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## Abstract

Fees-related protests in South African universities have pushed the decolonisation of the law curriculum to the front burner of academic discourse. As part of the curriculum, African customary law was marginalised in the courts, distorted by policy makers, and largely labelled as unfriendly to women and younger male children in issues of marriage, property, and succession. However, this normative system is shaped by the manner in which people adapt norms with agrarian origins to the socio-economic changes caused by colonial rule. In this historical context, scholars focus more on conflict of laws than on people's adaptation of indigenous norms to socioeconomic changes. So, in what ways should universities handle the pedagogy of African customary law? This article argues that colonialism endowed Africans with a new socio-legal identity, which questions the mainstream conceptualisation of customary law into "official" and "living" versions. Accordingly, the law curriculum should reflect this new identity and acknowledge the self-sustaining legacy of colonialism as a reality check on decolonisation. As the article suggests, re-conceptualising African customary law offers a framework for legal integration, especially in South Africa.

## Keywords

African customary law pedagogy; curriculum decolonisation; academic literacy; student protests.

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Fellow educators – are we not lost?  
Do we know where we are?  
Remember where we have been,  
Or foresee where we are going?<sup>1</sup>

## 1 Introduction

Although policy makers have long acknowledged the existence of challenges in legal education in sub-Saharan Africa,<sup>2</sup> the relevance of the university curriculum came under intense scrutiny only as one of the issues raised by students' protests in South Africa.<sup>3</sup> A notable demand of these protesters is curriculum decolonisation, an issue that has captured the attention of scholars and policy makers in the last few years. For example, at the Higher Education Summit of October 2015, the Minister of Higher Education, Science and Technology, Blade Nzimande, called on universities to "shed all the problematic features of their apartheid and colonial past." Largely due to its limited scope,<sup>4</sup> this paper's contribution to the decolonisation debate is confined to a single question: In what ways should universities handle the pedagogy of African customary law?<sup>5</sup> One key reason informs this focus on customary law.

As the introductory quote above shows, the relevance of the curriculum is usually questioned when teachers fail to connect their teaching to the larger society. Just like indigenous knowledge systems, African customary law bore and arguably still bears the burden of marginalisation, derision, and distortion in our classrooms.<sup>6</sup> Indeed, it has taken several post-colonial decades for it to become compulsory in some law schools. Since customary law affects the lives of most Africans, it affects African legal identity. In this sense, it occupies a unique place in the debate on the decolonisation of the

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<sup>1</sup> Huebner "Poetry and Power" 231.

<sup>2</sup> See, for example, Iya 2003 *Third World Legal Stud* 141; Modiri 2014 *Acta Academica* 2; Greenbaum 2012 *Stell LR* 16-18.

<sup>3</sup> Disemelo 2015 <https://mg.co.za/article/2015-10-29-student-protests-are-about-much-more-than-just-feesmustfall>.

<sup>4</sup> For the epistemology of curriculum decolonisation and its race and class struggle elements, see Le Grange 2016 *SAJHE*.

<sup>5</sup> "Customary law" sounds derogatory (Mamdani *Define and Rule* 6, 20). Given the author's view that African customary law is constructed from the adaptation of indigenous norms to socio-economic changes, the reader should expect the usage of the term in this article to sometimes appear confusing, and for it to be used in both the singular and the plural senses.

<sup>6</sup> Himonga 2010 *PSILR* 54.

law curriculum. Here, pertinent questions on academic literacy include the following: What should teachers teach as African customary law? What socio-legal theories should inform African customary law pedagogy? By which methods should it be assessed?<sup>7</sup> Exploring these questions would be unrealistic unless the meaning of decolonising the university curriculum is unpacked.

For this purpose, I look to Pinar's description of curriculum theory as "the interdisciplinary study of educational experience."<sup>8</sup> Here, educational experience encompasses the attitudes, values and perceptions that inform the stories teachers tell students about their past, present, and future.<sup>9</sup> As Arendt argued in the context of the United States, it demands that teachers, as representatives of the world that learners enter, take responsibility for learning by presenting it accurately and fairly.<sup>10</sup> In this sense, the literature on curriculum decolonisation reveals that the university curriculum is perceived as a carrier of colonialism.<sup>11</sup> Conversations on this subject trace this perception to the Eurocentric design of the curriculum and its suppression of African world views.<sup>12</sup> Much of this suppression lies in the pursuit of academic literacy through foreign languages such as English, French, and Portuguese. For example, Boughey and McKenna show how the dominance of the autonomous model of literacy in South Africa divorces students from their social contexts by perceiving "language use as the application of a set of neutral skills".<sup>13</sup> Demands for curriculum decolonisation therefore seek to end "the domination of Western epistemological traditions, histories and figures", and instead to focus on works by Africans about African problems.<sup>14</sup> These demands are fuelled by perceptions of injustice, oppression and, arguably, confused identity, which persisted at the end of colonial rule and apartheid. Indeed, the demands for decolonisation demonstrate the slow pace of transformation in postcolonial and post-apartheid structures. As Mbembe observes, "there is something

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<sup>7</sup> To reflect the views of many students I interacted with, one might also add the issue of the qualifications and/or training of those who teach African customary law.

<sup>8</sup> Pinar *What is Curriculum Theory?* 2

<sup>9</sup> Grumet "Restitution and Reconstruction of Educational Experience."

<sup>10</sup> Arendt "Crisis in Education."

<sup>11</sup> For example, see Smith *Decolonising Methodologies*; Letsekha 2013 *IJTL* 8.

<sup>12</sup> Theconversation.com is a popular forum. See, for example, Mgwashu 2016 <https://theconversation.com/universities-cant-decolonise-the-curriculum-without-defining-it-first-63948>; Wingfield 2017 <http://theconversation.com/what-decolonised-education-should-and-shouldnt-mean-72597>.

<sup>13</sup> Boughey and McKenna 2016 *CriStal* 1, 3.

<sup>14</sup> Molefe 2016 *World Policy J* 32.

profoundly wrong when ... syllabuses designed to meet the needs of colonialism and apartheid ... continue well into the liberation era."<sup>15</sup>

The law curriculum does not escape Mbembe's observation. The four-or five-year LLB programme, which is the standard qualification for lawyers, is heavily Eurocentric.<sup>16</sup> Its Eurocentrism is unsurprising, given that the LLB programme mirrors the format in other Commonwealth universities.<sup>17</sup> Notably, the content of Jurisprudence largely neglects African philosophy, except for recent efforts towards ubuntu theorisation in South Africa.<sup>18</sup> Since descriptions of curriculum decolonisation seek to highlight African worldviews, I offer a revisionist pedagogy of law as a starting point for attaining this objective. In what follows, I contextualise legal revisionist pedagogy and outline the structure of this article.

