

SUBALTERN RESPONSES TO EPISTEMIC VIOLENCE; THE LEGACY OF COLONIALISM

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Figure 1: Cartoon by Taylor Jones¹

* Final year LLB student, University of Pretoria. Vice Chairperson of Legal Shebeen and recipient of the Norton Rose Fulbright South Africa Bursary. This article deals with the contentious issue of epistemic violence in the legal culture, and the rift between the academic and the marginalised classes that the law purports to support. It challenges legal thinkers to engage in issues surrounding race, sex/ gender, and class and to reflect on these issues in order to make sense of South Africa's norms and values and develop a critical jurisprudence. Special thanks go to Akhona Mdunge who dared me to put my thoughts down on paper, Tshireletso Kuriti, and Victor Radebe, whose criticism about Marxism and the class divide system informs a huge portion of this paper. I dedicate this article to my brothers, Nhlakanipho Mkhwanazi and Malusi Khathwayo who are both always challenging me to be cognisant of the law's lived reality. This publication would not have been possible without the kind yet stern words of the PSLR Editor-in-Chief Miss Primrose E.R Karusha. To her, I would like to extend the most heartfelt thank you

1 In this cartoon for eaglecartoons.com, Taylor Jones illustrates how the marginalised in society such as the poor, the elderly, and the disabled are pushed further into the outskirts of society, while enjoying only the bare minimum of the

1 introduction

Epistemic violence is the extent in which local knowledge has been ignored, rejected and in some cases completely wiped out.² It stems from a constant repression that imposes mental violence rather than physical violence. This cognitive abuse is instigated and institutionalised by a coloniser, who sees himself as superior and limits the ‘subordinate’s’ happiness by burdening their knowledge of freedom.³

This field of violence is portrayed throughout South African history, which is commonly signified by the arrival of Jan Van Riebeeck in the Cape of Good Hope. Vale is perpetually mesmerised by the nature in which ideas, as a result of this, were carried from different corners of the world into South Africa, but in stark contrast, that very same South Africa is now often portrayed as a ‘one-dimensional South Africa’ as a result of epistemic violence.⁴ In order to redress the past and contribute to epistemic diversity and justice, one must have a sufficient grasp of the systemic integration of western knowledge into South Africa, and this serves as a direct example of epistemic violence. The real questions that must be asked are; first, how Western intellectual history has contributed to epistemic violence in South Africa, for example through positivism, which removed morality from law and therefore instilled the oppression of the apartheid regime; second, how we may make use of some parts of this intellectual history to respond to epistemic violence, for example, by using Black Consciousness to advocate for epistemic diversity.⁵

This essay aims to use critical jurisprudence as a tool to listen to the different voices and perspectives excluded by the traditional mainstream, without assimilating them. It also aims to engage with and reflect on the abovementioned theme of epistemic violence, and reflect on how critical legal theories could assist in the development of a critical jurisprudence. It will draw inspiration from *Sleeper-Black*, an artwork by William Kentridge showing the discomfort of ignorance.

2 state resources. It further highlights how their voice has been stifled, with the phrase ‘can you hear us now?’ often used in bad telephone reception to demonstrate how the ‘subalterns’ have been speaking, but they have not been heard.

2 T Thomas *What is epistemological violence in the empirical social sciences? Social and personality psychology compass* (2010) 2.

3 As Above.

4 P Vale ‘Of ships, bedraggled crews and the miscegenation of ideas: interpreting intellectual traditions in South Africa’ in P Vale, L Hamilton & EH Prinsloo (eds) *Intellectual traditions in South Africa. Ideas, individuals and institutions* (2014) 5.

5 J Modiri ‘The jurisprudence of Steve Biko: A study in race, law and power in the “afterlife” of colonial-apartheid’ PhD thesis, University of Pretoria, 2017 at 287.

