

The role of culture in teaching about other legal systems

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“I argue that legal scholars should stop prevaricating over the definition of law and should instead develop sensitivity for the intrinsically plural and dynamic nature of all law. If pluralist approaches take themselves radically serious, they end up respecting almost all positions of the ‘the other’ as equally valid. There is nothing wrong with that. Pluralist methodology should be realistic, and therefore it cannot accept monism. Beyond that there is a jungle of competing conceptualisations and the contested field of global legal theory.”¹

Introduction

The topic of the International Association of Law Schools educational programme in Montreal centres on other cultures and legal systems. In the planning of this programme, the Planning Committee was conscious of the fact that culture is a broad subject and includes many things that are far afield from the law. In order to guard against the danger of wandering, the Committee agreed that culture be discussed only when it is relevant to a legal system, and that in this case the connection between culture and the legal system should be made explicitly. Put another way, if the topic did not include the word culture, what exactly would be the difference in what the educational programme should be considering? This paper discusses the relevance of culture to legal systems and the need to take cognisance of this in the teaching of law in a globalising world.

The paper is divided into three sections. The first section is a brief consideration of the problematic notion of culture and the way it is viewed by lawyers and scholars operating purely or largely within legal centralist and positivistic theoretical perspectives. I argue that the view within these perspectives of non- Western legal systems as culture have led to the marginalisation of some of these legal systems to the extent that they are often not considered as serious candidates for inclusion in the curricular of law schools, including the home country law schools. The second section deals with the ‘grounded’ realities of culture in relation to law in both Western and non- Western societies today, which underscore the need to take culture seriously in modern legal systems and in legal education. I argue that this “grounded” realities mark a turning point in the way culture should be viewed and treated in legal education curricula. The third section is the conclusion.

The notion of culture

Culture is not only a broad concept which may be far afield from the law as already stated. It is, more importantly for our present purposes, a problematic concept in so far as it is sometimes used to trivialise non- Western legal systems, such as customary law or religious systems of personal law (e.g. Muslim law) in comparison to Western legal systems. I submit that culture in non- Western societies has a depth of meaning which makes it an integral

¹ W Menski ‘On the law of laws,’ Inaugural Lecture, 19th October 2005, p. 1.

element of the normative systems of the communities whose culture is in question; it is not a superficial thing that people put on and off like shoes. For this reason, I cannot but marvel, as does also Menski, that despite the recognition by scholars, including those working within the legal positivism framework, of the globalising context of our times many still fail to seriously account for what Menski has called “concurrent glocalisation,” ‘for local non-Western perspectives and for the input of non-Western legal theories.’ Menski further observes that non-Western legal systems are viewed as cultural tradition while Western legal history continues to assume the stature of a global legal theory, and that: ‘Modern Western lawyers have largely managed to banish religion, culture and tradition from the tree of law. Such intellectual pruning, declaring that this or that is ‘extra-legal’ labels the bountiful fruits of South Asian and other laws ...as cultural poison, which progressive lawyers want to consign to the dustbin of history.’²

This view of non-Western legal systems through the lenses of positivism and its transcendent State may be likened to a child who refuses to be weaned off its dead mother’s breast, in the sense that legal positivism continues to feed on conceptualisations of law in the bygone British colonial contexts of Asia, Africa and other regions of the world. In these contexts, law (i.e. generally representing imported colonial legal systems) was considered to be bigger than culture (i.e. generally representing indigenous and other non-Western systems of law). Moreover, Western law supplied the standards of morality, natural justice and public policy used to determine the applicability of indigenous laws and other non-Western laws where these had been spared abolition, in addition to overriding culture in critical areas of life of the local communities, such as marriage. Examples of this legal chauvinism may be drawn from the interpretation of public policy by the courts in cases involving the recognition of African customary law and Muslim law institutions by the common law systems derived from the Western legal systems of the colonial States.

In many Anglophonic colonial territories, the applicability of non-Western legal systems was determined by reference to the notion of public policy, i.e. that in order to apply as a legal norm, a rule or concept deriving from non-Western laws should not be contrary (or repugnant) to public policy, morality or natural justice.³ But the values that informed the interpretation of public policy in specific contexts were clearly those of the Europeans and their culture. Statements such as the following (in *Ismail v Ismail*⁴) were common in the jurisprudence involving the recognition of non-Western legal concepts and institutions and used as a basis for refusing their recognition:

“To sum up thus far. Having considered all the arguments presented on plaintiff’s behalf, I have come to the conclusion that we would not be justified in deviating from the long line of decisions in which our Courts have consistently refused, on grounds of public policy, to recognise, or to give effect to the consequences of, polygamous unions contracted in South Africa, statutory exceptions apart. The concept of marriage as a monogamous union is firmly entrenched in our society and the recognition of polygamy would, undoubtedly, tend to prejudice or undermine the status of marriage as we know it...”⁵

The non-recognition of non-Western legal systems was and continues to be reflected in legal education by the absence of these systems of law from the curricula of law schools. Customary laws and other non-Western legal systems are not taught as mainstream courses

² Menski note 1 above, p. 4.

³ See, for example, Section 1(1) of the Law of Evidence Amendment Act 45 of 1988 of South Africa.

⁴ 1983 (1) SA 377(A). This case was decided by the Appellate Division, then the highest court of appeal in South Africa.

