

Whose morality? Towards a legal profession with an ethical content that is African^{*}

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Introduction

If we intend restoring morality in South Africa, what would be the *content* of that morality? Or to put it more contentiously: whose morality do you chose? And on what basis would that choice be made?¹

At the core of the legal profession are legal professional ethics, which are concerned with ‘questions of moral permissibility’² of legal practitioners. The debate about the relationship between morality and the law is far from over.³ One cannot make any mention of morality without falling into the ‘predictable’⁴ polarised debate between positivists and natural law thinkers. For proponents of natural law, morality plays a vital role in determining the validity of positive legal rules, while positivists on the other hand believe in a clear separation between law and morality.⁵ Positivists hold the view that the validity of law is dependent on compliance with the formal requirement of rules.

^{*}The terms morality, ethics and values will be used interchangeably in this article.

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¹Kroeze, ‘When worlds collide: An essay on morality’ (2007) 22 *SAPR/PL* 323-335 at 327 (emphasis in the original text).

²Kronman ‘Living in the Law’ (1987) 54 *University of Chicago Law Review* 835.

³See Hart ‘Positivism and the separation of law and morals’ (1958) *Harvard L R* 593-599 and Fuller ‘Positivism and fidelity to law: A reply to Professor Hart’ (1958) *Harvard LR* 630-671.

⁴Kroeze (n 1) 323.

⁵*Id* 323-324.

The net effect of the latter is that for legal formalists, ethics, like law itself, are 'hermeneutically sealed off'⁶ from the reality outside the rules and codes of the legal community. Moral permissibility, in their view, focuses on what is acceptable to a lawyers' professional life and not necessarily to their day-to-day personal life, and so creates an insider-outsider divide. It will be argued in this article that a view of legal ethics that seals the legal community off from the world tends to turn lawyers into moral or ethical schizophrenics. Lawyers that subscribe to the formalistic view of legal ethics constantly vacillate between two 'moral' worlds whose ethical values are different. Their legal moral world is informed by professional codes of ethics, while their everyday morality is informed by the cultural mores and other factors which have historically been sidelined by the profession.

In South Africa, the insider-outsider divide has a political dimension to it. It is trite to say that for a long time, the legal practice in South Africa has been the domain and preserve of white males, to the exclusion of the rest of the community. The insider-outsider approach depicted a profession that did not want to acknowledge and engage the cultural mores and values cherished by the majority of the citizenry. The last few decades have witnessed a gradual inflow into the profession of the historically marginalised, and their entrance to the profession has not, as yet, had a meaningful impact on the ethics of the profession.

This article will argue that the inflow of both women, in particular, and black people, in general, has not had an impact on the ethics of the profession. It will be argued that there should be a positive reflection within the legal profession of the new ethical reality. Feminist scholars elsewhere have made great strides in informing us that gender differences do have an impact on how lawyers perform their tasks, make ethical decisions and enforce the law.⁷ If the inflow of women into the profession has the potential to develop different traits in the profession, then the fact that more Africans are entering the profession should encourage a consideration of what the African culture itself can bring to the profession.

I have chosen to use the word 'inflow' instead of 'inclusion' for reasons that will be apparent as this article unfolds. My argument will be

⁶Markovits 'Legal ethics from the lawyers' point of view' (2003) 12 *Yale Journal of Law and the Humanities* 210.

⁷See Menkel-Meadow 'Portia Redux: Another look at gender, feminism, and legal ethics' Parker and Sampford (ed) *Contemporary Issues* (1995) 25-56.

divided into four parts. Firstly, I will argue that though there has been an inflow of the historically marginalised into the profession, the ethical regulation of the profession does not reflect this fact. Instead, legal professional ethics continue to reflect their Western heritage. In the second part of this article, I will argue that though there is a general crisis⁸ in the legal profession internationally, in South Africa the crisis is further deepened by the absence of African values in the code of professional ethics. The third part will present the conceptual framework that informs my argument. The article will then conclude by suggesting a contextual approach to legal professional ethics.

