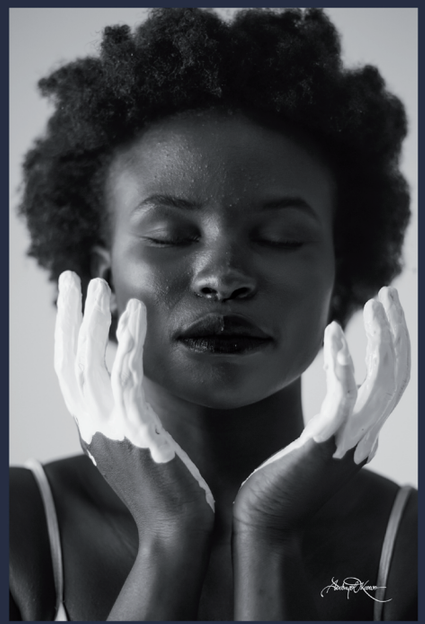

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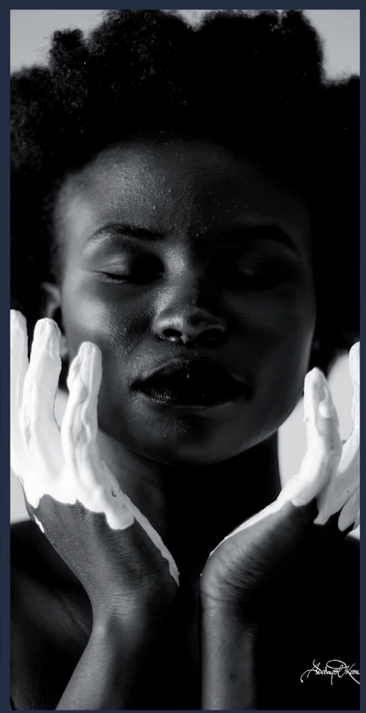
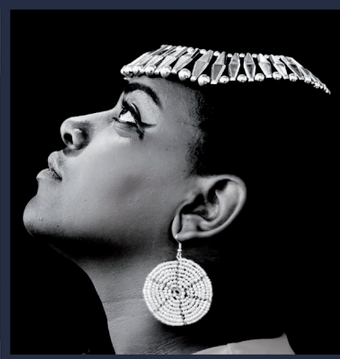


# PRETORIA STUDENT LAW REVIEW

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# EDITORS' NOTE: SPECIAL EDITION

*by Simon Motshweni*

Honoured to present to you, the reader, the very first special edition of the *Pretoria Student Law Review* (*PSLR*), an annual publication which is the pride of the best law faculty in Africa. The *PSLR* is a student driven law review that creates an interactive forum for students, academics and legal professionals to discuss topical legal matters that challenge the status quo.

Fittingly, this edition endorses articles addressing a critical and topical issue in legal academia: the decolonisation of legal education, and ultimately, the law as a whole. I believe that such a topic sparks important conversations in a 'post-colonial' South Africa.

I am thankful to Primrose E R Kurasha, Dr Gustav Muller, Prof Ademola Oluborode Jegede and Annette Lansink for building relations that have allowed me the great opportunity to drive this ship, the *PSLR*, into newer heights by introducing the special edition.

I am truly proud of the work that the authors have put into their articles and I would like to thank them for their submissions and tireless efforts to produce quality articles. More-so, I am proud of the Editorial Board for being able to work under intense pressure to produce a publication *par excellence*. This edition would have not been possible without the dedication and hard work of this dream team. To Adelaide Chagopa, Kayla Thomas, Marcia van der Merwe, Nicholas Herd and Phenyo Sekati, it has been a privilege to have worked with you on this special edition. A special note of thanks to Dr Gustav Muller for his continued and immeasurable support throughout this journey.

To you future author, I implore you to start writing, for the water does not flow until the faucet is turned on. To you the reader, Jurgen Zwecker (2018 Managing Editor of the *PSLR*) was right: enjoy the read — without fear to question what is in front of you, for that is the only way we, as scholars, grow.

Simon Motshweni
Editor-in-Chief
2020

## NOTE ON CONTRIBUTIONS

We invite all students to submit material for the fourteenth edition of the *Pretoria Student Law Review*. We accept journal articles, case notes, commentary pieces, response articles or any other written material on legal topics. You may even consider converting your research memos or a dissertation chapter into an article.

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# INTRODUCTION TO THE *PRETORIA STUDENT LAW REVIEW*: SPECIAL EDITION ON THE DECOLONISATION AND AFRICANISATION OF LEGAL EDUCATION

*by Annette Lansink* & Ademola Oluborode Jegede***

## 1 Introduction

This special edition of the *Pretoria Student Law Review (PSLR)* is devoted to papers presented at a Conference on Decolonisation and Africanisation of Legal Education hosted by the University of Venda and the South African Law Deans Association (SALDA).[1] This was the third event on decolonisation and Africanisation under the umbrella of SALDA in the period 2016 to 2019 and the first devoted to law students.

The reason is not farfetched. While the movement to transform and decolonise higher education has since been on the ascendancy in South Africa, the intellectual voice of law students who are at the centre as both the recipients and the future agents of the discourse is faint. Thus, the purpose of the law student conference was to listen to the perspectives of students and intellectually engage the various meanings and implications of decolonisation and Africanisation of legal education. The conference was premised on the fact that, although postcolonial and post-apartheid legal education in South

* Annette Lansink (former Dean: School of Law, University of Venda).
** Ademola O Jegede (Professor of Law, University of Venda).

1 Law Students' Conference on the Decolonisation and Africanisation of Legal Education (2019) University of Venda, Thohoyandou.

Africa has seen many changes, the knowledge systems in the legal discipline remain rooted in colonial and western worldviews and epistemological traditions. The Conference held at the University of Venda on 15 July 2019 was attended by students and staff members from 15 out of the 17 South African law faculties.

We are indebted to Prof Tshepo Madlingozi for giving an insightful and much appreciated keynote address that set the tone of the conference by raising critical questions. Prof Madlingozi posed five 'provocations', to wit the possibility of decolonising the curriculum in a colonised university, the need to address institutional racism and its manifestations in the hidden curriculum, the meaning of moving beyond the ivory tower, the necessity to link up with social movements, the importance of critical pedagogy as well as multi- and transdisciplinarity, and the need to develop our own norms and not to borrow uncritically from Latin-American and African-American experiences. In his address, Prof Madlingozi argued for a post-conquest constitution that recognises pluriversalities and emphasised the point that colonialism and coloniality should be made the unit of analysis. He also contended that decoloniality will be disruptive and should not be equated with mere transformation.

The first article in this collection is by Mankhuwe Letsoalo and Zenia Pero on *Historically white universities and the white gaze: critical reflections on the decolonisation of the LLB curriculum* which takes the point of distinguishing decolonisation from transformation further. The article critically reflects on the University of Pretoria's Curriculum Transformation Framework document in which the University identified four drivers of curriculum transformation (responsiveness to social context; epistemological diversity; renewal of pedagogy and classroom practices; and an institutional culture of openness and critical reflection) as an essential tool in decolonising legal education, especially in white universities as it provides in-depth strategies to achieve epistemic justice. The authors, however, caution against an approach that fails to confront whiteness and deep-rooted legacies of racial exclusion and cultural domination at universities. Following in the footsteps of the philosopher George Yancy, the article employs the term 'white gaze' which 'encapsulates black experiences in white spaces' as a site of power and control that structures 'how race operates socially and epistemologically'. According to Yancy, the white gaze is a 'form of embodied seeing'.[2] The authors emphasise the need to dismantle whiteness within the institutional culture otherwise decolonisation runs the risk of denoting change at historically white universities and merely

2 G Yancy 'Elevators, social spaces and racism: a philosophical analysis' (2008) 34(8) *Philosophy & Social Criticism* 843.

incorporating African concepts into an Eurocentric educational system.

The title of the article by Ropafadzo Maphosa and Nomathole Nhlapo is *Transformative legal education in the South African context*. This article starts with examining the impact of the disparities brought about by apartheid in the provision of legal education, *inter alia*, the lack of resources at historically black universities, and the geographical restrictions placed on black law graduates. In the next section, the history of the four-year LLB is discussed in the light of transformation objectives. The authors proceed to engage Himonga and Diallo's three aspects of decolonisation: the integration of living customary law in law modules; a shift in the theoretical paradigm within which law is taught, and the importance of an interdisciplinary study of law in the African context using the methods and insights from the social sciences and comparative law to elucidate the understanding of law in its broader societal context.[3] Maphosa and Nhlapo propose that fundamental concepts in law be taught less axiomatically and more critically, and advocate for a 'therapeutic jurisprudence'. While embracing the constitution, they make an argument for the 'redesign' of legal education and the infusion of African and constitutional values so that ultimately the legal order 'mirrors the society' in which it exists.

In *Decolonising legal education in South Africa: a review of African indigenous law in the curriculum*, Joshua Mawere grounds arguments on decolonisation in the theory of Afrocentricity. After providing several definitions of the latter, including from Molefi Asante,[4] Mawere advocates for a paradigm shift in the law curriculum to respond to the needs of Africans. He examines how colonialism led to epistemicide and endorses Ngũgĩ wa Thiong'o's view on the direction that the education system should take to break with neo-colonialism.[5] Ngũgĩ wa Thiong'o argues for decolonisation of the mind, a liberation from colonial education and the 'consciousness necessarily inculcated in the African mind' by the inherited colonial education system; at the heart of this struggle for control and political, economic and cultural self-definition are African languages.[6] To foreground knowledge from an African point of view, Mawere suggests introducing 'living indigenous law' in the law curriculum. This needs to be distinguished from the 'old' indigenous

3 C Himonga & F Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20 *Potchefstroom Electronic Law Journal* 3.

4 See MK Asante *Afrocentricty: The theory of social change* (2003); *The Afrocentric idea* (1998).

5 Ngũgĩ wa Thiong'o *Decolonising the mind: The politics of language in African literature* (1981) Zimbabwe Publishing House (1987) 101.

6 Ngũgĩ (n 5 above) 101, 108, 4.

law which has been tainted by colonialism whereas living indigenous law is situated in the 'social actualities within which people live their lives'. He supports the critical views of Joel Modiri and Tshepo Madlingozi regarding the South African Constitution and how it is 'implicated' in the failure to address the 'structural continuity' of apartheid and colonialism.[7] As a way forward, the author asserts the importance of centring indigenous law and values in the entire law curriculum, an interdisciplinary and multicultural approach to the law, African teachers and a syllabus that includes both African and European views and knowledges.

The next article is by Paul Mudau and Sibabalo Mtonga *Extrapolating the role of transformative constitutionalism in the decolonisation and Africanisation of legal education in South Africa.* The authors focus on transformative constitutionalism and contend that the University of Pretoria's Transformation document with its four drivers contains valuable guidelines for curriculum transformation that 'resonates well with the objectives of both the National LLB Standard and transformative constitutionalism itself'. The authors consider views on decolonisation and decoloniality from both African and Latin-American scholars, including Motshabi, Mignolo and Maldonado-Torres and highlight the need to decolonise the mind and knowledge itself as well as the inadequacy of Western theories to solve local problems.[8] The article considers various perspectives on decolonisation, including an 'inside-out vision from Africa into the world' with a focus on Africa and its people, while subscribing to the view that there is not a 'single one-dimensional answer'. African epistemology and African practices are embraced whereby African jurisprudence has precedence over European knowledge systems. At the same time, an argument is put forward by the authors to entrench transformative constitutionalism in the curriculum as this 'can enhance' decolonisation and Africanisation of legal education. In the absence of a national pedagogical framework to steer the transformation and decolonisation process, the authors propose using the four drivers contained in UP's Transformation document as a guide.

7 See J Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 300; T Madlingozi 'Social Justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution (2017) 28(1) *Stellenbosch Law Review* 123.

8 See KB Motshabi 'Decolonising the university: a law perspective' (2018) 40(1) *Strategic Review for Southern Africa 104;* MW Mignolo 'Delinking: the rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality (2007) 21 (2-3) *Cultural Studies* 459; N Maldonado-Torres 'Thinking through the decolonial turn: post-continental interventions in theory, philosophy, and critique — an introduction' (2011) (1) *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World* 1

In *Breaking the language barrier in legal education: a method for Africanising the LLB curriculum*, Thokozani Dladla examines the relationship between law and language in the light of section 6(2) of the Constitution and the failure to advance multilingualism in the LLB curriculum. The author argues that despite the constitutional imperative on the state to take positive measures to advance the historically diminished use and status of indigenous languages, the use of African languages in law has not been promoted while the first language of the majority of South Africans is an African language. It is for this reason that Dladla critically engages the lack of transformation in this regard and the 2017 directive to judicial officers by the Chief Justice in which English was declared the only language of record in South African courts. Drawing upon the Constitution and case law, an argument is put forward that non-inclusion of compulsory African languages in legal education and the non-promotion of African languages in government policies where it is reasonably practical to do so would amount to unfair discrimination. The author proposes that at least one African language be made compulsory in the LLB curriculum and further that each law school chooses an African language of the region and 'partner with schools of languages to translate sources of law'. Translating legal texts in African languages will deepen understanding and enhance multilingualism while the teaching of law modules and, ultimately the entire LLB curriculum, in a local African language would be to the benefit of law students, the legal profession and society at large. At the same time, it will enhance efficiency in courts and the sociological context of law in particular for non-African language speakers.

In the penultimate article on the topic *Critical legal education: a remedy for the legacy of colonial legal education,* Emerge Masiya and Given Mdluli use Critical Legal Studies (CLS) to deconstruct the law and colonial epistemology. They recommend the replacement of a colonial "black-letter" approach to law and teaching, formalism and a restrictive jurisprudence with a 'therapeutic jurisprudence'. They suggest that legal naturalism which according to them is more in line with 'traditional African legal phenomena' be substituted for legal positivism. The authors combine insights from CLS with the approach advocated by Himonga and Diallo[9] to advocate for alternative epistemologies with a view to promoting 'the transformative potential of law in achieving social and economic justice'. Following Modiri they criticise the formalistic and text-book conscious legal culture, and suggest a 'policy-oriented consequentialist approach' instead of a functionalist one. Masiya and Mdluli contend that CLS is most suitable as a vehicle for decolonising the law due to its

9 Himonga and Diallo (n 3 above) 1-19.

'restorative, cosmopolitan outlook and interdisciplinary approach' and ability to enhance the inclusion of African values such as ubuntu.

In the last article in this collection titled *Decolonisation of the law curriculum in South Africa through the prism of a lived experience*, Mandisi Magula and Shatadi Phoshoko, set out to show the historical context of colonialism and its impact on the law curriculum. The authors argue for the creation of an Afrocentric curriculum that would be better attuned to the needs of the country than the Eurocentric curriculum currently used in law schools, which produces graduates who are 'blind to the identity and knowledge' of Africans and unable to solve societal problems. They mention some good practices such as the inclusion of modules focused on African philosophy and customary law in the University of South Africa (UNISA) law curriculum and provide examples how the curriculum can become Afrocentric. Their article posits that African languages be prioritised and ubuntu made the 'basic principle' of the law, the latter is premised on the contention by the South African philosopher Mogobe Ramose that ubuntu is the basis of African law.[10] Hence, the article argues for the inclusion of African knowledge and perspectives to ensure that the law curriculum is decolonised, Africanised and able to serve the needs of society.

The conference provided a forum for the voice of law students in South Africa as students representing all but two law faculties presented papers. After the conference students were asked to prepare their presented papers for publication. Seven papers were finally submitted for publication after having been anonymously reviewed.

While the quality of the articles varies in the level of detail provided to sustain an argument, the articles are interesting and display a diversity of approaches and emphasis. The articles collectively illustrate the need to engage and overhaul what and how we teach. The need to decolonise legal education has been strongly expressed in all the articles and requires further engagement by the sector. We should be mindful of the fact that the students who submitted papers are not representing law students or their associations. These are students who competed to represent their universities at the conference and their interest in the topic and ability to critically reflect on the law curriculum is commended. Each article albeit in different ways makes the point of the disjuncture between the legal order and society and advances the argument that legal education and the legal order serve the needs of society and its people. Whereas some articles are reflecting on the paradigmatic idea of Afrocentricity, and others argue for transformative constitutionalism and the inclusion of African values or perspectives

10 MB Ramose *African Philosophy through Ubuntu* (1999).

in the law curriculum, in all instances the distinct voice of students is heard.

Other common themes include the importance of teaching living customary law, the necessity of including African languages and African jurisprudence, less formalistic and more critical approaches to teaching law, the need to augment critical thinking skills, situating law in its social context and encouraging multi- and interdisciplinarity in the law curriculum.

As guest editors, we are most grateful to all the contributors and the reviewers whose efforts culminated in making this special issue a reality. The students were committed to the project and we are gratified with their determination and enthusiasm to deliver. We also wish to express a word of appreciation to the Editor-in- Chief of the *PSLR*, Simon Motshweni, and Dr Gustav Muller for their valuable assistance in ensuring the publication of this special edition and the *PSLR* Editorial Board for providing space for the conference papers in this journal.

# HISTORICALLY WHITE UNIVERSITIES AND THE WHITE GAZE: CRITICAL REFLECTIONS ON THE DECOLONISATION OF THE LLB CURRICULUM[1]

*by Mankhuwe Caroline Letsoalo* & Zenia Pero***

> The white gaze, given the power of the ocular metaphor in Western culture, is an important site of power and control, a site that is structured by white epistemic orders and that perpetuates such orders in return.[2]

**Abstract:**

*The (most recent) call for curriculum decolonisation came at the height of student protests such as #feesmustfall and #afrikaansmustfall. In the University of Pretoria's Curriculum Transformation Framework document, the University identified four drivers of curriculum transformation, namely, responsiveness to social context; epistemological diversity; renewal of pedagogy and classroom practices; and an institutional culture of openness and critical reflection. The content of these drivers mirror what is needed to engage in decolonisation of* curricula. *In the spirit of these protests that led to the conceptualisation of decolonised higher education, the authors of this*

* Mankhuwe Caroline Letsoalo III is an LLM research candidate at the University of the Free State. She holds an LLB from the University of Pretoria.

** Zenia Pero is an LLM candidate in the Socio-economic rights program offered at the University of Pretoria. She holds a BA Law and LLB obtained at the University of Pretoria.

1 This article focuses in particular on the University of Pretoria.

2 G Yancy *Whiteness and the return of the 'black body'* (PhD Thesis, Duquesne University, 2005) 37.

*article critically reflect on the institutional landscape of historically white universities. The authors employ the term 'white gaze' to highlight how historically white universities respond to calls for decolonisation, often substituting this call with transformation. The purpose of this article is to re-contextualise the need for decolonisation at historically white universities.*

# 1 Introduction

The call for curriculum decolonisation came at the height of student protests such as #feesmustfall and #afrikaansmustfall in 2015 and 2016. In the spirit of these protests that led to the conceptualisation of decolonised higher education, the authors of this article critically reflect on the institutional landscape of historically white universities, particularly the University of Pretoria (UP). Following the protests, the University of Pretoria called a Lekgotla between management and student leaders to discuss how it would respond to the students' demands. What followed, is the University of Pretoria's Curriculum Transformation Framework document. In this framework document the University identified four drivers of curriculum transformation, namely, responsiveness to social context; epistemological diversity; renewal of pedagogy and classroom practices; and an institutional culture of openness and critical reflection.

The key considerations of the drivers are explained further in the curriculum framework document. The focus areas of the first driver are: prioritising social transformation, retrieving and foregrounding historically and presently marginalised narratives, voices and subjugated knowledge, as well as the critical examination of the role of race, socio-economic class, gender, sexuality, and culture.[3] Encouraging epistemic diversity, recuperating African knowledges, and honestly and critically reckoning with the histories of all disciplines fall within the scope of the driver on epistemic diversity.[4] The focus of the driver on the renewal of pedagogy and classroom practices includes: addressing the invisibility of certain groups, pursuing inquiry-led teaching and learning, and equipping students with skills.[5] Lastly, in addressing the institutional culture at UP, the focus is placed on advancing an intellectual culture of critical reflection, accelerating transformation of academic staff, reviewing and redefining the identity of the university, and dismantling institutional hierarchies.[6]

3 UP Curriculum Transformation Framework 2.
4 Transformation Framework (n 3 above) 3.
5 Transformation Framework (n 3 above) 4.
6 Transformation Framework (n 3 above) 5.

It is, of course, important to note that the term 'decolonisation' is used once in this framework document. 'Decolonising and democratising of the curriculum' are used in conjunction with one another,[7] but further throughout the document the word 'transformation' is used as an alternative. How this project is called is important. Are transformation and decolonisation interchangeable terms? The article argues that the terms may overlap, but have fundamentally different core aims and outcomes; moreover, decolonisation requires commitment. Historically white universities must, for this very reason, heed caution when engaging with framework documents like the one from UP. The caution is not because of decolonisation itself, but one that stems from intention and commitment to decolonisation which might be lacking on the part of role-players at a University. There is the risk to subsume decolonisation as an academic mini-industry which lacks substance, in other words, there is a chance of colonising decolonisation itself.[8] The argument here is the need for caution through exploring the term 'white gaze', a popular term in discourse on African American Literature which encapsulates black lived experience in white spaces,[9] as a critical lens to unpack how a historically white university, such as UP, responds to calls for transformation and decolonisation. The purpose of this article thus is to critique the approach of transformation as/without decolonisation, to provide a cautionary tale of falling into the trap of the white gaze, and to re-emphasise, re-contextualise and essentially decolonise the need for decolonisation at historically white universities.

## 2 Meaning of a decolonised law curriculum

To begin with, there is a need to unpack what a decolonised curriculum entails by first distinguishing between three concepts: transformation, Africanisation and decolonisation. Transformation entails altering practices within a system, or introducing new practices to achieve certain goals, referred to as transformative goals often addressing social, political and economic issues. For the LLB curriculum, of particular importance is the phrase 'transformative constitutionalism' as coined by American legal scholar Karl Klare.[10] Transformative constitutionalism involves the alteration of social,

7 Transformation Framework (n 3 above) 1.

8 T Madlingozi 'Decolonising decolonisation with E'skia Mphahlele' 1 November 2018 https://www.newframe.com/decolonising-decolonisation-mphahlele/ (July 2019).

9 This metaphor is prominent in the works by WEB Du Bois *The souls of black folk* (1903); J Baldwin *Nobody knows my name* (1961); T Morrison *The bluest eye* (1970) and T Coates *Between the world and me* (2015).

10 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Human Rights Law Journal* 198.

political, and economic frameworks under a constitutional dispensation.[11] This entails that transformation is subject to and often usurped by constitutional provisions. Africanisation calls for the inclusion of more local content in practices, and can be seen as part of either transformation, where one includes epistemic diversity as a goal of transformation, and could also be seen as part of decolonisation where decolonisation entails the 'un-doing' of the intellectual colonisation of ideas that were forced upon and imposed on colonised peoples.[12]

Transformation operates in a limited school of thought and parameters, for example where colonial provisions and practices form part of the constitutional dispensation, or where certain systems of law are favoured over others. Transformation does not always amount to decolonisation, depending on the strategies utilised as will manifest later in the article. Africanisation is a useful strategy to transform and decolonise and it is arguably an effective tool to respond to the violence of colonisation and can potentially bring about epistemic justice and diversity. Fanon cautions that to Africanise without decolonising may lead again to the assimilation of colonial systems and practices.[13]

Decolonisation is a process of conducting research in such a way that the worldviews of those who have suffered a long history of oppression and marginalisation are given space to communicate from their frames of reference, assumptions and perspectives. Decolonisation is not an event but an on-going process that involves creating and consciously using various strategies to liberate the colonised mind. Ngugi wa Thiong'o submits that a 'captive mind' is incapable of partaking in decolonial projects hence one needs to undergo the process of decolonising the mind.[14] This involves the restoration and development of indigenous cultural practices, thinking patterns, values and beliefs and the birth of new lifestyle and intellect that contributes to the encroachment and empowerment of Africa.[15]

Laenui identifies the following five phases in the process of decolonisation: Rediscovery and recovery, mourning, dreaming, commitment and action.[16] Rediscovery and recovery is the process whereby colonised peoples rediscover and recover their own history, culture, language, identity and interrogating the captive mind.

11 Klare (n 10 above) 198.
12 Ngũgĩ wa Thiong'o *Decolonising the mind: The politics of language in African literature* (1981) 9-10.
13 F Fanon *Wretched of the earth* (1961) 23.
14 B Chilisa *Indigenous research methodologies* (2012) 8.
15 T Serequeberhan 'The Critique of eurocentrism and the practice of African philosophy' in PH Coetzee & APJ Roux (eds) *The African philosophy reader* 2ed (2003) 75.
16 Chilisa (n 14 above) 8.

Mourning refers to the process of lamenting the on-going assault on the colonised identities and social realities. Dreaming is the phase of decolonising the mind — the colonised invoke their histories, worldviews, and indigenous knowledge systems to theorise and imagine alternative possibilities, in this instance a different curriculum. Commitment is when academics and scholars become political activists who demonstrate the commitment to include the othered voices, in this case, in the university curriculum. Action is the phase where dreams and commitments translate into strategies of decolonisation.[17]

Smith identifies the elements of decolonisation — deconstruction and reconstruction, self-determination and social justice, ethics and critique.[18] Deconstruction and reconstruction concerns discarding false narratives regarding indigenous knowledges, and interrogating distortions of people's life experiences. Self-determination and social justice relate to the struggle of the colonised and their journey in seeking legitimacy for knowledge that is embedded in their own histories, experiences and ways of viewing reality. In this context, ethics relates to the formulation, legislation and dissemination of ethical issues related to the protection of indigenous knowledge systems.[19] Critique concerns a critical thinking of colonial method in our curricula that continues to deny space and reject inclusion of voices of the others.

