Chapter 9: Lawyers and Activism in the Context of the Decolonial Turn

Ntando Sindane

Introduction

The subject of activist lawyers has been widely written about in South Africa. Most accounts trace the emergence of activist lawyers from the 1910-1914 grouping of legally trained "natives"[1] who collectively converged to form Africa's oldest liberation movement, the African National Congress (ANC) (Plaatje 2007).[2] Activist lawyers (not all of them were connected to the ANC) of that period and neighbouring eras included, the likes of Pixley ka Isaka Seme, Alfred Mangena, Richard W. Msimang, Desiree Finca, Anton Muziwakhe Lembede, Wycliffe MIungisi Tsotsi, Thulani Gcabashe, Vincent Joseph Gaobakwe Matthews, Massabalala (Bonnie) Yengwa, Godfrey Mokgonane Pitje, and many others (Ngcukaitobi 2018).[3]

In more recent years, two prominent names immediately come to mind when discussing activist lawyers, namely Bram Fischer and Albie Sachs. The latter was a prominent member of the anti-apartheid movement, who served as foremost supporter of *Umkhonto weSizwe* (ANC armed wing), only to become one of South Africa's first constitutional court judges shortly after the 1994 democratic breakthrough. Sachs is an example of what activist lawyers were, in the sense that the roots of his activism stem from

1 Black people referred to themselves as "natives" – this labelling is a matter of scholarly contestation in certain quarters.
2 Plaatje broadly recounts some of the ANC's earlier missions to Crown to negotiate the place of Black people in the racist arrangement of the newly formed Union of South Africa.
3 For a broader reading on the history of South Africa's first Black lawyers, see Ngcukaitobi (2018).

his days as a law student at the University of Cape Town in the early 1950s.[4] Whilst in Europe, Sachs completed his PhD studies in law, culminating in a doctoral thesis entitled *Justice in South Africa*; the text was banned in South Africa. The various spaces that Sachs found himself in did not deter his activism—instead, he found ways to support and advance the goals of the revolution.

Two scholars, Drucilla Cornell and Karin van Marle have co-authored a book (with Sachs) about the activism of Albie Sachs (Cornell et al. 2014: 1–126). The book's first chapter is titled, 'Comrade judge: Can a revolutionary be a judge?' (Cornell et al. 2014: 9–47) where they carefully probe the possibility for a liberation movement fighter to become an officer of the court, and specifically, a judge.[5] To respond to this question, the authors demonstrate the role that Sachs played in the liberation movement. In the main, Sachs was tasked by the then president of the ANC, Oliver Reginald Tambo, to draft a Code of Conduct for *Umkhonto weSizwe* combatants (Cornell et al. 2014: 14). The Code of Conduct was a product of Tambo's concern that there was a breakdown in discipline and ethics in the *Umkhonto weSizwe*'s military camps. In the main, the Code of Conduct was an instrument to instil the ANC's democratic values in its military wing. Sachs drafted the Code of Conduct (Cornell et al. 2014: 15).[6] which, among other things, forbade the use of torture as well as various other 'non-ethics of war'[7] in *Umkhonto weSizwe* military actions. The draft was presented and duly adopted by the ANC's 1985 conference in Kabwe (Scholtz and Scholtz 2011: 551–574). It was apparent throughout his life as a student leader and a lawyer, that Sachs committed himself to activism and the struggle to liberate South Africa from Apartheid (Cornell et al. 2014: 19).

As gleaned from Ngcukaitobi's careful reading of history, we can observe that activist lawyers of the yesteryears had one thing in common—they were responsive to the community struggles of their

4 Historical accounts show that in 1952, as a student activist, Sachs joined in mass protests and the Defiance Campaign led by the ANC—he mobilised fellow White students to occupy chairs at the local post office, that were legally reserved only for Black people. This was the beginning of his long life in the struggle against racist segregationist apartheid regime. Subversive mobilising against the apartheid state meant numerous arrests, tortures, and related harassment by the regime, which ultimately led Sachs to exile, first in England, then later to other parts of Europe. He later moved to Mozambique after it gained independence from Portugal, where he continued doing underground activist work for the ANC and *Umkhonto weSizwe*.

5 Notwithstanding its obvious scope, it is interesting to note how Cornell and Van Marle overly emphasise Sachs' activities as a judge more than his earlier years as first a student activist, and later as a freedom fighter. Oddly, the younger Sachs was more radical and subversive to the empire and it begs the question why his peacetime activities are the object of such greater attention/focus.