⁵ *Ibid* at p. 1024.

or as part of legal theory in mainstream courses on jurisprudence in many law schools. Neither are they included in comparative law courses, and where they are, this is done in a cursory manner. Even in schools that have incorporated the study of these legal systems as area studies, such as the School of Oriental and African Studies (SOAS) of the University of London, there is evidence that these studies are not taken seriously by some scholars of these institutions. For instance law professors who engage in these studies and argue for the inclusion of non- Western legal systems in what is considered to be law are referred to by their colleagues as SOAS ‘eccentric[s] from a bygone age.’ In response, Menski, a Professor of South Asian Laws at SOAS remarked in his inaugural lecture: ‘I hope people won’t say this about me in years to come. I have, of course, asked myself what makes it appear so eccentric to argue that Asian and African people should be allowed a well-respected human right to their own culture-specificity rather than copying Western transplants....’⁶

The “Grounded” Realities of Culture in relation to law: A turning point?

A question may be asked whether the “grounded” realities about culture have not brought us, as legal educators and scholars, to a turning point about the way we should view culture in relation to law, and about its inclusion in our teaching of law. What are the “grounded” realities of culture? It is not possible to give an exhaustive answer to this question within the limited scope of this paper. A few indicators will suffice.

Taking the African continent, constitutional law and human rights studies have, for example, taken a new turn with the emergence of new constitutions that explicitly recognise culture. Countries like Namibia,⁷ Malawi,⁸ and South Africa guarantee cultural rights in their respective constitutions. For example, the South African Constitution provides that:

“Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.[⁹] Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”¹⁰

I have argued elsewhere that culture in these provisions undoubtedly include the unwritten, normative customary practices that regulate the lives of South Africans in their day-to day lives.¹¹

In guaranteeing the freedom of religion, section 15 of the Constitution of South Africa adds to these rights by stating that: “This section does not prevent legislation recognising- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.”

⁶ Menski, note 1 above, p. 6.

⁷ See the Constitution of Namibia, section 19.

⁸ See the Constitution of Malawi, section 26.

⁹ Section 30 of the Constitution of the Republic of South Africa of 1996.

¹⁰ Section 31 of the Constitution.

¹¹ See further, C. Himonga and C. Bosch, ‘The Application of African customary law under the Constitution of South Africa: Problems solved or just beginning?’ *South African Law Journal* (2000) vol. 117 part 2, p.306.

Other indicators of the “grounded” realities of culture in relation to law in the South African context are that some courts are more willing than before to broaden the view of law to include what was hitherto referred to as culture and unimportant to law.¹² They have in a number of cases cast aside the narrow view of law espoused by the Appellate Division in cases such as *Ismail v Ismail* in favour of a legal system that is inclusive of previously marginalised non- Western systems of law. Thus the High Court held in one case that:

“It inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it. It is clear, in my view, that in the *Ismail* case the views (or presumed views) of only H one group in our plural society were taken into account.”¹³

Furthermore, there are cases in which customary law concepts, such as the concept of *ubuntu*, have not only been equated to the “global” human right to dignity,¹⁴ but have also been employed to decide major constitutional cases,¹⁵ while concepts of unwritten customary practices (now known as living customary law) have been explicitly recognised as part of the national legal system.¹⁶

What about indicators of the grounded realities of culture in Western countries? It has been observed that English courts have been under pressure not only to learn about Asian laws, but also to incorporate the cultural element of some disputes in their decisions, in order to achieve justice, even though the decisions concerned are ultimately couched in English law principles, such as the principle of equity. The latter is done in order for the judge not to be “seen to be implementing Muslim law in Britain.”¹⁷

Thus notwithstanding that Britain does not generally recognise many Asian customs and norms, culture is doing its rounds on the ground, forcing the legal system to acknowledge it as an integral part of law in reality. The pressure in this regard has come from the settlement in Britain of immigrant Asian communities which import their cultures and plead them in disputes before the courts.¹⁸ Presumably, Great Britain is not alone in its experience of the immigrant communities’ cultures; but many more of its Western counterparts are experiencing the grounded realities of culture in a similar manner. Furthermore, it has been pointed out that “all over Europe today, governments talk to certain representatives of ethnic minority communities and religion because they wish to be seen as inclusive....”¹⁹

¹² See for example, *Ryland v Edros* 1997 (2) SA 690 (C), *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) ([1999] 4 All SA 421).

¹³ *Ryland v Edros* at p 707. It should, of course, be mentioned that in south Africa, in particular, there are already worrying trends towards the uniformity of laws in which the Western legal system is once more overriding the non-western legal systems, thereby minimizing the effect of the recognition given to culture by the Constitution. For further discussion, see C. Himonga ‘The advancement of African women’s rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession, *Acta Juridica* (2005), p. 82

¹⁴ See, for example, *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (6) BCLR 665) (CC).

¹⁵ See for example, *City of Johannesburg v Rand Properties (PTY) Ltd and Another* 2007 (1) SA 78 (W), *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) (2000 (11) BCLR 1211).

¹⁶ See for example, *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC), *Mabena v Letsoala* 1998 (2) SA 1068 (T).

¹⁷ W Menski, ‘Chameleons and dodgy lawyers: Reflections on Asians in Britain and their legal reconstructions of the universe’ *Indo-British Review. A Journal of History*, vol XXIII No. 2 p. 89. at p. 100.

¹⁸ See generally, Menski, *ibid*.

¹⁹ See Menski, note 1 above.

Conclusion

In conclusion, I submit that the developments connected with the “grounded” realities of culture in relation to law suggest that the time has come for according culture in so far as it relates to non- Western legal systems, whether they be systems of minorities within our own borders or of communities in far away lands a greater, if not the same, recognition we accord Western legal systems and of giving similar attention in our legal education curricula to non- Western legal systems.

Thus, even if one were to disagree (for whatever reason) with the legal pluralistic methodology advocated for by Menski’s statement at the head of this paper, a legal educator would miss an important point if he or she were not to appreciate the need to be conscious of culture as an integral element of law that requires to be respected and studied as any other system of law in a global context.