For the purpose of this article, arguably there are three strategies that may be a useful starting point in the decolonisation of legal education. These are the inclusion of African jurisprudence, the teaching of indigenous law, as discussed by Himonga and Diallo,[20] and the pluriversality between legal fields and theories.

## 3 African jurisprudence

John Murungi submits that to know what it is to be an African lawyer necessarily entails to know what it is to be African and 'what is at stake in being African'.[21] He also critiques the current legal education for its failure in training its legal scholars to be *African* legal scholars. He submits that 'the well-being of Africa ... must be the cornerstone of legal education in Africa'.[22] He also rejects the narrative that Africa did not have a legal system before colonisation as the word

17 Chilisa (n 14 above) 8.
18 L Smith *Decolonising methodologies: Research and indigenous peoples* (1999) 12.
19 L Le Grange 'Decolonising the university curriculum' (2016) 30 *South African Journal of Higher Education* 4.
20 C Himonga & F Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20 *Potchefstroom Electronic Law Journal* 7.
21 J Murungi *An introduction to African legal philosophy* (2013) 1-9.
22 Murungi (n 21 above) 8.

African qualifies jurisprudence and when adequately understood one can see the pluriversality between different schools of thought. African legal systems, much like all legal systems, are founded on the principle of social cohesion and collective justice which is different from the individualistic approach in the English system.

## 4 The teaching of indigenous law

'Living customary law' is the law that governs the legal relations of people who are subject to a given system of customary law in their day-to-day life. Otherwise known as indigenous law, this refers to law and knowledge inherent in the knowledges of indigenous people, and as opposite to the law that is currently practised and that had been planted and developed here through conquest and colonisation.

Indigenous law represents the practices or customs observed and invested with binding authority by those who observe it and its unwritten legal ideas and knowledge. Indigenous law is passed down from one generation to the next orally.[23] This store of knowledge is uniquely African in the sense that though not insulated from global conditions, its evolution is shaped within changing African social, economic and political contexts.[24] Moreover, because of its oral nature and flexibility, indigenous law can readily and easily be adjusted to meet the varied needs of justice in a decolonised context. Indigenous law must, therefore, be taught in all law faculties or law schools and at appropriate levels of the law degree that enable students to comprehend the significance and complexity of the subject within the constitutional frameworks.

## 5 Pluriversality between legal theories and fields.

The major legal theoretical framework within which law is taught, is hugely influenced by English and Roman-Dutch common law which follows formalist and positivist legal approaches. These approaches separate legal rules from 'non-legal normative considerations of morality or political philosophy',[25] which is a hindrance to legal decolonial projects. Legal pluralism must be the cornerstone of the curriculum. Legal pluralism is the coexistence of distinctive legal systems. To claim that the law exists in a vacuum would not only be an illusion but also a myth as far as legal history is concerned. Areas of law must not be taught and learned distinctively but rather

23 Murungi (n 21 above) 8.
24 Murungi (n 21 above) 8.
25 B Leiter 'Legal formalism and legal realism: What is the issue?' (2010) 2 Cambridge University Press 111.

modules must be taught holistically and pluriversally. Pluriversality is conceived by the theory of pluralism and highly entrenched in the notion of cultural relativism which is the objective analysis of knowledge systems; it contrasted with ethnocentrism.[26] The teaching and study of law 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.

## 6 UP Framework document and decolonisation

As Tuck and Yang observe 'decolonisation is not a metaphor',[27] – within the UP framework document there are a few concrete markers that indicate its alignment with decolonisation. It encourages 'epistemic diversity and pluriversality between different intellectual and cultural heritages',[28] and 'not merely adding new voices and theories but reconceptualising the way in which knowledges and sources of knowledge are organised, valued and represented within disciplines and subject areas'.[29] These may be read as aligning itself to some of the core tenets to decolonising legal education earlier highlighted. However, a foreseeable problem in historically white universities, is the institutional culture. The framework acknowledges the problem and the need for the university to confront it when it notes as follows:

> Honestly and critically reckoning with the histories of all disciplines and dominant traditions within disciplines to examine their underlying colonial biases and exclusionary cultural norms at the intersections of race, gender, sexuality and class, as well as the complicity of disciplinary knowledges with various forms of violence and oppression over time. This involves, among others, the acknowledgment that even those few historically white universities that admitted a limited number of black students operated on the principle of racial segregation and that black people were mostly excluded from Higher Education, bar the Bantustan universities and two universities set aside for 'coloured' and 'Indian' students.[30]

The danger then is not the project of decolonisation, but the fact that the proposals in the framework themselves have two possible outcomes. The first possible outcome is a successful challenge to the norm of whiteness through, in particular, the use of African jurisprudence, and the promotion of indigenous knowledge.[31] The

26 B Bizumic & J Duckitt 'What is and is not ethnocentrism? A conceptual analysis and political implications' (2012) *Political Psychology* 33:6 887.
27 E Tuck & KW Yang 'Decolonisation is not a metaphor' 1 (2012) *Indigeneity, Education & Society* 1-40.
28 Transformation Framework (n 3 above) 3.
29 Transformation Framework (n 3 above) 4.
30 Transformation Framework (n 3 above) 3.
31 J Murungi 'The question of an African jurisprudence: Some hermeneutic reflections' in K Wiredu (ed*) A companion to African philosophy* (2005) 521.

second possibility, is that these proposals could simply assimilate African concepts into the Eurocentric system. The colonisation or recolonisation of decolonisation.[32]

What should be clear then is that decolonisation is not a metaphor for change. Approached in this way decolonisation itself will still reaffirm the structure of white supremacy and colonialism.[33] Decolonisation requires the system itself to be dismantled, interrogated, thereby no longer allowing the structures that affirm colonialism to survive.[34] If we were to simply teach indigenous law as equal to our current euro-centric law, without interrogating the role it had played in racism, colonialism, and oppression, then that is not decolonisation.[35]

Consequently, the problem lies in the interpretation of transformation as/and decolonisation at historically white universities where frameworks are still left vague in its conceptualisation of what can and must happen. The distinction between transformation and decolonisation will widen, depending on the commitment to the interpretation of transformation in the document as decolonisation. The interpretation thereof will be influenced by the white gaze, which is explored in the ensuing section.

## 7 The historically white university and the white gaze

George Yancy, a philosopher from the United States of America, sought to theorise on the lived and embodied impact of how race operates socially and epistemologically.[36] He gives us an example of an elevator occupied by himself, well dressed, and a white woman. The white woman does not 'see' Yancy, but she sees his black body.[37] What she sees is the characterisation of black men by media, film, public officials rendering his body supersaturated with meanings constructed by whiteness.[38] Whiteness renders all things that do not ascribe to, appease, and assimilate to whiteness as 'other'.[39] Her gestures, her pulling on her purse, her body language, immediately indicate her discomfort at seeing a black man and indicate her

32 Madlingozi (n 8 above) 1.
33 Tuck & Yang (n 27 above) 9.
34 Tuck & Yang (n 27 above) 9.
35 Murungi (n 31 above) 521.
36 G Yancy 'Elevators, social spaces, and racism: A philosophical analysis' (2008) 8 *Philosophy and social criticism* 846.
37 As above.
38 As above.
39 As above.

discomfort at occupying the space with him.[40] Yancy did not have to do much in order for his existence, his wants and his intentions, to live within the imagination of this white woman.[41] Yancy's elevator example exposes the social microcosm of racism, and the ways in which whiteness and racism permeate even the most passive of spaces.[42] In 'Black bodies, White Gazes' Yancy considers the murder of Eric Garner by white police officers — an instance where the white gaze literally asphyxiated a black male body.[43] He asks what it is about Eric Garner screaming that he cannot breathe while being held down by the white police officer that does not warrant a sympathetic response.[44] Did they *hear* his cries? Did they *see* and *hear* his attempts at justifying his actions, his existence? If they heard and saw him, what justifications existed in their minds to ignore him?

This is the power of the white gaze in society, and the power thereof in white spaces.[45] Historically white universities institutionalised whiteness, racism, and in so doing institutionalised the ocular metaphor of the white gaze.[46] Arguably, this is as a result of the institutional history of racial divisions entrenched at Universities, especially through policies under the apartheid government.[47] Specifically legal constraints were put into place to prevent institutions from allowing other race groups to enrol at institutions designated for another.[48] Rigid distinctions were made between white students and 'the others'. Historically white universities have inherited a legacy from apartheid and played a crucial role in the act of racial subordination.[49]

This legacy continues. As recently as 2007 the UP allowed a 'student organisation to campaign using extremely offensive and racist posters which stated (in Afrikaans) 'Proudly Afrikaans, Proudly White'; 'Afrikaner Studentebond, a Light in the Darkness' and 'White, Whiter, Tuks'.[50] Fees Must Fall and Afrikaans Must Fall in recent years brought the institutionalisation of racism and whiteness to the fore. These protests culminated in several court cases unpacking exactly

40 Yancy (n 36 above) 850.
41 Yancy (n 36 above) 851.
42 Yancy (n 36 above) 852.
43 G Yancy *Black bodies, white gazes: The continuing significance of race in America* (2008) 4.
44 Yancy (n 43 above) 4.
45 We rely on African American Literature to draw parallels between white hegemonies which persists after liberatory struggles.
46 Yancy (n 43 above) 6.
47 I Bunding 'The higher education landscape under apartheid' in N Cloete, P Maassen, *et al* (eds) *Transformation in higher education* (2006) 36.
48 Bunding (n 47 above) 37.
49 T Madlingozi 'Confronting and dismantling institutional racism in the Faculty of Law, University of Pretoria' in C Heyns and H Visser (eds) *Transformation at the Faculty of Law, University of Pretoria* (2007) 32.
50 Madlingozi (n 49 above) 32.

the role of Afrikaans at a post-apartheid university, a direct question as to the legacy of racism and whiteness at universities.

Though the universities themselves are seen as racially neutral, or at least diverse in its constituency, the protests were met with violence — they were met with the white gaze. The demands of students were not initially looked at. Rather the students were seen through the ocular metaphor — a demanding force that would disrupt the non-racial utopia perceived to exist. Teargas ensued; interdicts were issued. And then, Lekgotlas were established and frameworks for curriculum transformation were created. Is it possible for the institutional culture to shift so easily from violence to acceptance and commitment? Unlikely. The white gaze need not be outwardly violent, as shown in Yancy's elevator example. The objectification that comes with the white gaze also manifests itself in tacit, but equally violent, ways.[51] It involves a majority of white academic staff, a lecturer expecting less of black students because the merits and standards for greatness are still defined through 'whiteness',[52] and invisibilising black academics where they dare not assimilate whiteness.[53]

## 8 Conclusion: Decolonising legal education and confronting the white gaze — a cautionary tale

At the outset of this article we aimed to critique the approach of transformation as/without decolonisation, to provide a cautionary tale of falling into the trap of the white gaze, and to re-emphasise, re-contextualise and essentially decolonise the need for decolonisation at historically white universities. The UP framework document for curriculum transformation is an essential tool in decolonising legal education especially in a historically white university as it recognises the epistemicide that still manifests itself at the institution and further gives in depth strategies to achieve epistemic justice which can ultimately bring about decolonisation of the law curriculum. Some of the strategies undertaken in the framework document align with the research and approaches to decolonisation which we consulted. In particular the strategies from the framework document relate to pluriversality, epistemic justice, promotion of African jurisprudence and the promotion of indigenous knowledge. Although 'decolonisation' is not the preferred term in the document it still undertakes the decolonisation of the curricula at UP.

As Madlingozi warned, however, there is the need to confront deep-rooted legacies of racial exclusion and cultural domination

51 Yancy (n 45 above) 4.
52 Madlingozi (n 49 above) 33.
53 Madlingozi (n 49 above) 29.

within universities, and in particular within law faculties.[54] So, even if one has switched from violence to acceptance — from resistance of calls for decolonisation of universities, to the drawing up of framework policies, the white gaze will persist in transformation efforts where it is not confronted and dismantled. Whiteness will simply centre itself once again in the project of decolonisation.[55] To merely tolerate the call for decolonised education, and accept a lower standard thereof (or accept a less radical and committed transformation), is to maintain the power of the white gaze where the lives, the well-being, and the futures of black students merely exist in the imagination of (white) academics who make the call on what is included in the curriculum.

54 Madlingozi (n 49 above) 27.
55 Madlingozi (n 8 above) 2.

# TRANSFORMATIVE LEGAL EDUCATION IN THE SOUTH AFRICAN CONTEXT

*by Ropafadzo Maphosa* & Nomathole Nhlapo***

**Abstract:**

*The late former Justice of the Constitutional Court of the Republic of South Africa, Pius Langa, opined that a truly transformative South Africa requires a new approach that places the Constitutional dream at the very heart of legal education. This view is consistent with section 29 of the Constitution which guarantees everyone the right to further education. However, the state has failed to make further (or tertiary) education progressively available and accessible. We believe this can be attributed to the fact that the South African legal education is still riddled with inequalities from the apartheid/colonial era. This article argues that decolonisation of legal education will begin when teachers of the law become cognizant of the reality that their teaching models will shape the future legal landscape, thus it is imperative for law schools to birth law graduates with an unwavering appreciation and willingness to implement constitutional values, such as human dignity and equality in practice. The advancement of these values is enhanced by the Africanisation of legal education which will ultimately legitimize the legal order so that it mirrors the society in which it exists.*

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*Secondly, the transformation of the colonial system of education requires that we regard law as part of the social fabric and law students are encouraged to view it as such. Transformative constitutionalism requires that students not only see the law as an instrument that was used to oppress in the past, but as a greatly influential tool with an unfettered capacity to transform our society. An important facet of transformative constitutionalism lies in improving the quality of education through a better understanding of the process of teaching and learning. This article concludes with a call for the sweeping redesign of legal education in South Africa, including an overhaul of the pedagogy of apartheid and colonialism with special emphasis on the leveling of educational inequalities which were dramatically skewed during the apartheid era.*

***Key Words:*** *Transformative legal education, transformative constitutionalism, pedagogy*

# 1 Introduction

Aristotle said, 'the ultimate goal of education is to assist human beings in developing their unique capacity to contemplate the world and their role in it'.[1] For historically disadvantaged students, this goal has not been realised due to the remnants of the apartheid legal system that continue to linger more than 25 years later. This article discusses how a shift in pedagogy of legal education and the inclusion of African customary law can address systemic obstacles to the attainment of transformative legal education. For the purpose of this article, legal education refers to a curriculum which equips law students for filling different roles in society, and for various law related careers.[2] Therefore, the terms 'legal education' and 'curriculum' will be used interchangeably.

The first segment begins with a review of legal education in the Apartheid era considering the separation of educational institutions based on race. In the second section, the authors will assess how the previous education system has shaped the current state of legal education in South Africa in light of the post-Apartheid LLB degree. This article will then address the pedagogy of legal education, more particularly its failure to integrate customary law into the current LLB curriculum. Finally, this article concludes with a re-examination of legal education in the African context and a call for the teaching of legal education through a therapeutic lens with a suffusion of the notions of transformative constitutionalism and *ubuntu*.

1 TW Johnson and R Reed *Philosophical documents in education* (2000) 35.
2 A Lakshminath 'Legal education, research and pedagogy' (2008) 50 (4) *Journal of the Indian Law Institute* 606.

## 2 Legal education in the colonial/apartheid era

The colonial system and Apartheid created much division between the state judiciary and the traditional chief tribunals that were exclusively used for the resolution of legal disputes between the black communities.[3] The alienation of customary law from its indigenous origins began with the colonial policy of indirect rule when indigenous legal regimes were co-opted to the received systems of European law.[4] As a result, the division played a critical role in the way in which legal education was taught in universities during both the colonial and the Apartheid era.

The history of South African law is framed as a Roman-Dutch system, influenced by English law, without much attention given to African law. Roman-Dutch law principles ('the common law') have remained in areas of the law such as property law, contracts and wills because these were strongly grounded in equitable principles and supported by an adequate availability of authoritative text sources both in Latin and Dutch.[5] When the British assumed control over the colony in 1806, many aspects of English Law were adopted which shaped the existing South African procedural law and all branches of commercial law, such as insurance law, maritime law and company law. English Law supplemented the deficiencies and gaps that had arisen in the law as it developed at the Cape.[6]

Prior to the new constitutional dispensation in South Africa, legal education was largely characterised by racial disparity. There are various ways in which legal education either bolstered apartheid or was influenced by it. For instance, those in positions of influence used it to regulate access to the legal professions to ensure that the pattern of white domination in the field would persist.[7] This access was reinforced by apartheid governmental policy through the limited participation of minorities in political and legal processes and through a lack of educational and employment opportunities.[8]

3 M Ndulo 'Legal education in Africa in the era of globalization and structural adjustment' (2002) 20 *Penn State International Law Review* 487.
4 T Bennett 'The compatibility of African Customary Law and human rights' (1991) 1 *Acta Juridica* 18.
5 L Greenbaum 'A history of the racial disparities in legal education in South Africa' (2009) 3 (1) *John Marshall Law Journal* 6.
6 As above.
7 Bantu Education Act 47 of 1953; Extension of University Education Act 45 of 1959.
8 Greenbaum (n 5 above) 7.

### 2.1 A lack of resources: A challenge at historically black universities

Legal education reflected the apartheid system of allocation of national resources along racial lines.[9] Separate education, including university education, was provided to students based on their racial designation, with separate institutions established for white, black, Indian and coloured persons. This was facilitated by the Bantu Education Act and the Extension of University Education Act,[10] which empowered the government to establish universities for black people and ensured that 'white' universities were closed to black students.[11] In its report, the Commission on Native Education highlighted that the black community received limited funds which ensured minimum educational effect.[12] After the establishment of separate university colleges, the 'historically black universities' (HBUs) remained under-resourced and inconveniently located in rural areas so as to ensure that the quality of the education provided was not comparable to that offered at generally historically white institutions (HWUs).[13] This separation perpetuated the stereotype that degrees conferred from HWUs were of a higher calibre compared to those obtained from HBUs. This had a negative impact on the ability of graduates from HBUs to obtain employment in top law firms.[14]

Prior to 1995, the statutory requirement for all practising lawyers to have passed a university course in English, Afrikaans and Latin remained an impediment to black candidates.[15] Furthermore, the obstacles in gaining access to high quality tertiary education; the cost and the length of time required to obtain an LLB degree to qualify as an advocate coupled with the difficulty of obtaining articles of clerkship in urban white male-dominated law firms, ensured that black lawyers were effectively restricted to the lower levels of practice within the legal profession. Even in the event that they were successful in overcoming the many structural barriers within the differentiated education and legal systems, black law graduates faced restrictions in the geographical areas where they could practise.[16] This resulted in that branch of the profession being dominated by white practitioners and appointment as a judge could only be made

9 JB Kaburise 'The structure of legal education in South Africa' (2001) 3 *Journal of Legal Education* 364.
10 Extension of University Education Act 45 of 1959.
11 J Moulder 'Academic freedom and the Extension of University Education Act' (1975) (1) *Philosophical Papers* 64
12 Report of the Commission on Native Education (Eiselen Commission) 1949-1951, Government Printer, 1953.
13 Greenbaum (n 5 above) 10.
14 Greenbaum (n 5 above) 10.
15 L Greenbaum 'The four-year undergraduate LLB: Progress and pitfalls' (2010) 35 (1) *Journal of Juridical Science* 2.
16 Greenbaum (n 5 above) 13.

from the ranks of experienced advocates thus reinforcing the discriminatory effect that the differential qualifications had in terms of racial, gender and socio-economic bias.

Since 1994, more black law students have attended law schools and many of them come from modest economic backgrounds. Even with the possibility of entering into well-paying employment in the private sector and government, many come to these positions with limited financial resources, debt and sizable family obligations and responsibilities. This makes it difficult for most African graduates to complete a full year of pupillage without compensation.

In practice, the apartheid government policies of having separate trade areas for each racial group enacted by the Group Areas Act ensured the geographical isolation of black practitioners due to the restrictions which placed their practice areas in 'townships' or black 'homelands'.[17] This policy was not based on the notion of justice, and it had an effect on our approach to the law.[18] As a result, our legal education was riddled with contradictions, anomalies and inconsistencies.

Although the South African government has established the National Student Financial Aid Scheme (NSFAS) to 'redress past discrimination and ensure representation and equal access ... and establish an expanded national student financial aid scheme that is affordable and sustainable',[19] the scheme has several pitfalls which have left many students at a disadvantage.[20] Since its inception, the NSFAS has grown considerably in terms of the amount of money available for annual disbursement. However, despite the significant increase in government funding allocated to the NSFAS, the demands on the scheme continue to exceed available resources. NSFAS currently assists about 17 percent of higher education students, but estimates show that NSFAS only has half of the funds it would need to meet the demand for student financial aid from qualifying applicants.[21] It is evident that the scheme is not able to fund all current awardees at the levels required to fully meet their tuition and living expenses. Moreover, while students can now use their NSFAS loans to pay their registration fees, the way this process is handled by institutions is neither consistent nor uniform. A number of institutions still insist that students pay registration fees, despite the NSFAS provision.

17 Group Areas Act 41 of 1950. Black Lawyers Association (BLA) (http:www.bla.org.za) quoted in Greenbaum (n 5 above) 13.
18 Greenbaum (n 5 above) 13.
19 National Student Financial Aid Scheme Act 56 of 1999.
20 Preamble of the National Student Financial Aid Scheme Act.
21 Ministerial Committee 'Report of the ministerial committee on the review of the National Student Financial Aid Scheme (NSFAS)' 2009 73.

In HBUs such as the University of Fort Hare, Walter Sisulu University and University of Limpopo, where demand far outstrips supply, there is often a spread of the NSFAS allocation to as many students as possible by granting smaller awards to a larger number of students, in order to provide a temporary solution to the dilemma of financial exclusion.[22] University administrators do not take into account that allocating funds on a 'some for all' instead of an 'all for some' basis results in all students being substantially underfunded. Such underfunding impedes students' chances of succeeding. It is a cruel irony that the use of NSFAS loans to inadequately fund many students contributes to a high dropout and failure rate among the very group for whom the scheme was set up to provide access to higher education. This is precisely the 'revolving door' outcome against which the *White Paper: A Programme for the Transformation of Higher Education* warned in 1997:

> Poor students gaining access to the higher education system education system, but being unable to complete their studies, so being 'revolved' back into poverty — in this case with the additional burden of a student loan debt — including unfunded institutional debt — they are unable to repay because they lack the qualifications to secure formal employment.[23]

Another pitfall of NSFAS is that prior to 2018, funding was limited to students whose family income was less than R122 000 per annum.[24] At present, the threshold of R350 000 family income per annum now applies to students who were first-time entrants in 2018 and will also apply to first time-entering students in 2019 going forward.[25] There are many households above the R350 000 per annum joint income threshold that require financial assistance; these are the so-called 'missing middle' in the current student financing arrangement. Despite being disqualified from NSFAS funding because their incomes are too high, these families cannot afford to fund their children's higher education themselves, especially if more than one child wants to study at the same time. In the light of this, the NSFAS has not been able to extend its reach to the increasing numbers of students whose family income is above the NSFAS eligibility threshold but who cannot afford to access higher education without financial aid.[26]

22 Ministerial Committee Report (n 21 above) 39.
23 Ministerial Committee Report (n 21 above) 39. See also N Cloete 'For sustainable funding and fees, the undergraduate system in South Africa must be restructured' *South African Journal of Science* (2016) 112 (3/4) 4.
24 Ministerial Committee Report (n 21 above) 63.
25 Ministerial Committee Report (n 21 above) 37.
26 South African Union of Students Submission to the Ministerial Review Committee, August 2009 in Ministerial Committee Report 65-67.

## 2.2 The current state of legal education in South Africa

The legacy of the previous inequalities discussed above continues to linger in the current legal education system, replicating a cycle of disadvantage that is reflected in poor student graduation rates amongst black students and high student attrition rates.[27] With the transition to democracy in 1994, the need to address the under-representation of historically disadvantaged people in all areas of the legal profession and to establish a single, affordable academic qualification was undeniable. A commitment to incorporate the teaching of legal skills and ethical values, and to heighten students' sensitivity to diversity, formed part of the proposal by the curriculum Task Team of Law Deans and professional representatives in 1996.[28]

In 1995, the South African Ministry of Justice convened a Legal Forum on Legal Education for the purpose of critically reviewing the structure and provision of legal education, with a view to devising a new system that would give expression to the new constitutional dispensation in the country.[29] Emerging prominently at the forum was a general consensus that the approach to legal education in South Africa needed change. A dominant theme in this respect was the structure of the basic law degree, together with the need to design a form of legal education which would include both formal academic and practical skills training.[30] Consensus was reached that a standard legal qualification lasting four years, followed by one year of practical training, should be adopted as the norm by all South African law schools. The degree was designated as the undergraduate LLB, and the first intake of students for the new degree began in the 1998 academic year.[31]

The four-year LLB programme was introduced in South African universities in 1998 through the Qualification of Legal Practitioners Amendment Act 78 of 1997 as an alternative measure of the five-year LLB, in order to create a shorter and less expensive way for LLB students to obtain their law degree.[32] The justification for the introduction of the four-year LLB programme was twofold: firstly, there were too few black South Africans represented in the legal profession; and, secondly, the country's previous apartheid laws, i.e. the Extension of University Education Act, had resulted in a

27 Greenbaum (n 5 above) 1.
28 Proposals by the Task Group on the Restructuring of Legal Education (1996) 11 in Greenbaum (n 15 above) 10.
29 Ministry of Justice, Proceedings of the *Legal Forum on Legal Education* (1995) 96 in Greenbaum (n 15) 9.
30 Kaburise (n 9 above) 366.
31 As above.
32 ES Fourie 'Constitutional values, therapeutic jurisprudence and legal education in South Africa: Shaping our legal order' (2016) 19 (1) *Potchefstroom Electronic Law Journal* 8.

distinction between the various law degrees that were obtained by black and white students.[33] Prior to 1997, law graduates held either a B Proc degree or a postgraduate LLB after completing a primary degree.[34] The expense of completing two degrees and the additional years spent studying at university represented an impediment that most aspiring African lawyers were unable to afford. In an effort to redress these imbalances, the Government introduced a single law degree, which was intended to remedy both the problem of under-representation as well as to provide equal qualifications for all.

