

DISMANTLING RACIAL ONTOLOGY: CONSTITUTIONAL ABOLITIONISM AS A SOLUTION TO SOUTH AFRICA'S ANTI-BLACKNESS AND WHITE SUPREMACY

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Abstract

The constitution of the Republic of South Africa, 1996 (the 1996 constitution) is typically represented as the ‘best constitution’ in public and academic discourse around the world. In this article, the aim is to argue against this notion. The thesis presented in this article is, how can this constitution be regarded as the best in the world when it has failed to make possible conditions which mark a break from the cultural, social, and political order of colonial-apartheid South Africa? This article then explores a comparative analysis of the racial ontology of conquest pre and post-democracy. The conclusion is that the racial ontology of conquest remained unabated irrespective of the claims of freedom and a ‘new’ South Africa was supposedly ushered in by the 1996 constitution. Consequently, the notion of regarding the 1996 constitution as the beginning of a new South Africa and the end of Black people’s sufferings is outrightly rejected. The concept of constitutional abolitionism is thereafter adopted and placed as a catalyst towards a decolonised South Africa where the racial ontology of conquest would be undone. In giving a proper analysis of constitutional abolitionism as a theory of the constitution, the thought and practice of constitutional optimists and sceptics are also dissected and challenged.

* LLB, University of Pretoria. ORCID iD: 000-0001-5967-3101. I dedicate this article to Prof Joel Modiri. He introduced me to the notion of abolitionism. The interactions I had with Prof Tshepo Madlingozi and Prof Isaac Shai and their works also had a great influence in this article. Aluta!

1 Introduction

In the year 1994, South Africa became what many may call a democratic country ‘after’ more than 300 years of colonialism and subsequent apartheid.¹ In 1996, South Africa adopted a constitution² that has been regarded as a ‘savior constitution’ that ended Black people’s sufferings, thus presupposing the notion that the constitution was a breakaway from colonial-apartheid South Africa.³ This article joins the call for the reconstitution of South Africa. It presents the argument that the 1996 constitution was not the correct response to South Africa’s colonial-apartheid history since it did not undo the racial ontology (racial dehumanisation) of conquest. Consequently, anti-blackness and white supremacy persist. It does this by looking solely on racial ontology as a foundation upon which South Africa was built, the relationship between the 1996 constitution and this constitutional foundation, and the shortfalls of constitutional optimism as the dominant theory of the constitution. Lastly, this study adopts constitutional abolitionism as an alternative theoretical perspective. The concept ‘constitutional abolitionism’ was coined by Dladla in a ‘Big Debate’ episode.⁴ This notion of ‘abolition’ can be traced in the history of the Black freedom struggles, linked to the abolition of slavery and recently revived by Black studies in the United States of America and Black people organising, as a movement, to abolish prisons and the police, and further extends to the abolition of the nation-state, race, and private property.⁵ In the context of South African history, it can also be traced back to the Azanian tendency which, rather than seeking the recognition and inclusion of the indigenous conquered peoples, has called for the repudiation and abolition of South Africa itself and its replacement with Azania.⁶

- 1 N Mtshiselwa ‘A post-apartheid nation in chains? Relevance of Lucky Dube’s Mickey Mouse Freedom in reconfiguring forms of oppression in South Africa today’ (2014) 40 *Studia Historiae Ecclesiasticae* at 58. I put the word ‘after’ in inverted commas to show that colonisation and apartheid continues – consequently, there is no ‘after’.
- 2 Constitution of the Republic of South Africa, 1996 (Constitution).
- 3 See how the constitution is described by Langa, the former Chief Justice of the South African Constitutional Court in P Langa ‘Transformative constitutionalism’ (2006) 17 *Stellenbosch Law Review* at 351. See also KE Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* at 150.
- 4 Big Debate South Africa ‘BIG DEBATE: Twenty Years of the Constitution (Season 7 Ep 1)’ 01 August 2016 <https://www.youtube.com/watch?v=7aGheRRkSeY> (accessed 22 April 2020).
- 5 Library of Congress ‘The African American Odyssey: A Quest for Full Citizenship’ <https://www.loc.gov/exhibits/african-american-odyssey/abolition.html> (accessed 22 May 2020).
- 6 Azania is described as a liberated polity in which title to territory and unencumbered sovereignty over it are returned to the indigenous people. See, generally, N Dladla ‘The liberation of history and the end of South Africa: some notes towards an Azanian historiography in Africa, South’ (2018) 34 *South African Human Rights Journal* at 414-440.

2 The fallacy of a saviour constitution

2.1 An introduction to the racial ontology of conquest

The introduction of the racial ontology of conquest in South Africa began in 1652.⁷ This year marked the beginning of colonisation in South Africa.⁸ Racial ontology defines white people as the primary political and social subjects of South Africa whilst Black people are cast away as sub-humans, natives of nowhere, and nonhumans.⁹ Serequeberhan opines that the enslavement of the African, [through colonialism and subsequently apartheid] resulted in the African being marked out of world history.¹⁰ Colonialism led to the destruction of the African's mode of life and everything that was African was devalued.¹¹ The African was turned into a slave and forced to be subhuman through a submissive state of being a colonial subject.¹² Although Serequeberhan refers to Africa, this article employs his ideology with reference to South Africa in particular. Through Serequeberhan's conceptualisation of racial ontology, it is evident that South Africa's colonial-apartheid past was one where Black people were seen as 'savages' or non-humans.¹³

Racial ontology can be traced throughout the constitution/creation of South Africa until what it is today.¹⁴ Modiri notes that Biko identifies 1652 as the beginning of an onslaught of unprecedented violence against the natives.¹⁵ This violence was enforced through enslavement, forced labour, and massive land disposessions together with the impairment of legal and racial status and accompanied by cultural destruction and social dehumanisation.¹⁶ In essence, 1652 sets in motion the racial ontology of conquest. The consolidation of white domination in South Africa through making Black people feel envious of, inferior to, and dependent on white people, whiteness, and European culture was the main project of colonialism and apartheid.¹⁷ Colonisation, apartheid, and slavery jointly created a figure of blackness as underserving of economic and social advancement, unintelligent and irrational, morally inferior, fungible

⁷ JM Modiri 'Conquest and constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* at 320.

⁸ As above.

⁹ T Serequeberhan 'African Philosophy as the Practice of Resistance' (2005) 4 *Journal of Philosophy: A Cross-Disciplinary Inquiry* at 50.

¹⁰ As above.

¹¹ Serequeberhan (n 9) 50.

¹² As above.

¹³ As above.

¹⁴ JM Modiri 'The jurisprudence of Steve Biko: A study in Race, law and power in the aftermath of colonial-apartheid' PhD thesis, University of Pretoria, 2017 at 182.

¹⁵ As above.

¹⁶ Modiri (n 14) 182.

