



Black Feminist protests and the Must Fall movement at South African Universities.

by

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Dissertation submitted in fulfilment of the requirements for the degree

Master of Laws (LLM) in
Constitutional Law and Philosophy of Law

in the

DEPARTMENT OF PUBLIC LAW
UNIVERSITY OF THE FREE STATE

BLOEMFONTEIN

NOVEMBER 2024

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STUDENT DECLARATION

I **BOKANG FAKO** declare that the Master's Degree research dissertation or interrelated, publishable manuscripts/published articles, that I herewith submit for the Master's Degree qualification **LLM in Constitutional Law and Philosophy of Law** at the University of the Free State is my independent work, and that I have not previously submitted it for a qualification at another institution of higher education.

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ACKNOWLEDGEMENTS

I would like to thank my mother, Keletso Fako, who has always believed in my wildest of dreams. My eldest brother, Tokelo Fako, who has always held space for me and encouraged all my pursuits. I would like to thank all my siblings and the rest of my extended family. I would not have made it this far without your support, your prayers and encouragement

I would like to thank all my friends, colleagues and comrades and with whom I have spent hours debating extensively about a myriad of topics in relation to this project. Our conversations have guided me in this process, they have helped me shape the direction of this thesis. I would like to thank Neo Mokhuoane in particular, for holding me accountable, exchanging thoughts and ideas and engaging with my work.

My supervisor, Prof Karin van Marle. Thank you for believing in me and encouraging me to pursue this project. You have held my hand so graciously and so patiently throughout the process. Prof, you have inspired me to expand my thinking and to challenge world issues in more critical and rigorous ways. Thank you for teaching and guiding me.

DEDICATIONS

I dedicate this dissertation to my best friend, a friend of my mind and my partner, Matshidiso Pako Legalamitlwa, who passed away in 2024. Thank you for holding for engaging my thoughts with so much enthusiasm. It is affirmations and your guidance that has carried me thus far. You would have been so proud Sparkles. I hope you are proud. I am so grateful to have experienced your kindness and unwavering love in this lifetime. Thank You.

“You knew, didn't you, how I needed your language and the mind that formed it? How I relied on your fierce courage to tame wildernesses for me? How strengthened I was by the certainty that came from knowing you would never hurt me? You knew, didn't you, how I loved your love? You knew.”ⁱ

I dedicate this thesis to myself as well, there were so many times that I wanted to give up because I was convinced that I cannot complete this. Especially towards the end. This has been a deeply personal commitment, and I am proud of myself for never giving up.

ⁱ An excerpt from Toni Morrison's eulogy written for James Baldwin.
<https://speakola.com/eulogy/for-james-baldwin-by-toni-morrison-1987>

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LIST OF ABBREVIATIONS

CC – Constitutional Court

FMF – Fees Must Fall Movement

HC - High Court

LGBTQIA++ - Lesbians, Gays, Bisexuals, Trans, Queer, Intersex and others

MK – uMkhonto we Sizwe

NPA – National Prosecuting Agency

NWU – North West University

PAJA – Promotion of Administrative Justice Act

RMF – Rhodes Must Fall

RU – Rhodes University

SRC – Student Representative Council

SCA - Supreme Court of Appeal

SAPS – South African Police Service

SERI – Socio Economic Rights Institute

UCKAR – University Currently Known as Rhodes

UCT – University of Cape Town

UFS – University of the Free State

UP – University of Pretoria

CHAPTER 1: INTRODUCTION

1.1 RESEARCH PROBLEM

The research problem of this study explores the black feminist protests whose occurrence can be located at the same time and place as the #MustFall¹ movement in South African universities which started in March 2015. I am positing that the Must Fall movement failed to centre the politics of gender and sexuality in the call for decolonisation and this approach resulted in the alienation of women and queer students from the Must Fall; as a, they organised and mobilised themselves to advocate and raise awareness on gender and sexuality matters in the higher education space. I highlight three of the many feminist-led protests, namely The Trans Collective, The Naked Protest, and the #RURerenceList to give context as to how they were formed as break-away movements from the broader Must Fall and centred feminism in their approach. By way of a close reading into the case law pertaining the #RURerenceList protest, UCKAR² and Yolanda Dyantyi I raise questions on how universities and the law as institutions of power perceive black women and queer people and accordingly how they respond to black feminist resistance. I also give a close look into how institutions that use power in regressive ways elucidate similarities between prevailing culture(s) in protest movements, the university and legal space.

1.2 MOTIVATION

I focus on this problem because the dominant and mainstream narratives of the history and purpose of Must Fall is more geared towards a hetero-patriarchal point of view which predominantly centres the men in the movement. I am positing that there are inconsistencies with this narrative and continuing with that version of history only

¹ Must Fall captures both the Rhodes Must Fall movement which transpired in March 2015 at UCT when students called for the removal of the Cecil John Rhodes and subsequently Fees Must Fall at Wits University which called for free, decolonised and accessible education. It also includes all the other Must Fall related that transpired in other universities.

The (#) before Must Fall indicates that the movement also unfolded in the age social media activism where the hashtag is used on different social media platforms to raise awareness and gather more engagements on topic and trending issues.

Hereinafter referred to as Must Fall.

² Short for the University Currently Known as Rhodes, which is the current name that decolonial and fallist scholars use as a sign of resistance against the memory of Cecil John Rhodes, whose name is used to name the Rhodes University.

perpetuates the epistemic erasure and symbolic of women and queer people.³ The Must Fall movement calls for the decolonisation of higher education through the removal of colonial statues and the implementation of a curriculum that is decolonised, free and accessible and a radical restructuring of higher education institutions.⁴ The popular narrative is that the movement started at Univeristy of Cape Town in 2015, in an event where a black male student, Chumani Maxwele defaced the statue of Cecil John Rhodes by throwing feaces as a way to illustrate disdain towards the preservation of colonial culture within historically white universities.⁵ This is then followed by the Fees Must Fall protests, which is said to be led by a black male named Mcebo Dlamini at Wits who called for zero increment in student fees, called for government to increase funding and eventually a national call for free, quality and decolonised education for all.⁶ Various other univeristies have since followed and led Must Fall movements of their own and the narrative that still remains when re-telling stories about this revolution is that they were led by male student leaders, that of which is not entirely true.

I am interested in reflections of the Must Fall from the perspective of black women and queer people such as Kelebogile Ramararu⁷, Athinangamso Nkopo⁸, Wanelisa Xaba⁹, Lwando Scott¹⁰, and many others who have written extensively on their participation in the fallist movement. Most of these scholars write on the dual adversities of already navigating historically white and patriarchal institutions and only to be met with the same kind of hostility and detest from within the same protest spaces¹¹ that are ought to be space for common interests and similar politics. They highlight on how participating in these protests and forming part of that community essentially turned them into targets and exposed them to much more layered and intersecting violence.¹²

³ For purposes of this paper, queer people is an umbrella term used to refer to people who are not heterosexual or cis-gendered, who belong to the LGBTQIA community including those who identify as gender diverse, non-binary or non-conforming.

⁴Scott 2018: 79.

⁵ Ramaru 2018: 149.

⁶ Ramaru 2018: 154.

⁷ Ramaru 2018: 147 – 157.

⁸ Nkopo 2018: 185- 167

⁹ Xaba 2017: 96 -104.

¹⁰ Scott 2022: 77-91.

¹¹ Scott 2022: 77-91.

¹² Ramaru 2018: 147-157.

This study aims to emphasise how black women and queer people were actively involved from the very beginning and proposed that a radical feminist and intersectional approach must be explored simultaneously with the decolonial stance that the movement had already declared. Intersectionality, however, was abandoned and alienated along the way, hence the birth of other feminist led movements.¹³ It is for these reasons why I also aim to reflect, with intention to viziabilize and memorialize, the different protests and organizations that were particularly organized and led by intersectional feminist students during the Must Fall era, with a particular focus on how they were disregarded, overlooked and violated by their immediate comrades/allies, including the public, the media and in the academic narrative.

An in-depth overview of the courts and universities as institutions of power gives an insight to how they have been instrumental in the alienation of women and queer people historically, but especially with regards to the rise in the student-led movement. The case between Dyantyi, UCKAR and the #RURferenceList protest forms a golden thread in elucidating further on the violent experiences. Moreover, it underscores the cisheteropatriarchy that is entrenched in the institutional culture of universities and the courts. I am positing that the ways which Dyantyi was intensely persecuted (as compared to the cis-het male protesters) is a manifestation of the prevailing patriarchal culture at universities and within the justice system, which is innately opposed to the mere existence of black women and queer people. The response to these feminist-led movement emphasise the societal perceptions on how the lives and experiences of black women and queer people is not a matter of national importance. Hence it can be deemed insignificant in the face of institutions that ought to deliver protection and justice.¹⁴

1.3 ASSUMPTIONS

I begin by exploring the notion of space, looking into the dynamics of how space is produced, and how we exist and live in space as an attempt to make sense of the university space and the protest space. This gives insight into how the university and the protest space creates a hostile and suffocating atmosphere towards women and queer people. Space reflects the material erasure of women and queer people, and

¹³ Khan 2017: 113.

¹⁴ Mailula 2018: 4.

that the ethos of university spatial production, by virtue of its geographical location which is derived from apartheid spatial planning, is innately violent towards women and queer people. This mode of operation and functionality is adopted in spaces that ought to be progressive (i.e. Must Fall) but fail to be progressive because they oppress and alienate disadvantaged groups to solidify their power and reign.

I centre Dyantyi because her story relays how women in a historically white university, leading an anti-rape protest can be taken as an example of how women and queer people who are radical leaders have been confronted with violence that ultimately seeks to invisibilize them and criminalize their activism. The Must Fall movement failed to centre and integrate gender and sexuality politics. Even though women and queer people were involved from the inception of the movement, issues that affected them directly were not a priority. The failure of the Must Fall movement to centre black women and queer activists and the resulting alienation led them to mobilize themselves and to start movements such as the #RUGReferenceList, #TheNakedProtest and the Trans Collective, which were primarily centred on gender and sexuality issues.

The response by the university and the courts, including the court of first instance can be seen as a continuance of the inherent heteropatriarchal and racist culture in these institutions and a further perpetuation of systemic violence suffered by these activists. The lack of care and substantive consideration aptly capture the prevailing institutional culture which is rooted in ensuring the protection of the status quo and its capitalist, western patriarchal tendencies.

1.4 RESEARCH QUESTIONS

I unpack the overall research problem by way of three specific research questions/ subproblems:

1. In what way did the Must Fall movement fail women and queer people and what are the consequences of the failure?
2. What was the role of the universities and the courts during students protest and how did they further perpetuate the violence that women and queer people experience in the protest space.

3. How does the case of Dyantyi and UCKAR underscore the prevalent cisheteropatriarchy that is present in legal culture, university culture and in the “male-led” student movement?

1.5 METHOD AND THEORETICAL APPROACH

I conduct desktop research, where I engage the work of many of the fallist activist writing and their reflections on the Must Fall, with a particular attention towards feminist fallist writings. I conduct a critical study inspired by intersectional feminism and queer theory to assert that the Must Fall movement took a hetero-patriarchal and androcentric nature and that is why black women and queer people were significantly erased and violated in the movement, to such an extent that they had to organise themselves against the shared oppression to advocate for their own agency. Relying on critical gender and race theory, I extensively engage feminist and queer literature within the context of the Must Fall movement.

I rely on Crenshaw, who speaks about how single-axis narratives that are predominant in anti-discriminatory/anti-racist politics and feminist theories have continued to neglect experiences of black women and perpetuates their theoretical/epistemological erasure.¹⁵ This single-sided narrative, therefore, denies these marginalised bodies from accessing any form of justice or remedial action, because their struggles were not identified and attentively inquired about to begin with.¹⁶ Adichie warns against this, the “danger of a single story” and how it originates from misconceptualised narratives of certain demographics that are primarily influenced by political and structural powers.¹⁷ hooks alludes that black males essentialised themselves and regarded themselves as the solerepresentative of the black race, which alienated women and queer people on the issue of racial oppression.¹⁸

Furthermore, I ponder on legal theory through the scholarship of Catherine Mackinnon who maintains through her arguments that that the law is used as tool to maintain the system of patriarchy, perpetuate gender disparities and is weaponised against gender

¹⁵ Crenshaw 1989: 193.

