2018 AFRICAN LAW SCHOOL LEADERSHIP FORUM
CONFERENCE ON LEGAL EDUCATION

CHIEF JUSTICE MOGOENG MOGOENG

THEME: "FROM IMITATION TO INNOVATION: COMPARATIVE PERSPECTIVES ON LEGAL EDUCATION"

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Acknowledgements

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Deans of Law schools from across the continent including from Uganda, Nigeria, Kenya, Ethiopia, and Zimbabwe

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Justice Emmanuel Ugirashebuja – President of the East African Court of Justice, Tanzania

Judge Margie Victor of the South Gauteng Division of the High Court of South Africa

Judge Shehnaz Meer, of the Acting Judge President of the Land Claims Court and Judge in the Western Cape High Court

Judge Roshnie Allie, of the Western Cape High Court

Judge Vincent Saldanha, of the Western Cape High Court

Judge Lee Bozalek, of the Western Cape High Court

Distinguished guests

Ladies and Gentlemen

South Africa and all but one African State, have a peculiar history that requires a legal system, programmes, curricula and approaches to teaching the law that are capable of helping us to redress the injustices of the past and heal the divisions of the past.

It is unrealistic to retain and impose on any under-developed country a legal system, curricula and teaching methods that bear no relationship to the history, traditions, realities and the constitutional aspirations of its people and seriously hope for meaningful progress. Wherever such an approach is adopted, decades will pass but nothing much is likely to change.

The correct starting point is in my view, to seek to understand why continents like Africa are in a deplorable and stubborn state of abject poverty, incidents of large-scale corruption are not rare, the freeness and fairness of elections is often suspect, the disregard for human rights, the rule of law and good governance is not unusual or might at times be impunified? What follows does in a way explain why Africa is where she is now and what might need to be done to address her situation in a fundamental way.

On 2 February 1835 and addressing the British Parliament, Lord Macaulay said:

"I have travelled across the length and breath of Africa and I have not seen one person who is a beggar, who is a thief, such wealth I have seen in this country [Africa], such high moral values, people of such caliber, that I do not think we would ever conquer this country [Africa] unless we break the very backbone of this nation [the African people], which is her spiritual and cultural heritage and therefore, I propose that we replace her old and ancient education system, her culture, for if the Africans think that all that is foreign and English is good and greater than their own, they will lose their self-esteem, their native culture and they will become what we want them, a truly dominated nation"

Lord Macaulay reveals the truth least told and acknowledged by the Western powers about Africa. Bearing this truth in mind, is essential to doing justice to any topic that has to do with why imitation has become virtually institutionalised and a permanent feature of

our way of doing things, our legal system, curricula and teaching of the law. Remember, no change of consequence can ever happen in any country without the backing of the law. And how that law is taught is just as critical for the attainment of the set objective. Lord Macaulay says that in the eighteen hundreds there was virtually no crime of dishonesty in Africa. He gives reasons for the peace, stability, ready observance of the rule of law and the apparently entrenched human rights culture that obtained at that time. African people, were so he in effect says, high moral values personified, people of high caliber who were very wealthy - none of them was a beggar or a thief or corrupt.

He states the primary goal of the West, as having been to conquer Africa and dehumanise her people so that “they will become what we want them, a truly dominated nation”. To reduce African people to the level of impoverished beggars, thieves and a defeated people with low self-esteem, certain barriers had to be removed or destroyed. And that entailed, undermining what fundamentally defines being an African - their heritage and the very foundation of their wealth, self-confidence and high moral values. These were to be replaced with something foreign to them. That way the evisceration of the very being of the African people would be and was achieved.

Lord Macaulay says the “very backbone” of the African people had to be broken. And that “very backbone” was Africa’s spiritual, cultural and educational system and heritage. The pattern remained essentially the same. Africans had to be made to imitate and internalise a completely new way of life and mindset. They had to be made to memorise and unquestioningly consume foreign traditions and practices so as to become what they have since turned out to be a thoroughly exploited and weakened people. Africans had to be made to “think that all that is foreign and English [French, American etc] is good and greater than their own”. They were to be made to “lose their self-esteem, their native culture”. And it bears repetition that it requires or takes a legal system and a teaching method purposefully designed in a particular way to realise that objective.