The Eurocentric nature of the legal professional ethics

In South Africa, the history of the legal system is incomplete without mention of colonialism, imperialism and apartheid. It is a documented fact that the South African law is a by-product of the imposed Roman Law, Roman-Dutch Law and English Law.⁹ With this imposition, Indigenous Law was sidelined and relegated to a subordinate role. This was despite the fact that Africans, who constitute a majority in South Africa, were its ardent adherents. The colonial environment prevalent at the time facilitated this Western supremacy. As Van Niekerk writes:

For many years, Western culture has been dominated by a spirit of cultural chauvinism which denied Africa a place in world history, in the origin of civilisation, and in world thought. All merited cultural attributes claimed by Africa have been ascribed to European or Asian influence. Because of its pre-literate nature, Africa has been denied a history and a law of its own. In this spirit, East and West are found to be characterised by progressive civilisation and Africa by primitive barbarism.¹⁰

A further by-product of the cultural chauvinism is the language of the legal profession itself. Law has its own language which is accessible to those who have learnt it, and for the South African context, this legal language was and is to this day, still offered in languages foreign

⁸See Markovits (n 6) 210-212, and Nicholson and Webb *Professional legal ethics: Critical interrogations* (1999) 277-280.

⁹Van Niekerk 'The status of indigenous law in the South African legal order: A new paradigm for the common law?' (2002) 1 *Codicillus* 5-6, and Taylor 'Where there is a way there is a will: How traditional African homesteads reflect the legal consequences of succession' in Falola and Salm *Urbanisation and African cultures* (2005) 419-421.

¹⁰Van Niekerk *The interaction of indigenous law and western law in South Africa: A historical and comparative perspective* (LLD Thesis Unisa) (1995) 10.

to the majority of the people.¹¹ The fact that the legal discourse is conducted in the medium of English and Afrikaans, both of which are languages of the minority cultures raises its own problems.¹² Language is a very important tool whose power cannot be underestimated. As Mwaura writes, ‘Language influences the way in which we perceive reality, evaluate it and conduct ourselves with respect to it. Speakers of different languages and cultures see the universe differently, evaluate differently, and behave towards its reality differently. Language controls thought and action and speakers of different languages do not have the same world view or perceive the same reality unless they have a similar culture or background’.¹³

The life of Nelson Mandela provides a telling window into both the apartheid system and the formalistic legal profession. Legal formalism has had a severe impact on the lives of citizens in general and of legal practitioners in particular. Mandela was not the first black lawyer in South Africa, but the firm he formed with Oliver Tambo was the first black law firm in the Republic. In his autobiography he recounts his numerous encounters with the law as a citizen and as an attorney. One such encounter was his capture in 1962 by the authorities for his political activities against apartheid. Having eluded the authorities for a while, Mandela’s life on the run came to a halt when he was arrested near Pietermaritzburg. The trial that followed was politically charged and so was the mood inside and outside the court.¹⁴ As an attorney, Mandela knew that to appear in court he needed to wear a suit and a tie. He however used the occasion to assert his African identity, and appeared in court wearing his traditional Xhosa *kaross*. As to why he chose this, Mandela writes:

I had chosen traditional dress to emphasize the symbolism that I was a black African walking into a white man’s court. I was literally carrying on my back the history, culture and heritage of my people. That day, I felt myself to be the embodiment of African nationalism, the inheritor of Africa’s difficult but noble past and her uncertain future. The *kaross* was also a sign of contempt for the niceties of white justice. I well knew the authorities would feel threatened by my *kaross* as so many white people feel threatened by the true culture of Africa.¹⁵

¹¹See Taylor ‘Addressing the *insane language of law*’ (1998) 68 *THRHR* 668-677 and Cowling ‘The tower of Babel - Language usage and the courts’ (2007) 124/1 *SALJ* 84-111.