¹⁶ Crenshaw 1989: 140.

¹⁷ https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story/c

¹⁸ hooks 1989: 101.

diverse people.¹⁹ Ngraire Naffine, who share the same sentiments as Mackinnon, further puts forward that the law is innately gendered, in a sense that a person deemed “the man of law” is essentially a figure that is built around the characteristics which reflects that of a cisheterosexual, middle class male. Therefore the law, ultimately alienates any other person who does not fall into that category.²⁰ I borrow from these scholars’ rich and vast intellectual repository in attempts to make sense of the Dyantyi case through the lens of feminist jurisprudence in as far as gender, race, sexuality and law intersect.

As I centre intersecting identities, I look to the experiences of those people who are black, women and queer, because they were at the receiving end of erasure and violence in the movement and their struggles are intertwined. Separating one demographic from the other will render an essentialist angle and essentialism that relies on the assumption that the experiences of one social group that is being studied will remain constant and maintain the same fixed meaning throughout historical, political and personal changes.²¹ I also centre women and queer people because they possess a kind of multiple consciousness that predisposes them to layered violence and intertwining struggles. I explore concepts such as ‘multiple consciousness’ in feminist theory (which echoes similar sentiments as that of intersectionalism) indicates that people are not oppressed solely on the basis of gender but also on the basis of their race, sexual orientation, class and other categories of identities that make up a person.²² This is because people exist and live within all of these different identities, at the same time, one or two cannot be separated and prioritised from the other.

Epistemes are systems of knowledge that determine ways in which a group of people make sense of the world they live in and how they themselves navigate that world.²³ Epistemicide or epistemic violence refers to the death of systems of knowledge, mostly indigenous knowledge due to the imposition of western knowledge system.²⁴ In this case, the obliteration of the existence of women and queer people in the history of the Must Fall and the work they have contributed into the movement including the extent

¹⁹ MacKinnon 157-170

²⁰ Naffine 1990: 100-102

²¹ Grillo 1995: 19.

²² Harris 587: 1990.

²³ Van Der Westhuizen 2021: 90.

²⁴ Grosfoguel 2013: 74.

to which it is erased can be compared to epistemic violence. This kind of violence essentially facilitates material and symbolic erasure,²⁵ because denying that a certain people exist is the same as denying them a sense of dignity and belonging, which enables the violence and alienation that they are subjected to. Epistemicide gives room for the perpetration of symbolic and material erasure of women and queer bodies.

Gqola writes on the connection between race, gender and sexual violence, she asserts that race was institutionalised through rape and sexual violence,²⁶ which meant the raping of black women. Rape, was, therefore a tool used to institutionalise and uphold the idea of race²⁷ and masculinity²⁸ and everyone else who identifies as women or presents as feminine, especially if they are black, is regarded as inferior and not belonging. Rape has been used as mechanism to channel the symbolic erasure of these demographics that are deemed as inferior or not belonging. It is an instrument of oppression that has traversed across slavery, colonialism, the apartheid era and in the current times,²⁹ a consistent instrument throughout times of conflicts or war. Racism is one tool that that has divided the politics of black men and white men, but sexism is the one force that united them together, against women and queer people.³⁰ I narrate stories of other activists who were either queer or women to memorialise them in history, but to also emphasise that as a black queer women, I have either shared similar experiences or resonate with their stories.

1.6 CHAPTER OVERVIEW

In chapter two, the first substantive chapter, I address ways in which the Must Fall movement failed to consider women and queer people and I further expand on the aftermath of this failure. To be able to identify this failure, I first explore theoretical frameworks that other scholars have applied to make sense of the Must Fall movement. I build on this foundation to unpack the history and give context of the Must Fall. From how the movement started, the students who were at the fore front and the issues that the movement was tackling. This is followed by a discussion on the idea of

²⁵ Mailula 2018: 14.

²⁶ Gqola 2015: 37.

²⁷ Gqola 2015: 37.

²⁸ Gqola 2015: 39.

²⁹ Gqola 2015: 52.

³⁰ hooks 1982: 99.

space and spatial justice, which offers another theoretical perspective into understanding the Must Fall, the formation of alternative movements and the crises in higher education, universities and student protests. Three of the many feminist-led protest which were formed as break-away movements that arose from the fractures. The discussion of the feminist-led movements highlights how the Must Fall movements failed to centre gender and sexuality politics.

Chapter three delves more in the role of universities and the courts during these student protests and the role they played in the perpetuation of violence against women and queer. To understand the role and influence of universities in this plight, I first understand the power that they possess and how they exert these powers on their constituencies I explore the idea of power and how it has been institutionalised to portray how universities, particularly UCKAR and the courts, have embodied power as an instantiation of western patriarchal capitalism. This serves to illustrate how people who dissent against the status quo are targeted and criminalized as form of social control.

In chapter four I discuss the case between Dyantyi and the UCKAR, from the disciplinary hearing to the court-case. My discussion in this chapter derives from the foundation laid in chapter two on how power exists and functions in institutions such as the universities and courts. I discuss in every detail, the #RURerenceList movement and Dyantyi's involvement. I then investigate how the university and the courts responded to this particular protest, from the internal processes exercised by the university to the escalation of the matter to the courts. I briefly refer to other feminist activists who have had to endure similar violence, on the basis of their gender, race and sexuality. This establishes commonality in how black women have been treated by institutions of power (and the public) over different generations.

CHAPTER 2: BLACK FEMINIST PROTESTS DURING THE MUST FALL MOVEMENT

2.1 INTRODUCTION

The main research problem guiding this study is the role played by black feminist movements led by women and queer people during the times of the Must Fall movement. The focus falls on the court case between Yolanda Dyantyi and UCKAR, focusing on how the law and universities perceive and respond to protests

In this chapter I address the question asking in what way did the Must Fall movement fail women and queer people and what are the consequences of the failure? I posit that the Must Fall as a movement failed to adequately centre the politics of gender and sexuality issues in their pursuit for free, accessible and decolonised education. This resulted in the alienation of women and queer people from the movement, some of whom were initially integral in organising and formulating, so eventually they began to form their own alternative movements. The alienation was, in essence a rejection of feminist politics and it created what Scott referred to as a “fracture”¹ in the Must Fall movement, from which the alternative feminist-led movements have transpired.

I show how some of the feminist-led movements began to form as a result of resistance towards the violence that women and queer people endured within the Must Fall space. While taking into consideration that the said violence was not only experienced in the protest space, I bring into perspective, through theories on spaces and spatiality, how spaces such as the universities and the law (the courts) have also been violent towards women and queer people. The point here is to indicate how spaces, whether in the form of social movements or institutions can exhibit violence towards women and queer people.

I also provide some theoretical context on social movements, including protest and protesting culture and give background on black feminist protests. Ultimately, what I seek to achieve with this chapter, is to challenge the dominant narrative of the Must Fall and to make visible more of the women and queer activists who were confronted with the plight that was the Must Fall student protest and to ensure that history reflects

¹ Scott 2022: 79.

all experience. I further by provide some background to the Must Fall movement before I turn to a discussion on spatial justice within the context of universities and student protest. I proceed to a discussion on black feminist protests that came about as the fractures of the Must Fall but also a consequence of how inadequately universities have addressed issues of gender and sexuality.

2.2 CONTEXT OF THE MUST FALL MOVEMENT

2.2.1 Rhodes Must Fall

In an attempt to make sense of the Must Fall, Scott relies on A Deleuze-Guattarian² framework to explain these fractures (he focuses particularly on Rhodes Must Fall/RMF³), he contextualises the multiplicitious nature of the movement to mean that it was made up of many layers (all of which were necessary) and could not be identified by only one of them.⁴ So, the array of the movements' subjects can mutate and create differences that can bring about progress but can also produce these fractures or alternative disruptions.⁵ He invites us to contemplate the decolonial queer futures that the alternative movements were fighting for when they were demanding their place in the movement.⁶ It is with this contemplative stance that Scott suggests that the Must Fall space was so radically precarious that it was inevitable for these alternative disruptions to permeate through the larger movement.⁷ I unpack the politics of the Must Fall movement, to reflect on some of Scott's suggestions, but also to indicate the feminist centred agencies, and to reflect on the larger movements' shortcomings which made way for alternative disruptions. It may be deemed rather conflating and contradictory to centre these feminist protests in the narrative of the Must Fall, but the Must Fall did not occur in silos. As an example of societal macrocosm, it was heavily influenced by several other internal and external factors, which must be taken into equal consideration. Scott's analysis shows us that issues of the Must Fall may have been different, but they cannot be separated from the feminist movements which I investigate here.

² Deleuze and Guattarian 2005: 1-499.

³ Rhodes Must Fall refers to the first version of the Must Fall movement when a protest erupted at UCT which was popularised by the defacing of the Cecil John Rhodes in the call for free, decolonised and accessible education.

⁴ Scott 2022: 80.

⁵ Scott 2022: 80.

⁶ Scott 2022: 81.

⁷ Scott 2022: 80

2.2.2 Feminist-led movements

While congruent with Scott, I inquire further into these alternative disruptions, which I refer to as “feminist led movements” because they focus on gender and sexuality, two of the many aspects which are central to feminist ideologies. These movements include the Trans Collective, at University of Cape Town, the Naked Protest at Witwatersrand University and the #RURferenceList at the University Currently Known as Rhodes (Rhodes University) in what was then Grahamstown, now Makhanda. I unpack how these movements came about, and I explore some of their similarities, and variations. These areas are worthy to discuss because I am attempting to establish that they are formed from the fractures and /or as a sign of resilience. There are other feminist-led protests which share the same interests as the three I mention above, such as #RapeInAzania,⁸ #EndRapeCulture⁹#ImbokodMustLead¹⁰ and several others, which can be placed in the same timeline and transpired for the same reasons. I narrow down to focus on only three of them because they are consistent and mostly relevant for the crux of this research. These three protests are all connected in that they, directly or indirectly, are a product of the fissure, and they are a break-away from the larger movement. Furthermore, they were all led by women and queer people, influenced by feminist ideology and were primarily advocating for gender and sexuality issues that were relevant to the Must Fall movement and the University space. In general, the women and queer people were confronting the pervasive rape culture that is ingrained in South African universities, they were dismantling the heteropatriarchy that has been normalised in political spaces that were exclusionary to women and queer people.¹¹ In the discussion where I give context regarding feminist-led movements, I start with the dynamics of the Naked Protest at Wits, followed by a discussion on the Trans Collective movement at UCT and then conclude with the #RURferenceList at UCKAR. I focus exceedingly on the #RURferenceList because I want to accentuate the experiences of one specific black

⁸ The movement took place at UCT after a woman alleged that she was raped by a fellow fallist comrade at on one of the buildings which the students had occupied as their operational base.

⁹ This was a nation-wide moment where women and students from various parts of the country protested against the normalisation of rape culture.

¹⁰ A campaign at Wits University which occurred during FMF which transpired after the women raised concerns about how women are not ta the fore front and in the leadership of the movement.

¹¹ Ramaru 2018: 155 – 156.

woman, Yolanda Dyantyi, and her legal battle with UCKAR, a matter which was concluded in 2022.

2.2.3 Erasure

The blatant erasure of women and queer people is pervasive in South Africa. It traces back to the colonial and apartheid era and has been deeply entrenched in almost all spaces, structures and systems, that it translates into injustices that are epistemic, symbolic, material and even spatial. So, it has become imperative to write, talk, research, and narrate about these feminist-led protests during the Must Fall period to confront directly the continuous epistemicide of women and queer people and to ensure that we too, are memorialised into the history of the 2015-upwards student movements. The current and most dominant narratives of the Must Fall movement feed into the hetero-patriarchal propaganda and centres the male figures who led the protests while simultaneously positioning them as the “heroes” (i.e.: the narratives of people like Mcebo Dlamini, Masixole Mlandu and Chumani Maxwele¹² to name a few). These narratives shape the movement as wholistically progressive, but all of this is not entirely true because the “fractures” did happen, and the alternative disruptions sufficed.

