Constitutionalism and coloniality: A case of colonialism continued or the best of both worlds?

Pieter W Heydenrych
North-West University (Potchefstroom Campus)
Pieter.heydenrych@nwu.ac.za

Abstract

This article deals with the concept of constitutionalism in relation to colonialism and modernity, with a specific emphasis upon South Africa and South African constitutional development. The Republic of South Africa transitioned from an authoritarian regime to a democratic regime in 1994 and adopted a constitution that is to contribute in the consolidation of its young democracy. However, amidst continued struggles within the South African polity and an emphasis upon de-colonisation, it is necessary to afford attention to aspects of South African constitutionalism.

This article relates a discussion of constitutionalism with coloniality and modernity, and considers the nature of the South African Constitution and constitutionalism in this respect. Attention is afforded to unpacking these concepts and the consideration of alternatives, in order to transform or decolonize South African constitutionalism. In this regard reference is made to the nature of constitutionalism, the context of the South African Constitution and the discussion of three approaches to South African constitutionalism that might be helpful in addressing the contested nature thereof. These three approaches are: transformative constitutionalism, progressive constitutionalism and Ubuntu.

The article concludes that no definitive or final solutions can be offered, except to suggest that the continued emphasis of these understandings of constitutionalism could perhaps contribute to the actualization and recognition of a deeper and fuller democratic constitutionalism for South Africa, that will also entail finding a balance between modernity and coloniality, because it is suggested that, in the end, there cannot be a complete divorce between these two worlds. Only in this way, it is suggested, can be moved to a South African constitutionalism that embraces the best of both worlds.

Keywords: Constitutionalism; Constitution; South Africa; Modernity; Coloniality; Colonialism; Democracy.

Introduction

Constitutionalism is essentially a product of modernity. With this is meant the modern era of the Enlightenment and the following centuries, during which the philosophical ideas of separation of powers, the constitutional state and human rights were formulated, debated and found an ideological home in Western Europe, including also the United States of America.[1] [2]But in considering the idea of modernity, it can be argued that its inherent twin concept is coloniality.[3] The modern era brought with it the colonial era and the two are intertwined.

This is of specific importance in considering constitutionalism in non-western contexts, such as South Africa. Constitutionalism in spaces such as these represents a colonial heritage, based upon a philosophy that cannot be accepted without interrogation. Perhaps questions can be asked about alternatives to classical or western constitutionalism, and as such, concepts such as democratic constitutionalism need to be explored.

The latter is deemed especially relevant in view of undercurrents that are noticeable in South Africa, where perhaps the Constitution and its application are questioned – and are in need of vigorous debate.[4] Such questions also relate to the consideration of the relationship between the branches of the *Trias Politica* and the nature of South African democracy.

This article therefore will explore the relationship between modernity and coloniality and constitutionalism and its relevance to South African constitutional development.

After providing a brief historical background on colonialism and constitutionalism, the author will commence by exploring the ideas of

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1 By referring to the Enlightenment the period meant is broadly the 18th Century. Furthermore, this period also correlates with what is regarded as the modern era (modernity) which at least continued late into the 20th Century, although this is a contested concept and the current era could also in some views be regarded as late-modernity.

2 "The Enlightenment is the period in the history of western thought and culture, ... characterized by dramatic revolutions in science, philosophy, society and politics... . Enlightenment thought culminates historically in the political upheaval of the French Revolution, in which the traditional hierarchical political and social orders... were violently destroyed and replaced by a political and social order informed by the Enlightenment ideals of freedom and equality for all, founded, ostensibly, upon principles of human reason".

3 W Mignolo, "Coloniality: The darker side of modernity" (available at http://www.spacesofcommoning.net/reading-group, accessed, 26 January 2016), p. 39.

4 J Duncan, "The problem with South Africa's constitution" (available at http://www.sacsis.org.za/site/article/631, accessed, 27 June 2016) and DT McKinley, "The majority and the 'meaning' of the Constitution" (available at http://sacsis.org.za/site/article/760.1, accessed, 27 June 2016).

constitutionalism and constitutions and what they mean, especially in a western context, whereafter the theoretical approach of modernity or coloniality will be explored. The article will conclude by considering possibilities for a South African constitutionalism.

Historical background

A central concept in the discussion at hand is colonialism. This necessarily provides the underpinning for a number, if not all, of the concepts to be discussed in this article. In practical terms when the concept of colonialism is considered, the general understanding that manifests is related to the historical development of an expansion of European influence across the globe, commencing with the exploring of "new" worlds by Europeans around the 15th and 16th Centuries. Those nations that are closely associated with this process would include the major powers of Europe, such as Portugal, Spain, Netherlands and also the British and the French.

