 N Maldonado-Torres 'On the coloniality of being: Contributions to the development of a concept' (2007) 21 *Cultural Studies* at 243.

South African legal system remains largely dominated by English and Roman-Dutch law; national politics continue to be characterised by violence and corruption; and the colonisers entrenched Christianity in South Africa, where it has remained at the cost of (South) African belief systems. In the sections below, I will elaborate on the above illustration of the South African context.

It should be noted that I refer to the current dispensation as '*post*'-apartheid because of its inextricable bondage to the history of colonialism, which implies that South Africa has not truly moved beyond its colonial-apartheid past.

Through the exploration below of '*post*'-apartheid South African constitutionalism, it can be argued that colonialism still largely subsists in the form of coloniality. Colonial and Eurocentric knowledge systems continue to dominate South African knowledge systems. In order to counter the effects of colonialism, a project of Transformation – and in the South African legal context, Transformative Constitutionalism – was embarked upon with the advent of democratic rule.

Below, it is argued that the doctrine of Transformation, and Transformative Constitutionalism, has failed to include any attempt to eradicate coloniality and to achieve epistemic justice. This doctrine has rather served to further exclude and marginalise (South) African knowledge in '*post*'-apartheid South Africa. This is specifically evident in the arbitrary exclusion of ubuntu from the final Constitution, and the large-scale denial of (South) African indigenous knowledge, specifically in the legal sphere. The article ultimately contends that because of the inherent nature of coloniality, a project of decolonisation must be embarked on if coloniality and the epistemic injustice it upholds is to be undone.

As mentioned, I will critically evaluate the doctrine of Transformation by exploring the endurance of colonialism as coloniality through three constitutive elements of this endurance: linear historicism, the geography of reason, and the lines within South African society and knowledge systems as a result of what De Sousa Santos terms '*abyssal thinking*'.³

Thereafter, I will discuss South African constitutionalism in the '*post*'-apartheid era by considering its general characteristics as well as the doctrine of Transformative Constitutionalism. Moreover, I will problematise '*post*'-apartheid constitutionalism for its continued bondage to the apartheid era, its exploitation of ubuntu, and the ongoing exclusion of (South) African indigenous knowledge from its ambit.

3 B De Sousa Santos *Epistemologies of the south: Justice against epistemicide* (2014) at 118.

I conclude by theorising a possible shift from the doctrine of Transformation to the project of decolonisation. It is this shift – the move beyond the abyssal line – that I believe is key to eradicating coloniality, achieving epistemic justice, and creating a true (South) African jurisprudence and political order.

2 The endurance of colonialism as coloniality in the South African context

Mudimbe points out that the word colonialism is derived from the Latin word *colĕre*, which can be translated as ‘to cultivate’ or ‘to design’.⁴ Colonialism can be understood as the forcing of political and economic power relations of one state onto another, wherein the imposing state determines the sovereignty of the other state.⁵

South Africa first became a victim of European colonialism when the Dutch settled in and colonised the Cape in 1652.⁶ After more than a century of Dutch rule, Britain occupied the Cape in 1795.⁷ The Dutch briefly regained control over the Cape in 1803, but ultimately, British sovereignty was confirmed in 1806.⁸ The Dutch, who renamed themselves the Afrikaners, in a claim to belonging and in resistance to British colonial power, moved inland where they continued colonising the South African landscape and its people.⁹ It was only in 1910, when the Union of South Africa was established, that the British and Afrikaner forces were joined as one.¹⁰ In 1948, Afrikaner nationalists took control of South Africa and imposed a policy of apartheid, a continuation of colonialism.¹¹ In 1961, South Africa gained independence from Britain, and the Republic of South Africa was established.¹² Once independent from Britain, the Afrikaners maintained control of South Africa until apartheid ended in 1994.¹³

Even though colonialism formally ended in South Africa when it became a constitutional democracy in 1994, it continues to define the culture, system of authority, relations of power, knowledge systems, economy, and the ontological framework of South Africa.¹⁴ These continuities are examples of coloniality – it is what remains in the

4 V Mudimbe *The invention of Africa* (1988) at 1.

5 Maldonado-Torres (n 2) 243.

6 TRH Davenport *South Africa: A modern history* (1987) at 22.

7 L Thompson *A history of South Africa* (2014) at 52.

8 As above.

9 H Giliomee *Die Afrikaners: 'n Biografie* (2004) at 40; MB Ramose ‘The philosophy of the Anglo-Boer War’ in I Snyman (eds) *A century is a short time: New perspectives on the Anglo-Boer War* (2005) at 16.

10 Thompson (n 7) 157; Davenport (n 6) 255.

11 Thompson (n 7) 186.

12 Thompson (n 7) 188.

13 Thompson (n 7) 264.

14 As above.

aftermath of colonialism. Coloniality encompasses Euro-Western elements such as an international economy constituted by capitalism, vertical intersubjective relations determined by racism and Eurocentrism, as well as the dominance of Christianity, at the cost of other religions.¹⁵

I will consider three constitutive elements that have facilitated the endurance of colonialism as coloniality globally, and in South Africa: firstly, linear historicism; secondly, the geography of reason; and lastly, abyssal thinking. As mentioned above, although this endurance can be explained in a number of ways, I deal with the specified elements in order to specifically problematise the doctrine of Transformation and Transformative Constitutionalism in the South African context.

