

DECOLONISING THE UNIVERSITY: A LAW PERSPECTIVE

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Abstract

Decolonisation has been said to be “working toward a vision of human life that is not structured by the forced imposition of one ideal of society over those that differ”. This paper argues that political independence, responsive to the “dialectics of identity, liberation, recognition and distribution”, is not a sufficient condition for decoloniality of being as well as decoloniality of power and knowledge; and that political independence addresses coloniality of being without confronting coloniality of power and knowledge. Scholars committed to substantive decolonisation are bound to decolonise knowledge. Decolonisation of knowledge presents at least the conceptual possibility of a decoloniality of power. Decoloniality of knowledge itself, and thus the true liberation of the academy, becomes a realistic operational possibility, though requiring considerable application. This effort is vitally important given the deep alienation of South African university students. The trend to mimic exogenous experts and sages accentuates this imperative. Apart from the trend being futile, wasteful and dreary, it forecloses fresh insight and impedes the search for truth. The aim of this paper is to fill a gap in the sparse South African legal scholarship on decolonisation, principally the lack of definitional clarity.

1. Introduction

The theme of the Colloquium on “Decolonising the University?”, which triggered these reflections, offers an opportunity to transform our sensibilities and habits.¹⁾ After all, a principal success of colonialism is to make the colonised think epistemically like the coloniser. According to Grosfoguel (2007: 213), “the success of the modern/colonial world-system consists in making subjects that are socially

located in the oppressed side of the colonial difference, to think epistemically like the ones on the dominant positions” (see also Mignolo 2007a: 449-470; Wolfe 2017: 1-14; Escobar 2004: 207-214). Self-reflection is thus a critical first step to assess and change our situation. The question is why we rightly discuss decolonisation today? I consider the reasons why decolonisation is relevant in today’s South African university. Next, I address the question of what decolonisation is. Thirdly, I delineate some possible contours of a decolonised South African university.

I avoid the vital issue of institutional ethos and culture including icons (Goodrich and Bombardella 2016; Mbembe 2015). The University of the Free State (UFS) has a promising Integrated Transformation Plan (ITP) (UFS ITP 2017) on these matters and the momentum seems sufficient. I also evade the demographic changes signalled by the ITP, even though representivity is indispensable, urgent and pressing. I handle the core curriculum mainly by exploring issues in legal education.

2. Relevance to contemporary South African university

Universities are not immune to the national condition and their colonial design and structure makes this more visible (Mamdani 2016: 69-71; Mignolo 2007b; Maldonado-Torres 2012: 91). Decolonisation transcends ‘identity’ and ‘liberation’ politics to require ‘epistemic’ and ‘academic’ change:

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 (Maldonado-Torres 2011: 4).

Colonial education pretends that knowledge is not always partial and passes the intellectual fraction off as the whole (Grosfoguel 2007: 213-217; Mamdani 2016: 70). It misrepresents a variety of phenomena, including peoples, lands and knowledge (Mbembe 2015: 8-9; Grosfoguel 2007: 211-221; Mignolo 2003: 97-106). It impedes access to the full range of knowledge and it prevents free inquiry and the search for truth, that preeminent province and preoccupation of scholarship. It destroys other knowledge, consistent with the nature of colonialism (Bogues 2007: 206-211; Grosfoguel 2007: 213-217; Mignolo 2007a: 492). One result is a lack of legitimacy and credibility. Students cannot relate and their ex-

perience is alienating. I believe this is a source of the clamour for change (Heleta 2016: 1-3). Furthermore:

Colonialism brought not only theory from the Western academy but also the assumption that theory is produced in the West and the aim of the academy outside the West must be to apply that theory. Its implication was radical: if the making of theory was truly a creative act in the West, its application in the colonies became the reverse, a turnkey project ... One student after another learnt theory as if learning a new language — some remarkably well, others not so well. It is these others, as they stutter in translation, who give us an idea of what is wrong with the notion that to be a student is to be a technician, learning to apply a theory produced elsewhere (Mamdani 2016: 81).