Colonialism established through this process an extension of the European sphere of influence, and can generally be attributed to political, religious and economic factors. What is undeniable is that the arrival of Europeans in other parts of the world led to a clash between the inhabitants of those areas and Europeans.

It has to be accepted that Europeans believed in their superiority in terms of material aspects such as access to modern weaponry, (western) scientific knowledge, modes of transport, etc., that must have, in conjunction with religious aims of bringing Christianity to peoples who were not Christian, solidified an idea of racial superiority, also considering that the Europeans were white while the inhabitants of Africa and the Americas who "lacked" the aforementioned material and religious aspects (thus being different and an-"other"), were not white.[5]

It can be suggested that this combination of factors, combined with the rise of capitalism and its inherent need of expansion, further coupled with political contestation between European powers, played a significant role in colonialism and imperialism as it developed into a complete political

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5   Consider also Fanon regarding blackness as a 'white construction'. L Praeg, "From ubuntu to Ubuntu", L Praeg and S Magadla (eds.), *Ubuntu. Curating the archive* (Pietermaritzburg, University of KwaZulu-Natal Press, 2014), p. 110.

domination during the 19th Century.[6]

What are the effects of this process of colonialism and domination? Also considering the philosophical and political (scientific) development in the European psyche towards the 18th and 19th Centuries with reference to the Enlightenment, a complete picture of European superiority emerged, where the philosophical world of western democracy, constitutionalism, human rights, etc., became dominant.

Thus, although it is broadly entangled in a complex of domination and colonialism, and somehow disentanglement is still required in a world where the formal brutalities of colonialism have in some measure been overcome, but the complexities created by it, have not.

Colonialism could not have an unchallenged legacy, and the colonial period has been a period of social, economic and political struggle, as the domination by colonial powers has not been accepted without challenge. This resulted in liberation struggles and a search by the colonized for identity and self-determination. Reference can be made to Africa pertaining to Negritude and Black Consciousness, responding to a western philosophical and political framework and generally the continued struggle between the Global North and the Global South (see the further discussion on modernity and coloniality).

Furthermore, central to this article and in close relationship with colonialism, is the concept of constitutionalism. Waldron[7] suggests the ideological nature of constitutionalism and he refers to the English and American manifestations thereof. The former, with its relationship to representative democracy, and the latter, in terms of limitation of state power. In both these manifestations the historical and ideological relationship with liberalism and liberal democracy, and thus, also its western roots and then, by implication, its colonial roots are evident. The idea then of constitutionalism operates in the same temporality as colonialism, and constitutionalism's modern roots can clearly be related to the ideas of representative democracy in England,[8] and in relation to the

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6   Praeg also refers to colonialism as follows: On the other hand, they set out, through 'civilisation', education and Christianisation, to transform the very nature of colonised people into a reflection of the Western self. The implicit legitimacy of this transformation (implicit, for the West did not need to explicitly legitimise itself) derived from the racialized belief that primitive societies (much like children) are in the process of re-enacting or recapitulating stages of development that the more civilised West (qua adults) had already gone through". L Praeg, "From ubuntu to Ubuntu", L Praeg and S Magadla (eds.), *Ubuntu. Curating the archive ...,* p. 103.

7   J Waldron, "Constitutionalism: A sceptical view" (available at http://scholarship.law.georgetown.edu/hartlecture/4, accessed, 1 July 2016).

8   JS Mill, *Utilitarianism, liberty and representative government* (London, JM Dent & Sons, 1912).

limitation of state power to the writings for example of Montesquieu and the French revolution, as well as the American revolution, not forgetting the debates pertaining to the American United States and its Constitution, as immortalized in the Federalist Papers.[9] All this happens in the time of modernity (which can possibly be considered as from the 16th Century) and Enlightenment, and even spills over into views relating to its applicability in non-western contexts. Mill[10] wrote in a fashion that clearly demonstrates the western colonial mindset of his time. Under the heading of "Government of Dependencies" in Representative Government (1861), he clearly accepts Britain's superiority, and in terms of the vocabulary he uses, and distinguishes between the applicability of representative government in dependencies that are ruled by whites ("her colonies of European race") and those that are not. As known from history, those dependencies (such as Canada, for example) had much more self-government than African colonies.

The idea then of constitutionalism with its emphasis upon fundamental rights and the limitation of state power creates a modern environment for democracy that is circumscribed by a context of representation and institutions in a world of colonialism. The relevance of this characterization will become clearer in the following discussion.