¹⁷ As above.

to the desires, needs, and mercies of white people, uncivil, criminal in nature, and violable.¹⁸

Machiavelli's discourse on conquest is worth deliberating on. He opines that conquest, simply put, 'is irreducible to brute force; it involves the production of appearances, of signs, and of symbols'.¹⁹ On the other hand, Seed notes that for conquest to strive, it requires the production of the legitimacy that is bound up with gestures, ceremonies, and words that compliments it.²⁰ This could have been the planting of emblems, flags and insignia; erecting crosses; measuring or uttering realistic pronouncements, assessing, and counting and mapping the population, territory, or geography.²¹ This is exactly what characterised the creation of South Africa. It involved the country's renaming, the mapping out of Black people as the primary economic and social subjects, and the grouping of Black people into small settlements or squalor. Winter sums up the discourse on conquest in the following statement:²²

Conquests inaugurate new rights and obligations; they frequently obliterate the political, legal, and social customs and conventions and consecrate new privileges and authorities. In founding a new order, the conquest sunders the temporal continuum, instituting a caesura, a new dawn that separates a 'before' from an 'after' the conquest.

South Africa was founded on the idea of dehumanising Black people.²³ It was founded on the idea that Black people were without reason and were thus disqualified as human beings.²⁴ Accordingly, the task that colonisation unilaterally assigned itself was to Christianise and civilise Black people.²⁵ Black people were made to look at themselves as undeserving of any humanity, as savages, and as 'heathens' who should conform to Christianity for them to be 'saved' or be human-like.²⁶ This resulted in African traditions and cultures being fabricated, infiltrated and, to a great extent, changed beyond recognition.²⁷ Africans' beliefs of their ancestors (Badimo/Vhafhasi) were termed demonic, primitive, and cast away to make way for Christianity through, amongst other things, missionary programs.²⁸

¹⁸ As above.

¹⁹ Y Winter 'Conquest' 21 June 2021 <https://www.politicalconcepts.org/conquest-winter/> (accessed 20 July 2021) at 5.

²⁰ As above.

²¹ Winter (n 19) 13.

²² As above.

²³ MB Ramose 'An African perspective on justice and race' (2001) 3 *Forum for Intellectual Philosophy* para 14.

²⁴ As above.

²⁵ P Hudson 'The State and the Colonial Unconscious' (2013) 2 *Social Dynamics* at 264.

²⁶ As above.

²⁷ DD Ndima 'The African law in the 21st century in South Africa' (2003) 36 *Comparative International Law Journal of Southern Africa* at 327.

²⁸ L John 'The colonization of consciousness in South Africa' (1989) 18 *Economy and Society* at 284.

The spiritual life of Black people was wiped away as though it never existed, and a new form of spiritual livelihood was imposed.²⁹

Colonisers also took advantage of the pre-existing social and cultural clashes amongst Black people.³⁰ They used this to their advantage by causing tribal tension amongst Black people.³¹ The words of Kenyan Revolutionary, Jomo Kenyatta, which are commonly misattributed to Archbishop Tutu, sum up the civilisation and Christianisation of the Black people very well. Kenyatta notes that ‘when the missionaries came to Africa, they had the Bible and we had the land. They said, “Let us pray”. We closed our eyes. When we opened them, we had the Bible and they had the land’.³²

Regrettably, the racial ontology of conquest in South Africa was not confined to the imposition of ideas and beliefs – it was also violent.³³ The dehumanisation of Black people made them objects always available for any form of dispensation.³⁴ Black people were, amongst other things, forced to carry ‘dompasses’ through the Pass Laws Act of 1952, and were discarded in squalors through the Group Areas Act of 1950.³⁵ They were forced into their own prison-like lives; from Bantu Education to Bantustans, from objectifying and ridiculing Sarah Baartman for being built like an African woman, to objectifying and ridiculing Black people through comparing and labeling them as monkeys or ‘kaffirs’.³⁶ The main reason for all of this was because Black people were not considered full and complete human beings.³⁷ It is without doubt that the trauma and psychological impairment caused by the racial ontology of conquest on Black people was enormous.³⁸

The ruthless and callous murders of Black people can be traced throughout the footsteps of colonisation and apartheid.³⁹ Some of the massacres that have occurred as a result of the colonial dispensation

29 As above.

30 See, generally, J Peires ‘”Soft” believers and “hard” unbelievers in the Xhosa cattle-killing’ (1986) 27 *Journal of African History* at 443-461; and J Peires ‘The central beliefs of the Xhosa cattle-killing’ (1987) 28 *Journal of African History* at 46-63.

31 As above.

32 Skeptics ‘Did Desmond Tutu criticize African missionaries for stealing land?’ 2016 <https://skeptics.stackexchange.com/questions/8644/did-desmond-tutu-criticize-african-missionaries-for-stealing-land> (accessed 25 August 2021).

33 Modiri (n 7) 320.

34 Serequeberhan (n 9) 50.

35 JS Saul *South Africa – The Present as History from Mrs Ples to Mandela and Marikana* (2014) at 5.

36 See, generally, G Baderoon ‘The Provenance of the term “Kafir” in South Africa and the notion of Beginning’ http://www.cilt.uct.ac.za/usr/cci/publications/aria/download_issues/2004/2004_MS4.pdf (accessed 20 May 2020); and P Scully & C Crais ‘Race and Erasure: Sara Baartma and Hendrik cesars in Cape Town and London’ (2008) 47 *Journal of British Studies* at 301-323.

37 Ramose (n 23) 9.

38 John (n 28) 284.

39 Saul (n 35) 120.

include: the Sharpeville massacre on 21 March 1960, where 69 demonstrators were shot and killed by police in a pass-burning rally led by the Pan African Congress (PAC);⁴⁰ the 1973 police shooting of unarmed protesting miners;⁴¹ the June 16 protests led by students in 1976, Soweto which resulted in the death of Hector Pieterson and vicious injuries of several other learners;⁴² the Bisho massacre where 29 people were shot at and killed by Ciskei soldiers;⁴³ the Boipatong massacre where 42 Black people were brutally killed;⁴⁴ the killing fields in Kwa-Zulu Natal; and the killing fields in the Vaal township.⁴⁵ These selected incidences are a clear indication of the role that racial ontology played in the constitution/creation of South Africa with the idea being that Black people should be conversed with through violence because they are not full human beings.⁴⁶

The creation of South Africa, accompanied by white settlement, was not just a one-day event. It was both a process and a structure. This means that when the Europeans arrived in South Africa, they undertook the task of creating a South Africa that would reflect their needs, lived experiences, traditions, education, and so on.⁴⁷ However, since they were and are still the minority, they needed Black people to participate in the building of their South Africa. Hence one of their objectives was not to completely eliminate Black people but to take their land and their labour.⁴⁸ In essence, Europeans wanted Black people's labour but not their co-existence as human beings or their equals, but as sub-humans whose only worth was to serve their masters.⁴⁹ Hence, they undertook to dismantle stable communities and Black people's cultures of resistance.⁵⁰ According to Kelley, this process was identified as the destruction of the African and the 'invention of the Negro'.⁵¹ These were the bases of the racial ontology of conquest in South Africa.

⁴⁰ As above.

⁴¹ Saul (n 35) 120.

⁴² As above.

⁴³ Saul (n 35) 120.

⁴⁴ As above.

⁴⁵ As above.

⁴⁶ Ramose (n 23) 19.

⁴⁷ As above.

⁴⁸ As above.

⁴⁹ RDG Kelley 'The Rest of Us: Rethinking Settler and Native' (2017) 2 *American Quarterly* at 269; JL Comaroff 'Reflections on the Colonial State, in South Africa and Elsewhere: Factions, Fragments, Facts and Fictions' (1998) 3 *Social Identities* at 269.

