



An ethical (anti-)constitutionalism? Transformation for a transfigured public

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How do we critically engage South African constitutionalism today? This is the basic question that will animate this article. In order to investigate this, I will specifically look at the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) from the perspective of an ethics of liberation. This investigation will proceed by way of two main points of discussion, namely an exposition of Enrique Dussel's formulation of an ethics of liberation and an application of this ethics of liberation related to the Constitution as *critique*. The three fundamental principles – material, formal, feasible – of an ethics of liberation will be discussed and applied, in the form of three questions, to the current constitutional order. These questions will then be discussed and answered in order to show how the Constitution came into being due to a process of unethical feasibility.

There is no construction without destruction. Destruction means criticism and repudiation; it means revolution. It involves reasoning things out, which is construction. Put destruction first, and in the process you have construction (Chairman Mao Zedong).¹

[O]ne of the most important and basic tasks of the contemporary discourse of African philosophy [is] its critical-negative project (Tsenay Serequeberhan).²

We should mobilise opinion in support of the Constitution (F W de Klerk).³

It may be necessary to use methods other than constitutional ones (Robert Mugabe).⁴

The role that the Constitution and constitutional legitimation plays in South Africa is pervasive and all encompassing. It is praised as a transformative document that heralds the era of the 'post' and acts as a bridge from the past to the present (Le Roux 2007: 61-3). Discourse on post-1994 South Africa has seen continual reference to this Constitution and the project of constitutionalism and reconciliation in South Africa.⁵ Why then, after a supposed 20 years of freedom and democracy, do labour camps in the form of townships still exist on the outskirts of the economic hubs of the country? And, most pertinently for this article, if the Constitutional project in South Africa claims to usher in a new democracy that addresses the injustices of the past, why do the majority of the people conquered and colonised still live uninterruptedly in the same material conditions directly emanating from their conquering and colonisation? This is an ethical question and an ethical problem that has a direct bearing on how we not only think of the world, but also how we currently live in the world. In order to investigate this ethical question, I will specifically examine the role of an ethics of liberation as a form of *critique*.

My investigation will consider the formulation of Argentinian-Mexican philosopher and theologian Enrique Dussel's (1988, 1999, 2006, 2008, 2013) idea of an *ethics of liberation*. The three principles that constitute the fundamental part of an ethics of liberation as well as the moment that this ethics takes on a

1 Circular of the Central Committee of the Communist Party of China on the Great Proletarian Cultural Revolution, 16 May 1966.

2 *The Critique of Eurocentrism and the Practice of African Philosophy* (Serequeberhan 2002)

3 The lasting challenge of April 27 1994. *Mail and Guardian* 25 April 2014.

4 Robert Mugabe speaking, in 1962, about ZAPU's possible future strategies of liberation. ZAPU deposes Mr Nkomo as leader. *The Times* 9 July 1962.

5 Both the *Sunday Independent* and the *City Press* ran special sections on 27 April 2014 praising this idea of 20 years of democracy. On 25 April 2014, the *Mail and Guardian* also had a series of articles addressing this theme in a celebratory manner.

specific critical-liberatory character will be discussed. The critique proposed by a critical-liberatory ethics of liberation involves a mode of critique that does not only destruct, but also constructs “liberation as critical feasibility [... constructs] the whole question of the possible utopia, real although not present” (Dussel 1999: 90). Critique in this sense needs to be understood as always proceeding from the position of materially oppressed and formally excluded within a given social order. Following the above discussion, I will attempt to apply the principles discussed in the Constitution and the constitutional project. A descriptive account of the Constitution will be put forward, focusing on the Constitution as the supreme law of the country. Three questions will then be posed related to the three principles of an ethics of liberation with the goal to interrogate the constitutional project. Under these questions, the continuation of colonial oppression and conquest validated by the Constitution, the illegitimate process of negotiation, and the Constitution’s unethical feasibility will be discussed.