While the convergence of a plethora of factors inevitably led to a theatrical re-conceptualisation of legal education in 1996, little attention was paid to the pedagogic soundness of the change.[35] On the surface, the government succeeded in remedying the problem with which it was faced: the new LLB did produce more black law graduates. However, 'the informing vision that inspired the change appears to have been founded upon unarticulated premises, lacking in a well-researched or pedagogical foundation'.[36]

### 2.3 The expectations of the legal fraternity from law students

Law firms and the legal profession at large have noted that law students are not prepared for the legal profession with a 4-year LLB because law students lack maturity, numeracy skills, literary skills and critical thinking amongst other prerequisites for legal practice.[37] This is problematic because poorly literate candidate attorneys and lawyers may fail in their duty to advance the interests of the client and ultimately reduce the public's faith in the legal system in the long term if lawyers are unable to perform effectively.[38]

There are expectations from the general public and within the legal profession itself as to how legal practitioners should conduct themselves in the profession. A higher ethical standard is placed on the legal profession because of the esteemed and well-respected nature of the legal profession. The legacy of the LLB curriculum has left many wondering whether LLB graduates are 'fit and proper' for practice as per section 24(c) of the Legal Practice Act (LPA), which provides that a legal professional is admitted if he or she is a *fit and proper person*.[39]

33 Greenbaum (n 15 above) 12.
34 As above.
35 Greenbaum (n 15 above) 2.
36 As above.
37 Greenbaum (n 15 above) 12.
38 JP Van Niekerk 'The four year undergraduate LLB: Where to from here?' (2013) vol 34 (3) *OBITER* 534.
39 Legal Practice Act 28 of 2014.

The LPA brought about a new dispensation within the South African legal system, however, the founding principles for the admission of advocates and attorneys have since remained the same.[40] The Act does not define the 'fit and proper' requirement extensively. However, in the legal field, it is commonly accepted that the meaning of a 'fit and proper' person include characteristics as 'complete honesty, reliability and integrity'.[41] In *Prokureursorde van Transvaal v Kleynhans*,[42] the question before the court related to the constitutionality of the judiciary to remove 'unfit and improper' persons from the roll of attorneys. The court held that 'standards could be set for the legal profession as far as both "competence" and "unquestionable integrity" were concerned'.[43] In addition to the requirements of competence and knowledge of the law, the overarching principle for one to be 'fit and proper' is the possession of integrity which is essential in the legal profession. According to the Law Society of South Africa, the requirement of a fit and proper person refers to the moral integrity of a person.[44] To this end, the Legal Practice Council was established to protect and promote integrity in the legal profession, and to protect the interests of the client in the context of the relationship between the lawyer and the client.[45]

It is apparent from the above discussion that ethical standards should be emphasised in the foundational years of legal education, in order to prepare students for practice. In terms of section 195(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution), public administration must be governed by the values of the Constitution, thus, a high degree of professional ethics must be maintained.[46] Moreover, public administration applies to every sphere of government including the judiciary.[47] Therefore, it is imperative for the ethics of the legal profession to be emphasised in legal education, in order to achieve transformative legal education and lawyers who are fully aware of their duties.

## 2.4 Alternatives to the LLB curriculum

Dissatisfaction amongst stakeholders regarding the quality of law graduates has added to the current impasse as to how legal education can most effectively be improved. Two alternatives have been

40 Admission of Advocates Act 74 1964; Attorneys Act 53 of 1979.
41 *General Council of the Bar of South Africa v Geach and others* 2013 (2) SA 52 (SCA) para 126.
42 *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T).
43 As above.
44 'Methods for qualification' http://www.lssa.org.za/about-us/about-the-attorneys-profession/becoming-an-attorney (accessed 27 February 2019).
45 Section 5 of the LPA.
46 Section 195(1) (a) of the Constitution.
47 Section 195(2) (a) of the Constitution.

suggested for remedying the deficiencies of the current four-year LLB. The first is an extension of the four-year programme and will be similar to what some universities already offer to 'at risk' students.[48] The University of the Western Cape, for example, offers an extended programme which includes a foundation year where students acquire various numeracy and literary skills to assist them in their transition to legal studies.

The second is a return to the postgraduate LLB which is still offered by some institutions that opted to retain the postgraduate degree when they first introduced the four-year curriculum, for example the University of Witwatersrand. Suggestions to extent the duration for the attainment of a LLB qualification from the current minimum four years of study to a minimum of five years of study have been made. Of the two alternatives mentioned, the first option seems more practical as it only requires students to register for one degree instead of two. The authors are of the opinion that extending the current undergraduate LLB by one year will not provide much of a solution to the problems currently experienced. Given the criticisms that have been raised, the central issue clearly concerns the curriculum and its failure to meet the demands of practice.

Curriculum issues are unsurprising given the fact that each university was allowed academic freedom regarding the content of the current four-year LLB degree. To this end, the Council on Higher Education (CHE) has urged many institutions where the LLB is taught to reform the curriculum.[49] The primary consideration in this report is that programmes have to be aligned with principles of transformative constitutionalism. Perhaps if 'core courses, practical skills training or non-law courses for inclusion in the curricula' had been identified from the outset instead of a mere 'list of recommended core subjects', legal education would be in a much better position today.[50]

It is evident that the notion of academic freedom, which was strongly advocated by the Task Group on Legal Education, and which permitted individual faculties to interpret the degree requirements as they saw fit, was ill-placed. The proposals did not identify practical skills training or non-law courses for inclusion in curricula, leaving these choices to individual faculties as a matter of preserving their autonomy.[51]

However, the Council of Higher Education recommended that it is necessary to set the Qualification Standard for Bachelor of Laws (LLB)

48 Van Niekerk (n 38 above) 539.
49 Council on Higher Education 'The state of the provision of the Bachelor of Laws (LLB) qualification in South Africa' 2018.
50 Greenbaum (n 15 above) 10.
51 Van Niekerk (n 38 above) 540.

to allow quality assurance of higher education qualifications as prescribed by the National Qualifications Framework Act 67 of 2008 and the Higher Education Qualifications Sub-Framework.[52] To ensure optimal adherence to the specific qualification standards developed for the Bachelor of Laws degree in 2015, the extended LLB may provide the answer — provided that it is applied uniformly at all institutions offering an LLB degree. This will also go a long way in ironing out prejudices in the law fraternity that law graduates from certain universities are of a higher caliber than others, thus making them more marketable.[53]

As it stands, with students struggling to complete the four-year degree in record time, it seems improbable that a return to the post-graduate LLB would make students better equipped to complete a second degree. Regardless of the option of pursuing a second degree being available to all, the reality in this country is that it would only be utilised by an elite who are in a financial position to do so. This factor takes one right back to where it all started, when the four-year LLB was considered the only solution to address the socio-economic inequalities of the past.[54]

Despite promises by the post-1994 democratically elected government to redress the historical inequity of the HBUs, the reality is that their goals have not been met. HWUs continue to have better facilities and more resources which attract more students and more state funding because state subsidies are linked to students enrolment numbers. Their superior facilities make them more attractive to students and academic staff alike.[55] Many of the historically disadvantaged institutions continue to be plagued by the structural legacies inherited from the apartheid education system. Although HBUs such as the University of Fort Hare were often the site of resistance to the apartheid regime and the focus of political opposition to the Nationalist government, since 1994, their appeal to black students and staff has diminished as they have not been able to meet the new imperatives of skills development, quality research production and creating improved facilities.[56]

There are also discrepancies in the resourcing of the HWUs and the HBUs.[57] The student-staff ratio is generally much higher at the HBUs. Library resources at HBUs do not compare at all with those at HWUs. Academic support programmes at HBUs are often inadequate

52 The Higher Education Qualifications Sub-Framework (HEQSF) (2013). See further the Council on Higher Education (CHE) Qualification Standards for the Bachelor of Laws (April 2015).
53 Van Niekerk (n 38 above) 534.
54 Van Niekerk (n 38 above) 541.
55 Greenbaum (n 5 above) 12.
56 As above.
57 Kaburise (n 9 above) 365.

compared to support programmes at HWUs. Administrative support at HBUs does not compare well with that at HWUs.[58] The above points are the direct result of the state's financial under-resourcing of the HBUs for the past decades. As a result, HBUs are underfinanced and are mostly located in non-metropolitan areas, and find it difficult to attract and to retain well-qualified and experienced staff.

# 3 The pedagogy of legal education in South Africa

The curriculum overemphasises corporate and private-practice courses, partly in response to student perceptions about their employability to the detriment of courses focusing on crucial social issues.[59] Consequently, African customary law is often taught as a detached course, instead of being woven into the substance of doctrinal courses.[60] Himonga and Diallo suggest that there are three elements to the decolonisation of the law and legal education which are the following: (a) the inclusion of living customary law in legal education; (b) the shift in the way in which the law is taught at universities; and (c) the interdisciplinary study of the law.[61] The three elements are discussed below.

## 3.1 The inclusion of living customary law in legal education

Prior to the constitutional dispensation, customary law seldom attracted much attention in South Africa; in Bennett's view, it was a Cinderella subject.[62] This was a deliberate policy to exclude Africans and their institutions from the mainstream of South African law.[63] The alienation of customary law from its community origins began with the colonial policy of indirect rule when indigenous legal regimes were co-opted to the received systems of European law. However, the status of customary law in South Africa is now constitutionally protected in section 211 of the Constitution which provides that the institution, status, and role of traditional leadership are recognized subject to the constitution. It further states, 'courts must apply

58 As above.
59 B.R Henderson 'Asking the lost question: What is the purpose of law school?' (2003) 53 *Journal of Legal Education* 48.
60 L Greenbaum 'Legal education in South Africa: Harmonizing the aspirations of transformative constitutionalism with our educational legacy' (2015) *New York Law School Law Review* 480.
61 C Himonga & F Diallo 'Decolonisation and teaching law in africa with special reference to living customary law' (2017) 20 *Potchefstroom Electronic Law Journal* 7.
62 Bennett (n 4 above) 18.
63 As above.

customary law when that law is applicable, subject to the Constitution and [relevant] legislation ...'.

The courts have made progress to develop and ensure the recognition of customary law in South Africa. In *Alexkor v Richtersveld Community*,[64] the Constitutional Court found that customary law must be recognised as an 'integral part' of the law and 'an independent source of norms within the legal system'. This was echoed by Van der Westerhuizen J in *Shulubana v Nwamitwa* wherein he explained that the status of customary law requires respect.[65] In addition, Langa DCJ (as he was then) noted in *Bhe v Magistrate, Khayelitsha* that an approach that disregards the rules or provisions of customary law on the basis that such rules are different from the common law or legislation would be incorrect.[66]

Nhlapo submits that when the court makes reference to customary law, it is specifically referring to living customary law.[67] Living customary law alludes to the unwritten traditions and laws of each ethic group whether recognised by the state or not. Moreover, living customary law refers to the traditional practices that are accepted by its people as binding authority.[68] As a result, this allows for living customary law to be flexible and adapt to the needs of society. It is important for the laws of South Africa to adapt to the changing needs of society, to move away from colonial laws and create laws that are relevant to South African issues. Diallo and Himonga argue that legal education is the most appropriate platform to dissect the intricacies of living customary law and for law students to fully understand the role living customary law can play in the creation of laws in South Africa.[69]

Additionally, the shift in the way in which laws are taught is imperative to the introduction of the Africanisation of legal education. For the purposes of this article, we interpret Africanisation as the infusion of indigenous knowledge and concepts into the law curriculum. Living customary law is still not the preferred solution to solving customary law issues. However, judges and legal professionals still 'view living customary law as non-existent, or regard living customary law as informal law that is irrelevant to State institutions'.[70] Universities choose different ways of teaching customary law in their law schools, either as a semester module or year module. The authors submit that customary law should be

64 *Alexkor v Richtersveld Community* 2004 (5) SA 460 (CC) para 50.
65 *Shilubana and others v Nwamitwa* 2009 (2) SA 66 (CC) para 69.
66 *Bhe and others v Khayelitsha Magistrate and others* 2005 (1) SA 580 (CC) para 42.
67 T Nhlapo 'Indigenous law and gender in South Africa: Taking human rights and cultural diversity seriously' (1994 volume 13 Article 1 *Third World Legal Studies* 53.
68 Bennet (n 4 above) 18.
69 Diallo & Himonga (n 61 above) 7.
70 Greenbaum (n 60 above) 11.

incorporated in different modules in order to ascertain how customary rules would solve legal issues, such as those relating to property law, succession, and dispute resolution with respect to family law matters.

### 3.2 A shift in the pedagogy of legal education

The law is subject to the pressure of social change, with each age making new and different demands upon the legal practitioner, and teachers of law must pay attention to these ever-changing demands.[71] Upon a reflection of societal changes, immediate issues arise concerning the system of legal education in South Africa.[72] The most pertinent one is whether our law faculties provide students with an adequate awareness on the social processes operating in society. Secondly, it is uncertain whether students are adequately equipped to be able to push back the frontiers of legal knowledge and to make a tangible and constructive contribution to society in the field in which they have been trained.[73]

John Dugard criticised legal education in South Africa for its failure to relate law to the social sciences; and the general lack of interest among lawyers in the nature and role of law in modern South African society.[74] The authors share the same views and submit that the approach to our legal education is too compartimentalised. As noted by Klare that despite the 'substantively post-liberal and transformative aspirations' of our Constitution, our legal culture is still a highly conservative one, meaning that South African lawyers instinctively rely on a legal methodology that places relatively strong faith in the precision, determinacy and self-revelation of words and texts and that interpretation of such legal texts is 'highly structured, technical, literal and rule-bound' with little emphasis on values and policy.[75] There is far too little critical examination of much of the underlying bias of the law.[76] Fundamental concepts, such as freedom of testation, freedom of contract and even the rule of law, are too often treated axiomatically rather than subjected to critical examination.[77]

71 CC Turpin 'Legal education in South Africa' (1958) *Acta Juridica* 154.
72 R Henrico 'Educating South African legal practitioners: combining transformative legal education with ubuntu' (2016) volume 13 *US-China Law Review* 838.
73 DM Davis 'Legal education in South Africa: A re-examination' (1978) *South African Law Journal* 425.
74 J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181 at 185.
75 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 (1) *South African Journal of Human Rights* at 146.
76 As above.
77 Davis (n 73 above) 426.

As a rule the only theoretical economic and philosophical examination of the law and legal system takes place within one specific jurisprudence course, yet a critical socio-economic and jurisprudential examination of the branches of substantive law is mostly ignored.[78] This positivistic approach to legal education has resulted in the curtailment of legal thought and literature on the vital question of the very framework of the law and legal system; this has had a detrimental practical effect on the legal profession.[79]

Turpin is of the view that if an important object of legal education is to produce practitioners who are 'officers of civilization', the teaching of law should be scientific or theoretical as well as practical.[80] He explains that the difference between a scientific and a practical teaching of law is to a great extent one of selection of the material to be taught.[81] A purely practical legal education aims to provide knowledge of rules necessary to be known in practice, and skill in their application, but not more. A scientific legal education aims to provide material bearing on law, which are not necessarily legal in nature, but illuminate rules of law. It is necessary to consider the elements of a sound scientific legal education, and thereafter to return to a consideration of the practical aims which legal education should pursue.[82] An example of tools that can be used to achieve this is an emphasis on moot court competitions which is a form of practical legal education. Such competitions enhance students' oral and research skills.

### 3.3 The inter-disciplinary study of the law

Lastly, law must be presented not as a collection of distinct branches, each existing within its own silo, but in an integrated fashion that reveals the connections among the various branches, especially in relation to the shared normative value system that underlies it all flowing from the Constitution.[83] The interdisciplinary teaching of law allows for the relationship between the law and the practices of society. It is essential for the laws of the country to reflect the social and economic problems that arise in society and for the law to address these issues effectively. Disciplines outside of the law such as sociology, history and anthropology can assist in the understanding and the interpretation of law for the issues of society to be understood in an African context.[84] Additionally, emphasis on the

78 Davis (n 73 above) 427.
79 As above.
80 Turpin (n 71 above) 154.
81 As above.
82 As above.
83 G Quinot 'Transformative legal education' (2012) 129 (3) *South African Law Journal* 416.
84 Nhlapo (n 67 above) 14.

integration of law with other disciplines will ensure that law students are equipped with skills to engage in the substantive mode of reasoning required within the scaffold of transformative constitutionalism.[85]

A comparative study of other legal systems may also be used as a tool to encourage law students to have a constructively critical attitude towards South African law, as well as a fuller appreciation of its merits.[86] As aforementioned, the law is not a self-contained system of norms isolated from experience and developments in other fields. While for some the proper and complete object of study for the lawyer is law, for others this would not suffice and they recommend a policy-directed legal education that assists the student to observe the law in a broader context.[87]

# 4 Re-examination of legal education in the African context

Decolonisation in a general sense does not mean that Africa should return to the system that existed before colonisation – this would be impractical due to globalisation and the growing pace of the world. However, Himonga and Diallo explain that decolonisation in the legal context means drawing from different sources of law and normative agencies to promote the transformative potential of law in achieving more social and economic justice.[88] As a result, the aim of decolonisation is to ensure the transition from the laws of apartheid and colonial principles to an era mindful and embracive of African legal cultures.[89]

## 4.1 Constitutional values reflected in legal education

The social, political, economic and legal advancement of mankind is attributed to the accomplishments of various role-players, including those of our legal practitioners and their educators.[90] Thus, it is vital for law schools to be conscious of their responsibility to remind law scholars that by studying law they have the power to transform thoughts, policies and lives, and that the greatest reward of practising law is contributing to the betterment of society and ultimately to

85 Quinot (n 83 above).
86 Turpin (n 71 above) 156.
87 Turpin (n 71 above) 157.
88 Himonga & Diallo (n 61 above) 5.
89 Ndulo (n 3 above) 487.
90 Henrico (n 72 above) 818.

social change.[91] In 2009, the South African Law Deans Association (SALDA) and the Society of Law Teachers of Southern Africa (SLTSA) re-affirmed their 'responsibility to produce lawyers with the necessary analytical skills, critical disposition and independence of thought to play a meaningful role in the development of [South African] society' and called on 'all legal educators and stakeholders to exert their energies to achieve this'.[92]

The imperative is to implement the tenets of transformative constitutionalism to bring about a change in the life of others in accordance with the values and ethos of the Constitution.[93] It is on this premise that Fourie and Coetzee assert that the introduction of concepts such as 'therapeutic jurisprudence' enhanced by important constitutional values, such as human dignity and *ubuntu,* into skills courses and clinical education is a means of ensuring that future legal practitioners may be responsible agents of social change.[94] Therapeutic jurisprudence focuses on the law's impact on emotional life and psychological well-being.[95] It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences …'.[96] Hence, Henrico argues that the realisation of social justice by means of a comity between transformative legal education (TLE) and *ubuntu* is necessary to advance the interests of the less privileged, the *marginalised* and generally assist others who would not otherwise have a voice or opportunity.[97]

The constitutional imperative of access to justice for all underlies the importance for law lecturers to incorporate therapeutic jurisprudence in their teaching methods from their first year until the completion of the students' studies. Therapeutic outcomes achieved by teaching through a therapeutic lens contribute to the national goal of improving access to justice.[98]

For instance, property law lecturers can emphasise the anti-therapeutic consequences of the law in South Africa. In *President of the Republic of South Africa v Modderklip Boerdery,*[99] the Constitutional Court developed the common law principle of *rei*

91 E Fourie & E Coetzee 'The use of a therapeutic jurisprudence approach to the teaching and learning of law to a new generation of law students in South Africa' (2012) 15(1) *Potchefstroom Electronic Law Journal* 367.
92 W Freedman and N Whitear-Nel 'A historical overview of the development of the post-apartheid South African LLB degree- with particular reference to legal ethics' (2015) 21 (2) *Fundamina* 237.
93 Henrico (n 72 above) 825.
94 Fourie & Coetzee (n 91 above) 1.
95 Fourie & Coetzee (n 91 above) 2.
96 As above.
97 Henrico (n 72 above) 818.
98 Coetzee & Fourie (n 91 above) 3
99 *President of the Republic of South Africa v Modderklip Boerdery* 2005 (5) SA 3 (CC) para 36.

*vinidicatio*.[100] This principle could have been used to deny the homeless the only accommodation that they had access to, as the owner of the property had a right under the common law to remove unlawful occupiers from his property. However, the Court chose to interpret this principle in light of the social realities in South Africa.

The Court explained that the apartheid urban planning which excluded African people from urban areas has led to agonising consequences which are still present in the South African society. Poverty and homelessness 'serve as a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved'.[101] Consequently, the Court held that the state had an obligation to provide adequate accommodation to the unlawful occupiers.[102] In this way, the law was used to achieve a therapeutic outcome.

The overall objective of therapeutic jurisprudence is the achievement of social justice, namely a dispensation in which legal education transcends the 'narrow confines of the rudimentary black-letter of law' to effectively serve a greater purpose namely, the advancement of social and economic equality as well as the realisation of social justice.[103]

Like Henrico, Quinot also advocates for transformative legal education. He submits that new areas of law such as fundamental rights and judicial review must be accommodated in the law curriculum, and that the curriculum should be adjusted to reflect the new paradigm based on a supreme and justiciable Constitution.[104] Particular focus should be given to training students in areas that have not seen the same level of constitutional infusion, such as the law of contract, to assess long-established common law rules against the values entrenched in the Constitution.[105]

Transformative legal education runs the risk of being a mere paradigm and effectively being lost in translation if not used effectively and optimally. This means that its effectiveness depends on a purposive interpretation of the law and the 'Constitution suffused with the necessary values such as the notion of *ubuntu* which tease out and animate the provisions of the Bill of Rights in a manner

100 *President of the Republic of South Africa v Modderklip Boerdery* 2005 (5) SA 3 (CC) para 36.
101 *President of the Republic of South Africa v Modderklip Boerdery* (n 100 above) para 35
102 *President of the Republic of South Africa v Modderklip Boerdery* (n 100 above) para 48.
103 Henrico (n 72 above) 825.
104 Quinot (n 83 above) 414
105 D Moseneke 'Transformative constitutionalism: Its implications for the law of contract' (2009) 20 (1) *Stellenbosch Law Review* 3.

that provides protection, relief and benefit to the disadvantaged of society in the quest to create a more egalitarian dispensation.'[106]

Inexorably linked to *ubuntu*, as stated in *S v Makwanyane*,[107] are notions of respect for life and human dignity. *Ubuntu* was earmarked in *Makwanyane* as 'permeating the Constitution generally … and specifically fundamental human rights'.[108] There can be no doubt that *ubuntu* gives impetus to transformative constitutionalism. It demands one to have regard to the imperatives of the Bill of Rights addressing the advancement of the sense of community and social cohesion.[109] All responsible role-players in South Africa, not least lawyers from all walks of life, must take responsibility to ensure that the values of the Constitution are not reduced to incantatory or ritual phrases in the Bill of Rights, but are 'swung into action' or activated though 'creative law reform programmes, methods, approaches and strategies that will enhance adaptation' to aligning the society with the precepts of the values and principles of the Bill of Rights.[110]

## 5 Conclusion

Section 29 of the Constitution guarantees everyone the right to further education, which the state, through reasonable measures, must make progressively available and accessible. This article has shown that the State has fallen short of taking reasonable measures to advance legal tertiary education in a number of respects. This failure can largely be attributed to the inequalities bequeathed upon the South African legal education system from the apartheid/colonial era.

The authors opine that the first step to decolonising legal education is a shift in the pedagogy of legal education which requires an infusion of constitutional and African values such as *ubuntu,* in order to create social awareness amongst law students. The integration of customary law into the LLB curriculum will serve as a stepping stone to the Africanisation of legal education. Furthermore, the harmonisation of transformative legal education, *ubuntu* and therapeutic jurisprudence can only be achieved when legal education is responsive to the demands of our supreme Constitution and reflective of the society in which we live.

106 Henrico (n 72 above) 837.
107 *S v Makwanyane* 1995 (3) SA 391 (CC).
108 Henrico (n 72 above) 823.
109 Henrico (n 72 above) 821.
110 As above.