⁵⁰ As above.

⁵¹ As above.

2.2 The relationship between the 1996 constitution and racial ontology

2.2.1 *The conflict between the 1996 constitution and reality*

As a golden thread throughout this article, the test for the 1996 constitution is whether it undoes the racial ontology of conquest.⁵² When South Africa attained what many termed ‘freedom’ in 1994, it was pursuant to negotiations.⁵³ In essence, the 1994 establishment of ‘freedom’ was a negotiated settlement.⁵⁴ The results of this negotiated settlement were, firstly, the establishment of ‘freedom’ in South Africa and secondly, the adoption of a constitution.⁵⁵ The PAC outlined some preconditions to the apartheid government prior to its (the PAC’s) participation in the negotiations.⁵⁶ Of these preconditions were the requirements that the land had to be returned to its rightful owners and that the negotiations had to be held outside the country and by an independent and neutral forum.⁵⁷ The point of contention was that the oppressed can never hold fair negotiations with their master and in their master’s territory because there would be unequal bargaining powers.⁵⁸ As a direct consequence, the oppressed would succumb to the master’s demands, hence furthering the argument that Black people were compromised during these negotiations.

In my view, the rejection of these pre-conditions by the apartheid government was a clear indication of what the outcome of those negotiations would be. This is because these pre-conditions were the foundation of the creation of South Africa based on racial ontology. Accordingly, in order for the true essence of freedom to be ushered, this foundation had to be abolished. The fact that the apartheid government refused to abide by these pre-conditions further shows that it went into these negotiations without any intention to compromise its sovereignty over the South African title.⁵⁹ This also means that everything that was to come out of those negotiations was to favour the master and to continue the oppression of Black people.⁶⁰ It is of utmost importance to note that the apartheid government did not benevolently opt for negotiations, rather it did so because apartheid, as a system of oppression, was no longer

⁵² Modiri (n 7) 315.

⁵³ Ramose (n 23) 14.

⁵⁴ As above.

⁵⁵ Ramose (n 23) 14.

⁵⁶ As above.

⁵⁷ Ramose (n 23) 14.

⁵⁸ As above.

⁵⁹ Ramose (n 23) 13.

⁶⁰ As above.

beneficial to it due to the state of emergency protests and the country-wide unrest.⁶¹ Accordingly, the international community started to talk against the apartheid regime in South Africa, and businesses started losing income.⁶² In essence, the reason why the apartheid government opted for negotiations was because it was no longer beneficial to it.⁶³ Therefore, the negotiations were started to give Black people political freedom whilst the economic freedom remained retained by the white minority.⁶⁴

As an emphasis, the PAC rejected these negotiations as it noted that they would not be free and fair.⁶⁵ It contended that the conditions of these negotiations should be changed to allow for transparency, independency, and fairness.⁶⁶ However, as it has already been noted, the apartheid government never intended to surrender any real power, it rejected the PAC's terms and the PAC thus withdrew from these negotiations.⁶⁷ Since the 1996 constitution was a product of these negotiations, it is only logical to conclude that it was a compromise of the liberties of Black people. That is why it failed to undo the racial ontology of conquest. Accordingly, the accolades that have been paid to this constitution are unwarranted. It is also worth noting that the African National Congress, which continues to attract criticism for its role in these negotiations, was one of the eighteen political parties which signed. The PAC, CP, and AZAPO baulked at the idea of having negotiations under such conditions.⁶⁸

One of the scholars in the discipline of constitutional abolitionism, Dladla, argues that regardless of the fallacy that 1994 represents as a significant transition from an oppressive society to a democratic one, it did not mark the end of white supremacy but rather ensured its continuation and preservation from one form to another.⁶⁹ Dladla also refers to what he calls the 'right of conquest' which he argues remains affirmed by the 1996 constitution.⁷⁰ Expanding upon Dladla, the reason why the 1996 constitution is said to have affirmed the 'right of conquest' is because this constitution failed to act as a radical break away from colonial-apartheid South Africa to a decolonised South Africa by undoing the racial ontology of conquest.⁷¹

61 US Department of State Archive 'The End of Apartheid' <https://2001-2009.state.gov/r/pa/ho/time/pcw/98678.htm>. (accessed 20 August 2021).

62 As above.

63 US Department (n 61).

64 As above.

65 Ramose (n 23) 13.

66 As above.

67 Ramose (n 23) 13.

68 As above.

69 N Dladla 'Towards an African critical philosophy of race: Ubuntu as a phil praxis of liberation' (2017) 6 *Journal of African Philosophy, Culture and Religions* at 39.

70 As above.

71 As above.

The attributes of a decolonised South Africa are discussed throughout this article include, but are not limited to, the conqueror no longer having a claim over South Africa's title, and the administration of justice that was miscarried by the Truth and Reconciliation Commission (TRC). It is argued that the TRC, as an institution, failed to deliver justice as mandated because it neglected the victims of apartheid crimes, and the perpetrators of apartheid crimes were not prosecuted. Although this position could be said to be retributive in nature, it should be noted that restorative justice formed a tiny minority of the large number of hearings, and it does not necessarily shield perpetrators from making amends or contributions to put their victims at a better place.⁷² Christian articulates this position when he says:⁷³

RJ does not seem to have been an issue of much debate during the day-to-day proceedings of the TRC. As explained, my research shows that the term 'restorative justice' appeared only in three public TRC hearings, which is a tiny minority of the large number of hearings. It should also be noted that the term 'restorative justice' does not appear in the legal documents that form the background to the TRC. The Interim Constitution (Act 200 of 1993), which adjudicated that there should be amnesty after apartheid, does not contain the term 'restorative justice', and neither does the Promotion of National Unity and Reconciliation Act (No. 34 of 1995), which established the TRC and defined its mandate.

It is thus incorrect to use restorative justice as a shield against the TRC's inability to hold the perpetrators of apartheid crimes liable.⁷⁴ Also, it cannot be said that the TRC was founded on the principle of restorative justice. Christian writes that '[r]estorative justice demands that the accountability of perpetrators be extended to making a contribution to the restoration of the well-being of their victims'.⁷⁵ Therefore, since the TRC did not require perpetrators to do anything in return, restorative justice cannot apply.⁷⁶ Accordingly, the TRC did not address the issue of reparation and restitution, which includes the return of land and all its fruits to Black people.

The drafting of a new, inclusive constitution should be a transparent process, with the aim of this constitution being to undo the racial ontology of conquest.⁷⁷ Zikode opines that there is no new South Africa because Black people remain in their squalor, they remain below the law, and each and every attempt of theirs to raise

⁷² BN Christian 'Restorative justice and the South African truth and reconciliation process' (2013) 32 *South African Journal of Philosophy* at 22-23.

⁷³ As above.

⁷⁴ Christian (n 72) 22.

⁷⁵ As above.

⁷⁶ As above.