Constitutionalism and constitutions
Constitutionalism

The concept of constitutionalism will be considered first. Barnett,[11] in the context of British constitutional law, defines constitutionalism as the doctrine which governs the legitimacy of government action. He states further and importantly that: "By constitutionalism is meant – in relation to constitutions written and unwritten – conformity with the *broad philosophical values of the state*" (emphasis added). To this point will be returned later, especially in terms of what can be understood to be the broad philosophical values of the state. In addition, Barnett[12] states that:

"Constitutionalism implies something far more important than the idea of 'legality' which requires official conduct to be in accordance with pre-

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9   D Held, *Models of democracy* (Cambridge, Polity press, 1987), p.55-60.
10   JS Mill, *Utilitarianism, liberty and representative government...,* p. 378.
11   H Barnett, *Constitutional and administrative law* (Abingdon, Routledge-Cavendish, 2006), p. 5.
12   H Barnett, *Constitutional and administrative law...,* p. 5.

fixed legal rules…. The doctrine of constitutionalism suggests, at least, the following:

• That the exercise of power be within the legal limits conferred by parliament on those with power…and that those who exercise power are accountable to the law;

• That the exercise of power… must conform to the notion of respect for the individual and the individual citizen's rights;

• That the powers conferred on institutions within a state – whether legislative, executive or judicial – be sufficiently dispersed between the various institutions, so as to avoid the abuse of power; and

• That the government, in formulating policy, and the legislature, in legitimating that policy, are accountable to the electorate[13] upon whose trust power is held".

Thus, Barnett summarized constitutionalism as that it suggests the limitation of power, the separation of powers and the doctrine of responsible accountable government.

From the above discussion, a number of elements are clear at the outset. Firstly, the matter of the "broad philosophical values of the state" should be mentioned. This important point underlines the fundamental point of departure that there must be congruence between what the constitution encapsulates, and that which the state and the people are about and what they believe in. There must therefore be a "fit" between a constitution as well as those which it guides and serves.[14] The South African Constitution addresses some of these values.

Notably, Section 1, as part of the founding provisions of the Constitution[15] states the following:

"The Republic of South Africa is one sovereign democratic state founded on the following values:

• Human dignity, the achievement of equality and the advancement of human rights and freedoms.

• Non-racialism and non-sexism.

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13 Note the reference to electorate with the implication of a context of representative democracy.
14 Two approaches can be considered, namely constitutions that mirror society and constitutions that provide guidance on what the society should be about. I would like to suggest that a combination of these two approaches is probably suitable.
15 Republic of South Africa, Constitution, 1996.

- •   Supremacy of the constitution and the rule of law.
- •   Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".

Central to the current understanding of constitutions (and the South African Constitution) is the focus on democracy[16] and inherent components/values thereof, such as dignity and freedom and equality. The high regard for the constitution itself is then also elevated to a value itself. What is also clear from the section quoted above is the influence of modernity (to be discussed later), articulated by means of concepts such as human rights, the rule of law and the institutional characteristics of modern democracies.

Secondly, in terms of the doctrine of constitutionalism as defined by Barnett, is also the emphasis upon respect for the individual and the individual citizen's rights, the *trias politica* and the matter of accountability to the "electorate". It is suggested that all of these matters are products of (western) modernity, as reflected upon in the historical background and the sources quoted there.

Thus, at this point of the discussion, it can be suggested that the doctrine of constitutionalism and its components, and also as reflected in the quoted section from the South African Constitution, reflect modernity and its western roots. In this sense it fundamentally speaks to the development of democracy since the Enlightenment (also remembering the historic American and French revolutions), considering the attainment of political freedom and equality, individual rights and the right to vote: a representative democracy that speaks to formalities and institutions. The discussion will return to this conceptualization of democracy when modernity/coloniality is further discussed later on in the article.

Constitutions

Barnett[17] quotes Thomas Paine, also importantly, in terms of defining constitutions that:

> A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without

16   Not negating the fact that states that may be regarded as un-democratic also have constitutions.
17   H Barnett, *Constitutional and administrative law...*, p. 7.

> right… A constitution is a thing antecedent to a government; and a government is only the creature of a constitution [1792, Pt II, p93].

Related hereto, Carpenter[18] emphasizes that the constitution as an expression of the will of the people is an idea linked with the American and French revolutions, and maintains the distinction between the constituent authority (the people) and the constituted authority (the government). To this she links the question of legitimacy as it relates to the acceptance of the constitution by the people. In terms of constitutionalism, she states that the term:

> … could also be said to embody fundamental democratic principles, manifested in a constitution containing checks and balances to prevent a concentration of power in one person. Limited government, which ensures the distribution of power, is seen as an effective guarantee of rights and liberties, a guarantee formally incorporated in a structured form – the constitution.

