

AN EXPLORATION OF JUSTICE: IDEAL AND NON-IDEAL THEORY PERSPECTIVES ON THE CONSTITUTION

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Abstract

This article explores and analyses the concept of justice in post-apartheid South Africa and whether the 1996 Constitution of the Republic of South Africa is just. This is done through critical analysis and juxtaposition of the varieties of justice presented by constitutional optimists and constitutional abolitionists. The paper will show how the principles of Ideal Theory and Non-Ideal Theory feature in the political narratives of the constitutional optimists and abolitionists, respectively. Further, this paper allows for introspection surrounding the conception of justice and how justice is realised in society. Finally, it will be argued that the conception of justice that manifests in society is subjective to the interests of the agents that hold the economic means to influence political power.

1 Introduction

Following 350 years of colonial rule and approximately 50 years of apartheid rule, South Africans of all races participated in the Truth and Reconciliation Commission (TRC). The purpose of the TRC was,

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ostensibly, to facilitate reconciliation between the oppressors and the oppressed through the process of truth telling in the hopes that this would heal the nation.¹ However, victims grew tired of repeatedly telling their truths with no payoff, as promises of truth recovery and reparations were never realised.² The over-saturation of notions of forgiveness for the wrongs committed against victims during the apartheid regime, the TRC was labelled a ‘perpetrator-friendly’ process that protected the interests of individuals who benefited from the apartheid system.³ The objective of the TRC was not only to investigate human rights violations perpetrated between 1960 and 1994 but to bring about closure.⁴ However, the opposite was achieved, whereby the beneficiaries of the apartheid system continued to show no remorse or intention to correct their past transgressions, while the victims were left with a growing desire for proper justice.⁵

The Constitution of the Republic of South Africa, 1996 (the Constitution) was presented as the panacea to past injustices.⁶ It was the bridge from a divided and dehumanising past to a unified and just South Africa built on equality, freedom and human dignity.⁷ Although the Constitution presents itself and the rights contained therein as the key to emancipation and justice, it has been criticised by various scholars and theorists of jurisprudence, such as Madlingozi, Ramose and Modiri.⁸ As the discourse evolves regarding competing views of what the injustice of the past was and what justice entails, it becomes clear that various conceptions of justice are at play in this discussion.

The two conceptions of justice that will be discussed in this paper are the Ideal Theory and the Non-Ideal Theory of justice. Ideal theorising employs ideal conceptions and assumptions as its basic apparatus.⁹ These will all be discussed throughout this paper, and include:

- (a) The ideal social ontology: This is stereotypically characterised by an equal society as envisioned by the classical liberal tradition and is encapsulated in the Constitution’s political vision.¹⁰

1 C Villa-Vicencio ‘Living in the wake of the Truth and Reconciliation Commission: A retroactive reflection’ (1999) 3(2) *Law, Democracy & Development* at 199.

2 T Madlingozi ‘On transitional justice entrepreneurs and the production of victims’ (2010) 2(2) *Journal of Human Rights Practice* at 125.

3 As above.

4 As above.

5 Madlingozi (n 2) 125.

6 T Madlingozi ‘Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution’ (2017) 28(1) *Stellenbosch Law Review* at 128.

7 Madlingozi (n 6) 128.

8 JM Modiri ‘Introduction to special issue: conquest, constitutionalism and democratic contestations’ (2018) 34(3) *South African Journal on Human Rights*. These thinkers are mentioned on different pages namely 276, 296, 298.

9 C Mills ‘“Ideal theory” as ideology’ (2005) 20(3) *Hypatia* at 165.

- (b) Idealised human capabilities: Human agents are awarded unrealistic capabilities, capacities and reasoning abilities. This is showcased in the transformative constitutionalism and adjudication enterprise.¹¹
- (c) Silence on the oppressive powers' operation in society and how these affect social institutions and the realisation of the ideal. This will be addressed in the discussion on the politics of rights discourse.¹²
- (d) Ideal social institutions are conceptualised not to have counteractive or disadvantageous elements. The discussion on poverty, land dispossession and the colonial project will engage with this characteristic of ideal theory.¹³

On the other hand, Non-Ideal Theory is premised on identifying injustices, and conceptualising how justice ought to be applied to remedy these injustices. The assumptions heavily inform constitutional optimism. The abolitionists argue that the abstraction of actual material realities born from injustice in South Africa prevents the achievement of the envisioned ideal.¹⁴ The main contentions presented by abolitionists against the optimists' ideal theorising challenge the foundational assumptions of the constitutional order. First, is the assumption that the injustice of the past that must be corrected is apartheid.¹⁵ Second, the Constitution assumes that affording black people white rights has erased the effects of colonisation.¹⁶ Lastly, the Constitution, coupled with projects such as the TRC, impose the narrative that the Constitution and its supporting enterprises provide the only possible means of emancipation that is just.¹⁷ The rest of the article will examine these claims.