6 Cornell and Van Marle demonstrate that it is in this role that Sachs was already shaping/crafting the type of jurist that he would later become, because his investment to humanity and democracy insofar as armed responses to the apartheid regime completely mirror his insistence on the jurisprudence of *Ubuntu/Botho* and as well as his embrace of feminist jurisprudential discourse as a judge under the moral and legal mandate of the new Constitution.

7 The image of the "non-ethics of war" relates to those atrocities committed by the army that has won a battle and then proceeds to enslave, kill, rape and maim the people of the conquered territory.

respective epochs, and they went beyond the call of their legal demands/commitments to put their legal, spiritual, professional and intellectual wits in the aid towards defeating some of the challenges facing their community (Ngcukaitobi 2018). The 1910-1914 cohort rose against the 1910 Union of South Africa arrangement (Dladla 2018),[8] that created the present-day South Africa, on the backs of exploited Black people and which ultimately gave birth to the rise of ultra-Afrikaner nationalism that established apartheid in 1948.

Apart from individual activist lawyers, there are also organisations, associations and related formations that engage in social justice activism by way of lawyering that works on behalf of and serves purely as a public purpose.[9] Most of these organisations work in defence of vulnerable communities and persons who are unable to afford legal fees. These organisations include, but are not limited to, organisations such as the Social Justice Coalition (SJC), the Dullar Omar Foundation, the Legal Resources Centre (LRC), + Section 27, the Council for the Advancement of the South African Constitution (CASAC), the Centre for Applied Legal Studies (CALS), the Free State Centre for Human Rights and others.

This chapter grapples with the question as to how we should define or think about activist lawyers in the post-apartheid era, particularly in the aftermath of the #FeesMustFall and #RhodesMustFall movements, which presented South Africa, and indeed the legal academy, with what decolonial scholars refer to as the decolonial turn.

It is with the background set out above that the argument of this chapter is propounded in four segments, following this introduction: the second segment maps the decolonial turn, where this segment intends to substantively (albeit briefly) demonstrate the meaning, essence, and ethos of the decolonial turn and its practical implications for how we think about and re-imagine the practice of law and its pedagogy. The third segment follows through from the definitional clarity as hedged in the second segment, by proffering three characteristics of activist lawyers in the context of the decolonial turn—it argues that these characteristics are a legitimate starting point in the quest to exorcise legal practice and education from the vestigial clutches of colonial knowing, being and thinking. The last and final segment is the conclusion to this chapter.

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8 Dladla explains that the Union of South Africa was a newfound romance between the British and the Afrikaner after centuries of bitter wars between each other, over land that did not belong to them in the first place.

9 In personal conversations with Karin van Marle and Danie Brand, I am often drawn to the irony in "public interest litigation" or "lawyering that serves a public purpose". They both insist that lawyers are officers of the court, and that courts are public institutions, therefore, all litigation should realistically and inherently be in the interest of the public; this includes private and commercial law litigation. Prevailing distinctions between public and private law litigation wrongfully create perceptions that private/commercial law litigation is a matter of private citizens, and therefore, not bound by public policy imperatives.

Mapping the decolonial turn

Although contemporary mappings of the decolonial turn tend to over-emphasise and unduly place it with the theorisation of decolonial scholars from South America and some parts of Europe (and therefore, the United States of America), a deeper reading shows that Africa (Mudimbe 1988),[10] and the diaspora have been central in significant epochs that presented a decolonial turn (Robinson 2021).[11]

Theorisation as relating to the decolonial turn is an offshoot of the broader intellectual discourse on decolonisation. Most contemporary scholarship on decolonisation accordingly draws its lexicography from Frantz Fanon's insights encapsulated in his two seminal writings, *Black Skin, White Masks* (Fanon [1952] 1986)[12] and *The Wretched of the Earth* (Fanon [1963] 1967).[13] A deeper reading of Fanon's seminal works helps crystalise the contextual relevance of decolonisation and the emergence of multiple decolonial turns even after the cessation of official colonialism and related imperialist conquests.

Contemporary scholars of decolonial theory, thus, begin the discourse on decolonisation by distinguishing between colonialism and coloniality:

> Coloniality is different from colonialism. Colonialism denotes a political and economic relation in which the sovereignty of a nation or a people rests on the power of another nation, which makes such nation an empire. Coloniality, instead, refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus, coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image

10 Mudimbe unpacks the various epochs in the various decolonial turns that have defined Africa's long resistance to colonialism and related imperialist conquests.