2 Intellectual history as a response to epistemic violence

In order to make sense of the extent to which traditional knowledge or perspectives that were deemed inferior were ignored and rejected, one must trace the various intellectual histories that became prominent in the country, and the resistance against these traditional approaches. This exercise compels us to recognise, not only the legal theory and jurisprudence that was prominent in South Africa from 1652 until present, but to also consider the changes that have contributed to that legal theory that arose before the colonisers ‘came in different boats onto the Cape of Good Hope’ as Vale declares.⁶ Vale further asserts that; ‘every conversation on intellectual traditions in South Africa must deal with the fact that both the idea of it, and the country itself, were construed from the outside in.’⁷ It would be a futile attempt to deconstruct the legal jurisprudence introduced in South Africa without recognising that it is itself multi-faceted and is influenced by the Roman-Dutch law, English law and the newly legitimised customary laws, which are in turn, influenced by a wide array of intellectual theories such as Marxism, feminism, legal pluralism and the Black Consciousness movement, which led to a miscegenation or mixing of ideas, but due to epistemic violence, only a select few became prominent. The words of Russell Ferguson highlight the extent of epistemic violence and describes the relationship between the academic and the marginalised classes:

[There is] no need to hear your voice, when I can talk about you better than you can speak about yourself. No need to hear your voice. Only tell me about your pain. I want to know your story. And then I will tell it back to you in a new way. Tell it back to you in such a way that it has become mine, my own. Re-writing you, I write myself anew. I am still author, authority. I am still [the] colonizer, the speaking subject, and you are now at the centre of my talk.⁸

However, early modern historian Fernando Coronil declared that the goal of an investigator must not be to ascend to a position of dominance over the voice, by interpreting its words to the meanings we desire to attribute to them but ‘to listen to the subaltern subjects, and to engage them and interact with their voices.’⁹ Douzinas and Gearey asserts that modern jurisprudence has neglected the big philosophical questions offered by natural law and that this omission

6 As above.

7 Vale (n 4) 7.

8 H Bell ‘Marginality as a site of resistance’ in R Ferguson (eds) *Out there: marginalization and contemporary cultures* (1990) 241.

9 F Coronil ‘Listening to the subaltern: the poetics of neo-colonial states’ (1994) 4 *Poetics Today* at 645.

has 'seriously affected the integrity of the discipline.'¹⁰ Such a shift has been highlighted by various legal theories such as Marxism, which attacks capitalism and declares that it enables social discrepancies between the rich and the poor where the bourgeoisie enjoy the fruits of the subordinate class' labour and exploit them by using laws and policy.¹¹ The rich bourgeoisie, according to Karl Marx, dehumanised the subordinate class and reduced their relationship between power and knowledge in scholarly and popular thinking.¹² Without power, one's voice was reduced to silence. Veitch stated that, 'there is a connection between material production and the control of intellectual production.'¹³ This link between class and intellectual production is a philosophical influence in the South African fight against white monopoly capital and the recent *Afrikaans Must Fall* campaign.¹⁴ White monopoly capital is a residue of apartheid and shows that the economy is still owned by the oppressors, especially the 'white Afrikaner male' and Afrikaans as a medium of instruction in institutions is seen as perpetuating cultural supremacy and further enabling epistemic violence.

This racial divide along class lines seems to be enabled by capitalism and the crux of what Marx denounces is that, under capitalistic conditions of production, the white bourgeoisie ruling class owns the means of production, the surplus value of the produce and the government.¹⁵ Douzinas and Gearey declare that, 'power relations and practices penetrate into the social and often takes a variable legal form.'¹⁶ Furthermore, Foucault's theory of legal modernity states that governmentality is a specific form of power, which does not necessarily emanate from the state.¹⁷ The author further argues, that 'power is not located at a particular point in society, it cannot be possessed nor is it a consequence of the ownership of something; such as the means of production.'¹⁸ This theory negates the assertion that the white bourgeoisie has power, or should have power in society merely because they own the means to production. It also raises radical questions about the law's role and function in modern society.

Foucault's theory gives a possibility for epistemic diversity and allows us to listen to and acquire knowledge and ideas that had been

10 C Douzinas & A Gearey *Critical jurisprudence: The political philosophy of justice* (2005) 11.

11 Douzinas & Gearey (n 10) 11.

12 As above.

13 S Veitch *et al Jurisprudence: themes and concepts* (2012) 233.

14 See *AfriForum v University of the Free State* 2018 (2) SA 185 (CC) para 2 for an illustration of colonial-settler domination and the link between language and dominance.