I will explore the conceptions of justice presented by optimists and abolitionists in an attempt to organise the debate and conclude how justice manifests in society. Furthermore, I will argue that constitutional optimists endorse an idealised sense of justice premised on presupposed moral values that inform the political values of the democratic transition. The Constitution sustains these political values. The constitutional abolitionists favour a Non-Ideal Theory of justice that is categorised by correcting injustices identified in society as they appear. Lastly, I will argue that the controversial political philosophy proposed by constitutional optimism is purposed

10 Mills (n 9) 168

11 As above.

12 As above.

13 Mills (n 9) 169

14 Mills (n 9) 170.

15 JM Modiri 'Conquest and constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34(3) *South African Journal on Human Rights* at 302.

16 Madlingozi (n 6) 129.

17 JM Modiri 'Law's poverty' (2015) 18(2) *Potchefstroom Electronic Law Journal* at 248.

to sustain South Africa as an unjust polity and preserve the interests of the oppressor.

2 Ideal and non-ideal theorising concerning the Constitution

The conception of justice postulated by constitutional optimists resonates with Ideal Theory as they present justice as achieving an ideal society built on democracy and fundamental rights enjoyed by all. This line of theorising can be traced back to philosopher John Rawls' *A theory of justice*.¹⁸ Here Rawls argued that the remedy to the world's injustices begins with an objective idea of what justice entails.¹⁹ Society must set its conception of justice by first envisioning the characteristics of a just society.²⁰ Thus, this theory presents justice under ideal conditions and the principles thereof are selected behind 'The veil of Ignorance'.²¹ What the veil of Ignorance essentially proposes is for members of a society, free from their subjective realities, to set the conditions that should exist for an ideal society.²² Since these conditions are spoken in a state of ignorance regarding their own social and economic positions, the society envisioned by each member would be a society where freedom, equality, and essential goods and services are provided to all.²³ Consequently, free from subjective prejudices, such a society would be just and fair.²⁴ In this way, justice is produced through a social contract, and its limits and possibilities are set by a veil of ignorance.²⁵

Constitutional optimists favour this Rawlsian approach to justice. Moreover, the Constitution functions as their 'veil of ignorance,' effectively establishing the social contract for the new democratic society. The 'new' South Africa is founded on the values of freedom, equality and human dignity, which are the springboard to the normative model articulated by the Constitution.²⁶ Normative models are employed to achieve a particular nation-state by setting the normative principles that guide the actions of individuals and other agents that operate within society to create a particular envisioned state.²⁷ Stemplowska postulates normative model building as having

18 J Rawls *A theory of justice: Revised edition* (1999) at 4.

19 As above.

20 As above.

21 Rawls (n 18) 11.

22 Rawls (n 18) 17.

23 As above.

24 As above.

25 Rawls (n 18) 3.

26 Constitution of the Republic of South Africa, 1996.

27 A Volacu 'Bridging ideal and Non-Ideal Theory' (2018) 66(4) *Political Studies* at 888.

three definitive steps:²⁸ The first is the selection of assumptions; the second is the construction of rules and values that ought to represent the model and the setting of normative principles that guide the model; and the third is the implementation of mechanisms to guide the action of the individual or collective.²⁹ These three steps are respectively exemplified in the Constitution's claim to neutrality and objective morality, the provisions contained in the constitutions, and the principles such as equality, dignity and lastly dissemination of transformative legal enterprises.

Ideal theorising of justice has been heavily scrutinised for its over-reliance on the idealisation of factors whilst minimising or excluding the actual manifestations of these factors.³⁰ This results in the actual conditions being understood either as simple deviations from the ideal, which are not worth theorising and critical analysis, or undesirables that are best remedied by striving towards the ideal.³¹ For those who favour the Constitution, present-day South Africa – where all citizens, regardless of their racial, social and economic standing, are afforded equal rights and access to the law – is just. Thus, not only was the enactment of the Constitution a symbol of justice, but the rights contained therein, sharpened by the framework of transformative constitutionalism and adjudication, are the necessary tools for addressing societal injustices.

The abolitionists not only rebut the grand ideals presented by the optimists but also offer a competing stance, effectively poking holes in the optimists' arguments, exposing inconsistencies, challenging existing values and presenting new values. As the name suggests, abolitionists postulate a narrative to abolish the social contract that is the Constitution. Although there is mention of a post-colonial constitution, none has intricately mapped out what such a constitution might look like; hence we can understand the abolitionists' conception of justice as more of a reaction to injustice – namely, settler colonialism and white supremacy. In this way, constitutional abolitionists favour more non-ideal theorising by identifying injustices and conceptualising how justice proper is to be achieved.

