Conquest and Law as a Eurocentric enterprise: An Azanian philosophical critique of legal epistemic violence in "South Africa"

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Abstract
This essay will critically analyse how conquest that resulted in white settler colonialism laid the foundation for epistemic violence. Epistemic violence, which took the form of the imposition of the law of the European conqueror in the wake of land dispossession in 1652 in South Africa is the fundamental problem this essay will critically engage with. We will rely on the Azanian philosophical tradition as a theoretical framework to critique this legal epistemic violence. Our theoretical framework is in line with Afrikan jurisprudence, which is grounded in the culture and worldview of the Indigenous people conquered in wars of conquest. Fundamental to our argument is that the law of the European conqueror, which was imposed through conquest is a Eurocentric enterprise, which seeks to negate the Afrikan worldview and culture and reinforce historic injustice. It is important to note that epistemic violence commenced with the issuing of papal bulls, which undergirded conquest and white settler colonialism in South Africa. The thesis of the essay is that in the wake of conquest and the attendant imposition of the law of the European conqueror, white settlers used their law to technicalise issues of historic injustice such as land dispossession. It is in this sense that this essay seeks to contribute to the decolonisation of law by foregrounding the worldview and culture of the Indigenous conquered people.
Keywords: Conquest, epistemic violence, law, white settler colonialism, South Africa, Azania, Afrikan jurisprudence, Chimurenga

Introduction

This essay will critically analyse, in the context of conqueror South Africa (RAMOSE 2018), the relation between conquest in unjust wars of Western colonisation and legal epistemic violence. This legal epistemic violence took the form of the imposition of the Eurocentric law of the European conqueror on the Indigenous people. The European conqueror imposed the Eurocentric law to justify the violent acquisition of the land of the Indigenous people in 1652. By relying on the Azanian philosophical tradition/Azanian jurisprudence, this essay will contribute towards a decolonisation of law in conquered Azania which is dominated by white settlers who used their law to rationalize conquest since 1652. It is in this sense that it is a defence of the Afrikan world view, culture and law. And a contribution to the negation of European legal epistemic violence, which sustains the historic injustice of land dispossession since 1652.

The underlying argument is that the "scientization" of the law in the form of legal positivism led to the dismissal of the idea of knowledge as symbolic in

nature through the argument that there are "objective legal facts" and thus "objective legal problems" which need "objective or neutral adjudication and resolution" without a committed consideration of their cultural and historical context. This is an imposition of legal colonial epistemology on the Indigenous conquered people. And this imposition made it possible for the Europeans to entrench their colonisation legally through the distortion and subjugation of Afrikan law and jurisprudence specifically the underlying ethical dimension thereof, which is *Ubu-ntu*.

This distortion is apparent through the "deliberate absence" of *Abantu/Batho* and *Ubuntu/Botho* in the current "South African" constitution. This distortion of Afrikan jurisprudence is conspicuous in the 1996 constitution, and this very distortion led to the legal colonisation of Afrikan jurisprudence through the shift from parliamentary supremacy to constitutional supremacy in 1994. This legal colonisation of Afrikan law and jurisprudence as a manifestation at the level of law of the epistemological legitimation of conquest took the form of the colonial invention of "customary law" *ala* the *African Survey*. Distorted Afrikan jurisprudence and law are now "subject' to the constitution, and one cannot fail to notice the connotations of colonial power-relation accompanying the operative word "subject". The Indigenous conquered people are a "subject race" with a "subject law". Thus, the liberation of the Indigenous conquered people implies the liberation of their law. This liberation entails first and foremost the restoration of sovereign title to territory as the fundament of Afrikan law and jurisprudence prior to conquest in the unjust wars of colonisation since 1652. The restoration of sovereign title to territory to its rightful owners since time immemorial, namely, the Indigenous conquered people should be through a *chimurenga* which will precede the abolition of the current constitution. This is because a revolution must negate the current constitutional framework in order to establish a new one premised on the law and culture of the Indigenous people. It is in this sense that the mere call for the abolition of the constitution of 1996 is not revolutionary in itself but must be preceded by a *chimurenga.* This war of liberation will first restore the land and then lay the foundation for a post-conquest Azanian constitution for an independent Azania premised on Anton Lembede's Africa for the Africans, Europe for the Europeans, and Asia/India for the Asians/Indians. This essay is divided into three sections, which discuss the above in detail, we now turn to the first section.