11 In an almost similar fashion to Mudimbe, Robinson extensively grapples with the numerous decolonial turns that have defined Black and African people's unending resistance to colonialism, capitalism, slavery, sexism and all other episodes of oppression facing them. For example, Robinson is one of the foremost scholars in the study of the spectre of racial capitalism where he provides an annotated account of the limitations of Eurocentric criticisms of capitalism, because it was bereft of an appreciation of the racist and anti-Black nature of capitalism.

12 In *Black Skin, White Masks*, Fanon broadly engaged in a rich psychoanalytic study of racism in the colony. Fanon warns that the colonial society is facing a crisis of White racism and that this will eventually lead to a rupture. Racism creates a society that is divided into two distinct realities, these are the zone of being and the zone of non-being, Fanon explains that, first and foremost, coloniality is a dehumanising experience that places humans (White people) at the zone of being and subsequently places colonised bodies (Black people) in the zone of nonbeing.

13 In *The Wretched of the Earth*, Fanon broadly considers two broad topics, (1) the reality and material conditions of the colony moments before political independence, and shortly thereafter, and (2) the impact of colonial wars on the psyche of the coloniser and the colonised, as evidenced through varying degrees of mental disorders.

> of people, in aspirations of self, and so many other aspects of our modern experience. (Maldonado-Torres 2007: 4)

Walter Mignolo's *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* serves an appropriate starting point (in the context of this chapter) when historicising discussions about the decolonial turn. He explains that in the sixteenth century, Spanish missionaries came into contact with people from the Global South and declared that people shall be judged (engaged with) on the basis of their (in)ability to read/write and use the alphabet (Mignolo 2012: 3). Mignolo posits that this was the beginning of what he calls colonial difference and the Atlantic imaginary (Mignolo 2012: 13).[14]

Towards the eighteenth century and the beginning of the nineteenth century, the yardstick was no longer the ability to read/write in alphabets, but rather "history"—the resultant effect of this was that those who could read/write in alphabet were said to have had a history, and those who could not read/write in alphabet had no history (Mignolo 2012: 3).

The function of relegating to "sub-human", people who could not read/write in alphabet, and declaring that their inability to read/write in alphabet to also mean that they do not have a history, is at the centre of the coloniality of knowledge, it is what Mignolo refers to as the 'subalternization of knowledge' (Mignolo 2012: 12–13).

A fundamental understanding of the essence of the decolonial turn can be drawn from another of Walter Mignolo's work; 'Epistemic Disobedience and the Decolonial Option: A Manifesto' to understand the meaning of the decolonial turn:

> The Decolonial Turn is the opening and the freedom from the thinking and the forms of living (economies-other, political theories-other), the cleansing of the coloniality of being and of knowledge; the de-linking from the spell of the rhetoric of modernity, from its imperial imaginary articulated in the rhetoric of democracy (Mignolo 2011: 48).

This definition accepts that the #MustFall moment presented South Africa with a decolonial turn, this is an epochal inevitability that seeks to complete the incomplete task of decolonising our society. The decolonial turn is thus, a fundamental rupture that happens when a specific colonial society undergoes a notable action that seeks and calls for radical change (Motimele 2019: 205–214). This rupture may be evidenced in different epochs of history—for example, the youth uprising of June 1976 could legitimately

14 Mignolo (2012: 3) defines colonial difference to mean 'the classification of the planet in the modern/colonial imaginary by enacting coloniality of power to transform differences into values'.

be understood as a form of a decolonial turn, since the uprisings brought about a precise rupture that had the impact of changing South Africa's course of history (Sindane 2023: 60).

To be sure, the June 16 generation of students precipitated a rupture that had the South African society questioning (with the intention to de-link) the colonial modes of control that insisted that a colonial and regressive Afrikaans language should become the medium of instruction in South African schools. This decolonial turn presented the academy with an opportunity to extensively engage with the epistemic toxicity of language in colonies—wherein the oppressor used language as a weapon to replicate and reinscribe his image in the imaginations of the colonised and thus, deepen their colonial malady. Although language was at the centre of the dispute, the June 16 moment was also characterised by broader colonial entanglements and the people's multipronged resistance to it.

A fundamental rupture as the cornerstone of the decolonial turn presented by the #MustFall moment is carefully studied by Motimele (2019: 205) as follows:

> Yet, the true rupture presented by the unified activism of students and workers was in the critique they presented of a neoliberalized university, hierarchical bureaucratic structures, an institutional culture still defined by Whiteness, and dominant epistemological paradigms that foreclosed the possibility for an indigenous intellectual project ... Students and workers refuse to be keepers of neoliberal-time by disrupting their roles as human capital with a focus on issues of racial, sexist, classist, ableist, and epistemic exclusion and exploitation.