⁷⁷ See Ramose (n 23) 26; and JM Modiri 'Race, history, irresolution: Reflections on *City of Tshwane Metropolitan Municipality v Afriforum* and the limits of "post" apartheid constitutionalism' (2019) 7 *De Jure Law Journal* at 29.

their concerns in this democracy is met with violence.⁷⁸ However, the way the constitution is described by other judges and academics shows that the widespread and authoritative belief is that the constitution is one of the best constitutions in the world.⁷⁹ One might ask, which standards were used to come to such a conclusion when South Africa is one of the most unequal societies in the world?⁸⁰ As is revealed in the latter paragraphs, this discourse of the widespread and authoritative notion of describing the 1996 constitution as one of the best in the world is, in fact, inaccurate and misleading.

The Marikana massacre was a spit in the face of the so-called ‘freedom’ of Black people. From Bisho to Boipatong, and from the 1973 mine strike to the June 1976 protest, Tupac’s sentiments are a fitting reaction ‘I see no changes all I see is racist faces [and institutionalized and structural racism]’.⁸¹ The government of South Africa, which may be characterised as anti-black, found it easy to repeatedly open fire at unarmed Black protesters. In response to this, one may ask whether the government would have reacted in the same manner if those miners were white.⁸² If the response to this rhetorical question was in the affirmative, then why did white students in Cape Town and many other parts of the country put their bodies at the forefront so that Black students did not get shot at during the #feesmustfall protests? Additionally, why would the police’s reaction to protests led by Black people always end with rubber bullets and tear gas canisters being shot and thrown while protests led by white people are treated as photoshoots and genuine exercises of the right to gather?

The African National Congress (ANC) government which willingly participated in the CODESA negotiations knowing that the issues pertaining to the return of land and the true emancipation of Black people were not on the agenda, is said to be anti-black because it presides over white supremacy and anti-blackness in South Africa. As it is shown in this study, the government sees Black people as a people that should be dispensed with, shot at, or denied social services because they are not full humans. This shows that white supremacy remains intact – the belief that Black people cannot be conversed

⁷⁸ S Zikode ‘Poor People’s Movements and the law’ 2 December 2011 <http://abahlali.org/node/8551/> (accessed 9 August 2019).

⁷⁹ Langa (n 3) 151; Klare (n 3) 150.

⁸⁰ K Scott ‘South Africa is the world’s most unequal country. 25 years of freedom have failed to bridge the divide’ CNN 10 May 2019 <https://edition.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html> (accessed 18 July 2019).

⁸¹ See 2Pac ‘Changes’ <https://genius.com/2pac-changes-lyrics> (accessed 19 May 2020).

⁸² eNCA ‘Marikana Massacre Documentary’ 21 May 2014 <https://www.youtube.com/watch?v=sAXzs40WJ6A&bpctr=1581338558> (accessed 22 October 2019).

with because they are not full humans, or they somehow do not meet the human threshold.⁸³ Arnold summates this in noting that:⁸⁴

Since the first week of lockdown, videos and news stories have been circulated allegedly depicting the police and SANDF members brutally beating up black people for any level of lockdown deviation, while other videos have displayed white people nonchalantly enjoying their daily run or braai, seemingly unbothered by the national mandate to stay inside. In stark contrast to footage of police chasing, beating or arresting black people, white people appear to get away with little more than a stern talking to.

It has become trite in contemporary South Africa that we will hear of police brutality imposed on Black people without any accountability.⁸⁵ This coincides with the apartheid treatment of Black people where they were seen as half or incomplete humans who could not be spoken or reasoned with, so the only way to talk to them was through violence.⁸⁶ Recently, this was seen with Sizwe Mbokazi, a young man from Alexandra who was shot dead while sitting with his friends playing cards.⁸⁷ The same police officer who shot Sizwe Mbokazi then shot and killed another young lady named Samantha Mathane Radebe who was just a bystander while the police were allegedly chasing a stolen vehicle.⁸⁸ If the police officer was held accountable for the murder of Mbokazi then he would not have had the opportunity to kill Radebe, but because the Black life is very cheap in South Africa, the policeman was not held accountable.⁸⁹ It is only now with the second murder that the policeman has been charged with murder.⁹⁰

The killings of Collins Khoza, Nathaniel Julius, Mthokozisi Ntumba, and many other killings by the South African Police Service (SAPS) show that apartheid policing is very much still alive.⁹¹ This argument is summed up with the painful words of the leader of the National Union of Mineworkers (NUM), Joseph Mathunjwa, who addressed the miners before they were gruesomely gunned down.⁹² Mathunjwa

⁸³ Serequeberhan (n 9) 50.

⁸⁴ K Arnold 'Army and police violence spurs racial tensions' *Mail & Guardian* 20 April 2020 <https://mg.co.za/article/2020-04-29-army-and-police-violence-spurs-racial-tensions/> (accessed 22 August 2021).

⁸⁵ 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 127.

⁸⁶ As above.

⁸⁷ A Nyathi 'Alex residents assured action if shooting victim killed by cop' *Eyewitness News* <https://ewn.co.za/2020/01/17/alex-residents-assured-of-action-if-shooting-victim-killed-by-cop> (accessed 30 October 2020).

⁸⁸ As above.

⁸⁹ Nyathi (n 87).

⁹⁰ As above.

⁹¹ PT Clarke 'Police killings: How does South Africa compare?' *Mail & Guardian* 2 March 2021 <https://mg.co.za/news/2021-03-02-police-killings-how-does-south-africa-compare/> (accessed 21 April 2021).

⁹² eNCA (n 82).

clearly knew that the racial ontology of conquest in South Africa persisted. He knelt and said: ‘My brothers, the South African government is anti-black, they will not hesitate to shoot and kill us then replace us tomorrow’.⁹³ This is exactly what happened afterward, miners were shot down and replaced soon thereafter.⁹⁴

It is my view that the 1996 constitution which was a product of the negotiated settlement, was not and could not have been the correct response to South Africa’s colonial-apartheid history.⁹⁵ To further illustrate this argument, Scott notes that while democracy is said to have delivered freedom, nothing much has changed for those living in the townships.⁹⁶ Townships in South Africa remain the best example of a country that is anti-black.⁹⁷ A good example is the situation within the Alexandra township, north of Johannesburg.⁹⁸ Alexandra is one of the poorest slums in Africa and a few metres away is Sandton City, which is one of the wealthiest squares in Africa.⁹⁹ As Alexandra is engulfed with inequality, dehumanisation, poverty, violence, and many other traits resembling the persistence of colonisation and apartheid, elites in Sandton flash their expensive cars and mansions, with pets that even eat better than the children of those in the Alexandra township.¹⁰⁰ Scott notes further that while democracy is said to have delivered freedom, nothing much has changed for those living in the townships.¹⁰¹

Zikode argues in the same manner as Scott. He argues that there is no true democracy in South Africa and if there is one, then it is a spoil of wealth denied to the poor.¹⁰² The situation in *Abahlali BaseMjondolo* shows that poor people have been disregarded and discarded as non-humans.¹⁰³ *Abahlali BaseMjondolo* is a movement of shack dwellers from Durban and its members fight against unlawful evictions for better living conditions.¹⁰⁴ In 2009, the group had won in the Constitutional Court case against the Durban municipality prohibiting its members’ evictions from their slums.¹⁰⁵ However, a

⁹³ As above.

⁹⁴ As above.

⁹⁵ Ramose (n 23) 14.

⁹⁶ Scott (n 80).

⁹⁷ As above.