¹²*Ibid.*

¹³Mwaura as quoted in Taylor (n 12) 675.

¹⁴Mandela *Long walk to freedom: The autobiography of Nelson Mandela* (1994) 311-364.

¹⁵*Id* 312.

Adding to the politically heated temperature within the courtroom, Mandela opted to conduct his own defence. He applied for the recusal of a white Magistrate. One of the reasons he put forward was that white people in South Africa do not have same standards of morality and justice as Africans. Addressing the white magistrate, he said, 'Broadly speaking, Africans and whites in this country have no common standards of fairness, morality, and ethics, and it would be very difficult to determine on my part what standards of fairness and justice Your Worship has in mind'.¹⁶ The application did not succeed and the trial continued before the same white magistrate.

Western law is deeply entrenched in western philosophy. To study law, therefore, becomes a process of initiation into the western worldview, culture and ethos. Philosophy, like language and culture, play a crucial role in the formation of those aspiring to enter the legal profession. Western philosophy espouses a reality that is based on individual autonomy. It speaks of subjective rights and the right of an individual to assert those. In African philosophy, reality is a related whole. The lack of communication between the two worldviews has had an effect on those entering the profession. The marginalised were received into the profession as *tabula rasa* onto which the legal profession would write the new rules of morality and what is acceptable and what is not. The net effect of this is what Nicholson and Webb call the 'anaesthetisation of moral conscience'.¹⁷

It is a historical fact that the Eurocentric Western law has found a home on the African continent, but this cannot be accepted as a *fait accompli*. As pointed out above, Western philosophy is the bedrock of Roman Law, Roman-Dutch Law and the English Law. Couched within what may seem to be the 'legal culture' or legal ethics are western norms and philosophical underpinnings that cannot be blindly assimilated by new entrants to the profession. To argue that the legal profession is, on its own, a community *sui generis* with its own culture is tantamount to authenticating the legal imperialism on the African continent. There must be a symbiotic relationship between the law and the cultural *milieu* within which it operates.

Politically the tide has turned and the Constitution of the Republic of South Africa¹⁸ (hereinafter referred to as the Constitution) has

¹⁶Mandela *I am prepared to die* (1979) (International Defence and Aid Fund for Southern Africa) 6.

¹⁷*Id* 285.

¹⁸The Constitution of the Republic of South Africa, 1996.

made it possible to consider not only other laws¹⁹ but other traditions as well²⁰. The Preamble of the Constitution seeks to ‘heal the divisions of the past and establish a society based on democratic values’. Such values, it is argued, include but are not limited to the right to culture and language both of which are constitutionally protected.²¹ Values are important for South Africa’s jurisprudence which has for a long time been driven by legal positivism.²² The constitutional values have received a place of prominence in the jurisprudence of the Constitutional Court of South Africa.²³ The inclusion of values in the constitution makes it possible for judges to consider both moral and political values in adjudicating matters before them. The legal profession too must be open to these democratic values, particularly in its professional code of conduct and rules. It is this article’s argument that some of these democratic values are entrenched in the different cultures that constitute South Africa’s rainbow nation. Sidelining these values, would be equal to rendering the legal professional ethics culturally out of touch. This article does not seek to refute the fact that there are values that are common to all cultures and peoples. The core of this article is to agree with scholars who argue that the content of those values is determined by one’s culture, race, status religion and class.²⁴

The conceptual framework

The history of the South African legal system bears some resemblance to that of the United States of America. In America, the legal profession has for a long time been the exclusive preserve of the white majority males. As Menkel-Meadow writes, ‘the story of law in the United States is largely a story about one group of people, middle class to upper class white males’.²⁵ As the American profession began to open its doors to those who were historically excluded, Menkel-Meadow embarked on her feminist study of what she calls ‘the

¹⁹See Van Niekerk (n 10) 5-6.

²⁰See Church ‘The question of ethics revisited’ (2006) 47/2 *Codicillus* 19.