As indicated it is for this reason that I write this research project, to postulate about what it meant to navigate spaces as black, women and queer at a time of a call for decolonising universities, and to think about the small, silenced revolutions that the women and queer people led amidst this very big and mainstreamed movements. The work of visibilising women and queer people, through any medium or platform is at the core of feminist scholarship, because throughout history when we are faced with injustices, we have always insisted on naming our history, defining our reality, and establishing our identities.¹³

2.2.4 Yolanda Dyantyi

Yolanda Dyantyi’s experience and (and the UCKAR case) is crucial here, for purposes of understanding how positionalities of womanhood, blackness (and queerness) are simultaneously and separately perceived in spaces such as institutions of higher

¹² All these men have been involved in the Must Fall, some are considered the leaders of the movement and have been arrested for participating these student protests.

¹³ Collins 1990: 72.

learning and the courts. Dyantyi's victimization reflects how these different social identities are perceived and how each is categorised and treated due to such. Her experience is also important in this context because several student activists who are queer, women and black can resonate or have had similar experiences.

It is for this same reason that I bring my positionality into context and elucidate from my own experiences as a black queer woman navigating the University of Free State, a historically white-Afrikaner university, that is located in Bloemfontein, a city with deep roots of colonialism and the apartheid regime.¹⁴ My personal experiences helps to put into context the stories of other students who are black queer women like me, and had to navigate these spaces.

In light of the subjugation that women and queer people have endured in the university spaces and the protest space, all while centring Yolanda Dyantyi and the legal battle with UCKAR, I elaborate on how spaces such as universities, the law (primarily the courts) are produced to be "unbreathable" spaces¹⁵ for women and queer people. I want to suggest that the Must Fall space, which was initially designed to be inclusive and progressive, only replicated an affective atmosphere¹⁶ by adopting repressive perceptions of gender and sexuality. It has become necessary to think about spaces and atmosphere in the context of student protests because firstly, spatial (in)justice, as evident in the call for the removal of statues, was central to the fallist movement, secondly spatial (in)justice cannot be separated from the history of colonialism and imperialism's imagination¹⁷ because spatial theories were instrumental in rationalising and producing unjust geographies.¹⁸

2.2.5 Spatial injustice

It is also imperative to postulate on space and spatiality in the context of the Must Fall movement, but also in as far as the erasure of women and queer people is concerned because epistemic violence (and ontological violence), as well as symbolic and material erasure can be linked to spatial injustice.¹⁹ Very often discourse on spatial

¹⁴ <https://www.sahistory.org.za/article/colonial-history-bloemfontein>

¹⁵ Van Marle 2018: 297-302.

¹⁶ Van Marle 2018: 305-306.

¹⁷ Soja 2010: 36.

¹⁸ Soja 2010: 40.

¹⁹ Van Marle 2018: 296.

injustice is a neglected aspect on the conversation of human rights²⁰ because it is deemed irrelevant. However, space is a place for social cohesion and economic exchange, and a breeding ground for hierarchal constructions and social power, which means spaces become a place of contention when seeking for democracy, justice and equality.²¹ Ultimately, this renders space as a key element even in the context of universities and student protests.

The Must Fall student protests, by demanding for the removal of colonial statues, and calling for transformation of a university space that embraces the history of black people (through the aesthetics and the curriculum) are an attestation to these links.²² The feminist-led student protests require that we investigate these links even further. We can also link these universities to their geographical positioning, i.e. Cape Town, Johannesburg and Grahamstown (now Makhanda) because as Soja writes “things do not just happen in cities, they happen to a significant extent because of cities.”²³ In addition, we can unpack how the Apartheid spatial planning produced cities that are inaccessible and hostile, which results in the reproduction of neoliberal universities such as UCT, UCKAR, WITS (and UFS) thus, equally rendering them as alienating spaces. It should be noted how even the space of protest (the Must Fall), which is a space that ought to foster camaraderie, and is a space for collective pain and therefore collective healing, only became mimetic of the same violence they were defying. The call for spatial justice requires us to not only think about how spaces produce violence on a systemic or structural level that is tangible or visible to the eyes, but also on an atmospheric basis or what Böhme would refer to as “aura”, a crucial point that exists between aura and bodily disposition, and the extent to which it is crucial. ²⁴

In thinking about how space is reproduced in cities and in universities, we learn from Lefebvre who writes about the “right to the city” in the context of seeking for spatial justice and that space in urban areas has been produced in way that is crucial to the survival of capitalism.²⁵ Van Marle postulates on Lefebvre’s teachings, contextualizing the Must Fall and proposes the “right to the city” where she urges us to rethink about

²⁰ Van Marle 2019: 119.

²¹ Soja 2010: 97.

²² Van Marle 2018: 296.

²³ Soja 2010: 97.

²⁴ Van Marle 2018: 302

²⁵ Soja 2010: 98.

the interpretation and application of rights in conjunction with student protests through a Lefebvrian lens.²⁶ She poses that that the re-imagination of new cities/universities cannot be separated from the already existing social ties, lifestyle, technologies, history, and the new aesthetics that we so much desire.²⁷ Thinking about the aesthetics of space and production of space is often neglected but it is just as equally revolutionary and progressive as the other aspects of human rights, even in the discourse on social movements.

2.2.6 The Must Fall Movement

There are still contentions about where exactly the Must Fall movement began who started it. But many have traced it back to the apartheid era and deem the Must Fall as a continuance of the past struggles.²⁸ For purposes of this research, I am not interested in indulging those debates, so I rely on the current narrative derived from the accounts of multiple fallist activists across the country. The Must Fall movement initially started with #RhodesMustFall (RMF) which took place at UCT in 2015, and a couple of months later progressed into #FeesMustFall(FMF) at Wits. One movement was derived from the other with similar ideological foundations. We can suggest that RMF provided FMF with an extensive theoretical framework, language, and critical tools to enable them to articulate their own agency.²⁹ RMF was a “movement to decolonise education by targeting still-active tentacles of colonial relations in Africa.”³⁰ It originally started with the removal of the statue of Cecil John Rhodes, a British imperialist, at UCT.³¹ While FMF on the other hand was fighting against the university fees increment, which included issues of student accommodation or lack thereof, food insecurity, financial exclusions, and other related matters³² that were relevant to the affordability of university fees and access to higher education. The struggles of both these movements are connected because the statue serves as a physical reminder of our history of colonial contest, while the universities are draped in colonial aesthetics, the systems and cultures in the institutions will be entrenched in the racism, sexism and queerphobia.

²⁶ Van Marle 2019: 118.

²⁷ Van Marle 2019: 119.

²⁸ Langa 2017: 6.

²⁹ Dlamini 2018: 4.

³⁰ Chantiluke *et al* 2018: 3-5.

³¹ Chantiluke *et al* 2018: 3-5.

³² Dlamini 2018: 4-5.

Must Fall related protests continued to erupt across universities in various forms and shapes, some were generic and showing allyship with other institutions, while others were specific and nuanced, depending on institutional context. For instance, the #SteynMustFall movement at the University of the Free State, Bloemfontein Campus in 2018.³³ This movement was a decolonial call for the removal of the statue of MT Steyn, which was positioned right at the centre of the main campus.³⁴ Steyn was the last president of the independent Orange Free State from 1896 to 1902.³⁵ The statue of Steyn was removed from campus and relocated to the War Museum in Bloemfontein. It should be noted that museums also function as epistemic spaces,³⁶ where histories are preserved and celebrated.

Before the Steyn Statue removal, there was a forceful removal of the Charles Robberts Swart statue in 2016. CR Swart was a member of the National Party since its very inception and served as President of the Republic South Africa between 1961 to 1976.³⁷ His statue was positioned in front of the UFS Law Faculty and was removed by Must Fall protesters in 2018. The removal of CR Swart and the relocation of MT Steyn from the UFS campus were both actions encouraged by the decolonial pillar of the Must Fall and a domino effect from the removal of the Cecil John Rhodes statue at UCT.

Besides removing statues, the movement also called for the renaming of buildings and facilities across universities. They spray-painted “Sobukwe Law School” across the walls of the UFS Law Faculty building. The Student Affairs building at UFS has now been officially renamed to the Steve Biko Building. A facility building that was initially called “Client Centre” at UP changed to “Student Centre” soon after the students protested with a slogan that said “we are not clients” in 2015, where they were shunning the commercialization of higher education.³⁸ The Bremmer building, which was the administration building at UCT was unofficially renamed to “Azania House”, the students had occupied the building and used it as their operational base for organising and strategizing for the movement.³⁹

³³ <https://www.thejournalist.org.za/kau-kauru/why-steyn-must-fall/>

³⁴ <https://www.thejournalist.org.za/kau-kauru/why-steyn-must-fall/>

³⁵ <https://www.sahistory.org.za/article/national-party-np>

³⁶ Mbembe 2016: 4.

³⁷ <https://www.sahistory.org.za/people/charles-robberts-blackie-swart>

³⁸ Van Marle 2019: 110.

³⁹ Scott 2022: 77-78.

At some point the renaming of the buildings and removal of statues unfolded through diplomatic channels, some universities implemented committees like the Institutional Transformation Plan at UFS⁴⁰ or the three working streams at UP⁴¹, as a direct response to the students protests call for change.⁴² Some name changes happened through guerilla tactics and were just temporary for purposes of the protest (i.e. spray painting the walls or occupying spaces and renaming them unofficially). Many other universities have since initiated plans and some implemented plans to rename their buildings, change their insignias and emblems and put measures in place in attempts to transform institutional culture and image.

The call for the removal of statues was regarded as trivial and received with criticism from some scholars and the public because “they are just statues”,⁴³ while others were convinced that removing these statues and monuments is “erasing history.” I am of the view that this criticism did not understand that the movement was interested in spatial justice. Mbembe argues that “human history is by definition history beyond whiteness” and recommends that to progress with a functional history in a post-apartheid country we need to start demythologizing whiteness⁴⁴ and decentre its violent history as holistic South African history. The presence of statues in public universities has always been strategic, intentional, and serving a purpose. Their display in university space insinuates a commemoration of the apartheid legacy, a commitment to its history and a perpetuation of coloniality and all its neoliberal politics. In a country that is past 30 years of democracy, there should not be room or space for colonial historical figures and iconography in shared public spaces.⁴⁵ Historical architectures, whether in the form of statues, or buildings, serve a meaningful purpose, provoke deep emotions, and can reflect the beliefs of a social space and make political statements.⁴⁶

⁴⁰ The ITP or Integrated Transformation Plan is the university’s plan to transform itself into the university it wants to be. The ITP covers all aspects of the university, including the Core Functions (Teaching and Learning, Research, and Engaged Scholarship), the University Culture (Student experience, Staff Experience, Names, Symbols and Spaces, and Universal Access) and Structural Issues (Finance, Governance, Systems, and the Multi-Campus Model).

⁴¹ Van Marle 2019: 121.

⁴² Van Marle 2019: 121.

⁴³ Malaika 2020: 76.

⁴⁴ Mbembe 2016: 3.

⁴⁵ Mbembe 2016: 6.

⁴⁶ Shabazz 2015: 61-62.