# DECOLONISING LEGAL EDUCATION IN SOUTH AFRICA: A REVIEW OF AFRICAN INDIGENOUS LAW IN THE CURRICULUM

*by Joshua Mawere**

**Abstract**

*The student demonstrations in universities, which began in 2015, demanded the decolonisation of higher education. The demands included free education and a decolonised curriculum. In the field of law, the demand is anchored in changing the law curriculum. The central issues accompanying the demand are the status of indigenous law, legal history, concept of law, how law is taught and the role of law in African societies. The article examines the necessity of decolonising legal education in relation to the curriculum and the teaching of law in South African universities. The article adopts a doctrinal approach to assess the need to transform the curriculum. The article is grounded in the theory of Afrocentricity in a bid to revive the African paradigm and to examine legal epistemology in post-colonial South Africa. The argument developed in this article is that the legal education system has not significantly been decolonised since 1994. Arguably, the education system is founded on European theories and systems, hence difficult or impossible for the students in Africa to relate. This article recommends that a new curriculum that reflect laws, principles and customs of the African people must be introduced in the South African*

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*legal education. Institutions are also encouraged to take positive steps to decolonise legal education and end eurocentrism.*[1]

***Key Concepts**: Living indigenous law, Decolonisation of legal education, Legal education.*

# 1 Introduction

In recent times, there has been an intense debate on the decolonisation of legal education in South Africa. This article seeks to contribute to this discourse by examining the African response to the decolonisation of the law curriculum. The article uses the theory of Afrocentricity in a bid to revive the African paradigm and to examine legal epistemology in post-colonial South Africa. This theory is not easily susceptible to definition and various scholars have attempted to capture its essence. Asante defines Afrocentricity as a 'mode of thought and action in which the centrality of African interests, values, and perspectives predominate'.[2] The American essayist and culture critic Early *et al* defines Afrocentricity as 'an intellectual movement, a political view, and/or a historical evolution that stresses the culture and achievements of Africans.'[3] According to the Nigerian author Chukwuokolo, Afrocentricity means 'African centeredness', bestowing Africans pride as instigators of civilisation.[4]

Afrocentricity is not without criticism. While Mbembe advocates for decolonisation of knowledge and the university, he is critical of Afrocentricity. He contends that Afrocentricity is the transfer into native hands of those unfair advantages which were a legacy of the colonial past, and that the discourse of Africanisation was itself ideological and retrogressive as it can lead to xenophobia and chauvinism.[5] In my view, the argument is misdirected. What is correct is the viewpoint of Asante that Afrocentricity is only one of several cultural perspectives from which multiculturalism in education is derived. In his further view, since Afrocentricity is not the opposite of Eurocentricity, it does not seek to replace Eurocentricity. Rather it is based on the harmonious coexistence of an endless variety of cultures.[6] Varma also argues that 'the aim of Afrocentricity is not

1 S Heleta 'Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa' (2016) 1 *Transformation in Higher Education* 5.

2 MK Asante *Afrocentricity: The theory of social change* (2001) 2; Asante is constantly acknowledged as the originator of the concept 'Afrocentricity' and the one who introduced it as an academic debate.

3 G Early *et al* 'Symposium: Historical roots of Afrocentrism' (1994) 7 *Academic Questions* 44-54.

4 JC Chukwuokolo 'Afrocentrism or Eurocentrism: The dilemma of African development' (2009) 6 *OGIRISI: A New Journal of African Studies* 32.

5 AJ Mbembe 'Decolonizing the university: New directions' (2016) 15 *Arts and Humanities in Higher Education* 33-34.

6 Asante (n 2 above) 138.

reselecting the bars to form new divides'.[7] Chukwuokolo argues that Afrocentrism, which means African centeredness, does not violently confront any person or people, but is a resolute attempt to put the records right. It is about situating African people in the context of their historical framework to assert their footprints in world history.[8]

According to Mbembe, the legal education system in South Africa keeps masquerading as replicas of the universities in the Western world but fails to demonstrate the same productivity as the original institutions they continue to mimic.[9] The syllabi were designed to meet the needs and interest of colonialism and apartheid. Hence, the then Minister of Education, Prof Bengu observed that 'the higher education system must be transformed to redress past inequalities, to serve a new social order, to meet pressing national needs and to respond to new realities and opportunities.'[10] In the same vein, Yesufu quoted in 'Internationalisation and African Intellectual Metissage: Capacity-Enhancement Through Higher Education in Africa' by Hagenmeier *et al* had argued that:

> ... the emergent African university must ... be much more than an institution for teaching, research and dissemination of higher learning. It must be accountable to, and serve, the vast majority of the African people who live in rural areas.[11]

For these reasons, it is axiomatic that the law curriculum and education structure must undergo a process of decolonisation both of knowledge, content and of the university as an institution. There is need for a paradigm shift in the law curriculum in order to respond to the peculiar and specific needs of the African indigenous people. The legal institutions must not only be seen to be built and sited in Africa, but must be of Africa, drawing inspiration from Africa and eloquently devoted to her ideals and ambitions.[12]

## 2 The colonial education system

The crux of colonialism is centred on destroying all knowledge contrary to Eurocentric ideologies, opinions and views. Lebakeng argues that 'during colonial wars of conquest the Western colonialist instituted epistemicide (a destruction of African knowledge and

7 P Varma 'Decolonising universities conference', University of Cincinnati https://www.youtube.com/watch=KVfevgW608c (accessed on 20 April 2019).
8 Chukwuokolo (n 4 above) 33.
9 Mbembe (n 5 above) 39.
10 South African White Paper on Higher Education: Programme for the Transformation of Higher Education (1997) 3.
11 CCA Hagenmeier *et al* 'Internationalisation and African intellectual metissage: Capacity-enhancement through higher education in Africa' (2017) 31(1) *South African Journal of Higher Education* 84.
12 As above.

systems) and imposed a Western colonial epistemology'.[13] Colonialists believed that Africans were uncivilised and primitive and that as superior human beings, colonialists had the mandate to civilise the uncivilised people of Africa.[14] Colonialists argue Africa was both *terra incognito* and *terra nullius* (unknown continent). According to Modiri:

> [C]olonial domination in South Africa both produced and then worked to maintain and institutionalise a political ontology that positioned white people at the zenith of all definitions of humanity (civilisation, reason, morality) while simultaneously placing Black people at the nadir of the social hierarchy and binding them into perpetual inferiority and powerlessness.[15]

It is thus not surprising that the effect of the colonial system was to model the colonised to think and reason like the coloniser.[16] Education was one of the mechanisms that colonialists allegedly adopted to civilise Africans.[17] Education relates to the process of imparting knowledge, judgment and skills. Legal education therefore communicates to the process of imparting legal knowledge and skills to law students in universities. Legal education in Africa is predicated on Eurocentric methodologies, its main sources being Roman-Dutch law and English law.[18] It is on this basis that it is criticised for being Eurocentric, persistently advancing Western dominance, and at the same time being full of stereotypes, biases and patronising opinions about Africans.[19]

Mamdani, the Ugandan intellectual, contends that 'colonial education pretends that knowledge is not always partial and passes the intellectual fraction off as the whole'.[20] Mbembe also argues that colonial education falsifies a variety of phenomena, including among others, land and knowledge.[21] According to Kanengoni, it hinders access to knowledge and inhibits unrestricted inquiry and search for

13 T Lebakeng 'Towards a relevant higher education epistemology' in S Seepe (ed) *Towards an African identity of higher education* (2004) 109–119.
14 C Himonga & F Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20 *Potchefstroom Electronic Law Journal* 1.
15 JM Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* 4.
16 R Grosfoguel 'The epistemic decolonial turn: Beyond political-economy paradigms' (2007) 21 *Cultural Studies* 211-223.
17 I Léglise & B Migge 'Language and colonialism. Applied linguistics in the context of creole communities' (2008) https://halshs.archives-ouvertes.fr/halshs-0029 2388/document (accessed 6 January 2020).
18 Himonga & Diallo (n 14 above) 5.
19 Lebakeng (n 13 above) 112.
20 M Mamdani 'Between the public intellectual and the scholar: Decolonization and some post- independence initiatives in African higher education' (2016) 17 *Inter-Asia Cultural Studies* 68-83.
21 Mbembe (n 4 above) 29.

truth in scholarship.[22] Kanengoni's view is that a legal curriculum based on imported legal ideas, principles and theories assures a people of being 'controlled and ran'. It produces African students who are only good at translating and interpreting Eurocentric ideologies, with nothing to offer the community of legal scholars.[23] The primary objective of legal scholarship in Africa must be to provide and teach insights that are relevant and accessible to Africans but rare to other cosmologies.[24] It is for these reasons, that there has been an outcry to decolonise legal education. The general uproar by most African students is advocating for a decolonised curriculum to guarantee a departure from the history of colonialism.

Thaman writes that 'decolonising formal education involves accepting indigenous and alternative ways of seeing the world'.[25] In this context, the concept of decolonising legal education leads to Africanising legal education.[26] Placing the Africans' interest at the centre of education is important. In the words of the Kenyan writer Ngũgĩ wa Thiong'o:

> Education is a means of knowledge about ourselves .... After we have examined ourselves, we radiate outwards and discover peoples and worlds around us. With Africa at the centre of things, not existing as an appendix or a satellite of other countries and literatures, things must be seen from the African perspective. All other things are to be considered in their relevance to our situation and their contribution towards understanding ourselves. In suggesting this we are not rejecting other streams, especially the Western stream. We are only clearly mapping out the directions and perspectives the study of culture and literature will inevitably take in an African university.[27]

Other authors have reinforced the position of Ngũgĩ wa Thiong'o. Nkoane posits that such an education should emancipate Africa to produce the knowledge that can help solve their living problems.[28] According to Himonga and Diallo, decolonisation is 'a move from a hegemonic or Eurocentric conception of law connected to legal cultures historically rooted in colonialism in Africa to more inclusive legal cultures'.[29] Decolonising legal education is thus about re-

22 D Kanengoni 'Transformative Education: The Education We Need by 2030' (2016) 7 *BUWA* 1-7.
23 Kanengoni (n 22 above) 14.
24 N Mahao 'O se re ho morwa 'morwa towe'! African jurisprudence exhumed' (2010) 43 *Comparative and International Law Journal of Southern Africa* 317-336.
25 KH Thaman 'Decolonizing pacific studies: Indigenous perspectives, knowledge and wisdom in higher education' (2003) 15 *The Contemporary Pacific* 1-17.
26 Decolonisation of the curriculum is about Africans seeing themselves 'clearly in relationship with [themselves] and other selves in the universe'. This is consistent with Africanisation that requires the curriculum to have more local content. This implies that the content must be 'African focused content'.
27 Ngũgĩ wa Thiong'o *Decolonising the mind: The politics of language in African literature* (1986) 87.
28 MN Nkoane 'The Africanisation of the university in Africa' (2006) 13 *Alternation* 49-69.
29 Himonga & Diallo (n 14 above) 5.

emerging subdued indigenous knowledge and re-entering the knowledge project of all legal institutions from an African point of view. To achieve this objective, Himonga and Diallo argue in favour of introducing 'living indigenous law' in the law curriculum.

## 3 State of legal education in South Africa

This section elaborates on the state of legal education in South Africa. The section is categorised into two arguments. The first argument is that the law in South Africa and the legal curriculum remains under colonial and apartheid subjectivity twenty-five years after independence. South Africa remains under oppression as it is defined by unrepressed asymmetries of power and continues to display features of stratification, exploitation, violence, marginalisation, powerlessness and cultural dominance. In fact, South African law, mainly the Constitution is criticised for being a neo-apartheid charter that facades continuing domination.[30] Modiri states that:

> … the Constitution is figured not only as a supreme law but also a supreme rationality. Not only is it a formal law-text but it is also a particularly hegemonic public grammar, political imaginary and a form of historical and social consciousness. It embeds particular cultural and ideological values into its fold and as such works to consolidate and preserve particular arrangements and relations of power and knowledge. Understood in this way, the Constitution must be implicated in the continuation of colonial-apartheid power relations, value systems and subjectivities. How else could we explain why the advent of constitutional democracy in South Africa has left white supremacy and coloniality largely undisturbed? What interests and powers does the Constitution secure and leave untouched, and what realities and demands does it silence, minimise or erase?[31]

The argument is that the Constitution, 'deifies a "teleological" kind of "whiteness" as aspiration, if as an ordinary black South African you need to be treated as human'.[32] It is absurd that we are in South Africa, an African country, but law is only taught in Afrikaans and English. An African child is compelled to appreciate and understand either of the two languages before he or she can dream to study law. There is a need to strike a balance when it comes to the teaching of law. What is wrong in teaching indigenous law in *IsiZulu* at an institution situated in KwaZulu Natal or teaching in *Tshivenda* at a

30 F Fanon *The wretched of the earth* (2004) 97–144 who states that the term 'neo-colonialism' was, after all, coined precisely to capture the dilemma of postcolonial African states that, after gaining national independence, simply replicated the ways of the 'former' colonial power and plunged the formally liberated population into a deepening phase of unfreedom and stagnation.

31 JM Modiri 'Towards a (post-)apartheid critical race jurisprudence: "divining our racial themes"' (2012) 27 *South African Public Law* 231–258.

32 K B Motshabi 'Decolonising the University: A law perspective' (2018) 40(1) *Strategic Review for Southern Africa* 104.

university situated in Thohoyandou? Madlingozi argues that 'the Constitution fails to dislodge white supremacy and constitutes a post-1994 conquest'.[33] Modiri cements this argument by calling for elimination of the structures, practices and relations of coloniality and white supremacy in the educational system.[34]

Following this discussion, the general argument is that colonialists through the Constitution succeeded in relinquishing the crown but keeping the jewels.[35] This is because the settlement leading to the drafting of the Constitution was driven more by the need to realise stability and peace rather than justice, hence it inclined more towards protecting white people's unfairly acquired interest, translating them into constitutional rights. In this sense, the Constitution cannot rationally be categorised as 'non-racial', when it keenly protects interests secured through racial oppression. The conundrum is that the Constitution, in terms of the Bill of Rights, is the supreme law of the land. All laws inconsistent with the Constitution are null and void. Thus, it follows that the legal curriculum develops from the same Constitution. If that is the case, then it is reasonably possible to argue that even the curriculum itself is tainted with colonial supremacy.

Secondly, there exists uneasiness at the failure of the South African government and universities to accord appropriate status to indigenous law and African values. There has been an attempt to include indigenous law in the legal system and the curriculum at large. However, progress in this regard has been sporadic. The decry is predicated against 'starting with existing schools of jurisprudence developed elsewhere for different conditions and requirements' and 'imposing them on local conditions'.[36] The general view is that there is need for academic change. As Maldonado-Torres rightly argues, in addition to a critical interrogation and revision of received theories and ideas, new concepts must be built by African intellectuals.[37]

South Africa over-relies on Western legal scholarship, most probably this is due to colonial history as well as the huge influence of colonialism on colonial universities.[38] Lenta argues that the 'Western theories we use are inadequate to local problems and the

33 T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28(1) *Stellenbosch Law Review* 123-147.
34 Modiri (n 31 above) 237.
35 A Mazrui 'Pro-democracy uprisings in Africa's experience: from Sharpeville to Benghazi' (2011) *Africa Day Lecture* 7.
36 R Odgaard & BA Weis 'The interplay between collective rights and obligations and individual rights' (1998) 10 *European Journal of Development Research* 105-116.
37 N Maldonado-Torres 'The crisis of the university in the context of neo-apartheid: A view from ethnic studies' (2012) 10 *Human Architecture: Journal of the Sociology of Self Knowledge* 91-100.
38 Mamdani (n 20 above) 71.

European lens does not perceive our complexity'.[39] The Western theories specialise in producing future lawyers, magistrates and judges who are embedded in positivism and centralism. Legal positivism and centralism remain the leading theoretical framework within which law is taught in most law schools in South Africa. It finds its roots in Roman-Dutch and English law. Legal positivism and centralism are often criticised for producing lawyers and judges who can engage with Western legal systems and cultures and not with African legal systems, in particular, oral legal traditions.[40] Legal positivism is embedded in formalism. Formalism separates legal rules and morality or political philosophy.[41] The theory requires litigants and judges to apply the law or rules to the facts deductively. This is contrary to indigenous law. Rules of 'living' indigenous law cannot be abstracted from their social contexts.[42] Indigenous law is entrenched in the social actualities within which people live their lives. Indigenous law is not embedded in aspects of certainty and predictability–factors which form the basis of Western legal cultures.[43] These theories produce lawyers and judges who lack appreciation of indigenous law and regard it as irrelevant.

For example, in *Bhe v Magistrate, Khayelitsha*, the court showed willingness to step beyond the dominant influence of positivism and centralism.[44] However, despite the willingness, the judges found themselves retreating to their predominantly Western law and theoretical training when applying customary law. They retraced their footsteps to positivism. Evidently, the court moved away from moral considerations and customary practices and was guided by the positivist theory that concludes that laws and their operation derive validity from the fact of having been enacted by authority or of deriving logically from existing decisions, rather than from any moral considerations. The court recognised the concept of 'living' indigenous law, including its flexibility and the fact that it is less rule-bound. However, most judges decided to focus on the values of certainty and uniformity. They retraced their steps towards positivism and centralism. The discussion confirms that despite the judges' willingness to uphold and develop indigenous law, their education and training under positivism and centralism influenced their decision.

39 P Lenta 'Just gaming? The case for postmodernism in South African legal theory' (2001) 17 *South African Journal on Human Rights* 173-209.

40 *Bhe and others v Khayelitsha Magistrate and others* 2005 1 (SA) 580 (CC) (hereinafter referred to as '*Bhe v Magistrate*'); *Shibi v Sithole* 2005 1 (SA) 580 (CC); *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) paras 110-112.

41 B Leiter 'Legal formalism and legal realism: What is the issue?' (2010) 2 *Cambridge University Press* 111.

42 Living customary law is the law that governs the legal relations of people who are subject to a given system of customary law in their day-to-day life.

43 TW Bennett *Human rights and African customary law under the South African Constitution* (1999) 46.

44 *Bhe v Magistrate* (n 40 above) paras 110-112.

The ghost of training judges and lawyers in legal centralism and positivism continues to follow them when applying indigenous law.[45]

# 4 The way forward

Arguably, three fundamentals are indispensable for decolonising legal education. A discussion of these follows:

## 4.1 Centring indigenous law in the curriculum

Legislation defines indigenous 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'.[46] Culture is dynamic, hence the mentioning of the word 'culture' in the definition is suggestive of the dynamic nature of 'living' indigenous law. 'Living' indigenous law according to Hund, 'represents the practices or customs observed and invested with binding authority by the people whose customary law is under consideration'.[47] The beauty of indigenous law is that, its evolution and progression is fashioned within changing African political, social and economic contexts. It is unwritten and passed down orally from generation to generation. The oral nature of indigenous law makes it easily adjusted to meet the different needs of justice in a decolonised context.[48]

Others, as discussed earlier, may argue that indigenous law already forms part of South African law and legal education system. While this is correct, this article argues that the inclusion of indigenous law – 'old' indigenous law in the current education and legal system is flawed and insufficient. The 'old' indigenous law consists of codifications of indigenous law and these include legislation such as the Black Administration Act,[49] the Natal Code of Zulu Law,[50] case law, textbooks and so on. The 'old' indigenous law as explained above, bears colonial and apartheid marks. This argument is predicated on the view that 'old' indigenous law is distorted because it was designed to advance colonial and apartheid

45 C Himonga 'The Constitutional Court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law — Justice Moseneke, transformation, equality and indigeneity' (2017) 1 *Acta Juridica* 101.

46 Recognition of Customary Marriages Act 120 of 1998 section 1.

47 J Hund 'Customary law is what people say it is — HLA Hart's contribution to legal anthropology' (1998) *Archiv für Rechts-und Sozialphilosophie* 420-429.

48 Odgaard & Weis (n 36) 105.

49 Black Administration Act 38 of 1927. This Act regulated Black South Africans during the apartheid era. Several aspects of the Act have been repealed, except for a few provisions that remain in existence.

50 Proclamation No. R. 151, Natal Code of Zulu Law, 3 September 1987.

state interest.[51] Therefore, its inclusion in legal education is propagating and preserving colonial legacy. This contrasts with the ideology of decolonisation. For this reason, 'old' indigenous law must not form the core part of the legal curriculum. To the contrary, I suggest the inclusion of 'living' indigenous law in the legal curriculum. Restructuring legal education should be considered as a matter of exigency of historic and fundamental justice.

'Living' indigenous law should inform the entire law curriculum. There is need for a mind shift towards a greater incorporation of indigenous knowledge. The inclusion of indigenous law must not be restricted to merely one subject that stands alone like the *status quo* in most South African universities. Rather, indigenous knowledge, values, customs and practices should inform the entire law curriculum. African knowledge, worldview, experience, norms and values should be at the centre of scholarship and knowledge seeking. Kwame Nkrumah argues that 'we must in the development of our universities bear in mind that once it has been planted in the African soil it must take root amidst African traditions and cultures'.[52] In the same vein, Mamdani argues that the university must adapt its scholarship to the social structure and the cultural environment of Africa by producing knowledge that takes the African condition and the African identity as its central problem.[53] An African university must be the custodian of African knowledge. This is not going to be an easy task because there is need for much research on African law and values and there will be contestation. To be realistic, this will be a gradual process considering that we now live in a fast-moving global world with masses of changes to systems.

'Living' indigenous law is not without criticism. It is criticised for being unsystematic, fragile and inconsistent. The South African writer Bennet, argues that rules of an oral regime are porous and malleable. Because they have no clear definition, it is difficult to differentiate one rule from another, and, in consequence, to classify rules per type. If rules cannot be classified, they cannot be arranged into a system, and without the discipline of a system, rules may overlap and contradict one another. In fact, strictly speaking, the oral versions of customary law should not be called systems at all. They are probably better described as repertoires, from which the discerning judge may select whichever rule best suits the needs of the case.[54] The statement clearly demonstrates that indigenous law methodology does not place emphasis on systemisation, thus it does not embody a rigid framework unlike Eurocentric laws. It is the writer's view, as

51 M Chanock *Law, custom and social order. The colonial experience in Malawi and Zambia* (1985) 219.
52 Quoted in SP Seepe *Towards an African identity of higher education* (2004) 13.
53 Mamdani (n 20 above) 81.
54 Bennett (n 43) 52.

depicted from the above-mentioned arguments, that 'living' indigenous law is flexible and adaptable. Its distinctive nature and originality are a positive development in decolonising law. Its uniqueness and originality as an evolving source of law compels its inclusion in a decolonised system of legal education.

Africa has a lot to offer towards legal scholarship apart from memorising and interpreting European theories. Legal education requires a sincere 'totality' of universal knowledge.[55] This permits a true search for truth. Africans deserve to be given an opportunity to contribute immensely towards legal scholarship. Africans must be able to claim space and authority in the field of knowledge production and dissemination. However, the call to decolonise legal education does not imply jettisoning every Western concept. The idea is 'not to debunk British colonial and Afrikaner Christian nationalism, but to identify that which is authoritarian, patriarchal, and Eurocentric from that which is emancipatory and liberatory'.[56]

The existing curriculum brought with it a lot of positives. It has been argued, for instance, that the call to decolonise the University of Cape Town is not to return it to the pristine condition prior to the arrival of the settlers.[57] The idea is to critically interrogate the knowledge system of that era and elicit what is helpful in addressing contemporary challenges.[58] The above-mentioned statements caution against adopting a romanticised and rhetoric concept of decolonisation. It is argued that, South Africa must avoid advancing the unconditional and uncritical indigenisation of law, that permits an anti-colonial discourse that is stuck within the same colonial epistemology. The statement also satirically proposes that before colonisation, Africa had its own challenges and the existing call for decolonisation does not outright make Africa all glorious and unblemished.

To conclude, 'living' indigenous law must be taught in all law schools to equip law students to comprehend indigenous law within the constitutional framework of South Africa. This is essential to equip students to have lenses that observe indigenous law and not from the perspective of foreign legal systems.[59]

55 H Hudson 'Decolonising gender and peacebuilding: Feminist frontiers and border thinking in Africa' (2016) 4 *Peacebuilding* 192-209.
56 Seepe (n 52) 15.
57 M Price & R Ally UCT 2015 Year in Review 23.
58 As above.
59 *Alexkor Ltd v Richtersveld Community* 2004 SA 460 (CC) para 51 where the court held that 'while in the past indigenous law was seen through the common law lens, it must now be an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution'.

## 4.2 Academics that Relate to Indigenous Knowledge Systems

Ngũgĩ asks the question: Who should be interpreting that material to them, an African or non-African? If African, what kind of African? One who has internalised the colonial world outlook or one attempting to break free from the inherited slave consciousness.[60] It is important when decolonising legal education to ensure that academics must understand and conceptualise indigenous knowledge systems. While this sounds farfetched, it remains a valid argument. Law schools require academics who relate to African culture, problems, languages and way of life. This proposition is not advocating for an exclusion of non-African academics or Africans who have internalised the colonial world outlook. They remain relevant and necessary. However, when it comes to accessing indigenous knowledge and decolonising the content of legal education, institutions require academics who are 'attempting to break free from the inherited slave consciousness' as stated by Ngũgĩ.[61] An academic who appreciates and understands indigenous knowledge systems is most suitable to teach indigenous law modules as compared to an academic who understands indigenous law only from a Eurocentric view or understanding. The proposition promotes collaborative research, where both the academics and students apply personal lived experiences.

## 4.3 Adopting an Interdisciplinary and Multicultural Approach

The adoption of an interdisciplinary approach in legal education is vital for the decolonisation of legal education in South Africa. The National Science Foundation defined an interdisciplinary approach as:

> [A]n approach that integrates information, data, techniques, tools, perspectives, concepts, and/or theories from two or more disciplines or bodies of specialised knowledge to advance fundamental understanding or to solve problems whose solutions are beyond the scope of a single discipline.[62]

The article argues that the adoption of an interdisciplinary approach offers a podium of understanding law in all its manifestations. There is a need to fuse legal science with other disciplines. It is the writer's view, that law is meant to address problems, however most of these problems lie beyond a single discipline and culture. This confirms the need to integrate and understand legal knowledge from different disciplines. The article advocates for an interdisciplinary approach that allows Eurocentric theories, views and ideologies to work

60 Wa Thiong'o (n 27 above) 88.
61 As above.
62 National Science Foundation 'What is interdisciplinary research?' http://nsf.gov/od/oia/additional_resources/interdisciplinary_research/definition's (accessed 17 November 2019).

together with Afrocentric theories, views and ideologies. Our law must not be subsumed or explained from the viewpoint of Eurocentric theories only. This kills the ability to search for the truth in legal scholarship. Mamdani posits that:

> Excellence has to be contextualised and knowledge made relevant. Shed this mimicry of the West that continues to parade as universal excellence and take on the challenge to produce knowledge that takes the African condition as its central problem. The African condition is historical and not biological.[63]

Data must be collected from all disciplines and cultures. This ensures checks and balances on the theories produced. The ordinary perception of an interdisciplinary approach relates to different fields, for example, sociology and anthropology. However, this article aims to define an interdisciplinary approach from the context of fusing Eurocentric myths and theories with African theories and knowledge systems. The writer recommends a departure from a law syllabus that is individually aligned to European views and rather argues for a decolonised syllabus that represents both European and African views and knowledge. The writer recommends a teaching of law that is responsive to social and legal plurality. Legal education cannot continue to be unresponsive to colonial history. Legal education must endeavour to decolonise law beyond vernacularisation. Law must be developed based on peoples living experiences and not solely on borrowed theories.

