Editorial

Hoolo 'Nyane*

1. Introduction

This is the second issue of the inaugural volume of the *Turf Law Journal*. The first issue published seminal papers that firmly launched the journal into the academic discourse. Hence, obtaining another set of quality contributions for the second issue has been relatively easy. Both senior and emerging academics have contributed to this inaugural volume's first and second issues. The articles published in the journal are not limited to any specialised area of law. The journal's view of legal scholarship is that, jurisprudentially, the law is better studied within its broader socio-legal and transdisciplinary context. This approach is the antithesis of the positivistic and straight-jacketed study of law. It is the epitome of disenchantment with legal positivism as it applied in South Africa during apartheid.[1] The transition into the new era has not involved a move from one constitutional design to the other; it also represents a transition in the episteme – how the law is studied. One of the most evident consequences of coloniality is its damage to the episteme. This is captured crisply by Ndlovu-Gatsheni, who observes that there is an 'urgent need for epistemic freedom, which restores to African people a central position within human history as independent actors. This epistemological concern is fundamentally decolonial.'[2] Ndlovu-Gatsheni is in the good company of the many other observers of epistemological dynamics in Africa. For instance, Atieno-Odhiambo asks the following pertinent questions:

> Has the time come to question the unitary acceptance of the hegemonic episteme which posits that the discipline of history uniquely belongs to Western civilization? Alternatively, can Africans articulate an African gnosis that stands independently of these western traditions in our study of African history? Need African epistemes be intelligible to the West? Need the study and practice of history be tied to the guild of historical study at the universities? Is there still the lingering possibility than any one of us working within the western mode can have the arterial bypass surgery that may still be the viaduct upstream to the African reservoir of history?[3]

1 Dugard, J 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* 181; Chaskalson, A 'From Wickedness to Equality: The Moral Transformation of South African Law' (2003) *International Journal of Constitutional Law* 590.

2 Ndlovu-Gatsheni, SJ *Epistemic Freedom in Africa: Deprovincialization and Decolonization* (2018) 2.

3 Atieno-Odhiambo, ES 'Democracy and the Emergent Present in Africa: Interrogating the Assumptions' (1996) 3(2) *Africa Zamani* 27-42, 31.

* Associate Professor in Public Law, University of Limpopo, South Africa, and Editor-in-Chief, *Turf Law Journal*. <https://orcid.org/0000-0001-5674-8163> Email: hoolo.nyane@ul.ac.za

The development of law – its history and pedagogy – represents the classical case of epistemological hegemony. The legal system in South Africa, and arguably in most African countries, is still entrapped in Western histories. For instance, African customary law is still regarded as a system of law that is different from the 'common law'. The so-called 'common law', considered closely, represents Western countries' legal practices. It is often tacitly accorded superior status to customary law, deliberately or inadvertently. It is inconceivable why traditional African law has not occupied the mainstream position in our legal systems.

The study of law has proceeded on this basis – that the best way of studying law is to study the Western legal systems. This propensity has affected the genuine development of autochthonous legal scholarship. Instead, African scholarship has, for the most part, become what can be styled 'intellectual puppetry'. It is tantamount to what Alatas calls 'intellectual imperialism'.[4] In an impassioned call for the renaissance, Maluleke says: 'African intellectuals must reconnect to African culture. However, such a reconnection must include not only an analysis and problematisation of what African culture is, but also the question of how best to connect to it.'[5] This is a huge indictment of African scholarship across all disciplines. This is not to suggest that African scholars should be required to study only African systems. While there is an urgent need to challenge the discourses about African systems created by our Western counterparts, African scholars must still participate globally to bring African perspectives to the composition of global epistemic dynamics. The global epistemological makeup is still hugely skewed. It requires the genuine participation of African scholars to bring about the requisite balance.

This is the challenge that *Turf Law Journal* has addressed, and this issue is no exception. It continues to give a platform to transformative perspectives about the law in South Africa and beyond.