Colonialism refers to “colonial situations enforced by the presence of a colonial administration” (Grosfoguel, 2007: 220). This naturally requires “the implanting of settlements on distinct territory” (Said 1993: 8). Imperialism is the process of spatial and geographic expansion and conquest to subjugate the colonised and create colonies for the metropole. Political freedom may cause doubt about the presence of colonialism, a dualistic interpretation of colonialism and independence as mutually exclusive (Grosfoguel, 2007: 220). Colonialism definitely continues to exist:

... part of the Eurocentric myth is that we live in a so-called ‘post’ colonial era and that the world and, in particular the metropolitan centers, are in no need of decolonization (...) we still live in a colonial world and we need to break from the narrow ways of thinking about colonial relations, in order to accomplish the unfinished and incomplete twentieth century dream of decolonization (Grosfoguel 2007: 221).

Negative stereotypes about people, geography and knowledge are core to colonial and imperial narratives. The imperial imagination, especially objectification and ‘othering’, hinging on biology, geography, animalism, sexuality, gender, lightness and darkness, ‘colour and culture’ and professed absence, whether real or fanciful; enables conquest (Comaroff and Comaroff 1997: 689-703; Kline 1994: 454; Costa 2000: 13; Nyamnjoh 2016: 45; Bron 2017: 1, 22). Intrinsically, these notions are not a sufficient condition for colonial expansion. But they do lend it legitimacy and coherence, thus aiding the enlargement and political aggrandisement of Europe (Said 1993:10).

Marlow, the focal character in Joseph Conrad’s *Heart of Darkness*, says:

... the conquest of the earth, which mostly means the taking it away from those who have a different complexion and slightly flatter noses than ourselves, is not a pretty thing when you look into it too much. What redeems it is the

idea only. An idea at the back of it; not a sentimental pretence but an idea — something you can set up, and bow down before, and offer a sacrifice to ... (Conrad 1973: 10).

Decolonial theory is criticised for being too general, for not emancipating and for having been surpassed by events (Wolfe 2017: 2, 14; Mignolo 2003: 101). The first of the charges may stick. However, decolonial scholarship is innocent on the second and third charges. The aim of decolonial theory goes beyond emancipation to a struggle for revolution and liberation (Mignolo 2007a: 454-470). The modern view posits a “new empire” and the growth of “social fascism” based on the “imposition” of Western “norms” and “the power” of “economic and military globality” (Escobar 2004: 214). Coloniality is evident, also, in much of African economics and politics, littered as it is with cronyism, patronage, grand larceny, sheer thuggery and scant regard for citizens (Meredith 2005). The possibly irrelevant difference is that native elites are the coloniser (Mignolo 2003: 101). Consider this:

In Munich, you do not see or feel coloniality. In La Paz, Bolivia, you feel it all the way, all the time, in your bones: modernity is constantly reproducing coloniality. Which means that the rhetoric of progress, of salvation, of technology, of democracy goes hand in hand with the logic and practice of oppression, racial discrimination [and, my insertion] political concentration of power in the hand of a Creole/Mestizo/an elite.

... modernity not only needed coloniality but ... coloniality was and continues to be constitutive of modernity. From England, you see only modernity and, in the shadow, the ‘bad things’ like slavery, exploitation, appropriation of land (Mignolo, 2007a: 466, 495).

Extractive colonial economics continue to delay African advance while serving the West, and more recently and as ominously, the East as well. Colonialism itself followed detectible African progress. European development and modernity are, as was intended, abetted by colonialism and coloniality (Tamburro 2013: 2-3). Escobar asserts:

The conceptualisation of modernity/coloniality is grounded in a series of operations that distinguish it from established theories. These include: locating the origins of modernity with the conquest of America and the control of the Atlantic after 1492, rather than in the most commonly accepted landmarks such as the Enlightenment or the end of the 18th century; attention to colonialism, post colonialism and imperialism as constitutive of modernity; the adoption of a world perspective in the explanation of modernity, *in lieu* of a view of modernity as an intra-European phenomenon; the identification of the domination of others outside the European core as a necessary dimension

of modernity; a conception of eurocentrism as the knowledge form of modernity/coloniality — a hegemonic representation and mode of knowing that claims universality for itself, ‘derived from Europe’s position as center’. In sum, there is a re-reading of the ‘myth of modernity’ in terms of modernity’s ‘underside’ and a new denunciation of the assumption that Europe’s development must be followed unilaterally by every other culture, by force if necessary — what Dussel terms ‘the developmentalist fallacy’. The main conclusions are, first, that the proper analytical unit of analysis is modernity/coloniality — in sum, there is no modernity without coloniality, with the latter being constitutive of the former. Second, the fact that ‘the colonial difference’ is a privileged epistemological and political space. In other words, what emerges from this alternative framework is the need to take seriously the epistemic force of local histories and to think theory through the political praxis of subaltern groups (Escobar 2004: 217).

Colonial constructions of subject people and knowledge, in which the European university was a complicit export, depend on erroneous if harmful notions, about inherent superiority and inferiority. The “colonial matrix of power” depends on four “domains”. These include the “management and control of knowledge” based on “a geo-political order of knowledge founded on European epistemic and aesthetic principles that legitimised the disqualifications over the centuries of non-European knowledge and non-Europeans aesthetic standards, from the Renaissance to the Enlightenment and from the Enlightenment to neo-liberal globalisation” (Mignolo 2007: 449; see also Grosfoguel, 2007: 217). The European university was instrumental in both colonial expansion and the destruction and displacement of other ways of knowing (Mignolo 2003: 104; Mignolo 2007a: 492). The fictional “neutrality”, “objectivity” and “abstract universalism” of Western knowledge, and the associated notion of a “hierarchy” of knowledge attached to “superior” and “inferior” peoples, drives this epistemic attack (Grosfoguel 2007: 214). Thus:

... the practice of liberation and de-colonization is initiated with the recognition, in the first place, that the colonialization of knowledge and being consisted of using imperial knowledge to repress colonized subjectivities and the process moves from there to build structures of knowledge that ... (Mignolo 2007a: 492).

The understanding that “knowledge” is “colonised” and “must be decolonised” has been around since the middle of the 1970s (Mignolo 2007a: 499). Mamdani (2016: 70) submits:

Rather than acknowledge the plurality of experience and perspective, the uni-

versalism born of the European enlightenment sought to craft a world civilization as an expression of sameness. It is the linear theory of history undergirded by this particularity of vision, and the power that drives it, that we have come to know as Eurocentrism. It is this vision, and this institutional form, that was transposed to the colonies. Decolonization would have to engage with this vision of the undifferentiated human — culled from the European historical experience — which breathed curricular content into the institutional form we know as the modern university.

Colonialism works to “degrade, exploit and subjugate”. Black students, in particular, justifiably object to being “confronted by texts and theories that negate their own history, lived experiences” and “dreams” (Heleta 2016). Thus, colonial curricula malign student image and self-concept and causes students to despise themselves (Mamdani 2016: 79). Unsurprisingly, students feel estranged and cannot relate. This cannot be conducive to learning and so the argument for change rests partly on dignity (Selzer 2017: 6).

3. Decolonisation in law

The “Western theories we use are inadequate to local problems and the European lens does not perceive our complexity”. Thus, some argue for theories that are based on the “key features of South African law and society”. They decry the practice of “starting with existing schools of jurisprudence” developed “elsewhere for different conditions and requirements” and “imposing them on local conditions” (Lenta 2001: 173).

Decolonisation and decoloniality “means working toward a vision of human life that is not ... 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” (Mignolo 2007a: 459). Epistemic decolonisation is “necessary to make possible and move toward a truly intercultural communication; to an exchange of experiences and significations as the foundation of an-other rationality” (Quijano cited in Mignolo 2007a: 499). Decolonisation requires an outlook embodied in a set of perspectives and the question of what is decolonisation does not admit of a single one-dimensional answer. 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 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. We repudiate Western claims to universality of parochial constructions of what is, after all, the common heritage (Allais 2016). Pluriversality is thus the only

true universality.

