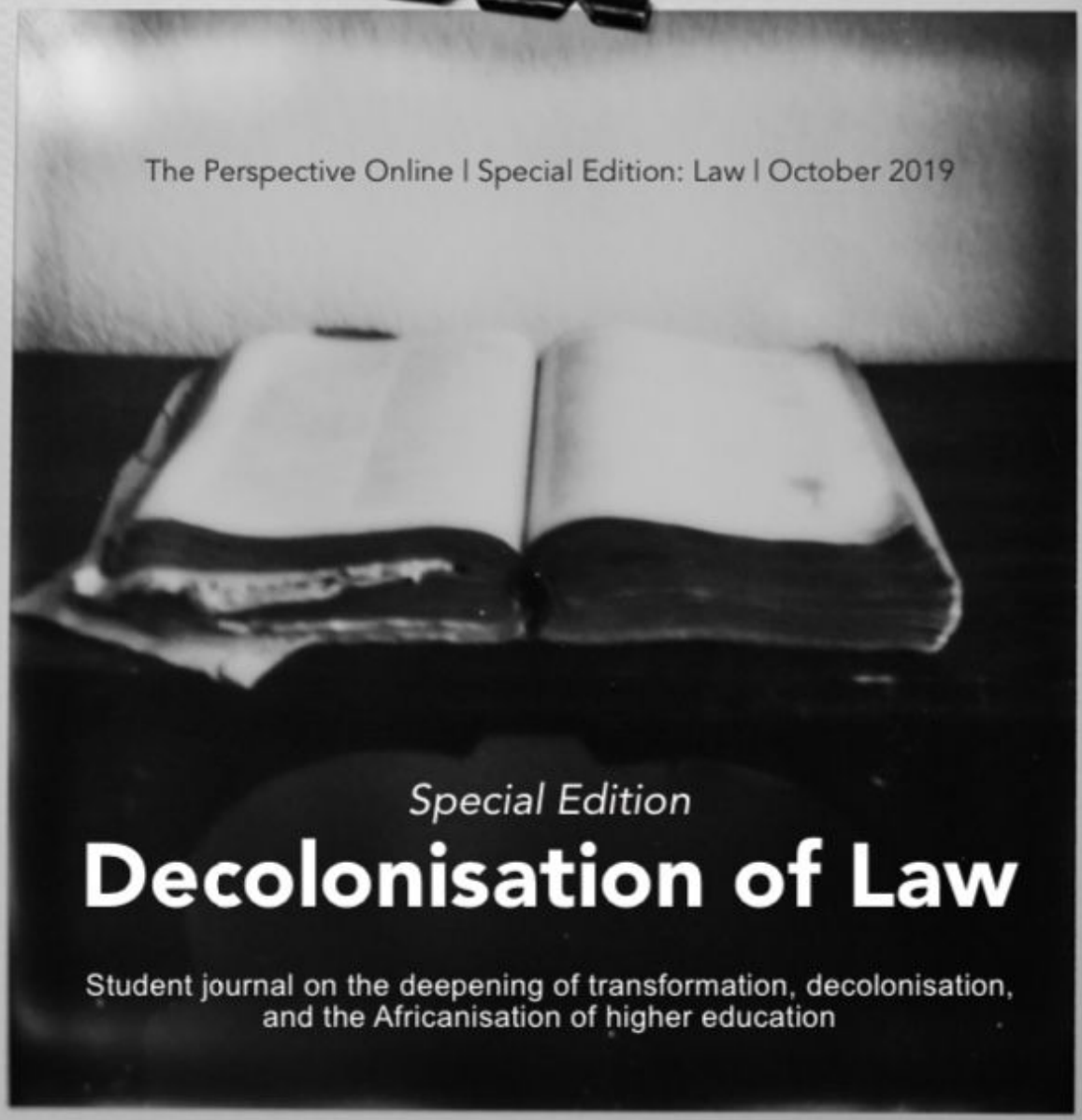

Special Edition

Decolonisation of Law

Student journal on the deepening of transformation, decolonisation, and the Africanisation of higher education

4th Quarter 2019

Special Edition

The Perspective Online **journal is published quarterly at Nelson Mandela University by the Chair for Critical Studies in Higher Education Transformation (*Cri*SHET), the Office of the Dean of Students, and the Department of Student Governance and Development.**
Send editorial contributions to: Pedro.Mzileni@Mandela.ac.za or to: *The Perspective Online* journal, 14 Bird Street, Nelson Mandela University, Port Elizabeth, 6001.

The Perspective Online

Student journal on the deepening of transformation, decolonisation, and the Africanisation of higher education

4th Quarter 2019 **Special Edition**

Editorial Committee

Acknowledgements

The production of this journal is a collective effort from colleagues in the Chair for Critical Studies in Higher Education Transformation (*Cri*SHET), Andre Keet, Marisa Botha, Deronique Hoshe, Avivit Cherrington, Nobubele Phuza, Nomtha Menye, Noxolo Kali, Asiphe Mxalisa, Jenny Du Preez, Melathisi Ncityana, Anne Munene, Zizipho Mbokazi, Luan Staphorst, Jessica Schroeder and Aphiwe Bizani. I want to thank all of them for their patience, encouragement, and support on this year long journey.

This Special Edition was done in collaboration with the Faculty of Law in Nelson Mandela University. I would like to thank the Dean of the Faculty, Professor Avinash Govindjee, for his leadership, wisdom, support and blessings. I know that he has been pushing for his Faculty to have a student journal that will develop writing skills for its talented students. I hope this is the beginning of the project. I would also like to thank the Deputy Dean, Dr Lynn Biggs for her understanding, intellectual guidance, and administrative support on this project. She gave me access to the Faculty and was holding me with her hand until the whole thing came together. Thank you, colleagues.

I want to also acknowledge the hard-working team in the Division of Students Affairs, Luthando Jack, Bernard Sebake, Sade Prinsloo, Karen Snyman, Asanda Penkese, and Simamkele Sam, your energy and support was remarkable. No matter how short the deadline is, they are always willing to get their hands dirty to ensure that student development is prioritised and achieved.

I am highly obliged to thank all the staff in the Centre for Teaching, Learning and Media, Cheryl Foxcroft, Linda Mostert and Clare Madeleine. Thank you for the space and the contributions.