²¹S 30 of the Constitution of the Republic of South Africa, 1996.

²²Van Niekerk *Codicillus* 6 and Dugard ‘The judicial process, positivism and civil liberty’ (1971) *SALJ* 181.

²³Cockrell ‘Rainbow jurisprudence’ (1996)12 *SAJHR* 1-38.

²⁴See Macaulay ‘Symposium: Popular legal culture’ (1989) 98/8 *The Yale Law Journal* 1547.

²⁵Menkel-Meadow ‘Excluded voices: New Voices in the legal profession making new voices in the law’ (1987) 42 *University of Miami Law Review* 29.

epistemology of women's exclusion'.²⁶ Through this epistemology of exclusion, she wished to understand what exclusion means to those who are excluded and she also wanted to know what new things can be learnt, if the excluded were to be included.²⁷ This is a crucial point to note for the epistemology of exclusion because the profession which was once closed to a certain group cannot, after opening its doors to the excluded, continue to operate as though those who were previously excluded are still excluded. The excluded do not come empty handed to the profession; they come with knowledge and experience which is deeply rooted in their 'contextual particularity'.²⁸ The contextual particularity in the South African context would include the indigenous values and ethos which have from time immemorial held indigenous communities together.

Conceptually this article is indebted to the work of Menkel-Meadow on the epistemology of exclusion and inclusion. She distinguishes various categories of exclusions. In her own words: 'There are many ways to exclude, such as refusing to admit to the club, admitting but not listening to the new members, admitting but segregating or marginalising, and finally transmuting or translating the words of those excluded into the terms and definitions of the included'.²⁹ Admission into the profession in South Africa is subject to one being a fit and proper person.³⁰ Other than that, the profession is open to everyone. The focus of this article is on those who have been found to be fit and proper in terms of the rules of the profession. The question remains: are they included? To answer this question, a distinction is made between admission and inclusion to the profession. One's admission into the legal profession does not necessarily translate into being 'included', hence, my use of the word 'inflow' above. One may be 'admitted' and yet remain an outsider culturally, linguistically and ethically.

Almost fourteen years into the non-racial democratic dispensation in South Africa, a study like this will inevitably have unintended consequences by polarising the debate along racial and gender lines. An added concern may be that a study like this will feed into racial stereotypes and reverse the gains made since the dawn of democracy

²⁶*Id* 30.

²⁷*Id* 29.

²⁸*Id* 31.

²⁹*Id* 35.

³⁰The Law Societies of different provinces see to the admission and regulation of Attorneys while different Bar Associations attend to matters pertinent to the admission and regulation of the affairs of Advocates.

by taking the debates back by a decade or more. While these concerns are valid to some degree, a study like this goes beyond polarisation and stereotypes. The epistemology of exclusion interrogates all the role players. It deals with the legal profession itself or what Menkel-Meadow calls the 'dominant legal culture'.³¹ To the excluded, the epistemological questions raised are: what do they know, how do they know what they know, and why do they know what they know?³² On the experiences of women lawyers, Menkel-Meadow writes:

A difficult wrinkle to this question is whether we know what we know *because* of our exclusion - the underclass is forced to know both its own world and the world of the oppressor. We need to be multilingual, speaking white, male, objective tongues, while at the same time speaking in black, brown, yellow, red, female and subjective ones (italics in the main text).³³

The epistemology of exclusion does not cease its enquiry simply because the excluded have been admitted. It continues to enquire on the included because admission into the dominant culture does not, of its own accord, bring an end to the exclusion. Those who are admitted may still continue to feel excluded from the dominant legal culture to which they have been admitted. The exclusion may be in terms of the language used in the profession, the field or area of specialisation, and the ethical practices. Once the excluded have been included, the epistemology of exclusion then asks the question as to whether they will assimilate or innovate when they enter the dominant culture.³⁴ Total assimilation is what the legal profession has been hoping, but has failed, to achieve. Inclusion requires the profession to listen to new voices with the hope of making new voices welcome, and heard, not only in the profession but in the law too.³⁵

Though the history of the South African legal system has similarities with that of the United States of America in terms of exclusion, politically speaking, there are nuanced dissimilarities. In America it was the majority white males who excluded the minority black people and women to the dominant legal profession. The dominant legal culture was populated by the dominant majority white group. In South Africa, however, the dominant

³¹*Id* 33.