Related to both the concepts of constitutionality and the constitution, reference can also be made to the constitution as a continuous dialectical process. In this regard the interpretation of the constitution is not merely a mechanical action, but a creative process.[19] Carpenter[20] states that:

> The constitution is not like a contract in private law which must be rigidly interpreted and applied within a narrow framework – it can 'grow' to accommodate the changing needs of the community it serves.

It can therefore be argued that even though the theoretical understanding of constitutionalism and constitutions is undoubtedly intertwined with modernity, as alluded to above, (within a context of individual rights and representation as evidenced by British constitutionalism), the centrality of the people, the will of the people[21] and the sovereignty of the people have been recognized for centuries, and this also relates to the matter of "fit" referred to earlier. In the birth of a given constitution, and then further in terms of the growth of the constitution over time, there should therefore be an interaction with the particular people or community (as Carpenter refers to above), in relation to the constitutionalism and constitution under discussion.

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18 G Carpenter, *Introduction to South African constitutional law* (Durban, Butterworths, 1987), pp. 8-9.

19 The implication of describing a constitution as a dialectic and creative process is that it is seen as a changing phenomenon. It cannot remain set in stone and must respond to the people and the people must respond to it, thus creating/recreating the constitution on an ongoing basis.

20 G Carpenter, *Introduction to South African constitutional law*..., pp. 9-10.

21 It should, however, also be considered that the idea of the 'will of the people' is part and parcel of modernity as well. Review this against the observations of in this regard the views of Rousseau. This point perhaps also serves to illustrate the intertwined nature between modernity and coloniality, as will become clearer later.

This then also relates to how Lategan[22] defines a constitution:

> Constitutions are rich, dense and multi-layered expressions of values, dreams and aspirations of the citizens of a state… Constitutions are documents that present us with a curious mix of philosophical, legal and empirical elements… Constitutions are living things, despite their appearance as timeless and universal texts, they are the products of a very specific history and their Geschichtlichkeit is unmistakable.

With reference to sovereignty mentioned above, mention can be made of Sir Thomas Smith's understanding of the concept, as published in 1583, arguing that sovereignty is vested in Parliament:[23]

> The Parliament of England which representeth and hath the power of the whole realm, both the head and the body. For every Englishman is intended to be there present, either in person or by procuration and attorneys, of what pre-eminence, state, dignity or quality soever he be, from the Prince, be he King or Queen, to the lowest person of England. And the consent of the Parliament is taken to be every man's consent (quoted by Carpenter).

At this point in the discussion, it has become clear that in exploring the concepts of constitutionalism and constitutions, the fundamental or core content that this doctrine and the "product" of a constitution represent, even in the western context that exported its philosophy and ideas through colonialism, contains the central focus that is considered of high importance in a post-colonial context, notably the centrality of the people[24] and its sovereignty, which can then be regarded as core to democracy as well.

Regardless of whether it is considered as people's power or sovereignty, and even if it translates into (only) representative government/democracy, Sir Thomas Smith as quoted above, articulated it very well.[25]

It is therefore suggested that this fundamental core has become intermingled with a focus upon representation and representative government, together with significant emphasis upon the individual and the law itself, in a sense leading to an aberration pertaining to the fundamental values of constitutionalism,

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22 B Lategan, "The quality of young democracies from a constitutional perspective", U van Beek (ed.), *Democracy under scrutiny: Elites, citizens, cultures* (Opladen, Barbara Budrich publishers, 2010), pp. 95-96.

23 G Carpenter, *Introduction to South African constitutional law*…, p. 137.

24 Especially, as "the people" inhabiting colonies were excluded from colonial democracy by colonial powers.

25 However, Rousseau was not impressed with representative democracy, as he stated: "Sovereignty cannot be represented… . The English people [who live under representative democracy] believes itself to be free; it is gravely mistaken; it is free only during the election of Members of Parliament; as soon as the Members are elected, the people is enslaved; it is nothing", Rousseau, 1762/1968:141, as quoted by J Cairns & A Sears, *The democratic imagination* (Toronto, University of Toronto press, 2012), p. 83.

even as expressed in modernity and in the West. Possibly the structural or institutional idea of a constitution (and legality) then becomes the epitome of the doctrine and not the centrality of the people as the normative idea suggests. This can be described as the development of a doctrine (or high altar) of constitutional legality, instead of what could be described as substantive constitutionalism or a democratic constitutionalism.

The importance of this matter for democracy is paramount, as Lategan[26] argues that constitutions play a role in the ongoing consolidation of the emerging democratic dispensation, and further states that:[27]

> If the values, beliefs and attitudes of the elites and of citizens do not support the essence of the constitution and its application, the consolidation of democracy … will have little chance of success.