# 5 Conclusion

In summary, the writer contends that legal education should be decolonised and 'Africanised'. The writer also contends that unless the law curriculum and the teaching of law is redesigned to move away from the theoretical paradigm within which it is taught, the plan of decolonising law in South Africa will fail and the education system will remain colonised.

63 M Mamdani 'Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism' (1997) 1(2) *African Sociological Review* 96-144.

# EXTRAPOLATING THE ROLE OF TRANSFORMATIVE CONSTITUTIONALISM IN THE DECOLONISATION AND AFRICANISATION OF LEGAL EDUCATION IN SOUTH AFRICA

*by Paul Mudau* & Sibabalo Mtonga***

**Abstract**

*This article extrapolates the role of transformative constitutionalism in the decolonisation and African of legal education in South Africa. In a constitutionally mandated transformative context, the systematic approach to the decolonisation and Africanisation of legal education advanced in this article emanates from the four drivers of curriculum transformation set out in the 2017 document entitled 'Reimagining curricula for a just university in a vibrant democracy — Work stream on curriculum transformation at the University of Pretoria'. These four drivers are: responsiveness to social context; epistemological diversity; renewal of pedagogy and classroom practices; and an institutional culture of openness and critical reflection. Presently, South African universities do not have an existing national framework for a decolonised and Africanised legal education. The article therefore argues that the UP Document contains valuable guidelines on curriculum*

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*transformation of legal education as it resonates well with the objectives of both the National LLB Standard and transformative constitutionalism itself. As result, the universities which offer legal education in conjunction with key stakeholders and role-players in the legal fraternity can incorporate its valuable guidelines in National Review of the LLB programme through a proper design of constitutionally transformed framework for a decolonised and Africanised legal education.*

***Key words**: Africanisation; curriculum transformation; decolonisation; legal education; South Africa; transformative constitutionalism.*

# 1 Introduction

Central to South Africa's famed transition from apartheid to a democratic society is transformative constitutionalism,[1] wherein the main quest was to establish a society based on democratic values, social justice and fundamental rights.[2] The end of the apartheid system resulted in considerable structural changes to higher education in South Africa. Before 1994, higher education had 'a fragmented and structurally racialised system of 36 public and more than 300 private institutions'.[3]

The merger of public universities commenced in the early 2000s and as of 2015, higher education increasingly transformed into a more integrated system of 26 public universities — comprising of traditional, comprehensive and universities of technology,[4] and 95 private higher education institutions. Of the 26 public universities, 17 have law faculties or schools offering legal education,[5] principally, the undergraduate Bachelor of Laws (LLB) degree which is South Africa's legal qualification for admission and enrolment to practise as an Advocate or an Attorney.[6]

1 M Rapatsa 'South Africa's transformative Constitution: from civil and political rights doctrines to socio-economic rights promises' (2015) 5 *Juridical Tribune* 208.

2 Preamble of the Constitution of the Republic of South Africa, 1996.

3 Department of Justice and Constitutional Development (DoJCD) 'Reflections on higher education transformation' (2015) 1 http://www.justice.gov.za/commissions/FeesHET/docs/2015-HESummit-Annexure05.pdf (accessed 21 June 2019).

4 Traditional universities offer theoretically-oriented university degrees; universities of technology ('technikons'), which offer vocational oriented diplomas and degrees; and comprehensive universities, which offer a combination of both types of qualifications.

5 The names of South African public higher education institutions with law faculties and/or schools that provide legal education, in the context of this article, LLB degree in particular are: University of Venda, University of Limpopo, University of Pretoria, University of the Western Cape, University of the Witwatersrand, North-West University, University of Cape Town, University of Fort Hare, Walter Sisulu University, University of the Free State, University of Johannesburg, University of KwaZulu-Natal, Nelson Mandela University, Rhodes University, University of South Africa, University of Stellenbosch, and University of Zululand.

6 Preamble of the Qualification of Legal Practitioners Amendment Act 78 of 1997.

Against this backdrop, over the last 25 years, impressive strides have been made with regards to transforming South Africa into a democratic society based on social justice and the constitutional values of human dignity, equality, human rights and freedoms.[7] However, exclusion, marginalisation and social injustice are still deeply engrained in the society, including the racial disparities in higher education.[8] More profoundly, the stagnated transformation of higher education in general and legal education in particular, has made it difficult to overhaul the knowledge systems in the legal discipline at most South African universities which 'remain rooted in colonial and western worldviews and epistemological traditions'.[9]

The Qualification of Legal Practitioners Amendment Act steered the changes of legal education in South Africa.[10] Among other provisions, the Act provides for the requirement of a four-year undergraduate LLB degree for admission as an advocate or attorney. The objective for the changed legal framework was to provide greater access to the profession for people from historically disadvantaged backgrounds. It was further believed that the new law curriculum would incorporate constitutional values and infuse a pervasive human rights culture and social justice discourse as part of the transformation.[11]

More so, in post-apartheid South Africa, legal education 'remains firmly in the grip of restricted jurisprudence', which entails having the majority of law courses which Modiri perfectly described as follows:

> [They] focus exclusively on law as an exercise in technical rule-application and they are structured around what the legal rules and principles currently are; in which cases they were decided or from which legislation or other source of law they are derived and what, if any, exceptions are applicable to them.[12]

7 JN Wanki 'When the rule of law and constitutionalism become a mirage: An analysis of constitutionalism and rule of law in post-independent Cameroon against post-apartheid South Africa' unpublished LLD thesis, University of Pretoria, 2015 5.

8 Draft Framework Document: Reimagining curricula for a just university in a vibrant democracy — Work stream on curriculum transformation at the University of Pretoria (2017) 1 (thereafter 'UP Transformation Document'); see also DoJCD (n 3 above) 1.

9 The 2019 call for papers from the University of Venda and South African Law Deans' Association (SALDA) for the Law Students' Conference on the Decolonisation and Africanisation of Legal Education.

10 The Qualification of Legal Practitioners Amendment Act 78 of 1997.

11 L Greenbaum 'Re-visioning legal education in South Africa: Harmonising the aspirations of transformative constitutionalism with the challenges of our educational legacy' (2014) 6 http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Greenbaum.pdf (accessed 25 August 2019).

12 J Modiri 'The crises in legal education' (2014) 46 *Acta Academica* 6.

Zitzke completely labels this kind of legal teaching as conceding to 'a conservative legal culture.'[13] As South Africa celebrates 25 years of its constitutional democracy 'with the wisdom of hindsight and experience', it is proper to review whether the current state of legal education is sufficient to propel and produce 'law graduates with the requisite attributes and skills to fulfil the pivotal role that they are required to play in advancing constitutional democracy.'[14] Inevitably, the role of transformative constitutionalism in the decolonisation and Africanisation of legal education needs to yield practical results.

Thus, the immediate objective of this article is to extrapolate the role and significance of transformative constitutionalism in the decolonisation and Africanisation of legal education in South Africa. In a constitutionally mandated transformative context, the systematic approach to the decolonisation and Africanisation of legal education advanced in this article stems from the following four drivers of curriculum transformation: (a) responsiveness to social context; (b) epistemological diversity; (c) renewal of pedagogy and classroom practices; and (d) an institutional culture of openness and critical reflection.[15]

These four drivers of curriculum transformation have been borrowed from a 2017 finalised draft framework document entitled: *'Reimagining curricula for a just university in a vibrant democracy — Work stream on curriculum transformation at the University of Pretoria*' (UP Curriculum Transformation Document).[16] The UP Curriculum Transformation Document contains valuable guidelines on curriculum transformation across different academic disciplines, including legal education and it resonates well with the overall objectives of both the National LLB standard and transformative constitutionalism itself.

The article is organised as follows: first, having identified the issues in the previous section, it poses key questions which assist in setting out the overall argument of the article; second, a construction to the meanings of decolonised and Africanised legal education is provided; thirdly, within the parameters of decolonisation and Africanisation of legal education, transformative constitutionalism is defined; fourthly, the article gauges whether the UP Curriculum

13 E Zitzke 'Stop the illusory nonsense! Teaching transformative delict' (2014) 46 *Acta Academica* 52.

14 LA Greenbaum 'The undergraduate law curriculum: Fitness for purpose?' unpublished PhD thesis, University of KwaZulu-Natal, 2009 1.

15 UP Curriculum Transformation Document (n 8 above) 2.

16 It is worth to highlight from the outset that the aim of the article is not to reflect and refract on the progress to which the UP Curriculum Transformation Document has been implemented at the University of Pretoria but seeks to utilise its valuable guidelines on curriculum transformation in order to make significant contributions in the efforts for decolonising and Africanising legal education in South Africa.

Transformation Document sets a model on how to design a national framework on the decolonisation and Africanisation of legal education; and finally, the article presents some of the possible implications of decolonisation and Africanisation of legal education.

# 2 Identifying and addressing key questions

A general consensus about some of the crucial attributes of a complete law graduate encompasses graduates who flourish in knowledge creation and original thinking as stimulated by the desire to be active contributors rather than being passive recipients of knowledge.[17] From a student-centred approach, this desire hinges on self-directed learning while addressing the invisibility of students' voice in the renewal of legal pedagogy. Hence, to demonstrate independent and critical thinking, the following key questions are similarly aimed at critiquing the genuineness of objectives decolonisation and Africanisation of legal education in South Africa.

The main question in this discourse interrogates the role of transformative constitutionalism in the decolonisation and Africanisation of legal education. Subsequently, a further three-faceted inquiry is crafted with the aim of developing the primary question by firstly, interrogating the definition of a 'decolonised' and 'Africanised' legal education, secondly, evaluating whether the UP Curriculum Transformation Document provides a suitable lead on how to properly design the transformative framework for the decolonisation and Africanisation of legal education in South Africa and finally, investigates the possible implications for the decolonisation and Africanisation of legal education.

## 2.1 Constructing the meanings of decolonised and Africanised legal education

Decolonisation and decoloniality 'means working towards a vision of human life that is not dependent upon or structured by the forced imposition of one ideal of society over those that differ, which is what coloniality does and hence, where decolonisation of the mind should begin.'[18] After all, a principal success of colonialism is to make the

17 R Spronken-Smith 'Experiencing the process of knowledge creation: The nature and use of inquiry-based learning in higher education' (2012) 1, 5 & 13. https://pdfs.semanticscholar.org/3fee/07e7280a7404e5dd99b88965be3e60b42e93.pdf?_ga=2.262527368.583208458.1581579661-29176745.1581579661 (accessed 22 August 2019).

18 MW Mignolo 'Delinking: The rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality' (2007) 21 *Cultural Studies* 459.

colonised think epistemically like the coloniser.[19] According to Motshabi, the importation of legal ideas falsely portrays that the minds and knowledge of Africans have nothing significant to offer the international fellowship of scholars.[20] Motshabi further argues that the Western theories used in Africa are inadequate in solving local problems.[21]

Decolonisation therefore requires an outlook embodied in a set of perspectives and the question of what decolonisation is does not admit a single or one-dimensional answer.[22] One perspective is an inside-out vision from Africa into the world, founded on an African context with a prime focus on Africa and in which the continent and people are central. This is to situate ourselves in African epistemologies and knowledge production, interpreting existing bodies of knowledge and providing cognitive justice.[23]

Scholars committed to substantive decolonisation are bound to decolonise knowledge through the decoloniality of knowledge itself, and thus the true liberation of the academy, becomes a realistic operational possibility, though requiring considerable application.[24] Motshabi argues that this effort is vitally important given the deep alienation of South African university students.[25] Decolonisation transcends 'identity' and 'liberation' politics to require 'epistemic' and 'academic' change. As Maldonado-Torres observes:

> What I am saying, and what intellectuals seeking to advance the discourse of decolonization make clear, is that beyond the dialectics of identity and liberation, recognition and distribution, we have to add the imperative of epistemic decolonization, and in fact, of a consistent decolonization of human reality. For that one must build new concepts and being willing to revise critically all received theories and ideas.[26]

Colonial education misrepresents a variety of phenomena, including peoples, lands and knowledge. It impedes access to the full range of knowledge and it prevents free inquiry and the search for truth, and it destroys other knowledge, inconsistent with the nature of colonialism.[27] In her recent article, Chikaonda laments the current state of legal education as follows:

19 Indeed, decolonisation and decoloniality are not the same; see KB Motshabi 'Decolonising the university: A law perspective' (2018) 40 (1) *Strategic Review for Southern Africa* 104.
20 Motshabi (n 19 above) 110.
21 Motshabi (n 19 above) 104.
22 Motshabi (n 19 above) 109.
23 As above.
24 Motshabi (n 19 above) 104.
25 As above.
26 N Maldonado-Torres 'Thinking through the decolonial turn: Post-continental Interventions in theory, philosophy, and critique — an introduction' (2011) 1 *Transmodernity* 4.
27 Motshabi (n 19 above) 105.

> One wonders how the well-being of the African can be pursued in future when the LLB curriculum fails to trace for students how the law on the continent was used and perceived as a tool for social, economic and political cohesion since the past and until now.[28]

The prolonged debate on the existence of an African legal theory, African legal philosophy or alternatively an African jurisprudence has silently been raging in a small corner of legal scholarship. In Oche Onazi's work in *African Legal Theory Contemporary Problems,*[29] scholars explore the concept of African jurisprudence in some depth. Included in the definitions of African legal theory or African jurisprudence, terms used interchangeably, are the following ideas: 'the ways in which law, legal concepts and institutions embody or reflect the most salient and common attributes of life in sub-Saharan Africa, attributes which are most often called Afro-communitarian.'[30]

Himonga and Diallo define decolonisation in the context of legal education in their work *Decolonisation and teaching law in Africa with special reference to living customary law*. They define decolonisation as a 'move from a hegemonic or Eurocentric conception of law connected to legal cultures historically rooted in colonialism (and apartheid) in Africa to more inclusive legal cultures.'[31]

Thus, the numerous and varying degrees of descriptions outlined above constitute a concerted effort in the quest of finding a continentally-agreed and precise definition concepts of the exact nature of a decolonised and African legal education. It is reasonable to assume that a decolonised and African legal education needs to obliterate Eurocentric conception of law and fully embrace the African epistemological ideas and practices that resonates well with the African society altogether. That entails an African legal theory or African jurisprudence having precedence over the knowledge system that emanates centrally from Europe.

## 2.2 Decolonisation and Africanisation of legal education: Transformative constitutionalism in context

The significance of entrenching transformative constitutionalism in the curriculum renewal of the LLB qualification requires the

28 GP Chikaonda 'To decolonise our LLB degrees, we have to understand and incorporate the roots of African law' 9 July 2019 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 10 July 2019).

29 O Onazi *African Legal Theory Contemporary Problems: Critical Essays* (2014) 1.

30 As above.

31 C Himonga & F Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20 *Potchefstroom Electronic Law Journal* 5.

advancement of constitutional principles of transformation in order to systematically decolonise and Africanise legal education in South Africa. Hence, this will enable the possibilities of setting uniform national objectives, norms and standards in reinvigorating the LLB curricula in order to create just universities which produce law graduates who immensely contribute in a vibrant constitutional democracy.

According to Greenbaum,[32] the potential for developing curricula for legal education to fulfil the possibilities of educating, transforming and contributing to a vision of a new constitutional democracy, and a society in which lawyers would play a leading role in enhancing access to justice for all, is a debatable issue. In this context, like any other academic discipline and profession, law graduates are required to immensely contribute in the constitutional democracy. This argument resonates with the words of South Africa's struggle icon Nelson Mandela who once said:

> It is our hope that … you shall put your knowledge at the service of society and community; and that with the help of your contributions South Africa shall become a winning nation …[33]

An important step that best captures the extent to which the role of transformative constitutionalism could be situated in the decolonisation and Africanisation of legal education arises from the Preamble of the LLB Qualification Standard which provides as follows:

> The South African constitution is transformative in nature. "Our constitutional democracy seeks to transform our legal system. Its foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms, introduce a new ethos that should permeate our legal system." Therefore, legal education cannot be divorced from transformative constitutionalism.[34]

Thus, law graduates possess 'comprehensive and sound knowledge and understanding of the South African Constitution and basic areas.'[35] In terms of critical thinking skills, graduates, according to the document, have to 'recognise and reflect on the role and place of law in South African society and beyond.'[36]

Therefore, the concerted efforts to decolonise and Africanise legal education should not solely be confined to how graduates must fare in legal profession, especially in the corporate world, 'but rather how it contributes to a new jurisprudence suited to the legal, social and political transformation of South Africa.'[37] Accordingly, the

32 Greenbaum (n 14 above) 1.
33 Graduation address by President Nelson Mandela as chancellor of the University of the North University of the North, Saturday 20 September 1997.
34 Council on Higher Education (CHE) 'Higher Education Qualifications Sub-Framework: Qualification Standard for Bachelor of Laws (LLB)' (2015) 6.
35 CHE (n 34 above) 7.
36 CHE (n 34 above) 9.

reviewed and consolidated symbiotic relationship between transformative constitutionalism and the decolonisation and Africanisation of legal education should be aimed at producing law graduates with the requisite attributes and skills to fulfil the pivotal role that they are required to play in advancing constitutional democracy. In fulfilment of the constitutional obligations based on the values of human dignity, equality, human rights and freedom, universities must transform themselves socially, culturally and in terms of the curriculum. In this context, it is also relevant that the curriculum provides critical spaces and opportunities for students 'to develop ways of seeing which are different from those provided by dominant discourses'.[38]

## 2.3 Quintessential model on decolonisation and Africanisation of legal education

Library research was conducted with the aim of finding out whether or not the theories of pedagogical framework which form the basis of the subject-matter under discussion have been given prominence in the re-curriculisation of legal education. Although there are universities which have commenced with the groundwork initiatives of re-curriculisation through the lens of decolonisation and Africanisation, thus far, it has been established that the efforts to transform legal education could be on the cards of almost all universities but the usage of the terminologies of 'decolonisation' and 'Africanisation' of legal education seldomly features. Accordingly, the UP Curriculum Transformation Document could present itself as quintessential model on decolonisation and Africanisation of legal education.

## 2.4 Assessing UP Curriculum Transformation Document

This section succinctly discusses the four drivers of curriculum transformation contained in the UP Curriculum Transformation Document.

### *2.4.1 Responsiveness to social context*

The UP Curriculum Transformation Document envisages an increased and broader participation together with responsiveness to societal interests and needs that are regarded as essential features of a transformed system.[39] Hence, under this driver, the transformed

37 Modiri (n 11 above) 1.
38 V Bozalek *et al* 'A pedagogy of critical hope in South African Higher education' in Bozalek V (ed) *Discerning critical hope in educational practices* (2013) 43.
39 Greenbaum (n 14 above) 9.

curriculum must require the development of a compulsory foundational course for all first-year students in African history, thought and society, political economy and human rights.[40] In addition, social transformation must be prioritised by focusing on ways in which legal education can contribute to the development of society and the realisation of a dignified and sustainable life for all South Africans. More specifically, the empowerment of law students has to encourage their active participation in the transformation of legal education, which should transcend the academic discourse. It aims at ultimately reshaping the nature and scope of the legal profession and society as a whole.

The driver for responsiveness to social context further envisions thoughtful students who are part of a greater and diverse public. It foresees students who are able to contribute meaningfully to different communities and society. This can be drawn from critical thinking, which entails 'the ability to problematise received wisdoms within disciplines and to question old and new frameworks, to exercise judgement and engage in reasoned debate'.[41] In addition, their meaningful contribution must stem from critical literacy, which involves the ability to independently read, analyse, reflect, evaluate, conceptualise and synthesis arguments, approaches and solutions.[42]

### *2.4.2 Epistemological diversity*

The driver of epistemological diversity asserts that 'diversifying epistemology means bringing marginalised groups, experiences, knowledge and worldviews emanating from Africa to the centre of the curriculum.'[43] This involves challenging the hegemony of Western ideas and paradigms and foregrounding local and indigenous conceptions and narratives. Equally important, it states that:

> Honestly and critically reckoning with the histories of all disciplines and dominant traditions within disciplines to examine their underlying colonial biases and exclusionary cultural norms at the intersections of race, gender, sexuality and class, as well as the complicity of disciplinary knowledges with various forms of violence and oppression over time. This involves, among others, the acknowledgment that even those few historically white universities that admitted a limited number of black students operated on the principle of racial segregation and that black people were mostly excluded from Higher Education, bar the Bantustan universities and two universities set aside for 'coloured' and 'Indian' students.[44]

40 UP Curriculum Transformation Document (n 8 above) 3.
41 As above.
42 As above.
43 As above.
44 UP Transformation Document (n 8 above) 4.

The aim is not merely to add voices and theories but reconceptualising the way in which knowledge and sources of knowledge are organised, valued and represented within the discipline and subject area of law.

### *2.4.3 Renewal of pedagogy and classroom practices*

The transformation of the curriculum involves the continuous rethinking and re-evaluation of the ways in which learning and teaching take place.[45] This includes responsiveness to and training in new pedagogical methodologies and approaches in legal education. It further entails pursuing inquiry-led teaching and learning. Rather than testing for memory, students must be encouraged to do more writing and research.

Additionally, this driver seeks to address the invisibility of certain groups by critically interrogating the composition of students and staff, especially in disciplines historically dominated by one sex, gender and/or race, and removing pedagogical and classroom hindrances in a way of diversification. From a human rights perspective, there is also a need to create a robust learning space that is affirming and sensitive to student diversity by actively including students across differences such as race, sex, gender, sexuality, socio-economic class or disability.

### *2.4.4 An institutional culture of openness and critical reflection*

With regards to institutional transformation, Gutto states as follows:

> Every social institution, like every living organism, undergoes changes necessitated either by subjective self-will and initiative or by objective circumstances and pressures lying outside of the social institution or living organism itself. The point is therefore not whether reform or change is desirable.[46]

The driver for institutional culture of openness and critical reflection states that transforming curriculum exhibits understanding that a 'hidden curriculum' can be found in the spaces, symbols, narratives and embedded practices that constitute the university and in the diversity, or lack thereof, of the staff and student cohort.[47] Transformation requires exposing and resisting the subliminal practices of the hidden curriculum that are part of South Africa's legacy of discrimination.

45 As above.
46 S Gutto 'The reform and renewal of the African human and peoples' rights system' (2001) 2 *African Human Rights Law Journal* 175.
47 UP Curriculum Transformation Document (n 8 above) 6.

## 2.5 Possible implications of decolonisation and Africanisation of legal education

Decolonial theory has been criticised for being too general.[48] According to Gutto, the question to be asked relates to the extent of the change and whether the reform or change embarked upon leads to the renewal and reinvigoration of the institution, or to degeneration and ruin.[49] With regards to the possible implications ensuing from transforming higher education, Quinot and Greenbaum caution that 'reform in higher education can, however, be dangerous and counterproductive if it is driven purely by policy agendas and in the absence of sound pedagogical considerations.'[50]

It is hereby submitted that Quinot and Greenbaum's argument is justifiable, and that the debates about reform of legal education in South Africa should take place within the broad contours of a legal pedagogy rather than purely on policy and political grounds.[51] It is commonplace that in some quarters of the society, the decolonisation and Africanisation of legal education is the unfinished business of the liberation struggle. In turn, the quest for the decolonisation and Africanisation of legal education can be deemed to be a smokescreen to disguise the unfinished business of liberation struggle that has permeated the legal fraternity and which therefore threatens academic independence.

Presently, there is no any fully existing and functional pedagogical national framework for the transformation of legal education. The vast majority of intellectual engagements reveal so far that the efforts to devise, design and implement strategies for the decolonisation and Africanisation of legal education have proven to be intricate, cumbersome and with possible far-reaching repercussions. This is a consequent of an array of factors which are discussed below.

It is imperative to note that the first Law Students' Conference on the Decolonisation and Africanisation of Legal Education took place at the backdrop of a disconcerting truth concerning the state of legal education in South Africa. During the LLB Summit held in 2013, the key stakeholders and role-players in the legal fraternity such as Council for Higher Education (CHE), the South African Law Deans Association (SALDA), General Council of the Bar (GCB) and the Law Society of South Africa (LSSA) decided that a national review of the LLB programme should be conducted.[52] The outcomes of the national review of the LLB qualification in April 2017 have led to the

48 Motshabi (n 19 above) 107.
49 Gutto (n 45) 175.
50 G Quinot & L Greenbaum 'The contours of a pedagogy of law in South Africa' (2015) 1 *Stellenbosch Law Review* 29.
51 Quinot & Greenbaum (n 50 above) 30.
52 M Sedutla 'Legal education in crisis?' (2017) 573 *De Rebus* 3.

declaration that legal education in South Africa is in a state of 'crisis'. In the process, four universities: North-West University, Walter Sisulu, University of South Africa and the Free State were found initially to be non-compliant with the required standards set by the Council on Higher Education in the LLB Qualification Standard.[53] As a result, the four were at risk of losing their accreditation for the LLB qualification if the quality of their programmes would not improve in specific areas.[54] The quality of their programmes defaulted in issues relating to staffing, the curriculum, teaching and learning assessment.