Lastly, I want to thank the activist authors of the articles that are featured in this Special Edition, their resilience, commitment to the value of ideas has made the pushing of this work into being a great success a possibility. Thank you so much comrades.

The idea behind this journal

The Perspective Online journal came from a collective observation that student activism needs to also be driven by thoughtful and productive contributions to advance academic, pedagogical and knowledge renewal within the university.

The journal has been positioned as a strategic resource for students to develop a culture of disciplined writing in order to bring to the fore a particular social consciousness amongst university students underpinned by robust engagement, radical contestation of ideas and critical scholarship.

As a result, *Cri*SHET, in partnership with the office of the Dean of Students, and the Department of Student Governance and Development introduced this journal which will be published quarterly and feature articles, columns, and creative work by students on the deepening of transformation, decolonisation, and the Africanisation of higher education.

The journal will be made available online in all communication and media platforms, with a limited number of hard copies. It will also be available through the library platforms of the university. Writers who also intend to develop their columns into research studies and/or journal articles are encouraged to utilise this platform.

Lastly, undergraduate and postgraduate students across all Faculties are encouraged to write as individuals and/or as groups. A quarter of the journal space will be set aside for the contributions of staff and community members.

Contributions must be thoughtful, considered and analytical. They must meet the general criteria of conversational-academic writing.

The Perspective Online

Student journal on the deepening of transformation, decolonisation, and the Africanisation of higher education

4th Quarter 2019 **Special Edition**

Editorial Notes:
Decolonisation of Law

The conversation about decolonisation of the university and curricula continues to raise questions for knowledge production and transmission in educational institutions. Decolonisation also raises questions about the impact of the preceding issues on people within and outside these educational institutions. In this special edition, the student activist writers here are largely interested in legal academia and its societal implications; they are exploring what the decolonisation debate means for them and what the possibility of a 'decolonised law' means for the relationship between law and society.

On this score, how do we become more aware of, and directly mention, how the law came to be and how that 'coming-to-be' has influenced how law is taught, what law is taught, and what law is now? How do we teach law as the study of social order, and elucidate how racial stratifications in the 'social' are [re]formed, and maintained? How do we examine how legal subjectivities are related to other issues, such as the recycling of racialised and gendered privileges of the academy? All this is most important if we believe that the law should function as a tool of positive social change and justice.

The expand on these questions further, in this special edition we have five articles. First, **Aphiwe Bizani** tackles the standing nature and colonial character of jurisprudence, arguing that it should be repositioned to the philosophical canon of Ubuntu as defined by African people themselves. Second, **Nxobile Mahlangu** stretches the concept of Ubuntu to social reality by exposing how institutional discrimination effected African misrecognition in a recent human rights case that was heard in the Supreme Court of Appeal. Third, **Sonwabise Lande** and **Lubisi Thoriso** take the debate back to the academy where they problematise the epistemological underpinnings of the discipline. These issues, as the **Thinker's Collective** argue, will ultimately have to be examined in terms of their moral impact by our society.

I have no doubt that the articles featured here are all based on a social justice orientation that will contribute to the transformation, decolonisation, and Africanisation of law in higher education and in the broader society. I invite you to enjoy this reading.

Pedro Mzileni
Editor
The Perspective Online

Dismantling epistemic violence in South African law by decolonising jurisprudence

Aphiwe Bizani

In 1652, Jan Van Riebeeck and his crew ostensibly settled in today's Cape Town to set up a sustenance station (Madlingozi, 2018). The multi-century wars of colonisation broke out when the settler colonisers demonstrated sinister motives towards the land and humanity of the indigenous people (Madlingozi, 2018).

In an attempt to justify mounting wars of colonisation against the indigenous people, the settler colonisers drew a line between the coloniser and the colonised as a marker of difference between the two (Ramose, 2003:24). This is the line that imprints the demarcation between reason and unreason. The line was reiterated in Aristotle's formulation that ''man is a rational animal" (Ramose, 2003: 24).

The animals whose features included reason or rationality, the very heartbeat of philosophy, fell within the purview of this definition of being human (Ramose, 2003: 25). Reason or rationality became the conduit through which one entered the purview of humanity. Therefore denial of it is necessarily a denial of one's humanity (Ramose, 2003: 25).

In the missions of colonising the world the conquerors applied this line in relation to Africans, among others (Ramose, 2003: 25). They were said to be creatures that resembled Human Beings Proper (read: Europeans) physiologically but were animals without reason. Therefore, they were not humans (Ramose, 2003: 25).

Colonial conquest, as the settler colonisers reasoned, did not raise any conflict in law or morality because indigenous people of South Africa were not Human Beings Proper (Ramose, 2003: 25). Furthermore, the settler colonisers implanted their own laws in terms of which rights and duties according to their laws were accorded to human beings (Ramose, 2003: 25).

This constituted the expulsion of indigenous people from jurisprudential subjectivity as, in the colonial imaginary, only humans that are 'subjects' to the law. Moreover, it was a foregone conclusion that indigenous people of South Africa were not endowed with epistemological agency to philosophise about law, as epistemic virtue was strictly preserved to human beings.

As a result, indigenous people of South Africa did not experience the law as their own. In effect, this gave rise to a relational dynamic between the law and the conquered indigenous people conquered under the unjust wars of colonisation, wherein the latter were met with violence, not conditional on a crime committed,

because the very existence of law *as* constituted embraces unjustifiable violence (Afro-Pessimism, 2017: 8).

Despite the 1996 constitution being fallaciously described as marking a decisive break with colonial conquest and having heralded an epoch of justice, equality and fairness, the law in South Africa continues to be firmly anchored in the European episteme (Modiri, 2018:39). The very architectural layout of the state espoused by the constitution resembles the Eurocentric nation-state (Comaroff, 2006).

Notwithstanding the fact that the indigenous people are a numerical majority in South Africa, the 1996 constitution though confers the lowest status to the laws of indigenous people (Dladla, 2018).