The relevance for a state such as South Africa, as a new democracy, is therefore clear. Constitutions are critical in terms of consolidation of a new democracy, thus contributing to the sustainability and substantiveness thereof, and that this critical aspect can be related to the values, beliefs and attitudes of the people, consisting of the elites and the broader community.

The key concept of equality as pertaining to democracy, can also be considered in this context. As implied earlier, the context of modernity has, in the modern development of democracy, provided for a formal and individualistic form of political equality,[28] that it can be argued, negates more substantive forms of equality.

From the preceding discussion it is also clear that a conceptual difficulty exists in terms of the western concepts of constitutions and constitutionalism and democracy, with its inherent western identity and meaning, yet it, does contain universal truths of which the negation of is also evident in western contexts. Yet transplanted to colonial contexts there is the set of problems related to the colonial imposition thereof, but also shortcomings in the meaning thereof.   Still, the question that remains is: what other concepts could be used to articulate and debate the universal truths and values that these concepts try to deal with?

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26 B Lategan, "The quality of young democracies from a constitutional perspective", U van Beek ed., *Democracy under scrutiny...*, p. 102.

27 B Lategan, "The quality of young democracies from a constitutional perspective", U van Beek ed., *Democracy under scrutiny...*, p. 113.

28 It can also be argued that this is even the case when provision is made for socio-economic rights, such as in the South African constitution, which could in theory provide scope for a more substantive constitutionalism.

Modernity and coloniality

In the preceding discussion several references were made to modernity and coloniality. These references reflect on two levels. Firstly, the foregoing discussion focussed on constitutionalism in a modern political context, in terms of its importance in the Western hemisphere, and also with relevance to democracy. A second important level of reference is the theoretical approach of modernity/coloniality.

The approach of modernity and coloniality finds much of its energy within the context of Latin America, and, as such, represents a critical understanding of the world also in the context of the global north and the global south and engages in critical dialogue with imperialism, development, neo-liberalism, globalisation, etc.

Mignolo[29] states that:

> The basic thesis is the following: "modernity" is a European narrative that hides its darker side, "coloniality". Coloniality, in other words, is constitutive of modernity – there is no modernity without coloniality. Consequently, de-colonial thinking and doing emerged… as responses to the oppressive and imperial bent of modern European ideals projected to, and enacted in, the non-European world.

Mignolo[30] further argues that:

> In order to uncover the perverse logic – that Fanon pointed out – underlying the philosophical conundrum of modernity/coloniality and the political and economic structure of imperialism/colonialism, we must consider how to decolonize the "mind" (Thiongo) and the "imaginary" (Gruzinski) – that is, knowledge and being.

Modernity/coloniality historically places Europe and its rationality at the centre, and it implies a universality in its thinking. However, what is of interest, in this context, is the de-linking from this power matrix, which continues to inform the world.

It is therefore important to consider that constitutionalism should be understood in the context of its modern development in terms of mainstream constitutional law and political science, on the one hand, but then also understood within the broader context and implications of modernity/

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29 W Mignolo, "Coloniality: The darker side of modernity" (available at http://www.spacesofcommoning.net/reading-group, accessed, 26 January 2016), p. 39.
30 W Mignolo, "Delinking", *Cultural Studies*, 21(2), p. 450.

coloniality and what this means in terms of how constitutionalism should be understood in non-western contexts. Specifically pertaining to South Africa and referring to liberal democracy, Reddy[31] argues that:

> … settler colonialism is a very particular form of modernity…presenting a condition that undermines the presumed linear trajectory towards liberal democracy. Given this very different path to the modern,…South African political modernity will be different and necessarily unlike that of Europe. Certainly the assumptions of the Western liberal democratic model as an inevitable process, a desirable end goal, and a standard of evaluation must be questioned.

In essence an important point to take from coloniality is that although formal colonization ended in the 20th Century, western imperialism and globalisation perpetuate the inequalities of colonialism. It could then also be argued that in the context such as that of South Africa, the integrated and imbedded issue of race, which could then very well be compounded by its special relationship with capital, creates a specific arena of relevance for understanding coloniality in the South African context. Also of importance, is making use of Habib's[32] analysis of South African politics, economics and society, where he argues around the balance of power in establishing the new South African dispensation, in essence a balance of power between the forces of capital and liberation.[33] The result in many ways, is a perpetuation of coloniality in South Africa, with relevant implications for constitutionalism.