2.1 Linear historicism

Hannaford provides insight into linear historicism as theorised by Hobbes in the *Leviathan*.¹⁶ Hobbes makes the argument that unless humankind is organised by civil society through a Social Contract, individuals will live in a state of nature where every human being fends for themselves.¹⁷ In terms of the theory of Social Contract, people agree to denounce their right to use violence against one another in exchange for certain political rights and freedoms.¹⁸ This theory presupposes that the state of nature – a pre-political state – is a state from which humankind can progress by concluding a Social Contract. Such progression refers to ontological, social, and economic development.¹⁹ Dussel calls this the *fallacy of developmentalism*.²⁰ He argues that this type of thinking suggests that Europe's path of development must be followed by all other cultures and peoples, universally.²¹

Along the same lines, Arendt has argued that Hobbes's theory of Social Contract suggests that human beings within the Social Contract are free to do as they please with or to those who are excluded from the agreement.²² Arendt describes these excluded communities as human beings who live in *apolitical voids*.²³ It is indeed this logic employed by Hobbes that sets a new standard for colonialism. Arendt

15 SJ Ndlovu-Gatsheni 'Genealogies of coloniality and implications for Africa's development' (2015) XL *Africa Development* at 18-19.

16 I Hannaford *Race: The history of an idea in the west* (1996) at 192.

17 As above.

18 As above.

19 E Dussel 'Eurocentrism and modernity (Introduction to the Frankfurt Lectures)' (1993) 20 *boundary 2* at 68.

20 Dussel (n 19) 67.

21 Dussel (n 19) 68.

22 H Arendt *The origins of totalitarianism* (1951) at 142; Hannaford (n 16) 192.

23 Hannaford (n 16) 192.

argues that Hobbes's Social Contract therefore served to legitimate the right to colonise those who are *still* in the state of nature.²⁴ This justification for colonisation meant that Europe – the colonisers – understood that they had the right to *correct*, *rescue* and *conquer* those who were *still* in the state of nature – the colonised.

Hobbes's theory of Social Contract was realised through agreements such as the Peace of Westphalia treaty of 1648.²⁵ State signatories agreed to the principle of state sovereignty as well as equality of such states.²⁶ This agreement, however, was entirely reserved for Europe and, as such, everything outside of Europe remained viable for conquest and colonialism.²⁷ Those who lived outside of the treaty were perceived to live outside of the law. Similarly, the Berlin Conference was held between 1884-1885 where the continent of Africa was divided and discussed.²⁸ Africa was, however, entirely excluded from the agreements made between the European states.²⁹ Excluded from the Social Contract, Africa could not benefit from it, and was conquered and colonised instead.

Berlin describes historical inevitability as large patterns that can be discerned in the procession of historical events, by applying a kind of scientific method in order to build on historical knowledge so as to fill gaps in knowledge of the past, to explain the present, and predict the future.³⁰ Similar to Hobbes' linear historicism, Berlin argues that the notion of historical inevitability places the colonised at the beginning of development, and Western Eurocentric civilisation at the end thereof.³¹ This narrative forms the foundation for colonialism because it suggests that the colonial subject will *inevitably* develop and reach Western Eurocentric civilisation. It is, therefore, justified to conquer the colonised subject as such development is inevitable.

Such inevitability clearly rests upon the idea that history is *more* than mere past events, rather, it is a theodicy.³² This means that historical events, as well as what happens in the present, seem to be caused by abstract forces such as class, race, culture, and religion.³³ The logic of historical inevitability and determinism is still perpetuated. Capitalism and the inequality it creates, namely, injustice and poverty, continues to be justified in society through the mechanisms of: the religious framing of individual, racial and classist positionalities as the will of the Christian god; the globalisation of

24 Arendt (n 22) 146; Hannaford (n 16) 193.

25 Ndlovu-Gatsheni (n 15) 25.

26 As above.

27 As above.

28 Ndlovu-Gatsheni (n 15) 26.

29 As above.

30 Berlin 'Historical inevitability' in H Hardy (ed) *Liberty* (2003) at 96.

31 As above.

32 Berlin 'Historical inevitability' in Hardy (n 30) 101.

33 Berlin 'Historical inevitability' in Hardy (n 30) 103.

capitalism as the most viable economic policy; and Eurocentrism situating Europe at the centre of the world order.³⁴ The logic of historical inevitability is, however, flawed as individual responsibility and free will cannot be entirely eliminated.³⁵ Unfortunately, this logic has worked in the coloniser's favour, as the colonised is accordingly doomed to believe that changing their circumstances is beyond their control and entirely up to abstract forces.

In this respect, Murungi argues that Africa is a victim of European terrorism.³⁶ The West has indeed managed to institutionalise liberty and equality in its own societies, while simultaneously institutionalising oppression and inequality in African societies.³⁷ The integrity of this logic can, however, only be maintained by convincing the colonised that their problems – poverty, disease, high mortality rates, racism – are simply a condition of their being.³⁸ This also means that the legitimacy of the Christian god in the presence of such grave injustice, evil, epistemic and social violence, is justified.³⁹

Gordon argues that to understand colonialism, one has to understand Western modernity.⁴⁰ He defines Western modernity as the colonisers enforcing their idea of reality onto the colonised.⁴¹ Gordon points out that this process does, however, only provide colonised peoples with two possible futures: firstly, the colonised could disappear through genocide, erasure or assimilation; or the colonised could adapt by way of hybridisation or transformation.⁴² As such, modernity has ultimately threatened the indigenous culture, knowledge, values, and beliefs in its entirety. Modernity, as it is defined here, clearly distinguishes between one legitimate reality and everything beyond it, which is regarded as illegitimate.