1. Towards an ethics of liberation

For Dussel (1988: 8), ethics is always a praxis, or practice. This praxis “denotes the very relationship of one person to another. Praxis is both act and relationship [...] In the first place, praxis is an *act* done by a person, a human subject, but addressed to another person [...] In the second place, praxis is the *relationship* between two or more persons”.

An ethics as praxis, where praxis is both *act* and *relationship*, is one that foregrounds the relational and discursive elements of human existence. This type of ethics would have as its necessary condition a way of relating to another human being where “[o]ur most radical *being* is our social being, our ‘being’ in virtue of our being human (and not merely animal)” (Dussel 1988: 22). If ethics is praxis, where praxis is relationally between human beings in their “most radical *being*”, then any praxis should also correspond to some kind of ethics. That is to say that any institutional system of legitimation that prescribes a certain way in which its adherents *ought* to relate to each other has its base in an ethics that parades itself as a morality. Dussel (1988: 28) qualifies his understanding of the ethics-morality distinction by arguing that “the term ‘morality’ (or ‘morals’ and so on) [...] will denote any ‘practical’ [...] system of the prevailing, established order now in place”. Ethics, on the other hand, “denote[s] the future order of liberation, the demand of justice with respect to the poor, the oppressed, and their project of salvation” (Dussel 1988: 28). Morality is thus what is institutionalised as a legitimate form of relation, whereas ethics is that form of relationality (praxis) that thinks its possibilities from the side of the oppressed, exploited and excluded.

An ethics of liberation thus attempts a critique of the prevailing order based on its validity as related to the materially oppressed and formally excluded.

In laying out his project for the ethics of liberation, Dussel puts forth three fundamental principles, namely material, formal-discursive, and feasibility. This first part of his ethical project is the “foundational” part where he lays out the three principles that will guide his ethics (Marsh 2000: 51). The second part is a “critical-liberatory” part where he applies the three principles to the current state of world capitalism to affect a “negative critique”, showing how each of the three principles is violated in turn (Marsh 2000: 52). The three principles of the foundational ethics are applied in the critical-liberatory ethics as a paradigm with which to read current ethico-political systems. I will now discuss these three principles of Dussel’s ethics with a view to reading the Constitutional project through these principles and interrogate its validity according to an ethics of liberation.

1.1 Material principle

For Dussel (2013: 55–6), ethics is first and foremost “an ethics of life; that is to say, human life is the content of ethics [and] [e]very norm, action, microstructure, institution, or cultural ethical life always and necessarily has as its ultimate *content* some moment of the production, reproduction, and development of *the human life* in the concrete”. This is the material principle of an ethics of liberation. The material principle – the production, reproduction and development of human life – refers to more than merely the biological continuation of the human body (which he indicates as *material*). For Dussel (2013: 94), *material* also includes “conscious life activity”: the production of the human being of its “physical, spiritual, and cultural life”. Conscious life activity is that sphere of human existence that ensures the continuation of cultural memory, social existence, economic activity, and so on. The human being cannot survive without conscious life activity. Not only does the memory of self-preservation get transmitted through cultural institutions, what sets the human being apart from animals is its ability to produce a cultural, social and political memory.

The material principle of Dussel’s ethics, therefore, refers to the need for human life to be produced and developed in its totality. The descriptive level of material ethics allows us to make a judgement on the relationship between our necessary condition for ethics – the production, reproduction and development of human life – and the way in which a specific instrumental system of legitimation corresponds to this necessary condition (Marsh 2000: 53). If a specific system does not allow for the production, reproduction and development of human life, it is establishing a relationality between human beings that may represent a specific morality (one of individualism, greed, and so on), but it does not

correspond with the necessary condition of an ethics of liberation. There is a clear dialectical relationship between the descriptive level discussed earlier and the ethical level. The ethical level is where one can make an *ought* statement based on the substantive judgement made on the descriptive level (an *is* statement). If the goal of any system of ethics *ought* to be the production, reproduction and development of human life in community, and a specific system of ethics does not do this, then this system cannot be considered ethical. This is the same 'test' that applies to the descriptive level. The descriptive and ethical levels of the material principle thus co-constitute each other on the level of substantive content (Marsh 2000: 54). The material principle can thus be described as the substantive ethical imperative to produce, reproduce and develop human life.