³²*Id* 30.

³³*Ibid*.

³⁴*Ibid*.

³⁵*Id* 53.

legal culture was dominated by the minority white males, excluding black people and women who collectively constituted the majority in the country. While the American dominant legal culture may have had its cultural roots in the wider majority white populace, the dominant legal culture in South Africa had no cultural legitimacy as it had no resemblance to the demographics of the country as a whole. Practically, this meant that the minority exclusively white legal profession had to serve the majority black population to which there was no cultural connection. When the excluded black majority and women were included in the profession, there continued to be a cultural chasm between those included and the majority of the people. This chasm has the potential to alienate legal practitioners ethically, that is, from the general populace they are supposed to serve and above all from themselves.

The crisis in the legal profession

Though contested, there is a general perception that the legal profession is in crisis.³⁶ This crisis affects the profession not only from within, but also from without in terms of how the public perceives the profession. From within, the crisis relates to the identity and nature of the profession as it responds to external challenges. The competitive legal environment poses challenges that require the profession to revisit the question of its identity. To argue that the profession is not a business may not be an adequate response, because the profession does have a business component which needs to be acknowledged.³⁷ The current reality in South Africa is such that most law firms are run on a purely business basis. Clients are assisted on a purely business rationale based on principles of profitability to the company. The myth that if law firms were to be run on the basis of profitability, indigent clients will not have access to justice does not bear resemblance to any current reality.³⁸

³⁶See Markovits (n 6) 210-211, where he says, 'There is a widely remarked upon crisis in the modern legal profession, but the character of the crisis and indeed its very existence are hotly debated'.

³⁷Rossouw 'Why professional ethics in the legal profession?' (1998) *TSAR* 56, where he argues that: 'There is a growing awareness that practitioners cannot merely be cast as professionals who serve the public. The fact that they are also businessmen and women should be acknowledged'.

³⁸*Id* 59. 'Should a law firm be run on a purely business basis, it could merely pick up the most lucrative cases and clients, whilst denying assistance to those clients and cases it does not consider profitable enough'.

The code of professional ethics which has historically been the repository of the moral ethos of the profession is also questioned, leading to what Rossouw calls the crisis of professional ethics.³⁹ For insiders the problem with professional ethics lies in the fact that it does not have an enforcement mechanism. The unenforceability of the code means that legal practitioners do not have faith in the very rules that guide and govern their conduct.⁴⁰ To those outside the profession, the ethical code is seen as a protective measure to guard both the profession and legal practitioners. As Rossouw puts it, 'The ethical code is thus regarded as serving the interests of the members of the profession, protecting their honour, status and privileges, while neglecting the interests of the clients that the profession is supposed to serve'.⁴¹ The loss of faith both from inside and outside the profession provides an opportunity for the legal profession to reimagine itself in the light of the new challenges.

The inward looking nature of the legal profession, and the fact that its norms and codes are not readily accessible to the public, renders lawyers vulnerable to moral criticism that does not attach to any other professional.⁴² The kind of interests that lawyers serve and the way they execute their functions also make them vulnerable to wrongdoing.⁴³ The public constantly fails to understand why a legal practitioner acts in the manner that they do. As they live out their professional lives, lawyers find themselves in 'the unenviable position of offering what appears to be a far fetched rationale for their conduct'.⁴⁴ In an attempt to address criticisms levelled against lawyers, Wasserstrom writes, 'The primary question that is presented is whether there is adequate justification for the kind of moral universe that comes to be inhabited by the lawyer as he or she goes through professional life. For at best the lawyers' world is a simplified moral world; often it is an amoral one; and more than occasionally, perhaps an overtly immoral one'.⁴⁵

³⁹*Id* 53 -61 and Radloff 'Professional ethics' (1996) *De Rebus* 524 where he asks whether there is an ethical collapse in the profession or not.