Before turning to the second constitutive element, it should be noted that Hobbes's Social Contract implicitly suggests one single linear path of development that is essentially European. It is the deterministic and historically inevitable nature of this theory that supported the right to conquer and colonise. Colonial forces indicated that such development would eventually occur and, as such, interference and facilitation of the process was justified. In this sense, Christianity is also deeply implicated in the process of colonialism as it is a belief system and way of seeing the world that was entirely imposed on colonised peoples. The process of colonialism

34 Berlin 'Historical inevitability' in Hardy (n 30) 115.

35 As above.

36 J Murungi *An introduction to African legal philosophy* (2013) at 36.

37 Murungi (n 36) 37.

38 LR Gordon 'Justice otherwise: Thoughts on ubuntu' in L Praeg & S Magadla (eds) *Ubuntu: Curating the archive* (2014) at 14.

39 As above.

40 Gordon (n 38) 11.

41 As above.

42 As above.

thus came at the cost of indigenous culture, knowledge, values, and beliefs.

2.2 The geography of reason

With regards to the second constitutive element, Schmitt contended that the various geographical divisions for the purpose of colonialism resulted in the *geography of reason*.⁴³ At the dawn of colonialism, the spatial ordering of the earth led to the birth of international law. The earth was soon divided by cartographical lines.⁴⁴ The dividers, of course, were European Christian colonisers – who, at the time, perceived themselves as synonymous with civilisation.⁴⁵ This spatial ordering was, therefore, not merely a superficial cartography, but rather political from the start.⁴⁶

Shortly, this spatial ordering brought about the Raya lines, which were Spanish-Portuguese divisional lines.⁴⁷ These lines were entrenched when two princes recognised the same spiritual authority – the pope – as well as the same international law – European law. They then agreed on the acquisition of land that belonged to other princes and/or people of another faith.⁴⁸ As such, a distinction was made between the territory of Christian princes, and non-Christian princes and/or people. Although the pope granted the princes a missionary mandate, on the basis of the Raya lines, such a right was not held separate from the right to trade and occupy a given territory.⁴⁹ As a rule, however, the Raya lines were not seen as global separations between Christian and non-Christian territories, but rather as treaties between land-appropriating Christian princes.⁵⁰

The Amity lines were French-English friendship lines.⁵¹ One specific Amity line – the Western meridian – demarcated where Europe ended, and the rest of the world began.⁵² As a result, it was decided that European law also ended at this line. Schmitt claims that this is precisely how Europe managed to achieve a ‘bracketing’ of war through international law.⁵³ Beyond this line was the rest of the world – where the *legal limits* to war no longer applied.⁵⁴ As opposed to the Raya lines, the Amity lines were not based on any mutual authority

43 C Schmitt *The nomos of the earth in the international law of the jus publicum europaeum* (1950) at 86.

44 As above.

45 As above.

46 Schmitt (n 43) 88.

47 Schmitt (n 43) 90.

48 Schmitt (n 43) 91.

49 As above.

50 Schmitt (n 43) 92.

51 Schmitt (n 43) 90.

52 Schmitt (n 43) 93.

53 As above.

54 Schmitt (n 43) 94.

such as the pope.⁵⁵ It remained true, however, that the mutuality of Christian Europe was the basis on which the rest of the world was colonised.⁵⁶ As such, everything beyond the line was excluded from legal, moral, and political values that were recognised on Europe's side of the line.⁵⁷ This exclusion, however, challenged all traditional, European intellectual and moral principles.⁵⁸

The behaviour of European Christians beyond the line rather coincides with actions in war, as opposed to the ethical values established within the bounds of Europe.⁵⁹ Beyond the line, the non-ethics of war regulated their behaviour.⁶⁰ Coloniality as entrenched colonialism can, therefore, be understood as the exception to ethics, namely, the non-ethics of war becoming a global norm.⁶¹

Thus, what first started out as cartographical divisions between the territories of the colonisers and the colonised, evolved to become a geography of reason. The Raya, Amity, and other similar lines demarcated where 'reason' would start and where it would end. On the European coloniser's side of the line; reason, law and Christian values were exhibited. Beyond the line, however, the non-ethics of war regulated the coloniser's behaviour – it was generally accepted to be void of reason. Over time, lines such as the Raya and Amity lines have become internalised in our societies, leading to the endurance of colonialism in the form of coloniality. In the following section, I will consider the third constitutive cause or element contributing to the entrenchment of colonisation as coloniality, namely, the lines within.

2.3 The lines within

Maldonado-Torres posits that colonialism, as it continues to exist through coloniality, has been internalised to the point where the *geography of reason*, as theorised by Schmitt, is now observable within society as opposed to being determined by a superficial cartography dividing international territories.⁶² To explain the internalisation of the lines, Maldonado-Torres starts at the birth of European enlightenment: the Cartesian *ego cogito*.

Descartes's *ego cogito* (I think, therefore I am) is widely considered as the catalyser of Western modernity, and the foundation of European epistemology and reason. Dussel, however, argues that the Cartesian *ego cogito* must be understood in the context of the *ego*

55 As above.

56 As above.

57 As above.

58 Schmitt (n 43) 95.

59 Maldonado-Torres (n 2) 259.

60 As above.

61 As above.

62 Maldonado-Torres (n 2) 240-270.

conquiro (I conquer).⁶³ Dussel claims that the foundation of the project of colonisation is what the certainty of Descartes' reason above, and Europe's reason, is based on.⁶⁴ If Dussel's argument is accepted, and we are to understand the *ego cogito* in the context of the *ego conquiro*, then the ideology of *I think, therefore I am* presupposes two hidden facets.⁶⁵ Firstly, the *I think* conceals the notion that others 'do not think'.⁶⁶ Secondly, the *I am*, conceals the notion that others 'are not' or others 'do not have being'.⁶⁷ Dussel's argument provides insight into both the coloniality of knowledge and the coloniality of being.⁶⁸ The denial of the colonised's knowledge is the precondition to the affirmation of the coloniser's knowledge. Similarly, the denial of the colonised's being, is the precondition to the affirmation of the coloniser's being.⁶⁹