⁹⁸ BC Simelane ‘Xenophobia, crime and poverty trigger anger in Alexandra’ *Mail & Guardian* 3 April 2019 <https://www.dailymaverick.co.za/article/2019-04-03-xenophobia-crime-and-poverty-trigger-anger-in-alexandra/> (accessed 22 November 2019).

⁹⁹ As above.

¹⁰⁰ As above.

¹⁰¹ Scott (n 80).

¹⁰² Zikode (n 78).

¹⁰³ As above.

¹⁰⁴ Zikode (n 78).

¹⁰⁵ As above.

day after winning the court case, a group of armed men came and attacked them.¹⁰⁶ The racial ontology of conquest persists – the belief that it is acceptable to kill or converse using violence when dealing with Black people because they are non-human.¹⁰⁷ In response to this, Zikode noted that ‘when you are poor, the law does not protect you, it may protect you on paper but the truth is that the elite will still get to you’.¹⁰⁸ Zikode further stated that poor people are below the law because the people who attacked them in their slums are yet to be apprehended.¹⁰⁹

Black people are disregarded and discarded in their squalor, their human dignity is stripped off by the bucket system toilets and the sewerage leaks that surround their shacks, and they are the forgotten people where service delivery is concerned. Their voices are only heard after their bodies have endured the terror of rubber bullets and their eyes have seen the wrath of tear gas.¹¹⁰ Black people do not have access to the socio-economic rights entrenched in the constitution and this is as a result of their dehumanisation by white supremacy and the racial ontology of conquest. These are the people who sleep with one eye open, from the fear of not waking up from the easily flammable shacks in whose confines their humanity has been discarded.¹¹¹

2.2.2 Violation of the right to dignity and health

The term ‘esidimeni’ means ‘place of dignity’.¹¹² Life Esidimeni means a ‘place of dignity’, however, the patients placed there were not treated with dignity.¹¹³ In Life Esidimeni, about 144 psychiatric patients lost their lives.¹¹⁴ An inquest into the processes that led to these deaths revealed that the deaths resulted from negligence, dehydration, starvation, and cold, just to mention a few.¹¹⁵ After the

¹⁰⁶ As above.

¹⁰⁷ Serequeberhan (n 9) 50.

¹⁰⁸ Zikode (n 78).

¹⁰⁹ As above.

¹¹⁰ I Mahlangu ‘Bucket toilets still reality for thousands’ 06 June 2018 <https://www.sowetanlive.co.za/news/south-africa/2018-06-06-bucket-toilets-still-real> ity-for---thousands/#:-:text=The%20bulk%20of%20bucket%20toilets,that%20exist%20in%20formal%20areas.&text=More%20than%2060000%20South%20African,the%20government%20to%20eradicate%20them (accessed 30 October 2020).

¹¹¹ Scott (n 80).

¹¹² L Lebaki ‘Restoring Dignity in Disability in South Africa’ 01 December 2016 <https://www.hrw.org/news/2016/12/02/restoring-dignity-disability-south-africa> (accessed 22 January 2020).

¹¹³ As above.

¹¹⁴ C Capri ‘Intellectual disability in the Esidimeni tragedy: Silent deaths’ (2018) 108 *South African Medical Journal Editorial* at 153.

¹¹⁵ As above.

inquest which warranted for someone to be held accountable, the National Prosecuting Authority (NPA) still declined to prosecute.¹¹⁶ Interestingly, the NPA recently announced its intentions to conduct a formal inquest into these deaths.¹¹⁷ This tragic incident clearly shows a repetition of what happened in colonial-apartheid South Africa, yet we have a constitution that guarantees the right to life and human dignity.¹¹⁸

The gross violations of human rights which occurred daily in the streets of South Africa during colonisation and apartheid were left unaccounted for because they were done on Black people.¹¹⁹ In contemporary South Africa, Black people continue to suffer due to the failure of the 1996 constitution in undoing the racial ontology of conquest.¹²⁰ The Life Esidimeni tragedy is a good example – those with money have access to one of the best healthcare in private hospitals while the impoverished are left to die in under-resourced public hospitals.¹²¹

The country's continued embrace of the name 'South Africa' does not serve as a reminder of a past South Africa has once been through, but symbolises the continuation of this 'past'.¹²² This name is a construct and artefact of the sovereignty of colonialism which was imposed by conquering powers on this land in the union of 1910.¹²³ This name symbolises the sufferings, oppression, dispossession, and the non-sovereign being of Black people as the conquered peoples of South Africa.¹²⁴ The continuation of this name shows the continuation of this symbolism.¹²⁵ The author should not be misconstrued as saying that the changing of names on its own would be enough to account for the tragedies and injustices of conquest, because it will not, just as the changing of street names comes short. However, the mere fact that this article must entertain this discourse should already reveal the failure of the constitution to break away from the racial ontology of conquest.

¹¹⁶ N Jordann 'Not enough evidence' to prosecute Life Esidimeni deaths: NPA 17 September 2019 <https://www.timeslive.co.za/news/south-africa/2019-09-17-not-enough-evidence-to-prosecute-esidimeni-deaths-npa/> (accessed 22 January 2019).

¹¹⁷ T Kubheka 'Life Esidimeni formal inquest to begin in July, NPA announces' *Eyewitness News* 19 April 2021 <https://ewn.co.za/2021/04/19/life-esidimeni-formal-inquest-to-begin-in-july-npa-announces> (accessed 30 April 2021).

¹¹⁸ Constitution (n 2) secs 10-11.

¹¹⁹ B Magubane *The political economy of race and class in South Africa* (1979) at 1.

¹²⁰ N Dladla 'The liberation of history and the end of South Africa: Some notes towards an Azanian historiography in South Africa' (2018) 34 *South African Journal on Human Rights* at 415.

¹²¹ See M Young 'Private vs Public Healthcare in South Africa' (2016) Honors thesis, Western Michigan University, 2016 at 3 where Young reveals the gap that exists between the public hospitals and private hospitals in South Africa.

¹²² Modiri (n 77) 29.

¹²³ As above.

¹²⁴ Modiri (n 77) 29.

¹²⁵ As above.

In South Africa, as we have seen with Abahlali BaseMjondolo, Black people should not speak for themselves and should accept anything that is thrown at them.¹²⁶ Zikode correctly puts it when he states that everyone wants to talk for the poor but no one wants to talk to the poor.¹²⁷ This is happening in a country with ‘one of the best constitutions in the world’ which guarantees a right to life and human dignity and confirms that South Africa is unreceptive to blackness.¹²⁸

3 The reconstitution of South Africa

3.1 The dominant theory of the constitution

One can rarely converse about the continuation and preservation of the racial ontology of conquest in contemporary South Africa without receiving questions of implementation, how good the constitution is, how it is the best in the world, and how it is so sophisticated.¹²⁹ These are the views held by constitutional optimists. Langa in ‘Transformative constitutionalism’ discusses how the constitution can be used to transform the society by providing access to justice and transforming legal culture and the way law is taught.¹³⁰ In essence, Langa argues that the constitution, if interpreted in a transformative way, has the potential of achieving access to justice, equality, and the realisation of other socio-economic rights.¹³¹