### **1.1 Problem context**

Law teachers are not extra-terrestrials. Rather, they are products of an unyielding Western cultural indoctrination that begins from infancy. Consequently, they deliver the law curriculum in terms of their knowledge of law's history and role in society. Given the conscious and unconscious presentation of colonialism as a civilising mission,<sup>19</sup> it is easy for law teachers to neglect the fact that colonialism is an inhumane, predatory enterprise, which left an irreversible mark on law and society in Africa. Arguably, one of its most notable marks was left on African customary law. Until recently this subject was not taught in an interdisciplinary way that links to subjects such as theology, sociology, political science, economics, and anthropology.<sup>20</sup> Importantly, it is still largely perceived to be hostile to women and younger male children, especially in the spheres of marriage, property, and succession. However, aside from the modest literature on colonial and apartheid distortions of African customs, scholars and policy makers rarely emphasise how customary law's perceived hostility flows from the dissonance between its agrarian, communal features and its application in modern, individualistic conditions. Furthermore, the mainstream conceptualisation of African customary law is criticised as

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<sup>15</sup> Mbembe 2016 *AHHE* 32.

<sup>16</sup> Wildenboer 2010 *Fundamina* gives a historical account of the legal profession in South Africa.

<sup>17</sup> Iya 2001 *J Leg Ed* 359.

<sup>18</sup> Muvangua and Cornell *Ubuntu and the Law*; Mokgoro 1998 *PELJ*.

<sup>19</sup> Mudimbe 1985 *Afr Stud Rev* 181; Bain 2003 *Int Relat* 64-65; Mamdani *Citizen and Subject* 220.

<sup>20</sup> Admittedly, this non-interdisciplinary accusation can also be levelled against other law subjects.

ambiguous,<sup>21</sup> while conflict of normative orders encourages an antipodal approach to customary law's interaction with state law.<sup>22</sup> In the foregoing context, is it realistic to decolonise the law curriculum without reversing the manner in which law teachers project the identity of African customary law? Drawing primarily from field insights in South Africa and Nigeria, this article uses the didactic tool of legal revisionism to anchor two arguments.

Legal revisionism, as explained in Part III below, illustrates the need for a reality check in the decolonisation debate. This reality check may be referred to as an African legal identity crisis. The failure of mainstream legal scholarship to explain the impact of colonialism on the African psyche is evident in scholars' ambiguous categories of official and living customary law.<sup>23</sup> While they define official customary law as the version perceived by observers, especially legal experts, outside the community in which the concerned norms are observed, they define living customary law as the norms that regulate people's daily lives.<sup>24</sup> Such intrinsically insular categorisation misses two crucial points. Firstly, the self-replicating effects of the colonial experience on Africans are so radical that the commencement of colonial rule arguably ushered in a new normative era. As a normative historical marker, therefore, Africa's colonial experience demands a distinction between indigenous African law and African customary law.<sup>25</sup> While indigenous laws are surviving precolonial norms which people still observe in their ancient forms, customary laws are adaptations of these ancient norms to legal, religious, economic, and cultural changes. Secondly, the mainstream categorisation of customary law ignores the impact of the interaction between of legal orders on the normative behaviour of people who observe indigenous laws.<sup>26</sup> Indeed, this categorisation was arguably prompted by state recognition of norms with agrarian origins without due consideration of the foundational values that shape(d) their adaptation to socioeconomic changes. If attention is focussed on the manner in which these foundational values inform African people's

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<sup>21</sup> For a critique of customary law's conceptualisation, see Diala 2017 *J Legal Plur*.

<sup>22</sup> State law is essentially transplanted European laws adopted or adapted to local circumstances.

<sup>23</sup> For a sample of this categorisation, see Himonga and Bosch 2000 *SALJ* 319; Bennett "'Official' vs 'Living' Customary Law"; Bekker and Van Niekerk 2010 *THRHR* 679; Bekker and Maithufi 1992 *JJS*; Van Niekerk 2012 *SUBB Jurisprudentia* 6.

<sup>24</sup> As above.

<sup>25</sup> Indigenous African law and African customary law are used in both the singular and the plural senses.

<sup>26</sup> Diala 2017 *J Legal Plur* 152.

encounter with modernity, the labels of "official" and "living" customary law become unnecessary. These two points will be expanded in Part II.

Furthermore, law, especially customary law, should be taught with a revisionist outlook. Revisionist pedagogy exposes colonialism as an imperialistic enterprise, rather than as the civilising mission that is often portrayed to students.<sup>27</sup> Colonialists (and their citizens) saw nothing wrong with seizing African natural resources, dividing the loyalties of African peoples, exploiting their ethno-religious divisions, and killing those who resisted them. For example, Belgium's King Leopold II cruelly plundered the Congo territories in a manner unparalleled in recent history, thereby contributing "in a large way to the death of perhaps 10 million innocent people".<sup>28</sup> Yet very little of his murderous looting is heard in classrooms. Significantly, Africans accepted colonial indoctrination, which manifests in a relentless demand to become more Western in thought, language and, of course, learning. This acceptance, which Odora-Hoppers and Richards labelled "second generation colonialism",<sup>29</sup> largely remains with us. Despite the noise made about the decolonisation of the university curriculum in the last few years, colonialism is not being unmasked as a successful ideological struggle for African beliefs (religion), way of life (culture), and perception of the world (philosophy). Part III shows why a revisionist pedagogy of African customary law is required for a meaningful engagement with other subjects that form part of the law curriculum. In Part IV several suggestions regarding this revisionist pedagogy are offered. The article ends by drawing attention to the potential value of re-conceptualising African customary law.

## 2 The identity of African customary law

Historically, universities symbolised the nation-state, and served them by promoting and protecting their cultural identity.<sup>30</sup> This historical mission explains why European settlers in Africa established universities primarily as symbols, servers, and shippers of the European brand of civilisation in European colonies.<sup>31</sup> The stress on "European" is deliberate. Europeans modelled the architecture of African universities on their own universities;

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<sup>27</sup> The imperial anthem, "Rule Britannia, Britannia rule the waves ..." is still widely admired by university students on YouTube.

<sup>28</sup> Hochschild *King Leopold's Ghost*; Dummett 2004 <http://news.bbc.co.uk/2/hi/africa/3516965.stm>.

<sup>29</sup> Odora-Hoppers and Richards *Rethinking Thinking* 7.

<sup>30</sup> Readings *University in Ruins* chs 2 and 3.

<sup>31</sup> Mamdani "Decolonising the Post-colonial University"; Pietsch *Empire of Scholars* pt 1.

they drew most of their faculty from Europe, and, of course, designed their curricula using European models. Readings gave an excellent analysis of how these universities evolved from three eras. These eras are reason, culture, and excellence.<sup>32</sup> Significantly, European universities were still in the second era when they were exported to Africa. As integral aspects of the colonial project, therefore, the curricula of African universities "played an instrumental role [in] promoting and imposing the Eurocentric 'ways' and worldviews while subjugating everything else."<sup>33</sup> Given their foundations, these universities left a huge mark on the African intellectual psyche. In numerous schools, for example, teachers favour Plato and Shakespeare over Chinua Achebe, Ngugi wa Thiong'o, and Ayi Kwei Armah. Literary critics of white supremacy such as Peter Abrahams, Miriam Tlali, Alex La Guma, and Nadine Gordimer were banned or simply ignored.

However, the university is only one aspect of a systematic and highly successful cultural promotion of Western supremacy. Indeed, one could say that this promotion was driven by conscious efforts to "erase the historical, intellectual and cultural contributions of Africa and other parts of the 'non-Western' world to our common humanity."<sup>34</sup> In this respect, Kelley notes:<sup>35</sup>

The colonial mission to 'civilize' the primitive is just a smoke screen. If anything, colonialism results in the massive destruction of whole societies—societies that not only function at a high level of sophistication and complexity, but that might offer the West valuable lessons about how we might live together and remake the modern world.