The laws of people from indigenous rank, according to the South African constitution, are below the Roman-Dutch law, which is ironically referred to as ''common law''. Moreover, the laws of the indigenous people suffer an inferior status even to the laws of other nations and the lowest of colonial courts can overturn them (Dladla, 2018). The point is precisely that the relegation of ''customary law'' is an outward expression of epistemicide upheld by the current South African constitution.

The legal academy is overwhelmingly dominated by white academics (Modiri, 2018: 9). Their whiteness in this instance is relevant to the extent that it denotes their structural racial power in knowledge production in the legal academy. This whiteness forms the epistemic viewpoint through which they see and interpret the world. Moreover, these modalities, de facto, become how the world is (Modiri, 2018: 9).

Although they are geographically located in South Africa, these scholars have an incestuous relationship with intellectual authorities that are culturally and epistemologically located in Europe (Modiri, 2018: 10). It is not uncommon for them to rely principally on these intellectual authorities when engaging on what supposedly constitutes the South African legal canon (Modiri, 2018: 10).

This perverse anomaly is so widespread that one could be pardoned for thinking that there are no Black legal theorists or philosophers.(Modiri, 2018:11). Beyond bodily representation, the anomaly extends to the marginalisation of African legal theory and jurisprudence.

In fact, there has been a raging debate in the legal academy as to whether African jurisprudence exists (Chikaonda, 2019). This debate is kept alive not by Africans themselves (Ramose, 2003: 25), but to sustain the claim that Africans are not endowed with epistemic virtue. Thus, it would be inconceivable even to suggest

there is something called African jurisprudence (Murungi, 2004: 516).

This state of affairs is untenable because the reality that South African law is still engulfed by coloniality and under the yoke of domination effectively means that the experiences of the indigenous people with such laws will be perpetually violent. Therefore, to dismantle this epistemic violence that defines the South African law; jurisprudence must be decolonised, because, as Deleuze succinctly puts it: it is jurisprudence, ultimately, that creates law (Van Marle, 2010).

Indeed, the African proverb holds true, "Until the lion tells the tale, stories of the hunt shall always glorify the hunter" (Dladla, 2018). Thus, decolonising jurisprudence entails, firstly, being historically conscious of how precolonial Africa conceived of law and how it was used to harmonise relationships with people across the spectrum of societal activities. Furthermore, the indigenous people must locate jurisprudential thought in the rich historical archive of Africa (Chikaonda, 2019).

This historical consciousness will illustrate how, for example, in the African jurisprudential thought the idea of extinctive prescription, held in the European canon of law, is unsustainable in African jurisprudence because it conflicts with the African understanding of historical justice (Ramose, 2001).

According to the African legal canon; *'ityala aliboli/molato ga o bole'* which directly translates as: *a debt or crime does not prescribe or rot* (Ramose, 2001). In other words, the African holds that the passage of time cannot alter the truth, and whenever it is known it must be taken into account in pursuit of restoring equilibrium that was fractured by the debt or crime (Ramose, 2001). This necessarily means that the land which was usurped from the indigenous people after the unjust wars of colonisation must be restored to them (Ramose, 2001).

Philosophers hold divergent views as to what philosophy is and who philosophers are but there is consensus that philosophy concerns itself with asking questions about a variety of things central to the human experience (Dladla 2016). In conducting an enquiry the said person employs a language as a means through which to express the questions he or she has (Dladla, 2016). Therefore, language and philosophy, in the context of jurisprudence, are intertwined. Besides being a tool of communication, language is a carrier of culture. It is imbued with social elements about a people's particularity and history (Ngũgĩ wa Thiong'o, 1986).

Language as a culture has three categories. In the first instance there is culture as the

descendant of history: *"language as culture is the collective memory bank of a people's experience in history"* (Ngũgĩ wa Thiong'o, 1986). This is because the evolution of culture is made possible by the language in which the culture is articulated, and the culture reflects human interaction in history in their attempts to navigate the complexities that life presents (Ngũgĩ wa Thiong'o, 1986).

The second category, language as a culture, helps us form images in our minds of realities. Therefore, our conceptualisation of ourselves, both as individuals and as a collective, is premised on the images we have formed in our minds about these realities (Ngũgĩ wa Thiong'o, 1986).

In the last category, language as culture and languages as communication are inseparable and the existence of the one makes it possible for the other to exist. They are mutually re-enforcing in the following respect: language is a carrier of culture and the culture is expressed through language (Ngũgĩ wa Thiong'o: 1986).

To usher the point home, the centrality of language in articulating African jurisprudential thought cannot be overstated. Thus, decolonising jurisprudence necessarily means that indigenous languages must take centre stage in philosophising about law. This philosophical activity is inseparable from the Ubuntu concept of community and law.

Ubuntu is the base for African philosophy. According to the philosophy of Ubuntu, community consists of those who have departed before us to join the realm of the living dead, the presently living and those who are yet to be born. The concept of law is founded on this understanding of community.

The Ubuntu concept of law concerns itself with justice and morality as a way of restoring balance (Ramose, 2001). It follows that all human beings are equal and being just to others is central (Ramose, 2001). The Ubuntu concept of law is informal, flexible and inextricably linked to the necessity of treating others humanely. Thus, Ubuntu is a yardstick to test the validity of justice and law (Ramose, 2001).

The argument defended here is that the South African understanding of law must be steadfastly rooted in the Ubuntu concept. Furthermore, this concept must form the very basis on which we engage with other understandings and concepts of law. It follows that a people cannot look at themselves or attempt to understand themselves through the lenses of others because that understanding will be limited and may be encumbered by prejudices.

South Africa as a polity is founded on colonial conquest (Mamdani, 1998). The

current laws are, in part, intended to transmute the ill-gains of conquest to legally protected properties and/or interests. This has become possible through waging an epistemic assault against the indigenous people. Therefore, for justice to be done, South Africa itself must be repudiated epistemologically, chief among others (Dladla, 2018). The Ubuntu concept of law must become the jurisprudential praxis.

Reference List

Afro-Pessimism: an introduction. 2017. Editorial. *Racked and Dispatched*. Available https://rackedanddispatched.noblogs.org/files/2017/01/Afro-essimism2_imposed.pdf (accessed 23/09/2019).