The concept of 'neoliberal-time' is a marker that Motimele uses to define the totality of three realities that beset the prevailing Eurocentric university, these are curriculum-time, capitalist-time and production-time (Motimele 2019: 205). Implied in these three is the ubiquity of neo-liberal trappings that define the very essence of a colonial university. To Motimele, the decolonial turn presents itself as a rupture to disrupt these three realities in the quest of a radical imagination for the future university that is free from colonial and capitalist sensitivities. Indeed, these ruptures, although canvassed in the context of the university, is a mirror of the South African society in general. For example, Mpofu-Walsh (2021: 25) uses the concept 'tensions' to extend 'neoliberal-time' from the university to South Africa in general—the author argues that the post-1994 reality is a constant tussle between two contradictory/competing visions. On the one hand, a democratic and egalitarian vision that is known as a 'the New South Africa' and on the other hand, a conservative and oppressive vision that he refers to as 'the New Apartheid' (Mpofu-Walsh 2021: 25).

Whereas 'neoliberal-time' in the context of the university speaks to the oppressive/capitalist insistence

on the conclusion of the academic programme(curriculum-time), the need to optimise university profitability (capitalist-time) and throughput (production-time) (Motimele 2019: 205), 'tensions' is defined by two markers, (1) a firm shift towards neo-liberal orthodoxy where national economic policy imperatives are concerned and (2) the fact that the new Black-led state replicates and reproduces the oppression of its predecessors (Mpofu-Walsh 2021: 27).

Although Mpofu-Walsh can carefully demonstrate 'neoliberal-time' (in the make of "tensions") beyond the confines of the university, he concedes that it is only students who have validly responded to the challenge of the decolonial turn:

> The living ghosts of segregation surround South African spaces, causing recurrent protest and social rupture... The 'Must Fall' moment was a new generation's first expression of disgust at the new apartheid ... Student protests of the mid-2010s should, therefore, be read as a challenge to the very foundations of post-settlement South Africa – one that revealed the spatial contradictions inherent in the new apartheid, just as student protests of the 1970s and 1980s had done with apartheid. (Mpofu-Walsh 2021: 45–47)

Martinez-Vargas (2020: 112–128) carefully observes that the #MustFall student protests and subsequent demand for higher education to be decolonised constitutes a legitimate engagement with the fiction and poetics called upon by the decolonial turn. Most importantly, she observes that a critical component of decolonising higher education includes dismantling the prevailing objective and universal worldview that assesses knowledge according to its own standards of truth and thus, ignores other knowledge systems. Martinez-Vargas addresses a misperception of decolonisation as meaning the doing away of the Western epistemic system; she correctly argues that a turn to the pluriverse does not mean dismantling Western knowledge(s), instead it says that there should be diversity in the knowledge systems that exist. Furthermore, Martinez-Vargas appreciates that epistemic and ontological turns are an invitation to re-think concepts and norms that have been long accepted as the golden truth.

Having briefly mapped the decolonial turn,[15] the chapter investigates decolonial imaginations of an activist lawyer in a legal practice. The chapter argues that an activist lawyer, in the context of the decolonial turn embraces the need to completely rethink, dismantle and undo the very strictures, formalities, tropes, and traditions that define legal practice today. The exercise of defining, assessing and thinking anew about the meaning of activist lawyering in the context of the decolonial turn is part and

15 The scholarship regarding the decolonial turn is vast, for further examples, see Grosfoguel (2007), Maldonado-Torres (2011a, 2017), Ndlovu-Gatsheni (2021), Snyman (2015).

parcel of the proposal made by various decolonial legal scholars (Sindane 2021),[16] whose scholarship is said to constitute a prophetic intellectual engagement (Sindane 2022).[17] Examples of decolonial critical scholars who have made calls for a complete rethink of legal practice, the LLB curriculum and legal practitioners, include Madlingozi, who sharply criticises South Africa's constitutional polity, arguing that it is founded on elitist pacts that do not reflect the material and spiritual aspirations of the people on whose behalf it claims its genesis. The central thesis of his argument is two-fold: (1) that the perennial protest by marginalised communities is impelled by the fact that the constitution does not rise to the demand of decolonisation and (2) that the constitution's failure to live up to decolonial demands can be understood by studying the ambivalent racial melancholia and the double-consciousness of South Africa's political elite (Madlingozi 2018). Elsewhere, he has argued that the constitutional moment presents itself as one that seeks to undo colonial conquests, yet it serves to deepen and entrench imperial gains (Madlingozi 2017). This is an argument that is echoed by Modiri, who broadly draws from Africana Existential philosophy to make a multipronged critique of South Africa's post-1994 situation, he critically analyses the epistemic, spiritual, political, and social conditions that define South Africa's reality after the proverbial 1994 democratic breakthrough (Modiri 2017). Modiri's approach is one that sums up the prevailing situation as that of anti-Black racism as being definitive of all facets of South Africa's lived reality. Elsewhere, he argues that instead of resolving the crisis of institutionalised anti-Black racism, the Constitution breeds and perpetuates anti-Black norms and tropes (Modiri 2018: 300–325).

