

Decolonising the South African legal curriculum: Challenges and prospects

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1 Introduction

South Africa's legal system reflects a complex colonial history that has significantly influenced the teaching and understanding of customary law.¹ While the Constitution of South Africa officially recognises customary law, it also mandates that customary law be assessed against constitutional standards, including the principles of equality and human rights.² Despite this, the customary law curriculum in South African Institutions of Higher learning including the University of Limpopo disproportionately highlights negative customs such as patriarchy and male primogeniture. This narrow focus risks reinforcing the misconception that customary law is inherently discriminatory and incompatible with gender equality, thereby undervaluing its dynamic and evolving nature.

This chapter seeks to address this gap by exploring the process of decolonising the legal curriculum, particularly the teaching of customary law, to better align with South Africa's post-apartheid constitutional framework. Decolonisation here refers to transforming the curriculum to include not only the historical critique of customary law but also its contemporary relevance and future potential, emphasising positive African legal philosophies like ubuntu. The scope of this chapter

1 TW Bennett 'Legal pluralism and the family in South Africa: Lessons from customary law reform' (2011) 25 *Emory International Law Review* 1029.

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

focuses broadly on the customary law modules taught in South African law faculties, recognising the need to contextualise and enrich legal pedagogy. This includes assessing the challenges of such transformation and proposing practical approaches to curriculum reform.

2 Literature review and theoretical framework

There is an emerging body of scholarship on decolonising legal education in Africa, emphasising the need to integrate indigenous legal traditions and perspectives often marginalised in colonial and Western-dominated curricula.³ Himonga and Diallo argue for the inclusion of 'living customary law' – the contemporary social customs that reflect evolving indigenous norms – in legal education to foster a more nuanced understanding of customary law's role in modern society.⁴

Moreover, scholars have highlighted the importance of linking customary law education with constitutional values, especially the supremacy of the Constitution in ensuring human rights and equality.⁵ This involves critical engagement with case law and legislative reforms that have reshaped customary law post-apartheid.

However, existing literature also points to significant challenges in curriculum transformation, including resistance from entrenched academic traditions, limited resources, and the difficulty of balancing respect for indigenous laws with universal human rights standards.⁶ These debates situate this chapter within broader discussions on legal pedagogy reform aimed at decolonisation and relevance to South Africa's diverse legal landscape.

3 S Zondi 'Decolonising legal education in Africa' (2019) 53 *Law and Society Review* 567.

4 C Himonga & F Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20 *PER / PELJ*.

5 T Vilakazi 'Constitutionalism and customary law: Teaching challenges and opportunities' (2018) 11 *African Journal of Legal Studies* 133.

6 N Mkhize 'Challenges to curriculum transformation in South African Law Faculties' (2019) 69 *Journal of Legal Education* 45.

3 Case law as a foundation for curriculum reform

3.1 South African case law

The landmark case of *Bhe v Magistrate Khayelitsha*⁷ and related matters significantly transformed customary law by declaring the rule of male primogeniture unconstitutional, the Constitutional Court ruled that the customary law rule discriminated unfairly against women and illegitimate children, violating constitutional protections against gender and birth discrimination. While this case is often taught to expose the negative history of customary law, it is equally important to highlight its reformatory impact and the Constitutional Court's role in evolving customary law to meet contemporary standards of justice and equality. Teaching this case within the curriculum should emphasise both the historical context and the ongoing development of customary law under constitutional supremacy.

4 Decolonising the customary law curriculum: A three-step approach

To move beyond a deficit-focused narrative, this chapter proposes a three-step pedagogical model for teaching customary law:

4.1 Teaching the historical context of customary law

Students should learn about the origins of customary law within indigenous African societies, acknowledge its dynamic nature and the impact of colonialism. This includes the critical examination of laws such as the Black Administration Act 38 of 1927, which codified certain customary practices in ways that often-undermined indigenous autonomy.⁸

7 2005(1) SA 580 (CC).

8 Himonga & Diallo (n 4).

4.2 Teaching the present realities

The curriculum must include Customary law as it exists today, recognising reforms brought about through constitutional mandates and landmark case law. This step incorporates the notion of 'living customary law' particularly, how communities practise and adapt customary norms in contemporary contexts.⁹ This is important as it would assist students to actually see that Customary law is very crucial and positively impacts livelihoods for many African individuals even in the current constitutional dispensation.

4.3 Teaching the future prospects

Students should be encouraged to engage in critical research premised on exploring how customary law can evolve to better promote constitutional values such as equality and human dignity. This includes understanding African philosophies like ubuntu, which emphasise community, respect, and restorative justice.

Ubuntu, which is roughly translated as 'a person is a person through other persons', underpins many indigenous legal systems and has been recognised by the Constitutional Court as a foundational value promoting solidarity, compassion, and human dignity. The Court in *S v Makwanyane* emphasised ubuntu's principles in abolishing the death penalty, underscoring values of humanity and morality in legal decisions.¹⁰ In *Du Plooy v Minister of Correctional Services* the Court further illustrated the role of ubuntu in promoting compassion within correctional services, framing humane treatment as a constitutional imperative.¹¹ In *Afri-Forum v Malema*, the Equality Court identified twelve principles of Ubuntu, including restorative justice, reconciliation, and mutual respect, reinforcing its relevance in contemporary jurisprudence.¹²

Incorporating ubuntu into the legal curriculum would be one example of a positive framework for understanding African customary

9 Mkhize (n 6).

10 1995 3 SA 391 (CC).

11 2004 3 All SA 613 (T).

12 2011 6 SA 240 (EqC).

law beyond stereotypes of oppression, illustrating its potential for contributing to justice and social cohesion.

Despite its importance, curriculum transformation faces several challenges. This includes Institutional resistance which may occur when traditions may resist the inclusion of indigenous legal perspectives.¹³ These challenges must be acknowledged and addressed through policy support, faculty development, and collaborative research.

5 Recommendations for curriculum transformation

The Law faculties should incorporate ethnographic and community-based studies to teach customary law as it is practised today. Furthermore, ubuntu and African philosophies should be foregrounded as positive values in legal education to provide balanced perspectives. Curriculum development should encompass dedicated courses on customary law transformation and decolonial legal pedagogy. Lastly, there should be encouragement of critical and comparative research including motivating students to explore how customary law can evolve in dialogue with constitutional norms.

6 Conclusion

This chapter argues that decolonising the South African legal curriculum requires a comprehensive approach that goes beyond critiquing the negative aspects of customary law to also recognise its constitutional transformation and future potential. By adopting three-step teaching criteria: the history, present state, and future possibilities of customary law and incorporating African legal values such as ubuntu, legal education can better reflect South Africa's diverse socio-legal realities. This transformation promises to enhance critical thinking, promote cultural awareness, and prepare law students to engage with customary law in a manner that respects both tradition and constitutional democracy.

13 NS Matlou 'Curriculum decolonisation and revisionist pedagogy of African customary law' (2019) 22 *Potchefstroom Electronic Law Journal*.