The catastrophic coming of the Europeans and conquest

Fundamental to European Modernity in "South Africa"[1] is conquest[2] in the unjust wars of colonisation since 1652 (RAMOSE 2007). White settler colonialism

[1] For the purposes of this study the name South Africa is placed in inverted commas to reflect that it is an ethically and politically contested name. The Pan Africanist Congress and the Black Consciousness movement regard the geographical area called South Africa by the European conqueror to be Azania.

founded on land dispossession, following military defeat in "South Africa" and its consequent imposition of the law of the European conqueror at the expense of African law and jurisprudence, is founded on conquest in these unjust wars of colonisation since 1652 (RAMOSE 2007). Thus, conquest is not just a military encounter, but it is also an epistemological event. Conquest in the form military defeat, is premised on the epistemological paradigm of the European conqueror in the form of the international law of colonialism (MILLER 2011) and *Romanus Pontifex* issued in 1455(RAMOSE 2018). In other words, there is an epistemology that founds conquest in the form of military defeat and another epistemology which legitimates the former, so as to naturalise it in the eyes of the Indigenous conquered people.

The distinction between these two epistemologies is merely analytical but not historical. This is because the racist idea that Azania was a *terra nullius* precedes military defeat, as part and parcel of the doctrine of Discovery (MILLER 2011), but also attains an afterlife through white settler historiography (DLADLA 2018) "in the wake" (SHARPE 2006) of military defeat and the colonial invention of "South Africa". Thus, the historiography of Afri-forum as a manifestation of white settler historiography, which propagates the absurd myth of "the Bantu migration" complements the principle of *terra nullius,* as part and parcel of the doctrine of Discovery as international law of colonialism (MILLER 2011). In other words, while the principle of *terra nullius* founds conquest, "the Bantu migration" legitimates conquest, following military defeat. While the former is jurisprudential, the latter is historiographical.

But both are part and parcel of the entire epistemological paradigm of the European conqueror and the successors in title to conquest in the unjust wars of colonisation (RAMOSE 2007). For instance, with regard to the jurisprudential

[2] For the purposes of this thesis conquest by itself as a result of war is neither just nor unjust in the sense that it is part and parcel of the logic of war. But that it is war which can be either just or unjust as per the doctrine of the Just war as formulated by St Augustine and Thomas Aquinas. We are aware that Thomas Hobbes employs the locution "unjust war" in the technical sense. However, for the purposes of this thesis we will eschew this phraseology. In this thesis we will consistently employ the concept *"indigenous peoples conquered in the unjust wars of colonisation"* to posit that the conquest of 1652 was ethically untenable as it stemmed from the wars of colonisation which were unprovoked thus unjust. This concept will also be employed to contest the ethically untenable claim by the successors in title to conquest such as the so-called Afrikaners that they are a conquered people and that they are indigenous to Azania just like the Indigenous people they conquered in the unjust wars of colonisation since 1652. This historically obfuscating equation in effect obliterates, for the ethically and historically less sensitive, the inherent original injustice of the unjust wars of colonisation. It is the case that this obliteration is the reaffirmation of the famous "South Africa belongs to all who live in it, black and white" *ala* the Freedom Charter and as reinforced by the Preamble to the final constitution with "we the people of South Africa". This thesis will not delve into an extensive analysis of the doctrine of Just war as developed by the abovementioned philosophers.

aspect of the epistemology of conquest, the first discovery claim entailed the assertion of an "unoccupied land" (meaning not occupied by Europeans as civilized beings), while the historiographical eventuates in the arrogant "self-indigenisation" by white settlers, through "fantasies of colonialism" such as "our fatherland" by for instance the so-called Afrikaners. In addition to regarding themselves as indigenous, they deem themselves to be a conquered people.

This is how Willie Esterhuyse (2012,277) states it "At one stage I wondered whether we would succeed in seeing the peace process through. South Africa, I told Pahad, was different from all the other countries in Africa. It had a large white population, and the Afrikaners had long ceased to be settlers. They were white Africans. Aziz Pahad agreed enthusiastically". This is how Neil Barnard further states it:

> Perhaps my mother's remark to me in my childhood years that English was the 'language of the conqueror' had something to do with my refusal to speak it…What rubbed even more salt into their wounds was a letter from the South African head of state for the attention of the British premier, Margaret Thatcher, in which he objected in the strongest possible way to this undermining by our former conquerors (2015,22)

Contrary to the above-mentioned statements by the successors in title to conquest in the unjust wars of colonisation since 1652, the title to territory is vested in the Indigenous people since time immemorial. The Indigenous people conquered in the unjust wars of colonisation are subjected to epistemicide as inscribed historically in a constitution, that condones epistemic domination by recourse to the ethically contestable "right of conquest" (RAMOSE 2018). It is however important, to note that for the purposes of this essay conquest in "South Africa" does not commence in 1652. We now know that there were several attempts at military conquest by the Portuguese and the Spanish around the late 1400s (PHEKO 1984). The epistemological fundament of conquest was laid in 1455 in Europe prior to the catastrophic coming of the Europeans to Azania.