A thorough distillation of the decolonial turn as presented by the #MustFall moment has reasonable implications for legal practice. Three issues are salient: (1) the totality of the legal practice edifice remains largely untransformed and contributes to ontological/epistemic ruptures, (2) the reality of an untransformed legal practice and judiciary calls for the need to challenge the very foundations of a legal system that has been inherited from apartheid without any substantial change and (3) the work that must be done to attain a substantial paradigm shift in society's imagination of the role of lawyers must completely transcend what we currently know and have accepted as normal/procedural/conventional/customary.

16 Sindane argues there is a difference between decolonisation and transformative approaches to law, the latter tends not to overemphasise the triumph over apartheid and colonialism, whilst neglecting coloniality and the prevailing vestigial force of colonialism that is affixed in the colonial global matrix of power.

17 Sindane draws from similar work done by theologians to honour the intellectual insights of Allan Boesak, where he was described as 'the Prophet from the South', Sindane argues that decolonial critical legal scholars also engaged in intellectual prophecy in their different scholarly texts, where they predicted the precarity of post-apartheid South Africa, and the inherent weaknesses of the constitutional project in resolving the unresolved question of decolonising our society.

Three characteristics

Below, the chapter sets out three characteristics of an activist lawyer in the context of the decolonial turn. These three are drawn from the theorisation regarding the decolonial turn; they are an exploratory engagement between theory and praxis. To be sure, the chapter accepts the invitation of the decolonial turn to think about and imagine newer types of activist lawyering in the times of a subtler type of colonialism.

(1) A lawyer who is situated, contextual and conscious.

There is a Christian adage that posits a suggestive metaphor: 'The fear of the Lord is the beginning of wisdom, and knowledge of the Holy One is understanding' (Proverbs 9:10, New International Version). In the context of the decolonial turn, the beginning of all wisdom does not lie in fear of the Lord, but rather in attaining a deeper consciousness and awareness of the world, its intricacies and all the granularities that define it. Various activist theorisations on behalf of people in pursuit of liberation from the bondages of any kind of systematic oppression tend to place consciousness at the zenith of their discourse. Depending on each one's persuasion, others claim that the first of all wisdom is class consciousness (Marx and Engles [1848] 2008),[18] whilst others would say it is Black consciousness (Biko [1978] 2002: 29),[19] and yet others might refer to national consciousness (Maher 2017).[20] An activist lawyer, in the context of the decolonial turn, is one who is conscious of the coloniality of our prevailing situation. They appreciate that although colonialism has been defeated *de jure*, it persists *de facto*, and this is evidenced in its vestiges that continue to define power, property and human relations in the colony, long after the defeat of colonialism (Maldonado-Torres 2007: 4).

Consciousness of the context of the global matrix of power, allows legal practitioners to be able to appreciate the various ills that continue to bedevil South Africa, post-1994, and be sensitive in their articulation and conduct. For example, a lawyer who is conscious of coloniality would readily be able

18 In laying out the manifesto of the communist party, Marx and Engels jointly argue that one of the crucial steps in waging a worker-led people's revolution, communists have the task to mobilise workers into effectively raising their consciousness. Essentially, class consciousness is pitted as a constitutive ingredient in how exploited working-class masses respond to capitalist oppression and expansionism.

19 Biko ([1978] 2002: 5) defines Black Consciousness as follows: 'The first step therefore is to make the Black man come to himself; to pump back life into his empty shell; to infuse him with pride and dignity, to remind him of his complicity in the crime of allowing himself to be misused and therefore letting evil reign supreme in the country of his birth. This is what we mean by an inward-looking process. This is the definition of Black consciousness.'