Chikaonda, G.P.2019. *To decolonise our LLB degrees, we have to understand and incorporate the roots of African law*. Daily Maverick, July 9, 2019 Available at https://www.dailymaverick.co.za/opinionista/2019-07-09-to-decolonise-our-llb-degrees-we-have-to-understand-and-incorporate-the-roots-of-african-law/ (accessed 23/09/2019).

Comaroff, J.L & Comaroff, J. 2006. Law and disorder in the postcolony: an introduction. In Comaroff, J.L & Comaroff, J. (eds.) *Law and Disorder in the Postcolony*. pp. 22.

Dladla, 2016. *Here is a Table: A Philosophical Essay on the History of Race in South Africa*. Unpublished Paper: University of Pretoria.

Dladla, N. 2018. The liberation of history and the end of South Africa: some notes towards an Azanian historiography in Africa South. *South African Journal on Human Rights*.34:3, 415-440. Available at https://www.tandfonline.com/doi/full/10.1080/02587203.2018.1550940

Madlingozi, T. 2018. The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonisation? *Critical Legal Thinking : Law and the Political*. Available at http://criticallegalthinking.com/2018/04/06/the-proposed-amendment-to-the-south-african-constitution/ (accessed 23/09/2019).

Mamdani,M. 1998. *When Does a Settler Become a Native? Reflections of the Colonial Roots of Citizenship in Equatorial and South Africa*. Inaugural lecture given at the University of Cape Town.

Modiri, J. M. 2018. *The Jurisprudence of Steve Biko: A Study in Race, Law and Power in the "AFTERLIFE" of Colonial-*

Apartheid. D.Phil Thesis, University of Pretoria.

Murungi, 2004. The Question of African Jurisprudence: Some Hermeneutic Reflections. In Wiredu, K. (ed.) *A Companion to African Philosophy* pp. 519-526, Malden Massachusetts: Blackwell Publishing Limited.

Ngũgĩ Wa Thiong'o, 1986. *Decolonising the Mind: The Politics of Language in African Literature*. London: Heinemann.

Ramose, M.B. 2001. *An African Perspective on Justice and Race*. Available at https://them.polylog.org/3/frm-en.htm#s3 (accessed 23/09/2019).

Ramose, M. B. 2003. The struggle for Reason in Africa. In Coetzee, P.H. and Roux, A.P.J. *The African Philosophy Reader*. Cape Town: Oxford University Press. 4-25.

Van Marle, K. 2010. Reflections on Post-Apartheid Being and Becoming in the Aftermath of Amnesty: Du Toit v Minister of Safety and Security. *Constitutional Court Review, 3*: 1, Jan, 347 – 367.

Ubuntu
(The quality of being Human)

Mahlangu Nxobile

Introduction

Ubuntu is a quality that includes the essential human virtues: compassion and humanity. It is a value enshrined in the Constitution and it recognises a person's status as a human being entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. (S v Makwanyane , 1995).

In the case of 'Emmanuel Paulking v Mzalisi' in 2018 the Department of Home Affairs barred a man with asylum seeker status from registering a customary marriage and marrying in terms of civil law. The contention of the barring of the above case was that Mr Paulking and his wife, who is a South African by birth, were not entitled to enter into a civil marriage. This was based on an assumption that this was a marriage of convenience, without any thorough investigation into the merits of this particular union.

South African law regulates and protects marriages and families and also safeguards the interests of children. In terms of the African Charter of Human Rights it provides that: *"the family shall be the natural unit and basis of society. It shall be protected by the state*" (African Charter on Human and Peoples' Rights ("Banjul Charter"), 1981).

As one legal case submitted; "at issue is access to an institution that all agree is vital to society and central to social life and human relationships. More than this, marriage and the capacity to get married remain central to our self-definition as humans." (Fourie and another v Minister of Home Affairs and others, 2005).

Ubuntu as an underlying value in South Africa

South Africa is faced with an enormous backlog in the administration and service sector, particularly in the Department of Home Affairs. In terms of the 2011 Census there were 309 794 asylum seekers in South Africa with 171 700 undecided cases as from 2009.

But is that justification enough for a departmental head blatantly to deny a service to those who desperately need it?

People in high positions, possibly with their own agendas, seem to have enabled the Department of Home Affairs to pass notices which infringe on basic human rights. The right to get married ties in with the right to dignity which is a basic human right that the Constitution strives to promote and protect. However, time and again Government officials deny non-citizens fair and just administrative action. In terms of Circular Notice No.4 of 2016 refugees whose asylum seeker status is pending cannot contemplate marriage. However, should there be an inquiry to a refugee or asylum seeker's status, the marriage cannot be concluded (Department of Home Affairs, 2016).

Based on the statement above, it can be inferred that the provision implies that any person who is a refugee or asylum seeker should not even think about marriage, let alone intend to enter into one. I do not see justification for this because asylum seekers should share the right to dignity, the right not to be discriminated against, and the right to equal protection from the law, like any other human being living in a country subscribing to international basic human rights.

If people's perceptions of refugees and asylum seekers are negative, then the concept of Ubuntu is far from being achieved. As much as the law is essential in a democratic society, it is nothing without the society it seeks to regulate; and it is my view that the law should aim to protect human rights to a greater extent than it does to limit them. It is in this same country that refugees are granted access to seek asylum. In addition, they are afforded primary health care should they need any and, thirdly they are mostly provided with work permits should they have the need to pursue economic independence. It is, therefore, contradictory and unreasonable not to afford the same people who are openly welcomed into the country the very rights that afford them the dignity they should inherently have as human beings.

A practical approach into exercising ubuntu

The Courts are transformative, and the Constitution of the Republic of South Africa is also regarded as a

Transformative Constitution. Justice Pius Langa defines a Transformative Constitution as; "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex" (Langa, 2006).

Government officials should be trained to exercise their authority in a manner which serves to provide everyone with equal opportunities where human rights are concerned. The legal culture should be transformed by;

"a culture of justification, a culture in which every exercise of power is expected to be justified, in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion, not coercion" (Langa, 2006).

In a country where equality exists only on paper some people will be more privileged. That privilege may be because of the colour of their skin or, as in this case, their nationality. It is impossible to rationalise how people who flee their country of origin due to fear of persecution, are consequently welcomed into this country to seek asylum yet still get treated with very little human regard as opposed to others who choose to come into the country with study and work permits, for example, and are financially secure.