For Rawls, the principles of justice are developed in response to the human condition, and justice regulates how resources ought to be distributed in society.³² Rawls' theory of justice has been criticised for being too focused on idealising society whilst turning a blind eye to the crucial aspects of real-world politics.³³ Rawlsian Ideal

28 As above.

29 Volacu (n 27) 888.

30 Mills (n 9) 168.

31 Mills (n 9) 168.

32 L Valentini 'Ideal vs. Non-Ideal Theory: A conceptual map' (2012) 7(9) *Philosophy Compass* at 5.

Theorising is categorised by well-ordered and just institutions coupled with individuals willing to comply and submit to the regulations imposed by these institutions.³⁴ This means that the ideal may be disturbed by unjust institutions, or citizens who are unwilling to comply fully with the regulations of the ideal.³⁵ It is in these cases that non-ideal theorising is utilised.³⁶ The Non-Ideal Theory provides solutions when others fail to do their part in society, namely through punishment and restitution.

Furthermore, Non-Ideal Theory acknowledges the existence of unjust legal requirements and prescribes civil disobedience when justice demands that citizens not comply with unjust regulations.³⁷ Rawls' approach has also been criticised for not being realistic enough since its circumstances of justice do not consider the circumstances of politics, which include various perspectives on what is just.³⁸ From a realist's perspective, one can imagine the ideal society but not predict it. Therefore, holding society accountable to such demanding moral standards becomes a naïve and ineffective undertaking.³⁹ Moreover, like individuals, institutions can also be unwilling to play their part. Therefore, there must be mechanisms through which institutions and their agents can be punished and for restitution to be effected.⁴⁰

Rawls argues that Non-Ideal Theory presupposes Ideal Theory because until an ideal is realised, the Non-Ideal Theory lacks an objective reference point for its queries.⁴¹ Ideal theorising sets out an ideal long-term goal for institutional reform, whilst Non-Ideal Theory opts to set out the steps for how this goal is to be achieved.⁴² The elements and consequences thereof will be discussed later in this article.

33 As above.

34 G Sreenivasan 'What Is Non-Ideal Theory?' (2012) 51 *NOMOS: American Society for Political and Legal Philosophy* at 234.

35 As above.

36 As above.

37 Sreenivasan (n 34) 234.

38 Valentini (n 32) 7.

39 As above.

40 Sreenivasan (n 34) 235.

41 Valentini (n 32) 9.

42 Valentini (n 32) 8.

3 The Constitution as the ideal tool for freedom and nation-building

3.1 The idealised social ontology

At the heart of constitutional optimism is an unwavering faith in the Constitution as the cornerstone of transformation in South Africa. The rights therein, so the argument goes, provides the necessary means to attain freedom for all persons. The Bill of Rights is fundamental to nation-building.⁴³ The Bill of Rights is the collection of values that empower citizens governed by laws to acquire justification for laws and decisions.⁴⁴ Furthermore, the Bill of Rights empowers citizens to be active participants in the making of laws and policies as well as to choose their leaders in a democratic election process.⁴⁵ The rights prescribed therein are not absolute, however, section 36 of the Constitution⁴⁶ sets out the requirements that ought to be satisfied to justify the limitation of a right.⁴⁷ Rights such as the right to freedom of expression contained therein, are the constitutional embodiment of its conception and support for a culture of individual self-realisation.⁴⁸

The Constitution lays the nation's political foundation and prescribes the means to realise the values upon which a democratic society is to be built.⁴⁹ The vision articulated in the Constitution is purposed to heal the divisions of the past⁵⁰ and rectify material inequalities that exist in society, along with the power relations from which these inequalities stem.⁵¹ Thus, constitutional optimists argue that the Constitution is a well-crafted document with immense potential to realise its vision and to be the catalyst for widespread transformation in South Africa.

43 D Davis 'Is the South African Constitution an obstacle to a democratic post-colonial state?' (2018) 34(3) *South African Journal on Human Rights* at 363.

44 E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* at 32.

45 Constitution of the Republic of South Africa, 1996.

46 As above.

47 The Constitution of the Republic of South Africa, 1996 Bill of Rights contains rights such as the right to freedom of Religion, Belief and Opinion, freedom of expression, freedom of association. Sec 36 also allows for prescribed limitations on the rights contained in the Bill of Rights.

48 Davis (n 43) 368.

49 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14(2) *South African Journal on Human Rights* at 248.

50 Albertyn & Goldblatt (n 49) 249.

51 Albertyn & Goldblatt (n 49) 250.

3.1.1 *Idealised human capabilities*

South Africa's democratic transition is significant because it symbolises a shift from a culture of authoritarianism and parliamentary sovereignty to a culture of justification and constitutional supremacy.⁵² It is important to note that this culture of justifiability not only refers to the correctness of an administrative decision but also scrutinises the soundness of the process through which a decision is made.⁵³ When looking at the South African constitutional system, there is heavy reliance on judges' ability to apply the law in line with the values enshrined in the Constitution, which form the basis of our democratic society. Therefore, judicial decisions are a source of law-making.⁵⁴ Since that is the case, South Africa's democratic vision rests on a legal system composed of conscientious judges who strategically navigate themselves within the prescribed legal constraints in the pursuit of freedom and social justice.⁵⁵ In this way, judge's adjudication unlocks law-making and transformative adjudication unlocks legal practices that can be used to accomplish justice.⁵⁶ Through the exercise of conscientious interpretation and adjudication, the Constitution can be used to create a legal framework that supports transformative hopes and creates a society centred on democratic values, social justice and fundamental human rights.⁵⁷ This is referred to as transformative constitutionalism. Transformative constitutionalism, according to Klare, is 'an amorally and politically engaged long-term process of constitutional enactment, interpretation and adjudication dedicated to evolving the country's social and political institutions and power relations into an exhibition of democracy, social inclusion and egalitarianism'.⁵⁸ This way, transformative constitutionalism is an enterprise dedicated to large-scale change rooted in law.⁵⁹

