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

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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

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