20 Ciccariello-Maher hedges national consciousness as central to not only decolonising dialectics but as a ploy to enact substantive epistemic decolonisation.

to embrace different approaches to the law—such as the proposed jurisprudence of Steve Biko (Modiri 2017). Modiri explains that the jurisprudence of Biko (also known a jurisprudence of liberation or post-conquest jurisprudence) can be an alternative way for lawyers to respond to the afterlife of apartheid racism that continues to permeate the corridors of legal practice and the judiciary today:

> In any event, an exploration of Biko's contribution to a post-1994 critical jurisprudence in my view unavoidably necessitates an engagement with CRT [critical race theory] to the extent that it was the first serious endeavour by Black legal scholars to insist on the theoretical relevance of race to legal inquiry; to make sense of Black suffering and alienation in/under the law and to develop "racial analytics" with which to study. critique and transform law (Modiri 2017: 14)

This reading of the jurisprudence of Biko necessitates a deeper engagement with the racist reality of our times, the law and all its instruments. It hollows out and disavows the notion that 1994 defeated apartheid and exorcised the judiciary and legal practice from its racist characteristic. At the centre of the jurisprudence of Biko is a reading of legal history as one that is not divorced from the deep-rooted racist architecture of this country and its judiciary.

Some law scholars shy away from engaging in a contextual reading of history and caution that race-infused readings of history may unreasonably amount to grand narratives, and that this would be highly problematic (De Vos 2001). Indeed, this is a view that is echoed by Froneman and Cameron in the case of *City of Tshwane Metropolitan Municipality v Afriforum and Another* (2016), where they felt that the majority's reading/conception of the racist history/present of South Africa unduly relied on grand narratives rather than a nuanced enunciation of history:

> What does concern us is the broad statement in the third judgment that embraces the implication of the first judgment, that any reliance by White South Africans, particularly White Afrikaner people, on any historically rooted cultural tradition finds no recognition in the Constitution, because that history is inevitably rooted in oppression... What does that mean in practical terms? Does it entail that, as a general proposition, White Afrikaner people and White South Africans have no cultural rights that pre-date 1994, unless they can be shown not to be rooted in oppression? How must that be done? Must all organisations with White South Africans or Afrikaners as members now have to demonstrate that they have no historical roots in our oppressive past? Who decides that, and on what standard? (*City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016: paras. 130–131)

Put plainly, the (all Black) majority expressed themselves through Judge Mogoeng, asserting that the street names in South Africa's capital are an embodiment and reminder of this country's ugly past (City of Tshwane Metropolitan Municipality v Afriforum and Another 2016: para. 8). This observation was shared by (the White duo of) Froneman and Cameron. (*City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016: para. 164). Their bone of contention lay in what they perceived to be two critical contradictions. First, how the Black judges construe history in contrast to them and second, their disagreement about the meaning of culture and whether White people's culture can be realistically divorced from its violent, racist and oppressive characteristics (*City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016: para. 131). To be sure, Froneman and Cameron were of the sincere opinion that it is somewhat of a grand narrative to assert that White people's culture is directly connected and proportional to oppression, and that the majority's opinion on this matter is not only regrettable and unfortunate, it is also not within the ambit/tenor/ethos of the Constitution (*City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016: para. 131). Furthermore, Froneman and Cameron felt that this country's ugly history (*City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016: para. 164) does not exclude White people from the new South Africa; it also does not take away their right of cultural and historic belonging (*City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016: para. 157).

As was the case in the *City of Tshwane Metropolitan Municipality v Afriforum and Another*,[21] it is worth noting that the debate on how legal history should be read takes a racial uniqueness in a peculiar manner, where White judges take the one position, whilst their Black colleagues take another. The race positionality of each of the judges is glaringly conspicuous. All of this happens in a South Africa that seeks to present a farcical mirage of unity in diversity, a rainbow nation and a successful reconciliation project.

A lawyer with a deepened consciousness of the coloniality of our times will also be a lawyer who is honest about their privilege and positionality. Activist lawyers must be frank about their positionality and privilege; this frankness reasonably allows them to be able to lend their privilege to the struggles of other people. The importance of being conscious of one's privilege is that it is only when one is conscious that they can lend their privilege to those who are disenfranchised/oppressed by that privilege.

(1) A lawyer who is actively partisan

The suggestion that activist lawyers must be partisan is controversial in the sense that it contradicts the traditional liberal paradigm that draws a distinction between subjective and partisan politics, and

21 The split between the majority and minority judgement was glaring based on colour-lines, with Black constitutional court judges on the one side and their White colleagues on the other side.

"neutral" and "objective" legal interpretation (De Vos 2001: 4). One of the most common features of post-1994 legal practice is its formalist/positivist legal culture that tends to create a purist façade of law—insisting that the law is a science that is above, and indeed divorced from, politics (Zitzke 2017: 185–230). De Vos (2001: 4) accordingly observes:

> In order to deal with this dilemma without jettisoning the liberal project, most judges, lawyers and legal academics believe that they must find a way to uphold the distinction between law and politics through the identification of objective criteria for judicial decision-making. To this end, they search for devices or criteria that may be employed to place a rhetorical, symbolic or what they perceive to be a factual distance between their own personal views, opinions and political philosophy, on the one hand, and the interpretation of legal provisions and the outcome of a particular case, on the other.