The doctrine of Discovery, which laid the fundament for the loss of title to territory, traces its origin to 1455, when Pope Nicholas the V issued *Romanus Pontifex*. Thus, *Romanus Pontifex* is foundational to the loss of title to territory by the Indigenous people conquered in the unjust wars of colonisation, since 1652 (RAMOSE 2018). In explicating this connection, this essay follows a wholistic approach which is premised on a philosophical analysis, which situates the conquest of 1652 in the unjust wars of colonisation, within the historical context of *Romanus Pontifex*. In so doing, this essay posits that the loss of title to territory, begins almost two centuries earlier with *Romanus Pontifex* (1455) of Pope Nicholas the V which authorised and anticipated the unjust wars of colonisation of 1652 in conqueror South Africa (RAMOSE 2018). The doctrine of Discovery as an international law of colonialism (MILLER 2011) is the fundament of the conquest since 1652 in the unjust wars of colonisation.

The condition of possibility for the imposition of the law and jurisprudence of the European conqueror, is the 1652 conquest which is normally excluded from the realm of "juristic facts" (RAMOSE 1998). European rationality is fundamental to conquest at the ontological and epistemic levels. The Aristotelian philosophical anthropology typified by the idea that "man is a rational animal" is foundational to the white supremacist political ontology, which reduces

the Indigenous people to the non-human, thus legitimating the 1652 conquest in the unjust wars of colonisation. For the analytical purposes of this essay, this "ontology of racism" is foundational to both the epistemology which founds conquest and the epistemology which legitimates conquest.

This is because the doubting of the humanity of the Indigenous people, which is at the core of the "ontology of racism" is not just an event of military defeat, but it is a structural relation following the former. This ontological aspect of conquest is inextricably linked with the epistemicide, that manifested itself in the imposition of the epistemological paradigm of the European conqueror in law and history. Conquest is foundational to epistemicide, and it is its condition of possibility. This is because conquest is not just a mode of territorial acquisition, through military defeat which eventuates in the deprivation of native title by the European conqueror. According to Winter (2011) conquest in the colonial world is foundational to "a legal claim and title to rule" over the conquered people. Thus, conquest in the form of military defeat founds the "right of conquest" (KORMAN 1996). This is the second aspect of the epistemology of conquest for our analytical purposes in this essay. This implies that the epistemology of conquest comprises of two dimensions, the first one which founds military defeat and the second one, which legitimates military defeat.

This epistemology of conquest which founds and legitimates military defeat, and its aftermath is at the core of "the epistemological paradigm of the European conqueror" (RAMOSE 2018) which was imposed since 1652 to this day in "post-apartheid South Africa," particularly in the final constitution of 1996. In other words, there seems to be an epistemology of conquest at work in the whole process of the imposition of the law and jurisprudence of the European conqueror, who became a white settler through land dispossession. Land-appropriation (SCHMITT 2006) is foundational and prior to land-division through the law of the coloniser. Land-division (SCHMITT 2006) is premised on the originary violence of land-appropriation in military defeat. Thus, our hypothesis is that the originary violence of conquest precedes and buttresses the epistemic violence which stems from it. Conquest since 1652, which inaugurates white settler colonialism takes the form of violent land dispossession and epistemicide (RAMOSE 2018), which legitimises the loss of territory and sovereignty of the Indigenous conquered people. In other words, epistemic violence which manifests itself in the form of the imposition of the law, jurisprudence and history of the European conqueror is a form of an exercise of "the right of conquest" (KORMAN 1996), a legitimation of conquest and a manifestation of "the law of conquest" in "South Africa".

It is an established historical and legal fact, that conquest has been foundational to the acquisition of territory and sovereign title to it, both in Europe and outside of Europe (RAMOSE 2002, KORMAN 1996, SCHMITT 2006 and WINTER 2011). Mogobe Ramose in *I conquer, therefore I am sovereign: reflections upon sovereignty, constitutionalism and democracy in Zimbabwe and South Africa (2002)*, critically discusses how the European conqueror both in Zimbabwe and "South Africa," acquired territory through conquest in the unjust wars of colonization. Foundational to this violent mode of acquisition of title to territory, is a military defeat in unjust wars of colonization both in Zimbabwe and "South Africa". Conquest as reflected in the title entails the violence of war. This is central to our argument. We argue that this violence of war results at the same

time in land dispossession and the imposition of the law of the European conqueror ,who uses the same law to justify the violence of law, in order to evade issues of historic justice.