This epistemological and ontological exclusion of those beyond the line – the colonised, the global South and Africa – has ensured that Europe and the West, remain visible.⁷⁰ Those beyond the line are doomed to a state of Fanon's *non-being*, or *invisibility* as Ralph Ellison wrote in his book, *Invisible Man*, in order to ensure the continued visibility of those who created, maintain, and continue to benefit from the line.⁷¹

De Sousa Santos argues that this logic of visible and invisible distinctions of modern Western thinking is an *abyssal thinking*.⁷² The invisible distinctions divide reality into two distinct realms, namely, that which is on 'this' side of the line, and that which is 'beyond' the line.⁷³ Everything beyond the line is doomed to radical exclusion, incomprehensibility and invisibility.⁷⁴ These invisible distinctions coincide with the visible distinctions between the metropolitan societies of the West, or Europe; and colonial territories, or the Global South.⁷⁵ In law, science, philosophy, theology and knowledge, the visibility of that which is on this side of the line, depends on the invisibility of that which is beyond the line.⁷⁶ There is thus a clear tension between legitimate and illegitimate ways of knowing.

63 E Dussel 'Modernity, Eurocentrism, and Trans-Modernity: In Dialogue with Charles Taylor' in E Mendieta (ed) *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation* (1996) at 133; Maldonado-Torres (n 2) 245.

64 As above.

65 Maldonado-Torres (n 2) 252.

66 As above.

67 As above.

68 As above.

69 Maldonado-Torres (n 2) 253.

70 Maldonado-Torres (n 2) 257.

71 As above.

72 De Sousa Santos (n 3) 118.

73 As above.

74 As above.

75 As above.

76 De Sousa Santos (n 3) 119.

Beyond the line, there is no legitimate knowledge – only beliefs, opinions, intuitions, traditions, magic, and subjective understanding.⁷⁷ In the field of law, the visible, universal distinction between legal and illegal relies on the invisible distinction between that which is law and that which is lawless.⁷⁸ To consider the law as an example, the *non-ethics of war* is normalised beyond the line – in the colonial zone. But such behaviour remains lawless or *nonlegal*, as it is seemingly impossible to comprehend within the visible distinction between legal and illegal. As such, no legitimate form of law exists beyond the line, and that which does exist there is deemed invisible. Consequently, the indigenous and customary law of colonised people is simply erased or denied – an (im)perfect example of epistemic violence and injustice.

Western modernity and its logic does not signify the abandonment of the state of nature, as Hobbes theorised it – but rather its coexistence with civil society.⁷⁹ Europe – the West – exists within civil society, on its side of the line. The Global South, the colonised, Africa exists beyond the line and beyond legitimate reality, thereby, doomed to non-existence. The exclusion, negation and delegitimisation of the colonised is indeed the precondition to the affirmation of what is on Europe's side of the line – Eurocentrism, Western civilisation, modernity.⁸⁰ Its coexistence, however, has become increasingly complex.⁸¹

Colonial zones have become internalised to every society and in every space on a global scale.⁸² It is now designated to prisons, townships, ghettos, sweatshops, human trafficking, prostitution rings and the list goes on.⁸³ What is *beyond the line* now exists *within*.⁸⁴ De Sousa Santos, therefore, agrees with Maldonado-Torres in that the logic of the superficial cartography of global lines – the Raya lines and the Amity lines – has indeed been internalised.⁸⁵ This leads me to consider the lines that have been internalised in South African society.

2.4 The endurance of colonialism as coloniality in the South African context

When considering the South African context, it is clear that we have endured a long history of colonialism that has been entrenched as

77 De Sousa Santos (n 3) 120.

78 As above.

79 De Sousa Santos (n 3) 123.

80 De Sousa Santos (n 3) 123-124.

81 De Sousa Santos (n 3) 124.

82 As above.

83 As above.

84 As above.

85 As above.

coloniality. From the perspective of the discussions above, it can be argued that at the dawn of its democracy, South Africa concluded a Social Contract, similar to the one theorised by Hobbes, namely, the 1996 Constitution. Just as with Hobbes's Social Contract, the Constitution has served both an including and excluding role in South Africa. Abyssal thinking and its visible and invisible distinctions between territory, knowledge, as well as being, remain evident to some extent. In South Africa, coloniality persists in domination by the Euro-West: the Constitution, the economy, the social and religious spheres, politics as well as power relations. What remains invisible is the (South) African indigenous and customary knowledge, beliefs, religions, and values.

From the perspectives theorised above, it can be argued that within South African society, African people are still excluded and doomed to exist *beyond the line*. I argue that coloniality, as it is internalised within the South African context, has made way for ontological as well as epistemic violence to thrive as the norm, even in the 'post'-apartheid constitutional dispensation.

3 Defining 'post'-apartheid South African constitutionalism

This section discusses 'post'-apartheid South African constitutionalism by considering its inherited nature as well as the doctrine of Transformative Constitutionalism theorised by Klare and Langa.

As I have previously remarked, I refer to the current South African dispensation as '*post*'-apartheid because of its inextricable bondage to the history of colonialism, which implies that South Africa has not truly moved beyond its colonial past.