Limitations of space discourage a full exposition of the impact of colonialism on the African psyche.<sup>36</sup> To highlight a few, Africans used Christianity to nullify the female deity prevalent in many communities, thereby entrenching patriarchy with its focus on "a male God, his son, his bishops and priests".<sup>37</sup> Africans shaped their worldview with franchises and movies such as *Star Wars*, *James Bond*, and *The Good, the Bad and the Ugly*. They heard their elders say frequently – and with great admiration – that "the white man is

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<sup>32</sup> Readings *University in Ruins* (the erosion of state sovereignty by globalisation turned universities into transnational corporations, forcing them to replace national culture and identity with the discourse of capitalist "excellence").

<sup>33</sup> Heleta 2016 *Transformation in Higher Education 2*.

<sup>34</sup> Heleta 2016 *Transformation in Higher Education 2*.

<sup>35</sup> Kelley "Poetics of Anticolonialism".

<sup>36</sup> For intellectual responses to colonialism in South Africa, see Masilela "African Intellectual and Literary Responses".

<sup>37</sup> Amadiume *Male Daughters, Female Husbands* 123 shows how "indigenous customary laws associated with woman-to-woman marriage became confused as a result of its reinterpretation according to cannon law and Christian morality". See ch 8 titled "The Erosion of Women's Power" 134.

god". They imbibed lifestyles alien to humanistic African values, and acquired a frightening sense of inferiority to people who had pillaged their resources and killed, raped, and maimed their ancestors. As the editor of *Current Affairs* noted in 2017, "One of the cruellest aspects of colonialism is the way it forces the colonized into servility and obedience".<sup>38</sup> Today, not many appreciate that "colonial domination required a whole way of thinking, a discourse in which everything that is advanced, good and civilised is defined and measured in European terms".<sup>39</sup> The impact of colonialism is so enduring that literature on Greek and Roman history dominate many African libraries, while some history books still teach that Mungo Park discovered the River Niger. Naturally, law did not escape the cultural impact of colonialism. So, the issue is not whether colonialism altered the identity of indigenous African laws. The issue is the extent of this alteration.

## **2.1 What the scholars say**

On the one hand, scholars like Chanock and Snyder have argued that customary law is not a remnant of the pre-colonial past.<sup>40</sup> Rather, it is the product of normative struggles between various interest groups during and after the colonial period.<sup>41</sup> These struggles range from property contestations to political power grabbing and claims of gender superiority. A brief illustration of the context of these struggles will suffice. Put simply, European colonialists encountered African men who were understandably suspicious of their motives, or anxious to subjugate their wives.<sup>42</sup> They met chiefs and elders who claimed powers they never exercised, or magnified the source, purpose, and range of their powers.<sup>43</sup> They also met ambitious Africans who, metaphorically, jumped into bed with their economic and political aims.<sup>44</sup> Significantly, the colonialists generally wanted to maximise their economic exploitation of the natives and discourage rebellion.<sup>45</sup> Accordingly, they were not overly concerned with the veracity of the customs presented to them.<sup>46</sup> These presentations of customs, the processes of interpreting customs in the courts, and the systematic cultural, educational, and spiritual indoctrination of Africans subject to indigenous

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<sup>38</sup> Robinson 2017 <https://www.currentaffairs.org/2017/09/a-quick-reminder-of-why-colonialism-was-bad>. Also see Césaire "Discourse on Colonialism" 43.

<sup>39</sup> Kelley "Poetics of Anticolonialism".

<sup>40</sup> Chanock *Law, Custom and Social Order*; Snyder 1981 *J Legal Plur* 76.

<sup>41</sup> Claassens 2011 *Acta Juridica* 176.

<sup>42</sup> Nwanesi *Development, Micro-credit and Women's Empowerment* 36-37.

<sup>43</sup> Chanock *Making of South African Legal Culture* ch 12.

<sup>44</sup> Mamdani *Citizen and Subject* 17.

<sup>45</sup> Commission of Enquiry *Report* 24-30.

<sup>46</sup> Holleman 1973 *Law & Soc Rev* 607.



law influenced the construction of African customary law. Seen from this "construction" viewpoint, the pre-colonial identity of African customary law is lost.

On the other hand, there are some scholars who believe that indigenous African laws retain their pre-colonial identity, and therefore deserve protection from the incursions of state law.<sup>47</sup> Ostensibly goaded by conflict of normative orders, these scholars raise alarm at legislative interventions affecting indigenous law.<sup>48</sup> This protectionist attitude underlies the mainstream classification of customary law into living and official versions, with the perhaps unintended impression that living customary law is authentic, while official customary law is inauthentic. For the reasons given below, the categorisation of customary law into "official" and "living" versions demonstrates the confused legal identity of Africans.

### 2.1.1 *A misplaced categorisation*

It is easy to sympathise with the justifications for the scholarly categorisation of African customary law. From the late eighties, studies by the Women and Law in Southern Africa Research and Education Trust (WLSA) began to highlight disparities between the customs observed by people and those recognised by postcolonial, post-apartheid governments. Specifically, WLSA's research "exposed the state-recognised customary law in Southern Africa as not only rigid, but also largely distorted versions of the precolonial, pre-apartheid customary law."<sup>49</sup> Significantly, this perception of customary law is not exclusive to southern Africa. A historian noted that the court clerks who acted as interpreters to Warrant Chiefs and District Commissioners in Nigeria were "generally men of 'little dangerous knowledge'".<sup>50</sup> Often, their limited language abilities, pecuniary interests and power motives influenced their presentation of indigenous law to British officials.<sup>51</sup> Their reconstruction of indigenous norms was clearly evident in the widespread misrepresentations of gender relations from relational to hierarchical.<sup>52</sup> However, the empirical reality is that distortions of customs form part of the adaptation of indigenous law to socio-economic changes. As explained

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<sup>47</sup> See, for example, Kult 2000 *Ind Int'l & Comp L Rev*; Pieterse 2000 *De Jure*; Rautenbach and Du Plessis "Reform of the South African Customary Law of Succession" 336-360.

<sup>48</sup> For reference to these authors, see Himonga "Future of Living Customary Law".

<sup>49</sup> Diala 2017 *J Legal Plur* 143.

<sup>50</sup> Afigbo *Warrant Chiefs* 111.

<sup>51</sup> Afigbo *Warrant Chiefs* 106-107; Akoma 2009 *Res Afr Lit* 90-92.

<sup>52</sup> Walker *Women and Gender*; Hafkin and Bay *Women in Africa* 55; Achebe *Farmers, Traders, Warriors, and Kings* 164-171.

below, other than religious laws and the imposed European laws that became state laws, there are only two categories of African laws: indigenous law and customary law.