While recently other universities were grappling to meet the LLB Qualification Standard, the question is whether the decolonisation and Africanisation of legal education will provide a broad solution to these challenges or will aggravate the crisis of legal education. This confluence of factors must be fully considered in the renewal of legal education including the need ensure that there is a high level of congruency between the existing LLB Qualification Standard and the University LLB curriculum.

The review of legal education should place the best interest of society in whole as the paramount deciding factor. A general view is that these theories of curriculum transformation have the potential of misdirecting the purpose of law, to a similar degree to the apartheid era style where legal education played a central role in structuring and supporting the ideology of apartheid.[55] However, if well implemented, transformative constitutionalism may enhance decolonisation and Africanisation thereby contributing to the transformation of legal education in South Africa.

## 3 Conclusion

This article extrapolated the role and significance of transformative constitutionalism in the decolonisation and Africanisation of legal education in South Africa. South African universities do not have an existing, functional and clear-cut national framework for the decolonisation and Africanisation of legal education. The article submits that the UP Curriculum Transformation Document which presents four drivers of curriculum transformation are in alignment with the objectives of transformative constitutionalism and the National LLB Standard. These four drivers are: responsiveness to social context; epistemological diversity; renewal of pedagogy and

53 As above; see also B Macupe 'Eight universities get full LLB accreditation; five more in the balance' 22 June 2018 *Mail&Guardian* https://mg.co.za/article/2018-06-22-00-eight-universities-get-full-llb-accreditation-five-more-in-the-balance (accessed 21 June 2019).

54 Sedutla (n 51 above) 3; NWU, UNISA and UFS were subsequently accredited. The LLB programmes at 16 out of the 17 law faculties are now accredited.

55 Greenbaum (n 14 above) 9.

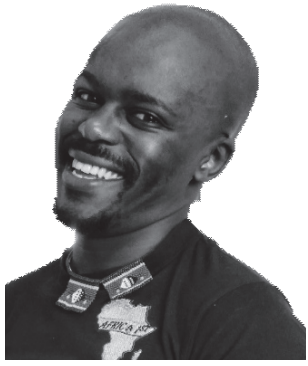
classroom practices; and an institutional culture of openness and critical reflection.[56]

It can be concluded that within the spirit of transformative constitutionalism, the 'Reimagining curricula for a just university in a vibrant democracy — work stream on curriculum transformation at the University of Pretoria' can be a quintessential model which can guide the transformation of legal education in South Africa. As a result, the universities which offer legal education in conjunction with key stakeholders and role-players in the legal fraternity can incorporate its valuable guidelines in National Review of the LLB programme through a proper design of a constitutionally transformed framework for a decolonised and Africanised legal education.

56 UP Curriculum Transformation Document (n 8 above) 1.

# BREAKING THE LANGUAGE BARRIER IN LEGAL EDUCATION: A METHOD FOR AFRICANISING LEGAL EDUCATION

*by Thokozani Dladla**



**Abstract**

*Section 6 of the Constitution of the Republic of South Africa, 1996 recognises eleven official languages of the Republic and further requires the State to take practical steps to advance the use of African languages. The Statistics South Africa 2017/18 report shows that most South Africans' first language are African languages. Despite this reality and the constitutional imperatives, the South African Bachelor of Laws (LLB) curriculum does not prescribe any African language as a compulsory course, and very few sources of law are in an African language. Some law schools do offer some African languages as an elective. However, it is submitted that this is not sufficient. Experience has shown that the inability to articulate oneself in English can be a barrier to completing the LLB degree in regulation-time and admission to legal practice. Furthermore, it is submitted that the Chief Justice 2017 Directive, in which Chief Justice Mogoeng declared English as the only language of record in South African courts, does not address the language problems experienced by court staff. Instead it simply perpetuates the Eurocentric legal system. This is because it counters the advancement and use of African languages envisaged by the Constitution.*

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*This article investigates how the failure to advance multilingualism in the current LLB curriculum can disadvantage law students going to practice. It is proposed that law schools begin to address this issue by introducing two innovations. First, it is suggested that law schools make at least one African language a compulsory course. For English first language speakers in particular, this arrangement will strengthen their understanding of the sociological context in which the law operates. Second, it is proposed that each law school should choose an African language that is predominantly spoken in their geographical area and partner with schools of languages to translate sources of law. For African first language speakers in particular, this will assist them in understanding legal concepts better. Translations of legal texts may also allow for law schools to teach the law in the local African language.*

***Key words**: Decolonisation of law, legal theory, African language, Legal education; Africanisation of legal education.*

# 1 Introduction

Section 6(1) of the Constitution recognises eleven official languages,[1] a move from the previous discriminatory regime of the recognition of only English and Afrikaans as official languages.[2] Section 6(2) of the Constitution, in turn, imposes positive obligations on the state to take practical and positive measures to elevate the status and advance the use of historically diminished languages.[3] This article argues that the state has failed to take the adequate measures envisaged in section 6(2) in the context of legal education. The argument is based on the fact that there has not been any inclusion of indigenous languages as compulsory courses as part of the transformational measures of legal education, particularly in the Bachelor of Laws (LLB) curriculum offered by tertiary education institutions allowed to offer the qualification.[4]

The relationship between law and language in South Africa is pivotal in ensuring that constitutional rights, obligations, values and principles are implemented across society through the assistance of the legal system. In this article, it is proposed that the law schools should begin to address the lack of transformation in the education system by introducing two innovations. Firstly, that law schools should make at least one African language a compulsory course.

1 The Constitution of the Republic of South Africa, 1996, (thereafter 'the Constitution').
2 The Constitution (n 1 above) sec 89(1).
3 This subsection provides: 'Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.'
4 Higher Education Act 101 of 1997; National Qualifications Framework Act 67 of 2008. This absence is also noticeable in the Council on Higher Education 'Higher education qualifications sub framework: Qualification standard for bachelor of laws (LLB)' (May 2015).

Secondly, it is argued that each law school should choose an African language that is predominantly spoken in their geographical area and partner with schools of languages to translate sources of law into that African language. In doing this, the goal is to equip law schools with the necessary tools to be able to teach law in an African language. The details of these recommendations are discussed later in this article.

## 2 The language versus law tension

The South Africa Act recognised English and Dutch as the official languages of the country.[5] The definition of Dutch was extended to include Afrikaans in the Official Languages of the Union Act.[6] In 1927, the recognition of Dutch fell away, and Afrikaans and English were recognised as the only official languages. This position remained in place throughout the apartheid era.[7] The English and Afrikaans language requirements were legislated for attorneys and advocates in the Attorneys Act and the Admission of Advocates Act respectively.[8] These statutes, in conforming to the official languages at the time of enactment, prescribed that English and Afrikaans, in addition to Latin at university level were requirements for admission to the Side Bar and Bar (as they were referred to at the time).[9]

In the Admission of Advocates Amendment Act of 1994,[10] the Latin requirement was removed, however, the English and Afrikaans requirements remained unchanged. At the onset, cognisance must be taken of the dates when the legislation were enacted, namely; 1979 and 1994. Both dates are of significance. In 1970s the apartheid parliament put its stamp on the regulation of the legal profession and in doing so endorsed the official languages at the time, namely English and Afrikaans, as those in which legal matters had to be conducted.[11] And 1994 is the year in which the Interim Constitution became operational and democracy was ushered in.

It is argued that the legislature missed a golden opportunity in 1994 when it failed to include an African language-requirement in the Amendment Act of 1994 based on section 3 of the Interim Constitution.[12] If, at that time, the legislature had amended the

5 The South Africa Act of 1909 sec 137.
6 Act 8 of 1925.
7 Constitution Act 110 of 1983 sec 89(1).
8 Attorneys Act 53 of 1979; Advocates Act 74 of 1979.
9 Sec 15(1)(f) required applicants for admission to the side-bar to have passed examinations in 'the Afrikaans and English language which the joint matriculation board referred to in section 15 of the Universities Act, 1955 (Act No 61 of 1955), certified to be of equivalent or superior standard to one or other of the examinations in the said languages conducted at the matriculation examination ...'.
10 Act 55 of 1994.
11 G van Niekerk 'Multilingualism in South African courts: The legislative regulation of language in the Cape during the nineteenth century' (2015) 21 *Fundamina* 372.

Advocates Admission Act to require prospective advocates to be competent in at least one African language in order to be admitted that requirement could be justified by section 3(2) of the Interim Constitution which requires the state to elevate the status of historically diminished languages — indigenous languages.

The language requirements for a person to be admitted to the legal profession have not changed despite the advent of democracy. By virtue of sections 2 to 24 which deal with the qualifications, admissions and removal from the roll, It is apparent that being competent at least in one African language is not a requirement for admission to the roll.[13] One reasonably expected that the Legal Practice Act,[14] which has repealed both the Attorneys' Act and the Admission of Advocates Act in part to include a substantive language requirement for aspirant legal practitioners;[15] for example, a requirement that prospective legal practitioners be competent in at least one African language in order to be admitted.[16] The Act includes no such provision.

However, without being too optimistic, it can be envisioned that such a move can contribute to the transformation of legal education. In one way or another, the LLB curriculum should be changed to include African languages as part of its curriculum, with a goal of providing students with an option as to whether they would prefer to acquire LLB curriculum in an African language. It can be argued that the LLB curriculum as it is, perpetuates a form of unfair discrimination based on a prohibited ground in section 9(3) of the Constitution, namely; language.[17] LLB students who learn best in their African first language could argue that they are disadvantaged when forced to learn in a second or third language and that it is reasonable to expect education in their home language. While English is an official language, it is not the only official language or the most important official language.[18]

12 This is now section 6 of the Constitution of the Republic of South Africa, 1996.
13 Attorneys Amendment Act of 1993, ss 2 to 24.
14 Act 28 of 2014.
15 Sec 24 of the Act that determines the requirements for admission of legal practitioners does not include any language requirements. Significantly, the Legal Practice Council published a notice on 4 March 2019 determining that admissions, notary and conveyancing examinations would only be written in English as from 2020, ending the longstanding practice of offering the examinations in English and Afrikaans. However, this notice was withdrawn on 14 January 2020, restoring the previous position. See https://lpc.org.za/urgent-notice-examination-language/ and https://lpc.org.za/withdrawal-of-notice-on-examination-language/ (accessed 21 February 2020).
16 Legal Practice Act 28 of 2014, sec 3(a).
17 The Constitution (n 1 above).
18 Afrikaans home language students have the opportunity to study in their mother tongue at some universities. Speakers of African languages do not have the same opportunity to study in their mother tongue.

Therefore, it makes sense to argue that if students find it to be in their best interest to be taught in one of the official African languages, and it is reasonably practicable to do so,[19] a decision by a university to deny students the opportunity to learn in that language contradicts the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).[20] The above reasoning was found to be correct in *University of the Free State (UFS) v Afriforum*.[21] The legal dispute in this case concerned a decision by the University of the Free State to adopt a new language policy, which replaced Afrikaans and English as parallel mediums of instruction with English as the primary medium. *Afriforum* argued that the new language policy, which prefers English over Afrikaans, will erode the position of Afrikaans as a language of instruction and its constitutionally protected status as an official language.[22]

The respondent argued further that the UFS policy violates section 29(2) of the Constitution, which affords the right to education in a language of choice where this is reasonably practicable. The respondent, using the *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo,*[23] argued that UFS did not use the appropriate assessment to determine whether the attainment of the right to receive an education in a language of choice was reasonably practicable.[24] Despite the fact that the court did not rule in Afriforum's favour the court made some assertions worth indicating here. One is that the legal standard to determine the language of teaching and learning in the context of section 29(2) of the Constitution is reasonableness, which of necessity involves a consideration of constitutional norms, including equity, redress, desegregation and non-racialism.[25] In a nutshell, the court held that what is required of a decision-maker, when there is a change in circumstances, is to demonstrate that it has good reason to change the policy. In other words, it must act rationally and not arbitrarily within the context of the particular institution.

It is posited that the some of the arguments used and reasoning advanced by *Afriforum* can be used to successfully argue that the LLB curriculum as it is, unfairly discriminates and undermines the Constitution, particularly sections 6(2), 9(3) and 29(2) of the Constitution. In the same breath, it is noteworthy that the argument

19 The Constitution (n 1 above) sec 29(2).
20 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (thereafter 'PEPUDA') sec 1.
21 *AfriForum and another v University of the Free State* 2017 48 SA (CC) (thereafter the '*AfriForum* case').
22 *Afriforum* case (n 21 above) para 2.
23 *Head of Department:Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) (thereafter 'Hoërskool case').
24 *Hoërskool* case (n 23 above) para 52.
25 *Afriforum* case (n 21 above) para 26.

here is not that English should be done away with as a language of teaching and learning in South African law schools. Rather, the contention is about the need to elevate the status of the African languages to assume their rightful place alongside English in the education sector.

## 3 Courts proceedings as a challenge to African languages

16 April 2017 is arguably the darkest day in the South African legal system since the dawn of democracy. On this day, Chief Justice (CJ) Mogoeng Mogoeng announced that English would be the *only* language of record with immediate effect, replacing the previous dispensation of English and Afrikaans as equal languages of record. This decision was announced shortly after the Heads of Courts meeting, comprising of all Judge Presidents of all the divisions of the High Courts. The immediate question that arises is: what is the legal status of this directive? According to section 8(3) of the Superior Courts Act:[26]

> (3) The Chief Justice may, subject to subsection (5), issue written protocols or directives, or give guidance or advice, to judicial officers —
>
> (a) In respect of norms and standards for the performance of the judicial functions as contemplated in subsection (6); and
>
> (b) regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts.

Therefore, from the provision quoted above, one can conclude that the language directive the CJ issued is binding on the members of the judiciary, and that failure to abide by the CJ's directive amounts to a breach of the protocol.

Docrat and others argue that the removal of Afrikaans and the moving away from a *de facto* bilingual language of record to a monolingual position weakens the argument for a linguistically inclusive legal system.[27] According to Docrat and others it is questionable how the directive can be justified in relation to section 6 of the Constitution. Their argument goes further in asserting that the CJ's decision results in unfair discrimination on grounds of language in terms of section 9(3) read with 9(5) of the Constitution as well as the definition of unfair discrimination as envisaged in PEPUDA.

In an attempt to find a positive side to the CJ's decision, one could argue that it was intended to send a message to the legislature to

26 Act 10 of 2013.

27 Z Docrat *et al* 'The exclusion of South African sign language speakers in the criminal justice system: a case-based Approach' in MK Ralarala *et al* (eds) *Interdisciplinary themes and perspectives in African language research in the 21st Century* (2017) 1.

amend section 174(2) of the Constitution to include historically diminished languages' speakers as one of the transformative measures to diversify the judiciary.[28] If this was the case one would reasonably defend it on the basis that it constitutes a radical judicial decision. However, it does not fulfil this purpose, even if the argument is that the decision was based on the idea that Afrikaans is an 'apartheid' language, and as such, needed to be removed. This justification is fundamentally flawed, because if that was the reason, it necessarily follows that English language should be equally removed for the fact that it is a colonial language. Lastly, it would also be flawed to attempt to justify the CJ's decision on the basis that he believed that Afrikaans was not a widely understood language, and therefore limiting access to courts. Such a reasoning would not stand because the latest Statistics South Africa census shows that Afrikaans is one of the three most spoken first-languages in South Africa alongside isiXhosa and isiZulu.[29] This is illustrated diagrammatically below.

***Graph: National language statistics (Census, 2011)***

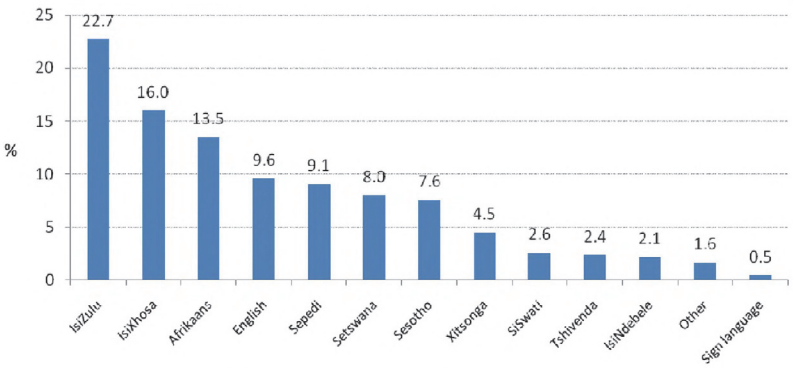


***Table: National language demographics of South Africa (Census, 2011)***

| Language | EC | FS | GP | KZN | LP | MP | NC | NW | WC |
|---|---|---|---|---|---|---|---|---|---|
| Afrikaans | 10.6 | 12.7 | 12.4 | 1.6 | 2.6 | 7.2 | 53.8 | 9.0 | 49.7 |
| English | 5.6 | 2.9 | 13.3 | 13.2 | 1.5 | 3.1 | 3.4 | 3.5 | 20.2 |
| IsiNdebele | 0.2 | 0.4 | 3.2 | 1.1 | 2.0 | 10.1 | 0.5 | 1.3 | 0.3 |

28 The Constitution (n 1 above) sec 174.

29 Statistics South Africa (2011) Census http://www.statssa.gov.za/?page%20id=3836 (accessed on 30 June 2019). As such maintaining Afrikaans as one of the languages of record makes sense, especially when one considers the fact that the 2017 Revised Language Policy for Higher Education recognises Afrikaans as one of the indigenous South African languages.

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| IsiXhosa | 78.8 | 7.5 | 6.6 | 3.4 | 0.4 | 1.2 | 5.3 | 5.5 | 24.7 |
| IsiZulu | 0.5 | 4.4 | 19.8 | 77.8 | 1.2 | 24.1 | 0.8 | 2.5 | 0.4 |
| Sepedi | 0.2 | 0.3 | 10.6 | 0.2 | 52.9 | 9.3 | 0.2 | 2.4 | 0.1 |
| Sesotho | 2.5 | 64.2 | 11.6 | 0.8 | 1.5 | 3.5 | 1.3 | 5.8 | 1.1 |
| Setswana | 0.2 | 5.2 | 9.1 | 0.5 | 2.0 | 1.8 | 33.1 | 63.4 | 0.4 |
| Sign Language | 0.7 | 1.2 | 0.4 | 0.5 | 0.2 | 0.2 | 0.3 | 0.4 | 0.4 |
| SiSwati | 0.0 | 0.1 | 1.1 | 0.1 | 0.5 | 27.7 | 0.1 | 0.3 | 0.1 |
| Tshivenda | 0.1 | 0.1 | 2.3 | 0.0 | 16.7 | 0.3 | 0.1 | 0.5 | 0.1 |
| Xitsonga | 0.0 | 0.3 | 6.6 | 0.1 | 17.0 | 10.4 | 0.1 | 3.7 | 0.2 |
| Other | 0.6 | 0.6 | 3.1 | 0.8 | 1.6 | 1.0 | 1.1 | 1.8 | 2.2 |

Graph 1 represents the national percentage of speakers for each official language. It is evident from these percentages that speakers of African official languages are the majority, whereas only 9.6 percent of the population speaks English as their mother tongue and 13.5 percent speak Afrikaans as their mother tongue.[30] It is also important to note the provincial language demographics in determining whether there is one dominant African language in each province and contrast those percentages against the number of English speakers in the various provinces. The significance of the statistics in relation to this article is to substantiate a critique levelled at the use of English as the language of record in all courts. Simply put, how can the language of record in all courts be English, when there is a smaller percentage of English mother tongue speakers in the Republic? The Chief Justice's reasoning for making the directive is that it is for practicable reasons, given that all the judges understand English. The weaknesses of this justification have been illustrated above.

In a press release the CJ reaffirmed the judiciary's decision to remove Afrikaans as a language of record.[31] It was stated that this decision was because of practical reasons, given that all the judges understand English. This reasoning is even more flawed than the hypothetical arguments canvassed above. By removing Afrikaans, the Chief Justice appears to have undermined the Constitution by ignoring section 6(2) of the Constitution. In doing so, he has limited the language of record in courts to English which has always been recognised, used and developed prior, during and post the apartheid era.

30 Statistics South Africa (2011) Census http://www.statssa.gov.za/?page%20id=3836 (accessed on 30 June 2019).

31 J Chabalala 'English will be only language of record in courts — Mogoeng' (2017) *News24* https://www.news24.com/SouthAfrica/News/english-will-be-only-language-of-record-in-courts-mogoeng-20170929 (accessed 29 September 2017).

It is clear that English was the preferred language of the liberation's leadership both during and after Apartheid. Alexander advances the leadership's basis for choosing English, arguing that English is 'the international language of trade and commerce'.[32] Based on that reasoning, Alexander concludes that it makes sense for South Africa to make English the national language of communication and a language of teaching and learning.[33]

Arguably, Alexander's reasoning is flawed because if the international-use of language was the standard, then China would not be the second biggest economy in the world while their language of communication, learning and teaching is Mandarin.[34] Therefore, the fact that a country chooses to make English their language of instruction does not guarantee economic success.

## 4 Courts proceedings as a catalyst for African languages

The benefits of equipping law students with African languages can be argued also about South African case law. For instance, in *S v Matomela* where the Court *a quo* heard the entire case in *isiXhosa*.[35] On automatic review Tshabalala J, as he was then, enquired from the Magistrate who presided over the trial asking — 'Why was the evidence, conviction and sentence in the Xhosa language? Is this in terms of an instruction from the Department of Justice? Full reasons are required.'[36] The response from the Senior Magistrate to the query read as follows:

> The fact that the evidence was recorded in Xhosa, is not in terms of an instruction from the Department of Justice, but due to the following reasons:
>
> (a) On the day that this matter came before the Court, we had a shortage of interpreters. The matter would of necessity have to be postponed because of this. This would have caused the complainant in the matter further hardship.
>
> (b) When I was approached for assistance, I ascertained that the parties were all Xhosa speaking. The presiding officer is Xhosa and could thus communicate with the parties. I instructed the presiding officer to continue with the case in the language that the accused understood.

32 N Alexander 'Language policy and planning in the new South Africa' (1997) 1 *African Sociological Review* 87.
33 As above.
34 The common language in China is Mandarin, often known as the 'Han language' which is spoken in the People's Republic of China and Taiwan. It is the language favoured by the government, education and media.
35 *S v Matomela* 1998 3 BCLR (CK) (thereafter '*Matomela* case'.)
36 *Matomela* case (n 35 above) 340.

> The recording of the evidence was discussed between us. I advised that the recording be done in Xhosa. The reason for that was that I did not want the presiding officer to act as an interpreter. I believe and submit that this procedure at the time was the best we could do.[37]

According to the Senior Magistrate's reasons, IsiXhosa is one of the eleven official languages, hence, the judgment that followed complies with section 6(1), (2) & (4) of the Constitution.[38] Tshabalala J found the Senior Magistrate's reasons to be fair and reasonable in the circumstances.[39] Although he did not expressly make this point in the judgment, it appears that Tshabalala J would support the idea that the Legal Practice Act should be amended so as to require legal professionals to undergo vocation-specific language training,[40] or deal with the root of the problem by developing the LLB curriculum to include at least one African language as a compulsory course, as a build-up to the ultimate goal of providing an option to students of being taught the LLB programme in an African language.

Hence, it is proposed that each law school in South Africa may select a predominant African language in their geographical area and collaborate with schools of languages to translate sources of law to the selected African language.[41] For English first language speakers, this arrangement will strengthen their understanding of the sociological context in which the law operates. For African first language speakers, this will assist them in understanding legal concepts better. For these propositions to be realised, a buy in from the judiciary, executive and legislature is necessary. Similarly, the Department of Higher Education and Training may have to amend its language policy. The reason is that the 2017 Revised Language Policy for Higher Education is not specific in guiding institutions in that it does not address the linguistic transformation areas such as legal education explicitly.[42]

The case of *Mthethwa v De Bruyn,*[43] also illustrates the benefits of having all legal practitioners and judicial officers competent in an African language that is dominant in the geographical area they serve. The facts of *Mthethwa* can be briefly set out as follows; the accused was a Zulu speaking person who was charged with the theft of a motor vehicle in Vryheid. The accused applied through his attorney for his trial to be conducted in isiZulu, his home language as well as one of

37 *Matomela* case (n 35 above) 341 -342.
38 *Matomela* case (n 35 above) 692.
39 *Matomela* case (n 35 above) 341.
40 *Matomela* case (n 35 above) 342.
41 See Z Docrat 'The role of African languages in the South African legal system' Master of Arts Thesis, Rhodes University, 2017, Mpati (Interview Appendix D).
42 The Department of Higher Education and Training 'The Revised Language Policy for Higher Education (2017)' http://www.dhet.gov.za/Policy%20and%20Development%20Support/Government%20Notice%20Revised%20Language%20Policy%20for%20Higher%20Education.pdf (accessed 10 July 2019).
43 *Mthethwa v De Bruyn* 1998 3 BCLR 336 (N) (thereafter '*Mthethwa v De Bruyn*').

the official languages as per section 6(1) of the Constitution.[44] The application was dismissed, and it was ordered that the case be heard in English and, or Afrikaans, the official languages of record at that time. On review the applicant argued that the failure to be tried in an official language of his choice, isiZulu, was both unlawful and unconstitutional.[45] The accused argued further that an order be granted for him to be tried in a language of his choice, namely isiZulu.[46]

The court dismissed the application on the basis that it would not be practicable for the matter to be heard in isiZulu.[47] Docrat comments that the court was of the view that there were no presiding officers who were competent in isiZulu to hear the case in IsiZulu.[48] But such challenges could be overcome if a requirement of the LLB is that students may graduate after being certified fully competent in at least one African language. This would result in a substantial number of graduates who will eventually be admitted to practice and they will be able to conduct cases in African languages. In the long run, the same practitioners will be appointed as members of the judiciary and they will be able to hear cases conducted in African languages. So, there are clear short- and long-term benefits for making African languages compulsory in the LLB curriculum.