3.1 The legal system we inherited

The South African legal system has historically been shaped by Dutch and British colonialism and apartheid. Iya argues that a legal system is generally a cultural product of its community and thus a product of the community's history as influenced by politics, geography, and religion.⁸⁶ As such, Du Bois states that the South African legal system has developed according to: local demographic, political and economic factors, especially the replacement of Dutch by British rule, the expansion of the European settlement, the subjugation of the indigenous population, and the development of a commercial and

86 PF Iya 'The legal system and legal education in southern Africa: Past influences and current challenges' (2001) 51 *Journal of Legal Education* at 355-356.

industrial economy in the wake of the discovery of gold and diamonds in the late 19th century.⁸⁷

When the Dutch East India Company (the VOC) arrived on South Africa's shores, essentially setting in motion the colonisation of the area, there were several people and communities already living there. It has been widely claimed that the Cape was colonised in 1652 when Jan van Riebeeck and his company officially settled there. Mellett argues that this is itself contested and should be known as the 'lie of 1652' as there had already been 180 years of engagement between the original peoples of South Africa, specifically the Khoi and San communities, and the Europeans.⁸⁸ The laws observed by the original peoples of South Africa is what is referred to as customary law, or indigenous law.

Authors have claimed that South Africa boasts a mixed, hybrid or pluralist legal system as it is determined and influenced by several different legal frameworks. The most significant of these legal frameworks is the Constitution that plays a foundational role in the South African legal system and is the supreme law.⁸⁹ Further, the major legal framework is the common law – which consists of English and Roman-Dutch law – as inherited from the British and Dutch colonisers. With the introduction of the Constitution, some authority was allegedly restored to customary law or indigenous law that existed in pre-colonial (South) Africa, and remained living throughout its history of colonisation. Other legal sources include legislation passed by parliament as well as judicial precedent set in our courts. It is said that all of these frameworks contribute to the current mixed, hybrid and/or pluralist 'post'-apartheid South African legal framework.

This is exactly where the problem of coloniality can be located in the 'post'-apartheid constitutional dispensation. What is common law if not merely European customary law? Yet the inherited systems of English and Roman-Dutch law have historically been adopted and developed as opposed to indigenous (South) African law. As an unfortunate result, indigenous (South) African law does not have an elevated status in 'post'-apartheid constitutionalism.

3.2 Transformation in the 'post'-apartheid legal sphere

The history of South African constitutions did not start with the Constitution that came into effect in 1996, nor did it start with the interim Constitution of 1993. South Africa's first constitution was

87 F Du Bois 'Introduction: History, system and sources' in CG Van der Merwe & JE Du Plessis (eds) *Introduction to the law of South Africa* (2004) at 1.

88 PT Mellett *The lie of 1652: A decolonised history of Land* (2020) at 95.

89 Constitution of the Republic of South Africa, 1996 sec 2.

introduced when it became a Union in 1910. It declared many of the same freedoms and rights entrenched in the current Constitution, but it was agreed to by white citizens, and deliberately excluded all non-white South Africans from its ambit. Today, however, the Constitution *prima facie* includes everyone within its ambit, regardless of social status, race, skin colour, sexual orientation, gender, and more. It can, therefore, very well still be argued that the Constitution, even in its new, democratic and inclusive form, remains Euro-Western in text, in structure and in virtue, due to the persistence of coloniality.

The 'post'-apartheid South African constitutional dispensation has been described as 'transformative'.⁹⁰ The core idea of transformation can be described as a call to change.⁹¹ Albertyn and Goldblatt argue that this change must be brought by a complete reconstruction of the South African state and its society, with the aim of equality with regards to power and equal distribution of resources.⁹²

Klare defines Transformative Constitutionalism as a long-term project that focusses on leading South Africa's political and social institutions, as well as power relations, towards a more equal and participatory democracy, by means of the interpretation and the enforcement of the Constitution.⁹³ Klare further contends that the Constitution is self-conscious as it is committed to social transformation and reconstitution. It further operates within the specific history of South Africa.⁹⁴ In agreement with Klare, former Chief Justice Langa describes Transformative Constitutionalism as a social and economic revolution that is mainly focused on the fulfilment of socio-economic rights.⁹⁵ The main goal of Transformative Constitutionalism can, therefore, be identified as the establishment of a truly equal society.⁹⁶

Klare argues that a legal culture of justification is how the road to a transformed South African society will be paved.⁹⁷ This shift from a legal culture of authority to a legal culture of justification means that the law can no longer be separated from politics.⁹⁸ This shift must entail moving from a culture of authority to a culture of justification,

90 P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* at 351.

91 Langa (n 90) 352.

92 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* at 249; Langa (n 90) 352.

93 KE Klare 'Legal culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* at 150.

94 Klare (n 93) 155.

95 Langa (n 90) 352.

96 As above.

97 Klare (n 93) 147.

98 Langa (n 90) 353.

where every judicial decision can be substantively justified in terms of the values and rights entrenched in the Constitution.⁹⁹ Klare argues that adjudication on the basis of justification will be a significant means to achieving justice.¹⁰⁰ As such, judges must be conscientious in that they promote and fulfil the values and rights entrenched in the Constitution in such a manner that social justice is achieved.¹⁰¹ Klare adds that Transformative Constitutionalism requires that value judgments are made and extra-legal considerations are taken into account.¹⁰²

Many scholars have criticised 'post'-apartheid constitutionalism for its Western tenets and values, and its failure to create a fundamental rupture with the previous regimes of colonialism and apartheid. I will elaborate on these criticisms in the following section.

4 Problematising the transformative nature of 'post'-apartheid South African constitutionalism

The above discussions of 'post'-apartheid South African constitutionalism leads me to a few questions: If 'post'-apartheid South African constitutionalism is built on a skewed power relation between European common law and this constitutionalism, and indigenous (South) African law; is Transformative Constitutionalism not merely a vehicle for furthering coloniality? Is Transformative Constitutionalism then not merely the instrument that allows coloniality to continue its existence in 'post'-apartheid South Africa? If value judgments are to be made in courts by aligning indigenous (South) African law with the Euro-Western Constitution, are we not furthering the process of epistemic erasure that was first implemented by European colonialism? In other words, has epistemic justice been achieved in the 'post'-apartheid constitutional dispensation?