⁴⁰Radloff *id* 54-5.

⁴¹*Id* at 55.

⁴²See Wasserstrom 'Lawyers as professionals: Some moral issues' in Davis and Elliston (eds) *Ethics and legal profession* (1986) 114.

⁴³Eshete 'Does a lawyer's character matter?' in Luban (ed) *The good lawyer: Lawyers' roles and lawyers ethics*(1984) 271.

⁴⁴*Id* 270.

⁴⁵*Id* 115.

From Biblical times, lawyers have been subject to scrutiny by members of the public.⁴⁶ The code of professional ethics regulates the life of the lawyer only in his or her professional life. The public on the other hand assesses the lawyers' moral or ethical life based on ethical standards which do not make a distinction between professional and private life. As it has been argued above, lawyers are turned into moral schizophrenics as they straddle these two worlds. It will be argued that the moral schizophrenic lawyer is created by the fact that the code of professional ethics of a lawyer does not speak to the cultural norms and values of the general public and vice versa. This, it is suggested, is the core of the cultural deficit of the professional legal ethics.

Towards a contextual approach

The discipline of Business Ethics has in the recent past witnessed a surge of interest in the link between culture and ethics.⁴⁷ Central to the emerging research is the acknowledgement of the role that culture plays in informing one's sense of morality and ethics. As some authors assert, 'culture is a fundamental determinant of ethical decision making. It directly affects how an individual perceives ethical problems, alternatives, and consequences'.⁴⁸ The leaning of these studies is that ethical reality and morality are culturally mediated. This raises a question as to whether one can speak of the universality of morality or of its relativity. This article's view is that while morality can be considered to be universal, there is an element of specificity that needs to be considered, which is where the African ethical component needs consideration. There has been criticism that within the discipline of Business Ethics, the African voice has been relegated to the periphery. Some authors have argued that Africa's voice has been on the periphery because mainstream voices in business ignore the would-be contributions of African values to the emergence of African Business Ethics.⁴⁹ The legal profession is no

⁴⁶I say this continues, because, as Church (n 20) points out, from Biblical times lawyers have not always been kindly looked upon by society. See footnote 10 in Church which refers to Luke 11:46.

⁴⁷See Sims and Gees 'Attitudes Towards business ethics: A five nation comparative study' (2004) *Journal of Business Ethics* 253-265 and Lu, Rose and Blodgett 'The effects of cultural dimensions on ethical decision making in marketing: An exploratory study' (1999) 18 *Journal of Business Ethics* 91-105.

⁴⁸Lu *et al id* at 92.

⁴⁹Murove 'The voice from the periphery: Towards and African business ethics beyond the Western heritage' (2005) 8 *SAJEMS NS* 339.

exception to this. South Africa with its Western imposed law, continues to be oblivious to the African cultural context within which it is situated. This stark omission becomes more evident in the codes of legal professional ethics.

The problem with Western philosophy is that it compartmentalises knowledge,⁵⁰ which leads to the distinction between what is private and what is public in the life of a legal practitioner. This creates problems for practitioners in a number of ways. Firstly, though legal practitioners make a distinction between what they do in their professional capacity and what they do in their personal lives, members of the public see their conduct as one. They judge and assess legal professionals on the basis of ordinary standards of morality and not according to the professional codes of the profession. Secondly, the codes and rules of professional conduct are too inward looking. In the legal professional codes, a legal practitioner receives clear guidance with regard to what to do and shun in his or her professional life and nothing for his or her private life. While the profession does not acknowledge any cultural values that the aspirant brings, impliedly, it is assumed that in his or her private life that cultural ethos would guide him or her. Thirdly, a public-spirited legal practitioner⁵¹ who wants to assume 'a truly positive social role'⁵² will find little guidance in the codes and rules of professional conduct. Fourthly, legal practitioners see themselves as being accountable to their respective professional associations and the court, an institution that has given effect to their practice.⁵³ In so doing, they lose sight of the very community which is the reason why the profession exists in the first place.