There was also a demand for a change in language policies, which included the removal of Afrikaans, and the integration of other African languages into the courses that are offered. The #OpenStellenbosch⁴⁷ at Stellenbosch University was initiated with the same interest of tackling the exclusive use of Afrikaans as a medium of instruction, and the main operational language that is used in other parts of the university.⁴⁸ NWU in the Potchefstroom campus is still utilising Afrikaans in their classes and now uses technological aids such as the Autshumato translation machine to translate Afrikaans (a predominately used language) to English. This is to accommodate none-Afrikaans speaking students.⁴⁹ The call for “Afrikaans to fall” can be directly linked to the demand for spatial justice in a sense that language was an instrumental tool in the colonial conquest. Thus, becoming a tool for post-colonial oppression survival- it entrenched its tools of domination in universities such as SU, UP and UFS which are located in cities with a very rich history of Afrikaner Nationalism.⁵⁰

Must Fall was consolidated into an ideology that is now known as “Fallism” which was understood as an amalgamation of Pan Africanist and Black Consciousness ideas.⁵¹ One of the renowned fallist activists, Athabile Nonxuba, described the idea of Fallism as “an oath of allegiance to the decolonial project. It is an oppositional force against forms of domination. Fallism seeks to expel imperialism and its various forms of colonialism from Africa, which includes the hegemony of European history which superimposed itself as an intellectual, ideological, and cultural ideal in Africa. In imagining new political expressions that are able to house a collective suffering of African people despite them being from different political persuasions, Fallism to us meant an ontological and epistemological response to forms of domination”.⁵²

Nonxuba succinctly captures the true essence of Must Fall, what it represents and the radical decolonial politics it stood for. Progressive as it may be, it does not mention any issues on gender and sexuality. Fallism did not, on a very fundamental level,

⁴⁷ Open Stellenbosch was a movement created by black students and staff of UP who refuse to accept the lackadaisical interventions for transformation and refuse to challenge the hegemony of white Afrikaans culture and exclusion of black students and staff.

⁴⁸ <https://www.dailymaverick.co.za/article/2015-04-28-op-ed-open-stellenbosch-tackling-language-and-exclusion-at-stellenbosch-university/>

⁴⁹ <https://humanities.nwu.ac.za/ctext/autshumato>

⁵⁰ Van Marle 2022: 206.

⁵¹ Makgopa 2018: 110

⁵² Makgopa 2018: 110.

recognise the struggles of the LGBTQIA+ community, women, and gender non-binary people.⁵³ This patently translates on the ground when majority of the time was spent establishing consistent race politics and centring blackness, as well as black women and queer people who were compelled to identify as “black first.”⁵⁴ This resulted in the abandonment of all their intersecting identities for the sake of the general cause. The division of labour during the organising unfolded in a very gendered and patriarchal manner, which relegated women to nurturers and supporters and not active participants of the movement.⁵⁵ Women and queer people were victims of sexual violence and homophobic threats,⁵⁶ while some were physically assaulted.⁵⁷ Conversations regarding making the space more inclusive were met with hostility.⁵⁸ Not enough attention was directed to addressing or ideating on gender issues and feminist politics.⁵⁹ Which is an oversight, considering the politics of what Fallism entailed. I am positing that it cannot be possible for a movement that claims to deeply care about intersectional feminist politics, to subject its proponents to such levels of violence.

It is imperative to highlight the performative nature displayed by some cis-het women and white students when it came to including gender and sexuality issues in the movement. At Wits, we saw women at the forefront, leading some parts of FMF and for a second there was hope that Fallism was making room to integrate gender consciousness into its politics.⁶⁰ These were all just fleeting moments because prioritizing gender and sexuality issues and understanding intersectional feminism is more than just holding space for victims of hetero-patriarchy to relay their traumatic experiences, or having women lead protests while chanting “*wa thinta abafazi, wa thinta imbokodo*”.⁶¹ The #PatriarchyMustFall was started at UCT, when, during a particular discussion, some cis-gendered people and white people realised how some

⁵³ Makgopa 2018: 110.

⁵⁴ Nkopo & Chantiluke 2018: 140.

⁵⁵ Ramaru 2018: 150.

⁵⁶ Ramaru 2018: 155.

⁵⁷ Shange 2017: 63.

⁵⁸ Scott 2022: 78.

⁵⁹ Nkopo & Chantiluke 2018: 140.

⁶⁰ Makgopa 2017: 110.

⁶¹ An isiXhosa phrase, which means “you strike a woman, you strike a rock”. It is a popular phrase in South Africa which is often used to refer to the resilience and strength of a woman.

of the experiences shared by women and queer people were in fact symptomatic to a much broader issues, which is hetero-patriarchy.⁶² This only lasted for a short while.

When reflecting on the organising and ideating around the Rhodes Must Fall movement at UCT, Ramaru uncategorically states that queer people and black women did not ask to be included in the movement and that in fact, these were the very people that started the movement.⁶³ A lot of time was spent on trying to establish consistent race politics and centring blackness, where black women and queer people were cornered to identify as “black first”⁶⁴ and not enough attention was directed to addressing the gender issues and feminist politics like the patriarchal gendering of labour with regards to how task and duties were allocated.⁶⁵ As a result, it relegated women to nurturers and supporters and not active participants of the movement ⁶⁶

To understand the plight of gender violence that transpired within the Must Fall space, especially when we expected it to be the space that is progressive and free from all forms of oppression (because it was a social movement that transpired in a democratic era and led by the “born free⁶⁷”), we must understand South Africa’s history and relationship with masculinities. Hegemonic masculinities is a concept that is broadly used in the South African gender and sexuality research space to make sense of these dynamics. Connel explains the concept of hegemonic masculinity as the understanding of gender practice which captures succinctly the current crises of the assumed legitimacy of patriarchy in South Africa.⁶⁸ It is explained as an unrealistic idea of masculinity that seeks to ensure the continuous oppression of women and all gender diverse people.⁶⁹ Hegemonic masculinities can be traced back to constructions in colonial times when effeminacy in men was abhorred and men who were deemed as less masculine were relegated because they lacked the necessary bravado needed to display the efforts of men who are hardworking and committed on expanding and defending the empire.⁷⁰ The Apartheid regime perpetuated the construction of

⁶² Fenton 2018: 89.

⁶³ Ramaru 2018: 151.

⁶⁴ Nkopo & Chantiluke 2018: 140.

⁶⁵ Nkopo & Chantiluke 2018: 140.

⁶⁶ Ramaru 2018. 150.

⁶⁷ A phrase use to refer to people born who were born or grew up after the end of the Apartheid regime in South Africa. These are people born from the year 1994 onwards.

⁶⁸ Morell et al 2012: 19.

⁶⁹ Mailula 2019: 47.

⁷⁰ Mailula 2019: 47.

hegemonic masculinities by branding masculinities which were politicised, and revolved around violence and religion.⁷¹ Even when we transitioned into a post-apartheid country, these constructions of masculinities overlapped into the new democratic regime, infiltrating spaces such as the government, family structures, universities and other. It is for this reason that we witness “protest masculinities” where military means (physical violence/ use of weapons) are utilized to mobilize solidarity and to fight against disempowerment.⁷² This kind of masculinity is reminiscent of the colonial and apartheid regime, rooted in the need to exercise power over women and gender diverse people. Judge writes about how hegemonic masculinities supplement the construction of a cis-heteronormative society legitimise gendered violence and perpetuates the marginalization of gender diverse people.⁷³ The existence of women and queer people, in spaces that are predominantly designed for the occupation of men (i.e. assuming leadership position in the Must Fall) defies the foundations of hegemonic masculinities⁷⁴ and makes them vulnerable to marginalization and violence.⁷⁵ South African social dynamics are deeply gendered, women and queer people have been oppressed through history, and political dominance is continuously contested, this reality manifest in every social aspect, including the organising and unfolding of the Must Fall movement.

Evidently, the Must Fall movement was layered, including the call for spatial justice and the struggle of belonging for black students in historically white universities.⁷⁶ The statues and names of white Afrikaners Nationalist loudly echoed racial, and class divide within our campuses, and this what Must Fall largely prioritised, but the statues were also a constant reminder of the marginalization of gender and sexuality, which meant the continued invisibilization of women and the LGBTQIA+ community. One wonders if the idea of decolonization was applied metaphorically in this instance because how do we decolonize without including all the groups that were directly affected by colonialism. It is not possible to decolonise without a deliberate and rigorous gendered approach. I dissect the Must Fall movement without necessarily dwelling extensively on the dichotomies of the RMF versus FMF because it falls

⁷¹ Mailula 2019: 47.

⁷² Morell 2018: 21.

⁷³ Judge 2019: 20 – 22.

⁷⁴ Mailula 2019: 51.

⁷⁵ Judge 2019: 39.

⁷⁶ wa Azania 2020: 77.

outside of the scope of this study. I also dissect the movement by enumerating their primary interest, and to show that at the very epistemic core of the movement, it did not centre matters of gender and sexuality. I also dispel the belief that the movement was homogenous by discussing the “break away” feminist movements in the next section.

2.3 SPACE, SPATIAL JUSTICE AND STUDENT PROTESTS

Postulating on space and spatial production in critical discourses around social disparities, justice and democracy is often a neglected aspect but it is, in fact, a crucial aspect of the conversation. Neglecting this topic stems from how the idea of space was often understood in mathematical contexts⁷⁷ and seemed irrelevant to the broader discussion of how social differences are structured and constructed. But once we start thinking of space in more literal and broader configurations instead of limiting it to idealised abstractions, and we investigate how space produces consequential geographies,⁷⁸ this can assist with giving context to the matter. Space, according to Lefebvre, is socially constructed and how it is constructed is a true reflection the power dynamics, social practices and relations that exist in that society. In more details in the book about production of space, this is how he explained:

“(Social) space is not a thing among other things, nor a product among other products rather subsumes things produced and encompasses their interrelationships in their coexistence and simultaneity - their (relative) order and/or (relative) disorder. It is the outcome of a sequence and set of operations, and thus can be -reduced to the rank of a simple object. At the same time there is nothing imagined, unreal or ‘ideal’ about it as compared, for example, with science, representations, ideas or dreams. Itself the outcome of past actions, social space is what permits fresh actions to occur ... while suggesting others and prohibiting yet others. Among these actions, some serve production, others consumption ... (i.e. the enjoyment of the fruits of production). Social space implies a great diversity of knowledge.”⁷⁹

He explains the complexity of the existence of space, highlighting its co-existence nature and how it is influenced by the people who occupy it, their ideas, and beliefs, how the history of spaces makes it what it is, but maintains that space is ever evolving with the times and how forms of interactions, whether social or economic, are what

⁷⁷ Lefebvre 1974: 86.

⁷⁸ Soja 2010: 31.

⁷⁹ Lefebvre 1974: 73.

creates the space. He proposes a three-fold model of understanding space, namely Spatial Practice (Perceived Space) which is interested in the material and physical compositions of space, it interrogates how space is produced through its social interactions and by observing that intersection between the daily reality and urban reality which shape how space is used, occupied and experienced.⁸⁰ Representations of Space (Conceived Space) is about the conceptualization of said space, it is the most domineering space that exists in society ⁸¹ and reflects mainly the theoretical/philosophical representation of space, and lastly the Representational Spaces (Lived Space) which concerns how spaces are inhabited. It is about how human beings connect with each other in the space they occupy and the environment they create through imagery, symbolism and signages.⁸²

Soja went on further to simplify Lefebvre's work into Triality of Spatiality, which is divided into the First Place, which represents the material and physical and is concerned with the tangibility of space, much like the perceived space.⁸³ The Second Place, is essentially a conceived space that is concerned with theoretical perceptions⁸⁴ and the Third place combines the conceived and the perceived to highlight the lived experiences.⁸⁵ Through this framework, we can critically analyse and understand the dynamics of space, spatiality and space production, through the nexus of the three spaces, we can use this to establish the association between the epistemological and spatial foundations of the concept of social space.

Lived space is particularly relevant in the discussions on epistemic violence contextualised with the need for inhabitance, because the call for epistemic justice is synonymous with spatial justice.⁸⁶ Lefebvre's concept of lived spaces is concerned with the ways in which people connect to and relate with the space they co-exist beyond its physical element - belonging becomes relevant in this regard. The student movement's call for decolonization, doing away with rape culture, transformation of the curriculum, the falling of tuition fees, amongst others was more than a call to

⁸⁰ Lefebvre 1974: 38.

⁸¹ Lefebvre 1974: 38 - 39.

⁸² Lefebvre 1974. 39.

⁸³ Soja 1996: 10.

⁸⁴ Soja 1996: 10.

⁸⁵ Soja 1996: 10.