Indeed, this is a distinction that is drawn by other legal scholars:

> Political action is a way of being part of the world, of engaging in the world in all its multiplicity and complexity. Important here is to insist on the distinction between politics and the political, the former reflecting the notion of partisan politics, the latter, as articulated by Jean Luc Nancy and Philippe Lacoue Labarthe, calling for a retreat from partisan politics in order to reflect on the meaning of politics. This distinction is crucial for an understanding of the relation between law and politics, also when teaching law to students. At the heart of a critical jurisprudence lies the awareness of the need to retreat from partisan politics and to embrace a continuous rethinking of the political (Van Marle 2019: 209).

In part, liberal legal academics sometimes fail to appreciate the historicity of partisan politics in the people's efforts to defeat racism, sexism, colonialism, apartheid, and slavery. To them, forming part of political/social/ecumenical movements is optional, and can somewhat be likened to a hobby, but to oppressed people, joining these movements and being partisan is an existential commitment (Lenin 1905).[22] The oppressive web of systems in the colonised world are designed to not only throttle oppressed peoples, but to kill them. With the benefit of hindsight, we know that organisations such NAACP, ANC, SACP, ZANU, ZAPU, FRELIMO, PAIGC and other liberation-movements-cum-political-parties were not

22 Lenin warns that the emergence of non-partisan sentiment among working people only serves the interests of the bourgeois class, who revel in both non-partisanship and disunity of the people on the underside.

formed out of boredom nor the exercise of some superfluous liberal liberties—no, they exist precisely in response to a polity that was set on killing and disenfranchising Black and colonised people. Indeed, these organisations and related formations afforded oppressed and colonised people a platform to organise among each other and set up networks of resistance. All things considered, the distinction of politics between a small letter "p" and capital letter "P" (the proverbial distinction between politics and the political) constitutes an abstract theoretical supposition that is bereft of praxis and context. It is apt to conclude that for a people waging a struggle against persisting colonisation and its entangled webs of oppression, being partisan is inherently essential.

Activist lawyers, in the context of the decolonial turn would precisely choose to be partisan, because they would have an appreciation that the struggle for substantive freedom/liberation is yet to be won. Most importantly, they would disabuse themselves from the illogical surmise that suggests that the only way to achieve clarity and better perspective of issues is to retreat from partisan politics.

(1) A lawyer who is NOT ideologically promiscuous

The opposite of ideological promiscuity is ideological steadfastness. By 'ideological promiscuity', I am referring to the often-present flexibility where lawyers distance themselves from the political implications, undertones and overtones of the issues brought to them by their clients. Present legal strictures expect a lawyer to have indifference to the moral merits of the case of his clients. On the same score, by "steadfastness" I mean an approach where a lawyer does not consider themselves as merely a conduit for legal disputes, but situates their own politics within their work.

I deliberately set this characteristic out in the negative, because I intend to decisively critique brazen ideological promiscuity that defines current legal practice. On the same score, ideological steadfastness does not mean a dogmatic and zealous commitment to a specific idea, instead, it means an appreciation that ideas are central to our imagination of a different future and society. To be sure, the decolonial turn allows us to insist on ideological steadfastness.

To demonstrate the promiscuous vs steadfastness dichotomy, I rely on Advocate Dali Mpofu SC: In 2014, following the Economic Freedom Fighters' (EFF) intensive campaigns for Gareth Cliff to be punished for his racist comments on social media, his employer, Multichoice TV decided to fire Cliff from his role as an on-screen judge in a popular show, Idols SA. Aggrieved by the decision to fire him, Cliff approached Advocate Dali Mpofu SC for legal counsel. As it so happens, the good advocate duly represented Cliff. The courts eventually found Multichoice TV channel to have wrongfully and unlawfully sacked Cliff. At the time, Mpofu was serving as the National Chairperson of the very EFF that not only campaigned for the dismissal of Cliff, but was (and is) ideologically positioned as the bastion of the

struggle against racism in all its manifestations. When probed about this, the EFF said that it took strong exception to Mpofu's decision to represent an unrepentant racist, however, reluctantly respected his decision/explanation that he was duty bound, as a legal practitioner, to provide legal assistance to all members of the public, regardless of who they are.