In South Africa, a constitution is in place that speaks very much, to the constitutionalism as described at the beginning of this article, with its emphasis upon classical European principles, and even tendencies towards regressing into legality above substantiveness.[34] Bond[35] states, and very importantly to the argument of this article, that:

> Part of the problem, it is argued above, is resistance to the commodification of the society, and the inability of a liberal capitalist Constitution to grapple with the problems thereby caused. The potential to move the society from excessive commodification to a "commoning" approach more consistent with Ubuntu African values, runs up against the limits of a western Constitution

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31 T Reddy, *South Africa, settler colonialism and the failures of liberal democracy* (London, Zed Books, 2015), p. 7.

32 A Habib, *South Africa's suspended revolution. Hopes and prospects* (Johannesburg, Wits University Press, 2013).

33 P Bond, "Constitutionalism as a barrier to the resolution of widespread community rebellions in South Africa", *Politikon,* 41(3), p. 479. Bond also discusses the "pact" that the constitution presents with what might be called the forces of neo-liberalism.

34 In this regard it can be argued that in South Africa preponderance towards constitutional litigation is noticeable where applicants require black letter law application of the Constitution, especially when rights are concerned.

35 P Bond, "Constitutionalism as a barrier to the resolution...", *Politikon,* 41(3), p. 480.

based upon liberal-individualist conceptions of rights, especially in the socio-economic sphere.

Reddy[36] suggests similar ideas, and states that it is:

> … necessary to trace back the features of colonial modernity as expressed historically in South Africa as settler colonialism, including legacies of violence, Othered subjects and racialized capitalism, (which) present new contradictions to its liberal democratic project.

This could then be regarded as colonialism as well as in terms of a power discourse. South Africa is thus confronted with a dual challenge to decolonise.

It can be argued that the response to colonialility is decoloniality. Decoloniality is synonymous with decolonial "thinking and doing". It also speaks to the context of power with its European roots. What is of importance in this context is also what could be considered epistemic reconstruction and a way of at least reconsidering western thinking as universal (see also earlier discussion). Thus it is necessary to turn to discussing a South African constitutionalism, that embodies South African "thinking and doing".

South African constitutionalism and constitution

Considering what has been discussed in the previous paragraphs, South Africa represents an important case study in terms of the doctrine of constitutionalism and in terms of modernity and coloniality.

South Africa's Constitution of 1996 stems from a well-known and much praised negotiation process and transition from authoritarian rule to a democratic dispensation. The negotiation outcomes can be described as a pact (but see also earlier footnote on this point) between the forces of apartheid and liberation in order to usher in the new dispensation.

Several aspects pertaining to the abovementioned is important for the purposes of this article. Reference has been made to the continued colonization that the constitution represents, in terms of its classical constitutionalism and then also in terms of a broader act of colonialism in term of modernity/coloniality.

This is then, it is suggested, further exacerbated by the specific observable remnants of physical colonization in a case such as South Africa, and which,

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36   T Reddy, *South Africa, settler colonialism and the failures of liberal democracy* (London, Zed Books, 2015), p. 11.

in essence, represents settler colonialism. It can be argued that the forces of apartheid essentially represented colonialism. The system of apartheid developed from colonial roots as well as the assimilation of, in essence, a British styled government in the 20th Century, following the British colonial conquering of South Africa, especially after the end of the South African War of 1899-1902; despite the hegemony of Afrikaner nationalism articulating an anti-British rhetoric. It is suggested that the colonial nature of the previous dispensation is also emphasized by the eventual departure of the colonial masters and the inheritance of South African government by the mostly Afrikaner ethnic group, representing a European heritage. It might thus not have been so much a struggle between Boer and Brit as South Africans were led to believe, but rather a struggle between colonial brothers. The dissipation of Afrikaner nationalist political influence post-apartheid also serves to emphasise this point and that despite the apparent powerful position of Afrikaners nationalists, as represented at the end of apartheid and during the transition, the colonialist nature of this group post 1994 and even during apartheid is underscored.

Returning to the transition, opposing these colonial forces were those of liberation, representing a curious mix of socialist, radical and conservative influences, essentially and predominantly articulated by leaders who received a colonial education, the likes of Mandela, Tambo and Sisulu. The flag bearer for the liberation struggle, the African National Congress (ANC), has long suffered under these broad internal discrepancies that continue until today. The point is that the forces of liberation also suffered and continue to suffer in terms of coloniality, and even contribute in the perpetuation thereof.

It is therefore suggested that the above brief explanation of the South African political context in terms of colonization, apartheid and transition, clearly speaks to the pervasive nature of modernity as has been highlighted earlier on. It is a context that finds its existence flowing from the power matrix of Europe, with a multi-faceted political colonialization (British conquering and Boer and Afrikaner apartheid ending in a physical political departure), followed by a transition championed by a liberation movement that cannot escape the 19th and 20th Century forces of modernity and now being held at ransom by the 21st Century manifestation of modernity by means of, liberal democracy, neo-liberalism and globalization. Is this what the South African Constitution is all about?