⁸⁶ Van Marle 2018: 304.

access university spaces on just a physical level,⁸⁷ it was about a sense of belonging in spaces that refuses to recognize our humanity.⁸⁸ It was alluding to access to the university as follows: “space is directly lived through its associated images and symbols”.⁸⁹ Access to university is also about how students experience the space and how they are treated and catered for and to what extent are they accepted or alienated.

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2.3.2 Right to the City

Insisting on Spatial Justice, Lefebvre introduces the idea of the “Right to the City”. where he asserts that that the city is an important place for social and economic interactions and therefore, a space that cultivates social power and societal hierarchies. It therefore becomes imperative to want to interrogate the extent to which societal struggles are affected by a city.⁹¹ The city is not merely an urban place but is an instance of a space that is produced by the people who occupy. Through critical analysis, we can see how the three-fold framework mentioned earlier are applicable for purposes of establishing spatial justice. The daily urban activities and interactions in the city generate a disparity of power relations amongst people, which consequentially create an unjust system of resource distribution across the space,⁹² creating what Soja explains as “unjust geographies” – a concept which I will expand on later.

The right to the city is therefore a call to reclaim the space on a physical and social facet. This ensures that the city does not only serve capitalism⁹³ – which is an embodiment of a “white supremacist capitalist patriarchal”⁹⁴ status quo. The right to the city seeks to gain control on the areas that are responsible for creating this unjust societies.⁹⁵ The production of space in cities/ urban life exist solely to ensure survival of capitalism⁹⁶, which means the perceived and conceived would curate a space that reflects that of a capitalist state, thus only benefitting only the people at the upper

⁸⁷ Van Marle 2018: 304.

⁸⁸ Aa Azania 2020: 77.

⁸⁹ Lefebvre 1974: 39.

⁹⁰ Van Marle 2018: 304.

⁹¹ Soja 2010: 96.

⁹² Soja 2010: 96.

⁹³ Soja 2010: 98.

⁹⁴ <https://www.youtube.com/watch?v=sUpY8PZlgV8>

⁹⁵ Soja 2010: 96.

⁹⁶ Soja 2010: 98.

echelons, who are white and cis-heterosexual, alienating those below. The call for the right to city seeks to bring to light the creation of consequential geographies, which are occupied by those who benefit the least from capitalism. Ideally, right to the city, which claims an active participation in everything that happens in urbanised life under capitalism,⁹⁷ seeks to ensure that we are all able to participate freely and equally in the production of space and we can equally access the space and all its advantages.⁹⁸

2.3.2 Unjust Geographies

Soja pioneers another three-tier framework that seeks to simplify the complexities of spatiality and spatial justice to establish how unjust geographies are produced, reproduced and responded to. Unjust geographies, in the context of spatial justice can be explained as space that embodies the social and economic consequences of colonialism. Unjust geographies are an embodiment of the disparities that have been created by an oppressive regime, resulting in spatial injustice. He proposes the following lenses, firstly the Exogenous Geographies (top-down)⁹⁹ which are geographies generated by global divisions of power, overlapping into government structures and into districts and demarcations that are designed by the state and therefore determined the political organisation of space.¹⁰⁰ Secondly, it is the Endogenous Geographies,¹⁰¹ which is the configuration of locational decisions making, the internal process that are involved in producing space.¹⁰² and Mesogeographies of Uneven Developments¹⁰³ which is regarded the principle tenet of the other two, hence “the in-between”, mesogeographies refers to the space between the two, that remains when the inequalities produced by other spaces are sustained over a course of time.¹⁰⁴

When discussing Exogenous Geographies, Soja refers to how post-colonial geographies are major contributor to the how spatial injustice is produced.¹⁰⁵ He is thinking about how colonialism, through its forceful and intrusive space tactics, occupied space in order to produce their desired political geographies that they can

⁹⁷ Soja 2010: 96.

⁹⁸ Soja 2010: 99.

⁹⁹ Soja 2010: 32-46.

¹⁰⁰ Soja 2010: 32-33.

¹⁰¹ Soja 2010: 47-56.

¹⁰² Soja 2010: 47.

¹⁰³ Soja 2010: 56-66.

¹⁰⁴ Soja 2010: 56.

¹⁰⁵ Soja 2010: 36.

impose regulations and control over. In South Africa, the colonisers relegated the colonised to Bantustans/Homelands during the 19th Centuries. This colonial spatial divisions were institutionalised during the Apartheid Regime through legislations such as the Groups Areas Act¹⁰⁶, The Regulations for the Administration and Control of Townships in Black Areas¹⁰⁷ and others, it is from these spatial segregations that deeply Afrikaner cities such as Cape Town, Bloemfontein, Pretoria and others were produced, these same cities are where the “major” universities are located. Morell proposes that the colonial spatial segregations created a mixture of masculinities from the patriarchal authority of the chiefs in the Bantustans and the leadership of the Afrikaner nationalists,¹⁰⁸ this amalgamation of masculinities only perpetuated the oppression of women and gender diverse people further.

Soja identifies apartheid in South Africa as another significant contributor to unjust geographies, he asserts that apartheid is centred around the struggle to maintain and perhaps maintain perhaps maintain colonial geographies.¹⁰⁹ The spatial segregation has always been strategic, in order to ensure the social and economic disparities are maintained throughout,¹¹⁰ it overlapped into other social spaces, such as universities.

2.3.3 Right to the university

It is from this positing that Van Marle probes into the “right to the university”, where she is reconsidering how rights can be interpreted in the light of the student protest and rampaging crises that is in higher education.¹¹¹ Van Marle wonders if Lefebvre’s Marxist radical politics can be implored to better understand the Must Fall movement, whether we can observe the right to the University through the lens of the right to the city, looking particularly into the “lived spaces.¹¹² If we undertake the conversation on ‘rights’ to go beyond the orthodox discourse and we extend the discourse to pursue an alternative through which students protests are centred, we must then consider whether a right to the university can translate to a need for spatial justice or an alternative vision for humanity.¹¹³ Because the Must Fall movement was action

¹⁰⁶ of 1950.

¹⁰⁷ R293 of 1962.

¹⁰⁸ Morell et a: 15

¹⁰⁹ Soja 2010: 41-42.

¹¹⁰ Soja 2010: 40.

¹¹¹ Van Marle 2010: 118.

¹¹² Van Marle 2019: 111.

¹¹³ Van Marle 2019: 112.

reclaiming for constitutionally granted rights, and a consideration of more broader human rights, it becomes to important bring rights into context and enquire on their role in furthering and/or prohibiting radical politics.¹¹⁴

Van Marle remarks primarily on the response by the University of the Pretoria towards the Must Fall protests. The University of Pretoria, a historically white University's whose spatiality with regards to geographical location. How UP responded towards the student protests was similar if not precedential to that of many other Universities. The law was used extensively and even unnecessarily in some instances to prohibit the protest. At the time there was a heavy presence of security personnel and currently, access to the university is much more stringent than it as before the protests started.¹¹⁵ Van Marle considers how the actions taken by the students of the Must Fall movement were rooted in realising some sort of rights¹¹⁶ in the university space. However, the university responded in ways that sought to dismiss those rights, under the impression that they were protecting other parties' rights.¹¹⁷ The duality of ideas and materiality creates a lived space, that is never fully realised¹¹⁸ which requires us to probe what looks like – the right to a university. It is from that “unknown” from which Must Fall emanates- the call to reimagine a university outside the colonial foundation. But university management cannot allow that, hence the exaggerated and hostile responses, because that will disrupt the status quo and collapse it at its core.

The university spaces that we are navigating are produced by the existing social interactions, which mainly favour a capitalist state, which means the university culture, its aesthetics and systems are curated in such a way that inevitably alienates others and ignore their rights. The Must Fall protest were a direct confrontation to this alienation, the black feminist movements in the universities were also confronting the alienation that was furthered by The Must Fall. Universities are social settings where knowledge, power and space intersect, creating what Foucault termed “heterotopia”, and perhaps a new lens through which we can think about spatiality discourse,¹¹⁹ to the extent that interrogates the rights of women and queer people.

¹¹⁴ Van Marle 2019: 111.

¹¹⁵ Van Marle 2019: 120 - 121.

¹¹⁶ Van Marle 2019: 110.

¹¹⁷ Van Marle 2019: 110.

¹¹⁸ Van Marle 2019: 118.

¹¹⁹ Van Marle 2019: 118.

2.3.4 Suffocating Spaces

In thinking about the right to university, derived from Lefebvre's the right to the city and the higher education crises, I want to place the feminist-led student protests in the discourse and think about their position where spatial justice is concerned. The #RURerenceList, the Trans Collective and the Naked Protests become essential points of reference in exploring aspects of gender, race and sexuality in the context of student protests, the right to university and spatial justice discourse. I have already established earlier that these feminist-led movements came about because of the fractures that occurred from the Must Fall. I maintain that the intersections of gender, race and sexuality were decentred from the movement, leaving women, queer and non-binary people bereft of a sense of belonging, although Must Fall was the one place where they ought to belong, considering that universities were already an environment that was suffocating from everyone black, woman and queer.

Scott, who relies on Deleuze-Guattari logic in trying to make sense of the Must Fall through a queer lens, establishes the Must Fall as a multiplicity of assemblages where there is an intersection with coloniality and apartheid, lack of institutional transformations, a post-conquest reality.¹²⁰ Which means the Must Fall is a space layered with multiplicities which form part of an assemblage of various parts of a whole.¹²¹ So, when we think of Must Fall as a space produced due to various social, political and economic interactions, we begin to see why Must Fall became an embodiment of a space that is indulged in hypermasculinity, heteropatriarchy¹²² and bigotry. Scott further posits that the view that, it did not really matter what the movement was about when it initially started, but once established it became a "multiplicity sprouting in a rhizomatic fashion of uncontrollable movements and deterritorializations".¹²³ Deterritorialization means a process where bodies, ideas and space are completely separated from the orthodox structures- which means disruptions of currently existing spatial arrangements. This is what the Must Fall was about, although it failed to account gender, sexuality and the multiplicity of blackness in the process. I think the feminist-led movements were then a quest to reterritorialization not just in the Must Fall but including in the university space and

¹²⁰ Scott 2022: 82.

¹²¹ Scott 2022: 81.

¹²² Scott 2022: 82.

¹²³ Scott 2022: 80.

even outside- they were claiming for new spatial arrangements to ensure inclusive and radical spatial justice.

While thinking about queering the Must Fall spaces and right to (city) university for queers. The notion of non-places (*ou-topos*) and placelessness (*a-topos*) becomes relevant, and the Trans Collective is actually quintessential for this context. A non-place is a liminal space that exists on the outside and inside of the heteropatriarchal *nomos*¹²⁴, it is a secret place where queer individuals find themselves looming under the impression that they are safe and that they belong to the space. An *ou-topos* is also the same place where women and queer people of the Must Fall belong, until they were alienated and secluded from the space. The individuals who formed Trans Collective were also looming in the *ou-topos*, under the impression that they belong, until it became evident when their sexuality and genders were a point of contention in the movement¹²⁵ and it became explicit that they can, at any moment be destitute and subject to displacement¹²⁶ and might I add, violence. The queer people who navigated the protest space can also be vulnerable to subtle “political homophobia,”¹²⁷ where they are subjected to violence as a strategy to mobilize solidarity for another cause. The Trans Collective was a reminder that in terms of spatial politics and belonging, the queers do not possess any geographic place outside the heteropatriarchal *nomos*¹²⁸ which can also be also racist, capitalist and white supremacist. Eventually being a gender and sexuality dissent in such spaces exposes one to violence, which alienates you and subjects you to a state of placelessness.¹²⁹ Yolanda Dyantyi of the #RURerenceList was found in that state of placelessness, when she was stripped off her spaces, places and relations that created a sense of belonging for her. These experiences from student protests and universities only confirmed that gender and sexuality dissents do not belong to spatiality, that the perceived and conceived spaces were rooted in hetero-patriarchal *nomos* and the lived spaces are just a physical manifestation of the hetero-patriarchal beliefs. Perhaps the intersections between universities, student protests and spatial justice compels us to think about revolutions, movements and transformation in a different way. Perhaps we

¹²⁴ Higginbotham 2022: 157.