This historiographical legitimation of conquest through historical knowledge is discussed by Ndumiso Dladla in "The liberation of history and the end of South Africa: some notes towards an Azanian historiography in Africa, South" (2018). As far as conquest as a mode of acquisition of territory is concerned, Robert Miller states that:

Europeans could acquire title to Indigenous lands by military victories. Conquest was also used as a term of art to describe the property and sovereign rights Europeans claimed automatically just by making first discovery (2011,854)
In the so-called voyages of discovery Europeans acquired newly discovered lands by conquest. As Yehuda Blum states it:
Notwithstanding this hesitancy of practice to follow the classifications laid down by doctrine, it seems both pertinent and useful to mention the fact that modern international law generally distinguishes five modes of acquiring territory which are classified under the following heads: occupation, accretion, cession, *conquest* and prescription (1965, 3) (our italics).

This is how according to Freda Troup conquest unfolded in South Africa:
The Khoikhoi sued for peace, and tried to regain rights to their pastures, "standing upon it that we (the Dutch) had gradually been taking more and more of their land, which had been theirs since the beginning of time… Asking also, whether if they came to Holland, they would be permitted to do the like. The Commander argued that if their land were restored there would not be enough grazing for both nations. The Khoikhoi replied Have we then no cause to prevent you from getting more cattle? The more you have the more lands you will occupy. And to say the land is not big enough for both, who should give way, the rightful owner or the foreign invader? Van Riebeeck made it clear that they had now lost the land in war and therefore could only expect to be henceforth deprived of it… The country had thus fallen to our lot, being justly won in defensive warfare and…it was our intention to retain it (1975,33-53).

It is upon this military defeat that a process of legitimisation, was embarked on to naturalise this conquest in the unjust wars of colonisation. This exercise in legitimation is intended to result in what is called "colonial unknowing" (VIMALASSERY 2016). Thus, conquest has two elements, namely, the element of military defeat through which title to territory is acquired and the acquisition of a legal and moral claim to rule over those whose title to territory is deprived in the military defeat. As Yves Winter in *Conquest in Political Concepts (2011)* states it "conquest was intimately tied not only to the empirical fact of military defeat and subjection but to a legal and moral claim, to a legal title to rule". This second element of conquest took the form of the imposition of the law and jurisprudence of the European conqueror, which was accompanied by the distortion of the law of the Indigenous people conquered in the unjust wars of colonisation and the resultant reduction of issues of historic justice to technical legal issues, which is the core of the critique in this essay. This second element of conquest is consummated in the final constitution, which is a culmination of the long process of white settler colonial constitutionalism since the 1853 Cape

constitution. We are aware that the legal legitimisation of conquest is also premised on the historical legitimisation of conquest.

This is because law and history are inextricably intertwined. History is studied in the interest of power and the foundation of European law is also power and violence. It is important to note that the legal history of "South Africa" by white settler scholars, is reflective of this exercise in the legitimation of conquest. This takes the form of the exclusion of conquest and its concomitant epistemicide, from the realm of "juristic facts" as Mogobe Ramose has established it in relation for instance with H.R Hahlo and Ellison Kahn in the text called *Historic titles in law (1998).* The imposition of the law of the European conqueror is consummated in "South African" constitutionalism, which has reached its apex in the final constitution of 1996. This implies a historical connection between conquest and constitutionalism in "South Africa" as accentuated by Joel Modiri in *Conquest and constitutionalism: first thoughts on an alternative jurisprudence (2018).* As Mogobe Ramose in *Towards a Post-conquest South Africa: beyond the constitution of 1996* states it:

The his-story of constitutionalism in conqueror South Africa reinforces our argument. We are not against constitution making. Rather, we are against the surreptitious imposition of a constitution being the reaffirmation of the elements of the doctrine of Discovery". The inherent injustice of this doctrine renders the constitution as its outcome ethically unacceptable *(2018,14)*

The European view that accepted the legitimacy of acquisition by conquest, during the so-called journeys of discovery is no longer formally accepted in terms of contemporary international law (BLUM 1965). The European legal framework which justified the idea of the wrongdoer benefiting from wrongdoing, is countered by another one which rejects the idea of benefiting from crime such as violent acquisition through conquest, namely *jus ex injuria non oritur* [a legal right or entitlement cannot arise from an unlawful act or omission*]* or, its relative, *commodum injuria sua nemo habere debet* [*a wrongdoer should not be enabled by law to take any advantage from his actions]* (RAMOSE 2002). Even in terms of the doctrine of Just war, the victim can recover that which was taken through violence if there was no just cause. The principle of recoverability **(ad repetendas res**) (RAMOSE 2018) posits that the victim can recover that which was taken through violent conquest. But the papal bulls like *Romanus Pontifex* that was issued in 1455 justified conquest by violent means, on the basis that people outside of Europe were not fully human/uncivilized and enemies of christ. (RAMOSE 2018 and MILLER 2011). This is the ethically inferior view which was used to legitimise acquisition by conquest since 1652 in South Africa as part of the doctrine of Discovery as an international law of colonialism (MILLER 2011). This doctrine comprises of conquest (as one of the ten elements) in the form of military defeat (MILLER 2011), as a legitimate way of acquiring territory by "discovering" European nations. The worldview of the Afrikans/Indigenous people conquered in the wars of conquest, comprises of the philo-praxis of Ubuntu (RAMOSE 2002). One of the ethical aphorisms of this philo-praxis which negates the legitimacy of acquisition by conquest, is "feta kgomo o tshware motho" (RAMOSE 2002), which translates loosely into English as the moral dictum that "one must choose life over property as human life is more valuable than material possessions". It is in this sense that in pre-conquest Azania