Interpretations of constitutionalism

At the beginning of this article, the broad outline of constitutionalism, as it is understood from a western perspective, was articulated. The author went further to provide some remarks on modernity/coloniality and then indicated what kind of context or result the transition to democracy achieved, with reference to the last section.

As a political project and an epistemic exercise, consideration has been afforded to carving out a meaning to the South African political and constitutional context to address the ambiguous nature of the South African political settlement. The following remarks deal with possibilities of decolonizing South African constitutionalism.

Transformative constitutionalism

Of relevance to the South African context is the concept of transformative constitutionalism. CJ Langa,[37] refers to change as the core idea of transformative constitutionalism. This change he brings into the context of a changed society, based upon substantive equality. He goes on to quote Albertyn and Goldblatt, stating that in order to move to in essence a democratic society:

> … requires a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.

He makes it clear that he understands transformative constitutionalism as a social and economic revolution. Furthermore, what is understood in this context is a "different" kind of constitutionalism, taking into consideration the politics of law. Apartheid denied the linkage between law and politics, although they are necessarily linked. It is argued that we accept the role our beliefs, values and ideas play in our decisions. This is in contrast to the concern expressed about legalism in the context of western constitutionalism discussed earlier.

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37 P Langa, "Transformative constitutionalism", *Stellenbosch Law Review*, 17(3), 2006, p. 352.

Langa further deals with challenges pertaining to transformative constitutionalism such as in terms of legal education and the ongoing need for reconciliation. It can be argued that the bottom line in this approach is one that reflects upon the need for change in South African society, addressing inequality and extending the political rights obtained through liberation, to deepen the democratic nature of South African society. The Constitution therefore needs to be understood in a way that acknowledges and addresses the legacies of modernity and coloniality taking South Africa constantly and ever changingly forward into a world beyond coloniality. This can be considered to be a perpetual journey.

Progressive constitutionalism

In considering an understanding of "progressive constitutionalism" an engagement with the mainstream constitutionalism reflected upon at the beginning of this article, and that what has been bequeathed to South Africa by its colonial masters can be considered. In the discussion on British-style constitutionalism, emphasised the reference to representation and individuality was emphasised. The counterpart to this is a broader emphasis upon the people. Once again modernity is not escaped from, as the sovereignty of the people is also integral thereto. However, a progressive constitutionalism may contribute to balance the focus of liberal democratic constitutionalism with a people, society and community emphasis that speaks to the inherently democratic principle of popular sovereignty.[38] The author argued before[39] that shortcomings in the South African democracy and constitution relate to a lack of society focus and vulnerability of institutions and procedures, and therefore greater emphasis is needed upon the role of the people. Even in the context of a liberal-democratic state such as the United States of America (USA), a case is made for popular constitutionalism. Kramer[40] argues that:

> American constitutional law has, practically from the start, consisted of a struggle between two principles, which we can call "popular constitutionalism" and "legal constitutionalism". In a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution making, but

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38 M Mamdami, where he states that: "The goal should be to struggle towards a definition of these concepts that will mot displace, but in fact lead to, the all-important discourse on power and popular sovereignty", *The Journal of Modern African Studies*, 28(3), p. 364.

39 P Heydenrych, *From the City of Westminster to Kliptown: An exploration of democracy in the South African context* (Paper, South Africa's democracy @20: Diagnosis and prognosis. Published conference proceedings of the 2014 biennial conference of the South African Association of Political Studies, Pretoria, 2015).

40 L Kramer, "Popular constitutionalism, circa 2004", *California Law Review*, 92(4), 2004, p. 959.

> includes active and ongoing control over the interpretation and enforcement
> of constitutional law.

The point to be taken from Kramer, in the context of this article, is the recognition of the people and the continued dialectic (see also earlier in the article) between the people and the constitution. Perhaps through such an approach, a balance may be sought between modernity and the requirements of a South African constitution.

Ubuntu

The author have argued elsewhere[41] that there is a need for a South African understanding of democracy. In this regard a comparison between the values of democracy as such values are understood in a western context, and the values reflected in Ubuntu in an African context, was attempted.[42] The position taken in this regard is that:

> Ubuntu could be the mechanism to ensure universality of democracy through the balancing of the modernistic rationality thereof, with what it aims to do, which is enabling people to be their own political masters, a core democratic value. The values emphasised in African politics relating to communality and the "we" and "us" of politics, need to speak as one voice with democracy, and this is true in any of the democratic values mentioned above, be it justice, be it rights, be it political or economic freedom, etc.

