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.