

The Evolution of Constitutionalism in Conqueror South Africa. Was Jan Smuts Right? An Ubu-ntu Response

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Modu wa taba

Diphetogo tseo di tlisitsego boipuso mafatsheng a Afrika gase tsa fetola nyenyefatso ya bothopja le bokgoba bjo bo gapeleditsweng ke mafatshe a Bodikela bja mose wa mawatlle. Sebakwa ke sona se taodisong ye. Re ema ka la gore magoro kamoka a bophelo a tshwanetse go mothofatswa, botho ebe bjona motheo wa phedisano magereng ga batho kamoka “Afrika-borwa” le lefatsheng ka bophara. Moono wo o tshwanetse go ba karolo ya mananego kamoka a thuto go tloga thutong ya motheo go fihlela thutong tje phagamego.

Abstract

The ethically unjustified violence of Western colonisation continues in the economic and epistemic spheres in Africa, despite the reluctant concession by the Western coloniser to political independence. The constitutional histories of politically independent Africa are mainly the reaffirmation of the imposed domestication of the legal paradigm of the Western colonial conqueror. This is constitutionalism. With particular reference to conqueror South Africa, I take the “Union of South Africa” as the commencement of constitutionalism. General Smuts, later Prime Minister, was among three Afrikaner Generals engaged in the founding and the development of the “Union of South Africa.” He is selected here for his claim that the White colonial conquerors from Western Europe are endowed with superior intelligence. This can be used to continue the subjugation of indigenous conquered peoples into an indefinitely long future. This article challenges this claim because it is ethically untenable and fundamentally at odds with constitution-ness underlying the ubu-ntu legal paradigm. Given the evolution of constitutionalism in conqueror South Africa until the constitution of 1996, was Smuts right in his claim? In addition to the ethical indefensibility of this claim, it is argued further that the “epistemic

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decolonial turn” overlooks “decolonisation” as argued by Africans, and disregards humanisation—*mothofatso*—as the fundamental counter to the dehumanisation project of colonialism.

Keywords: constitutionalism; decolonisation; education; humanisation; *mothofatso*; ubu-ntu

Introduction

The ethically unjustified violence of Western colonisation continues in the economic and epistemic spheres in Africa, despite the reluctant concession by the Western coloniser to political independence. The constitutional histories of politically independent Africa are mainly the reaffirmation of the imposed domestication of the legal paradigm of the Western colonial conqueror. This is constitutionalism. With particular reference to conqueror South Africa, I take the “Union of South Africa” as the commencement of constitutionalism. The Anglo-Boer War is a crucial historical point in the advancement of Afrikaner Nationalism. It is one of the high points of the spirituality of the Afrikaner based on their belief in the God of Jesus Christ (Pienaar 1964, 86–87).

The great struggle ceased on May 31, 1902. Might had triumphed through ruthlessness, but only for a period; it had not succeeded in forcing unconditional surrender. The flags of the patriots went down, the flag of the arrogant, proud, invading conqueror rose in their stead, but the spirit of the land was undaunted. It lived on, and would triumph yet, against the usurpers who had evilly used the might of a nation for selfish and ignoble ends. (McCord 1952, 314–315)

It is odd that the Western colonial conqueror appears to date to have no time to imagine that the indigenous conquered peoples also have similar thoughts expressed in the above citation and do have an indomitable spirit urging them to pursue the return of their motherland lost to conquest in unjust wars. Instead of turning their minds in this direction, at least for reasons of good conscience, the Anglo-Boer War served as the impetus propelling the Afrikaner to strive towards the Republic of South Africa through the thorny path of conciliation with the English speakers in the country.

General Smuts, later Prime Minister, was among three Afrikaner Generals engaged in the founding and development of the “Union of South Africa.” He is selected here for his claim that the White colonial conquerors from Western Europe are endowed with superior intelligence, which can be used to continue the subjugation of indigenous conquered peoples into an indefinitely long future. This article challenges this claim because it is ethically untenable and fundamentally at odds with constitution-ness underlying the ubu-ntu legal paradigm. Given the evolution of constitutionalism in conqueror South Africa until the constitution of 1996, was Smuts right in his claim? In addition to the ethical indefensibility of this claim, it is argued further that the “epistemic decolonial turn” overlooks “decolonisation” as argued by Africans and disregards

humanisation—*mothofatso*—as the fundamental counter to the dehumanisation project of colonialism.

According to the son of Smuts:

It was perhaps the holistic concept of an integrated whole being larger than the sum of its constituent parts that gave him [Smuts senior] this idea [the idea of a Commonwealth]. No less was it this holistic vision that brought about the integration we now know as the Union of South Africa. (Smuts 1952, xiv)

Smuts junior grounds the “Union of South Africa” in the holistic philosophy of his father. However, McCord submits an argument to the contrary, that Smuts senior:

... was a Holist, not only in thought, but in action, which took him beyond the nationalists of all lands, and made him international. ... He saw South Africa as part of a bigger whole, if necessary, with the loss of personality and individuality. ... South African national sentiment had little appeal for him, it could form no part of his holistic thinking. (McCord 1952, 344)

It appears that Smuts junior was not aware of the above criticism of his father. His biography of his father was published in 1952, exactly the same year in which McCord’s book was published. Furthermore, McCord appears neither in the index nor the bibliography of Smuts junior’s biography of his father. McCord also does not mention Smuts junior anywhere in his book. What remains, however, is the contrast pregnant with tension between McCord and Smuts junior on the question of whether or not the Holism of Smuts senior was basic to his vision of “the Union of South Africa” and “South African Nationalism” in general.

It is odd that Smuts junior omits to mention that “the Union of South Africa” brought about by his father was, in fact, a “Union” exclusively and specifically for Whites, “*die verhouding tussen die blanke rasse onderling*” (Pienaar 1964, 221); the successors in title to conquest in the unjust wars of Western colonisation. Although the citation in italics refers to “White races”—in fact, the primary and virtually exclusive focus was upon the Afrikaner and English “races” as though there were no Portuguese, Spanish, Italians and Jews counting as members of the “White races.” The last-mentioned race

appears to have entered the Cape of Good Hope already in the second half of the 1600s.¹ There is yet another omission which Smuts junior shares with the author below.

It is affirmed that:

The foundations and the development of the Union of South Africa is the work of three Boer Generals, Botha, Smuts, Hertzog, taken in the order in which they became Prime Ministers of South Africa. ... The contribution of each was different, but all three were complementary to each other, and all three Republican generals must be remembered and honoured as the founders of the Union. (McCord 1952, 342)

It is noted with special emphasis that the above citation, nor anywhere else in the same text, does not mention directly and explicitly that:

So, by the right of conquest, entrenched by legislation, the principle of legal differentiation on racial grounds was the legacy upon which the Union of South Africa was constructed. (Hepple 1960, 760–813)

This is the omission which Smuts junior shares with McCord cited above. The point here is that after the “Union” constitution all the subsequent constitutions of conqueror South Africa built upon the ethically questionable “right of conquest.” None of them either questioned or repudiated this “right.” And so, interested historiography and history (“history”) with impugned objectivity cultivated and protected acquiescence to the original and fundamental injustice of acquiring the territory of the indigenous peoples by means of ethically unjustified use of force. In view of this and considering the “negotiations” prelude to the 1993 and the 1996 constitutions, it is pertinent to pose the question: Was Smuts, one of the founders of the “Union” constitution, right in his claim that the White colonial conquerors from Western Europe are endowed with superior intelligence, which can be used to continue the subjugation of the indigenous conquered peoples into an indefinitely long future? I now turn to an answer to this question.

1 See Herrman, L. (1955), “Cape Jewry before 1870,” which reads in part: “If there were some Jews in the seventeenth century who accepted Christianity at the Cape there were many more who were converted in Holland. That some of these Christian Jews took service with the Company and came to the Cape is strongly indicated. It was one of those periods, all too frequent in the history of the Jews, when thousands of Jewish refugees were on the move seeking any land where they might settle to escape persecution. Holland was the haven of religious freedom in Europe. It was in fact in the very year of the founding of the Cape settlement, 1652, that Menasseh ben Israel in Amsterdam published his work *The Hope of Israel*, dedicating it to the Parliament of England ...” In Saron, G and Hotz, L. (ed.) 1955, “The Jews in South Africa A History,” Cape Town, Geoffrey Cumberlege Oxford University Press, 2–3 (page range 1–16). The introduction to this book underlines the importance of “the Union of South Africa” thus: “This volume tells the story of the growth and development of South African Jewry from the earliest days until 1910. The year 1910 was chosen because the Union of the four Colonies in May 1910 was an important milestone in the history of South Africa, and by then the foundations of modern South African Jewry had been firmly laid (p. xi).