This perhaps implies that one person is more human or worthy than the other, based on standards set by the society by the current parameters of legality by the South African state.

Family and Marriage in South Africa

In terms of the Universal Declaration of Human Rights, the family is the natural and fundamental group or unit of society and is entitled to protection by society and state. (Universal Declaration of Human Rights, 1948). Mr Paulking in this case may not be a South African, but his wife is, and it is legally understood that when people marry, they acquire legal rights which regard them as a union. Therefore, refusing to allow an asylum seeker to marry in this instance is consequently

infringing on the rights of the South African citizen; but the courts currently do not have the required comprehension in place to accommodate this kind of a provision. It is thus my view that not only is an asylum seeker discriminated against based on their nationality, but the wife's rights are also unjustifiably limited in this instance.

Conclusion

The human rights case forming the basis of this paper went to the upreme Court of Appeal (SCA) at the time of writing, and the judgment has since been published in favour of Mr Paulking with the effect of declaring the whole paragraph that had intended to bar asylum seekers and refugees from contemplating marriage unconstitutional. This case has highlighted the malpractices found in government sector and the court moved a step closer to remedy the injustices. It is my hope that the practices that hinder South Africa's progress in trying to pursue a democratic society based on human dignity, equality and freedom are done away and the spirit of Ubuntu prevails.

Reference List

African Charter on Human and Peoples' Rights ("Banjul Charter"). 1981. Human Rights and Fundamental Freedoms. Organization of African Unity .June 27, *Emmanuel Paulking v Mzalisi*, 1995/2017 (High Court of South Africa, Eastern Cape local Division January 30, 2018).

Fourie and another v Minister of Home affairs and others, CCT60/04 (Supreme Court of Appeal December 1, 2005).

Langa,. P. (2006). Transformative Constitutionalism. *Stellenbosch Law Review,* 17: 351-359.

Republic of South Africa. Department of Home Affairs. 2016. *Consolidated procedures for solemnization and registration of marriages*. Circular no.4. S v Makwanyane. 1995. CCT/3/94 (Constitutional Court June 6, 1995.

Universal Declaration of Human Rights. (1948, December 10). Human rights and fundamental freedoms| Treaties/ Agreements/ Charters/ Protocols/Conventions/ Declarations. UN General Assembly, 1948.

Transformative Constitutionalism and Decolonization of Law in Higher institution of learning.

Lubisi Thoriso

Introduction

The year 2015 marked the most important event in our country when South African students came together in a movement called "Fees-Must-Fall". This movement was aimed at fighting high fees in higher institutions and broad issues of social justice and transformation. The struggle was not merely based on fees but also broader disputes of decolonisation of the curriculum in higher institutions of learning. This makes one question the South African legal history and its impact on current legal studies. The South African legal system had many other legal systems imposed on it. Most of South African common law came from Europe, hence, the use of the term Roman-Dutch law. Our legal education remains highly Romanised, particularly private law in legal education and application.

This article is based on the ideas of decolonisation and teaching of law in South African institutions of higher learning. As a first-year student studying towards a Law degree, I have developed an immense curiosity about the roots of law in Africa. This curiosity led to my asking myself whether an African legal theory or African jurisprudence exists.

Firstly, the article will look into the idea of decolonisation of law in relation to the teaching in South African universities under the influence of English and/or Roman-Dutch law. Secondly, the article will look into two elements important to the decolonisation of law and legal education, namely, inclusion of 'living customary law' in legal education and a shift in the legal theoretical pattern within which law is taught.

The Constitution of the Republic of South Africa, 1996, is the supreme law of the land, and all laws inconsistent with the Constitution are declared invalid. A real transformative South Africa requires a different tactic that is in the best interests of legal education and which is not from a colonial background. It requires that we regard law as a social contract (agreement) to

regulate and reflect shared values of society and to teach law students to view it that way. Students should be taught that the law was used as a weapon to oppress black children in the past, but that equally it has greater potential to transform society for the better. We have witnessed the efforts to change the legal education syllabus to be in line with the Transformative Constitution goals and to be decolonised by de-Romanising the content. Nevertheless, private law remains an unchanged product of colonialism.

Legal History

Law books and philosophical writings, when referring to South African legal history, put an emphasis on what happened upon the arrival of Jan Van Riebeeck at the Cape of Good Hope. By doing so they seem to suggest that the 'worthwhile' or 'relevant' legal history of South Africa only started with the arrival of the colonists. Law students must be taught African Legal Jurisprudence as much as they are taught about the influence of western laws on our legal system.

The first inhabitants referred to as First Nations lived in Kinship societies with their own African Legal systems. They played a very important role in shaping our current law which is today known as customary or indigenous law. Although the customary laws applicable at that time have always been subject to the development of society over time, they still remain an important source of law in the South African context and should, therefore, be taught to students currently. The importance of legal history is to learn where we come from as African people and where we are going; and to realise that the law is not static.

It is not a secret that when colonisers arrived, they started to disregard the laws of African people. As a result, some of those laws were destroyed or changed beyond recognition from their original form. Legal education should, therefore, include living customary law in order to revive those laws and create African consciousness in law students.

Inclusion of living customary law in legal education

'Living customary law' refers to the social experiences of those living according to customary values. It is derived from social practices that the community accepts as obligatory and

promote natural justice. South African legislation defines customary law as "the customs and usages traditionally observed among the indigenous African peoples of South Africa which form part of the culture of those people". The use of the term "culture" in this definition is important, as it appears to refer to the dynamic nature of living customary law as well as culture. Living customary law represents the practices or customs observed and invested with binding authority by the people whose customary law is under consideration.

"Living customary law must be taught in all law faculties or law schools and at appropriate levels of the law degree to enable students to understand the importance and difficulty of the subject within the constitutional frameworks of African countries" (Himonga and Diallo, 2017:9-10). Future law practitioners need to have an understanding of important aspects of such customary law, including its conceptualisation, its practice in a broad sense, and its development as a system of law within African constitutional frameworks. If law practitioners are not given suitable legal training in living customary law, they will not have the right lens through which to view it in its own right and not from the perspective of other legal systems such as the Roman-Dutch law. The important pronouncements of the South African Constitutional Court above will therefore be lacking in any practical significance.