¹²⁵ Scott 2022: 78.

¹²⁶ Higginbotham 2022: 157.

¹²⁷ Higginbotham 2024:

¹²⁸ Higginbotham 2022: 157.

¹²⁹ Higginbotham 2022: 157.

must re-consider in a way that seeks to ensure that women and queer people are centred and not rely on what the revolutions has always “looked like”.¹³⁰

It has become patently clear that, space, as an abstract and literal environment with socio-political consequences, cannot be discussed outside the concept of race when establishing spatial, ontological and epistemic justice. It is for this reason why Modiri makes valid connection between race, colonialism and spatial justice, he proposes that the first point of contention when discussing space and spatiality must be in line with colonialism and coloniality, because that is the first instance of how space was produced.¹³¹ Tracing the ontological foundations of space and the connection between race and space from the 15th to the 17th century.¹³² Colonialisation interfaces space with race, which is linked with personhood, which determines who is a person (white people) and who is relegated to sub-personhood.¹³³ Modiri alludes that spatiality was central to the colonial project,¹³⁴ evident in the violence that come with colonialism and the dispossession and dehumanisation that accompanied that regime. He further discusses racialised spaces, making references to South Africa’ racial organisation, racial spaces, (i.e.: universities, cities) affords privilege and access to the “white/colonial spatial imaginary” and prioritises racialised capitalism at the expense of the minority groups.¹³⁵ Racialised spaces are more interested in projecting a homogenous and controlled environment, while camouflaging the real social problems that transpire within and outside that environment.¹³⁶

2.4 BLACK FEMINIST PROTESTS IN SOUTH AFRICAN UNIVERSITIES

2.4.1 The Trans Collective at the University of Cape Town

The Rhodes Must Fall at UCT was the main trigger event for many Must Fall student protests that would follow from 2015. The fractures began to show in both the RMF and later in the FMF.. The Must Fall starting at UCT, although not deliberate, is somehow very symbolic because UCT is the oldest institution of higher learning in South Africa. It was founded in 1829 and was formally established and operating as a

¹³⁰ Van Marle 2019: 116.

¹³¹ Modiri 2024: 39.

¹³² Modiri 2024: 42.

¹³³ Modiri 2024: 39.

¹³⁴ Modiri 2024: 39.

¹³⁵ Modiri 2024: 41.

¹³⁶ Modiri 2024: 41.

university in 1918.¹³⁷ When the movement first began at UCT under the vice-chancellorship of Dr Max Price,¹³⁸ who has since left the university.¹³⁹ The movement was led and organised by the likes of Athinangamso Nkopo, Wanelisa Xaba, Kelebogile Ramaru, Ntokozo Qwabe, Chumani Maxwele and many other students. Rhodes Must Fall ostensibly commenced with the call for the removal of the Cecil John Rhodes statues, but the politics of the movement have always been more nuanced than that, the removal (and defecating on) of the statues was a symbolic action, rooted in the call for decolonisation which reflects on matters of land dispossession, spatial injustice, and transformation of the curriculum and university culture amongst many other issues.

The Must Fall movement was happening at UCT for several days until such as a point during one of the #RhodesMustFall meetings the cracks began to show. In one of the discussions, a group of trans, queer and non-binary students demanded for a degendering of the Bathrooms at Bremmer Building (which they occupied and renamed Azania House) in order to curate a protest space that was more inclusive for gender diverse people,¹⁴⁰ considering that the University is not entirely inclusive itself. Some people outright resisted this proposition, a cis-heterosexual Christian woman particularly contested and said she is not comfortable with sharing bathrooms with “men.”¹⁴¹ However, since the space belonged to all those who occupy it, the queer students still proceeded to draw “gender-neutral” signs and pasted them on the bathroom doors of the building.¹⁴² This one incident, is the one of many which exposed the queerphobia that reigned in the movement, and necessitated for the queer students to organise amongst themselves, hence the Trans Collective.

The Trans Collective referred to themselves as black radical intersectional and decolonial student movement that was formed by nonbinary, trans, gender non-conforming and queer students.¹⁴³ The organisation emerged as a result of a vacuum

¹³⁷ <https://uct.ac.za/history-introduction>

¹³⁸ <https://www.drmaxprice.com/>

¹³⁹ <https://usaf.ac.za/dr-max-price-bids-peers-goodbye/#:~:text=The%20second%20ordinary%20meeting%20of,ordinary%20meeting%20of%20the%20Board>

¹⁴⁰ Scott 2022: 78.

¹⁴¹ Scott 2022: 78.

¹⁴² Scott 2022: 77-78.

¹⁴³ <https://bubblegumclub.co.za/art-and-culture/giving-content-decolonisation-trans-collective-south-africa/>

created by RMF movement when it failed to include politics of gender and sexuality in their decolonial project.¹⁴⁴ They went on to organise with 26 other universities across the countries to establish a conglomerate called the Trans University Forum.¹⁴⁵ The Must Fall movement initially started with a strong presence of a diverse group of queer people, trans folks, and women as protesters and some at the forefront leading the movement,¹⁴⁶ but this later dissipated as queer students were neglected, erased and violated as the movement progressed.¹⁴⁷ During that year they continued with gender advocacy work on campus, such as hosting panel discussions and dialogues that were attended in numbers, and sparking very critical and controversial conversations in-person and on their social media platforms. They were able to make demands to the Must Fall movement and directly to the university on gender and sexuality related issues, including campaigning for a position in the Student Representative Council.¹⁴⁸

The framework of Intersectionality had initially formed part of the RMF language, but was used to a very limited extent,¹⁴⁹ and at the same time there was never really a clear consensus on how the decolonisation should unfold in terms of a feminist approach.¹⁵⁰ The formation of the Trans Collective serve as an indication of the shortcomings or limited understanding of the politics of intersectional feminism¹⁵¹ and misconstrued commitments to decolonisation. and only after the formation and later intervention of The Trans Collective did some fallists agree that a thorough integration of intersectionality would have been a crucial aspect in understanding the praxis of decolonisation,¹⁵² especially a decolonised gender praxis that interrogates the interconnections of gender, sexuality racism and structural capitalism¹⁵³ and therefore includes everyone.

In March of 2016, a year after RMF took place, UCT's Centre for African Studies Gallery hosted an exhibition titled 'Echoing Voices from Within, with the purpose of reflecting and commemorating the RMF, and how the movement significantly impacted

¹⁴⁴ <https://www.astraeafoundation.org/stories/uct-trans-collective/>

¹⁴⁵ Scott 2022: 79.

¹⁴⁶ Ramaru 2018: 151.

¹⁴⁷ Ramaru 2018:155.

¹⁴⁸ <https://www.astraeafoundation.org/stories/uct-trans-collective/>

¹⁴⁹ Scott 2022: 85.

¹⁵⁰ Ramaru 2018: 150.

¹⁵¹ Ramaru 2018: 155

¹⁵² Ramaru 2018: 151.

¹⁵³ Van Heerden 2016: 7208.

UCT and influenced other universities across and outside the country.¹⁵⁴ The content of the exhibition was a compilation of videos, photographs, banners, and other artefacts, most of which were taken by the students who were part of the movement the previous year.¹⁵⁵

The exhibition was disrupted by members of the Trans Collective, who were asserting that the RMF was trans exclusionary, the exhibition perpetuates trans erasure, and that trans people continue to be systematically disregarded in the Must Fall structures.¹⁵⁶ The protesters were de-robed and covered in red paint, laid on the floor of the exhibition venue and dared the attendees to walk over them if they feel the exhibition and its content was for more important than their lived experiences and actual bodies.¹⁵⁷ The Trans Collective was interrogating the very radical decolonial praxis that Must Fall pledged by, positing that it is not possible for solidarity to be centred around a single rallying point that refuses to acknowledge the reality of the complex and layered violence that exists under white supremacist colonialism.¹⁵⁸ To neglect issues of gender and sexuality, is a clear indication of failure to comprehend what a struggle for decolonisation really compromises of¹⁵⁹ and what it seeks to achieve.

The Trans Collective's disruptive protest was not a rejection to RMF but a commitment to the same ideas they stood for in the previous year, that there is a need for an intersectional approach into this decolonial project.¹⁶⁰ The exhibition was not responding to this agency, but instead it was perpetuating the narrative of singular blackness that RMF was articulating in the previous year.¹⁶¹ If the exhibition continued

¹⁵⁴ <https://humanities.uct.ac.za/african-studies/gallery-exhibitions-previous-exhibitions/echoing-voices-within-rhodes-must-fall-exhibition#:~:text=The%20Centre%20for%20African%20Studies,and%20potentially%20other%20universities%20forever.>

¹⁵⁵ <https://humanities.uct.ac.za/african-studies/gallery-exhibitions-previous-exhibitions/echoing-voices-within-rhodes-must-fall-exhibition#:~:text=The%20Centre%20for%20African%20Studies,and%20potentially%20other%20universities%20forever.>

¹⁵⁶ Beukes & Francis 2020: 11.

¹⁵⁷ <https://bubblegumclub.co.za/art-and-culture/giving-content-decolonisation-trans-collective-south-africa/>

¹⁵⁸ <https://bubblegumclub.co.za/art-and-culture/giving-content-decolonisation-trans-collective-south-africa/>

¹⁵⁹ <https://bubblegumclub.co.za/art-and-culture/giving-content-decolonisation-trans-collective-south-africa/>

¹⁶⁰ Van Heerden 2016: 7206

¹⁶¹ Scott 2022: 85.

without any disturbances, it would have endorsed the idea that blackness, or the experiences of black students in South Africa are uncomplicated¹⁶² and furthered the epistemic violence and symbolic erasure of the work and experiences of black queer people, trans folks and women.

2.4.2 The Naked Protest at Witwatersrand University

Around October 2016, it had been almost two years since #RhodesMustFall had taken place at UCT, and about a year since #FeesMustFall, at this point the Must Fall movement was the talk of local and global politics. Occasionally, a Must Fall related protest would erupt on a campus and go on for a while across the country. The students of Witwatersrand University were also involved in the Must Fall movement, they pioneered and championed the #FeesMustFall part of Must Fall movement.¹⁶³ Like many similar Must Fall movements across the country, the Must Fall at Wits was also inundated in heteropatriarchy and hyper masculinities. Popular narrative, like media reports, social media posts, positioned Mcebo Dlamini as the leader of the movement at Wits¹⁶⁴ because at the time he was at the forefront of FMF. This later led to his arrest for participating in the protests which was followed with suspension from the University.¹⁶⁵ Although he did contribute to the leadership. It has become important to clarify that at the time the FMF at Wits begun, Shaeera (then an outgoing president) and Nompandolo (then an incoming President) championed the movement through the SRC and the other male comrades. Mcebo and Pambo, did not have any official capacity, they only appeared later and undermined the leadership of the women and dominated the protest to Luthuli House where they essentially sidelined the women from leadership.¹⁶⁶

The Must Fall at Wits was centred predominantly around the increment of fees, and this was intertwined with land, dignity, workers' rights, accommodation fees, the need to decolonise and wholistically, the dismantling of all systems of oppression against black people.¹⁶⁷ Another area of Must Fall that can be linked to the space and spatial justice discourse is the land questions, which has been linked to affordability of

¹⁶² Scott 2022: 85.

¹⁶³ Mcebo 2018: 3

¹⁶⁴ Malabela 2017: 140.

¹⁶⁵ <https://www.politicsweb.co.za/politics/mcebo-dlamini-no-longer-src-president-or-member--a>

¹⁶⁶ Malabela 2017: 140.