As stated in part I, indigenous laws are ancient norms which people still observe in their precolonial forms. Many of these norms, like human sacrifices, widowhood cleansing and regicide are fast disappearing because they are no longer suited to modern conditions. Others like the male primogeniture rule and women's lack of matrimonial property rights persist because they find support in some attitudes and social settings. Put differently, some indigenous laws survive for various reasons such as tradition, agrarian livelihoods, state recognition (example, codifications, restatements, and precedents), and people's failure to exercise agency to assert change. For example, in the past, property was administered by the oldest male in the family largely because the security of the family required a strong leader who was capable of defending the household from enemies and certain not to leave the family (to marry into another family).<sup>53</sup> Furthermore, male heirs used deceased persons' estates to care for women and children because the agrarian, close-knit nature of society left them no choice.<sup>54</sup> Today, socio-economic changes such as acculturation, urbanisation and the changing forms of property make it difficult for heirs to fulfil their duty of care, thus leading to agency-driven changes in the application of many customs. The normative build-up to these changes created a dissonance between people's practices and government perceptions of customs, thereby prompting references to living customary law. But these references are unnecessary.

If norms are "living" merely because they are being observed, then one may argue that all laws such as criminal and commercial laws are living. Yet no one refers to living criminal law or living commercial law. Indeed, this analogy implies that the male primogeniture rule, which is commonly regarded as official customary law, would be living law because it is widely observed in sub-Saharan Africa.<sup>55</sup> Primarily because male primogeniture is

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<sup>53</sup> Mbatha 2002 *SAJHR*; Okoro *Customary Laws of Succession* 4-6.

<sup>54</sup> Diala 2014 *AHRLJ*.

<sup>55</sup> This is evident in litigants' contestations. See, for example, *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC); *Onyibor Anekwe v Mrs Maria Nweke* 2014 All FWLR (Pt 739) 1154; *Ukeje v Ukeje* 2014 11 NWLR (Pt 1418) 384-414. See also Mbatha 2002 *SAJHR*.

ossified in codes, textbooks, and precedents, it has borne the brunt of criticisms of African customary law by judges and academics.<sup>56</sup>

Furthermore, living customary law is widely acknowledged to be flexible, a feature that supposedly distinguishes it from official customary law.<sup>57</sup> However, precedents and codifications are not cast in stone wherever there is political or judicial will for change. Importantly, the living and official categories of customary law are products of people's attitudes to indigenous law. Here, people include official and private actors, in line with the blurred nature of normative behaviour in contemporary social fields. Communities and officials engage in adaptation of norms to socio-economic changes, thereby making the living and official versions of customary law indistinguishable.<sup>58</sup> Accordingly, there is no need to append the word "living" to African customary law, since customary law was irrevocably affected by the radical socio-economic changes caused by colonial rule.

As argued here, colonialism's introduction of socio-economic changes was so disruptive that it marked a new normative era for Africans. These changes forced adjustments in the behaviour of Africans, of which customary law is the product. While indigenous law represents precolonial norms untouched by these adjustments, customary law is constructed by its observers, arbiters, and regulators. This construction process, which is driven by people's adaptation of indigenous norms to socio-economic changes, should reflect in the pedagogy of customary law. By so doing, it will expose the altered identity of African customary law.

In what follows, the foregoing arguments are further strengthened with a brief analysis of the major influences on the identity of African customary law.

## **2.2 Major influences on customary law's identity**

The first influential element is urbanisation. Colonial rule changed the agrarian social settings in which indigenous laws emerged and replaced these settings with the modernity we know today. There seems to be inadequate appreciation of the dissonance between communalistic customs that emerged in these agrarian settings and our individualistic modern settings.<sup>59</sup> In any case, it is unrealistic to expect agrarian norms to remain

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<sup>56</sup> Hinz "Bhe v the Magistrate of Khayelitsha" 274-276.

<sup>57</sup> Himonga and Bosch 2000 *SALJ* 319.

<sup>58</sup> Diala 2017 *J Legal Plur* 152.

<sup>59</sup> Nhlapo 1991 *Acta Juridica* 138, 141, 145-146.

unaffected after encountering radical changes such as bridges, mines, airports, industrialisation, migrant labour, independent income, and Western education. Poor appreciation of the dissonance between modernity and customary laws' origins manifests in the hypocritical attitudes towards changes in indigenous law. An example of these attitudes manifested during this author's focus group discussions with traditional leaders in 2015. During one meeting, Chief A vehemently opposed women's right to matrimonial property, shouting, "[t]his is not our custom! It is not what our forefathers practiced!" Countering him on the need for change, Chief B pointed out that Chief A was resisting change even though he was speaking English, a foreign language, was wearing designer shoes from Italy, and clutching car keys made in Germany. He went on to explain that the customary law of matrimonial property developed in social settings in which income was jointly produced and women were re-absorbed into their families after divorce. He gave examples of women from their community who sustain their husbands with their independent income, pointing out the "wickedness" and "absurdity" of denying them property after divorce.<sup>60</sup>

Chief B's argument demonstrates the futility of protectionism in issues concerning the reform of indigenous laws. Even when the core elements of some customs remain, their applications do change. For example, in many West African communities, the presence of the groom at his wedding may be replaced with his father or brother if he is far away, while empirical studies reveal women's increasing claims to land in southern Africa.<sup>61</sup>

The second element that shaped the identity of African customary law is the staggering impact of state law on normative behaviour. Undoubtedly, colonial rule in Africa (just as elsewhere) was marked by wholesale transplantation of European laws, which eventually transformed into state laws. Legal theorists know too well that legal transplant in Africa was accompanied by a rule-based, evidence-focussed approach to law.<sup>62</sup> In this context, Herbert Palmer, a colonial official, noted in his memoirs that customary courts in Nigeria (known then as Native Courts) "developed in a manner quite contrary to the spirit in which they were designed" and that efforts to preserve customary law "has so far resulted in steadily destroying it".<sup>63</sup> Palmer went on to add that "among these relatively primitive peoples, Europeanised individualistic government is being introduced [and] [t]he

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<sup>60</sup> "Wickedness" and "absurdity" are the closest English translation of the words of Chief B, who though educated in Scotland spoke Igbo language peerlessly.

<sup>61</sup> Claassens 2013 *J Agrar Change*; Claassens and Weeks 2009 *SAJHR*.

<sup>62</sup> See, for example, Okoth-Ogendo 1984 *Int'l J Soc L*.

<sup>63</sup> Afigbo 1965 *JHSN* 298.

Government machinery is steadily grinding to powder all that is native".<sup>64</sup> In South Africa, state law's influence on customary law is well known in legislation such as the *Recognition of Customary Marriages Act*, the *Reform of Customary Law of Succession and Regulation of Related Matters Act*, and the *Promotion of Equality and Prevention of Unfair Discrimination Act*.<sup>65</sup>

Considering the pervasive influence of state law, the interaction of legal orders, better known as legal pluralism, should influence the definitional pedagogy of African customary law. Put differently, the interpretation and application of customs by judges and litigants in intersecting social fields form part of indigenous norms' adaptation to socio-economic changes. In these interactive social fields, state laws and indigenous laws speak to each other, thereby rendering the label of official customary law absurd.<sup>66</sup> Indeed, some judgements reflect people's adaptation of customs to socio-economic changes because the judges often operate in the same normative field as the litigants.<sup>67</sup> It is hardly disputable that indigenous law does not apply in isolation of transplanted state laws. As Claassens urges, close attention should "be paid to issues arising [from] intersections between customary law, the formal legal system, and the Constitution."<sup>68</sup> It is pointless to persist with the labels of official and living customary law, thereby sending judges on unrealistic quests to discover the living customary law. Rather, judges should focus on whether and to what extent litigants and communities utilise(d) the foundational values of indigenous law to adapt their customs to socio-economic changes. These values include "humaneness, family continuity, the duty of care owed to family members by the family head, the non-individual nature of marriage, and the preservation of the ancestral home."<sup>69</sup>

It is necessary for students, who ultimately are tomorrow's judges, to discover the influences behind the new identity of African customary law. Acknowledging these influences, Claassens notes how conceptualisations which "seek to insulate customary law from other values and legal rights so that it can 'develop uncontaminated' at the local level fail to recognise the processes of integration, assimilation, and change that are underway in

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<sup>64</sup> Afigbo 1965 *JHSN* 298.