The material principle is what Dussel identifies as one part of the grounding of his fundamental ethics. Because the material principle does not only refer to the biological existence of human life, but also to conscious social being, it cannot be reduced to a biological imperative. Human life happens in common within a community of others. There needs to be a formal, institutional, discursive sphere that will ensure this continuation of human life within a community. It is at this stage that we turn to the second principle of Dussel's ethical project.

1.2 Formal principle

"Who decides on how we should develop life?" (Dussel 2006: 501). This question guides the discussion concerning the second principle: the principle of formal morality. The identification of the first principle of ethics as the production, reproduction, and development of human life leads to the question of how best to achieve this material principle. This requires an intersubjective agreement between individuals within a community to determine what is to be considered valid and legitimate ways of achieving this material goal. The material principle of ethics is what brings into being the need for the second, formal principle of morality. The formal principle aims to bring into being political institutions that makes possible the continuation of life: "[t]he material principle [...] and the formal principle [...] are mutually articulated in the constitution of objects proper to them, in the fluctuation of its process, thereby implicating itself within the application" (Dussel 1999: 86). For Dussel, the formal principle is constructed in relation to the need for the reproduction of human life (the material principle).

Dussel identifies this second principle through a dialogue with Habermas and Apel and their writings on communicative and discursive reason. The formal moment of morality makes it "*necessary* to exercise the formal consensual rational principle of intersubjectivity that can attain moral validity" (Dussel 1997: 9). What distinguishes an ethics of liberation from normal discourse ethics on this point is that an ethics

of liberation does not attempt to develop this moral validity exclusively from the formal principle: “[t]his is not a question of applying the basic norm to the empirical-historical; rather, conversely, the formal basic norm has the function of ‘applying’ the material principle” (Dussel 1997: 10). It is through interaction and deliberation within the speech community that these formal institutions of morality come into being. They are performative systems decided upon by a discursive community.

For the grounding of the formal moment of morality in the material principle to be valid, it needs to pertain to an “intersubjective agreement whose validity rests on consensus, autonomy and legitimacy [and it needs to] be founded on practical-communicative reason and not, as until now, on the violence and exclusion exercised by instrumental reason” (Dussel 2006: 501). The fulfilment of this basic norm is what ensures the communitarian and universal validity of the formal moment of morality. If not for this validity, then the formal principle can easily act to serve the interests of the few and the powerful (Dussel 2013: 141). The formal principle of morality should thus be grounded in the material principle of ethics; it should be instituted in such a way as to not destroy and exploit human life. For this to be possible, those who interact in the formal moment should not merely be those who govern or are in power; it should also be those who are governed and powerless. Ethics is first and foremost a way of relating to other human beings within a community, and the formal moment of morality should thus work towards the equal participation of all in the setting up of this system of relationality. The formal principle is grounded in the material moment, but the material moment also has as its conclusion the formal moment of validity. The two moments are thus co-determining, but still need to be carried out in a programmatic fashion. It is this question of ‘feasibility’ that takes us to Dussel’s third and final principle of his fundamental ethics.

1.3 Principle of feasibility

The third principle identified by Dussel (1999: 87) has to do with political feasibility and strategic reason. This feasibility is related to whether it can fulfil the previous two principles: “the *feasibility* of the protection of life and the promotion of symmetric participation in the building of a collective and rational form of organization” (Dussel 2006: 502). The principle of feasibility is a way to synthesise the previous two principles that leads one to a realisation of what is good on a concrete social level (Dussel 2013: 156). This realisation happens when instrumental reason is used to judge the best ways of achieving set goals; strategic reason is applied to deliberate on relevant means and ends, and the material and formal principles are used in a moment of ethical reasoning that evaluates the validity of the instrumental and strategic reason used (Marsh 2000: 57).