¹⁶⁷ Mcebo 2018: 3 - 5.

accommodation fees. The reality of unjust geographies was orchestrated through land dispossession during the colonial era and perpetuated further through the policies of the apartheid regime,¹⁶⁸ the ramifications of which are still prevalent in this post-conquest South Africa. For instance, access to space is denied through exorbitant university accommodation fees. The FMF was also a rejection towards the announcement by the then minister of higher education Blade Nzimande, who declared a 6% tuition fees increment,¹⁶⁹ it is from this when students demanded a 0% increment.¹⁷⁰

In many occasions, it was only post the fact, that many male leaders could admit to have ignored the gender and sexuality question.¹⁷¹ Mcebo makes reference to the #ImbokodoMustLead at Wits, when the women who were part of the Must Fall started caucusing and carrying sjamboks to raise important questions on leadership representation, sexual violence and other gender related matters that were relevant to the movement.¹⁷² This is one of the many instances when the fractures became visible, very often, in anti-oppression activist spaces, black people were often used synonymously with black men because black men always assumed themselves as the representative of everyone black.¹⁷³

Adam Habib was the Vice-Chancellor of Wits at that time, Habibi is notorious for his cynicism towards the Must Fall movement, he was in support of the 6% increment¹⁷⁴ and would often address the FMF in a condescending and discouraging tone. He has even expressed that the call to decolonise education was just rhetoric and not substantive enough.¹⁷⁵ Many have placed blame on Adam Habib and the Wits University management for the violence that ensued between the students and the South African Police Service (SAPS).¹⁷⁶ The Must Fall became embroiled in violence, the private security/ SAPS would shoot at students while they were chanting, and this

¹⁶⁸ Soja 2010: 35- 40.

¹⁶⁹ Ndelu 2017: 14.

¹⁷⁰ Ndelu 2017: 14.

¹⁷¹ Mcebo 2018: 3 – 5.

¹⁷² Mcebo 2018: 5.

¹⁷³ hooks 1981: 101.

¹⁷⁴ Malabela 2017: 132.

¹⁷⁵ <https://www.news24.com/news24/fees-must-fall-was-a-progressive-struggle-we-just-differed-on-tactics-adam-habib-20190807>

¹⁷⁶ Malabela 2017: 144 -146.

would continue for several days.¹⁷⁷ The campus become a site of protest violence.¹⁷⁸ The campus was militarised with police officers, security guards' patrols, heavy surveillance, and regulated entries¹⁷⁹ as a "security measure". As the violence continued to escalate more and more, students would continue to be hurt, the campuses became state of exceptions,¹⁸⁰ and the media reported a narrative that placed blame on the students.

At this point, the atmosphere on campus was unbreathable, there was tension between the students and the police/ private security, and there were leadership conflicts within the movement.¹⁸¹ The presence of police men and private security proliferated an increase in the already recurring reports and signed petitions on the continuous sexual violence incidents that emerged with the protests on campus¹⁸² Investigative reports have indicated that the police and private security has been discriminatory in their methods when handling women and queer students, and university management treated male led protests different from those led by men.¹⁸³ In some instance, a queer woman was physically violated by fellow activists, the space was homophobic and they were not tolerated.¹⁸⁴

On the 4th of October 2016, the violence was now rampant, police officers and security guards were heavily armed and firing at the students. This was when the three women, Sarah Mokwebo, Lerato Motaung and Hlengiwe Ndlovu intervened and disrobed themselves in half, displaying their breasts out, to call for a ceasefire because in that moment, the police were offloading rubber bullets, stun grenades and teargasses at the unarmed protesting students.¹⁸⁵ Even amidst all this violence, these women stood there in their half-naked bodies, forming a demarcation line between the armed police and the protesters, who were mostly men and attempted to call for peace, in the very environment that is discriminatory and violent towards them.¹⁸⁶ Historically, nakedness has always been used as a tool for resistance and activism, especially to collapse

¹⁷⁷ Malabela 2017: 144 -146.

¹⁷⁸ Mcebo 2018: 3.

¹⁷⁹ Gassiep 2022: 32

¹⁸⁰ Reinders 2019: 81-84.

¹⁸¹ Malabela 2017: 141.

¹⁸² Gassiep 2022: 33.

¹⁸³ Gassiep 2020: 32.

¹⁸⁴ Malabela 2017: 141 - 142.

¹⁸⁵ Ndlovu 2017: 68.

¹⁸⁶ Gassiep 2020: 32.

heteropatriarchal and oppressive systems.¹⁸⁷ (i.e. The Dobsonsonville, Soweto 1990 protest,¹⁸⁸ or the Women for Liberia Mass Action for Peace,¹⁸⁹ amongst many others). Even some of the feminists' movements that came because of the Must Fall fracture, the Trans Collective and the #RUPreferenceList did incorporate nakedness in their protest strategies. I highlight the Naked Protest at Wits because an immediate reaction to violence and a direct product of the fracture.

Even though The Naked Protests may have helped to de-escalate the situation at the time, it also highlighted really important issues and influenced some of the important decisions. In addition, it exposed the discrepancies of the Must Fall in the process, and yet this is a matter written less about. If anything, the protest was received with hostility and reduced to a joke by the media and the public. A Kaya FM radio presenter body shamed the protesters and called their actions "distasteful".¹⁹⁰ An Acting National Police Commissioner at the time questioned the moral correctness of the protesters and said they went "too far" with their actions.¹⁹¹ The harsh criticism and hostility from the media and the public was just another indication of how, even in such critical times, women's bodies continue to be sexualised and objectified.¹⁹² Moreover, their hard work, of reclaiming the picket lines, of influencing the trajectory of the movement and some of the important decisions they made, goes unacknowledged.¹⁹³ The ridiculing and rejection of this protest, which perceives them as sexual illegitimate or uncivilised stems from western colonial views of the black female bodies.¹⁹⁴ Black women's bodies have always been hypersexualised through history, (i.e. Sarah Baartman¹⁹⁵) which perpetuates the already existing marginalization and violence. The naked

¹⁸⁷ Jimlongo 2018: 2.

¹⁸⁸ A group of mainly black women shack-dwellers disrobed to draw attention to the plight of Dobsonville residents' housing concerns, and to demand new homes.

¹⁸⁹ The women wanted to be taken more seriously in the peace agreement negotiations, so they threatened to strip naked in front of the delated who were present at the peace talks.

¹⁹⁰ <https://www.timeslive.co.za/tshisa-live/tshisa-live/2016-10-07-watch-skhumba-blasts-haters-over-body-shaming-backlash/>

¹⁹¹ <https://ewn.co.za/2016/10/05/Khomotso-Phahlane-slams-bare-breasted-female-during-Wits-protests>

¹⁹² <https://ewn.co.za/2016/10/05/Khomotso-Phahlane-slams-bare-breasted-female-during-Wits-protests>

¹⁹³ Ndlovu 2017: 69

¹⁹⁴ Jimlongo 2018: 10.

¹⁹⁵ Sarah Baartman from South Africa was identified as Khoisan and had a unique feature - steatopygia – also known as possessing protruding buttocks). This feature was used to transform Baartman into an object of commercial exploitation and trade where she was brought to London in 1810 and then to Paris in 1814 to display her body for two shillings for scientific curiosity and entertainment in freak shows. Her physique became a site of fascination which was used in racial science to draw generalised conclusions about the African female body and sexuality.

protest is then a tool of empowerment in a sense that through being naked, they were rejecting the existing systems of knowledge that have created these controlling images, so they are denouncing the commodification, exploitation and objectification of their bodies,¹⁹⁶ it makes sense why the Naked protest, where women voluntarily displayed their bodies, was revered.

Ndlovu, who was one of the three women who led the Naked Protest, identifies the reception and ridicule of the protest as a sort of erasure- she posits that the Must Fall was a contestation of masculinities between the male protesters, the private security/police,¹⁹⁷ including the vice-chancellor. The violence that ensued on campus can be deemed as a battle of power amongst men. It is a battle between the black men and the white men¹⁹⁸ (vice-chancellor and police/ security are an embodiment of whiteness) and because the male protesters have assumed the position of a protector towards black womanhood¹⁹⁹ (and disregarding queerness), the extent to which this violence affects them was never considered. The culture of hypermasculinity found in South African social movements is historical and has been inherited in today's generation.²⁰⁰ These masculinities thrive through use of violence and disenfranchisement²⁰¹ of bodies they deem as below them.

The Naked Protest was a way for the women of #FeesMustFall to reclaim their position on the picket lines. They emphasized that women's bodies cannot always be reduced to sexual objects, and to say that we are just as capable take up space and participate in leading the protests just as well as men do.²⁰² The women were reclaiming space that has been militarized, privatized, inaccessible, and has alienated them. Through nakedness they symbolically abandon any expectation that has been placed on black women's bodies, and they emphasise that they too belong in those spaces. The abruptness of the protest undermined the status quo, the men, police/private security who were engaging in a display of dominance, were emasculated and the power dynamics were disrupted.

¹⁹⁶ Collins 2000: 289

¹⁹⁷ Ndlovu 2017: 68.

¹⁹⁸ hooks 1982: 97.

¹⁹⁹ hooks 1982: 91.

²⁰⁰ Scott 2022: 82.

²⁰¹ Mailula 2018: 48.

²⁰² Ndlovu 2017: 71.

Apart from actually reclaiming their position on the movement, these women, and many other women of the Must Fall were performing the intellectual and emotional labour of facilitating, sensitizing, and negotiating their safety and agency with the male comrades.²⁰³ But even then, the violence against women and queer people continued in the space, because it does not really matter to men the extent to which you teach, they will choose to continue the violence.²⁰⁴

2.4.3 The #RUREFERENCELIST at the University Currently Known as Rhodes

The Must Fall at Rhodes was initiated, just shortly after Maxwele's instigation at UCT. The BSM (Black Student Movement) held their first meeting to discuss their solidarity stance with the #RhodesMustFall movement.²⁰⁵ The BSM was a movement rooted in black consciousness philosophies of Steve Biko, Fanon and others. They were in agreement with the call to decolonise, and they are the one who called for the renaming of the university,²⁰⁶ hence UCKAR. Must Fall, through the BSM continued to join the nationwide protests on the increment of tuition fees.²⁰⁷ At this point other feminist movements were already taking place across the country. Women and queer students were standing up against gender-based violence, sexism and heteropatriarchy that is breeding within the protest space and in the universities. The students (and staff) of UCKAR were conscientized and had also begun to raise concerns about the rape culture in the university, and how it was not adequately addressed by university management, or even alluded to, in the Must Fall.

The #RURreferenceList at the University Currently Known As Rhodes (UCKAR) began with a list of eleven names of men that were posted on social media without any detail, explanation, or allegations, just a list of names.²⁰⁸ The list went viral a few hours later and on, Sunday the 17th of April 2016. Students began to gather in numbers after they figured out what the list was insinuating. Interest of the list began to grow around campus, with more and more students showing up. This led to the eruption of the #RUReferenceList protest.²⁰⁹ The hundreds of students who attended the protest decided to enter the male residences with intentions of collecting these men that were

²⁰³ Ramaru 2018: 156.

²⁰⁴ Lorde 2007: 115.

²⁰⁵ Meth 2017: 98.

²⁰⁶ Meth 2017: 98.

²⁰⁷ Meth 2017: 99.

²⁰⁸ <https://www.ru.ac.za/perspective/2016archives/deborahseddon.html>

²⁰⁹ <https://www.ru.ac.za/perspective/2016archives/deborahseddon.html>

on the list with the idea of holding them accountable.²¹⁰ However, issues of contention quickly escalated, and violence arose because the university immediately resorted to calling the police to “intervene”.²¹¹

The #RURferenceList was a feminist led movement that aimed at protesting against rape culture within the institution that the University has failed to address for years.²¹² The movement was also a continuance of the agitation that women and queer students have expressed against the plight of sexual and gender violence within and outside institutions of higher learning. The protest received enormous support from various activist organisations, some university staff, and allies, but was also met with some resistance and ridicule from some members of the public, on social media, and even in academia. Critiques said the publishing of the list was morally questionable,²¹³ comparing the rights of the alleged perpetrators and that of the victims against the backdrop of our constitutional democracy.²¹⁴

In attempts to demobilise the protest, as it was gaining serious momentum, the university obtained an interdict against the SRC, the “students of RU engaging in unlawful activities” and “persons associating themselves with unlawful activities” – which could have been anyone participating in the protest at that point. The Socio Economic Rights Institute (SERI)²¹⁵ was involved as the respondents’ legal representation in this matter and argued there was no basis for the court to grant a blanket order against unknown groups of protestors. They argued that the interim order infringes constitutional rights to free expression and to demonstration, picket, assembly and petition. Furthermore, they questioned the constitutionality of the interdict on the grounds of its vagueness and broadness and that it unjustifiably infringes their right to protest, freedom of expression, academic freedom, and that it

²¹⁰ Meth 2017: 100.