<sup>65</sup> It is also evident in the proposed unified marriage bill.

<sup>66</sup> For further objection to the label of official customary law, see Costa 1998 *SAJHR*; Diala 2017 *J Legal Plur*.

<sup>67</sup> Diala 2017 *J Legal Plur* 147.

<sup>68</sup> Claassens 2011 *Acta Juridica* 176.

<sup>69</sup> Diala 2017 *J Legal Plur* 158.

rural areas."<sup>70</sup> So, in what ways should law teachers approach African customary law?

### 3 Legal revisionist pedagogy

The pedagogy of African customary law should be revisionist. Revisionism usually conjures up images of reversing or denying negative history. An example that readily comes to mind is denial of the Holocaust or its major actors and casualties. However, reversing negative history is only one sense of revisionism. The other sense, which is used here, is different. It concerns the reversal of prevalent narratives or views based on new evidence or self-awareness. For example, Pluto was classified as one of nine planets in our solar system for over 70 years until 2006 when members of the International Astronomical Union demoted it.<sup>71</sup> In this sense of improving knowledge, legal revisionism may be described as a concept that challenges orthodox legal ideas to re-tell them and adapt them to new evidence. In the context of decolonising the law curriculum, legal revisionism embodies three elements.

#### 3.1 *New legal scholarship*

Firstly, legal revisionism addresses the failure of mainstream legal scholarship to acknowledge the irremediable alteration of the identity of indigenous law. How can the law curriculum be decolonised without unmasking the successful way in which colonialism westernised the African mind? Could it be that unmasking the pervasive impact of colonialism will reveal that the problem lies not in the content of the law curriculum per se, but in how teachers present the curriculum? Other than indoctrination with Western knowledge, especially Christianity and its concept of a white saviour, the most significant impacts of colonial rule in Africa are mainly redrawn borders, ethnic conflicts, and the transplanting of industrial laws onto agrarian political economies.<sup>72</sup> None of these impacts can be reversed. Instead, they draw attention to the normative consequences of imposing relatively industrial political economies on largely agrarian societies.

Before the advent of colonial rule in Africa, "adaptive social change was a reality evident in nomadic settlements, inter-communal trade, conflicts, and marriages. Colonial rule amplified these changes".<sup>73</sup> It is illogical to expect

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<sup>70</sup> Claassens 2011 *Acta Juridica* 208.

<sup>71</sup> Rincon 2015 <https://www.bbc.com/news/science-environment-33462184>.

<sup>72</sup> Meredith *Fate of Africa* 141-309.

<sup>73</sup> Diala 2017 *J Legal Plur* 154; Allot "Future of African Law" 220-221.

the identity of indigenous African laws to remain unaffected after encountering changes as monumental as those brought about by colonial rule. As Woodman observed, there is fair agreement that although "customary law has long existed, [it] has never been static. It has always been in processes of development and adaptation, although in recent times social change has occurred more swiftly."<sup>74</sup> The law curriculum is a child of colonialism, along with the rules governing the application of indigenous law in the courts. Undeniably, generations of African jurists and law teachers have grown up with excellent knowledge of the Western laws masquerading as state law, and comparatively poor knowledge of indigenous African laws. Judges and teachers can only interpret, teach and perpetuate their knowledge of the law. Legal revisionism therefore requires law teachers not only to re-learn but also to stimulate and enrich students' interest in and knowledge of legal history. A sound knowledge of African legal history, an indispensable aspect of revisionist pedagogy, will enable law teachers to highlight how African customary law was constructed in and outside the courts.<sup>75</sup> A pedagogical resource would be what is referred to as "African Archives" or "Black Archives" which feature the works of indigenous African scholars. These works shed light on the historical roots of colonial law, especially the concept of state sovereignty and its associated rule-based approach to law. In this sense, legal revisionist pedagogy has significance for law courses other than customary law.

For example, in Legal History, law teachers should be able to show, with respect to human rights, the link between the notion of individual rights and the Christian notion of (individual) salvation.<sup>76</sup> In Contract, they should explain the evolution of employer-employee relations from slavery and serfdom. In Property Law, they should show the similarities between the communal nature of pre-colonial African customary law and Anglo-Saxon law, especially how an individual's actions were submerged under his or her kinship group.<sup>77</sup> In Jurisprudence, they should demonstrate how legal positivism or a rule-focussed approach to law is an offshoot of power and control, specifically the violent dominion of state sovereignty.<sup>78</sup> In Evidence, they should demonstrate how legal positivism manifested in evidentiary

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<sup>74</sup> Woodman 1996 *J Afr L* 156; Koyana *Customary Law*.

<sup>75</sup> Kunbuor 2002 *Journal of Dagaare Studies* 1; Chanock 1989 *IJL&F* 72-73.

<sup>76</sup> Villa-Vicencio 2000 *J L & Relig*; Douzinas 2002 *MULR*.

<sup>77</sup> Pollock and Maitland *History of English Law*; Plunkett *Concise History of English Law* (showing how security, justice, oaths, marriage, ward-ship, and succession were regulated by the law of kinship).

<sup>78</sup> As Derrida argues, the original power of the state is founded on violence that not only "requires the origin to repeat" its originality, but also "to alter itself so as to have the value of origin, that is, to conserve itself". See Derrida "Force of Law" 13, 43.

rubrics,<sup>79</sup> and how this manifestation heavily influences the judicial interpretation of (indigenous) law. For example, they should reveal how positivism induces judges to prefer the legal certainty of documentary evidence over the oral nature of indigenous law. They should be able and willing to show how positivism often neglects the values that underlie indigenous law, guides its application, and informs its adaptation to socio-economic changes. The willingness and competence of law teachers to explain the history of law are crucial to the pedagogy of African customary law. As Snyder, put it, "[t]he concept of 'customary law' ... manifested an attempt to reinterpret African legal forms in terms of European legal categories."<sup>80</sup> It is therefore difficult to decolonise the law curriculum without adequately explaining the historical forces that shaped and still shape the identity of customary law.

### **3.2 A new legal identity**

Secondly, legal revisionism demands the conceptualisation of African customary law as the product of people's usage of indigenous African laws. Put starkly, customary law is what people do, and what people do includes official and private behaviour.<sup>81</sup> Importantly, what African people do now is not what they used to do prior to colonial rule. All over the African continent people have adopted Western-style technology, religion, education, politics, culture, and philosophy. This pervasive westernisation has influenced the identity of customary law, given that law is inseparable from society.