The principle of feasibility presents the challenge that one must make feasible that which, according to the first two principles, can be considered ethically good and morally valid. Feasibility, therefore, corresponds to that which can be considered possible within the framework of these two principles. If something is technically possible, but it does not produce, reproduce, and develop human life in a community where all of those within the community can participate in the social order, then this is not feasible since it is un-ethical. Feasibility thus distinguishes itself from pure pragmatism in that it is grounded in principles which determine what can be considered feasible and not. On the level of feasibility, the synthesis of the previous two levels is made possible through its transformation into “performative systems” (Dussel 2013: 158). Feasibility enables us to evaluate a performative system not only in a negative, destructive way, but also in a way that produces a critical-ethical consciousness. It is only after this third principle of the fundamental ethics that we can consider the critical-liberatory part of an ethics of liberation.

2. Critical consciousness

The three principles explicated above form the basis of Dussel’s ethics of liberation. The critical-liberatory part of his ethics is the application of these principles in order to evaluate a given performative system. Any institution of government, law, education, and so on would, therefore, be analysed according to these three principles. As mentioned earlier, any performative system of institutional legitimation leads to a mode of relationality between human beings. Every performative system therefore makes a claim to ethical life in the form of a specific morality and has a “goodness claim”, a claim to what is considered valid and moral (Dussel 2013: 205). An ethics of liberation as a critical-liberatory ethics must move from the perspective of the victim, because from this perspective the current performative system’s goodness claims are inverted: “truth begins to reveal itself as nontruth, that which is valid as invalid, the feasible as that which is in fact unviable, and thus that which had the intention or possibility of being ‘good’ can now be interpreted as ‘unjust’ or ‘evil’” (Dussel 2013: 205). The victim is here the human being who is materially unable to produce, reproduce, and develop her life and formally excluded from the discursive apparatus of a specific community.

An ethics of liberation should assume as its starting point a “material negativity”, which takes the position of those who are materially oppressed and formally excluded (Dussel 1999: 90). The move from a fundamental ethics to a critical-liberatory ethics occurs by way of the development of a critical-ethical consciousness (Dussel 2013: 215). The first step in the development of such a critical-ethical consciousness is the realisation that the position of the victim is not

a natural fact. It is a human creation by those in power and with privilege to keep their positions by exploiting those less powerful. The next step is the “formulation of a *negative* judgment of this project of domination as that which produces the poverty or unhappiness of the dominated or excluded victims” (Dussel 2013: 216). The critical-ethical consciousness comes about at the stage in which the victims of a certain order realise their material oppression and formal exclusion as being merely a constructed reality and not a natural fact. It is at this moment that the ethics of liberation takes on its critical-liberatory aspect, when a critique can be developed from the perspective of the victims.

Critique here refers to both an element of taking apart, destructing, and creating or producing, constructing. It is, however, the *negative* element within the critique that not only makes it destructive, but also enables the construction of “a positive, legitimately utopian alternative to the present” (Marsh 2000: 52). The critique proposed by an ethics of liberation thus has a *utopian moment* within its unfolding. This utopian element is what enables critique to be creative and productive. It is an idea of utopia that acts as a critical-ethical conscience that is able to construct, out of a negative critique, the potential conditions for a new ethics, an ethics of liberation. Negative critique inverts the truth claims of a given morality, while making this negative inversion a positive creation. Counter to the dominant reading of utopia – championed by sixteenth-century author Sir Thomas More (2012[1516]) – that considers it to signify an imagined, idyllic space, utopia as a negative critique is what unites the material and formal principles as a consideration of a feasible future.⁶ As Deleuze & Guattari (2009: 99) observe, “utopia is what links philosophy with its own epoch [...] In each case it is with utopia that philosophy becomes political and takes the criticism of its own time to its highest point”.⁷ Utopia is the ability to think and theorise about what is not yet possible. In order to achieve this, it is necessary to immerse oneself in the imminent, current juncture. For it is only through knowing what is currently possible that one can start imagining that which is not yet possible. For the victim of any given performative system, the impossibility of their material life and formal equality is what seems impossible. The strategic feasibility, to which Dussel refers, as an element of critical-ethical reason, is also what calls for this creation of the not-yet possible.