Langa’s discourse of transformative constitutionalism subscribes to the most dominant theory of the constitution – which is constitutional optimism.¹³² The group of scholars who subscribe to constitutional optimism hold that the constitution can bring about any form of change if it is implemented properly.¹³³ Further, Langa opines that transformation can be achieved through changing the legal culture, in other words, by ensuring access to courts and making judges accountable through giving justifications for their decisions.¹³⁴ He further writes that the task of transformation should not be exclusive to the courts and the government as society should also play a role.¹³⁵ He proposes reconciliation as a fundamental step towards social transformation.¹³⁶ According to him, the failure of people to

126 Zikode (n 78).

127 As above.

128 Constitution (n 2) secs 10-11.

129 Langa (n 3) 150; Klare (n 3) 151.

130 Langa (n 3) 351.

131 As above.

132 Langa (n 3) 351; Klare (n 3) 151.

133 As above.

134 Langa (n 3) 351; Klare (n 3) 151.

135 As above.

136 Langa (n 3) 358.

reconcile will only change the legal culture and the material conditions of a society while that society remains divided and fractured by bitterness and hate.¹³⁷ He refers to the role that the TRC played, and borrows from Borraine who stated that there is a need for South Africans to have the hope that they can move beyond the past, and that requires ‘remembering and forgetting’. Borraine opines:¹³⁸

We must remember what it is that brought us here. But at the same time, we must forget the hate and anger that fuelled some of our activities if we are to avoid returning to the same cycle of violence and oppression.

The idea of moving on as though nothing happened is the reason why white supremacy and anti-blackness persists. This is the path taken by the 1996 constitution, a forward-looking approach that is ignorant of South Africa’s colonial-apartheid history. Constitutional optimists worship the constitution as the saviour that ended Black people’s sufferings and a tool capable of ensuring justice and equality, while constitutional abolitionists speak of the need for the racial economy, ontology, and epistemology of conquest to be undone before any discussions can be had on justice and equality.¹³⁹ When constitutional optimists speak of the need to forgive and move on, constitutional abolitionists speak of the need to look back at our past and account for the tragedies and injustices of conquest which continue in the present.¹⁴⁰

Klare then opines the need for adjudicators to be transformative in their adjudication.¹⁴¹ He writes about the need for the ‘best interpretation’ to be adopted by judges and lawyers, and contends that the ‘postliberal’ interpretation is the best.¹⁴² He writes that the new South Africa has a constitution that has massive egalitarian commitments which are superimposed on a formalistic legal culture lacking a strong practice of substantive contestation and discussion over the medium legal discourse.¹⁴³ He argues that in order to start transformation, we need lawyers to complement the judicial legal interpretation and method with the constitution’s fundamentally progressive aspirations.¹⁴⁴

In essence, Klare argues that the achievement of democratic and responsive social transformation may find its foundation in the law and legal practices, however, an evolution of an updated and politicised account of the rule of law is required.¹⁴⁵ Klare, as a

¹³⁷ As above.

¹³⁸ As above.

¹³⁹ Langa (n 3) 151; Klare (n 3) 150.

¹⁴⁰ Ramose (n 23) 14; Modiri (n 77) 29.

¹⁴¹ Klare (n 3) 150.

¹⁴² Klare (n 3) 151.

¹⁴³ Klare (n 3) 188.

¹⁴⁴ As above.

¹⁴⁵ As above.

constitutional optimist, speaks of a ‘new’ South Africa, while Dladla, an abolitionist, argues that there is no new South Africa as it is a continuation and preservation of ‘post’-apartheid.¹⁴⁶ Klare speaks of the constitution as having the capability to ensure justice if judges are to interpret it in a ‘postliberal’ manner, while constitutional abolitionists argue that the constitution cannot translate to reality because it did not undo the racial economy, ontology, and epistemology of conquest.

Contemporary South Africa is said to be governed by a constitution that is seen as one of the best constitutions, but white supremacy and anti-blackness persists. This problem lies not in the inability of the 1996 constitution to be interpreted or implemented properly, but the problem lies in the constitution itself and its inability to act as a radical breakaway from colonial-apartheid South Africa to a decolonised South Africa.¹⁴⁷ That is the reason why there is a need for the reconstitution of South Africa. The reconstitution of South Africa calls for the racial ontology of conquest to be undone.¹⁴⁸

Shai summarises the group of scholars of constitutional optimism. He states that one thing that brings about unanimity amongst constitutional optimists is their shared beliefs on unity in ‘racial diversity’, ‘constitutional identity’, or ‘a common moral understanding of the constitution’.¹⁴⁹ Constitutional optimists share the same views with regards to the thought that the constitution can address white supremacy and anti-blackness if it is interpreted correctly or implemented efficiently.¹⁵⁰ However, constitutional abolitionists argue that the 1996 constitution is, in itself, a problem.¹⁵¹ Constitutional optimists also see the constitution as transformative and they see transformation as a tool that can bring about change.¹⁵² In contrast, constitutional abolitionists contend that transformation cannot bring about the radical change that is needed in South Africa.¹⁵³ Hence, constitutional abolitionism calls for decolonisation.

The Cambridge Dictionary defines ‘transformation’ as a complete change in the character or appearance of something in order for it to be improved.¹⁵⁴ Langa then says that transformation can be achieved when the social and economic situations of the disadvantaged people

¹⁴⁶ Dladla (n 120) 415.

¹⁴⁷ Ramose (n 23) 14; Modiri (n 77) 29.

¹⁴⁸ Ramose (n 23).

¹⁴⁹ I Shai ‘The quest for radical transformation and the limits and limitations of the law’ LLD thesis, University of Pretoria, 2017 at109.

¹⁵⁰ As above.

¹⁵¹ Dladla (n 120) 415.

¹⁵² Langa (n 3) 151; Klare (n 3) 150.

¹⁵³ Dladla (n 120) 415.

¹⁵⁴ Cambridge Dictionary ‘transformation’ <https://dictionary.cambridge.org/dictionary/english/transformation> (accessed 22 April 2019).

are changed.¹⁵⁵ However, constitutional abolitionists contend that transformation does not fundamentally dismantle the foundational roots of the system but rather seeks assimilation into the system.¹⁵⁶ This is because it does not call for the racial ontology of conquest to be undone, and it is ignorant of the tragedies and injustices of conquest which remain unaccounted for. In essence, constitutional optimists argue that the system should be used to change the lives of Black people, while constitutional abolitionists argue that the system should be abolished.¹⁵⁷

Constitutional optimists disregard the lived realities of the Black people of this country. They, through their transformation discourse, turn a blind eye to the structural and systemic persistence of white supremacy and anti-blackness. This they do by being ignorant of the fact that South Africa was created based on certain foundations and further disregard the notion that in order for the injustices and tragedies of conquest to be accounted for, these foundations must be undone. This is the reason this study adopts constitutional abolitionism as an alternative theoretical perspective.