As argued here, conceptual confusion over the identity of African customary law reflects in its categorisation into official and living versions. As suggested, the pedagogic label of official customary law should be dropped because the problems that prompted the label lie elsewhere. Much has been made of the distortion of indigenous African norms by colonial and apartheid authorities, who colluded with African chiefs and elders.<sup>82</sup> These distortions were encouraged and informed by three elements.

These are rule-based judicial interpretations of indigenous law, judges' reliance on old textbooks and precedents, and struggles for power and resources in the emergent colonial social relations. These three elements intersect(ed) with little or no consideration for the foundational values of indigenous law, thereby causing hardship to groups such as women and

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<sup>79</sup> Hart 1958 *Harv L Rev*.

<sup>80</sup> Snyder 1981 *J Legal Plur* 76.

<sup>81</sup> Hund 1998 *ARSP*.

<sup>82</sup> See, for example, Chanock *Law, Custom and Social Order*.



younger male children. If we accept that law emerges from society's ideas of acceptable conduct, it becomes clear that most of the ideas which informed the emergence of indigenous law are no longer compatible with urbanisation, individualism, independent income, and nuclear families. In this sense, the problem with African customary law is primarily its value-stripped application in social settings markedly different from the agrarian origins of indigenous law. To address this problem, therefore, policy makers should focus on the ways in which people adapt indigenous norms to socio-economic changes. The products of these adaptations constitute customary law, while norms applied in their ancient formats constitute indigenous laws. This re-conceptualisation illumines the identity of African customary law and reveals the futility of decolonising the law curriculum.

### **3.3 *Unrealistic expectations***

Many scholars have called for decolonisation to start from the mind because they recognise the alarming extent to which colonialism formatted African minds.<sup>83</sup> Realistically, decolonising the mind begins with self-awareness. This involves acknowledgement that Africa's contemporary legal identity was constructed by European colonialists. However, it also involves an acknowledgement of the disadvantages of the legal order foisted by the colonialists, as well as a critique of its motives. Accordingly, teachers concerned with decolonisation should debunk colonialism as a civilising mission and call out Western hypocrisy in international relations and human rights. Gutto cites several examples of this hypocrisy.<sup>84</sup> They include discriminatory referrals to the International Criminal Court, the hosting of funds stolen from Africa in Western banks, the disdainful way Europeans treat calls for reparations to be paid for slavery/colonialism, and the piracy prosecutions of East Africans for defending their own waters against exploitative foreign fishing. To these may be added the devastation caused by Western-inspired wars in the last two centuries, the nuclear and ecological threat hanging over our planet due to Western technology, and the mockery of equality in human rights treaties by the five permanent members of the United Nations Security Council. Yet, Western law, philosophy, and democracy are touted as the model in our classrooms. Revisionist pedagogy of law must not only deconstruct the Western knowledge hegemony, it must also emphasise the usefulness of African values like Ubuntu, kin interest in marriage, and collegial governance.

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<sup>83</sup> Wa Thiong'o *Decolonising the Mind*; Gutto 2012 <http://www.twn.my/title2/resurgence/2012/266-267/cover08.htm>.

<sup>84</sup> Gutto 2012 <http://www.twn.my/title2/resurgence/2012/266-267/cover08.htm>.

Unfortunately, many Africans are so westernised that African values are barely known to them. In this sense, legal revisionism must contend with unrealistic expectations about the decolonisation of the law curriculum by unpacking the meaning of decolonisation.

If by decolonisation, we mean the replacement of the current law curriculum with an indigenous African law curriculum, then decolonisation is obviously unfeasible. Where would we find indigenous African laws? If we find these laws, would they be translated into English, French, and Portuguese to make them comprehensible to our students? If not translated, which African languages should be chosen to satisfy our multi-ethnic student populations? Importantly, where would we find qualified teachers to teach indigenous laws?<sup>85</sup>

If by decolonisation of the law curriculum, we mean the rejection of Western legal theories and methods, problems persist. Most law academics know only the Western way of scholarship. It would take decades of concerted advocacy, re-learning, and extensive indigenous scholarship to shift the dominance of Western knowledge to indigenous knowledge systems. Indeed, scholars' resistance to change is shamefully strong, as the Mamdani Affair showed.<sup>86</sup> In this regard, a higher education report in South Africa acknowledges: "Since colonial and apartheid times, there has been a mind-set within academia that has, in its crudest form, regarded intellectual activity as the preserve of white scholarship and the indigene as performing mundane functions."<sup>87</sup>

However, if decolonisation primarily means emphasising indigenous knowledge,<sup>88</sup> re-learning law's violent history, and consequently developing self-awareness of Africa's constructed identity, then we might realise that decolonisation of the law curriculum basically means a new way of teaching law.

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<sup>85</sup> Himonga 2010 *PSILR* 56.

<sup>86</sup> In the mid-nineties, the University of Cape Town suspended Mahmood Mamdani, then AC Jordan Professor of African Studies and director of UCT's Centre for African Studies, for questioning the Eurocentric nature of African studies.

<sup>87</sup> DoE *Report of the Ministerial Committee* 91.

<sup>88</sup> Such knowledge belongs to those whom Garuba referred to as "previously devalued groups of people". See Garuba 2015 <https://mg.co.za/article/2015-04-17-what-is-an-african-curriculum/>.

### 3.4 A new way of teaching

This new way demands that we change the stories we tell students about their past, present, and future. It is inseparable from an exposition of law's violent history,<sup>89</sup> law's role in ensuring justice, and its shameful role in perpetuating injustice. Although the meaning is contested,<sup>90</sup> justice "casts the clearest light on the nature of law".<sup>91</sup> Given that law reflects the state of society, law's pedagogy should expose the historical forces that drive unequal power relations. When law teachers debunk the fallacy of colonialism as a civilising mission and highlight the hardships caused by the imposition of capitalist economic systems on agrarian political economies, then curriculum decolonisation becomes evident as a struggle for justice and identity. The remainder of this article proposes the way forward.

## 4 Way forward

When students' demanded the decolonisation of the university curriculum, they also raised issues of patriarchy, sexism, and institutional racism.<sup>92</sup> These issues arguably flow from our colonial/apartheid legacy of discrimination, division, and exploitation. We may characterise this legacy as injustice. Injustice is exacerbated by Africans' confused legal identity, and arguably drives the quest to change the narrative of the hegemony of Western knowledge in our higher education curriculum.<sup>93</sup>

Often scholars perceive injustice as the absence of justice.<sup>94</sup> However, this perception is narrow, for covert injustice arguably causes as much harm as overt injustice. For example, legal restrictions on land reclamations in South Africa is covert injustice because of the manner in which thousands of people were dispossessed of their lands in the 20<sup>th</sup> century. Similarly, research funding restraints could be covert injustice for academic freedom, since they may suppress certain narratives. Even affirmative action in employment policies could constitute covert injustice if it prevents students from benefiting from quality teaching.<sup>95</sup> Legal revisionist pedagogy therefore

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<sup>89</sup> Derrida "Force of Law".

<sup>90</sup> For example, Cahn described injustice as "sympathetic reaction of outrage, horror, shock, resentment, and anger". See Cahn *Sense of Injustice* 24.

<sup>91</sup> Cahn *Sense of Injustice* 2.