A Critical Investigation into Jan Smuts's Understanding of "the Intellectual Superiority of the White Man"

I propose to invite you to an epistemological tour of the former Prime Minister of conqueror South Africa, Jan Christian Smuts. Our principal tourist guide is his own son (Smuts 1952).² Smuts junior notes in the introduction to this book that some of the biographies about his father were either "deficient" or contained "distortions," which he is eager to rectify. Having lived in close contact with his father for at least "forty years," compared to outsiders from the family, he considered himself best qualified to write not just an ordinary book about him but an "eulogy." He made it plain that he does so without an "apology."³

I have selected two main tourist sites for this guided tour. One is on Smuts as the "oubaas" in his relationship with his farmworkers and, by extension, "the native" in general. This latter will be extended specifically as the second tourist site focusing on Smuts's idea of "the native" and "the African" problems.

I propose to examine these tourist sites critically, taking the cue from Smuts junior's robust observation that: "My father had *complete* confidence in the intellectual and administrative superiority of the White man. He was *convinced* that, come what will, these would see him safely through all trouble. It would also enable him to live indefinitely in a state of *semi-overlord* over the Blacks. He considered this mental superiority *the White man's greatest asset*" [my emphasis] (Smuts 1952, 307).

To this observation I posit the counter-thesis that the indigenous peoples conquered in the unjust wars of Western colonisation of "South Africa" are second to none in their ontological status as human beings. My definition and description of "indigenous peoples" in the preceding sentence include, ethically and historically, also the "Coloured" and the Indian. Concerning the last-mentioned population group, I take cognisance of the pertinent observation that "Given the impact of their life outside the workplace, it was perfectly reasonable for Indians to support the SACP and trades unions yet remain very 'Indian' in other facets of life. Indian militancy did not automatically lead to support for non-racial political alliances" (Vahed 1997, 36).⁴

2 For additional information on Smuts's biography, see Lionel, N. 2014, "A History of South African (SA) Psychology." *Universitas Psychologica* 13 (5): 1983–1991.

<http://dx.doi.org/10.11144/Javeriana.upsy13-5.hsap>; and for Smuts as an international statesman and the contradiction between this and his being a politician in conqueror South Africa, see Dubow, S. 2008, "Smuts, the United Nations and the Rhetoric of Race Relations." *Journal of Contemporary History* 43 (1): 43–77.

3 All the words in inverted commas in this paragraph appear at pages xiv–xv of Smuts, J. C. 1952, op.cit.

4 For tension pertaining to respect for the agreement between Natal, India and the United Kingdom on the status and treatment of Indians in conqueror South Africa, see Pachai, B. 1971, *The South African Indian Question 1860–1971*, Cape Town: Struik, 145–146.

In the estimation of Smuts junior:

But one thing is certain as the glorious sun that rises above our limitless veld—the name of Jan Christian Smuts, his deeds, his aspirations, his words and ideals, will live on as long as men take pride in great achievements, and will grow in stature with the passing of the years. To those who follow him he has bequeathed a glorious legacy. It is for history to prove whether we are worthy of this great gift. (Smuts 1952, xvi)

In light of the above observations, we now undertake our epistemic tour. Our first site is Smuts, the “*oubaas*.”

Smuts the “Oubaas”

There is no doubt that Smuts senior realised “great achievements.” It is so that some of what Smuts junior deems “achievements” will really be acknowledged as such. For others, however, the same objects of “achievements” may be considered failures. For example, his fixation on internationalism first and South Africa second invited censure, even from among his Afrikaner people (McCord 1952, 344–345). In response to a rumour that a statue of Smuts would be built next to that of Jan van Riebeeck, Malan suggested that the statue of Van Riebeeck should have its back facing the ocean and his face focused on looking at the interior of the country. In the case of Smuts, his back should face the surface of the country, and his face should fix its gaze on the ocean (Pienaar 1964, 229). Such was the censure of Smuts senior’s failure to place South Africa first.

From the point of view of the indigenous peoples conquered in the unjust wars of Western colonisation, it is more than doubtful that Smuts senior “has bequeathed a glorious legacy” precisely because he condoned the morally unjustified violence of Western colonisation and upheld the racism that went hand in hand with it. The fact that he was a continuator of this original injustice by laying down the foundations of “the Union of South Africa,” based upon the ethically unjustified “right of conquest,” can hardly qualify him as a man who left “a glorious legacy.” This is one of the basic reasons why the title of this article is stated in interrogative terms.

Smuts the “*Oubaas*”—his Relationship with his Farm Workers

In his own home and on his own farms he always took a kind and *patriarchal* view of his native wards. To Annie, the old *Bantu* servant who had worked faithfully with our family for many years, he left a small legacy in his will. He always took a keen interest in the native labourers on his farms, especially in the *old ones* who had been with him for years. These he took pleasure in greeting cheerfully “*môre booi*”; “*boy*” being an Afrikaans derivation having no connection with youthfulness. The natives, sensing an inherent kindness in their old *master*, treated him with *veneration* and worked steadily on the farm for years. It was the little piccanins, however, he preferred, with their shiny, shaven heads and big, dark eyes, and with their wide, white flashing smile. Their behaviour suggested to him the elemental wild *animal* of nature of which he was so

fond. Their eyes, in fact, held a surprised *doe-like* look that strengthened this feeling. At Christmas time he would ask my *mother* to prepare parcels of sweets for the various native families on his farms. He did this for as long as I can remember. Sometimes he would have a little *party* for them in the garden, and after listening to their *singing* or watching their *dancing* efforts, he would have cool drinks and refreshments *dispensed*. The little piccanins loved the parties, and I think they really loved their “*Oubaas* too” [my emphasis] (Smuts 1952, 312–313).

Like “*booi*,” the word “*piccanins*” does not appear in the many English dictionaries I have consulted. It is good that Smuts junior explained directly the former but omitted to do the same with the latter.⁵ The “*Oubaas*’s” idea of “*booi*” is akin to “*pais*” in Greek antiquity. The concept was used with particular reference to the relationship between master and slave.

While the child, however, has the potential, indeed the expectation, to obtain status, whether as a citizen or a wife, the slave does not have this same expectation; as long as a slave remains a slave, he or she will be forever without status and thus will never “grow up.” In this respect of social exclusion and expectation, and in the broader conception of the slave as perpetually in a mental and moral state of puerility, it was perfectly suitable to apply the word *pais* to all slaves, regardless of their age. (Wrenhaven 2013, 21)

On this reasoning, the native or the Bantu, in this case an older one, is never a senior in age, even to the unborn White. With sarcastic criticism, Caplin acknowledges that “*the Native boy ... may be old enough to be your grandfather*” (Caplin 1941, 154).

Smuts senior likened the Bantu or the “natives” to wild animals. But the likening was not a simple question of comparison. On the contrary, it meant that the Bantu or the “natives” were beasts without reason. Consequently, they did not belong to Aristotle’s famous definition of the human being as “a rational animal.” On this basis, Smuts frequently refers to the Bantu or the “natives” as “barbarian” or “uncivilised.” This dehumanisation of the Bantu, or the “natives,” underpinned by racism, is yet another reason why I decided to challenge Smuts senior.

5 The Collins Dictionary defines picanin thus: / (ˈpɪkəˌnɪn, ˌpɪkəˈnɪn) / noun. Southern African offensive a Black African child. The Wikipedia entry under the variant spellings “Pickaninny” (also picaninny, piccaninny or pickinninnie) suggests the word is pidgin for “small child” and may be derived from the Portuguese pequenino (13th century) (meaning: “boy, child, very small, tiny”) before stating that the word has been used as a racial slur for African American children or a perjorative term for Aboriginal children of the Americas, Australia or New-Zealand. <https://en.wikipedia.org/wiki/Pickaninny>. Outside of derogative connotations, which the article connects with trans-Atlantic slavery, what is clear is that it is a term that exclusively describes the children of those peoples that Smuts considered less than human.