the acquisition of land was not premised on conquest. This is because Azanian law rejects conquest as contrary to the philo-praxis of Ubuntu. Based on the Azanian ethical and legal rejection of conquest and the idea that the Just war doctrine of the European conqueror triumphs *Romanus Pontifex*, the Indigenous people have a solid foundation for reparations against conquest in 1652.

Notes on Conceptual Decolonisation

This essay will critically examine how the colonisation of Afrikan jurisprudence, made it possible for the white settler coloniser to "legally gloss over" the urgent issue of the disseizing of land and the entrenchment of this legally through extinctive prescription and the constitution specifically, the "property clause" which we designate as the "injustice clause". This is what we can designate as the "legal consummation" of white settler colonialism based on conquest, to rely on Hosea Jaffe (1988, 63). We use the term "constitution" with a small letter (c) deliberately, as a way to effect a "conceptual decolonisation", which challenges the supremacy of the constitution of 1996. Most scholars in the literature on South African law and constitutionalism who use the term the "Constitution" give the impression of deifying it, as if there is a legal hierarchy in which Afrikan jurisprudence and law should be subject[3] to Western law and jurisprudence, which are positioned in this fictional legal hierarchy, as the apex of all law and jurisprudence. This according to us is to defend the current white settler degradation of Afrikan law by re-naming it "Customary law", a racist invention of white settler colonialism since 1652, which is said to be "subject" to the constitution. One should not fail to notice the colonial power connotations attached to the word "subject" to the constitution.

It is through this white settler colonial "subjugation" of Afrikan jurisprudence and law that the Indigenous conquered people are legally "silenced" in their endeavours to attain historical justice of the restoration of their sovereign title to territory, humanity, and dignity. In an excellent article, Ramose constructs a philosophical refutation of extinctive prescription, which is a basis on which the white settler coloniser came to acquire ownership of the land, deprived immorally from the Indigenous conquered people. His philosophical refutation is based on Afrikan jurisprudence which is currently colonised by the constitution of 1996.

Ramose relying on his conception of law through Afrikan philosophy, posits that "the paradox of democratisation and independence in South Africa is that the compromises which the political representatives of the conquered made are philosophically inconsistent with their people's understanding of historical justice. Philosophically, the people hold that *molato ga o bole* that is "extinctive prescription is untenable in the African understanding of law" (RAMOSE 2002, 20). The underlying thesis is that for Europeans the passage of time is capable of

[3] We are referring specifically to South Africa as a white settler colony unlike other African countries which were colonized without whites settling through land dispossession and the attendant distortion of Indigenous law and the imposition of the law of the European conqueror such as Roman-Dutch and common law in the case of South Africa.

investing one with ownership over conquered land, because of their linear conception of time which contradicts that of the Indigenous conquered people, who view time as circular and symbolic in nature, thus incapable of endowing one with ownership based on historical injustice. We now turn to the last section to critically analyse this in detail.

Time and historic justice in law

This section will contend that the Indigenous conquered people's idea of time, is the basis on which they conceive of the idea of justice. The European conqueror's notion of time is one predicated on linear modality. What this means is that the European conqueror views time as a process of progression from one point to another point. This is the European conqueror's idea of time which is abstract and "rational". The abstractness and the "rationality" of linear modality is devoid of the idea of a symbolic connection between the past and the present. This is because what the European conqueror observes is a teleological and successive motion towards an unknown future. The basis of this linear temporality is the European conqueror's metaphysico-epistemological paradigm, which differs from that of the Indigenous conquered people as Afrikans and remains embedded in the Afrikan worldview and culture, despite epistemicide since 1652.

The relationship between the natural and the supernatural, can only be conceived based on complementary dichotomy which characterises the Indigenous conquered people's metaphysico-epistemological paradigm, which seeks harmony with humanity and nature as per *Maat* as encapsulated in the notion that "as above so below" (ANI 1994). The European conqueror's metaphysico-epistemological paradigm, especially as embodied in the materialistic epistemology of modern science, prohibits the inclusion and connection with supernatural. It regards the connection thereof as "irrational" and "primitive" and not conducive to the passion for control and domination, which characterise the European conqueror's "civilisation" in general and its overt manifestation in scientism. This is the substratum, on which the idea of an abstract and "rational" time is constructed and endowed with the ideology of progress. Progress here, for the European conqueror implies a movement away from the "irrational" and the "primitive" in terms of evolutionism, as peddled by Anthropology, which ultimately leads to the severing of the connection between the natural and the supernatural.