The case of *S v Damoyi* was heard by way of an automatic review in terms of section 302(1)(a) of the Criminal Procedure Act.[49] The facts of the case are like that of *Matomela* discussed above. In this case, the proceedings were recorded in isiXhosa.[50] The magistrate detailed the reasons why the record appeared in isiXhosa. The magistrate's reasoning draws a bright picture of the linguistically diverse and effective South African legal system. Such a system is to be aspired to as it is one in which cases are heard without undue delay, ensuring a fair trial to the accused and the state, and having prosecutors and magistrates proficient in an African language dominantly used where they practice and preside respectively. This arrangement does not favour any particular linguistic community in South Africa. Instead, it gives effect to section 6 of the Constitution.[51]

44 *Mthethwa v De Bruyn* (n 43 above) 336–337.
45 *Mthethwa v De Bruyn* (n 43 above) 337.
46 *Mthethwa v De Bruyn* (n 43 above) 338.
47 *Mthethwa v De Bruyn* (n 43 above) 338.
48 Docrat (n 41 above); in *Mthethwa* case, the judge gave a clear picture of the linguistic make-up of the judiciary in the Natal Division of the High Court. In 1998, when the judgment was rendered, there was only one judge of the twenty-two in the division who could speak isiZulu, the language in which the complainant wanted to have his trial conducted.
49 *S v Damoyi* 2004 (1) SACR 121 (C) (thereafter '*S v Damoyi*'); Criminal Procedure Act 51 of 1977, sec 302(1)(a).
50 *S v Damoyi* (n 49 above)123.
51 As above.

# 5 Conclusion

Despite the transition from the Apartheid regime to democracy, the legal framework still perpetuates apartheid era practices to a large extent. This is because of the lack of linguistic transformation in South African legal education. Evidence can be found in the lack of legislative and policy frameworks and the LLB curriculum that exclude African languages. The central recommendation made in this article is not new. In March 2017, Dr Mathole Motshekga raised a similar proposal in the Parliamentary Portfolio Committee on Justice and Correctional Services. He proposed that all LLB students first pass one of the indigenous languages before being awarded a law degree. He succinctly said: 'Law is not just mastery of rules, it has to do with people. If you don't understand society and how it functions, then how do we extend rights to people?'[52]

Ultimately, what is required is for universities to ensure that only linguistically-competent students graduate with LLB degrees.

52 B Ndenze, 'No law degree without fluency in indigenous language proposed' (2017) *Port Elizabeth: Herald Newspaper, Tiso Blackstar* 4.

# CRITICAL LEGAL EDUCATION: A REMEDY FOR THE LEGACY OF COLONIAL LEGAL EDUCATION?

*by Emerge Masiya* & Given Mdluli***

**Abstract**

*The call for decolonisation of legal education stems from the acknowledgement of the presence of retrogressive colonial approach to legal education. This approach includes a neutral and formal teaching that is blinded to ethical and social considerations. Law is a mirror of a country`s moral, cultural and social values and yet South African legal education distances itself with all other considerations and insists on a Western, autonomous and functionalist approach to legal education. This results in the moulding of uncritical and thoughtless "modern lawyers" with no concern to ethics and justice. Decolonisation demands a critical legal education and the replacement of the colonial "Black letter" teaching for a therapeutic jurisprudence. Both of which demand an interdisciplinary approach to legal education that acknowledges the impact of legal education on politics, society and culture. Thus, this article uses Critical Legal Studies (CLS) to deconstruct the colonial legal education epistemology.*

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# 1 Introduction

South African students have been desperate for the transformation of higher education. This was illustrated by the case of *Holtz v University of Cape Town* which saw the bold protests of students under the banner '#RhodesmustFall' and also revealed the need to address the colonial heritage in higher education.[1] This crisis reflects the presence of the legacy of colonial education, which also impacts on legal education. According to Iya, the system of legal education must 'ensure that the legacy of apartheid does not linger on into the twenty-first century.'[2]

In order to remove this legacy, there is a need to understand what it entails. The movement implicitly calls for the consideration of broader legal issues like the decolonisation of law, the concept of law and the status of indigenous systems of law in the post-independence legal system.[3]

This article argues that the current crisis in legal education stems from the essence of law itself and the culture of legal education prior to the constitutional dispensation. Decolonisation of legal education demands that law should be stripped of its rigid formalistic antics and welcome other disciplines and ideals. This can be achieved through critical legal education. Critical legal education comes in as a force that welcomes the inclusion of other disciplines in law. These are the disciplines which were not considered in law despite their relevance such as politics, sociology and others which are normally regarded as 'meta-legal'.[4]

The definition of decolonisation is unsettled. There are various definitions given to this dynamic concept.[5] However, Max Price and Russell Ally noted that decolonisation is a concept that 'should certainly not be reduced to some naïve desire to return to a pristine, unblemished Africa before the arrival of the settlers.'[6] This article acknowledges a more dynamic meaning of decolonisation in the legal context. As noted by Himonga and Diallo:

1 *Holtz v University of Cape Town* 2017 2 SA 485 (SCA) paras 1-12.
2 PF Iya 'The legal system and legal education in Southern Africa: Past influences and current challenges' (2001) 51 *Journal of Legal Education* 362.
3 C Himonga and F Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20 *Potchefstroom Electronic Law Journal* 2.
4 S Ratnapala *Jurisprudence* (2009) 217.
5 S Heleta 'Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa' (2016) 1 *Transformation in Higher Education* 5 https://files.eric.ed.gov/fulltext/EJ1187109.pdf (accessed 10 June 2019); M Sedutla 'The state of the profession discussed at LSSA AGM' (2017) 574 *De Rebus* 6.
6 M Price & R Alley 'Reflections on decolonising UCT' University of Cape Town Yearbook (2015) *A Year in Review* 23.

> [U]nconditional indigenisation of law in which an anti-colonial discourse … is advanced uncritically. Instead, we suggest that a more meaningful point of departure in the decolonisation of law is the defining of law from a "non-colonial" position and from alternative legal epistemologies. In this respect, decolonisation draws from different sources of law and normative agencies to promote the transformative potential of law in achieving more social and economic justice.[7]

Therefore, decolonisation of law is the shift from an uncritical teaching method to an unconditional indigenisation of law that welcomes social and cultural considerations. These considerations include ubuntu, morality and communalism. This article thus seeks to reflect that decolonisation includes a substantive look into the content and essence of law itself. It seeks to ensure that the law is more than just a paper-based institution. Decolonisation would ensure that the law takes into consideration the impact it has, on amongst others, society, politics, culture and community. On analysing the impact of law, it seeks to reshape legal education so that it can be a force to help transform the mind-set of scholars; the community and the legal field. Decolonisation in this case includes a process of stripping away the legacy of colonial legal education, as will be discussed below.

This article will reflect how Critical Legal Studies (CLS) may assist in deconstructing the epistemology of colonial legal education. CLS will reflect on the necessity of the fusion of African values, social and political consideration in legal education.

The contribution that this article makes is thus to bring together the principles of decolonisation, as articulated by Himonga and Diallo,[8] with CLS. Firstly, the article starts off by discussing the legacy of colonial legal education. Secondly, the basic principles of CLS are critically evaluated and lastly, recommendations are put forward for deconstructing colonial legal education.

## 2 The legacy of colonial education

Post-apartheid South Africa is still firmly entrapped in the colonial heritage of the 'black-letter-law' approach to legal education. This approach disregards the wider range of other factors, for example, the historical and social context in which the law functions.[9] Colonial legal education believes in the neutrality of law and subjects are not taught in a historical context, thus apartheid and colonialism are rarely mentioned. The lecturers educate students as if the subjects

7 Himonga & Diallo (n 3 above) 5.
8 As above.
9 J Modiri 'The crisis in legal education' (2014) 3 *Acta Academica* 6; see also CE Ares 'Legal Education and the problem of the poor' (1964) 17 *Journal on Legal Education* 307.

they teach are irrelevant to the demands of social justice. This stems from the positivist notion of law, which teaches that anything that is not within the confines of the text should not be considered in law.[10] Legal positivism is the separation of law and morality. It is a jurisprudential tradition with its roots in England. Okator contends that legal positivism is not African as it is based on a foreign Anglo-Saxon jurisprudence. He states that:

> [T]he legal systems and institutions we inherited from our colonial masters are not altogether alien to the African legal tradition. But some of the principles and concepts on which some specific legal practices are based are entirely alien to the traditional African legal experience. One such principle or concept which is widely held in Anglo-Saxon jurisprudence is legal positivism.[11]

It is argued that there is a need to shift from this colonial principle to legal naturalism. Legal naturalism is the shared sense of sympathy and sameness with some of the ideals that are characteristic of African social life and philosophy of society. The justification for the shift consists in the fact that legal naturalism is 'in accord with the traditional African legal phenomena'.[12]

Legal positivists contend that there is a separation between morality (or other social values) and law.[13] This perspective of law has found its way into legal education institutions. Legal educators separate legal education from all other relevant and influential considerations. It is considerations like morality, ubuntu and communalism that make up the bedrock of the African community. It is the social and cultural depravity in legal education that makes the law itself a foreigner to its own people. The rigidity of legal education thus creates closed-minded students who are uncritical and overly formalist. Hence, continuing the colonial trend of education which is not in synch with the current patterns of decolonisation.

As a result, contemporary legal education is still trapped in the legacies of a restrictive jurisprudence. This is the kind of jurisprudence that results in law being treated as an 'entomology of rules, a guidebook to technocratic legalism, [and] a science of what-legally-exists'.[14] Modiri relying on Douzinas and Gearey explains that the isolation of law from morality is a result of the reduction of law to technical set of rules.[15] These include the technicalisation of social conflict by private law rules; the belief in neutral, non-ideological problem-solving in the public law; the denial of law's imbrication with

10 A Marmor *Positive law and objective values* (2001) 49-70.
11 FU Okafor 'Legal positivism and the African legal tradition' (1984) 24 *International Philosophical Quarterly* 157.
12 Okafor (n 11 above) 157.
13 Ratnapala (n 4 above) 26.
14 Modiri (n 9 above) 4.
15 As above.

racism and sexism and its disconnection from the social reality.[16] Hence, contributing to the current legal crisis.

The current profitability and marketability of law graduates and the call for graduates to adapt to private legal profession is symptomatic of the crisis in legal education.[17] The legal profession and education is organised around a profit system that does little to manifest nor contribute to social and communal surroundings.[18] A glance at the typical LLB curriculum illustrates this.[19] At first year, there are modules like Introduction to South African Law, Computer Literacy, Legal Communications and Criminal Law. In second and third year there are Property Law, Business law and the Law of Contracts among others.[20] In the final year there are several elective modules, but the available offerings reflect the lawyer's predominant concern with problems of the management, regulation and disposition of material wealth.[21] This creates a mental makeup in law students which is 'money-hungry', 'short-minded', unanalytical and critically starved.

Though there are a few legal educators that welcome a socio-legal approach, it is inserted as a complimentary approach to the dominant 'black-letter' traditional approach which position students as uncritical and passive consumers of legal information operating in a routine, fixed and mechanical fashion.[22] The students are too occupied memorising for closed book tests to such an extent that they are deprived of the opportunity to think; analyse and appreciate the broad framework within which the law exists.[23] Unfortunately, it is these lawyers that become part of legal culture, which is formalistic and textbook conscious.[24] This is opposed to the advocated policy-oriented consequentialist approach.[25] This robs the community of its deserved transformative legal culture since the failure of law students to think critically has serious effects for active citizenship, for the proper enjoyment of rights and freedoms, for legal development and for indigenous knowledge production.[26]

16 Modiri (n 9 above) 7.
17 Modiri (n 9 above) 2.
18 Ares (n 9 above) 307; see also GC Hazard 'Law school law and sociolegal research' (1974) 50 *Denver Law Journal* 404.
19 As above.
20 These examples are taken from the University of Limpopo LLB Curriculum.
21 Ares (n 9 above) 307.
22 Z Motala 'Legal education in South Africa: Moving beyond the couch-potato model towards a lawyering skills approach' (1996) 113 *South African Law Journal* 695.
23 J Modiri 'Transformation, tension and transgression: reflections on the culture and ideology of South African legal education' (2013) 24 *Stellenbosch Law Review* 462.
24 Modiri (n 23 above) 456.
25 See KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146-157.
26 Modiri (n 23 above) 462.

The functionalist approach to legal education distracts students from the wider, more involved potential of legal education. This is the approach which merely equips students to be competent lawyers. Law schools' study and teaching of law as a professional discipline strips law of its decolonised affluent potential to cross social and cultural borders.[27] Modiri notes that the cognitive objective of legal institutions is to enable students to develop a mindset of 'thinking like a lawyer'.[28] Thus, creating the figure known as the 'modern lawyer' as noted by Van der Walt.[29] Unfortunately, this modern lawyer maintains his paralysing faith in the rationality and coherence of legal knowledge in the face of contradictory political and moral changes. These modern lawyers are a humanised legacy of colonial education.

The functionalist approach assumes that the problems of the law are to be confronted from the situation of the active practitioner and within the severe time limits under which he must work.[30] Students are taught to approach legal problem from the eyes of a practising lawyer whose main role is 'making a reasonable and practical recommendation for taking immediate action to dispose of a problem'.[31] This is reinforced by a statement made by deans in 1997 in which they stated that South African law should endeavour to 'ensure that students acquire skills appropriate to the practice of law and should strive to inculcate ethical values.'[32] From the statement, it is deduced that the 'ethical values' refer to ethics of legal practice as per legislation. As opposed to the cultural and societal expectation of the respective community, such a detached mindset does nothing in the greater responsibility of law to achieve transformation. Hence, according to Iya, legal education should be 'directed towards the road leading to the satisfactory achievement of the underlying social values and needs that should be the driving force behind the reform'.[33]

One of the most tragic consequences of the functionalist approach is that the predominant legal academics,[34] since the colonial era, have and continue to feed future lawyers with the same uncritical formalistic legal education. This creates a spiral, that is, a continuous

27 Hazard (n 18 above) 404.
28 Modiri (n 23 above) 460.
29 AJ Van der Walt 'Modernity, normality and meaning: The struggle between progress and stability and the politics of interpretation (Part 2)' (2000) 11 *Stellenbosch Law Review* 226-273; see also D Thies 'Rethinking legal education in hard times: The recession, practical legal education, and the new job market' (2010) 59 *Journal of Legal Education* 598-622
30 Hazard (n 18 above) 407.
31 Hazard (n 18 above) 408.
32 Iya (n 2 above) 359.
33 PF Iya 'Reform of legal education in South Africa: Analysis of the new challenge of change' (1997) 31 *Law Teacher-International Journal of Legal Education* 311.
34 Iya (n 2 above) 361.

loop of legal education that only creates competent lawyers who are neither analytical nor societally aware of their potential.

Hence, the legacy of colonial education has been to cement the neutralist, apolitical and neutral application and education of law whereas legal education can never and should never be devoid of politics, culture or ideology. This is reflected by Modiri when he notes that:

> [T]he work of traditional legal education … to affirm and entrench these formalist, legalist and liberal understandings of law, thereby reducing law and rights discourse to the economical, instrumental and functional application of rules and enclosing reality into a set of fixed, self-evident axioms that prevent any possibility of questioning, resistance and transgression.[35]

It is this legal mentality that hinders decolonisation and shuns the acknowledgement of African values and other societal norms. These are the values and norms which should be engraved in our law and legal education.

## 3 Critical legal studies

The critical legal studies movement has its roots in the anti-capitalistic and anti-liberal intellectual revolt that swept the Western world in the late 1960s and 1970s.[36] The movement flourished in the late 1970s to mid-1980s mainly in the United States but was a spent force in jurisprudence by the end of the 20th century.[37] CLS is discussed and often debated because of its role. CLS challenged the prevailing comfortable assumptions about law and compelled liberal legal theorists to examine, revise and redefine their view.[38] The movement undermines the central ideas of modern legal thought and thus put forward another conception of law.[39] The conception is one that implies a specific view of society and informs a practice of politics.[40]

The main contention raised by CLS is that law as developed in liberal societies is oppressive.[41] Thus according to CLS, law formalises oppression, makes it respectable and indoctrinates people to accept it. Thus, CLS defies liberalism. Liberalism is defined as the dominant ideology in the modern western world, an ideology that pervades our views of human nature and social life.[42] Thus it is worth noting that

35 Modiri (n 23 above) 456.
36 Ratnapala *Jurisprudence* (2009) 217.
37 Ratnapala *Jurisprudence* (2009) 218.
38 As above.
39 U Roberto 'The critical legal studies movement' (982) 96 *Harvard Law Review* 563.
40 As above.
41 Ratnapala (n 4 above) 217.

the Movement is one which contains a group of scholars that have political views ranging from disaffected liberalism to committed Marxism.[43] The CLS movement is placed within the leftist tendencies in modern legal thought and practice. CLS criticise formalism and objectivism of the law. The critique of objectivism of the law can be pressed through the interpretation of contemporary law and doctrine.[44] The basis of such is that the current content of public and private law fails to present a single, unequivocal version of democracy and the market.[45] It is thus submitted that a single, unequivocal version of democracy and the market is favourable.

### 3.1 Critical legal studies and the denial of the neutral value of law

It is very important to note that the CLS denies that law in liberal legal system is of neutral value.[46] For example, criminal laws concerning murder or rape cannot be described as value neutral as they enforce moral standards. Therefore, CLS disagree with the contention that law is value neutral. There are two kinds of laws which are recognised within our societies of which one contains rules and the other standards.[47] However, CLS scholar Kennedy, provides that apart from the two there are certain rules that can be mechanically applied, referring to them as 'formally realisable rules'.[48] The legal rule that one can be eligible to vote upon the attainment of the age of 18 is a form of formally realisable rules. Therefore, CLS are very right to question the value neutrality of law, as the neutrality value affords privileges to individuals autonomy over collectivism.[49] Thus law is used to facilitate class oppression.[50] The people in liberal societies are meant to believe that they are on equal footing with others as law is meant to apply to everyone. However, CLS provides that the laws are made to mask the relationship of equality.[51]

### 3.2 Critical legal studies and politics

The story of CLS is one of how the legal academy simultaneously tolerates and contains a radical political location.[52] CLS is a political

42 AC Hutchinson *Critical legal studies* (1989) 516.
43 AC Hutchinson *Critical legal studies* (1989) 516.
44 Roberto (n 39 above) 570.
45 As above.
46 Ratnapala *Jurisprudence* (2009) 221.
47 As above.
48 As above.
49 Ratnapala (n 4 above) 222.
50 D Blichtz *et al Jurisprudence in African context* (2017) 110.
51 Blichitz *et al* (n 50 above) 111.
52 M Tushnet 'Critical legal studies: A political history' (1990) 100 *Yale Law Journal* 1517.

location for a group of people on the left who share the project of supporting and extending the domain of the left in the legal academy.[53] Thus it is worth noting that the most common proposition by CLS authors is that law is politics.[54] Treating CLS as a political location may illuminate the meaning of the claim about laws and politics in the sense that one might believe that legal intellectual positions are political too.[55] CLS does not only provide for a political location but also envisage social construction. The common theme among CLS scholars is the insight or rather belief that concepts and categories of law are socially constructed.[56]

According to the CLS, judicial decisions are rarely fixed by what the legal text says thus providing for a great interpretive leeway.[57] Instead of the legal statute or rule being determinate in the sense that it clearly entails a single outcome, it is open to judges to interpret the law in a number of ways.[58] Thus, CLS as a movement firmly believes that judicial decisions are commonly constrained and influenced by extra-legal factors.[59] For example the judge's status as a comparatively wealthy member of society may lead the judge to avoid social conflict and favour status quo in his/her readings of law. Hence, there is the inevitable relationship between law and other disciplines of law like social and cultural factors.

Consequently, CLS could rightly serve as an instrument of relief to the crisis in legal education. Critical legal education provides that law schools need to acknowledge that various components of social, ecological, political prisms are essentially human constructs which provide the institutional and intellectual form of recess upon which change occurs.[60] Iya, relying on Kaburise, argued that 'notions of government, curriculum content, teaching and delivery mode require deconstruction to explicate the link between the broad social and political forces are contributing to construction of the new South Africa.'[61] Law schools must accept their role as an authority's social force in the re-definition of problems associated with law and legal education. Therefore, CLS provide a solution. CLS central theme has been that legal decisions are essentially controversial.[62] CLS encourage the consideration of alternatives to the legal structures,

53 As above
54 AC Hutchinson & P Monahan 'Law, politics and critical legal scholars: the unfolding drama of American legal thought' (1984) *Stanford Law Review* 206.
55 Tushnet (n 52 above) 111.
56 Ratnapala (n 4 above) 239.
57 Blichitz *et al* (n 50 above) 111.
58 D Kennedy 'Form and substance in private law adjudication' (1976) 89 *Harvard Law Review* 1685; see also S Motshweni 'The feminist agenda, a fall of hierarchal redress or an attempt to establishing an 'equal' society gone wrong: an internal critique to feminist theories' (2019) 13 *Pretoria Student Law Review* 219.
59 Blichitz *et al* (n 50 above) 111.
60 Iya (n 33 above) 314.
61 As above.
62 As above

thus, suggesting that legal studies must amalgamate politics, cultural and African values to ensure the transformative implementation of law.

Critical legal education has a strong commitment to social transformation especially in ways that would reverse the historically entrenched hierarchies of power and bring about new formations of community, democracy, politics and ethics.[63] Thus, transformation brings about a change in society from the imposition of colonisation to one which guarantees equality for all. It is this transformative nature that would be a catalyst for Africanisation of legal education.

Critical theories of law often self-consciously engage in multidisciplinary inquires as a form of resistance against the disciplinarity of law.[64] Therefore, one of the reasons why critical legal theorising about law is difficult to categorise with exactitude is the wide array of disciplines with which they emerge or interact. These disciplines include social sciences and psychology. It is the multi-disciplinary engagement that will serve to compliment the negative aspects of law.

It is worth noting that what is important for critical legal education is not so much the content and development of such theoretical traditions and perspectives but the method they employ.[65] This suggests that South African institutions can have the content, books and all other necessary equipment to learn and study but a wrong method of teaching. In other words, reliance on the black letter law may not achieve the much-needed change that would guarantee restorative justice.

It is these features of CLS that makes it the ideal instrument for the decolonisation of the colonial legal education for a more Africanised and inclusive legal education. Its interdisciplinary approach allows for the inclusion of African values and its commitment to transformation opens avenue for a more transformative legal education that transforms the community. The kind of communal transformation that is reflective of our African communal values.

CLS further contains that the law in the books is not the only law by which people live and not the only law that determines the structure of society. This is in sharp contrast to the positivist notion of law that has long been cemented in legal education. CLS firmly believes that the social rules of the societies that people live in should be included as part of their education.[66] This signifies that the rules

63 Modiri (n 23 above) 455.
64 Modiri (n 23 above) 455.
65 As above.
66 Ratnapala (n 4 above) 210.

contained in law books have proven to be ineffectual for the fact that social rules form a part of the identity of people and how they live. Accordingly, CLS firmly believes that institutions should not only focus on what the law provides in the books but should also consider the social rules of society. Thus, the legal order in institutions must adapt to social changes - which include African values.

CLS tries to make people conscious of the alienation and oppression claimed to be imposed by categories and modes of reasoning of liberal law and institutions,[67] a pointer to the need for attention to the language in use within institutions. The basis of such is that language can be a barrier towards understanding content or rather what is thought in institutions. Hence language must be meaningfully studied, and such can take place by giving the linguistic structure pride of place within the institutions.[68] It is worth noting that language in this context comprises speechwriting and signs. Thus, there is a serious call to deconstruct some parts of the textbooks in which the language used is one of barrier of understanding for the students. A typical example is evident in the incessant inclination to refer to Latin words in law. Such a language barrier fosters a culture of colonial legal education. Hence, CLS have become one of the most accepted elements in the pluralistic universe of legal scholarship. It is not a surprise that law faculties believe that it is a good thing to have at least one CLS advocate in the building.[69]

## 4 Practical proposals for deconstructing colonial legal education

CLS have been used in many disciplines including the field of law. As Varnava and Webb suggest, legal education must move 'beyond a narrow construction of the curriculum to a wider consideration of the place and status of law in society'.[70] Yet, one of the challenges of teachers is to articulate through a syllabus which takes students beyond the boundaries of their own assumptions of law. These challenges may be dealt with through, for example, research-based learning and innovative assessments as opposed to the normal class in which students are mere spectators rather than participants. Research tutor or research-based learning, focusing on the need for teachers and students to be critical and reflective. It is such

67 Ratnapala (n 4 above) 227.
68 As above.
69 Tushnet (n 52 above) 1519.
70 T Varvana & J Webb 'Enhancing learning in legal education' in H Fry, S Ketteridge & S Marshall (eds) *A handbook for teaching and learning in higher education: Enhancing academic practice* 3rd ed (2009) 363.

development that gives students direct experience in research and increased motivation in learning and critical analysis.[71]

It is, however, noteworthy that the above methods are rarely used because of possible plagiarism and misunderstanding that professional bodies require patterns of assessment. Nonetheless, the challenge of teachers having to articulate the syllabus beyond the boundaries of their own assumptions may easily be addressed in that CLS ensure that the student understands the law through a personal and Africanised lens.