The Ethical Significance of Smuts's Relationship with his Farm Workers

The Meaning of "Boy"

It is interesting that the appellation "boy" or "girl" is alive and well, even in the "new South Africa." The "master" in the White has elevated itself to the status of a god by appeal to "the divine right of white skin" (Caplin 1941, 155) in its relation with the natives and so demands "veneration" from them. Indeed, the word "*boo!*" is an Afrikaans term having no connection with age. It is intimately connected to the "*pais*" of ancient Greece. It is a veritable continuation of the Western tradition of master and slave relationship.

The "*Oubaas's*" idea that the native looks like a "wild animal" also has deep roots in the history of slavery in the West.

While *doulos* can refer both to slaves and to anyone who was considered in some way slavish, the word *andrapodon* seems more straightforward in that it was used specifically in the context of slavery. ... Due to its relationship with *tetrapodon*, literally "four-footed thing" (livestock), *andrapodon*, or "man-footed thing" is by far the most potent illustration of the conception of the slave as animal-like. ... Regardless of how a person might have fallen victim to slavery, the word [*andrapodon*] was appropriate for all slaves as it expressed the ideological connection that Greeks made between slaves and animals. (Wrenhaven 2013, 13;15)

It is pertinent to note with emphasis that it is the "thing" and not the human being that the *andrapodon* calls to mind. This is consistent with the logic of slavery, which demands the dehumanisation of the other, considering them as sub-human only and thus available for enslavement. The "*boo!*," or the native of the "*Oubaas*," is an animal by nature. But the "*Oubaas*" construes the "*boo!*" as a "wild animal" by virtue of its ontology. "*Boo!*" is deemed to be ontologically different and inferior to the White, positioned at a higher level of animality because of its rationality. This is the imaginary ontological hierarchy entertained either openly or discretely by many Whites, even today. The "*Oubaas*" and his family so loved the native wild animals, objects available for enslavement, that they remained blithely unaware of their deep immersion into the epistemologies of ignorance (Alcoff 2007, 39–57; Code 2007, 213–229; Mills 2007, 13–38; Outlaw 2007, 197–211; Sullivan and Tuana 2007, 13–38).

The Meaning of "Girl"

"Girl" is the epistemic complement to "*boo!*" in the master and slave culture in conqueror South Africa. I do hereby testify that even in the "new South Africa" today, one hears the free and malignantly innocent use of these words in taxis and buses and trains (including the Gautrain) by those thus baptised by the cultural heirs of the "*Oubaas*." In fact, "*Oubaas*" the male, is sometimes referred to in the native's language as "*Makhulu baas*." Yes, there is even "*groot baas*," referring to adult White males and "*klein baas*" or "*klein baasie*" referring to young White males. The female Whites are

known as “*groot*” or “*klein missies*” according to the age group to which they belong. For the White inhabitants of the “epistemologies of ignorance,” all Africans are “boys” and “girls” regardless of their age (Mulugeta 2007, 18–19).

The master and slave relationship lies hidden in the “*booï*” and “*girl*” language in conqueror South Africa. It is the adamant refusal to call the native even by its Christian name, let alone its original mother tongue name given to it by its elders. This resolute determination to refuse to call the native by name is the continuation of both an epistemology and a practice, deeply rooted in slavery in Western antiquity.

The use of names and/or titles, were [sic] often omitted if the addressee was considered to be inferior. Consequently, when free persons speak to slaves, the slaves’ names were often omitted and the slaves are just given simple commands ... simple orders also illustrate that the primary function of the slave was to be an object of command. ... More importantly, perhaps, choosing to address or not to address one’s slave by name is indicative of the power the master has over his slave. Just as the master has the authority to impose a new identity onto his slave by replacing his or her original name with a name of his choice he also has the authority to deny his slave any name at all. By not acknowledging a slave’s name, the slave is deprived of an individual identity and is relegated, a nameless entity, to a subhuman status. (Wrenhaven 2013, 39–40)

From “Boy” and “Girl” to “Thing”

Our forebears heard *booï* many times over from the ancestors of Smuts.⁶ Today, we continue to hear it frequently from the cultural heirs of Smuts. The “boy” and the “girl” are transmuted into a “thing.” The transmutation reads like this in the Afrikaans language: “*Die goed wil nie werk nie*” (The things do not want to work); “*Die goed moet werk*” (The things must work). Thus, *booï*, *girl* or native in conqueror South Africa is reduced to a “thing.” It belongs to “*the law of things*” and not “*the law of persons.*” Smuts’s watchful eye over the dancing “wild animals” was actually the celebration of White supremacy predicated on the false premise that the *booï* was not on an equal ontological plane with the White master. His benign contempt for the dancing “wild animals” was undoubtedly unethical. The 1996 constitution of conqueror South Africa continues Smuts’s benign contempt by its condescension to confer on all that is native the status of “customary law” and “traditional leadership.” By this provision, the native “wild animals” may enjoy their dance for as long as it is not in conflict with “the constitution.” This injustice to the indigenous conquered peoples affirms Smuts’s

6 *Booi*, “boy” was widespread in former British colonies. We find it, for example, in Bangladesh. In Yunus, M. 2007, *Banker to the Poor*, London, Penguin Books we read; “The *office-boy* brought us tea and biscuits” (p. 74); and “Our bank workers, unlike our managers, do not have master’s degrees. They have only two years of college education. ... If they were to enter government, they might become junior clerks or office boys, and they would be at the bottom of the office hierarchy” (p. 164). “Office boy” like “tea girl” are very familiar expressions in conqueror South Africa, even after the 1996 constitution. Their meaning is as clear and direct in conqueror South Africa as it is in Bangladesh: those “at the bottom of the office hierarchy.” They are often much older in age than their line managers. The ancient Greece “*pais*” is alive with us today.

mythology that the natives are condemned to ontological inferiority based on a pre-established metaphysical hierarchy.

Did the Farm Workers Reply to Oubaas's Thinking About Them?

It is interesting that Smuts junior does not mention the response of the farm labourers to the “*môre booi*” greeting of his father. This raises the question: In which language did the natives respond to his father’s greeting? A related question is whether or not Smuts and his family actually knew the vernacular of the farm labourers. Living in the comfort zone of the “epistemologies of ignorance” was unlikely to prompt the Smuts family—like so many other White families—to learn the vernacular language of their farm domestic workers or the miners. This disincentive to learn the vernacular of the labourers rests upon the epistemic social structure that renders the natives invisible and inaudible, except when they must be seen to give them commands that they must hear and obey. No wonder then that when they sang and danced, what they evoked was a strong and pleasant image of a “wild animal.” The social structure of epistemic blindness and deafness meant that the natives could not be seen as human beings. Their songs and dance could not be interpreted by Whites as a significant existential moment pregnant with the possibility of the ascent to higher levels of human consciousness.

What is sure, though, is that these native workers would readily understand and respond to “*dumelang*,” “*lotshani*” or “*sawubona*.” These words of salutation, especially the last mentioned, translate literally into “we see you.” I have provided an analysis of this salutation elsewhere (Ramosé 2016b, 78–83). Suffice it to state here that “*sawubona*” is the epistemic demolition of the socially structured invisibility and inaudibility of the *boois* and the *girls*.

Smuts and the Constitutional His-story of Conqueror South Africa

“In South Africa ... we started with the older system of mixed constituencies in the Cape Colony, and this system is embodied and entrenched in the Act of Union which forms *our Constitution*” [my emphasis] (Smuts 1952, 311). It is significant that Smuts uses the expression “our Constitution” with the capital letter “C.” According to the conviction of Smuts, “our Constitution” draws its inspiration and intention from “our Western civilisation,” “*our European civilisation*” and “*our Christian civilisation*” [my emphasis] (Smuts 1952, 351–352). His father upheld a similar conviction. For Smuts junior, the possessive “our” referring to the “Constitution,” excludes the indigenous peoples conquered in the unjust wars of Western colonisation. The exclusion is simultaneously epistemic and practical. In its practical aspect, it is manifested by the unilaterally contrived solutions to the unfolding self-made “native problem.” I will substantiate this in the following paragraphs.

The “Union of South Africa”

The South Africa Act of 1909 was passed by the British Parliament. It paved the way for the establishment of “the Union of South Africa.” The “Union” was established after

the representatives of the four former British colonies had come together in the National Convention and agreed to its formation.