Constitutions, legislation and the common law that were introduced since 1835 hardly ever recognised African legal and educational systems, culture and values or did so by

sheer coincidence. By design, there was no effort made to factor into the mainstream legal system and pedagogy anything inherently African in character. No wonder even the 1993 South African Constitution recognised the African philosophy of Ubuntu but the 1996 Constitution has inexplicably left it out. That is how powerful institutionalised or normalised imitation has consistently been allowed to undermine originality and innovation. It would be quite revealing to know who really sponsored that mutilation of African significance and the recognition of its philosophical treasure.

Imitation was and still is a fundamental necessity for the survival of colonialism, imperialism and racial discrimination albeit in a sophisticated and less crude, violent and obvious form. This is so because the preservation of vested interests in a post-colonial or post-apartheid era requires nuanced imitations accompanied by a repetitive yet insincere acknowledgement of the injustices of sectionally beneficial colonial or discriminatory systems and practices. Imitation is enabled or characterised by a tolerance of transformational words. This apparent and misleading support for change and inclusivity is anchored on a known and effective plan designed to ensure that there would be no tangible and significant positive change that accords with the new order. The other trend by other opponents of constitutionally compliant change is the effective yet subtle propagation of the notion that African legal and educational systems have nothing progressive or beneficial to offer, are inherently evil, backward and irreconcilable with modern, universally accepted constitutional values, fundamental rights, the rule of law, sound commercial norms and good governance.

That innovation works and is the way to go, is borne out by the experiences of developed countries. The legal and legal educational systems of the UK, US, Arab countries, France, Germany, China and Russia are not necessarily the same. But they seem to work for their intended beneficiaries. They were innovatively designed, to address the critical challenges facing those nations in a way that is understandable to the people. Unsurprisingly, because the law should be relevant to the people it seeks to serve. For, if the legal and legal education system and the people they are meant to serve run parallel, then the law is illegitimate and meaningless. Calls for the decolonisation of laws and legal

education in the previously colonised countries are probably informed by these concerns or realities.

Laws exist to facilitate the administration of justice and the realisation of national aspirations or dreams. Similarly, legal education must be designed to contribute to the eradication of various forms of injustice and oppression by producing lawyers who are able and committed to the realisation of shared constitutional objectives. It must strive to produce diligent, thinking, analytical, justice-driven and progressive graduates who are patriotically seeking to breathe life into the legitimate aspirations of all the people. State institutions or state-assisted institutions are supposed to directly or indirectly contribute to the restoration and enhancement of the dignity, high moral values, wealth, systems and institutions, peace and stability of their nations. Our laws and the way we teach them, must therefore enable them to achieve that objective.

To move from imitation to innovation requires that institutions of higher learning also share the following responsibilities:

1. Getting to the heart of what Lord Macaulay and all like-minded people of his era and their protégés did, to effectively institutionalise the impoverishment, low self-esteem or imposed indignity, mental, economic and institutional damage of the African people that these merciless people have engineered, using the law and its teaching by carefully selected champions of racial subjugation and exploitation.

2. As a pool of intellectuals – a natural think tank and solution-bearers, universities and Law Schools in particular, ought to devise and propose systems and teach law with an undisguised purpose of undoing all forms of injustice including economic injustice or exclusion from critical or destiny–defining opportunities. For, in any nation, the law is supposed to enable the delivery of real justice to all and secure peace and stability. It exists not to undermine constitutional dispensations. But, to undo racism, sexism, exclusivity to ring-fenced privileges, as well as the perpetuation of the fundamentally immoral and rapacious acquisition of wealth –

not to nurture, legitimate and dignify resistance to real and presumably shared or agreed constitutional goals.

3. Although law teachers do not have unlimited powers to influence changes to laws and pedagogy, those who are genuinely opposed to the injustices facilitated by systems and teaching methods that have been readily imitated over the years, would ordinarily seek to help eradicate oppressive and unjust practices. And that would extend to:

   a) proposing appropriate legislative and other changes to help undo what Lord Macaulay and like-minded people have successfully done with devastating consequences to Africa and the rest of the under-developed world.

   b) advocating for significant, practical and inclusive transformation that infuses African legal, institutional or traditional systems and values, into legal education, the mainstream legal system and African institutions.