4.1 'Neo-apartheid constitutionalism'

Several authors have raised critiques against 'post'-apartheid South African constitutionalism and the doctrine of transformation for failing to fundamentally change the South African landscape in its economic, social and political spheres. These authors argue that when the 'post'-apartheid South African dispensation is considered as a

99 Langa (n 90) 353.

100 Klare (n 93) 147.

101 Klare (n 93) 148-149.

102 Klare (n 93) 158.

whole, not much has changed at all. One of these criticisms is raised by Ndlovu-Gatsheni who argues that even though African people continue to exist after colonialism, they are bound to do so within the limits of coloniality.¹⁰³ Assimilation into the existing European, colonial society was a prerequisite for existence. This is evident when considering that ‘post’-apartheid South African constitutionalism is governed by Eurocentric, Western limitations.

Another critical examination of the ‘post’-apartheid South African dispensation is put forth by Dladla, who claims that white supremacy can still be clearly observed in ‘post’-apartheid South Africa.¹⁰⁴ In ‘post’-apartheid South Africa the law of the colonised, the indigenous South African people, is referred to as *customary law*. Curiously, customary law has been far less developed and utilised than the colonisers’ law – Roman-Dutch and English law.¹⁰⁵ Moreover, international law outranks customary law in the hierarchical legal structure of ‘post’-apartheid South Africa.¹⁰⁶ Dladla argues that this continued marginalisation of African thought and perspectives in South Africa is a symptom of the absence of liberation in the context of the social, political and economic spheres.¹⁰⁷

In line with the critiques of Ndlovu-Gatsheni and Dladla outlined here, Madlingozi refers to ‘post’-apartheid South African constitutionalism as neo-apartheid – a term coined by Leonard Gentle – and argues that Transformative Constitutionalism has failed to fundamentally change the bifurcated social structure inherited from the apartheid era.¹⁰⁸ In this regard, Mutua argues that the new constitutional framework adopted in ‘post’-apartheid South Africa has caused this bifurcated social and economic structure to be frozen in time.¹⁰⁹ The Constitution has, therefore, taken on the colour of oppression as it has been utilised as an instrument of the preservation of white privilege and wealth in the ‘post’-apartheid era.¹¹⁰

Even in the ‘post’-apartheid era, one finds mostly white people on this side of the abyssal line as well as the black elite living in a liberal democracy.¹¹¹ Beyond the abyssal line, however, one finds

103 Ndlovu-Gatsheni (n 15) 20.

104 N Dladla ‘Racism and the marginality of african philosophy in South Africa’ (2017) 18 *Phronimon* at 204.

105 Dladla (n 104) 205; N Dladla ‘Towards an African critical philosophy of race: Ubuntu as a philo-praxis of liberation’ (2017) 6 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 1 at 40.

106 Dladla (n 104) 206; Dladla (n 105) 40.

107 Dladla (n 104) 227.

108 T Madlingozi ‘Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution’ (2017) 1 *Stellenbosch Law Review* at 125.

109 M Mutua ‘Hope and despair for a new South Africa: The limits of rights discourse’ (1997) 10 *Harvard Human Rights Journal* at 68.

110 Mutua (n 109) 112-113.

111 Madlingozi (n 108) 124.

dehumanisation and widespread social invisibility.¹¹² Madlingozi argues that land dispossession, epistemicide, and institutionalised anti-black racism constitute and are constituted by the abyssal line.¹¹³

At the dawn of the South African democracy, many Africans held on to the promise that assimilating into whiteness would lead to the recognition of their humanity.¹¹⁴ Madlingozi specifically places the political party that has governed South Africa since the formal end of apartheid, the African National Congress (ANC), and its black elite in this category.¹¹⁵ These Africans assimilated mostly out of fear of being banished to the abyss – beyond the line.

Dladla and Madlingozi have made it clear that 'post'-apartheid South African constitutionalism is rather a state of neo-apartheid; the bifurcated society inherited from our unjust past has been reaffirmed by the Constitution. Through the internalisation of the abyssal line, the Constitution has entrenched coloniality, resulting in a remaining divide between those who exist on this side of the line – the colonisers, white South Africans and some assimilated black South Africans, and those who are banished to the abyss – the colonised, indigenous, (South) African people.

Fundamentally linked with the indigenous (South) African peoples, are their indigenous (South) African epistemologies that have been banished to non-existence beyond the line. One specific example of such epistemic injustice is ubuntu. Although it was originally included in the interim Constitution, it was later excluded. In this next section, I will investigate the epistemic injustices committed by means of the abyssal line by considering (South) African indigenous knowledge.

4.2 Epistemic injustice: (South) African indigenous knowledge & the abyssal line

Praeg suggests that a clear distinction must be made between the African concept of ubuntu as praxis and the commercialised, decontextualised Ubuntu as an abstract philosophy.¹¹⁶

The concept of ubuntu as praxis, as being in Africa, must be understood through the notion of origin in the dimensions of land, the living dead and belief systems.¹¹⁷ In these terms, land includes the symbiotic relationship between people and their land as well as

112 As above.

113 Madlingozi (n 108) 134.

114 Madlingozi (n 108) 131.

115 As above.

116 L Praeg 'A political economy of obligation' in *A Report on ubuntu* (2014) at 36.

117 Praeg (n 116) 37-38.

people and the living-dead that rest within the land.¹¹⁸ As such, the inclusion of living people and the living-dead signify that the concept of land refers to a geographical space but also to a metaphysical location – the interface between the living and the living-dead.¹¹⁹ It is, of course, this interface that forms the basis for the African belief system or rather, religion.¹²⁰ Ramose’s theory of ubuntu confirms this and he states that it consists of a metaphysical triadic structure between the living, the living-dead and the yet-to-be-born.¹²¹