It may be described as a typically “Westminster” constitution: ... The South African system departed from the Westminster model in two important respects. First of all, with very few exceptions, *the franchise was restricted to Whites*. ... Secondly, the South Africa Act contained three “entrenched” provisions [sections 35, 137 and 152], a phenomenon altogether unknown to the British system. These provisions related to the non-White franchise in the Cape province and to the equality of English and Dutch as official languages; ... These sections were to give rise to *the most important constitutional crisis in South African constitutional history—the Coloured vote issue of the 1950s*. [my emphasis] (Hosten et al. 1995)

The observation of the learned authors Hahlo and Kahn (1960 120–121) is that the two issues mentioned were affirmed 35 years before the publication of their book. It is also significant that the learned authors do not mention that:

The Boers then claimed *right of conquest* to the former Ndebele kingdom and established their main settlements north and south of the middle Vaal. ... In a series of wars in the 1850s and 60s the Boers of the “Orange Free State” gradually occupied the lowlands and reduced the size of the Sotho kingdom. In 1868 Moshoeshoe was driven to ask for British annexation. This saved the remnants of the Sotho kingdom from complete annihilation. But the most productive and valuable part of the kingdom had already been lost to Boer *conquest*. [my emphasis] (Shillington 1989, 271–272)

These ethically indefensible acts of conquest, by which “the Boers” acquired territory and exercised sovereignty over it by virtue of the ethically untenable “right of conquest,” were a repeat of what Van Riebeeck did to the Khoikhoi people.⁷ The genealogy of conquest in the unjust wars of Western colonisation originates from Van Riebeeck. It comes as no surprise then that Heppel submits, with superb justification, that:

... by the right of conquest, entrenched by legislation, the principle of legal differentiation on racial grounds was the legacy upon which the Union of South Africa was constructed. (Heppel 1960,795)

Subsequent Constitutions of Conqueror South Africa

The Republic of South Africa Constitution Act of 1961 is the successor in title to the Union of South Africa. It did not repudiate “the right of conquest, entrenched by

7 When the Khoikhoi sued for peace and demanded the return of their land invaded and occupied by Van Riebeeck, he replied: “The country had fallen to our lot, being justly won in defensive warfare and ... it was our intention to retain it.” Troup, Freda, 1975, *South Africa An Historical Introduction, Harmondsworth*, Penguin Books, 53. It is incomprehensible that Van Riebeeck considers it proper to appeal to a “defensive warfare” when in fact none of the three ships, *Dromedaris*, *Ryger* and *Tyger* that delivered him and his crew to the settlement of the “Cape of Good Hope” carried land cargo off-loaded onto a country later named South Africa by his successors in title to conquest in an unjust war.

legislation.” Instead, it condoned and protected it by tacit admission. The constitution of 1983 replaced that of 1961. Two special features of this constitution come into prominence. One was that it was an extension of the franchise to the “Coloureds” and the “Indians.” This constitutional dispensation is carefully described as “a racial federation” (Booyesen and Van Wyk 1984, 4), presumably on the contentious claim that neither the “Coloureds” nor the “Indians” held any title to the territory named South Africa. The second feature of this constitution is that it did not repudiate the ethically indefensible right of conquest.

The 1993 constitution dissolved the “racial federation” and functioned as the bridge to the 1996 constitution. It also did not repudiate the ethically indefensible right of conquest but protected it by tacit admission. By virtue of the same tacit admission, the constitution of 1996 reaffirmed the ethically unjustifiable right of conquest. It reaffirmed and sealed this original injustice by a change of course in the constitutional history of conqueror South Africa through the adoption of constitutional supremacy and the burial of parliamentary sovereignty. This is in sharp contrast to the negotiations for “the Union” constitution because “there was no discussion of the testing right of the courts and no express mention of it in the constitution.” Yet, “the testing right of the courts” was a matter of discussion and ultimately became consolidated by the acceptance of the supremacy of the constitution. This is a fundamental discontinuity in the constitutional his-tory of conqueror South Africa. Was this at all necessary? If the answer is in the affirmative, why then is *ubu-ntu*, the philosophy of the indigenous peoples conquered in the unjust wars of Western colonisation, completely and totally absent from the 1996 constitution? Does the constitution not belong to them also?⁸

The Constitutional “Crisis of the 1950s”: A Defence of the Switch to Constitutional Supremacy

The constitutional “crisis of the 1950s” referred to above erupted in a country constructed upon the ethically indefensible right of conquest. It is a reference to the two famous Harris cases. The judiciary exercised its duties in accordance with the Western legal paradigm. It was epistemologically Western. According to skin colour-based hierarchical racial thinking, the judiciary adjudicating the Harris cases was wholly and exclusively White. Of interest is the fact that these cases are offered as examples of the abuse of parliamentary sovereignty. To avert this abuse, so the proponents argue, it is politically imperative to relinquish parliamentary sovereignty and replace it with constitutional supremacy in the “new” South Africa. But the defenders of this shift provide no answer to the ethically self-evident questions, namely: i) Why was this replacement not made at the construction of the 1983 constitution? ii) Why should the indigenous peoples conquered in the unjust wars of Western colonisation be

8 This question indeed includes the “Coloureds” and the “Indians” in terms of the author’s distinction between the indigenous conquered peoples and, the conquered peoples. Ramosé, M. B. 2007, “In Memoriam Sovereignty and the ‘New’ South Africa.” *Griffith Law Review* 16 (12): 320–321 (page range 310–329).

admonished and even punished for the interpretation of the law by conquerors-only White judiciary? The shift to constitutional supremacy is the undying urge of the successors in title to the unjust wars of Western colonisation to protect and promote the ethically indefensible claim to the ontological, let alone the intellectual superiority of Whites over Blacks.

Furthermore, the defenders of the 1996 constitution brandish the “Bill of Rights” contained in it as its most precious jewel. It is worth recalling that the British abolition of slavery happened in the absence of a constitutionally entrenched “Bill of Rights.” The abolition affected the Dominion of South Africa. It was one of the reasons for the “Great Trek” into the interior of the country, evidently in search of slaves (Shillington 1989, 266–267). In addition, few care to ask why the proposal for a “Bill of Rights” argued for in the 1960s received only a lukewarm welcome but was at best rejected outright. In his study of the his-story of civil rights in conqueror South Africa, Davenport observed that the “foundation fathers of the Union” erred in opting for parliamentary supremacy as a constitutional principle for the country. The first error was that the constitution was unrepresentative because it excluded other population groups in the country. The second was that in practice parliamentary supremacy fell into a sterile coma because the legislature acted with “singular lack of restraint” (Davenport 1960, 13). He argued for the introduction of a Bill of Rights to remedy the situation. However, his voice fell on deaf ears.

A Bill of Rights contained in a constitution based upon the ethically untenable right of conquest is a conceptual and practical denial of the right to life of a Bantu. It is a gross violation of these peoples’ right to life because of its repudiation of the inseparable connection between land and life. The adamant commitment of the successors in title to territory acquired in the unjust wars of Western colonisation is a reaffirmation of Van Riebeeck’s immoral vow asserting the intention to keep for ever land that was never downloaded as cargo from any of his three ships that landed in the Cape of Good Hope. This reaffirmation undermines the Bill of Rights in the 1996 constitution.

The claim that the 1996 constitution is among the “best” in the world rests also on the “Chapter 9 institutions” that it provides for. It is a questionable presumption that once the institutions are in place then everything must work properly to preserve the existing political order. This is commitment to transcendental institutionalism (Sen 2010, 8), giving priority to institutions instead of conceding primacy to the actual living conditions of the conquered peoples in their relation with the successors in title to the original injustice of Western colonisation. I will revert to this in the discussion on constitutionalism and constitution-ness.

The Coming into Being of the Republic of South Africa

Conqueror South Africa ceased to be a British colony when it attained republican status in 1961. According to Kahn (in Hahlo and Kahn 1962), “It is now accepted that the Statute of Westminster [sic] 1931, and the Status of the Union Act, 1934, resulted in

the abdication of the powers of the United Kingdom Parliament and cut the legal connection between Britain and South Africa.” Confident that this was the position, the Union Parliament passed the Constitution Act, which had taken over as part of South African law the relevant sections of the Statute of Westminster and section 2 had provided:

The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union unless extended thereto by an Act of the Parliament of the Union. None of the provisions of the Statute of Westminster is repeated in the Constitution Act; ... To this extent it can with justification be claimed that the old link with Britain has been cut. (Hahlo and Kahn 1962, 12–13)

The two immediately preceding citations leave no doubt that conqueror South Africa was decolonised. Its attainment of Republican status in 1961 was a reaffirmation of this fact. From this point onwards talk of decolonisation could be meaningful only if it referred to the epistemic and economic spheres. However, such talk is virtually idle since the Afrikaners had succeeded in establishing linguistic and cultural equality between themselves and the British. Both Afrikaans and English were recognised as the official languages. The Union Jack was dropped as the official flag of the country. Instead, it was allocated a tiny space in the specification of the new flag of the Republic of South Africa provided for in Article 5 of the Constitution of the Republic of South Africa, 1961 and Article 4 of the Constitution of the Republic of South Africa, 1983.