15 Douzinas & Gearey (n 10) 12.

16 Douzinas & Gearey (n 10) 9.

17 Veitch (n 13) 241.

18 As above.

previously silenced by the sovereign or juridical power of the state. The traditional juridical model of power enables the sovereign state to make and pass regulatory laws that society is invariably bound to, without taking into cognisance the social reality.¹⁹ It made use of hierarchical observation and examination in order to enforce the discipline of individuals in society through coercion and punishment. However, the normalising power of the modern liberal state allows for individual autonomy and gives that text-law is often distracted from the real operation of power in society.²⁰ According to this view, law ceases to be a principle of power or a yardstick with which society measures itself against, but becomes a guideline for harmonious living. Morality and moral philosophy are thus correctly acknowledged as an inherent part of judicial hermeneutics. Such an assertion makes provision for epistemic philosophy and self-governance to come to the fore, and enables the resolution of certain disputes to be handled outside of the state's iron fist.

3 The possibility for epistemic diversity and ultimately epistemic justice

Foucault's theory of legal modernity links with Karl Klare's transformative adjudication and legal culture, which allows adjudicators to listen to perspectives previously excluded by parliamentary sovereignty.²¹ This is done by allowing judges to voice their intellectual sensibilities and acknowledge that they exist.²² Klare stated that the exclusion of personal or political values called for by the traditional rule-of-law is simply impossible.²³ Reflecting is essential for the future health of the society, economy and polity within South Africa and this is what transformative constitutionalism seeks to achieve.²⁴ Moreover, the Constitution celebrates multiculturalism and diversity.²⁵ The preamble expressly acknowledges the scars of the deeply divisive South African past and declares a determination to bridge the gap between the past and a future of democracy and constitutionalism. The South African constitution offers the perfect platform for epistemic diversity and justice and is essential for the development of a critical jurisprudence.

19 Veitch (n 13) 242.

20 As above.

21 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* at 157.

22 Klare (n 21) 166.

23 Klare (n 21) 163.

24 P Langa 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* at 352.

25 The Preamble of the Constitution of the Republic of South Africa, 1996.

In the Constitutional Court art gallery, amongst others, is an art piece by William Kentridge called *Sleeper – Black*, telling the story of unblissful ignorance. It portrays the desire to remain oblivious to reality and to history, it was produced as part of the film project called *Ubu tells the truth* which highlights the different forms of self-awareness, as defined by a rift between the public and private self.²⁶ The main protagonist of this film is a camera on a tripod, which sees everything and then uses its knowledge to try to wipe out non-corroborating witnesses. Characters in the film are locked in a constant state of denial, specifically over the exploitation and abuse of African people spanning from colonialism to apartheid. However, in the end they experience a ‘rude and painful awakening’ and start acknowledging the past, and their present reality. According to Klare, denial ‘obscures the possibility, and therefore the desirability for social change.’²⁷ It is when we acknowledge the past, in all its atrocious glory, that we can have an honest perspective of the present social reality.

One of the intellectual traditions that enables us to reflect on the past is the Black Consciousness Movement. According to More, this movement is essentially ‘a black political thought that is part of a long line of black activism and philosophical thought dating back to the advent of African slavery, colonialism, anti-black racism and the modern world.’²⁸ Its focus is black resistance to white racism and white supremacy, and is both a movement and a philosophy. Robert Sobukwe’s description of the Black Consciousness philosophy is the understanding of the black people’s desire to construct their own identity and take full responsibility of their own liberation.²⁹ The movement is not shy to acknowledge the gross inhumane atrocities of colonialism, and the existential crisis of black people who were held hostage in their own land. Aimé Césaire articulated in an interview that, the result of being black in a white-owned world was that, you ‘lived in an atmosphere of rejection for so long, you develop an inferiority complex.’³⁰ This is a result of the cognitive abuse colonialism had on the identity and humanity of the indigenous people.