Modiri suggests the need to revisit the traditional methods such as street law.[72] Street law, simply put, is law-related education. That is, legal education for non-law students. Street law is a program that provides a powerful reality check in terms of connecting law students with a community far from the confines of the law school classroom.[73] Street law exposes one to conditions of subordination in an environment that may foster the consciousness and qualities lost or undeveloped in law school. The primary objective of street law is to advance critical thinking and analysis of complex topics through the study of law and justice.[74] It also provides 'the legal community with numerous opportunities for community involvement'.[75] Street law in legal education integrates law with social science. Such an integration results in critical legal studies that push law students beyond the carefully laid boundaries of law and stretch their intellectuality in a more productive social setting.

The value of legal education should not be indexed by how well it serves the needs and expectations of the legal profession and judiciary.[76] Legal education should be suited to legal, social and political transformation. Thus, what Modiri suggests is that legal education should keep up with current times as the society is one that changes.[77] Legal education should resultantly include African values such as ubuntu. The basis of such is that ubuntu begins with, and is rooted in, the actual experience of the people in the society.[78] Ubuntu is thus flexible and adaptable to changing circumstances of the society.[79] The inclusion of such values will inevitably influence the law.

71 Varvana & Webb (n 70 above) 371.
72 Modiri (n 23 above) 455.
73 EL MacDowell 'Law on the street; legal narrative and the street law classroom' (2008) 472 *Scholarly Works* 287.
74 KA Pinder 'Street law — twenty-five years and counting' (1998) 27 *Journal of Law and Education* 212.
75 Pinder (n 74 above) 212.
76 Hazard (n 18 above) 404-407.
77 Modiri (n 23 above) 472.
78 Blichitz *et al* (n 50 above) 33.
79 As above.

Another practical proposal for deconstructing colonial education is making a research report in law compulsory in all institutions of higher learning. The South African Law Deans Association (SALDA) had earlier noted a pattern of incompetency in numeracy, literacy and computer skills among graduates.[80] Research in law will foster a one-on-one interaction thus minimising laziness and a situation of just having to memorise the content of the book simply for test and examination purposes. It was noted above as one of the problems that students are too occupied memorising to the extent that they are deprived of the opportunity to think and analyse the broad framework of law. Research will foster critical thinking and analysis of law. Making research to be compulsory will also promote and encourage students to focus on scholarship beyond graduations thus filling the gap in legal academia.

As noted earlier, CLS deny the neutral value of law. Therefore, legal education should not be neutral. Every provision of law that empowers the woman who was once oppressed, for instance, should not be taught in a neutral impersonal way. Teaching law should stir opinions and be coloured with societal realities. Teachers should ensure that instead of a neutral view, students have an opinionated and cosmopolitan view of and about law.

Decolonisation, as noted earlier in this article, is the shift from an uncritical teaching method to an unconditional indigenisation of law that welcomes social and cultural considerations. CLS are the appropriate weapon for decolonisation since it opens the door for legal education to welcome social, moral and communal values within legal education. As noted earlier, CLS's denial of objectivism and neutrality launches a broad-minded and liberal teaching that acknowledges African values. The establishment of the National Consultative Forum sought to consider the transformation and democratisation of institutions to meet social values of the citizens.[81] Therefore, critical legal education would serve as an instrument to achieve those social values since one of its features is commitment to transformation.

## 5 Conclusion

The legacy of colonial education is the spiral creation of a formalist and uncritical textbook approach that enslaves law students. Their loyalty to legalism and technicality makes them short-sighted and suppresses their transformative ability to view law in a wider framework. Such a narrow-minded view of law deprives the society of its needed restorative outcomes. CLS ensure that the tragedy of legal

80 Modiri (n 9 above) 2.
81 Iya (n 2 above) 310.

colonial education is nullified. Its restorative, cosmopolitan outlook and interdisciplinary approach promises to be a remedy for legal formalism that was inculcated by colonial legal education. If CLS is infused into legal education, it will enhance the incorporation of African values like ubuntu, communalism (through for example street law) and morality into the field of law. In that way, law may be able to attain transformative outcomes.

# DECOLONISATION OF THE LAW CURRICULUM IN SOUTH AFRICA THROUGH THE PRISM OF A LIVED EXPERIENCE

*by Mandisi Magula* & Shatadi Phoshoko***

**Abstract**

*The current educational system, with a specific focus on legal education, remains based on Eurocentric knowledge with only limited inclusion of African knowledge. The article examines the historical context and the negative impact of colonial legislation on the law curriculum. The biggest problem identified in the law curriculum is that most modules (delete contents) and programmes are not linked to African cultures, realities and do not seek to address or solve African problems. This article argues for the creation of an Afrocentric law curriculum and the development of sufficiently rigorous local knowledge that relates better to the needs of students and the challenges in South Africa, while at the same time contributing to global knowledge production. This will make schools of law produce lawyers who are skilled to solve the problems confronting African people from different cultures. This article proposes solutions on how to decolonise, Africanise and transform the law curriculum.*

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# 1 Introduction

The lecture room-based education system was introduced and designed by the Dutch in the 1700s. The curriculum only covered Western knowledge, and that has been maintained over the years with minor inclusions of African knowledge systems. However, this has done nothing to dismantle the Eurocentrism embedded in the curricula.[1] Most modules in the law curriculum are not linked to African cultures and realities and do not seek to address or solve African problems. Examples of African problems include economic crimes such as theft and succession in traditional marriages.

There needs to be a proper re-look into the law curriculum, accompanied by change and reconstruction that will see the overthrow of colonial education and the inception of an Afrocentric law curriculum.[2] A colonised curriculum focuses on Western knowledge systems and either ignores or makes very small inclusions of African knowledge systems.[3] As such, it is important to develop sufficiently rigorous local knowledge that relates better to the needs of students and challenges in South Africa, while contributing to global knowledge production from the perspective of Africa.[4] This will make schools of law produce lawyers who are skilled in solving problems confronting African people. Moreover, it will rectify the Western idea that knowledge is produced from the west and can only be accepted based on that.[5]

The law curriculum plays a pivotal role in deciding the direction of the country. The content of the legal education imparted on students shapes them into future law practitioners who are tasked with one of the most pivotal roles of ensuring that the law works for its citizens. The problem, however, is the heavy reliance on Western culture, language and ideology and the cognitive dominance that creates self-doubt for Africans, and the over glorification of everything Western. This article demonstrates the historical context of colonialism in the law curriculum and laws that were passed in that regard. While highlighting the issue of language, as well as problems

1 The term Eurocentrism refers to 'the discourse that emphasizes European concerns, culture, history and values as superior at the expense of others'; S Makrinius & B Rebel 'Eurocentric or Afrocentric? A case study on the South African curriculum in Humanities' https://dspace.library.uu.nl/bitstream/handle/1874/34385 (accessed 24 April 2019).

2 The term 'Afrocentric' means 'content that is centred around African traditions, culture and history'; WD Mignolo 'The rhetoric of modernity, the logic of coloniality and grammar of de-coloniality' (2007) 40 *Culturalstudies* 20.

3 J Evans 'What is decolonized education?' http://m.news24.com.SouthAfrica/News/what-is-decolonized-education-20160925 (accessed 25 April 2019).

4 SJ Ndlovu-Gatsheni 'The Dynamics of epistemological decolonization in the 21st century: towards Epistemic freedom' (2018) 40 *Strategic Review of South Africa* 24.

5 O Imbo *An introduction to African Philosophy* (1998) 34.

associated with the curriculum, it concludes by proposing solutions on how to decolonise,[6] Africanise,[7] and transform the law curriculum.

# 2 Historical context of colonisation of the law curriculum

South Africa's legal system is referred to as a hybrid or mixed legal system owing to a few legal traditions that influence it. These include Roman-Dutch law, common law, English law and customary law.[8] Three of the four legal systems, excluding customary law, are a representation of colonialism.[9]

## 2.1 The Dutch's education system design

An argument may arise that education and the law have existed since before the white settlers arrived in South Africa. But it remains a factual point that schools were established formally by the Dutch in the late 1700s.[10] This is one of the many reasons why Christianity, which is another foreign belief system to the African people, is so deeply embedded in the legal system. This is because when the Dutch arrived in South Africa, they also had a plan to convert Africans into Christians for reasons that would benefit them. Therefore, the curriculum they implemented in the 1700s was centred on Christianity. The project of the colonialists continued during the apartheid era to convert Africans to Christians. Equally, curriculum content cannot exist without language.

## 2.2 Afrikaans as a language

Afrikaans is a diluted version of Dutch because it had been in contact with African languages that were adopted by the Afrikaner in colonial times.[11] Realising that they are now detached from the Dutch, the

6 The term decolonisation is described as the process of working toward a vision of human life that is not structured by the forced imposition of one ideal of society over those who differ; Mignolo (n 2 above) 449.

7 'Africanisation' is a process of inseminating African value systems, concepts and moral ethics into all human activities where people are acting freely to create their own future and are liberated from the mental passivity in which they have been imprisoned by colonialism; DK Koka *The impact of Eurocentric system of Education on the Afrikan mind: Decolonizing the mind* (1996) 54.

8 A Bauling '*Historical foundations of South African Law' University of South Africa* (2017); HFL 1501 Tutorial letter 501 (2017) University of South Africa

9 Colonialism refers to the practice of acquiring full political and social control over another country by settlers or colonialists thereby exploiting it economically; J Rossouw 'South Africa's enduring colonial nature and universities' (2018) 40 *Strategic Review for Southern Africa 65*.

10 Bauling (n 8 above) 8.

11 XS Ntombela *The double-edged sword: African languages under siege* (2004) 12.

Afrikaners established themselves as a nation through the instrumentality of a language of their own.[12] What the Afrikaners did to legitimise the language, was to champion the use of Afrikaans in government by making Afrikaans a legal medium of instruction in politics, commerce and the judiciary in 1948 with the instigation of Apartheid. In the educational system, Afrikaans was enforced as the medium of instruction in schools. Early resistance to this development is well documented. For instance, it caused the Soweto uprising of 1976 when learners fought for the removal of Afrikaans as a medium of instruction in schools because it disadvantaged them.[13] Yet, as a lived experienced, one still experiences question papers of examinations still comprising of both English and Afrikaans in post-1994 South Africa.

# 3 The impact of legislation on the law curriculum

The impact of apartheid legislation is discernible from a number of legislation passed in that era, some of which are still extant in South Africa. A number of such legislation are described below.

## 3.1 The British Colonial Laws Validity Acts 28 & 29 of 1865

This Act provided that there would be no competition to or defying of any colonial laws.[14] One hundred and fifty four years later, the British or English legal traditions are still the most used in procedural aspects of the South African legal system and methods of adjudication. For instance, in 1828 the Criminal Procedure Act was passed, thereby introducing criminal laws which were substantially modelled on those of the English system.[15] The English system continues to be a part of our legal system, after having been introduced by the colonialists in South Africa.

## 3.2 The Educations Proclamation Act 55 of 1921 and the amended Education Proclamation Act 16 of 1926

In 1921 the Educations Proclamation Act was passed, making provisions for necessary funds for the management of non-white education by mission societies, provided that they would conform to government regulations.[16] This Act was however superseded by the

12 Ntombela (n 11 above) 167.
13 E Ukam 'The choice of language for African Creative Writers' 7 *English linguistics research: Sciedu Press* 2.
14 The British Colonial Laws Validity Acts 28 & 29 of 1865.
15 Criminal Procedure Act 40 of 1828.
16 Education Proclamation Act 55 of 1921.

Education Proclamation Act 16 of 1926, which continued the government's control and management of all education.[17] These Acts played a pivotal role in intensifying colonial education and ensuring that the education dispensed to the African student did not serve him or her or the community he/she comes from.

### 3.3 The Bantu Education Act 47 of 1953

In 1948 when the Nationalist Government came into power, they introduced the Bantu Education Act whose aim was to legalise and intensify apartheid in schools. This saw movements such as the 1976 student uprising where students revolted against the Bantu education system due to its anti-Africa pro-European status.[18] However, the other purpose of Bantu education was to equip black students with skills for general work at factories, farms and companies due to demand for such workers in those fields.

### 3.4 The Extension of the University Act 45 of 1959

In 1959 the Bantu education curriculum was extended to 'non-white' universities and colleges with the Extension of Universities Act of 1959 which made provision for separate universities for separate race groups.[19] These aforementioned laws have played a pivotal role in the destruction of quality education.

### 3.5 Post-1994 development

Post-1994, when a black government under the leadership of the African National Congress (ANC) came into power, changes were made when legislation such as the Extension of the Universities Act of 1959 and the Bantu Education Act 47 of 1953 were repealed. The government started working on the restructuring of the universities through mergers and incorporations, thereby allowing both black and white students to learn in the same institutions. Yet the problem is far from being completely addressed. For instance, during the 2016 fees must fall protest when students demanded a free decolonised education, a University of Cape Town student leader, Athabile Nonxuba, in an interview with *News24* highlighted the challenge by commenting as follows:

> Our own thinking as Africans has been undermined. We must have our own education from our own continent. The current curriculum does not

17 Education Proclamation Act 16 of 1926.
18 T Karis & GM Gerhart 'From protest to challenge' (1997) 1 *Standford University, Hoover Institution Press* 567.
19 The Extension of the University Act 45 of 1959.

> accommodate African knowledge systems and expression in African languages.[20]

Arguably, the reason behind these problems being raised by Athabile Nonxuba is due to the fact that South Africa education has been colonised. As Credo Mutwa further observes,[21]

> writers and researchers deliberately overlook many important facts about African people and sometimes go out of their way to deliberately merely skim the surface of African knowledge and overlook the rest then pass on to nations and races they favour.[22]

# 4 Problems related to a colonised law curriculum

The biggest problem identified in the law curriculum is that most modules or programmes are not linked to African cultures and realities, and African languages are side-lined while languages that were imposed on Africans take priority. Imposing a foreign language and suppressing native languages seeks to dismantle the harmonious connection between Africans and their culture and place in the world.[23] This had a ripple effect on African children because of the lack of a harmonious connection between the language that was spoken at home and the language as taught in the institution.

Decolonising the law curriculum would mean using methodologies and learning materials that disrupt Eurocentric hegemonies. A colonised curriculum impedes access to the full range of knowledge and it prevents free inquiry and the search for truth.[24]

Through this curriculum, students are expected to gain skills and Eurocentric knowledge that will allow them to enter the marketplace. However, the quality of such education rarely allows them to make fundamental changes to the status quo in the society.[25] Perhaps the problem is that there exists a view that Afrocentric knowledge is difficult to package into academic material. There has been multiple attempts to justify and explain this, including the argument that the African knowledge is unwritten, hence, its merit as a system is weak. This claim does not lack entire merit in that it is said to be quite difficult to record African knowledge in academic books as African

20 Evans (n 3).
21 C Mutwa *Africa's hidden history: The reptilian agenda* (1964) 11.
22 As above.
23 Ngũgĩ Wa Thiong'o *Decolonising the Mind: The Politics of Language in African Literature* (1986) 29.
24 Evans (n 3 above).
25 S Heleta 'Coloniality persists in our universities and we must urgently decolonize' https://mg.co.za/article/2016-11-18-00-coloniality-persists-in-our-universities-and-we-must-urgently-decolonize (accessed 07 July 2019).

knowledge is regarded as non-scientific and undermined.[26] This reality explains why African knowledge is largely excluded from the curriculum. Hence, South African universities continue to produce law students every year who lack the required skill set to solve African people's problems. It is so because the current legal system does not recognise and address experiences of African people, especially indigenous people. Largely Eurocentric, the law curriculum has made students blind to the identity and knowledge of their country and the people who live in it. When addressing colonialism in the education system, Credo Mutwa had this to say;

> The black man of South Africa must be denied his identity to make it easier for people with sinister agendas to turn him into a puppet, spiritually and physically dependent on the west and its exploitative ways. The black man must be made to look down upon himself and other nations must be made to look down on him too.[27]

The erasure and selective inclusion of African knowledge in the curriculum creates a situation where African people are entirely undermined and not taken seriously, while Eurocentric knowledge systems are advanced and widely occupy our curriculum. The colonised curriculum in South Africa has promoted white supremacy and stereotyping of Africa.[28] The current curriculum,[29] still largely reflects colonial worldviews and is disconnected from African realities, including lived experiences of the majority of black South Africans.[30]

## 5 Decolonising and Africanising the law curriculum

Decolonisation of knowledge presents at least the conceptual possibility of decoloniality of power.[31] There are universities whose law curriculum have been improved, such as the law curriculum of University of South Africa (UNISA) which comprises modules like

26 E Mkhwanazi *Introduction to African philosophy (2018) Study Guide for PLS 1502 University of South Africa)* 9.
27 Mutwa (n 21 above) 11.
28 White supremacy is a system that maintains the ideology that white people are superior over the other races thereby marginalising them. M Christian 'An African centred perspective on white supremacy' 33 2 *Journal of black studies* 179.
29 Constitutional law, Criminal law and civil procedure, amongst other modules, reflect the British colonial laws.
30 Heleta (n 25 above).
31 Decoloniality is the process that seeks to promote the doing away of colonialism legacies; D Mashau 'Unshackling the chains of coloniality: Re-imagining decoloniality, Africanisation and reformation for a non-racial South Africa' 74 *Theological studies* 2-3.

Language through an African lens, Introduction to African Philosophy and African Customary Law.[32]

### 5.1 Creation of an Afrocentric curriculum

Firstly, there needs to be a radical change of content in the law curriculum so as to create an Afrocentric law curriculum. Of importance here is to develop sufficiently rigorous local knowledge that relates better to the needs of students and the challenges in South Africa, while contributing to global knowledge production from the perspective of Africa. It is noteworthy too, that eurocentrism does not only mean affirming and centralising European knowledge, but includes the appropriation of other people's knowledge and erasing their contribution.[33]

As South Africa's curriculum requires students to read primary sources, particularly court decisions, in order to acquire and appropriate the conventions of academic and legal discourse, this must translate into practice. The curriculum needs to produce relevant knowledge that is effective and empowering for the people of the African continent, especially the immediate African societies the universities serve. In an attempt to outline the importance of an Africanised curriculum, Nkoane notes:

> Africanised education maintains African awareness of the social order and rules by which culture evolves; fosters the understanding of African consciousness; facilitates a critical emancipatory approach to solve the problems of their lives; and produces the material and capacities for Africans to determine their own future.[34]

### 5.2 Pedagogy and epistemological decolonisation and Africanisation of the curriculum

Secondly, there should be a focus on pedagogy, which is the method and practice of teaching. There is a need to change not only what is taught but how it is taught too.[35] Currently, the method of teaching follows a banking system, where students cannot analyse, question and reject certain information from the study material. As such, students are reduced to receivers of information. Hence, the way in which content is dispersed to students must be transformed.

32 The module 'African philosophy' is a module that introduces students to metaphysical epistemological, ethical and political problems about the nature of African philosophy. And the module 'African customary law' involves equipping students with valuable knowledge and skills as well as competencies to enable them to analyse legal material directly pertaining to customary law.

33 J Baba 'William Mpofu at NWU Vaal on Decolonization of the curriculum P1'. https://m.youtube.com/watch?v=VIw9Dmysmo (accessed 13 May 2019).

34 CHE *A proposal for undergraduate curriculum reform*, Pretoria.

35 P Freire *Pedagogy of the oppressed* (1970) 43.

Transformation here would mean moving away from the thought that the curriculum is something that is merely received, but rather as something that is a co-constructed set of understandings.[36] Transformation, however, is not only limited to changing how the curriculum is taught, but further expands to systematic change to the curriculum, such as introducing an extended curriculum across the board.

This is a necessary precondition for achieving the goals of equity of access and equity of outcome. The recent report of the Council of Higher Education outlined a lack of critical thinking as one of the problems related to current legal education.[37] Whilst this may be the case, the key focus should be what content students are expected to think critically about. If the knowledge they receive in academia is not in sync with their lived experience then even their critical thinking will contradict the curriculum. Hence, students' critical thinking should include how to facilitate the rule of law to deepen economic development, human rights and human dignity so as to foster problem solving skills.

There is also the need for an epistemological decolonisation of the curriculum. There is an important epistemological argument made by Ndlovu-Gatsheni. According to the author;

> the historicity of the human condition, whereby we are born into pre-existing conversations regarding our pasts and our presents, necessarily shapes the positions from where we think and argue.[38]

The implication of this argument is that colonisation of the curriculum has had negative long term effects on African knowledge, education and social theory. Hence, the need to embark on a deliberate and radical journey to ensure that the curriculum is decolonised so that the education received can be to both student and societal benefits. Students are confronted by texts and theories that negate their own history and lived experiences in the current law curriculum. It is thus important that legal education is situated in African epistemologies and knowledge production, interpreting existing bodies of knowledge and providing cognitive justice.[39] This will make schools of law produce lawyers who are skilled in solving problems confronting African people. Moreover, it will destroy the idea perpetuated in the curriculum by western knowledge that knowledge is only produced in the west.

36 W Ngcaweni & B Ngcaweni *We are no longer at ease* (2015) 25
37 CHE *The state of the provision of the Bachelor of Laws (LLB) qualification in South Africa*, Pretoria
38 Ndlovu-Gatsheni (n 4 above) 9.
39 Motshabi B Decolonizing the university: A Law perspective (2018) 40 (1) *Strategic review for Southern Africa* 112.

### 5.3 Prioritisation and development of African languages

There must be an inclusion of African languages in the curriculum such as in the question papers and tutorial letters. Furthermore, it is recommended that universities follow the University of KwaZulu-Natal in this regard, where students are required to complete at least one module in an African language to complete their degree. The module must however be related to law on all accords. Language is not only a medium of instruction, it can be defined as a system of arbitrary vocal symbols by means of which the members of a society interact in terms of their total cultures.[40]

A decolonised curriculum must place South Africa at the centre of teaching, learning and research, and incorporate the epistemic perspectives, knowledge and thinking from the African continent and place them on an equal footing with the currently hegemonic Eurocentric canon.[41] The legal system must be seen as a core component which shapes the social and economic fabric of society. Law students should be educated to view law through this broader prism.[42] Furthermore, decolonising the law curriculum does not mean complete the erasure of all legal knowledge currently captured into the law curriculum, however, it means interpreting some of it from an African perspective. According to Savo Heleta, decolonisation of the curriculum also entails 'linking colonial and discriminatory legacies to the here and now', which in South Africa continues to be an ever present reality for many.[43]

Below are examples on how the law curriculum may be decolonised by the creation of an Afrocentric law curriculum. Although there are several modules, the point will be illustrated by reference to four modules, namely, Customary Law, International Law, Criminal Law and Law through ubuntu.

#### *5.3.1 Customary Law*

Modules such as African Customary law that attempts to address African problems, are covered with distortion and misrepresentation of the African people and their experiences. These include statements such as only Khoi-sans are the rightful original inhabitants of South Africa, implying that other South Africans are foreign to South Africa. These modules must be written and taught critically from the perspective of African people and be on the same standard as the

40 Ukam (n 13 above) 46.
41 Heleta (n 25 above).
42 Dennis Davis 'Legal transformation and legal education: congruence or conflict?' (2015) 1 *Acta Juridica* 172-188.
43 Heleta(n 25 above).

other legal modules as opposed to subjugating it and placing it as "the other module".[44]

### *5.3.2 International Law*

International law has been criticised for masking Eurocentric traditions or ways of doing things as universal principles.[45] As a body of rules regulating various global interactions, it needs to be inclusive of Afrocentric principles too. As such, the teaching of international law in the law curriculum should provide critical discussion around important epistemologies that emerged from diplomatic interactions between and among pre-colonial African empires on state building, peace, security and negotiations, methods of trade and dispute settlement mechanisms that were used.[46] African perspectives and knowledge contribution to international law has been written off as primitive, thereby side-lining these over Eurocentric principles.

### *5.3.3 Criminal Law*

It is clear that Criminal law is inclusive of how crimes were resolved in pre-colonial times, and crime and punishments should be written from the perspective of the African people. Moreover, it is necessary to teach with scenarios that resonate with the everyday experience of the South African student, so as to equip the student with the skills of solving problems that confront the people in the society. Case laws in criminal law must be inclusive of land claims cases, racism and crimen injuria cases and customary law cases.

### *5.3.4 Law through ubuntu*

Ubuntu is a crucial part of South Africa's traditional epistemology. Its inclusion in the curriculum shows that ubuntu forms a very crucial part of our law. However, whilst students are taught about ubuntu, they are not taught how to apply it in the legal practice. As Ramose observes:

> Ubuntu may be seen as the basis of African law … It is the experience of nonequilibrium that is thus the basic problem of law. To solve this problem, law invokes the concept of order as the means to establish and maintain equilibrium in human relations. Justice may be regarded as the affirmation of the view that order cannot come of chaos or lawlessness.[47]

44 Heleta (n 25 above).
45 F Babatunde 'Some thoughts on centering Pan-African Epistemic in the teaching of public international law in African Universities' (2019) 21 *International Community Law Review* 171.
46 As above.
47 B Ramose *African philosophy through Ubuntu* (1999) 79.

In essence, the law's purpose is to instil order within human relations, as such, it should have the characteristic of solving problems, relations and interactions more than the character of punishing the other human being. The law needs to be taught from an African perspective, of which the basic principle is ubuntu.

# 6 Conclusion

Direct colonialism may have ended in South Africa, however, its legacies in different spheres of our lives such as in the education system continue. It is for this reason that the law curriculum needs to be decolonised, Africanised and transformed so that it addresses and solves the problems of the society it serves. The law curriculum should relate to the African experience and the societal needs. It needs to relate to the needs and the realities of the students and the society at large and not just a small part of the society, because a compromised law curriculum results in a compromised country. This can be done through changing the content of the law curriculum, changing how the curriculum is taught and epistemological decolonisation of the curriculum. If this is done, the vision of building a better country that serves all its citizens and advances them, will be fulfilled.