On the other hand, “God Save the King” was replaced irrevocably by “*Die Stem van Suid-Afrika*” as provided for in Article 6 of the Republic of South Africa Constitution Act, 1961 and Article 5 of the Republic of South Africa Constitution Act, 1983. Afrikaners already had their own distinct and separate cultural groups to the extent that their youth maintained distant and subtly hostile contact with their English counterparts (Lambert 2000, 209–211).

Furthermore, the Afrikaners and the English, together with the other White tribes of conqueror South Africa, were heirs to the Western epistemological paradigm. No doubt there are variations and even tensions within this paradigm. Yet it continues to make sense to write⁹ and speak about the West as one, even though French philosophy, for

9 See Singer, M. G. (Ed.), 1985, *American philosophy*. London: Cambridge University Press. The editor argues thus in justification of the existence of American philosophy: “... there is some significant connection between the philosophers in question, identified somehow and on some criterion American, and the American scene, culture or setting. ... There is no unitary tradition in American philosophy. There is not even the illusion of one. There is complex interaction of heterogeneous, even heteronomous, traditions. In that respect even if in no other the path of American philosophy has run parallel to that of American immigration, and it is not too long ago that the bulk of American ideas were imported, along with the bulk of its population,” p. 4–5.

example, is not a hundred per cent German or British philosophy. So, it is that the constitutional his-story of conqueror South Africa until the 1996 constitution is a series of the triumphs of Western epistemology over that of the indigenous conquered peoples. Does this mean that Smuts was right in his claim to White intellectual supremacy over the indigenous conquered peoples?

Was Smuts right?

Up to this point, it seems necessary to admit that Smuts was correct in his questionable conviction that the “intellectual and administrative superiority of the White man ... would see him safely through all trouble. It would also enable him to live indefinitely in a state of *semi-overlord* over the Blacks” [my emphasis] (Smuts 1952, 307). The reason for the admission is that from the commencement of the constitutional his-story of conqueror South Africa until the 1996 constitution, it is the dominance of the epistemology of the successors in title to conquest in an unjust war and the prominence of their unjustly acquired wealth,¹⁰ which permeate all the spheres of life in the country. To claim a “breakthrough”¹¹ with regard to the circumstances pertaining to the “negotiations” leading to “the new” South Africa is an inexcusable anticlimax.

I consider Smuts’s conviction questionable for three reasons. First, because it is based upon the denigration of his farmworkers and, by extension, the “natives.” This basis is ethically repugnant. The second reason is that his conviction is based on the long-discredited “scientific racism.”¹² Third is that it is an inadvertent precursor of *The Bell Curve* (Herrnstein and Murray 1994) and the *Bell Curve Wars* (Fraser 1995). For these reasons, the aspiration to non-racialism in the preamble of the 1996 constitution turns out to be an ironic questioning of the enduring dominance of conqueror epistemology permeating the constitution. It is the affirmation of Smuts’s conviction about the “intellectual superiority of the White man.” And so, the question may be posed: To whom does the constitution belong; a constitution which excludes ubu-ntu completely and totally?

To whom Does the 1996 Constitution Belong?

My qualified admission that Smuts was right runs directly counter to Ngeukaitobi’s well-known book, *The Land is Ours* (2018). Its central thesis is that “constitutionalism” was born in conqueror South Africa through the political activism of the South African Native National Congress (later renamed African National Congress). This is not to deny the role of the African National Congress in the struggle for the liberation of the downtrodden and oppressed under Western colonialism. Rather, my aim is to identify

10 See Terreblanche, S. 2002, *A History of Inequality in South Africa 1652–2002*. Pietermaritzburg: University of Natal Press.

11 See Maharaj, M., and Z. P. Jordan. 2021, *Breakthrough: The Struggles and Secret Talks that Brought Apartheid South Africa to the Negotiating Table*. Cape Town: Penguin Books.

12 See Gould, S. J. 1981, *The Mismeasure of Man*. Harmondsworth, Middlesex, England: Penguin Books, p. 39–42.

defects in the reasoning of Ngcukaitobi (2018) in light of the facts he puts forward in his book.

Almost all of the six “first Black lawyers” discussed in his book were activists in this organisation. The thesis is unsustainable for five reasons. First, out of the six pictures on the front page cover of his book, “four of the first Black lawyers” appear wearing wigs. The wigs are the symbol of the epistemological dominance of the English legal paradigm. They are the reality of the practical subservience to this paradigm. Second, the first part of the title, *The Land Is Ours*, receives no focused and sustained attention in the book. As a result, it stands out as a spontaneous exclamation mark irrelevant to the substance of the book. Third, Ngcukaitobi invokes the *Magna Carta*, one of the important texts in English constitutional history, and holds it as the model for “Our *Magna Carta* Monument” (Ngcukaitobi 2018, 297). Fourth, he underlines his fixation on the Western legal paradigm with the affirmation:

And now, inspired by the universal vision of the Atlantic Charter, the ANC saw the opportunity of reimagining the foundations of the legal system. Leading African intellectuals would be approached to draw up South Africa’s first Bill of Rights. For Nelson Mandela, the Charter reaffirmed “faith in the dignity of each human being and propagated a host of democratic principles.” While “some in the West” saw the Charter as empty promises, Mandela said, “those of us in Africa” were inspired by its terms. Directly arising from the Atlantic Charter, South Africa’s first Bill of Rights was thus born. (Ngcukaitobi 2018, 167)

Sibanda (2021) mounts a devastating critique of Ngcukaitobi’s interpretation of the Atlantic Charter. In addition, we hear and read that the written Bible is the direct result of “inspiration” from “God.” We also hear and read that the Cardinals in the Roman Catholic Church are “inspired” by the “Holy Spirit” to select the next Pope from their midst. There seems to be no room for deviation from “inspiration.” Ngcukaitobi emphasises this point with triumphant emphasis: “Directly arising from the Atlantic Charter, South Africa’s first Bill of Rights was thus born.” Because of this “direct” unmediated assimilation of the legal paradigm of the West, “South Africa’s first Bill of Rights was thus born.” The Bill could not have been anything other than the unadulterated reproduction of the Western legal paradigm.

The above is the basis for my fourth reason for casting doubt about the philosophical validity of Ngcukaitobi’s thesis. Fifth is that Ngcukaitobi is completely silent about the epistemology imbibed by the “first Black lawyers” and everybody in the long line of his-story of education under subjugation up to himself and beyond. He does not bring into prominence in his book a single example of his protagonists drawing from the well of the indigenous conquered people’s knowledges of political organisation and governance as the basis for “constitutionalism.” His disregard for the epistemological dimension is like the fastest submarine sailing in the driest ocean. An extended criticism of Ngcukaitobi’s book is underway. For the present, I conclude on the basis of the five

reasons that Ngcukaitobi's central thesis is philosophically unsustainable and historically fragile.

A Critique of the “Epistemic Decolonial Turn” in the Constitutional History of Conqueror South Africa

Epistemologically, there was no “decolonial turn” in the constitutional his-story of conqueror South Africa. This is because the basic epistemology of British constitutionalism, such as the adoption, adaptation and continuation of the Westminster system was retained, with modification, to this day. In the economic sphere, the problem of the “poor Afrikaner” was solved particularly at the expense of the constitutionally absent “natives,” “Coloureds” and Indians. The Afrikaners had not succeeded in dislodging what Moodie (1975, 15–18) described as Hoogenheimer (a reference to Oppenheimer) from its solid and firm grip on the wealth of the country. However, Du Toit's book shows that an uneasy economic truce prevails between Hoogenheimer and the Afrikaners (Du Toit 2019). There was no fundamental epistemological change when the 1983, 1993 and 1996 constitutions were enacted. In view of this, what is the meaning and relevance of “the epistemic decolonial turn” as espoused by Ramon Grosfoguel for conqueror South Africa? I have already addressed this question extensively in the published article I have already referred to. For the purpose here, I apply my arguments in that paper to an epistemological-historical critique of the constitutional his-story of conqueror South Africa.