The footprints and remnants of legal positivism are prevalent within the professional codes of legal ethics. Within a formalistic legal tradition, an ideal legal practitioner is one who is obedient to the rules and codes. As Lewis writes, 'The ideal practitioner is one who, having studied the Acts, rules and regulations, avoids *in obedience* to the law those aspects of statutory misconduct which *have nothing to do with morality* and for the rest, out of his own good sense, conscience, and moral dignity, avoids misconduct per se whether or not it is statutory ...'.⁵⁴ (emphasis added). History has provided examples of legal practitioners who had difficulties with

⁵⁰Menkel-Meadow (n 25) 31.

⁵¹Kronman (n 2) 842.

⁵²Nicholson and Webb (n 8) 279.

⁵³Church (n 20) 18.

⁵⁴Lewis *Legal ethics: A guide to professional conduct for South African attorneys* (1982) 7.

such a positivistic view of an ideal legal practitioner.⁵⁵ It is becoming evident that a duty to obey such codes, rules and precepts is becoming inadequate. For instance Du Plessis writes that, 'Legal practitioners ought not to be pale or colourless legal bureaucrats, frivolously succumbing to legal precepts merely because they prevail'.⁵⁶ Noble as Du Plessis' exhortation may be, the problem is that for a lawyer who is steeped in a positivistic training, there may not be any written ethical guide in terms of what to do outside the rules and codes. As pointed out above, the legal training has anaesthetised their moral conscience, and to ask them to revert to the conscience is close to asking them to do the impossible. Their legal training has been about obedience to what is written in the codes and rules and nothing more.

The situation is not entirely gloomy. The Constitution provides a framework for a paradigm shift in South African jurisprudence. Constitutional adjudication of matters is characterised by a shift from formalism to a substantive vision of law.⁵⁷ Legal certainty guaranteed by legal positivism is now receding into the background. With this shift comes the need to make difficult and yet important decisions. As Cockrell writes, 'substantive reasons are difficult reasons; they require hard choices to be made between moral and political values which are inherently contestable and over which rational people will disagree'.⁵⁸ These difficult value choices, it is argued, must also be made with regard to African values which have been relegated to the periphery of the legal profession. South Africa is a colourful matrix of cultures and there is certainly going to be disagreement as to which of the values should be considered and which ones should be shunned.⁵⁹ Rather have an engaging society that is in disagreement in search for the truth than have 'brutal imperialism where the underlying aim is the possession and/or annihilation of difference'.⁶⁰ The starting point for professional ethics, it is suggested, should be the acknowledgment of the context within which it operates. The legalistic and formalistic application of the rules which do not make

⁵⁵See Le Roux 'Conscience against the law: Mahatma Ghandi, Nelson Mandela and Bram Fisher as practising lawyers during the struggle' (2001) *Codicillus* 20-35.

⁵⁶Du Plessis 'The ideal legal practitioner' (1981) *De Rebus* 426.

⁵⁷Cockrell (n 23) 3.

⁵⁸*Id* 11.

⁵⁹See Kroeze (n 1) 327.

⁶⁰Bohler-Müller as quoted in Church (n 20) 17.

reference to the context or to consequences is inadequate.⁶¹ The included must be given an opportunity to present the particularity of their experiences, but they too can only do so if they embark on a journey of 'decolonising' their minds. A possible way forward may start with opening the debate about what it means to be African in a profession that is Western in approach, ethos and orientation.

⁶¹Nicholson and Webb (n 8) 278.