Dismantling epistemic violence in South African law by decolonising jurisprudence

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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.

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