Critique of the Constitutional His-story of Conqueror South Africa

When Britain conceded republican status to conqueror South Africa, she condoned the expropriation of land by unjustified use of force. This concession prevailed despite the already circulating strong rumour of a declaration asserting that “South Africa belongs to all who live in it, Black and White.” From the perspective of *ubuntu*, *Molato ga o bole* (Sesotho), *Ondjo kai uoro* (Herero), *Mhosva haiori hairovi* (Shona) and *Ityala ali boli* (IsiXhosa), accordingly, the Western legal principle of prescription is unknown and untenable in ubu-ntu African law. Thus, *Izwe lethu!* (the land is ours) is the ethical demand for the restoration of unencumbered, wholesome title to territory to its original owners from time immemorial. This is one unfinished business of the liberation struggle. The British decolonisation of conqueror South Africa provides no relief in this regard. Instead, it enables the continuing dehumanisation of the indigenous peoples conquered in the unjust wars of Western colonisation.

I have already suggested that for Smuts, “our Constitution” excluded the “natives,” “Coloureds” and Indians. I now submit that Smuts's position is reflected in all conqueror constitutions after his time. According to Gibson and Comrie:

The basis on which the modern South African law has arisen is the Roman-Dutch law. This legal system resulted from the combination of principles of Roman law and Germanic law in the Netherlands and was brought here, of course, by the early settlers.

But the Roman-Dutch common law has since that time been greatly changed by legislation and judicial decision. And in the process of development the English law has played a large part. Particularly is this true of mercantile law. The term “Roman-Dutch law” to describe the modern law is, therefore, misleading and best be avoided. (Gibson and Comrie 1975, 1)

The learned authors do not deny nor do they question ethically “the basis” upon which “the modern South African law” rests. Hahlo and Kahn do the same in their monumental exploration of the various Western sources of the law in conqueror South Africa (Hahlo and Kahn 1968). The disregard of the ethical question by these three learned authors is the reaffirmation of Western legal philosophy (Hosten et al. 1995, 1) as the primary and exclusive epistemological paradigm underlying the law in conqueror South Africa.

This exclusive and deadly possessiveness of the constitution was, in my time, complemented by the expression “our law” in the University of South Africa study guides on constitutional law. They also reaffirmed the Western epistemological paradigm as the basis of the law in conqueror South Africa. Tutorial letter number 107/1985 reads thus on page 2, number 2:

We must go back further than the Constitution Act because this act is not the sole source of our constitutional law. Other sources are: South African and English legislation and case law, Roman-Dutch and English common law, and conventions. English common law, in particular, forms the basis of a great part of our constitutional law. We have to acquire a knowledge and grasp of English constitutional development because our parliamentary system (the Westminster system) is based on English law. (Tutorial letter number 107/1986 is a verbatim repetition of the already cited 1985 one)

I plucked up the courage to write to the professor responsible for the course, urging him to reconsider the expressions “our law” and “our constitution.” My argument was that it was not obvious that all students were at ease with these expressions. Some students had reservations about these expressions since they were morally and epistemologically injurious. I am still awaiting a formal response to my letter, though the professor has died recently. In the meantime, I passed my assignments and qualified to sit for the examinations. What is certain, though, is that since that letter, I have never passed three successive examinations in constitutional law. The fourth examination I wrote in the embassy of conqueror South Africa in Brussels. To this day, I am awaiting the results of that examination. So it is that the “cognitive empire” (De Sousa Santos 2018)¹³ of conqueror South Africa brooks neither inquiry nor challenge to its unilaterally established truth in the educational curriculum. It seems pertinent to observe then that “Teacher and student with a critical pan-epistemic orientation” (Ramose 2016a, 546–555) is a reality of the future in the country currently misnamed South Africa.

13 Boaventura de Sousa Santos, 2018. *The End of the Cognitive Empire the Coming of Age of Epistemologies of the South*. Durham and London: Duke University Press.

With courage equal to those where angels fear to enter, the learned judge Dennis Davis (Davis 2018a, 6) takes the liberty to describe Terblanche Delpont, Joel Modiri and the present author as “the denigrators” of the constitution of conqueror South Africa. To the category of “the denigrators” the learned judge includes also Tshepo Madlingozi and, Ramose again, in these terms:

It is high time that judicial education in this country allows the judiciary to pause and jurisprudentially reflect on the kind of legal system which it wishes to construct for future South Africans. Failure to do so can only lead to a form of legal nihilism which is already beginning to percolate through the halls of the legal academy. (Davis 2018b, 30)

The learned judge refers to Madlingozi’s article, “Social Justice in the Time of Neo Apartheid Constitutionalism,” and Ramose’s “In Memoriam: Sovereignty in the New South Africa” (2007). It is only with difficulty that the reader will find the Ramose article the learned judge referred to. This is because the title of the article is incorrect as the “in” is a mysterious substitution of the “and” and the “new” is not naked but clothed in inverted commas in the original title. The correct title is: “*In Memoriam Sovereignty and the ‘New’ South Africa.*” Another material error is that the learned judge directs the reader to “*Griffiths*” instead of Griffith.¹⁴ Looks like the learned judge did not suspect that *iudicis est lex dicere sed non dare*—the duty of the judge is to interpret and not to make the law—could apply even to the presentation of bibliographical details. The learned judge evidently alleges that “the denigrators” are a ghostly intrusion into the sacred terrain of the colonial conqueror’s legal education.

Perhaps, by some kind of mystical revelation, the learned judge writes subsequently with particular reference to Modiri and Madlingozi’s criticisms of the conqueror constitution that:

These critical voices call seriously into question the possibilities of which many spoke when the Constitution passed into law ... (Le Roux and Davis 2019, 17)

When, indeed, did these “denigrators” of the conqueror constitution renounce their refusal to venerate it as a god? Why is it that their denigration is now converted into a “critical voice” deserving to be heard? A fully-fledged commentary on some of the writings of the learned judge is underway. Suffice it to state here that he is an ardent adherent to “our law” (Davis 1999, 19) and “our Constitution.” (Le Roux and Davis 2019, 18)

The Preamble to the 1983 constitution goes even further than Smuts by identifying the “God” it refers to as the “Christian” God. It is this “God” who inspires the constitution to strive towards the realisation of “Christian values” and to uphold “civilised norms”

14 Incomplete reference details are also provided by the learned judge, for example, he neglects to specify the Number 2 within the 16th Volume.

(om Christelike waardes en beskaafde norme te handhaaf). By this, the preamble situates the constitution squarely and firmly into the doctrine of discovery.¹⁵ The doctrine was held to be the legal licence to colonise in pursuit of profit, to “civilise the barbarians” and to “Christianise the pagans.” The present writer is researching the recent reports that this doctrine has been repudiated.¹⁶ For now, I observe that the distance between 1983 and the 1993 interim constitution is so very short that it is legitimate to wonder if the successors in title to conquest in an unjust war have so suddenly gone through an intellectual revolution, renouncing irrevocably the doctrine of discovery.

The University of South Africa Constitutional Law Tutorial letter 106/1989 states explicitly that constitutional change in conqueror South Africa has always occurred on an “evolutionary” basis without any fundamental break with the past. The effect of this is the preservation, as well as the continuation, of the prevailing epistemological paradigm. Number 2 of the tutorial letter (just referred to) reads as follows:

Students often ask whether it is necessary to study all the historical detail contained in the study guide. In this regard we must mention the evolutionary nature of our constitutional law, of which the origins are to be found in English and Roman-Dutch common law. They are still sources of our constitutional law today. There has been a gradual change over the years, with the adaptation and extension of the existing system, but no break with the past has ever taken place in the juridical sense ...

Considering that this was written after the 1983 constitution, it is difficult to uphold the conclusion that any “epistemic decolonial turn” occurred in conqueror South Africa’s jurisprudence. Does the 1996 conqueror constitution fare better on this count? Before answering this question, it is important to turn to a related matter concerning the constitutional his-story of conqueror South Africa.