<sup>92</sup> Molefe 2016 *World Policy J* 32.

<sup>93</sup> Mamdani "Decolonising the Post-colonial University".

<sup>94</sup> Fricker *Epistemic Injustice*.

<sup>95</sup> McKaiser 2016 <http://www.iol.co.za/news/epistemic-injustices-the-dark-side-of-academic-freedom-2029747>.

encompasses the tripartite elements of unlearning, identity awareness, and remedial action.

#### **4.1 Elements of decolonisation**

These three elements resonate with Chilisa's five phases in the decolonisation process.<sup>96</sup> Le Grange summarised these phases as: (1) rediscovery and recovery; (2) mourning; (3) dreaming; (4) commitment, and (5) action.<sup>97</sup>

The rediscovery and recovery phase encompasses the arguments made in this article. In this phase "colonised peoples rediscover and recover their own history, culture, language, and identity".<sup>98</sup> Obviously, rediscovery will be slow if teachers have not experienced the rediscovery process themselves and acquired the ability 'metaphorically' to awaken others. Such teachers must, of course, be passionate and knowledgeable about legal history. A teacher that readily comes to mind is the late Harold Jack Simons, who is ably portrayed by Sachs in his 2016 book, *We the People*.<sup>99</sup> Unfortunately, many (law) teachers regard Western knowledge as "the only basis for higher forms of thinking".<sup>100</sup>

Mourning is indignation at the "continued assault on the world's colonised/oppressed peoples' identities and social realities" and their ignorance of the root causes of their suffering.<sup>101</sup> How can there be reaction without action? Today, many beneficiaries of our bequeathed social structure, especially wealthy landholders, are indifferent to the daily realities of the poor and marginalised among them. The decolonisation of the university curriculum would be cosmetic unless there was indignation at the status quo and concerted remedial action. These actions might be as overt as removing colonial/apartheid symbols of oppression, abolishing outsourcing, and dropping the demand for a driving license in employment application forms. They may also be as subtle as removing the word "comparative" from Legal History, and moving elective courses in the LLB curriculum down from the final year to afford students wider options for building their critical abilities in their formative years.

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<sup>96</sup> Chilisa *Indigenous Research Methodologies*.

<sup>97</sup> Le Grange 2016 *SAJHE* 3.

<sup>98</sup> Le Grange 2016 *SAJHE* 3.

<sup>99</sup> See Sachs *We, the People*. For a biography of Jack Simons, see Sparg, Schreiner and Ansell *Comrade Jack*.

<sup>100</sup> DoE *Report of the Ministerial Committee* 92.

<sup>101</sup> Le Grange 2016 *SAJHE* 3.

Remedial strategies involve dreaming, which "is when colonised peoples invoke their histories, worldviews, and indigenous knowledge systems to theorise and imagine alternative possibilities – in this instance a different curriculum."<sup>102</sup> Dreaming enables students to challenge pedagogies that make them feel culturally inferior. Currently, the university curriculum does not encourage dreaming. As Heleta stated, it merely requires students "to learn to 'speak well' and gain skills and Eurocentric knowledge that will allow them to enter the marketplace but not allow them to fundamentally change the status quo in society and the economy."<sup>103</sup> Regarding the status quo, dreaming must reject superficiality such as making African customary law a compulsory subject, or adding African Studies to the humanities curriculum. Rather, we must "rethink how the object of study itself is constituted",<sup>104</sup> since most of the curriculum is structured to suppress the dark history of colonialism in Africa. Only the sustained exposition of African legal history in classrooms will reveal the effects of "patriarchy, slavery, imperialism, colonialism, white supremacy and capitalism" on today's social relations.<sup>105</sup>

In this sense of invoking histories, dreaming arises from indignation, manifests in remedial action, and thrives on commitment. Le Grange explains:

Commitment is when academics/students become political activists who demonstrate the commitment to include the voices of the colonised, in this case, in the university curriculum. Action is the phase where dreams and commitments translate into [programmes] for social transformation.<sup>106</sup>

The above five phases are underlined by identity and injustice, two elements which demand a revisionist approach to the pedagogy of law. As shown below, revisionism is crucial to Africa's legal identity.

#### **4.2 Revisionism and African legal identity**

Western media usually go into overdrive when notable individuals such as Kofi Annan and Barack Obama tell Africans "to hold their political leaders – and not colonialism – responsible for the civil wars and economic failures that ravage their lives".<sup>107</sup> While it is mildly tempting to sympathise with this

<sup>102</sup> Le Grange 2016 *SAJHE* 3.

<sup>103</sup> Heleta 2016 *Transformation in Higher Education* 4.

<sup>104</sup> Garuba 2015 <https://mg.co.za/article/2015-04-17-what-is-an-african-curriculum/>.

<sup>105</sup> Molefe 2016 *World Policy J* 32.

<sup>106</sup> Molefe 2016 *World Policy J* 32.

<sup>107</sup> Crossette 1998 <https://www.nytimes.com/1998/04/17/world/stop-blaming-colonialism-un-chief-tells-africa.html>; Spillius 2009 <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/5778804/Barack-Obama-tells-Africa-to-stop-blaming-colonialism-for-problems.html>.

view, it is easier to dismiss it for its crass neglect of the pervasive impact of colonialism on the African psyche. Arguably, colonialism set up post-independence African states for failure. The disparate African tribes, which colonial authorities forcefully lumped together, share little sense of nationhood. Given the link between development and nationhood, it does not require acquaintance with rocket science to deduce that a lack of national identity contributes to corruption, conflict, and bad governance.<sup>108</sup> For example, national independence struggles compelled leaders such as Nelson Mandela, Haile Selassie, Patrice Lumumba, Julius Nyerere, Kwame Nkrumah, Nnamdi Azikiwe, and even Kenneth Kaunda to genuinely bond with their people, thereby forging a strong sense of nationhood. This bonding was reflected in the modest good governance and economic development achieved in the early post-independence years, which eventually disappeared because they were, among other reasons, built on shaky foundations.<sup>109</sup> Since we cannot negotiate the future without resolving the past, we must teach students how colonialism prevented Africans from negotiating their own borders, choosing their own leaders, and developing on their own terms.

While the decolonisation debate acknowledges the Eurocentric roots of the law curriculum, it tends to ignore the pervasive impact of colonial rule on indigenous African laws. For instance, our judicial system emulates the European structure, complete with ridiculous wigs and gowns, even in soaring temperatures. We have, of course, English, French, and Portuguese as court languages of record. Since the law curriculum is modelled on Western pedagogy, decolonising it requires wisdom because we can't "begin on a clean slate".<sup>110</sup> However, we can deconstruct the writings on the slate and use a new narrative as the basis for structuring the future. For this restructuring, here are three proposals for African customary law.

### **4.3 Pedagogic proposals**

First, African Customary Law and Legal History should be taught as standalone courses rather than as components of courses such as Jurisprudence, Introduction to Legal Pluralism or Legal Systems. Himonga observed that submerging customary law in other courses leaves it "to the discretion of individual course convenors ... [who may lack] sufficient

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<sup>108</sup> Wunsch and Olowu *Failure of the Centralized State*.

<sup>109</sup> Another key cause of poor development is neo-imperialism. See, for example, Zack-Williams 2013 *Rev Afr Political Econ*.