6 Sir Thomas More presents his vision of utopia as a proto-socialist island where all human beings live in peace and harmony with no discord and/or competition. Everyone has just enough to make them content.

7 This position is counter to Brown’s (2005: 15) claim that utopian thinking is linked with historical materialism and that “utopian intellectual exercises [...] attempt to leap out of history”.

3. Constitutional supremacy as a performative system

The creation of the not-yet possible as a critical-liberatory element of an ethics of liberation occurs in relation to a prevailing system of formal morality. In South Africa, this system is the South African Constitution. The South African Constitution acts as the highest law in the country in that it structures and regulates both individual and state conduct. The first chapter of the Constitution (RSA 1996) proclaims that “[t]he republic of South Africa is one, sovereign, democratic state [where the] supremacy of the constitution and the rule of law” is one of the Republic’s ‘founding values’. This act of proclaiming the ‘new’ state speaks to the constitutive and performative element contained in the Constitution: it acts by way of performing state sovereignty. The Constitution also affirms itself as the sovereign in the territory that is named South Africa, a territory that is also determined and discretised in the document: “[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled” (RSA 1996). This is confirmed by Chapter 2 of the Constitution that contains the Bill of Rights (sections 7-39), “a cornerstone of democracy in South Africa” (RSA 1996). The Constitution further qualifies its application in sections 8(1) and 8(2) of the Bill of Rights when it proclaims that it “binds the legislature, the executive, the judiciary and all organs of state [as well as a] natural or a juristic person” (RSA 1996).

Van der Walt (2005: 34) refers to this as a “horizontal and vertical application” of the Bill of Rights. A *horizontal application* entails that the Bill of Rights binds citizens and other private legal subjects to each other, whereas a *vertical application* assumes that the Bill of Rights is a contract that binds the citizen to the state and *vice versa*. Van der Walt (2012: 20) also attempts to conceive of this sovereignty of the Constitution by way of what he calls a “single-system-of-law” principle. Consequently, the Constitution requires both the common law and legislation “to promote the spirit, purport and objects of the bill of rights” (Van der Walt 2012: 20). Van der Walt (2012: 20) cites *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) paragraph 44 to illustrate this single-system-of-law principle: “There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control”.

The role of constitutional supremacy and a single-system-of-law principle is to make all actions and decisions fall within the already set-up parameters of the Constitution. It is through constitutional supremacy that a specific type of *legislative power* is created, a power “which permanently promulgates and actualizes the *legal system* in a constitutional manner” (Dussel 2008: 52).

The creation of the Constitution must also be the creation of a specific legal infrastructure that can put into force this Constitution. When a constitution proclaims itself as the highest form of law in the country, it also defines the country as a “government by law” (Dussel 2008: 52). The significance of a “government by law” is that this proclamation then also becomes a performative act that brings into being a legislative power used to further interpret and extend the already normative sphere set up by the Constitution. By proclaiming itself as the “supreme law of the Republic”, the Constitution also proclaims this Republic and becomes the master signifier from which all other spheres of power gain their legitimacy. The Constitution, being the central signifier of this organisation of political normativity, becomes that against which *validity* – in the personal/horizontal sphere – and *legitimacy* – in the legal/vertical sphere – are tested. No decision has to be made about what is legitimate; if there exists a normative framework (law) against which legitimacy is tested (court), there is no need for a decision. The Constitution’s supremacy forces an ethics of liberation to engage it, due to its all-pervasive role in structuring and setting up relations between people in the country.