The current legal theoretical framework

The major legal theoretical framework within which law is taught in universities, as argued previously, is based on the historical influence of English and Roman-Dutch common law, with their legal centralism and positivism. It is, therefore, arguable that the legal education of judges and lawyers in Africa exclusively within these theoretical frameworks does not adequately prepare them to deal with the application of non-western legal orders, such as living customary law, in which law and its values are viewed differently. The possible consequence, therefore, is that lawyers and judges view living customary law as non-existent at best or regard it as informal law that is irrelevant to state institutions at worst.

The interdisciplinary teaching of law

Interdisciplinarity is an analytically reflective study of the methodological, theoretical, and institutional implications of implementing interdisciplinary approaches to teaching and research. Interdisciplinarians are those who engage in the scholarly field of interdisciplinarity.

Providing legal education in a decolonised context should aim to bring together contributions from various disciplines to focus on regulatory practices embodied by law in all its manifestations. A departure from pure legal studies is visualised, in order to focus on conceptualising, developing, problematising, and suggesting hypotheses common to the various disciplines and interdisciplines involved, and to question and challenge legal approaches from these perspectives.

For instance, as enabling disciplines, sociology, anthropology and history can enhance the understanding, teaching and research of legal phenomena in their various contextual manifestations in Africa. This in turn can be valuable for exploring alternative epistemologies, hypotheses and methods that could lead to the renewal of legal studies, especially through critical conceptual and methodological innovations.

In conclusion, this article has linked the decolonisation of law in South African higher learning institutions to the teaching and revival of living customary law as an important source of law in South Africa. It reflects the way of life before colonisers imposed Western laws on Africa. This does not only reflect African legal realities before the colonisers, but also contributes to alternative epistemologies that reveal the transformative potential of law in dealing with the social realities of Africa. In addition, this paper has highlighted the importance of a legal theoretical framework shift from the environment in which law is taught.

The interdisciplinary study of law will promote Africanism and the true roots from which our own law originates from. A shift in mindset and a change in approach towards the law and beginning to actively engage with these issues critically; would be a significant step to successfully attain a truly transformed and Africanised law.

Reference List

Himonga, C. and Diallo, F. 2017 Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law. *Potchefstroom Electronic Law Journal*. 20: 2, 1 – 19.

Kleyn, D.G., Zitzke, E., Viljoen, F., and Madi, P. 2018. *Beginner's Guide for Law Students*. 5th ed. Cape Town: Juta Publications.

Langa, P. 2006. Transformative Constitutionalism. *Stellenbosch Law Review*. 17: 351-359.

Considerations of Time and Space: Marrying the Law to Society

The Thinkers' Collective

South Africa as a space was founded on violence which did not only underpin the "right to conquest" but also created a space over which this violence would be exercised and maintained (Mbembe, 2001: 25). By space, drawing from the work of Puwar (2004) and Brown, (2015) we mean space as a place which "has been signified as: material form, geographic location and an investment with meaning[s] and value" (Gieryn in Brown, 2015:9) occupied by people, with practices, objects and representations that have meaning(s). In other words, by space we mean that which is socially constructed and imagined in a place to symbolically mean something. Because the space is in a place (the physical geographical location) inhabited by people, it can carry multiple meanings, cultures and practices which are exclusionary. These exclusionary practices, particularly in the construction of South African space, were reinforced using the law, thus shaping law as violent. What follows then are some reflections on the relationship between time, law and space in South Africa.

The post-94 South African democratic era was grounded in a transitional justice framework necessitated by the liberal Constitution (both the interim and final Constitutions) which served, and continues to serve as a beacon of unity mandated to "heal divisions of the past" and build a "future founded on the recognition of human rights and democracy". The ethos underlying this nation building project was a Christianised version of Ubuntu based on reconciliation and constitutionalism. Put slightly differently, South Africa transitioned into justice, or to be precise it changed from the Apartheid regime to a democratic constitutionalist state. However, like many transitional justice projects as observed by Mulin, *et al* (2019), the transition was susceptible to "western interventions and geopolitical entanglements". Mulin *et al* (2019) extends this observation and labels transitional justice as "chronically short-sighted" because it misdiagnoses the causes of violence, dispossession and marginalisation as national concerns consequently failing to link them back to the global capitalistic system which was also an

impetus for colonisation. Additionally, this process individualises violations whilst ignoring the collective ones, leaving the transitional state in a position where it not only christens the universal human rights framework but also capitalism.

Speaking on this individualising nature of transitional justice and its impact on victims in South Africa; Madlingozi (2007,108-113) argues that transitional justice not only neglected "issues of social justice" but also produced what he calls "good victims and bad victims". By 'bad victims' we understand him to mean those who continue to demand social justice and reparations and are immediately silenced by being labelled and stigmatized as 'being against the nation building' and reconciliation programme. These victims are accused of clinging to and expropriating 'victimhood'.

Modiri (2016, 507), noting another shortfall of law grounded in transitional justice, argues that the law is "without a sense of time and space", meaning that the law has not transcended time and space to be able to deal with current reality taking into account the history and violence with which this country was carved. Instead, despite supposedly remedying the ills of the past through constitutional and transitional justice, the law has remained an obstacle towards achieving social justice. Therefore, it can be argued that because of the "western intervention and geological entanglements" the Constitution and law did not break away from the colonial establishment. The same critique is levelled by Van Marle, (2003: 243). "[T]he law", she writes, "fails truly to recognize a remembering [...] of the past and [imagining] of a future that challenges its institutional structures". More importantly, given that if we are to consider the questions of the past and, particularly of the future, some serious reflections are needed between the relationship of law and time. Instead of critically contemplating and recognising the challenges emanating from: 1) past exclusionary regimes and violence and 2) demands for socially just world, that law faces, rather it "reverts to universal generalization of time" (ibid). That is to say the particular is neglected in favour of the universal.

Universal generalisation of time then, "robs victims of their agency in ways that are inimical to victims'

empowerment" (Lundy and McGovern in Madlingozi, 2010, 212).