<sup>110</sup> Le Grange 2016 *SAJHE* 5.

knowledge of African Customary Law to be able to integrate it into the course."<sup>111</sup> The pedagogies of customary law and legal history should, of course, be interdisciplinary. They should draw from economics, sociology, and political science because lawyers are supposed to know a little about everything. Drawing from other disciplines in the teaching of customary law would reveal the historical forces that shaped and still shape its construction. Since law is inseparable from society, students must be acquainted with how legal history reeks of dominion, injustice, and struggle.<sup>112</sup> A broad knowledge of legal history will help them to comprehend the development of concepts such as individual rights, the land tenure system, legal positivism, and evidentiary rules. These concepts are useful for understanding why and when norms outlive their usefulness. In sum, an interdisciplinary approach to the pedagogy of African customary law will reveal "the perspectives of the colonised and the coloniser, their interwoven histories, [and] their discursive entanglements".<sup>113</sup> This interdisciplinary learning is best suited to the second proposal of this article.

Law students must be taught empirical research methodologies, especially some relatively new methods such as storytelling, oral history, and participatory action research. In this sense, the pedagogy of African customary law should de-emphasise rules and conflict of laws. Rather, teaching should focus on the processual nature of indigenous law, its research methodologies, and its foundational values in marriage, succession, land, contract, religion/rituals, traditional authority, and dispute resolution. One way of bringing these values to the fore and promoting the empirical research skills of law students is to send them on research visits to their communities during their long vacation as part of their continuous assessment programme. Presently, the teaching of African customary law in many universities may as well pass for an Introduction to Legal Pluralism,<sup>114</sup> while the current assessment model is overly rule-focussed. To reverse it, assessments should de-emphasise legislation and case law and favour research papers and mock interviews.

Finally, the pedagogic labels of official and living customary law should be dropped because they obscure the adaptive nature of legal pluralism in Africa. As argued here, customary law emerged from the encounter of indigenous African laws with European ways of life. Accordingly, the precedents and codifications which are labelled as official customary law

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<sup>111</sup> Himonga 2010 *PSILR* 55-56.

<sup>112</sup> Arendt "Crisis in Education".

<sup>113</sup> Garuba 2015 <https://mg.co.za/article/2015-04-17-what-is-an-african-curriculum/>.

<sup>114</sup> Mchombu "Comparison of Customary Law Programmes".

are products of this encounter. Customs which communities apply in their pre-colonial form (such as male primogeniture) constitute indigenous law. In sum, pedagogic descriptions of African customary law should base their definition on people's adaptation of indigenous norms to socio-economic changes.

#### **4.4 Closing remarks**

An adaptation pedagogy constitutes a reality check in the debate on the decolonisation of law. Obviously, the bulk of the law curriculum cannot be changed because African legal systems are founded on irreversible colonial legacies. Thus, hypocritical attitudes to decolonisation should be avoided, since everyone has embraced many products of colonial rule ranging from the way we dress to how we eat, think, and speak. While Africans cannot escape the changes brought by colonialism, they can embrace the challenge of self-discovery and new identity. Law teachers can acknowledge, explain, and situate social problems within their historical contexts.<sup>115</sup> Thereafter, they can use the foundational values of indigenous law and constitutional bills of rights as the basis of Africa's new legal identity. Indeed, if this task is handled well, it could offer a platform for integrating customary law with state law. In other words, a policy focus on people's adaptation of indigenous laws to socio-economic changes could help in the evolution of a common law in African countries.

For evidence in support of this suggestion, we may look to the mutation of the customary law of the English people. The English Common Law is an amalgam of indigenous laws and the laws introduced by the Romans, Germanic tribes, and Norse tribes from ancient Scandinavia, who conquered Britain for several centuries beginning in 43 CE. Indeed, "the [English] common law tradition itself is best understood, employed, and developed when it is regarded fundamentally as a system of customary law."<sup>116</sup> Already, indigenous African laws have been profoundly altered by legislation regulating marriage, land, succession, and property.<sup>117</sup> Judges are now accustomed to interpreting customs in accordance with the bill of rights. Rural women and civil society groups increasingly assert the principles of human rights in the application of indigenous law.<sup>118</sup> Self-

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<sup>115</sup> In South Africa, an obvious example is land redistribution.

<sup>116</sup> Aleck 1997 QUTLJ 139.

<sup>117</sup> Examples include South Africa's unified marriage bill and Kenya's Marriage Law of 2014, a comprehensive legislation that consolidates disparate laws regulating religious, indigenous, and civil marriages and divorces.

<sup>118</sup> Claassens and Weeks 2009 *SAJHR*.



evidently, the coercive influence of state laws, coupled with people's adaptation of customs to socio-economic changes, will eventually extinguish precolonial indigenous norms. Accordingly, founding the pedagogy of African customary law on an adaptation framework offers a sensible theoretical roadmap for legal integration, especially in South Africa.

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## List of Abbreviations

|                        |                                                      |
|------------------------|------------------------------------------------------|
| Afr Stud Rev           | African Studies Review                               |
| AHHE                   | Arts and Humanities in Higher Education              |
| AHRLJ                  | African Human Rights Law Journal                     |
| ARSP                   | Archives for Philosophy of Law and Social Philosophy |
| CriSTaL                | Critical Studies in Teaching and Learning            |
| DoE                    | Department of Education                              |
| Harv L Rev             | Harvard Law Review                                   |
| IJL&F                  | International Journal of Law and Family              |
| IJTL                   | Independent Journal of Teaching and Learning         |
| Ind Int'l & Comp L Rev | Indiana International and Comparative Law Review     |
| Int Relat              | International Relations                              |
| Int'l J Soc L          | International Journal of the Sociology of Law        |
| J Afr L                | Journal of African Law                               |
| J Agrar Change         | Journal of Agrarian Change                           |
| J L & Relig            | Journal of Law and Religion                          |
| J Leg Ed               | Journal of Legal Education                           |
| J Legal Plur           | Journal of Legal Pluralism and Unofficial Law        |
| JHSN                   | Journal of the Historical Society of Nigeria         |
| JJS                    | Journal for Juridical Science                        |
| Law & Soc Rev          | Law and Society Review                               |
| MULR                   | Melbourne University Law Review                      |
| PELJ                   | Potchefstroom Electronic Law Journal                 |
| PSILR                  | Pennsylvania State International Law Review          |
| QUTLJ                  | Queensland University of Technology Law Journal      |
| Res Afr Lit            | Research in African Literatures                      |

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|------------------------|------------------------------------------------------------------|
| Rev Afr Political Econ | Review of African Political Economy                              |
| SAJHE                  | South African Journal of Higher Education                        |
| SAJHR                  | South African Journal on Human Rights                            |
| SALJ                   | South African Law Journal                                        |
| Stell LR               | Stellenbosch Law Review                                          |
| SUBB Jurisprudentia    | Studia Universitatis Babes Bolyai-<br>Iurisprudentia             |
| Third World Legal Stud | Third World Legal Studies                                        |
| THRHR                  | Tydskrif vir Hedendaagse Romeins-<br>Hollandse Reg               |
| WLSA                   | Women and Law in Southern Africa<br>Research and Education Trust |
| World Policy J         | World Policy Journal                                             |