As opposed to ubuntu as praxis, being a cultural, value-laden way of being and belonging, Ubuntu as abstract contemporary philosophy has lost most of the metaphysical wealth that it actually represents.¹²² Praeg argues that due to ubuntu being a harmonising praxis, the decontextualised concept of Ubuntu often becomes inflated or assimilated into ‘ubuntufied Christianity’, where the lines between Western Humanism or Christianity and ubuntu become blurred.¹²³ Values such as compassion, mercy, forgiveness, and dignity become blended in this overlap.¹²⁴ Ramose, as opposed to Praeg, resists the recognition of Ubuntu as such a contemporary philosophy. Ramose argues that we must be aware of the dubious and arbitrary abuse of ubuntu by the colonisers of South Africa.¹²⁵

At the dawn of the South African democracy, the colonisers appealed to ubuntu in order to justify establishing the Truth and Reconciliation Commission through the interim Constitution of 1993.¹²⁶ Thereafter, ubuntu was also invoked in the Constitutional Court to declare capital punishment unconstitutional in *S v Makwanyane*.¹²⁷ However, ubuntu was then discarded and omitted from the final Constitution that still reigns supreme today.¹²⁸

I argue that the abstract, decontextualised Ubuntu, as Praeg describes it, feeds into Eurocentric hegemony and it sustains coloniality and the existence of the line and the abyss beyond it. This is merely an example of how the abyssal line constitutes what is legitimate knowledge and what is not. Christianity – a spiritual belief system of Europeans – may exist on this side of the line, but the metaphysical, spiritual, belief system of ubuntu has been banished to invisibility beyond the line and doomed to the abyss. I argue that we

118 Praeg (n 116) 38.

119 As above.

120 As above.

121 MB Ramose ‘An African perspective on justice and race’ 2001 *Polylog: Forum for Intercultural Philosophy* <http://them.polylog.org/3/frm-en.htm> (accessed 9 August 2021).

122 Praeg (n 116) 45.

123 Praeg (n 116) 39-40.

124 As above.

125 Ramose (n 121).

126 As above.

127 1995 (3) SA 391 (CC) para 313.

128 Ramose (n 121).

must (re)discover what has been banished to non-existence in the abyss. We must move beyond, even if it means that a truly (South) African dispensation will prove 'post'-apartheid constitutionalism in itself to be an injustice.

Epistemic injustice committed in terms of the abyssal line can also be observed in the South African intellectual property law regime. The South African government has set out to reform intellectual property law to ensure that indigenous forms of creativity, innovations, indigenous art and music are recognised as protectable intellectual property.¹²⁹ These reforms, contained in the Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019, has, however, not been implemented as of yet¹³⁰.

South Africa contains a wealth of indigenous knowledge dating back hundreds and thousands of years before the first colonisers even reached its shores. Unfortunately, intellectual property laws in South Africa provide insufficient protections to indigenous (South) African communities and their knowledge.

An example being the Hoodia plant that the San communities of Southern Africa traditionally use as an appetite suppressant when they are busy with work.¹³¹ In 1998, the South African Council for Scientific and Industrial Research (the CSIR) filed an international patent application relating to compounds extracted from the Hoodia plant.¹³² This application was filed without prior consent or any benefit-sharing agreement with the indigenous San community.¹³³ The CSIR later licenced this intellectual property to Phyto Pharma, a UK-based company, to develop and commercialise this new patented product.¹³⁴ Thus, the traditional knowledge developed over time by the San communities was appropriated by wealthy Western entrepreneurs at the cost of excluding the San communities from the right to protection and to benefit from their own traditional knowledge.¹³⁵

Gebrehiwot argues that this is a prime example showcasing that traditional communities lack the means and access to knowledge to protect their traditional bio-innovations by way of patents, leading to their manipulation and exploitation.¹³⁶ This often leads to communities losing livelihoods and the erosion of traditional knowledge.¹³⁷ The Hoodia case study makes it clear that the 'post'-

129 TD Gebrehiwot 'Patents and the traditional bio-innovation predicament: Critical perspectives' (2019) *South African Intellectual Property Law Journal* 7 at 57.

130 As above.

131 Gebrehiwot (n 129) 66.

132 Gebrehiwot (n 129) 65.

133 As above.

134 As above.

135 Gebrehiwot (n 129) 67.

136 Gebrehiwot (n 129) 66.

137 As above.

apartheid South African political framework has failed to include indigenous (South) African people, and offers little to no protection to their knowledge systems. Even though their knowledge of the Hoodia plant has been extracted and appropriated to be used on this side of the line, the San community is discarded into the abyss, where they are invisible and disregarded as the original bearers of such knowledge.

I argue that the line as well as the abyss beyond it, is sustained in and by 'post'-apartheid South African constitutionalism. It is clear that coloniality is deeply embedded in the current South African legal dispensation, where indigenous (South) African knowledge exists almost entirely in the abyss, beyond the line, only recognised when it is appropriated by the coloniser. Euro-Western knowledge, especially in the legal system is allowed to exist on this side of the line. Unfortunately, it seems that 'post'-apartheid South African constitutionalism and the underlying approach of Transformative Constitutionalism has been ineffective in protecting indigenous (South) African knowledge and peoples. Just as the inherited, bifurcated social structure remains, the bifurcated structure stretches into the realms of knowledge, the production thereof, and the law.