Consequently, the chronical short sightedness of the transitional justice leads to a wrong prognosis of social issues. In practical terms such a misdiagnosis leaves us with the firm assertion that the current Constitution, a product of transitional justice aimed at "healing divisions of the past", is the correct remedy even though it is insensitive to time and space and, therefore, an obstacle to social justice.

In fact, it can be concluded that the law, functioning from the framework of constitutionalism has been experienced as violent, because the space created by the colonial regime did not change with time. Instead, exclusive spaces were opened to incorporate those who were hitherto excluded without changing practices. For this reason, the signs, meanings and symbols that *symbolised* violence and exclusion were baptised, institutionalised and used as 'world' meanings to govern the people.

The rule of law, a foundational value of democratic South Africa, is a typical example of the above. This value constructs the law as supreme and demands that all state actions must be founded in law. Consequently, it incorporates the principle of certainty; that is, the law must be clear, predictable and concise. Interestingly enough, the rule of law and certainty can be observed in the introduction of customary law by Colonial Authorities to counteract the uncertainty which is foundational to custom.

The uncertainty in custom is due to the fact that custom, unlike customary law, is tethered to the adherents' moral and behavioural patterns (Himonga, *et al.*, 2014) making it fluid and time sensitive. The institutionalization of custom(s) as *law* would make custom rigid, static and give it certainty. Accordingly, this would alienate people from being at the centre of creation of custom and, consequently, law.

Morever, during the transition, particularly in the Truth and Reconciliation Commission, there were descrepancies and short comings between "law (and legal institutions) and politics, and reconciliation and ultimatey justice" (van Marle, 2003, p. 244). By politics here we mean how people relate to one another. In simple terms, social relations. These descrepancies were as a result of - and continue to be of – prioritising and

overemphasising judicial procedures "and particularly the fact that judicialised outcomes [are] favoured above 'moral' or 'political outcomes" (ibid).

Following Modiri (2016), we argue that the law grounded in constitutionalism is neither time nor space sensitive given that it remains strongly tethered to its colonial origins and fails to apprehend symbols which are markers of vanquished times and spaces. This then creates a situation whereby the law is read as rigid, firmly tied to colonial interests, whilst rejecting the interests of those it purports to protect.

Thus, the law is still violent and alienating despite it (law) promising everything and yet delivers nothing (Agamben, 1998: 49). This then, points to the need to decolonise the law. By that we mean a move away from the law as absolute, to a law that is divorced from precepts of European epistemologies, that being certainty (also read as rigidity) and capitalism. This is because law's "rule bound nature" puts emphasis on calculation and thereby excludes the needs of the particular; in other words, placing ordinary people at the centre of thinking and practising law and excluding the alienating nature often associated with law. To talk of decolonising law then, even time itself has to be disrupted. Particularly in law, the idea of linear and chronological time which, as shown above rests on universal generalising. By disrupture of time we are "suggesting an approach of slowness that could involve greater attentiveness" (van Marle, 2003) rather than universality.

Reference List

Agamben, G., 1998. *Homo Sacer: Sovereign power and bare life*. s.l.: Standford University Press.

Brown, C. 2015. Space as a Space. *South African Review of Sociology*, 46(1), 9-10.

Himonga, C. et al., 2014. *African Customary Law In South Africa Post Apartheid and Living Law Perspectives*. Cape Town: Oxford University Press.

Madlingozi, T. 2013. Good Victim, Bad Victim: Post-Apartheid Beneficiaries, Victims, and the Struggle for Social Justice". Paper presented at the annual meeting of the The Law and Society Association.

Madlingozi, T. 2010. On Transitional Justice, Entrepreneurs and Production of Victims. *Journal Of Human Rights Practice,* 2(3), 208-228.

Modiri, J. 2016. Time and Space of Critical Legal Pedagogy. *Stellenbosch Law Review,* 27(3), 507-34.

Mullin, C., Nada, T. & Azadeh, S., 2019. Decolonizing Justice in Tunisia From Transitional Justice to a People's Tribunal. Monthly Review, 71(1).

Puwar, N. 2004. *Space Invaders*. New York: Berg.

The Constitution of the Republic of South Africa Act of 1996.

Van Marle, K., 2003. Law's Time, Particularity and Slowness. *South African Journal on Human Rights,* 19(2), 239-255.

Decolonisation and Africanisation of Legal Education

Sonwabise Lande

Introduction

The analysis below seeks to determine whether or not it is prudent to decolonise legal education. The motion to decolonise education emerges from the fact that colonialism revolved around diminishing the indigenous ways and replacing them with the collective consciousness of the European diaspora and Eurocentric views (Peacock, 2017).

The focus is on the infusion of African values into the law curriculum, particularly in relation to how the use of African values and languages can contribute to decolonising the curriculum. In this regard, the discussion deals with values from the understanding that they are those principles by which people live and for which they can even die (Idang, 2015).

Values are intrinsically linked to culture in that culture entails the manner in which people live, especifically with regards to their social organisations, institutions, beliefs, norms and standards (Idang, 2015). The nexus between culture and values is attributable to the fact that people do not live in a vacuum but within a particular community setting.

I acknowledge that the law curriculum needs to be aligned with the Constitution and what is needed by the legal employment market. However, there needs to be insurance that law schools produce lawyers who are well versed in the African values by which members of society live by.

Use of African/indigenous Languages

Section 6 (2) of the Constitution requires the State to promote indigenous languages so as to move past historical injustices which did not accord equal status to indigenous languages compared with English and Afrikaans (Idang, 2015). Section 30 of the Constitution provides that everyone has the right to use any language of their choice and participate in the cultural life of their choice (Department of Education, 2002).

Section 29 (2) of the Constitution states that everyone has the right to receive

education in the official language or languages of their choice in public education institutions where that education is reasonably practicable (Constitution, 1996); so as to ensure the effective access to and implementation of this right, the State must consider reasonable educational alternatives, including single medium institutions, taking into account equality, practicability and the need to redress the outcomes of past racially discriminatory practices (Constitution, 1996).

The number of provisions in the Constitution relating to the need to incorporate indigenous languages into education, not only to accord them equal status but also develop them to a level where they are of scientific value, emphasises the importance of equal status for all languages. The above contention is premised on the fact that in the past only English and Afrikaans were given a chance to develop and thus be of important scientific value and this was done at the peril of indigenous languages.