   c) revisiting access to education and employment equity especially in the better-resourced, and in the case of South Africa, previously white universities. (As some of you probably know, I was recently appointed Chancellor of the UKZN University, a previously “whites only’’ university. Knowing how passionate and forceful the previous Vice-Chancellor was about decolonising, transforming and opening doors of education to the previously excluded, I immediately sought to know what practical changes have since been made – with regard to student admissions, and the employment of staff and senior management. A lot of good progress has been made but much more could still be done).

   d) are black Professors treated with the same respect as their white counterparts in other universities? What percentage of associate or full Professors do blacks particularly Africans represent? If it is low, why after so many years of independence or professed commitment to deracialisation? Who teaches the law to our future law teachers, practitioners, Judges and leaders, matters? Are

they committed to Afro-centric innovation or readily dismissive of virtually everything African?

e) working out funding models that could realistically and progressively place former black universities on par with the historically white and continuously well-resourced ones in every respect – to retain their best lecturers and administrative staff and be able to produce the best graduates.

f) influence the planning and development of basic education curriculum and the setting of standards to smoothen the transition from basic to tertiary education thus paving the way for the production of well-grounded law and other graduates across the racial divide.

g) encourage legal educators to use their vantage positions to help develop graduate programmes that speak to the unique challenges and needs of a particular nation. This extends to the duration and content of, for example, the first law degree programme. Why is it that a high quality law degree may be completed within three years in the whole of Europe and four years in several Asian countries like Singapore but South Africa is considering a longer period? Why can't our law teachers innovatively look for what needs to be done differently to reduce the duration without compromising the quality? This is very important for Africa and other under-developed countries because of the economic challenges that confront Africa and similarly-positioned countries.

h) where I did my LLB degree, we were privileged to be lectured to by a QC (Newman QC), who exposed us to the practical necessities of the law. We also had three High Court Judges, one of whom was among the first to be appointed to our Constitutional Court, Justice Didcott, presiding in the Moot Court finals in which I was privileged to be among the four participants. It was an invaluable and essential experience that I wish for any law student. I know of at least one University that has consistently exposed students to the practical side of the law, under the supervision of an experienced legal practitioner(s). It may be a

good idea to consider embracing this innovation. Even if a student does not intend to practise law but prefers to teach, it is probably useful to teach and write about court judgments and Judges with the benefit of some exposure to the practical realities of that environment. In the very least, let practical legal training be available as an option.

i) design a context-specific leadership programme for the Judiciary. Judicial leadership is in many respects very different from other leadership roles. I have for a long time been concerned that the uniqueness of judicial leadership, and the general dearth of opportunities or platforms from which to develop and refine judicial leadership skills does not seem to have occurred to the academia as a critical need that demands their special attention. The National University of Singapore has reportedly developed a Master's programme on judicial leadership. That innovation is worth considering.

j) to develop few, relevant but content-rich courses that are essential for the proper functioning of any constitutional democracy. Many lawyers now specialise in areas of the law they have never done at university. Having studied a module at university is not necessarily a prerequisite for a proper understanding of and ultimate specialisation in a particular area of the law. With some of the Constitutions we have, how much of what we learn from these many courses do we really need? This is your area of expertise. But, please reflect on how much of what you teach really needs to be taught, and whether you shouldn't perhaps be devoting more time to grounding students well on what stand out as critical courses for the production of excellent lawyers.

In conclusion, the time has come for an individual and national brutal introspection. Let us use our Constitutions as the all-important starting point they are intended to be. While we may use aspects of the common law to strengthen our constitutional jurisprudence, I doubt if we have to be as constrained in achieving real or substantive justice as we often are by the common law. The strong culture of imitation has often caused us to find it easy to brush aside African law and lean more in favour of imitating what Europe is doing. My

recent exposure in Rwanda to the practical value of African law and institutions helped me to appreciate the value of Afro-centric innovation and the progress-retarding effect of programmatic imitation. Access to justice and the speedy delivery of quality justice to all through an understood legal system and institution would be greatly enhanced by Afro-centric innovations.

Let’s stop this somewhat slavish imitation of old laws and practices that do not always work for our nations and design an effective and efficient legal system and teaching method that would be easy to understand and apply. Every aspect of the law ought to be anchored on the Constitution, its spirit, purport, object and values. Otherwise some of the injustices that flow from the law of contract, evidence or property would last forever, to the prejudice of the less informed, often desperate or vulnerable contracting parties. Revise the law and teaching methods innovatively with emphasis or special focus on real or substantive justice and equity.