3.2 The tenets of constitutional abolitionism

It is my view that those who have inaccurately ascribed all of these accolades to the 1996 constitution would rightfully regard the notion of abolitionism as too extreme and destructive.¹⁵⁸ However, one might ask, is it possible to undo a history that was created through extreme and destructive methods with smiles, flowers, and chocolates? It can never be. Similarly, the deep implications of racism with dehumanisation in the South African racial ontology raises the ultimate question; ‘is it possible to overcome racism without transcending the structural constraints of [racial ontology] as a system?’.¹⁵⁹ This is what the theoretical perspective of constitutional abolitionism is based on. Constitutional abolitionists opine that to overcome white supremacy and anti-blackness, the structural constraints of the racial ontology of conquest should be undone.¹⁶⁰

If this was storytelling, it would not suffice to pen it down because it would require us to sit before woodfires, at noon, confronting the winds of nature with our bare skins, just like our grandfathers and mothers used to. Dladla, surrounded by constitutional optimists and sceptics, is asked the question ‘what does being a constitutional

¹⁵⁵ Langa (n 3) 351.

¹⁵⁶ Dladla (n 69) 415; Ramose (n 23) 14.

¹⁵⁷ Langa (n 3) 351; Klare (n 3) 150.

¹⁵⁸ As above.

¹⁵⁹ Magubane (n 119) 3.

¹⁶⁰ Dladla (n 69) 415; Ramose (n 23) 14.

abolitionist mean?’ He argues that constitutional abolitionists believe that the problems of the constitution are so fundamental that the constitution itself is a document that is incapable of ensuring justice.¹⁶¹ He makes an example that the mere fact that the constitution is translatable to African languages does not make it an African constitution.¹⁶² He further states that this much-celebrated constitution contains the controversial property clause, which is section 25, as a fundamental right.¹⁶³ With South Africa being a country where land was acquired through racial dehumanisation, Dladla asks, how can it be ethical to protect such a right?¹⁶⁴ Dladla emphasises that constitutional abolitionism is not the abolition of the constitution as a document per se, but the abolition of ‘succession of the conqueror’s constitutions purporting to be “our” law’.¹⁶⁵

The historical overview of the notion of ‘abolition’ and its recent revival in the US has already been noted above. In the South African context, abolitionist thinking draws from and is closely related to the enterprise of Azanian critical philosophy.¹⁶⁶ The Azanian critical philosophy is explained by Dladla and it follows Ramose’s critique of the constitution which builds on the works of Lembede, Sobukwe, and Biko.¹⁶⁷ Azanian critical philosophy is essentially the ideology that this article has presented throughout. From the PAC’s ideologies to Ramose, Serequeberhan, Modiri, and others.¹⁶⁸ Azanian critical philosophy describes present-day theoretical and practical activity that was founded on the historical activities and thinking of movements like the PAC, the Black Consciousness Movement of Azania (BCMA), Azanian Racial Organisation (AZAPO) and Others, and ‘thinker-actors’ that were their products.¹⁶⁹ Dladla put it so well when he states, ‘this approach to philosophy is one that originates in the experience of the struggle against colonial (and then neo-colonial) domination in Africa’.¹⁷⁰

Modiri, who is one of the proponents of constitutional abolitionism, breaks down the different types of theories of the constitution.¹⁷¹ The theory of constitutional optimism has already been discussed.¹⁷² The second theory is one he calls ‘critical

¹⁶¹ Big Debate South Africa (n 4).

¹⁶² As above.

¹⁶³ As above.

¹⁶⁴ As above.

¹⁶⁵ Dladla (n 69) 416.

¹⁶⁶ As above.

¹⁶⁷ Dladla (n 69) 416.

¹⁶⁸ As above.

¹⁶⁹ Dladla (n 69) 416.

¹⁷⁰ As above.

¹⁷¹ JM Modiri ‘Introduction to special issue: Conquest, constitutionalism and democratic contestations’ (2018) 34 *South African Journal on Human Rights* at 296.

¹⁷² Modiri (n 171) 315.

scepticism' and he states that this is a group of scholars who find problems in the grand narratives of post-1994 constitutionalism, exposes the shortcomings of the law, the TRC, liberalism, enlightened reason, and so forth.¹⁷³

Constitutional sceptics will also not be afforded the centre stage because they hold a view that is totally opposite to the argument presented throughout this study. These are a group of scholars who still believe that the constitution is the right tool to address the colonial-apartheid history of South Africa, but they caution its over-celebration or worship. On the other hand, constitutional abolitionists reject the notion that the 1996 constitution was the correct response to South Africa's colonial-apartheid history.¹⁷⁴

Unlike the first two groups of scholars, the third group of scholars, which is the one that this article adopts and discusses throughout is that of 'the constitutional abolitionists' who have discovered the problem in South Africa and have the solution. The 1996 constitution, as the succeeding constitution of the constitutions of South Africa, which are; the 1913 Land Act; the 1948 declaration of apartheid; the 1960 constitution; and the 1983 constitution,¹⁷⁵ was supposed to act as a radical breakaway from colonial-apartheid South Africa to a decolonised South Africa.¹⁷⁶

The solution that constitutional abolitionists give is that there is a need for the reconstitution of South Africa so that the constitutional foundation of colonial-apartheid South Africa can be abolished. Constitutional abolitionists challenge the historical, cultural, and philosophical bases of the South African constitution from the view of occluded ontologies and epistemologies.¹⁷⁷

On the question of whether these scholars' views do overlap at times, Modiri argues that it is not always easy to differentiate them but provides a helpful contrast.¹⁷⁸ He states that constitutional optimists represent the idea of faithfulness towards transformative social change and within constitutional frameworks.¹⁷⁹ He notes that critical sceptics, on the other hand, are cautious of 'faithfulness' as a mode of relating to the law, while constitutional abolitionists reject the social vision underpinning the post-1994 constitutionalism based on more far-reaching conceptions of history and justice.¹⁸⁰

¹⁷³ Modiri (n 171) 296.

¹⁷⁴ As above.

¹⁷⁵ Natives Land Act 27 of 1913; The Republic of South Africa Act, 1961; The Republic of South Africa Constitution Act 110 of 1983.

¹⁷⁶ Library of Congress (n 5).

¹⁷⁷ Modiri (n 171) 296.

¹⁷⁸ As above.

¹⁷⁹ As above.

¹⁸⁰ As above.

Constitutional abolitionism reveals the problems and challenges that arise from the notion of creating a ‘new’ South Africa based on the 1996 constitution.¹⁸¹ These problems are, amongst other things, the persistence of the constitutional foundation of colonial-apartheid South Africa that is presented throughout this study.¹⁸² South Africa was created based on white supremacy and anti-blackness. With the adoption of the 1996 constitution, constitutional abolitionists argue that first on its agenda was supposed to be undoing this racial ontology.