A restricted legal culture affects interpretative and adjudicative practices and, ultimately, legal and social development.⁶⁰ Therefore, advocating for more policy arguments that push the boundaries of law and policies, opening the door for social realities outside the parameters of legal practices, displays how a transformed legal culture translates into jurisprudential progress.⁶¹ Inviting social realities into the arena of the courtroom, together with the

52 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14(1) *South African Journal on Human Rights* at 147.

53 Mureinik (n 44) 41.

54 Klare (n 52) 147.

55 Klare (n 52) 148.

56 Klare (n 52) 147.

57 Klare (n 52) 149.

58 Klare (n 52) 150.

59 As above.

60 Klare (n 52) 168.

61 Klare (n 52) 169.

simultaneous process of self-evaluation and reflection, will evolve judicial adjudicators' ability to interpret and apply the law conscientiously to effect social change.

3.2 Silence on the oppressive powers operative in society and how these affect social institutions and the realisation of the ideal

Kapur argues that human rights enterprises demand that the subjects of human rights submit to and adhere to their regulations to qualify to receive aid from human rights projects.⁶² The necessity for these projects is often the consequence of the colonial actions of first-world countries.⁶³ However, these states pose as the salvation and corrective force for third-world countries, masking their role in creating third-world issues.⁶⁴ Furthermore, to save victims of human rights worldwide, human rights campaigns grossly misrepresent third-world issues and their causes in the global media by subscribing to gender and cultural essentialism.⁶⁵ This results in the perpetuation of negative gender, racial and cultural stereotypes, leading to a preference for Western culture whilst the issues that third-world nations face and their root causes remain largely unaddressed.⁶⁶ Furthermore, this discourse not only distorts reality but also eclipses their self-expression and conditions a perception of self that mirrors this global narrative of victimhood.⁶⁷ If I apply this argument to the South African context, I would argue that the Constitution operates similarly.

The Constitution has committed the nation and its legal system to focus their resources and intellect in pursuit of a better South Africa. Through this narrow lens, the Constitution prescribes what the injustices of the past were and what a just future should look like.⁶⁸ Democracy and social justice are primarily predicated on the assumption that more rights will equate to more freedom, thus breaking free from past oppression.⁶⁹ Legal enterprises are presented as a liberating force when they operate as a governance project aimed at ordering the lives of non-white South Africans.⁷⁰ Previously

62 R Kapur 'Human rights in the 21st century: Take a walk on the dark side' (2006) 28 *Sydney Law Review* at 685.

63 By first-world and third-world nations I mean developed and developing nations respectively.

64 Kapur (n 62) 671.

65 Kapur (n 62) 678.

66 As above.

67 Madlingozi (n 2) 211.

68 Madlingozi (n 6) 128.

69 R Kapur 'In the aftermath of critique we are not in epistemic free fall: Human rights, the subaltern subject, and non-liberal search for freedom and happiness' (2014) 25(1) *Law and Critique* at 28.

70 As above.

disadvantage groups are positioned as the subjects and beneficiaries of constitutional rights however, the constitution has not been able to effect large scale change where it counts (that being, the material reality of majority of black South Africans lives). In this way, constitutional rights are the instruments of a government responsible for producing the victims they claim to protect.⁷¹ The constitutional project, based on the belief that more rights will equate more freedom, is a political project with political power carrying a brand of justice.⁷² Constitutional optimists present the Constitution as the only mechanism for liberation and achieving justice; therefore, this bridge to the 'new South Africa' functions to preclude other means of emancipation and versions of justice.⁷³ Moreover, although the Constitution may claim openness and plurality, it lends itself to a particular script of freedom and liberation, effectively engaging in a political project under an apolitical guise.⁷⁴

The worshiping of the Constitution creates a culture of legal fetishism and colonial unknowing.⁷⁵ The constitutional enterprise idealises a particular political vision and conception of a new nation, which has left colonial political and social structures undisturbed.⁷⁶ The centralising of the Constitution as the superlative mechanism for tackling social issues and injustices has resulted in the denial of alternative political visions and conceptions of justice.⁷⁷ It also overlooks persisting material inequalities and injustices lived by disadvantaged groups.⁷⁸ As the constitutional project remains constrained by the colonial power structures, we ought to seek alternative understandings of justice not rooted in Western modernity and white supremacy.⁷⁹ Critiques of the Constitution allow for reconceptualising historical events and inspire a variety of new articulations of counter-hegemonic theories and politics.⁸⁰ This will help remedy the existing consciousness of subaltern groups as subjects of Western history that acquire humanity through a struggle for legitimacy.⁸¹ This legitimacy is acquired by positioning them as beings that have been afforded rights and freedoms.⁸² Therefore, it appears that the rights contained in the Constitution seem to be aimed at making material realities tolerable for minorities but not liberating them.