For this, I turn again to the University of South Africa Constitutional Law Tutorial letter 104/1989. Number 1 of this tutorial letter is a discussion on the “main features” of the constitution of 1983. One of the features discussed is the provision for “own” and “general affairs.” The tutorial letter states that the underlying rationale for this provision is “the ethnic diversity of the country.” According to this letter, “Although it has been said that the Constitution is the first attempt to break away from this ethnic basis, the fact is that the traditional ethnic basis of the South African constitutional law has been retained...”

An important complement to the “ethnic basis” is found in the argument that:

15 See Miller, R J. 2011. “The Future of International Law in Indigenous Affairs: The Doctrine of Discovery, the United Nations, and the Organisation of American States.” *Lewis and Clark Law Review* 15 (4): 847–922.

16 See for example Bollettino, Holy See Press Office, Thursday 30.03.2023. “Joint Statement for the Dicasteries for Culture and Education and for Promoting Human Integral Development on the Doctrine of Discovery.”¹⁶

There is an alternative federal concept which has no ethnic or racial basis but is essentially based on the assumption that such a structure can be based on a subdivision into units of community of interest. This is a geographic federal structure to which is ascribed the immediate advantage that it apparently overcomes the illegitimacy of systems based on either racial or ethnic distinctions. ... If the geographical federal policy is to be found to be practically acceptable it would require considerable further detailed investigation to relieve real fears which exist about it. Without proportional representation it would lead, on the present constituency basis, to a possible total abrogation of “White” power and it is often perceived in this way. ... Nevertheless it would require a definitive method of defending minority rights in order to prove acceptable. It does not have the assurance ... of ensuring that there would always be a minority representation at executive level. (Buthelezi Commission 1982, 111)

Although this citation does not identify those gripped by “fears,” the political his-story of conqueror South Africa fills in the omission. It is from the same his-story evident that the fear is not restricted only to “Natal”; it is spread along the breadth and length of conqueror South Africa. “*Swart gevaar*,” translating into “Black danger” is a popular expression in any corner of the country. It requires no explanation. Accordingly, it is pertinent to ask if the 1996 constitution deals with this fear. It is to this that I now turn.

The “general affairs” provision of the 1983 constitution is now consummated into constitutional supremacy. The adoption and endorsement of constitutional supremacy is ethically and epistemologically questionable because it is an unwarranted submission to the historic myth of White “intellectual superiority.” It is—to borrow from Boaventura de Sousa Santos—a concession to the perpetuation of the Western “cognitive empire” in conqueror South Africa. There is no contradiction or necessary conflict between democracy and the absence of constitutional supremacy, as the British constitutional history shows.

The option for constitutional supremacy is politically questionable because of its aversion to parliamentary sovereignty based on the principle of popular sovereignty. The voice of the people is no longer the voice of “God,” as the theologisation of the constitution of conqueror South Africa would like us to believe. Having identified implicitly or explicitly the Christian “God” as the *locus theologicus* of the deification of the constitution, it is common—even in the case of Smuts—to write the word constitution with the capital letter “C.” My argument against this is as follows.

“*Grondwet*” or “*konstitusie*” are the Afrikaans words for constitution. Steyn prefers the upper case “G” for “*Grondwet*” (Steyn 1981, xi). Steyn’s use of “*Grondwet*” is almost consistent throughout the text. Kahn uses the upper case “C” for “Constitution” throughout the text (Kahn 1960). The learned authors, Booysen and Van Wyk, use the lowercase “c” for constitution throughout the text (Booyesen and Van Wyk, 1984). On page 5, footnote number 22 of their book, the learned authors refer to the just cited *The New Constitution* of Kahn. I have reason to believe that the learned authors noticed the fact that their learned brother actually used the upper case “C” for “Constitution”

throughout the text. If there were anything inherently scientific about the use of the upper case for “Constitution” then it is more than puzzling that the learned authors disregarded this with their option for the lower case “c.”

On page 52 of *Die '83 Grondwet*, the learned authors refer to the contested (“*omstrede*”) provision for the sovereignty and guidance of the “Almighty God” in the 1983 constitution. It is significant that the learned authors show sensitivity to the contentious status of this provision; a provision to be found also in the preamble of the 1961 constitution of the Republic of South Africa. This provision is contestable even today. On the same page 52, footnote number 45, the learned authors refer to Venter, “*Die Staatsregtelike Soewereiniteit van God*” (1977 TSAR 64). The title of this essay translates into “The Constitutional Sovereignty of God.” At least two questions arise from this. One is: Which “God” is referred to precisely here? The learned authors reply on the same page 52 that it is the “Christian” “God” who is referred to. Their justification of this reference is that it safeguards Christian values and protects civilised norms. This is more than the loudest echo of two elements of the doctrine of Discovery:

Christianity. Non-Christians were deemed not to have the same rights to land, sovereignty, and self-determination as Christians. ... Civilization. European ideas of what constituted civilization and the belief of European superiority over Indigenous peoples were important parts of Discovery. Europeans thought that God had directed them to bring civilization, education, and religion to natives, and to exercise paternalistic and guardian powers over them. [my emphasis] (Miller 2011, 853–854)

My argument against the use of the upper case “C” for the “Constitution” is directed at the seemingly benign reassertion of these two elements of the doctrine of Discovery.

The invocation of “God” is an unwarranted, one-sided theologisation of the constitution. It is certain that not everyone in conqueror South Africa is a “Christian.” What, then, is the reason for privileging the Christian “God” by granting “Him”—if He is a sexual being and only male—special recognition in the constitution that is presumably acknowledged by all whose lives it is designed to rule?

According to Thomas Hobbes, the Leviathan is a “Mortal God” created by the members of the Commonwealth. It is conceptually problematical that the constitution, being a creature of the members of the Commonwealth, should be elevated above its creators and be vested with divine immortality. Historically, constitutions have not always been the product of peaceful human interaction. Therefore, some constitutions may be presumed to be contentious despite their scientifically precarious appeal to the use of the upper case “C”. This is best replaced with the lowercase “c” to affirm that “the voice of the people” is a revocable mandate to parliament to fulfil the will of the people.

It is quite puzzling that the preamble to the 1996 constitution renounces racialism but upholds it in its rationale for constitution-making. Epistemologically, the 1996

constitution of conqueror South Africa fits very well into Kahn's sardonic assessment of the first constitution of the Republic of Ghana. According to Kahn:

Nkrumah, had uncomplimentary things to say of the alien nature of the Constitution that Britain had "thrust upon" the country on giving it independence, and clearly wished to reshape it from top to bottom to give it an "African" twist ... and so the new Ghana Constitution is traceable back to British origins. Nationalist sentiments were satisfied with a document that on the face of it contained no trace of foreign antecedents. (Kahn 1960, 8, 12)

Constitutionalism, Transcendental Institutionalism and the Constitution-ness of Ubu-ntu

In conqueror South Africa, transcendental institutionalism is reflected by the Bill of Rights in the constitution together with the "Chapter 9 institutions." These instruments of constitutionalism sidestep the question of how people, especially the downtrodden poor, actually live. The reason for this omission is the presumption that once the institutions are in place, then the political order will function well. This is far from the truth in conqueror South Africa, where there is a continuing proliferation of *mekhukhu* or *matyotyombe*, living conditions below the dignity of the human person standing in sharp contrast to the intensifying palatial living of the successors in title to the Western conquest in the unjust wars of colonisation, residing in safe havens called suburbs. There, they enjoy the relative peacefulness of adjacent malls serviced by underpaid Black labour. Some of them live on over-sized farms based on the unjust transfer of property protected by the virtually inviolable property clause of the 1996 constitution.