However, this philosophy does not aim to only acknowledge and delve into the past. It also aims to reclaim black identity and petitions for the decolonisation of institutions and the human mind through self-consciousness and self-definition. This is a reflection of a famous

26 YoutubeZA, ‘Ubu tells the truth (Ubú cuenta la verdad 1997)’ 9 June 2014 https://www.youtube.com/watch?v=cVWh_kYD2GY (accessed 30 March 2018).

27 Klare (n 21) 166.

28 MP More ‘The intellectual foundations of the Black Consciousness Movement’ in P Vale; L Hamilton & EH Prinsloo (eds) *Intellectual traditions in South Africa. Ideas, individuals and institutions* 176.

29 More (n 28) 192.

30 More (n 28) 175.

quote by Antonio Gramsci, an Italian Marxist philosopher. He claims that Man is a product of history and He has only been 'able to acquire a sense of worth bit by bit, in one sector of society after another through intellectual reasoning, and not out of brute physiological needs.'³¹ This highlights the importance of epistemology, and intellectual perspective, because although historical and political events in South Africa are important, thinking about how politics and history emerge in the minds of people and society may matter more. Black Consciousness is an affirmation of the struggle for justice, not just physical justice but epistemic justice as well. The history and freedom of Man is very much linked to his ability to conceive of ideas and have them heard, as the Latin philosophical saying goes '*I think, therefore I am.*'³² By refusing individuals the chance to have their ideas and perspective heard, we attack their humanity and in essence dehumanise them.

Although the Black Consciousness movement is influenced by a continuity of ideas from Negritude to black theology, black theology and the Black Consciousness Movement weren't always aligned since most Black Consciousness advocates, Biko included, were adamant that the religion was used to distract black people from what was truly going on, which is colonialism. Steve Biko outlined his critique on Christianity by saying, 'it was too passive in dealing with oppression, too bureaucratic, and too accepting of the status quo.'³³ It is often said that our ancestors traded the land for a bible and a suit. However, in the 1960s it became clear that Black Consciousness had to be connected to black theology so that it does not become an obstacle to liberation.

4 The development of a critical jurisprudence

The advent of globalisation has refocused the attention on plural forms of legal ordering and has reintroduced the notion of legal pluralism. This legal theory itself takes various forms and can be used to redress the adverse effects of epistemic violence by reintroducing knowledge and dispute resolution measures that have been previously excluded and shunned. Veitch argues that indigenous forms of law did not disappear in the colonial state, and that there was a co-existence

31 WF Felice *Taking suffering seriously: the importance of collective human rights* (1996) 147.

32 Translated into English by Rene Descartes.

33 A Egan 'Christianity as an intellectual tradition in South Africa: Les Trahisons des clercs' in P Vale; L Hamilton & EH Prinsloo (eds) *Intellectual traditions in South Africa. Ideas, individuals and institutions* (2014) 251.

between formal and indigenous law, the latter of which was unfortunately dispensed when inconvenient.³⁴

Veitch talks about John Griffith's distinction between 'strong' and 'weak' legal pluralism and argues that the latter is not a true reflection of legal pluralism since its legitimisation is subject to 'formal acquiescence by the state.'³⁵ Therefore, it becomes problematic where indigenous law is ignored and not recognised by the state despite the social reality. This mitigates the legal tradition's fight against epistemic violence, as it highlights a very restricted interpretation of jurisprudence. As Douzinas and Gearey highlighted, such jurisprudence excludes all matter that does not belong to state law and 'addresses a restricted part of legality's role in social being.'³⁶ John Griffith argues, that 'state law is but one legal order, whose authorisation is unnecessary for the empirical operation of other forms of law.'³⁷ The distinction between 'strong' and 'weak' legal pluralism is controversial but the leading account of it is held by Boaventura de Sousa Santos.³⁸ He advocates for structural places in society that generate their distinct forms of law, outside the state.³⁹ He famously asserts that the actual legal rules that apply at any given time are a combination of both state law and legal norms in the different social structures.⁴⁰ The recognition of these legal and social norms would immensely contribute towards epistemic diversity and justice. Empirical approaches to legal pluralism aim to provide a more comprehensible account of the actual norms that influence everyday life and demand a more in-depth research into the social being outside of state-law.