71 Kapur (n 69) 28.

72 As above.

73 Kapur (n 69) 29.

74 Kapur (n 69) 30.

75 Modiri (n 15) 306.

76 Modiri (n 15) 307.

77 As above.

78 As above.

79 Modiri (n 15) 309.

80 Kapur (n 62) 42.

81 As above.

82 As above.

Williams admits that the concept of rights is obscure and vague and cannot empower itself.⁸³ Paper promises such as the American Civil Rights Act of 1964 have passed off illusions as gains.⁸⁴ Whilst recognising that black people have always been sceptical of the liberal mandate of constitutional rights, Williams asserts that although it would be correct to state that black people never believed in rights, it is equally correct to state that it was black people who believed in them, so much that they gave them life; held onto them and nurtured them.⁸⁵ However, despite enacting a liberal constitutional order coupled with an anti-discrimination legal order and socio-economic rights, black people still make up the majority of communities living in poverty in South Africa.⁸⁶ Although some may escape the shackles of poverty by improving their economic conditions, aspects of oppression such as powerlessness, marginality and cultural imperialism continue to affect black people regardless of their class.⁸⁷

When one conceives poverty as a form of oppression and domination rather than an unintended mishap of policy and legal arrangements, it demonstrates that poverty is a logical outcome of a system that distributes benefits and opportunities following social power.⁸⁸ This is an inherent feature of a liberal democratic society. Racialised poverty is a symptom of the paper promises of the liberal constitutional order; it is a consequence of the constitutional optimist's ideal theorising. The idealist's vision thus becomes the object that is impossible to obtain since the Constitution is the product of political fantasy.⁸⁹ The anti-black politics of hope keep black people in pursuit of the ideal whilst widening the gap between historical reality and fantastical ideals.⁹⁰ Under the politics of hope, solutions do not exist, just the illusion or hope of a different order in the future.⁹¹

83 DA Bell 'Who's afraid of critical race theory' (1995) 4 *University of Illinois Law Review* at 900.

84 As above.

85 As above.

86 Modiri (n 17) 239.

87 As above.

88 Modiri (n 17) 239.

89 C Warren 'Black Nihilism and the Politics of Hope' (2015) 15 *CR: The New Centennial Review* at 221.

90 As above.

91 Warren (n 89) 223.

3.3 The conception of ideal social institutions

3.3.1 *The counteractive or disadvantageous elements*

Lawrence disagrees with the idealist notion that law is written from a neutral perspective.⁹² He claims that such a neutral perspective cannot exist because we all speak from a specific context, which he calls a positioned perspective.⁹³ This makes enterprises such as transformative constitutionalism fundamentally flawed because whatever consciousness an adjudicator may possess must still be applied within the legal constraints and thus operates subject to a particular political vision. This limits their ability to support specific perspectives. The law systematically and simultaneously privileges the perspectives that strengthen the ideal and purposefully ignores, silences or distorts oppositional voices that threaten the ideal.⁹⁴ Due to this, critical race theorists posit that racial problems are to be viewed from the perspective of the oppressed.⁹⁵

Niebuhr states that the political contribution of the realist is his awareness of self-interest.⁹⁶ The human and political situation is accounted for in the national self-interest.⁹⁷ A statesman that acts in his official capacity carries a responsibility to his community, including the preservation of the many individuals he serves.⁹⁸ The claims of the nation that govern individuals and communities are partly justified, partly pretentious, assume concrete universality and present itself as objectively moral.⁹⁹ The nation positions itself as God.¹⁰⁰ The supreme Constitution is portrayed as a set of unconditional values and the defender of everything worthwhile in human history. Although this self-interest is qualified by a more significant loyalty to an ideal South Africa, the question remains: Whose ideal? Furthermore, what happens when the national interests clash or even act against the material welfare and interests of its citizens? Under idealist theorising, such occurrences are remedied by continued faithfulness to the ideal or are regarded as slight deviations from the ideal that are not worth theorising.¹⁰¹

Although the Constitution has been in effect for more than 20 years, Madlingozi argues that most black people still live in poverty

92 Bell (n 83) 901.

93 As above.

94 Bell (n 83) 902.

95 As above.

96 R Good 'The national interest and political realism: Niebuhr's "Debate" with Morgenthau and Kennan' (1960) 22(4) *The Journal of Politics* at 598.