4. Critical-ethical constitutionalism

This final section of the article will consist of three questions posed to the Constitution from the perspective of an ethics of liberation. These three questions will act as the critical-liberatory part of this article, as it will consist of a critique on the level of material oppression, formal exclusion, and unethical feasibility of the Constitution.

4.1 Does the Constitution ensure the continuation of life of those who were excluded?

The first question to be posed relates to the material principle explicated earlier and is aimed at investigating the Constitution’s ability to produce, reproduce, and develop human life in the community. The Constitution, as will be discussed in the next question, was drafted in order to re-arrange an unjust political system. However, the identification of the unjust political system focused on apartheid and not on colonial dispossession and conquest. African philosopher Mogobe Ramose (2012: 26) argues that the Constitution postpones an answer to the “original fundamental conflict of sovereign title to territory and, the vital question of economic justice”. Ramose bases his argument on a reading of the unjust wars of colonisation that dispossessed the indigenous conquered people of South Africa from their sovereign

title to land and territory (Ramosé 2002: 471, 2007: 313, 2012: 23).⁸ Citing the just-war theory, Ramosé (2012: 23) argues that “[t]he victorious colonizer claimed sovereign title to territory by appeal to the ethically untenable ‘right of conquest’”. The “right to conquest” is a positive right derived from the theological “divine right of conquest” established by successive Popes since Pope Innocent IV in the thirteenth century (Ramosé 2007: 313). The divine right of conquest was part of the divine order to civilise the infidels of the world and bring them to God.

Ramosé argues that, for there to be justice for the indigenous people conquered in the unjust wars of colonisation, there needs to be a return of sovereign title to land, since conquest was based on the dispossession of territory. However, the Constitution failed to address this question of historical justice in the form of sovereign title to land, since the aim was merely to re-arrange an unjust order instead of addressing questions of historical justice from the perspective of those who were, and continue to be, materially oppressed and formally excluded. The condition in which the majority of the people in the country still find themselves is a consequence not merely of apartheid legislation, but rather of hundreds of years of colonial dispossession and conquest.

The fact that the majority of people in the country still lives in conditions that devoid them from material ability and formal participation speaks to the fact that the Constitution does not ensure the production, reproduction, and development of human life in the community. The Constitution does proclaim to grant access to those who have been excluded, but time and again shows that those who have been excluded continue to be excluded. We want to argue that this in-ability of the Constitution to effect a fundamental change in the material conditions of the majority of the people of South Africa is proof that it does not, and cannot, address these material conditions on a substantive level. This is a direct result of its misdiagnosis of the question of justice as reconciliation instead of re-construction. This can, in turn, be subscribed to the processes that lead to the moment of formal morality and those who were included and excluded from this discursive community.

8 I follow Ramosé's (2001) theorisation concerning the conqueror and the conquered. Accordingly, Ramosé argues that all the conquered peoples of the world share the experience of being unjustly conquered by colonial conquerors. The use of 'indigenous conquered people of South Africa' refers to a shared experience of loss of sovereignty and title to land. This term included the Bantu-speaking peoples, the Indians and the Coloureds of South Africa.

4.2 Does the Constitution ensure inclusion of those who have been formally excluded?

The continued existence of the majority of the people in South Africa under conditions of material oppression that can be traced to colonial dispossession needs to be read against the principle of formal morality. In 1989, two years before the first official 'negotiations', the African National Congress (ANC) drafted its *Constitutional guidelines for a democratic South Africa* and, in 1990, the constitutional committee of the ANC submitted a discussion document on a possible Bill of Rights to the relevant members and branches of leadership (Nolutshungu 1991: 97). The ANC made their decision to negotiate with the National Party (NP) government officially at a policy conference in 1991 (Ramose 2012: 26). Since it was an ANC conference, the right to vote on the matter was reserved for members of the ANC only. This was followed, in 1992, by a draft version of a Bill of Rights produced by the ANC. The main decision that largely defines the idea of South Africa's triumph was therefore made without the input of the majority of the people of the country who were materially oppressed.