Discussions on epistemic diversity and justice would be incomplete without acknowledging the effects that a lack of it has had on females in society. It cannot be argued that women's history, work and cultural contributions have been ignored or erased for centuries. The post-1994 dispensation boasts equality, not only racial equality, but gender equality as well. However, although women are now numerically well presented in government and their active contribution in the struggle against apartheid is acknowledged, they are still heavily oppressed and marginalised in society. There is still a large number of reported and unreported cases of rape and domestic

34 Veitch (n 13) 209.

35 Veitch (n 13) 210.

36 Douzinas & Gearey (n 10) 17.

37 Veitch (n 13) 210.

38 Professor at the School of Economics at the University of Coimbra.

39 B Santos 'The law of the oppressed: the construction and reproduction of legality in Pasargada.' (1977) 12 *Law & Society Review* at 14.

40 As above.

violence against women.⁴¹ The mere presence and participation of women in public activity does not negate this social reality. Women were given soft liberal rights without challenging, criticising and dismantling patriarchal social structures. South African gender never got the attention that race received as, ‘the struggle for political revolution came first and women were expressly told that their demands for equality had to wait in the queue.’⁴²

One of the challenges in tracking feminism in South African intellectual thinking, according to Helen Moffett, is ‘the lack of clarity about what this term encompasses.’⁴³ There are multiple forms of feminisms and different schools of feminist thoughts, which may be divided amongst class and racial lines, but what they all have in common is their attack against patriarchy and male dominance in society. However, ‘feminist conceptions of justice are often seen as Western or imperialist even though many feminists still struggle to find theoretical and practical examples that include non-Western women.’⁴⁴ The theoretical aim of this legal theory is to listen to these non-Western perspectives of feminism without assimilating them.

5 Conclusion

This essay has reflected on how we can use intellectual history as a tool to foster epistemic diversity. It has also used critical legal theories such as feminism, which highlighted the role of gender equality in society in order to listen to previously excluded pro-feminist voices. Marxism was also used to highlight the relationship between class, power and law, drawing from Foucault’s theory of legal modernity. After a critical analysis of these theories, I hereby infer that, like transformation, the development of a critical jurisprudence will never be a finished work. It should be rather viewed as an ongoing exercise that is enabled by the critical legal theories concerned with race, sex/gender, and class and so on. We must reflect on these in order to make sense of South Africa’s norms

41 According to StatsSA, the South African police recorded 41,583 rapes in 2018/19; these statistics can be found at <http://www.statssa.gov.za/publications/P0341/P03412018.pdf> (accessed 19 October 2019). However, the police’s rape statistics should not be viewed as an accurate measure of the extent of this crime since there is still a large number of unreported rape cases according to the Institute for Security Studies at <https://issafrica.org/research/policy-brief/rape-and-other-forms-of-sexual-violence-in-south-africa> (accessed 19 October 2019). There is, as yet, no estimate of how many women are actually raped in South Africa each year.

42 H Moffet ‘Feminism and the South African polity’ in P Vale; L Hamilton and EH Prinsloo (eds) *Intellectual traditions in South Africa. Ideas, individuals and institutions* (2014) 234.

43 Moffett (n 42) 220.

44 K Van Marle ‘The capabilities approach, the imaginary domain, and asymmetrical reciprocity: feminist perspectives on equality and justice’ (2003) 11 *Feminist Legal Studies* at 256.

and values and develop a critical jurisprudence. As Peter Vale declares, 'it is only by rethinking the ideas that made us can we reimagine the world.'⁴⁵ A critical jurisprudence is one that is conscious of the historical injustices against the subaltern classes of Africans, women and the poor. It is jurisprudence that hears and acknowledges their plight and listens to their knowledge and voices. My argument is that the legal practice and adjudication can be made to be more cognisant of different perspectives offered by different legal theories. The assertion that the development of a critical jurisprudence will never be a finished work should not negate efforts directed at its development.

45 Vale (n 4) 5.