97 As above.

98 As above.

99 Good (n 96) 599.

100 As above.

101 Mills (n 9) 168.

and face generalised marginalisation and social injustices.¹⁰² Despite new public holidays and a new flag, the independence acquired has failed to produce more dignified conditions and effect tangible change in their lives.¹⁰³ This exposes social justice projects as an assimilationist tactic to preserve hierarchical structures.¹⁰⁴ The compromises made during the negotiations leading up to the enactment of the Constitution is the consequence of negotiating from a position of weakness.¹⁰⁵ Negotiating from such a position forces one to accept unacceptable compromises that ultimately lead to no real change as the colonial structure remains intact, albeit under a different name and with new agents.¹⁰⁶

Madlingozi argues that in this idealised democratic South Africa, those still bound by the shackles of poverty are the forgotten, left behind on the bridge to the 'New South Africa'.¹⁰⁷ The forgotten are left to internalise that their misfortune and circumstances are not a product of historical oppression and injustice. Since the past is dead and gone, they are the issue with society.¹⁰⁸ At this point, it becomes evident that the ideal is more concerned with preserving the old order than with acknowledging how its philosophy harms its citizens' welfare.

Poverty cannot be simply apprehended as a material or economic condition but also carries psychological, symbolic and ontological dimensions.¹⁰⁹ Poverty not only infringes on socio-economic rights and deprives people of basic needs. It also discounts the humanity of the impoverished by structuring their lives as unreal and stripped of human teleology or presence either through oppressive practices such as apartheid, or systematic state negligence such as poverty and inequality.¹¹⁰ This is what Butler refers to as derealisation.¹¹¹ In light of this, many theorists advocate for a language and vocabulary that can correctly articulate the experiences of black people in society in ways that speaks to how black people experience rights and society differently from white people.¹¹²

Although theoretical self-preservation is understandable and even expected, it should not mean that national self-interest is accepted as normative.¹¹³ Niebuhr states that political justice agents that act

102 Madlingozi (n 6) 129.

103 M More 'Fanon and the land question in (post) apartheid South Africa' in *Living Fanon* (Springer, 2011) 173 at 4.

104 More (n 103) 3.

105 More (n 103) 10.

106 As above.

107 Madlingozi (n 6) 125.

108 Madlingozi (n 6) 126.

109 Modiri (n 17) 242.

110 Modiri (n 17) 243.

111 As above.

112 Modiri (n 17) 236.

113 Good (n 96) 601.

beyond their self-interest must acknowledge the interested motives that partly prompt their actions.¹¹⁴ It has been argued that since the apartheid regime was abolished, this promotes the enterprise of justice in the country. However, as pointed out in this paper, such an argument is not without flaws. Indeed, the discriminatory and dehumanising legal system has *de jure* been abolished, but has any material change followed? Were all the parties involved in pursuing the democratic Constitution convinced their actions were just or were ulterior motives at play?

The apartheid regime did not end due to a severe moral crisis within the oppressive class. Rather, local and international pressure from economic sanctions, sports sanctions and civil uprising prompted their decision to enter negotiations and broker a peaceful resolution with the ANC leaders.¹¹⁵ Factors such as the government's increasing foreign debt, trade sanctions, the weakening currency and international boycotts forced the oppressors to the negotiating table and commit to a democratic political system.¹¹⁶ The ANC's conception of justice centred on a multiracial democratic society, was the most palatable conception for the apartheid government, as opposed to the African Nationalist brand adopted by parties such as the Pan African Congress.¹¹⁷

Over 20 years into the democracy, we clearly see the effects of the apartheid and ANC governments' negotiated approach to transition as the white minority still controls the country's wealth and economic power.¹¹⁸ Therefore, the Constitution that presents itself as a symbol of freedom becomes a symbol of a neo-apartheid state, effectively sustaining South Africa as a white supremacist polity bound to the will of the conqueror with a distinctively European political history.¹¹⁹ Modiri writes that the idealisation of the Constitution amounts to a colonial unknowing in that a particular narrative of South Africa's past and future effectively erases settler colonialism from historical and theoretical awareness.¹²⁰ As I stated previously, the Constitution serves as the 'Veil of Ignorance' from which the optimists set out the ideal South Africa. The Constitution is portrayed as an apolitical tool that will achieve the ideal and rectify past injustices. However, viewed through an abolitionist lens, the Constitution is a veil ignorant of its inability to realise the society it envisions. Furthermore, the Constitution functions as a veil that keeps

114 As above.

115 More (n 103) 6.

116 As above.

117 Madlingozi (n 6) 129.

118 As above.

119 N Dladla 'The liberation of history and the end of South Africa: Some notes towards an Azanian historiography in Africa, South' (2018) 34(3) *South African Journal on Human Rights* at 418.

120 Modiri (n 15) 306.

citizens ignorant of the fact that settler colonialism (and the effects thereof) remains unaddressed by reframing the root causes of South Africa's issues.