In a nutshell, the European conqueror's notion of time is predicated on his metaphysico-epistemological paradigm. The European conqueror rejects the connection between the natural and the supernatural, by regarding it as 'irrational" and primitive and thus, endeavour to construct a linear temporality, which he deems as progress-driven and therefore rational. This is a result of the European conqueror's materialistic worldview, which strips the universe of spirit and escapes his quantitative/mathematical epistemology. In this sense, that which is regarded as still operating differently from the European conqueror's linear temporality, which is abstract and rational is subjected to violence and destruction as unleashed by his rationality which seeks to transform everything into its own image.

The Indigenous conquered people, on the other hand, conceive of time very differently from how the European conqueror conceives of it. The former's notion of time is fundamentally but not completely circular and symbolic in

nature. The symbolic and the circular time of the Indigenous conquered people, is predicated on their metaphysico-epistemological paradigm, which is premised on binary-complementarity. The metaphysics on which they derive their notion of time is holistic in nature, as it involves a connection with the "realm of invisible beings" or "triadic ontology" (RAMOSE 1996), in the form of the living-dead, the living and the yet to be born" (RAMOSE 1996). What this means is that for them, there is a cosmic connection between the natural and the supernatural. Thus, their notion of time is informed by this cosmic connection between the natural and the supernatural. This symbolic nature of their notion of time, entails a constant communication and relationship between the natural and supernatural, that is, the yet-to-be-born, living and living-dead, who were also subjected to the unjust conquest. The symbolic nature of time of the Indigenous conquered people is based on the "ontology of invisible beings" as discussed by Benezet Bujo in the *Ethical Dimension of Community (1998).* This ontology implies the connection and acknowledgement of the influence of the supernatural entities such as ancestors, spirits, and Gods of the Indigenous conquered people. Thus, the connection between the ancestors of the Indigenous conquered and the living Indigenous conquered people is always maintained. This is precisely how the Indigenous conquered people conceive of justice. For the living Indigenous conquered people, justice invokes the memories of the historic injustice, the Indigenous conquered's ancestors suffered at the hands of the European conqueror. Thus "memory is a weapon" (MATTERA 1983, 25).

The possibility of the invocation of the memories of the Indigenous conquered's living-dead/ancestors in the conceptualisation of justice, is predicated on the symbolic nature of their notion of time. Thus, for the living Indigenous conquered, the ideology of progress is a colonial strategy employed by the European conqueror to extirpate the memories of historic injustice and thus, to sever the connection between the Indigenous conquered living and their living-dead/ ancestors. The invocation of the memories of the historic injustice as suffered by the Indigenous conquered's living-dead/ancestors, is not probable in the abstract and rational linear temporality which grounds the European conqueror's notion of law. If it is ever alluded to, it is often disdainfully treated as a past event of misguided resistance to civilization or collateral damage of the inauguration of this civilization.

This is why even the current white beneficiaries of white settler colonialism can merely dismiss this past event, by claiming with barefaced insouciance that they were not there (they never occupied that point in time, but only have to do with current point in time which is disconnected from the former) and thus have nothing to do with it, despite benefiting as successors-in title to conquest (RAMOSE 2007) daily, at the expense of the Indigenous conquered people, from the very system of white settler domination which is based on this past event. They will continue to enjoy white privilege precisely because as Patrick Wolfe (2006, 388) argued, white settler colonialism is not an "event" but a "structure", and thus it persists over time. In this abstract and rational linear temporality there, is preoccupation with progress which leads to the legal insignificance of what happened to the Indigenous conquered's ancestors as the European conqueror's time marches forward to an unknown future. The logic behind Truth and Reconciliation Commission was based on the white settlers'

notion of time, which understandably led to their "exoneration" from their "past brutalities" against the Indigenous conquered people, according to whose notion of time this "exoneration" is a farce. This also explains the vicious tendency among the European conqueror/current white beneficiaries of conquest and their colonial discourse, to refer to the historic injustice of the Indigenous conquered people's loss of sovereign title to territory and epistemicide as "past injustices, "wrongs of the past" and "past discrimination". And to misleadingly classify the living Indigenous conquered people as "previously disadvantaged groups/people" as opposed to the historically correct phrase of "the conquered Indigenous people"/ "the conquered natives".