We recall that:

By delinking ethnic/racial/gender/sexual/epistemic location from which the subject speaks, Western philosophy and sciences are able to produce a myth about a Truthful universal knowledge that covers up, that is, conceals who is speaking as well as the geo-political and body political epistemic location in the structures of colonial power/knowledge from which the subject speaks (Grosfoguel 2007: 213).

Importation of legal ideas assures us of being an “also ran”, aping or translating exogenous experts and sages, and of having nothing hefty to offer the international fellowship of scholars. The true mission is to introduce that “special African flavour”, to understand that trying to “out-Harvard the Harvards” is futile, wasteful and dreary. The task is to provide insights that are accessible to African worldviews but rare in other cosmologies (Mahao 2010: 326; Steyn and Motshabi 1996).

Thus, Africa can teach such propositions as the following. Absolute separation between law and morals is a mirage. Law-making needs no political sovereign, that singular obsession of Western positivist legal theory. Law-making requires no parliament, executive, court or police though these institutions all make law, despite the official constitutional division of labour. Law-making merely uses societal authority and power to prescribe policy. Therefore, international law and micro-legal systems — whether regulating queues or looking, staring and glaring — do exist despite not resembling formal national legal systems. Legal structure is not necessarily a centralised and specialist hierarchy. I can scarcely imagine that otherwise the influential law, science and policy approach of McDougal and Lasswell would have been possible (Idowu 2008; Himonga and Bosch 2000; McDougal and Lasswell 1971; McDougal and Lasswell 1976; Reisman 1983: 182; Reisman 1985: 417; Koh 2009: 502).

Pluriversality requires a genuine “totality” of global knowledge, with its multiplicities theorised all over, that permits a true search for truth. This of course is entirely accurate and fitting (Mignolo 2007a: 497-499; Hudson 2016: 194; Jansen 2017: 156-171). African overreliance on Western scholarship is due to colonial history, on which I have touched; and the history of African colonial universities, which Mamdani (2016: 68-83) sketches.

H L A Hart has great stature as a legal philosopher. W Idowu (2008) has a fresh perspective on Hart's work. Ben Nwabueze (1973 and 1974) has written standard setting monographs on constitutionalism and presidentialism in the African and Asian post colony. The first monograph analyses revolutions, *coups d'état*, acts of secession and constitutional breakdown generally across Pakistan,

Cyprus, Rhodesia, Uganda and Ghana.

The University of Cape Town (UCT) experienced a raw and appalling but gripping conflict over the teaching of African Studies. Among the issues was whether “disadvantaged” students should be required to read primary sources, as astounding as that sounds. One protagonist said the material might be over the heads of the students (Graaff 1998: 78). These students are not ready for the conventions of academic discourse (Hartman 1998: 34). A synthesis of secondary materials would serve these students better (Hall 1998a: 91; Hall 1998b: 41-48). Mamdani (1998a: 13 and 1998b: 70) and Jansen (1998: 111) disagree.

Jansen challenges what he perceives as a deficit model of black students, something black managers suffer in parts of the private sector, and is thus not unique to higher education, though I suspect it is both unintended and intended (Human 1991). He says students overcoming large obstacles to enter elite institutions are greatly resourceful and able. Further, the institutions should be concerned at their own failure to teach students effectively as they find them. Universities should be anxious about their inability to teach in such languages as IsiXhosa and Sesotho.

The students may be disadvantaged socially and economically. But, this hindrance does not define the entirety of the class of student, such as it may be. Social and economic handicap is not equivalent to cognitive difficulty. Cognitive challenge is not necessarily intellectual. If there is an obstinate and total failure of intellect, university experience has no benefit for that individual student. Unlike the helicopter teachers slated by Grant (2017), we must not spoon feed, drop standards and plain make it easy (Jansen 1998: 108-111). Otherwise, our students will fail, attain second best status or be ineffective professionally.