Neo-apartheid constitutionalism is the name given to the current political and legal systems that have reinforced South Africa's colonial structures since 1910.¹²¹ The Constitution's contemporary discourse advocating social justice is complicit in perpetuating anti-black colonial structures.¹²² Social relations inherited from colonialism remain ever so present as the Constitution fails to address the material realities of those left behind on the bridge to the new society while their humanity remains unrecognised.¹²³ Social justice is sold as a remedy to the historically marginalised, giving them recognition and incorporation without dismantling the institutions agreed upon in the elite compromise.¹²⁴ The controversial constitutional ideology and philosophy that sustains South African polity is challenged by Azanian critical philosophy, which, *inter alia*, is committed to national and individual freedom.¹²⁵ Azania is the name given to an entirely African polity with an alternative idea of nationhood, culture and justice premised on Africanist ideology and liberatory philosophy.¹²⁶ It is this ideology and philosophy upon which abolitionist theorising is predicated.

3.3.2 *Two competing ideals of justice*

Kennan and Morgenthau identify two types of idealists: the pretentious idealist and the perfectionist idealist.¹²⁷ The pretentious idealist is oblivious to the hypocrisy in the nation's claim to transcendent values locally, resulting in fanaticism.¹²⁸ The perfectionist idealist only sees the hypocrisy in the nation's claim to a universal principle, resulting in withdrawal.¹²⁹ It can be argued that constitutional optimism and constitutional abolitionism resemble these two types of idealists, respectively. When confronted with their political vision's hypocrisy, constitutional optimists opt to preserve their ideal, believing that continued loyalty will remedy its inconsistencies and injustices. Although this article argues that constitutional abolitionists exemplify more non-ideal theorising, since their discourse largely rejects the vision for the 'New South Africa' and is set on dismantling white supremacy, they also mimic the

121 Madlingozi (n 6) 125.

122 As above.

123 Madlingozi (n 6) 127.

124 Madlingozi (n 6) 128.

125 Dladla (n 119) 420.

126 Dladla (n 119) 417.

127 Good (n 96) 602.

128 As above.

129 As above.

perfectionist idealist. In addition to the phenomena of racialised poverty discussed above, this is further illustrated in the debate surrounding land ownership.

Fanon argues that land was the fundamental target of colonial conflict; thus, any venture towards liberation must aspire to restore the land to the indigenous people.¹³⁰ The conquest of South Africa has been categorised as brutal and relentless land dispossession by settler colonialists.¹³¹ Land gives life and by denying the land, we deny the right to life. Such a violation being especially egregious when the original owner with the right to the land is the party that is denied.¹³²

The Constitution restored the native's right to own land. Yet, it never restored ownership of the land, while simultaneously solidifying the property rights of the oppressor that founded such a right to the land through violent acquisition.¹³³ The Mandela republic carries no fundamental transformation as the land was compromised during the negotiation process and was never resolved.¹³⁴ Therefore, although the Natives Land Act¹³⁵ was abolished, it is essentially *de facto* still operative.¹³⁶ Constitutional optimists remain oblivious to this fact.

Through the negotiated settlement, the colonisers strategically ensured that although apartheid was *de jure* abolished, the extensive white economic, cultural and social power structures of white supremacy remained intact.¹³⁷ The compromises left the economic power in the hands of the white elite and afforded the ANC mere political power.¹³⁸ As a consequence of trying to attain power peacefully, significant compromises were made that secured the existing property relations, thus stunting the achievement of a revolution as the land question remains unresolved.¹³⁹

These idealistic competing principles informed by different strains of thought concerned with analysing the connection between racial capitalism and consciousness embody South African society's fundamental contradictions.¹⁴⁰ Liberal legalism reproduces rather than resolves the basic contradictions.¹⁴¹ Through liberalism's exercise of ideological power, justice becomes nothing more than the interest of the strongest, as Thrasymachus stated. Or as Geus put it,

130 More (n 103) 7.

131 As above.

132 More (n 103) 8.

133 More (n 103) 9.

134 As above.

135 Act 27 of 1913.

136 More (n 103) 9.

137 More (n 103) 7.

138 More (n 103) 6.

139 More (n 103) 7.

140 A Hunt 'The theory of critical legal studies' (1986) 6(1) *Oxford Journal of Legal Studies* at 20.

141 As above.

ethics is usually dead politics – the victor of a past conflict extending their hand to the present and future.¹⁴² Those who favour liberal ideologies share an unwavering faith in freedom through reconciliation with authority.¹⁴³ This liberal authority sets limitations, yet, these chains do not seem to matter nor are they accepted for what is believed to be the ‘greater good’.¹⁴⁴ This begs the question: is the purpose of the South African liberal constitutional order to maximise the freedom possible for oppressed groups under Western authority? In other words, has the constitutional order deemed all sacrifices made in its vision and pursuit of freedom as inconsequential and immaterial to freedom? As Davis argues, it is incorrect to frame the Constitution as the reason for South Africa’s lack of development.¹⁴⁵ Instead, it is the presence of corruption within the government that hinders society.¹⁴⁶ To Davis, factors such as the colonial project are not the cause of South Africa not realising its Ideal. Therefore, one might infer that he views sacrifices such as land ownership as immaterial to pursuing freedom.