2. Summary of contributions in this issue

Paul S Masumbe, in an article titled *Defining the Future of the Immunity Ratione Materiae of State Officials in International Criminal Law*, interrogates the perennial question of the immunity *ratione materiae* of state officials before international criminal courts. In particular, the author focuses on the immunity *ratione materiae* of state officials from foreign criminal jurisdictions. In conclusion, the author contends that the view that the immunity *ratione materiae* of state officials covers only official acts performed by state officials which do not amount to international crimes is legally justifiable. This view is consistent with the decision of the International Court of Justice (ICJ) in the *Arrest Warrant* case.[6] And, as the author argues, it is inconsistent with the rule of customary international law on the immunity of state officials from foreign criminal jurisdictions.

4 Alatas, SH 'Intellectual Imperialism: Definition, Traits, and Problems' (2000) 28(1) *Asian Journal of Social Science* 23-45.

5 Maluleke, TS 'African Culture, African Intellectuals and the White Academy in South Africa: Some Implications for Christian Theology in Africa' (1996) 3(1) *Religion and Theology* 19-42.

6 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* Judgment, ICJ Reports 2002, 3.

In *The Re-establishment of the Corporate Affairs Commission under the Companies and Allied Matters Act of 2020 in Nigeria: A Critical Appraisal*, **Olukayode Olatunji** analyses the reestablished Corporate Affairs Commission (CAC) as the apex regulatory agency for companies' operations in Nigeria. The author gives a fresh perspective to the growing body of the Companies and Allied Matters Act of 2020, which is the law that re-establishes the regulatory agency. The author expresses scepticism about whether the agency will achieve its intended purpose. The regulatory board's composition gives the impression that it is poised to make ease of doing business a reality, but a critical evaluation of the composition of the board as it is presently constituted reveals that it may not achieve this purpose. The author recommends that the board must be enlarged to accommodate other regulatory agencies in the corporate sector.

In a case note, titled *Siblings but not Twins: The Oppression Remedy and the Derivative Action – Larrett v Coega Development Corporation (Pty) Ltd 2015 (6) SA 16 (ECG) in Retrospect*, **Shandukani Muthugulu-Ugoda** contends that although the oppression remedy and the derivative action are separate and distinct remedies, the boundary between the statutory shareholder remedies is often blurred. The derivative action and the oppression remedy are not mutually exclusive. This assertion is borne out by the fact that conduct which may result in harm to a company and may therefore be the subject of a derivative claim may also constitute oppression to minority shareholders. This contention is made against the backdrop of the High Court's decision in *Larrett v Coega Development Corporation (Pty) Ltd*,[7] where the court held that section 165 and not section 163 of the Companies Act 71 of 2008 ought to have been followed from the outset by the applicant shareholder.

In another compelling case note, titled *The End of the Beginning and the Beginning of the End of Attempted Sexual Penetration: Revisiting Silo v S 2016 (2) SACR 259 (WCC)*, **Joshua Kumwenda** analyses the fine line marking the transition from the end of the beginning and the beginning of the end of a crime, or defining in precise terms what is meant by consummation. The author notes that determining the specific moment that the consummation can be said to have commenced is fraught with controversy. The author's analysis is located within the context of the High Court's decision in *Silo v S*,[8] where the court attempted to clarify the principles and the law relating to the attempt to commit an act of sexual penetration without the consent of the complainant in violation of section 3 of the Sexual Offences and Related Matters Amendment Act.[9] In the final analysis, the author contends that the judgment is a good example of the application of the principles and the law relating to attempt, and indicates that the Sexual Offences and Related Matters Amendment of 2007 is yielding results.

How to cite:
'Nyane, H 'Editorial' (2021) 1(2) *Turf Law Journal* v-vii.

7 2015 (6) SA 16 (ECG).
8 2016 (2) SACR 259 (WCC).
9 Act 32 of 2007.