In line with Section 29 of the Constitution, the Higher Education Act 101 of 1997 came into operation, *inter alia,* to give a basis to the new language needs at institutions of higher learning. The Act requires the Minster of Higher Education to determine policy in respect of these institutions and, in this regard, the Ministerial Language Policy for Higher Education suffices (Department of Education, 2002). The framework notes that language poses a real risk of providing a platform to discriminate and oppress others (Department of Higher Education and Training, 2015).

Furthermore, the Ministerial Report on the use of African languages in higher learning institutions pointed out that languages can also create platforms for greater social cohesion as well as effective teaching and learning (Department of Higher Education and Training, 2015). In this regard, a multilingual approach to the issue of languages is favoured by the State.

In the Afriforum case, the Constitutional Court (CC) favoured a multilingual approach to teaching and learning (Afriforum v The Univeristy of the Free State, 2018). The court found that continuing to use a singular medium of instruction is not contrary to the law. However, it is contrary to the law to use such language to further racial or cultural discrimination

(Afriforum v The Univeristy of the Free State, 2018).

In the Afriforum matter the CC in essence affirmed that all our languages working together play a pivotal role in the pursuance of common nationhood and that such approach is aligned with the values of democracy, social justice and basic human rights (Afriforum v The Univeristy of the Free State, 2018).

Infusing African Values into the Law Curriculum

At a start, it suffices to mention that not all which is viewed as 'African values' deserve a place in the society where we live today (Idang, 2015). This is attributable to the fact that some may infringe on fundamental human rights entrenched in the Constitution (Constitution, 1996). In this regard, the discussion advocates for the infusion into the legal curriculum of those African values which are consistent with the Constitution (Bekker, Rautenbach, & Goolam, 2015).

Ubuntu- "*umntu ngumntu ngabantu*" (the difference between respect and ubuntu).

It has been said that the values of Ubuntu largely correspond to the underlying values of the Constitution, in terms of which individuals are encouraged to be more humane. This could also mean personhood and morality (S v Makwanyane, 1995). It can be fully expressed by the phrase "*umntu ngumntu ngabantu",* meaning that the mere existence of a person is attributable to the existence of other people (S v Makwanyane, 1995). This is central to group solidarity, survival and shared wealth. It can be said to encompass human dignity, compassion, conformity to basic norms, humanity and morality. It encourages conciliation as opposed to confrontation. (S v Makwanyane, 1995).

I respectfully submit that not directly incorporating Ubuntu into the Constitution was an error and a disservice to the people of South Africa. This is premised on the contention that, although many values such as human dignity and equality cover most of what Ubuntu offers, such values can never give full expression to the value of Ubuntu. This is true because Ubuntu is not just a value which seeks to achieve the above attributes associated with it, but it is the basis for African life itself.

The principle of Ubuntu moves away from the European perspective of individualism and private ownership of resources. It requires people to share not only living and working spaces, but also the fundamental resources of this earth. With regard to education, this would entail making education and academic resources accessible from a financial and cultural perspective.

Conclusion

University spaces being so diverse today need to have a common medium of instruction whereby no one is excluded on the basis of language use or assessments which are biased towards (a) particular group(s) or propagate racial or cultural discrimination. For instance, requiring students to write tests in the evening or assessing students using two languages would necessarily favour a single racial and class group of students – which is white people in our case.

It is submitted that it is through use of indigenous languages that African values can be properly and effectively infused. Infusion of such values will require a proper understanding and, by implication, identification of them. In addition, this will be a positive step towards making all aware of the importance of the relevant values.

It is on the basis of the right to education that there is a need to introduce indigenous languages which would be compulsory to all, particularly in legal education and similar fraternities (Constitution, 1996). The introduction of such languages will not only give value to the dignity of African people but also enable them to achieve their full potential. This will create greater social cohesion as all South Africans will be familiar with English and other African languages as a social norm.

Reference List

Afriforum v The University of the Free State. 2018. 4 BCLR 387 (CC).

Bekker, J.C., Rautenbach, C., & Goolam, N.M. 2015. *Introduction to Legal Pluralism in South Africa*. Durban: LexisNexis.

Idang, G.E. African Culture and Values. *Phronimon,* 16 (2).

Peacock, M. 2017. Decolonisation of legal education in South Africa in the aftermath of fees must fall. *Michael Peackock08's Blog*. March 10, 2017.

Republic of South Africa. Constitution Act 108 of 1996.

Republic of South Africa. Department of Education. 2002. *Language Policy for Higher Education*.

Republic of South Africa. Department of Higher Education and Training. 2015. *Report on the Use of African Languages as Mediums of Instruction in Higher Education*.

S v Makwanyane.1995. (6) BCLR 665 (CC) (CONSTITUTIONAL COURT OF SOUTH AFRICA 1995).

The idea behind this journal

The Perspective Online journal came from a collective observation that student activism needs to also be driven by thoughtful and productive contributions to advance academic, pedagogical and knowledge renewal within the university.

The journal has been positioned as a strategic resource for students to develop a culture of disciplined writing in order to bring to the fore a particular social consciousness amongst university students underpinned by robust engagement, radical contestation of ideas and critical scholarship.

As a result, CriSHET, in partnership with the office of the Dean of Students, and the Department of Student Governance and Development introduced this journal which will be published quarterly and feature articles, columns, and creative work by students on the deepening of transformation, decolonisation, and the Africanisation of higher education.

The journal will be made available online in all communication and media platforms, with a limited number of hard copies. It will also be available through the library platforms of the university. Writers who also intend to develop their columns into research studies and/or journal articles are encouraged to utilise this platform.

Lastly, undergraduate and postgraduate students across all Faculties are encouraged to write as individuals and/or as groups. A quarter of the journal space will be set aside for the contributions of staff and community members.

Contributions must be thoughtful, considered and analytical. They must meet the general criteria of conversational-academic writing.

NELSON MANDELA
UNIVERSITY

The Perspective Online journal is published quarterly at Nelson Mandela University by
the Chair for Critical Studies in Higher Education Transformation (*Cri*SHET),
the Office of the Dean of Students, and the Department of Student Governance and Development.