South Africa finds itself in a state of pseudo-independence as a consequence of pursuing independence through a negotiated settlement rather than through struggle, which would have ensured authentic independence.¹⁴⁷ Fanon argued that the Hegelian master/slave paradigm doesn’t completely apply to the white master and African slave colonial situation because under the racist colonial ideology and culture, Africans were not deemed as human.¹⁴⁸ Black humanity should be fought for by the black person by his own will and not conferred upon him by the mercy of his master.¹⁴⁹ Where recognition of black humanity is given without conflict, it amounts to nothing more than a gesture since the enslaved person has not attained independent self-consciousness and thus remains dominated by the master’s paradigm.¹⁵⁰ When the master sets the enslaved person free, this independence emerges externally and not from within the enslaved person. Thus external liberation does not lead to genuine liberation since the enslaved person did not act but was acted upon.¹⁵¹

Therefore, freedom is more than the absence of external obstacles and boundaries, it is premised on a liberated consciousness and should that consciousness be lacking, external freedom means

142 E Rossi ‘Is there such a thing as liberalism?’ (2013) at 8 available at <https://ssrn.com/abstract=2378348> (accessed 21 May 2020).

143 More (n 103) 9.

144 As above.

145 Davis (n 43) 372.

146 As above.

147 More (n 103) 1.

148 As above.

149 As above.

150 More (n 103) 2.

151 As above.

nothing.¹⁵² This means that decolonisation requires the oppressed to win on two fronts: freeing the land from the coloniser on the physical level, and freeing the consciousness from a slave mentality.¹⁵³ Black people must free themselves psychologically if we hope to liberate ourselves politically.¹⁵⁴ This is because freedom cannot be given, it must be taken.¹⁵⁵ Decolonisation must achieve the complete replacement of one species of human with another and give birth to a new humanity.¹⁵⁶

4 Conclusion

This paper has provided a critical analysis and juxtaposition of the various conceptions of justice presented by constitutional optimists and constitutional abolitionists and linked those to Ideal and Non-Ideal theories. Ideal theorising shows its benefits to society by setting standards that society ought to strive towards. This provides a basis for individuals and agents of society to be held accountable. This is the purpose and function of the Constitution. The idealising of the Constitution is a large part of why its enactment was viewed as a victory for oppressed groups and perpetuated the idea of justice as an ideal.¹⁵⁷ Since South Africa's constitutional vision of justice is predicated on the quest for a democratic nation founded on freedom, equality and human dignity, it is clear that constitutional optimism has accepted justice as an ideal that the nation strives toward using the Constitution and the values contained therein as the mechanism for achieving justice. The Constitution operates as the social contract to which the nation is accountable. As such, the optimists' approach supports the Ideal theory.

On the other hand, Non-Ideal theorising views justice as a response to injustices rather than justice as a grand ideal to strive towards. In the case of South Africa, constitutional abolitionists vehemently oppose the optimists' approach which they (abolitionists) argue has left the grave colonial injustices of the past unaddressed.¹⁵⁸ Abolitionists have criticised the Constitution for being ineffective in addressing and abolishing settler colonialism and white supremacy. Furthermore, they argue that enacting the democratic Constitution birthing the 'new South Africa' has created the false impression that South Africa is free from the effects of its oppressive past. Therefore,

152 As above.

153 As above.

154 More (n 103) 2.

155 More (n 103) 3.

156 More (n 103) 4.

157 S Hassim 'Decolonising equality: the radical roots of the gender equality clause in the South African constitution' (2018) 34(3) *South African Journal on Human Rights* at 344.

158 More (n 103) 7.

the Constitution is argued to be the glass ceiling prohibiting true justice from being realised.¹⁵⁹ This is why constitutional abolitionists call for abolishing the social contract that is the Constitution and call to explore a social order that rectifies colonial injustices. Consequently, constitutional abolitionism resonates with Non-Ideal Theory as it focuses on identifying past and present injustices that remain unchecked and contemplates the demands of justice proper.¹⁶⁰

As previously mentioned, to ensure its perpetual sovereignty, the constitutional vision must eliminate alternative political narratives, particularly those that challenge it. This is exhibited in its claim that universality, supremacy, and democracy created an element of absolutism in line with the Idealist stance. This objectivity is threatened when the constitutional vision is put under critical scrutiny. Despite presenting themselves as apolitical, liberal constitutional rights carry a particular form of politics representing and monopolising the political space.¹⁶¹ Whilst operating to dismiss other radical forms of political emancipation, rights discourse conveys its political mandate regarding justice, freedom and equality.¹⁶² The abolitionists not only bring an alternative view to justice but one that directly threatens that of the constitutional optimists. The abolitionist theorists argue that the current South African society and economic climate contradict the idealistic notion that justice is based on objective universal morality. It suggests the opposite, that justice or the social contract that sustains the South African polity is premised on the values of those with the institutional power to influence the political vision of the nation. In doing so, they can create a society that satisfies their ideals.

159 Modiri (n 15) 309.

160 Mills (n 9) 168.

161 Modiri (n 17) 248.

162 As above.