Helicopter teaching sometimes stems from feelings of pity. This compassion has little to do with students as it centres on the teacher’s feelings, albeit for the student. Helicopter teaching means well obviously but it constitutes an indulgent self-preoccupation. Students should be compelled to read primary sources, particularly court decisions, in order to acquire and appropriate the conventions of academic and legal discourse. Reading court decisions teaches the most about legal skills as logic, reasoning, argumentation, reading, writing, listening, speaking and about the internal structure of law and legal imagination.

There is too much law for students to read everything in the original but students must read certain seminal court decisions directly. Students of constitutional law and human rights law, possibly criminal law, should arguably read the Constitutional Court decision declaring capital punishment to be unconstitutional. Students deserve a dialogue with original texts. That dialogue, and the attending battle to extract and literally wring meaning and shape the material and assign

meaning is irreplaceable, both because and despite the challenge. Students deserve the consequential exhilaration, to say nothing of the confidence and acuity. Then, students might be competent to appropriate, manipulate and create knowledge.

The fact that some students find this a tussle raises important questions about available academic success mechanisms. The point is merely consequential even though it leads to major challenges regarding finance, staffing, infrastructure and logistics and so on. Our job is to face these questions head on and not to put this cart before the horse. Academic support questions are not logically anterior to the retention of proper academic standards. It is a mistake to anticipate and concede defeat, yielding to arbitrary expectations from whatever source. Grant's counsel is to set tough but achievable standards, hold students accountable for their own learning, distinguish the slackers from the strugglers and support the strugglers (Grant 2017: 30).

Appropriate perspective, content and context can better teach the functioning of the law. A primary focus on Africa directs attention to the issues, concerns, problems and debates of the continent. This being so, I use as illustrative aids, issues such as constitutional integrity and coherence, governance, international criminal responsibility and the place of indigenous law and African values in modern continental legal systems.

Ettienne Mureinik indicated that the interim constitution moved South Africa from a "culture of authority" to a "culture of justification" (Mureinik 1994: 32). This aphorism sprang from the experience of capricious legalism that he carried to Oxford University, where he read under a leading 20th century legal, moral and political philosopher, Ronald Dworkin. Mureinik's later works adapted Dworkin's jurisprudence to South Africa. I suspect Mureinik used "justification" to adapt Dworkin's interpretive devices, "integrity" and "coherence", to what was an arid legal system (Mureinik 1988: 207-208; Dworkin (1977, 1985 and 1986). Indeed, a former chief justice has demonstrated clearly the resulting benefits well beyond 1994 (Chaskalson 2003: 590-609).

An underlying constitutional issue is how to facilitate the rule of law to deepen economic development, human rights and human dignity. This approach is attentive to the matters raised by Nwabueze (1973 and 1974). Cogent scholarship labels the South African Constitution a neo-*apartheid* charter that masks ongoing domination. The Constitution, so runs the argument, deifies a "teleological" kind of "whiteness" as aspiration, if as an average black South African you want be treated as human. The Constitution fails to dislodge white supremacy and constitutes a post-1994 conquest (Madlingozi 2017). This version of a complex and important thesis is unavoidably basic for present purposes.

There is unease at the failure of, apparently most, African governments

and universities to accord proper status to indigenous law and African values. In South Africa, there is a penetrating study but little movement on this vital matter (Nhlapo 1995; Cornell and van Marle 2005: 195; Mollema and Naidoo 2011; Bohler-Muller 2005; Keevy 2009: 19; Bennett 2011; English 1996; Malan 2014; Himonga, Taylor and Pope 2013: 370; Motshabi and Volks 1991).

The educational problems of colonisation and coloniality are considerable. But, there is rich and significant opportunity to decolonise. Opportunities to reflect on ourselves critically, such as the colloquium triggering my contribution are important. Scholarship, academic linkages, texts, content and context all offer a chance to do something tangible. Ultimately, instructional language is a complex matter that raises policy issues but has seismic potential.

Endnotes

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