This is the basis on which the European conqueror can conceive of the passage of time as capable of endowing him with ownership of the land, unethically dispossessed from the Indigenous conquered people's ancestors during conquest in the unjust wars of colonisation (RAMOSE 2007). For the European conqueror, the passage of time can "bring into extinction" the legal right of the Indigenous conquered living to the land of their living-dead/ancestors. This is the substance of the European conqueror's rationalistic/reason-obsessed jurisprudence which is markedly dissimilar to the Indigenous conquered people's Afrikan law and jurisprudence, which are premised on *Ubu-ntu* as Ramose (2002, 7) so convincingly demonstrated.

The Indigenous conquered people, who were deprived of their land, hold that *molato ga o bole*. This *Ubu-ntu* legal aphorism in a nutshell, posits in this context, that time cannot endow the European conqueror with a legal right over the land which was taken away from its rightful owners since time immemorial, namely the Indigenous conquered's living-dead/ancestors in unprovoked and unjust wars of colonisation since 1652. This aphorism also captures the argument that memories inform the Indigenous conquered people's notion of justice. This means that despite the passage of time since the dispossession of land from the Indigenous conquered's living-dead/ancestors, the Indigenous conquered living will not forget that a historical injustice was committed against them and their living-dead/ancestors. This is notwithstanding attempts on the part of the European conqueror to make the Indigenous conquered living, sever their symbolic connection and communication between them and their living-dead/ancestors. The attempts at the severance of the symbolic connection and communication between the living Indigenous conquered people and their living-dead/ancestors, through the rationalisation of the law is futile as far as the use of "memory as a weapon", is concerned in the Indigenous conquered people's struggle for post-conquest *Azania*. The Indigenous conquered people will always maintain the symbolic connection and communication between them, and their ancestors and they do this based on what Ramose (2002, 5) designates as "triadic structure".

This, according to Ramose, is composed of the living, the living dead and the yet-to-be-born and the accompanying communication between them. This is in accordance with the Afrikan worldview that is fundamentally spiritual. Thus, the search for justice is premised on this "triadic structure" as Ramose calls it. Mogobe Ramose posits that:

> justice is determined by supernatural forces. Their determination seeks to restore harmony and promote the maintenance of peace. This

> determination by the supernatural forces is consistent with metaphysics of *Ubuntu* law. This consists in a triadic structure of the living, the living dead (supernatural forces) and the yet-to-be-born. This metaphysical structure ensures communication among the three levels of being. Based on this structure, justice determined by the supernatural forces is declared on their behalf by the living who are in authority. (2002, 5)

The entire current constitution of 1996 and its predecessors of which it is a mere reconfiguration are epiphenomena of conquest. This is because their condition of possibility for existence is land dispossession and epistemicide. Their fundamental objective is to preserve white settler colonialism, both materially and epistemologically. The name "South Africa" is based on and embodies loss of sovereign title to territory by the Indigenous conquered people, thus the current constitution of "South Africa" is a legal mechanism, which sustains conquest and not a legal framework which inaugurates a "structural rupture" with 1652. Thus, both the white settler's colonial name "South Africa" and the current constitution epitomise a material and epistemological symbiotic relation of what Francis Cress Welsing (1991, ii), designates racism/white supremacy, in Afrika since the "catastrophic" coming of the Europeans and conquest.

Thus, because *molato ga o bole*, the move to the "new South Africa" is not an authority on which the European conqueror can argue that acquisition of the legal right to the land is attained "constitutionally". What this means is that section 25 of the constitution of 1996 is an "injustice clause" as it is a colonial legal mechanism, through which historic injustice of land dispossession is "constitutionalised" based on the white settlers' notion of linear temporality. This section 25 embodies succinctly the white settlers' jurisprudence and notion of time which sustain legal epistemic violence since 1652.

The intimate imbrication of these two, is captured by the white settlers' notion of extinctive prescription, which is the exact antithesis of *molato ga o bole*. In terms of this notion, if one loses possession of a certain property over time, one eventually loses the legal right over this property. Thus, because the Indigenous conquered people lost possession of their territory during the time of unjust wars of white settler colonialism and its concomitant legislative consolidation through Acts like The Glen Grey Act of 1894 and The Land Act of 1913, they have lost sovereign title to it which is now vested in the white settlers who are now regarded as the rightful owners. These criminal owners whose property is regarded as expropriated and therefore the rider of with/without compensation. This section forecloses the fundamental question of historic justice, namely, when and how did white settlers come to be property owners and whose property is assumed to be expropriated?