Madlingozi argues that the adoption of the constitution, which Ramaphosa, the main negotiator of the ANC at the negotiations (called the ‘birthday’ of South Africa) led to the adoption of a constitution that did not look backward.¹⁸³ Consequently, the 1996 constitution cannot redress past injustices because it only looks onward with the aim of assimilating Black people without any recourse or restitution.¹⁸⁴ A fundamental question which constitutional abolitionists ask is thus, how could we expect constitutional jurisprudence and a constitutional text to allow for the reharmonisation of Black and white people while their social relations have not gone through a process of economic, psychic, racial, and spatial decolonisation?¹⁸⁵

The call for the reconstitution of South Africa emanates from the failure of the constitution to account for the tragedies and injustices of conquest.¹⁸⁶ The failure of the constitution to look back and address the constitutional foundation of colonial-apartheid South Africa has led to these foundations still in existence in contemporary South Africa. We saw this in Marikana, with Life Esidimeni, with the apartheid policing resulting in the death of Andries Tatane, and the situation in Abahali BaseMjondolo.¹⁸⁷

The abolition of the constitutional foundations of South Africa can be achieved through striving towards a decolonised South Africa. As noted above, a decolonised South Africa is one where white people are no longer seen as the primary racial and social subjects of South Africa whilst Black people are cast away as the natives of nowhere and as nonhumans.¹⁸⁸ It is one where the racial economy, ontology, and epistemology of conquest is undone. It entails the adoption of a new

¹⁸¹ MB Ramose ‘Towards a post-conquest South Africa: beyond the constitution of 1996’ (2018) 34 *South African Journal on Human Rights* at 327.

¹⁸² As above.

¹⁸³ Madlingozi (n 85) 127.

¹⁸⁴ As above.

¹⁸⁵ Modiri (n 77) 29.

¹⁸⁶ Ramose (n 23) 327.

¹⁸⁷ Simelane (n 98); Zikode (n 78).

¹⁸⁸ Ramose (n 23).

constitution that is not a result of closed doors negotiations and sunset clauses.¹⁸⁹ This constitution would have to address the injustices and tragedies of conquest – everyone must be represented during its drafting and the processes must be transparent. Of utmost importance, this new constitution must have the human right to subsistence in its Bill of Rights, and such rights should be legally enforceable.¹⁹⁰ In doing so, this new constitution would be reckoning with past injustices through the administration of substantive equality.¹⁹¹

With regard to constitutional abolitionists' view on the return of land, they reject the notion that there should be the amendment of section 25 of the constitution to allow for land expropriation because this would not address the problem.¹⁹² The problem is not with certain sections of the constitution or the failure of the constitution to be implemented efficiently.¹⁹³ Constitutional abolitionists articulate it very well when they say that the problem is that this constitution is incapable of producing justice because it is fundamentally the problem.¹⁹⁴ Its failure to dismantle the racial ontology of conquest means that it maintains and protects it.

What is more, the crimes that were committed during colonial-apartheid South Africa cannot just go unaccounted for. The reason why there is still violence imposed on Black bodies without any remorse, and the reason why Black people are still met with apartheid policing as we saw in Marikana, the murder of Andris Tatane, the murder of Collins Chabane and Nathaniel Julius, the #FeesMustFall protests, and many other incidences exposing the inability of the 1996 constitution to address the colonial-apartheid history of South Africa is because contemporary South Africa is behaving based on what it was created on, which is the racial ontology of conquest.¹⁹⁵

The reconstitution of South Africa embraces justice as one of its fundamental pillars because it remains aware of the fact that many of the constitutional foundations of colonial-apartheid still exist merely because justice was not served.¹⁹⁶ The miscarriage of justice by the TRC is noted by Madlingozi when he states, ‘There is neither truth nor

¹⁸⁹ South African Constitutional Hill ‘Negotiating our Freedom’ <https://ourconstitution.constitutionhill.org.za/south-african-constitution/negotiating-our-freedom/> (accessed 11 September 2021).

¹⁹⁰ MB Ramose, TGT Maphala & TE Makhabane ‘Lasting constitutional changes in South Africa’ (1991) 2 *Quest* at 27.

¹⁹¹ As above.

¹⁹² Ramose (n 23) 18.

¹⁹³ Dladla (n 69) 415.

¹⁹⁴ As above.

¹⁹⁵ Serequeberhan (n 9) 50.

¹⁹⁶ T Madlingozi ‘There is neither truth nor reconciliation in so called “South Africa”’ 29 June 2020 <https://thefunambulist.net/magazine/reparations/there-is-neither-truth-nor-reconciliation-in-so-called-south-africa-a-conversation-with-tshepo-madlingozi> (accessed 22 January 2020).

reconciliation in South Africa'.¹⁹⁷ Madlingozi argues that little, if any, the truth was revealed in these hearings, and victims of these inhumane crimes were neglected.¹⁹⁸ How then can we speak about reconciliation? The reconstitution of South Africa also means that the TRC was not the correct forum to address the issue of these violent and inhumane crimes as crimes were supposed to be prosecuted and not heard in hearings.¹⁹⁹

Dladla reveals that 'South Africa' is the fundamental problem for Black people being conquered in the unjust wars of colonisation.²⁰⁰ In essence, Dladla reveals how the constitution of South Africa from 1910 still exists and continues with the 1996 constitution.²⁰¹ Constitutional abolitionists' main argument is that the failure of the 1996 constitution to act as a radical breakaway from colonial-apartheid South Africa, to a decolonised South Africa is the reason why white supremacy and anti-blackness persist. Consequently, the 1996 constitution should not be worshipped or celebrated as a saviour constitution because it presides over the preservation and continuation of Black people's economic inferiority, dehumanisation, and epistemicide.

In my view, constitutional abolitionists would advocate for the need to conscientise Black people. More than 350 years of trauma, violence, dehumanisation, and indoctrination or 'white-washing' must have had a great impact on the psychological, spiritual, and social well-being of Black people.²⁰² It is my view that there is therefore a need for conscientisation through rewriting the history, tradition, laws, cultures, and livelihoods of Black people from their perspectives, and not just portraying them as victims but also as victors.²⁰³ This would also entail a project of rebuilding South Africa in the image of the conquered while dismantling the conqueror's South Africa.²⁰⁴

4 Conclusion

The creation of South Africa based on racial ontology can be traced throughout the footsteps of colonisation and apartheid in South Africa. The central tenet of this theory is that Black people are not full humans and should therefore be the objects of the economic, social, cultural, and legal subjects of South Africa, who are white

¹⁹⁷ As above.

¹⁹⁸ As above.

¹⁹⁹ As above.

²⁰⁰ Dladla (n 120) 415.

²⁰¹ As above.

²⁰² Serequeberhan (n 9) 50.

²⁰³ Modiri (n 77) 29.

²⁰⁴ As above.

people. This idea was used to justify the Christianisation of Black people, their enslavement, their oppression, and their relegation to the lowest form of biological and social life. When South Africa attained what many termed ‘democracy’, the racial ontology of conquest was not abolished. Consequently, white supremacy and anti-blackness persist. This study calls for the abolition of the racial ontology of conquest. It adopts the principles of constitutional abolitionism. Constitutional abolitionists simply contend that there is a need for a decolonised South Africa, and such can only be achieved through the abolition of the racial ontology of conquest. The abolition of the racial ontology of conquest can be achieved through the adoption of a constitution that is not subject to sunset clauses, one that breaks away from the constitutional foundations of colonial-apartheid South Africa, and one that accounts for the tragedies and injustices of conquest. Throughout this article, it is evident that the 1996 constitution has failed to live up to its expectations. Unlike this constitution, this article would like to believe that it has lived up to its expectations. Either way, it would be very difficult to find an appropriate ending to a writing of this kind, but what better way than to finish it with a slogan the PAC cherishes so much.

Izwe lethu-iAfrika!²⁰⁵

205 This is an isiZulu phrase, directly translated means ‘Africa, our land’. It is a PAC slogan which was used to affirm its claim over the South African territory.