While the NP was representative of the majority of the white population by being democratically elected into government in 1989 and putting the question of negotiations to the white electorate in the form of the 1992 referendum, the ANC was not representative of all the materially oppressed people of South Africa. The victims of colonial oppression and conquest whose production, reproduction, and development of their human life was made basically impossible were not consulted as to what form the 'new' South Africa should take. Calling what happened at the Convention for a Democratic South Africa (CODESA) in 1991 and the multi-party negotiations (MPN) in 1993 'negotiations' is also a misnomer as, in any legal transaction, any fair negotiation can only take place between equal participants in the negotiation process. There was no semblance of equality with these talks, in that the NP still held governmental and state power and the ANC was not representative of the majority of the materially oppressed. The choices regarding the form of the 'new' South Africa were made by a select few individuals and based wholly on an elite compromise between the ANC and NP government (Bond 2000, Ramose 2012, Terreblanche 2012). The culmination of the Constitution through these 'negotiations' could thus not possibly address the question of liberation for the victims of colonial conquest. This inability can be ascribed to the fact that the materially oppressed and formally excluded were again excluded from the formal moment of practical-discursive reason. The few and the powerful thus answered the question as to who decides how we should develop human life.

4.3 How does the Constitution view and engage the idea of feasibility?

The previous two questions aimed to prove that the first two principles – the material and the formal – of the fundamental part of an ethics of liberation were not fulfilled. The Constitution is a document built on un-ethical feasibility. It focuses on what is technically possible and not on what is ethically feasible. The Constitution does not ensure the production, reproduction and development of the total human life of the majority of the people of the country and continues to formally exclude this same majority from participating in public discourse. The protests to raise concerns show, on a very material level, the existence and continuation of a formal exclusion based on continued material oppression.⁹ The Constitution was not only based on an unethical feasibility, but also ushered in an era of critique in the line of this unethical feasibility. Although a survey of the history of constitutional critique in South Africa is not possible in this article, I would like to focus briefly on Klare's very influential *Legal culture and transformative constitutionalism* (1998) as an example of a dominant trend of critical engagement with the Constitution.

Since the publication of Klare's article in 1998, there have been several responses in various forms that deal explicitly with the notion of transformative constitutionalism put forth in that article. Klare's influence has been wide and, although not presenting the totality of critical positions on the Constitution at present, the trend inaugurated by the article has been relatively dominant.¹⁰ In this article, Klare (1998: 151) presents a reading of the Constitution as having a "postliberal" vision of the law, one where the "political" aspects and issues of the law are taken into account in the judgement, as opposed to the liberal interpretation and its association with positivist legal interpretation (Klare 1998: 152). For Klare (1998: 147), the Constitution makes possible transformation, but it needs to be interpreted progressively: "[a]djudication uniquely reveals ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice".

It is partly due to the postliberal vision of the Constitution that Klare (1998: 150) argues for what he calls *transformative constitutionalism*:

a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.

9 <<http://mg.co.za/article/2014-02-12-research-shows-sharp-increase-in-service-delivery-protests>>

10 See Van der Walt 2005, Langa 2006, Liebenberg 2006, Le Roux 2007, Roux 2009, Van Marle 2009, Klare & Davis 2011.

Transformative constitutionalism needs to be conceived of as a project of critically engaging with the Constitution in order to make it more responsive and democratic to the citizenship. As Klare (1998: 150) argues, “transformative constitutionalism is not a neutral concept but is frankly intended to carry a positive valence, to connote a social good”. The court is an arena of political change and can be used to accomplish a type of justice if the judges and lawyers would engage the Constitution in a substantive and not merely procedural way. The Constitution is thus in itself not a bad document, but it needs the right interpreters and judges to make it great. The fact that it is not yet great is due to a “disconnect between the Constitution’s transformative aspirations and the conservative character of South African legal culture” (Klare 1998: 151).