In some versions, Mpofu is said to have used the example of medical doctors and surgeons, saying that they are duty bound to give medical assistance to even those persons whose ideological positions they do not agree with. Whereas, he is partisan (because he is an EFF member) Mpofu falls short when it comes to ideological steadfastness—it begs the question as to why he is a member of a political party that fights against racism, when he gladly aids, defends and advances racism through his professional work as a lawyer. Mpofu's conduct is perfectly sensible in the prevailing legal practice norms, however, it is untenable in the context of what is expected of activist lawyers in the era of the decolonial turn.

Two salient facts can be gleaned from Mpofu's decisions, actions and subsequent reasonings, (1) he considers the task of lawyers as divorced from politics, and political struggles and (2) that there is an ideological discord between Mpofu as a lawyer and Mpofu as an activist. Both speak to the spectre of ideological promiscuity that haunts legal practice today.

Bloem (2022) considers Mpofu in her PhD thesis titled: *The Requirement of 'Fit and proper' for the Legal Profession: A South African Perspective*. Specifically, Bloem studies the findings of the disciplinary hearing in *Legal Practice Council v Dali Mpofu*, where the former was called upon to discipline Mpofu for his conduct at the State Capture Commission of Inquiry, where Mpofu rudely told opposing counsel to 'shut up' (Bloem 2023: 117). What is interesting about the proceedings of this disciplinary hearing is that Mpofu submitted that he felt insulted by the statements made by opposing counsel, when she accused him of 'political grandstanding' (Bloem 2023: 120). It is in the context of the claimed insult that Mpofu told opposing counsel to "shut up". The Legal Practice Council found Mpofu not guilty on the charges raised against him. Mpofu does not explain what inference he drew by the accusation of "political grandstanding". This is neither explained by the findings of the hearing, nor the person who made the accusation. In my opinion, Mpofu finds offence in this accusation because, to him, any insinuation that he is making a political statement in the course of his work as a lawyer is an insult. This is squarely in line with the strictly positivist notions of the law as something that is separate (and above) politics. The contradiction with Mpofu, specifically, is that he is a leading member of a political movement. Bloem concludes that the reason why the requirement of fit and proper is beset with contradictions and uncertainties is that there is a lack in a critical approach with due consideration of moral and ethical values.

Apart from Bloem, the requirement to be 'fit and proper' for entering the legal profession has been

studied by other law scholars, for example, Slabbert explains that a legal practitioner fulfils a dual function by assisting the client on the one hand and by promoting justice in society on the other hand (Slabbert 2011: 224). This, in my view, already means that the lawyer must embrace the fact that the law they practice is not merely for the sake of the law or their clients, but for society at large. A broader societal role inevitably means that there should not be a chasm between the law and politics.

With the decolonial turn as a background, I argue that Advocate Mpofu is a perfect example of what activist lawyers should strive not to be: ideologically promiscuous lawyers who are nothing but mercantilist intellectual mercenaries who take on cases without evaluating the impact of their acceptance of any and every matter presented to them. Activist lawyers have a neat appreciation that there is no distance between the political and the personal.

Conclusion

This chapter has carefully demonstrated that the #MustFall moment presented a decolonial turn to South Africa, and that this was a clarion call, specifically to lawyers requiring them to think anew about their role in society.

Although not exhaustive, the chapter argued that three characteristics are definitive of an activist lawyer in the aftermath of the decolonial turn. These three characteristics are (1) activist lawyers must be situated and contextual in their handling of legal matters—this means that they must be attentive that they exist in a society that is still riddled by the stubborn scum of the vestiges of colonialism that continue to fester long after the official cessation of colonial/imperial conquests; (2) activist lawyers are partisan, in the sense that they do not relegate themselves to merely their law firms/chambers and related law societies, they fully immerse themselves in academic, political, social, ecumenical and related mass movements—they fully comprehend that they should put their skills to the exercise of advancing a service above self, and for the betterment of their community and (3) activist lawyers are not ideologically promiscuous, they understand their role as one beyond "pay as you go" and value-neutral narratives, but rather as agents of change who are committed to a definitive worldview and polity.

Although the focus of this chapter is on legal practice, I accept that legal practice is presently governed by various laws and policies and these include the Legal Practice Act 28 of 2014, and others. Present legal strictures are at odds with the three characteristics of an activist lawyer in the context of a decolonial turn that I proposed in this chapter. This is not inimical to the material reality of coloniality, which appreciates that although South Africa and its legal profession have been formally decolonised, the standards and patterns that define the requirement of fit and proper in the legal profession still mirror Eurocentric

sensitivities. To this end, the chapter insists that if there is any seriousness to the calls to decolonise the law and the legal profession, lawyers should pay heed to the epistemic/conceptual opportunities that are presented by the decolonial turn.

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