The section below turns to the possibility of a deconstructed, rediscovered, rethought approach. As an alternative to current 'post'-apartheid South African constitutionalism, dominated by the doctrine of Transformation, I will now investigate decolonisation as the possibility for the creation of a true (South) African jurisprudence and political order.

5 Moving into the abyss: Possibilities of epistemic justice in South Africa

From the discussion above, it should be clear that the 'post'-apartheid South African constitutional framework and the doctrine of Transformation (transformation through constitutional means and ends) has thus far been ineffective in eradicating the abyssal line. South Africa's society remains bifurcated in its cultural, political, societal, legal and economic spheres. The abyssal line still exists within 'post'-apartheid South Africa, and serves to exclude (South) African indigenous people and their knowledge systems – doomed to invisibility in the abyss.

Decolonisation is a way in which the invisible is made visible.¹³⁸ Coloniality, understood as internalised abyssal thinking, has created a

138 Maldonado-Torres (n 2).

tension between legitimate, visible knowledge – Eurocentric, Western knowledge systems – and illegitimate, invisible knowledge – (South) African knowledge systems. Decolonisation could potentially mean moving into the abyss, beyond the line, in a quest to expose and (re)discover the knowledge that has been regarded as illegitimate and invisible since the conception of colonisation.

5.1 A case for decolonisation

Wiredu argues that decolonisation must take place in order for a contemporary African philosophy to emerge.¹³⁹ Wiredu posits that such decolonisation must, however, take place on a conceptual level, where all structures upholding society must be decolonised.¹⁴⁰

Serequeberhan argues that decolonisation addresses the neo-colonialism that Africans experience in the post-independence era.¹⁴¹ As such, the (re)discovering and practicing of African philosophy through decolonisation is practicing resistance against Eurocentrism.¹⁴² Serequeberhan contends that the idea of Eurocentric universalism must be dismantled in favour of African knowledge systems through the project of decolonisation.¹⁴³

In order to dismantle Eurocentric universalism, it must be understood that the specific particularity of European modernity has been globalised and normalised and has become universal.¹⁴⁴ European modernity has spread through educational, cultural and political institutions as modern humanity.¹⁴⁵ As opposed to such progress, other cultures appear to be inherently pre-modern.¹⁴⁶ In South Africa, what has been universalised in our legal system is Euro-Western law – common law, English law and Roman-Dutch law. This universalisation has come at the exclusion of (South) African legal knowledge from beyond the line.

As such, Serequeberhan calls for a (re)orientation of thought towards indigenous sources. Post-abyssal African thought must be both de-constructive and constructive.¹⁴⁷ Serequeberhan argues that a (re)discovering of the source of indigenous forms of knowledge is essential.¹⁴⁸ In this respect, Maldonado-Torres argues that

139 K Wiredu 'Conceptual decolonisation as an imperative in contemporary African philosophy: some personal reflections' (2002) 2 *Rue Descartes* at 56.

140 As above.

141 T Serequeberhan 'African philosophy as the practice of resistance' (2009) 4 *Journal of Philosophy: A Cross-Disciplinary Inquiry* at 45.

142 As above.

143 As above.

144 Serequeberhan (n 141) 45.

145 As above.

146 As above.

147 Serequeberhan (n 141) 46.

148 Serequeberhan (n 141) 47.

decolonisation involves the making visible of that which is invisible and analysing the mechanisms that continue to produce such invisibility with a specific focus on the invisible people themselves.¹⁴⁹ As such, it is essential that we move into the abyss in order to (re)discover what, *and who*, has been made invisible. Post-abyssal thinking involves a radical break with Euro-Western ways of thinking and acting.¹⁵⁰

Considering these perspectives on decolonisation, it can be concluded that post-abyssal thinking requires that we move into the abyss, to make visible those people and knowledge systems that have been banished to invisibility and nonexistence beyond the line. It is, however, essential that the abyssal line and its continuous existence must first be recognised. Thereafter, we may (re)discover what has been hidden beyond it.

6 Conclusion

In this article, I have explored the endurance of colonialism as colonality as it unfolded in the South African context. This exploration outlined three identified constitutive elements of this endurance: linear historicism, the geography of reason, and the lines within South Africa's society and knowledge systems as a result of abyssal thinking.

I have also discussed current South African constitutionalism in the 'post'-apartheid era by considering its general nature as well as the doctrine of Transformative Constitutionalism. I have put forth critical theories of the 'post'-apartheid constitutional dispensation, specifically critiquing its continued bondage to colonial-apartheid, its exploitation of ubuntu, and the ongoing exclusion of (South) African indigenous knowledge from its ambit.

In this article, I have further argued that the doctrine of transformation and Transformative Constitutionalism has largely failed to include any attempt to eradicate colonality and the epistemic justice that it upholds. The project of transformation, and Transformative Constitutionalism in the legal sphere, has rather maintained the abyssal line and internalised it as colonality. As such, the 'post'-apartheid South African legal and political framework remains divided by the line – essentially leaving indigenous (South) African people and their knowledge systems invisible in the abyss.

The abyssal line and its exclusionary nature is specifically evident in the arbitrary exclusion of ubuntu from the Constitution and the

149 Maldonado-Torres (n 2) 262.

150 As above.

large-scale denial of (South) African indigenous knowledge specifically in the legal sphere.

As an alternative to the doctrine of transformation and the related notion of Transformative Constitutionalism, I have argued that, due to the inherent nature of coloniality sustained by the abyssal line, a project of decolonisation must be embarked on. It remains the only viable way in which coloniality and the epistemic injustice it upholds, can be undone. The process of decolonisation, specifically in the South African context, could be the only way in which the abyssal line may be crossed and hopefully eradicated. In this sense, a true (South) African jurisprudence and political order may be discovered.