Klare (1998: 172-5) argues that the Constitution’s greatest strength is its transformative aspirations, in other words, its ability to address and transform the evils of apartheid. The Constitution is considered an achievement of transformative justice partly because “[o]n April 27, 1994, South Africans authorized a new, transformed legal culture (among other accomplishments of that magnificent day)”. Klare’s possibility condition for his argument of transformative constitutionalism is thus that the Constitution indicates a break from the past and has the potential to cause large-scale transformation and reform in South Africa. Transformative constitutionalism is not only reformist, but also unethical. The project of transformative constitutionalism is an unethical project, since it accepts technical feasibility without reference to the material and formal principles related to this feasibility. It proposes an idealist utopian thought that puts an overt amount of emphasis on the “right to life as a theoretical concept” without taking into account this right’s “strong contrast with the materiality of many other factors: death, famine, misery, the oppression of corporeity as a result of labour” (Dussel 2006: 503). Transformative constitutionalism proposes that those who are already part of the discourse of the legal profession change their perspective from positivist to post-liberal while still not including the voices of those whose rights it is meant to protect. Transformative constitutionalism propagates a position that does not see the violation of the material and formal principle in the constitutional project. It propagates a position that chooses technical possibility above ethical feasibility. Transformative constitutionalism is thus incompatible with a critical-liberatory position put forth by an ethics of liberation.

5. Utopian constitutionalism

The three questions above aimed to show that the constitutional project in South Africa cannot possibly address the issues of material oppression and

formal exclusion caused by colonialism and conquest. I focused on Klare's notion of transformative constitutionalism as a form of critique that contributes to the unethical feasibility of the constitutional project. However, it is not only transformative constitutionalism that makes itself guilty of this charge; all critical discourse that sees in the Constitution enough legitimacy for the critical project to not be explicitly anti-constitutional contributes to this silence and non-action. For critique to function as an ethics of liberation, it has to be anti-constitutional; it requires the possibility to think anti-constitutionally or supra-constitutionally. In this sense, an attempt was made to put forth a possible new way to consider critique, a negative critique from the position of the materially oppressed and formally excluded. If critique is to be a creation and a production of the new, if it is to be utopian in the sense of a negative imagination, then this creation and production needs to think what is currently not considered possible. The utopian element of critique needs to come not from an escape to the future or an idealistic pragmatism, but from an immersion in the present in order to find what is not yet possible. As Paulo Freire (2005: 39), a Brazilian theorist of pedagogy, notes:

The radical committed to human liberation, does not become the prisoner of a 'circle of certainty' within which reality is also imprisoned. On the contrary, the more radical the person is, the more fully he or she enters into reality so that, knowing it better, he or she can better transform it. This person is not afraid to meet people or enter into dialogue with them. This person does not consider himself or herself the proprietor of history or of all people, or the liberator of the oppressed; but he or she does commit himself or herself, within history, to fight at their side.

Being trapped in a circle of certainty can be attributed to the current discourse on constitutionalism in South Africa: the Constitution becomes the sphere from which all possibilities are constructed. It sets the boundaries for debate and action and validates whether something is, in fact, right or wrong. It acts as the sphere of formal morality without being grounded in a material ethic of human life.

To return to the idea of utopia then, critique cannot but engage with a creative bringing forth of an alternative formal morality from the position of the victim. The connection between utopian thinking and the material and formal principles lies with the imminence of utopian thought. One can only determine what is feasible by determining what is not yet possible, an insight that can only be generated from a complete immersion in the current political and social milieu. An ethics of liberation proposes an idea of utopia through the use of a negative critique against the current performative system. An ethics of liberation is thus an approach that needs to be taken seriously if a radical critique of the Constitution is

to be forwarded, one that breaks from the circle of certainty constructed by way of an unethical feasibility.

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