Giovanni Pico della Mirandola, a famous Italian Renaissance philosopher (who wrote the "Oration on the Dignity of Man"), would weep at reading the 1996 constitution constructed on the deliberate blindness and deafness of the successors in title to conquest, disabling themselves to recognise the human dignity of the conquered peoples of the country. If the blindness and the deafness were not deliberate, then it is necessary to explain why ubu-ntu appears in the post-amble of the 1993 constitution but it is completely, comprehensively and totally absent from the 1996 constitution. Pope Paul VI's *Dignitatis Humanae* ("The Right of the Human Person and Communities to Social and Civil Freedom in Matters of Religion") issued on December 7, 1965, would join Pico's lamentation and censure the 1996 constitution in these terms:

Furthermore, society has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection. However, government is not to act in an arbitrary fashion or in an unfair spirit of partisanship. Its action is to be controlled by juridical norms which are in conformity with the objective moral order. These norms arise out of the need for the effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights, also out of the need for an adequate care of genuine public peace, which comes about when men live together in good order and in true justice, and finally out of the need for a proper guardianship of public morality. (Paul VI 1965, para. 7)

But the denigration of the human dignity of the conquered peoples continues under the nose of the constitution and its “Chapter 9 institutions.” It comes as no surprise, therefore, that Barney Mthombothi, an astute, courageous and incisive critical political commentator of *The Sunday Times* newspaper, advocates for the abolition of some of these prematurely established institutions such as the Human Rights Commission. He argues thus:

For all our many watchdogs, the country is in a perilous state. The tap should be closed on most of them. They are an unnecessary expense which the hard-pressed taxpayer can hardly afford. ... As South Africans we thought we could reinvent the wheel, or find a better way of oiling the wheels of democracy. But the utopia we sought by creating these dummy institutions has not materialised. Instead, the opposite has happened. ... Create the right environment, with an accountable electoral system, among other things, and the voters will do it themselves. No need for crutches, guardians or watchdogs. (Mthombothi 2023, 19)

The guardianship of the “Chapter 9” institutions watched over a press steadily failing to remain the voice of the people by continuing the fight of the poor. Thami Mazwai describes this fight.

This is the suffering of the powerless, the poor lady and the child without parents at the informal settlement. It has instead hearkened to and preached the high and lofty talk of responsible budget management regardless of the starving millions on the ground. ... The media has become the custodian of the economics of neo-liberalism instead of the economics of poverty and homelessness. (Mazwai 2022, 8)

Six years before Mazwai, Ayabonga Cawe (Cawe 2016, 18) made the same point crisply by stating that “money often matters more than human life.” This is a fundamental point to the extent that its censure of Western money above human life is a pertinent invocation of the ethical maxim of *ubu-ntu*, *feta kgomo o tshware motho*—if and when one must choose between the accumulation and possession of wealth or the preservation of human life, then one ought to choose for the latter. But the 1996 constitution, together with all the constitutions that preceded it in conqueror South Africa, is the defender of money first and maybe the preservation of human life afterwards. Because of this fundamental ethical contradiction between Western money first and the African preservation of human life first, the struggle for “honest justice” in and through freedom for all for the sake of peace can never end. Abbey Makoe identified the reason, 12 years ago, why the struggle can never end:

Why is it that in a country such as South Africa, where the political emancipation of the 79 percent Black majority is yet to be matched with economic freedom, such explicit racial balderdash has not attracted the amount of wrath it deserves? ... In the townships and villages, Black-dominated suburbs and stokvels, talk is the same. It is about how change aimed at ameliorating the plight of the majority is either moving at a snail’s pace, or non-existent. (Makoe 2010, 15)

Founded upon the ethically indefensible right of conquest, the 1996 constitution upholds its violation of the human dignity of a Bantu precisely through its complete and total exclusion of *ubu-ntu* in its vocabulary. By so doing, it repudiates the fundamental principle of democracy, namely, whatever touches all must be (ought to be) approved by everyone—*quod tangit omnes ab omnibus approbetur*. And so, it is a mystery to hear and read even a Bantu referring to “our constitution,” “our democracy” in reference to the current political dispensation in conqueror South Africa.

The complete and total exclusion of *ubu-ntu* from the 1996 constitution denies the wholeness of the population of the country. It is an arbitrary (though no less egoistic strategy) fragmentation of the society. The fragmentation is in the service of the suppression of the emergence of the one-ness of constitution-ness as a philosophical and practical counter to constitutionalism. The latter is clad in dogmatic deification of the constitution, demanding obedience and veneration from all. The complete and total exclusion of *ubu-ntu* is a daily reminder of the ethical obligation to strive towards constitution-ness built upon the explicit repudiation of the right of conquest acquired through the unjust wars of Western colonisation. The foundation of the edifice of the yet-to-be-born constitution must include constitution-ness in the name of *bo-tho* (*ubu-ntu*). It ought to be the recognition and the practical promotion and respect for the human dignity of everyone in pursuit of justice and peace. I recognise that both justice and peace are not achieved once and for all time. They are systematically elusive concepts.

When people across the world agitate to get more global justice—and I emphasize here the comparative word “*more*”—they are not clamouring for some kind of “minimal humanitarianism.” Nor are they agitating for a “perfectly just” world society, but merely for the elimination of some outrageously unjust arrangements to enhance global justice ... on which agreements can be generated through public discussion, despite a continuing divergence of views on other matters. (Sen 2010, 26)

The constitution-ness of *ubu-ntu* is the pathway to *mothofatso*, that is, the continuing humanisation of one another and societies through open, truthful and critical dialogue.

The Question of Truthfulness in and Through the Educational Curriculum

Education starts at home. Home is the site of the first experience that truthfulness in human relations is always demanded. This lesson is continued at school and university. It is almost redundant to state that common sense and scientific knowledges are fallible. But fallibility is not the same as mendacity. This view of knowledge demands openness to exposure and acquisition of new knowledge. I have referred to this point many times in different publications in my exposition of the meaning of the suffix-ness in the philosophy of *ubu-ntu*. It is sufficient to mention that a -ness approach to knowledge is incompatible with dogmatism. Here, I will apply this understanding to the need to include acute sensitivity to truthfulness in the educational curriculum. I turn to illustrate this.

On 6 September 1966, Dr Verwoerd, Prime Minister of conqueror South Africa, was stabbed to death by a parliament messenger, Mr Dimitri Tsafendas. The latter escaped the death sentence in part on the basis of the evidence submitted by psychology that he was not mentally stable. So, Tsafendas was consigned to monitoring in a medical asylum. This truth about Tsafendas lived for more than half a century. Finally, it was revealed that Tsafendas was mentally sane when he killed Verwoerd. For him, so we read, doing so was a revolutionary act (Smith 2018,16). A new truth emerged. What about the old one? Among those who accepted the veracity of the revelation are two prominent jurists of conqueror South Africa. The researcher states this about them.

George Bizos spent countless hours going through my research findings with me, often in his office but also on the telephone. His opinions in several areas were invaluable. He also introduced me to people who were of help in extending my inquiries.

John Dugard participated without reservation, going through the evidence and the outline of my research. He welcomed me into his home in The Hague, where we spent an entire afternoon and evening, some six or seven hours, examining multiple issues. Professor Dugard also wrote the first draft of the letter/request from the five jurists to the minister of justice. (Dousemetzis and Loughran 2018, xiv)

The new truth received public acceptance in general (Dousemetzis 2018, 15–16). It was even urged that the history books should be revised and include this truth. Exactly the same exhortation is the ethical imperative to reflect the truth in the educational curriculum as known by the many and even contending inhabitants of conqueror South Africa. Only by so doing shall the educational curriculum become the vibrant repository for the sole aim of the scientific endeavour, namely, truth. Bronowski, arguing against the subordination and control of science by politics and the wealthy, puts it thus:

Science is an endless search for truth, and those who devote their lives to it must accept a stringent discipline. For example, they must not be a party to hiding the truth, for any end whatever. There is no distinction between means and ends for them. Science admits no other end than the truth, and therefore it rejects all those devices of expediency by which men who seek power excuse their use of bad means for what they call good ends. (Bronowski 1971, 235)

The philopraxis of ubu-ntu had identified the quest for truth as the golden rule of human relations long before Bronowski was born. According to one (among the many ubu-ntu proverbs), *o seke wa sala makeng* (be cautious and choose always the path of truth so you may not be exposed as a liar). And so, the his-story of human relations in conqueror South Africa is yet to become “our story” reflected without fear or favour in the educational curriculum. In this way, *mothofatso* (the continual humanisation of one another) will be the vibrant benefit of education for truthfulness. After all, truth is liberating.

Conclusion

Mothofatso: the humanisation of all human beings by reaffirming the human dignity of the epistemologically and economically subjugated and redeeming the colonial dehumaniser from the delusive fixation to the fallacy of a pre-established ontological hierarchy among human beings. After all, *motho* (the human being) is prior in logic and, in fact, to the inhumanity of colonisation. Surely, Smuts—blind-folded by the darkness of the fallacy of the ontological superiority of Whiteness—cannot be wiser than *mothofatso*.

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