Our radical postulation in this regard is that the fundamental question is not one of land redistribution but one of restoring "untrammelled" sovereign title to territory. Then the Indigenous people as the rightful holders of "untrammelled" sovereign title to territory, since time immemorial, can re-exercise one of its privileges, namely the absolute collective right to decide what to do with their land without white settler colonial tutelage. Once the entire territory is restored to them and by them, they can then exercise Afrikan national self-determination by collectively determining on their own terms, how and to whom the land must be

"redistributed". Thus, to speak of land redistribution before the restoration of "untrammelled" sovereign title to territory, is to put the cart before the horse, so to speak. First, the *Azanians* in terms of Race-first Afrikan nationalism and *chimurenga* must resolve the fundamental antagonism of "South Africa" as a conquest-based white settler State (MAGUBANE 1996), restore a post-conquest *Azania* in its place and then address issues of belonging and constitution which are usually categorised as nation-building (ALEXANDER 1979). This should entail the project of "nation-building" in terms of Afrika for the Afrikans and the *en masse* expulsion of all non-Afrikans such as whites, Indians, and Coloureds (Coloureds who accept their indigenous heritage will be integrated on the terms of the Afrikan majority). In other words, the end of "South Africa" is coterminous with the demise of the non-Afrikans. The war and violence which brought about the antagonism (WILDERSON 2020) between Afrikans and non-Afrikans in "South Africa" must be reversed by the Indigenous people through a chimurenga. Since central to settler colonialism as argued by Patrick Wolfe in *Traces of History* (2016) is the antagonism between the native and the settler and that settler colonialism is resistant to regime change. Revolutionary violent confrontation between white settlers and the Indigenous people is the only way to break this resistance.

The post-1994 compromised dispensation due to democratisation concessions made by the African National Congress under Nelson Mandela and reconciliation under Desmond Tutu, only postponed the inevitable confrontation between the natives and the settlers. The white settlers who invented this violent form of colonialism regard the land they have dispossessed as their fatherland, thus are willing to die for the ill-gotten white power. This is also because many of the white settlers in South Africa who are unapologetic about white power and privilege stemming from conquest are what Albert Memmi in [The Colonizer and the Colonized] (1991) calls "the colonizers who refuse". It is in this sense that Frantz Fanon in [The Wretched of the Earth] (2001) is correct to say that decolonisation must be a violent event since it is responding to colonisation as a violent process.

There is no rational discourse but a "violent cleansing force" (FANON 2001,74) which will cleanse the Indigenous conquered people of what Steve Biko in terms of the Black Consciousness Movement called "inferiority complex" (MORE 2004,97). *Poqo* as a liberation movement in South Africa encapsulated this need for a violent collective self-defence and Fanonian violent decolonisation in terms of the slogan of one settler one bullet, which still resonates with the Indigenous people today. The prominent example is the Black First, Land First embrace of one settler, one bullet as part of the heritage of the Azanian political and national liberation movement. Nothing short of the war and violence of reconquest can bring an end to "South Africa" and restore an independent Azania solely for the natives and people of Afrikan descent currently in the diaspora, in terms of Marcus Garvey's battle-cry of "Africa for the Africans those at home and abroad" (VINSON 2019,68). For "South Africa" is not a society but a structural relation of a race war between Afrikans and Europeans and "non-Europeans such as Indians" (LEMBEDE 2015,181).

Conclusion

By way of conclusion, it is important to underscore the fact that the dangerous fiction of the "transition" to the post-apartheid "new South Africa", is premised on the misleading ideology of progress, which, in this case, implies that the movement from the point of apartheid to the point of democracy as per the linear temporality of the European conqueror signifies improvement. Besides for the Afrikanist (Anton Lembede) and Azanian liberation movement (Robert Sobukwe and Steve Biko), the fundamental problem was never apartheid, which was just a vulgar and clumsy manifestation of an inherently racist white settler colonialism, but conquest since 1652, which is the foundation of white settler colonialism and legal epistemic violence.

However, this "transition," which was nothing, but the reconfiguration of white supremacy has been demonstrated to be a glaring fallacy which is based on the celebration of Black economic empowerment and imaginary Rainbow nation in the midst of "South Africa" being subject to US-led Imperialism under Neoliberal free market fundamentalism and "business-managed democracy" (BEDER 2010, 1). The urgent need for Decolonization *ala* Fanonian revolutionary violence in the form of the restoration of sovereign title to territory and epistemological autonomy, which will liberate the living Indigenous conquered people, is probable through the abolition of the entire current constitution of 1996 in the wake of a liberation war of land restoration and de-settlement of all non-Afrikans. The Indigenous people can then restore their material and epistemic autonomy beyond conquest and white settler colonialism, which have victimised them in several ways as discussed above. Until then it is not yet *Uhuru* and thus, the urgent revolutionary imperative for another *chimurenga* for a post-conquest *Azania,* which must precede the abolition of the constitution of 1996 as the embodiment of legal epistemic violence in conqueror South Africa.

Declarations

The author declares no conflict of interest and no ethical issues for this research.

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This issue is dedicated to our Assoc. Editor and a second-generation member of the Calabar (Conversational) School of Philosophy (CSP): **Prince. Prof Mesembe Ita Edet (1965-2023)**