The concept of Ubuntu has been included and utilized in South African constitutional jurisprudence[43] and is therefore not regarded as in conflict to what South African constitutionalism envisages and possibly assists in contributing to a balance between the strong influence of a western constitutionalism and consideration of African and South African values. Keevy[44] has, however, expressed concern that Ubuntu is imbedded in a system of patriarchy and that it is perhaps not so much in consonance with the progressive values of the Constitution. Yet, Metz,[45] on the other hand, considers Ubuntu of importance in the context of a moral theory for South

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41 P Heydenrych, *From the City of Westminster to Kliptown...*, p. 135.
42 The values referred to include: Common humanity, dignity, harmony, justice, responsibility, political participation.
43 I Keevy, "Ubuntu versus the core values of the South African Constitution", L Praeg and S Magadla (eds.), *Ubuntu. Curating the archive...*, pp. 54-95.
44 I Keevy, "Ubuntu versus the core values of the South African Constitution", L Praeg and S Magadla (eds.), *Ubuntu. Curating the archive...*, p. 55.
45 T Metz, "Ubuntu as a moral theory and human rights in South Africa", *African Human Rights Law Journal*, 11, 2011.

Africa. He considers the values of Ubuntu in the context of human rights, (also remember the observation of human rights at the beginning of this article in the context of the Enlightenment)[46] and suggests that: "Such a principle has a Southern African pedigree, provides a new and attractive account of morality, which is grounded on the value of friendship, and suggests a novel, companion conception of human dignity with which to account for human rights".[47] However, what is important is that it does contribute to a South African understanding of constitutionalism that provides an alternative to western constitutionalism.[48]

Conclusion

This article attempted to highlight the ambiguous context of the South African Constitution.[49] After the transition from Apartheid the Constitution has been hailed by many as some kind of miracle, being liberal and being progressive. But on further reflection, as the years of jubilation since being liberated from a special type of colonialism passed, and the steep hills to be climbed in consolidating South African democracy became a reality, the concerns about South African constitutionalism grew.[50]

Framing this discussion in the context of modernity (also reviewed as coloniality) provides an explanation for these concerns. The Constitution continues the power matrix of modernity and coloniality through its liberal character and those phenomena being facilitative of how modernity/coloniality manifests in the 21st Century, such as through neo-liberalism and globalization. Yet, it is also still combatting the remnants of colonization in terms of the need for deeper realization of the political rights won through liberation and dealing with the continuing threat of scourges such as inequality and racism.

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46 M Mamdami, *The Journal of Modern African Studies*, 28(3), p. 359. He argues against the idea of human rights as a western invention and states that: "The content of rights, as that of democracy, must necessarily vary, not only according to historical circumstances, but also from one social context to another".

47 T Metz, "Ubuntu as a moral theory...", *African Human Rights Law Journal*, 11, 2011, p. 559.

48 D Cornell, "Ubuntu and subaltern legality", L Praeg and S Magadla (eds.), *Ubuntu. Curating the archive...* , pp. 167-175.

49 J Duncan, "The problem with South Africa's constitution" (available at http://www.sacsis.org.za/site/article/631, accessed, 27 June 2016); DT McKinley, "The majority and the 'meaning' of the Constitution" (available at http://sacsis.org.za/site/article/760.1, accessed, 27 June 2016).

50 J February and G Pienaar, "Constitutional democracy in South Africa – fanciful ideal or tangible reality?" (available at http://www.hsrc.ac.za/en/review/hsrc-review-november-2013/constit-democ, accessed, 4 July 2016).

How can South African constitutionalism delink from modernity/coloniality? Some of the attempts at doing this are briefly reflected upon in this article, such as transformative constitutionalism, progressive constitutionalism and Ubuntu. Reference has also been made in this article to substantive constitutionalism and democratizing the Constitution. It is suggested that all of these in various, but related ways, seek to address a constitutionalism and constitution that would reflect and be the "other", which South Africa is, and to counter the hegemony of modernity, it therefore represents a continuing struggle.

No definitive or final solutions can be offered, except to suggest that the continued emphasis of these understandings of constitutionalism could perhaps contribute to the actualization and recognition of a deeper and fuller democratic constitutionalism for South Africa. Such a deeper and fuller democratic constitutionalism will also entail finding a balance between modernity and coloniality, because it is suggested that in the end, there cannot be a complete divorce between these two worlds. Such a democratic constitutionalism will also be of critical importance in delinking the deep-seated aspects of a colonial society in psychological, political and socio-economic terms. Only in this way, it is suggested, can be moved beyond the restrictions of a liberal democratic constitution of a fundamentally modern-colonial nature, to a South African constitutionalism that embraces the best of both worlds.