²¹¹ <https://www.ru.ac.za/perspective/2016archives/deborahseddon.html>

²¹² Meth 2017: 100.

²¹³ <https://thoughtleader.co.za/a-response-to-charlene-smiths-facebook-post/>

²¹⁴ <https://thoughtleader.co.za/a-response-to-charlene-smiths-facebook-post/>

²¹⁵ The Socio-Economic Rights Institute of South Africa (SERI) is a non-profit human rights organisation. They work with communities, social movements, individuals and other non-profit organisations in South Africa and beyond to develop and implement strategies to challenge inequality and realise socio-economic rights.

was inappropriate because there was no initial meaningful attempt to engage either the staff or the protesters.²¹⁶ I discuss the complexities of the case in the next chapter.

The #RURefereneList was not the first protest to take place raising issues of rape culture and sexual violence at UCKAR. The university organises an annual silent protest that is joined by several university departments, students and student activists, raising awareness on gender and sexual based-based violence and. .²¹⁷ The annual Silent Protest became the largest protest against sexual violence in South Africa. It raised the University's profile and UCKAR was perceived as champions of the fight against sexual violence nationally and abroad.²¹⁸ Just weeks before #RUReferenceList started, there was a peaceful protest led by Chapter 2.12.²¹⁹ These organisations plastered posters around campus quoting some of the statements uttered by the university staff and management when they reported rape incidents.²²⁰ This protest was also quickly counteracted by Campus Protection Unit who took down the posters.²²¹

Given that the university is familiar with the rape culture crises in their own institution, and they are aware of the actions that can be taken to raise awareness and fight against the sexual violence epidemic, their reaction towards the #RUReferenceList was expected to have been different, more sensitized, but it was not. The Silent Protest was acceptable because it was deemed legal. It was an institutional program that allowed the university to assume an image of a progressive and inclusive space, while there we no real intervention strategies.²²² The Silent protest was necessary, but they were not radical, they did not name and shame the perpetrators or blatantly called out the root of the problem like the #RUReferenceList was doing, nor exposed how the university personnel responded to rape claims. In August 2018, a few years after the #RUReferenceList, and while in the midst of a legal battle with Yolanda Dyantyi, one of the students from UCKAR, Khensani Maseko committed suicide.²²³ This comes

²¹⁶ Rhodes University vs Student Representative Council of Rhodes and Others 193/2016 (EC): par. 19.

²¹⁷ <https://www.ru.ac.za/perspective/2016archives/deborahseddon.html>

²¹⁸ <https://www.ru.ac.za/perspective/2016archives/deborahseddon.html>

²¹⁹ A national student organisation whose name is drawn from Chapter 2.12 of the Constitution which grants everyone the right to bodily and psychological integrity.

²²⁰ <https://www.ru.ac.za/perspective/2016archives/deborahseddon.html>

²²¹ <https://www.ru.ac.za/perspective/2016archives/deborahseddon.html>

²²² <https://www.ru.ac.za/perspective/2016archives/deborahseddon.html>

²²³ <https://www.dailymaverick.co.za/opinionista/2020-09-06-d-day-for-angry-black-girl-yolanda-dyantyi-as-rhodes-expulsion-goes-to-ec-high-court/>

after she had reported to the university that she had been raped by a fellow student in July of the same year.²²⁴ But the university did not respond adequately to the matter.

I mention the other anti-rape culture protests here as a way to establish that the UCKAR rape culture has always existed, and the multiple interventions, whether institutional or not were all ways curb the crises. The university was well cognizant of the crises in their own institutions and South Africa has the highest statistics of sexual violence against woman and queer people, to criminalise a student for taking a stand instead of investigating the allegations is completely unwarranted and negligible from their side.

Yolanda Dyantyi of the #RURferenceList

The university interdicted the #RURferenceList protest on the 20 of April 2016 with intentions of address the “disagreements” between them and the students.²²⁵ The interdict was issued against three individuals, namely, Sian Ferguson, Yolanda Dyantyi, Simamkele Heleni. More broadly, it also included the Student Representative Council of Rhodes, Students of Rhodes University engaging in unlawful activities on campus, persons engaging in or associating themselves with unlawful activities on campus, and the concerned staff members of Rhodes University.²²⁶ Although the Eastern Cape High Court dismissed the University’s application for a final interdict, on the 1st of December 2023, they granted them an interdict against three individuals who were explicitly named in the interim interdict.²²⁷ This was just the beginning of a war waged against a black woman who was protesting pervasive and institutionalised rape culture at a historically white institution that we currently refer to as Rhodes University.

Yolanda Dyantyi was 19 years old when she enrolled as a student at UCKAR, coming all the way from Johannesburg where she was raised by her grandmother, who was a domestic worker for wealthy families in the suburbs of Johannesburg and also a preacher and strong leader for the Zionist Church.²²⁸ Yolanda attests that her feminist

²²⁴ <https://www.timeslive.co.za/news/south-africa/2018-08-07-rhodes-university-knew-of-khensani-masekos-rape/>

²²⁵ <https://www.seri-sa.org/index.php/more-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

²²⁶ <https://www.seri-sa.org/index.php/more-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

²²⁷ <https://www.seri-sa.org/index.php/more-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

²²⁸ <https://theactionists.co.za/profiles/yolanda-dyantyi>

politics were influenced by her grandmother, who always taught her to stand up for herself and to speak up against any form of injustice.²²⁹ She was in her second year of pursuing undergraduate Bachelors Art degree. She double majored in Politics & International Relations and Drama at the time the protest took place. She participated as a way to show solidarity to the cause in alignment with her politics but also for personal reasons, as she was a survivor of sexual violence in the university, the previous year.²³⁰ Dyantyi was due to sit for her final examination for her degree, but just before that she was permanently excluded from the university on 17 November 2017 as per the outcome of a disciplinary hearing.²³¹

Dyantyi was singled out as one of the leaders for the #RURferenceList protest and before she knew it, she was permanently excluded from UCKAR, and her dreams of being the first person in her family to graduate from the university had been completely tarnished.²³² She was banned from entering the university premises for any academic, social, or administrative reasons.²³³ The only evidence that she has to show that she has at least stepped inside the premises of a university, is an academic transcript that is clearly marked with, “Unsatisfactory Conduct: Student found guilty of assault, kidnapping, insubordination and defamation”.²³⁴

Furthermore, this marking on the transcript is not only preposterous in a sense that the charges were exaggerated, and she subsequently received the most draconian punishment the university has ever granted any student, (not even in a sexual violence or race related charges has this punishment been seen).²³⁵ But it is also not common for institutions of higher learning to make such a marking on a student’s transcript.²³⁶ Which makes it entirely impossible for Dyantyi to pursue her education at any other tertiary institution in South Africa. ²³⁷

²²⁹ <https://theactionists.co.za/profiles/yolanda-dyantyi>

²³⁰ SERI STATEMENT 12 DECEMBER 2017.

²³¹ <https://www.seri-sa.org/index.php/more-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

²³² <https://www.dailymaverick.co.za/opinionista/2020-09-06-d-day-for-angry-black-girl-yolanda-dyantyi-as-rhodes-expulsion-goes-to-ec-high-court/>

²³³ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par. 17.

²³⁴ SERI STATEMENT 12 DECEMBER 2017.

²³⁵ SERI STATEMENT 12 DECEMBER 2017.

²³⁶ SERI STATEMENT 12 DECEMBER 2017.

²³⁷ SERI STATEMENT 12 DECEMBER 2017.

Granted all of the above, one is compelled to wonder if any consideration was given to the violation of basic human rights that all South Africans are granted under the Bill of Rights entrenched in our constitution. For instance, permanently expelling a student, denying them access to an institution they were enrolled in and making it impossible to register can be in contradiction with the right to education as stated in Section 29. Denying access to the institution also can inhibit the right to freedom of movement stated in Section 21. Severely reprimanding an individual for actively participating in a protest imposes on the right to freedom of expression in Section 18. This punishment also inhibits on and criminalises the right to protest that is given in Section 17. Alas, Dyantyi's legal representation from SERI argues the human rights violations extensively and is in conjunction with the other relevant legal matters.

In the time that Dyantyi was expelled, Must Fall movements were transpiring in various institutions of higher learning, including UCKAR. Must Fall demanding free, decolonised, and accessible education for all. Thus, permanently excluding a student and ensuring that it is impossible for them register anywhere else for a degree is a clear insult to the cause that Must Fall was rallying for. It was clearly disregarding a national crisis that was taking place at the time. In addition to this, the courts enabled the decision of the university, completely disregarding the transformative nature that our constitution ought to embrace. It cannot be possible that in a post-apartheid South Africa, a black woman is denied access to pursue an education, given the ramifications of an apartheid government and colonialism which strategically placed black women at an absolute disadvantage by denying them access to education or if they do access it, it is of sub-par quality.

As Dyantyi's battle against UCKAR continued, her name would occasionally trend on social media platforms under the campaign #IStandWithYolanda, we would sometimes see her face on our TV screens when the media would cover the court cases or interview her. She received enormous support and solidarity from various students, fellow activists, feminist organisations, social justice organisations and public interest law firms from around the country. But, as sexism would have it, she

was met with ridicule and reduced to an “angry black woman” who cannot have any opinion and has not the right to question patriarchal authority.²³⁸

Collins writes expansively on these negative controlling images that are used as a tool to subjugate black women, and to uphold and normalise intersecting social injustices.²³⁹ These negative controlling images categorize and confine black womanhood and influence sexist stereotypes such “angry black woman”. For instance, the matriarch is the unfeminine, overly aggressive woman, who fails to exhibit proper gender behaviour and emasculates her male counterparts.²⁴⁰ But all that an angry black woman really is, is an individual who is ‘anti’ any forms of injustice, refuses to conform to sexist binary expectations, and is not afraid to dismantle the heteropatriarchy.

Khwezi was called an angry black woman too when she accused former president Jacob Zuma of rape in 2016.²⁴¹ Khwezi was reduced to the “Jezebel” that Collins writes about on the controlling images of black women.²⁴² Khwezi was a sexually liberated woman with multiple partners, she was queer and living with HIV.²⁴³ The perceived embodiment of a woman with an excessive sexual appetite, and therefore not possible for a powerful man (like Zuma) to rape her.²⁴⁴ These negative controlling images offer an insight on how black women are perceived by society, which is harmful to black women. These perceptions play a significant role in perpetuating the institutionalization of rape culture while perpetrators are absolved without any real accountability.

Chumani Maxwele, renowned for catalysing an inferno that was #RhodesMustFall when he defecated the Cecil John Rhodes Statue is no different from Jacob Zuma. Maxwele is perceived a hero in the Must Fall narrative, despite how he publicly manhandled a queer woman during a #FeesMustFall protest at WITS,²⁴⁵ despite how he basically silenced the UCT Trans Collective for outing him as a rapist and a violent

²³⁸ <https://www.dailymaverick.co.za/opinionista/2020-09-06-d-day-for-angry-black-girl-yolanda-dyantyi-as-rhodes-expulsion-goes-to-ec-high-court/>

²³⁹ Collins 2000: 69.

²⁴⁰ Collins 2000: 75-76.

²⁴¹ Tlhabi 2017: 3.

²⁴² Collins 2000: 83.

²⁴³ Tlhabi 2017: 3.

²⁴⁴ Collins 2000: 199.

²⁴⁵ Shange 2017: 63.

man in his private life.²⁴⁶ While Jacob Zuma can be acquitted and ascend into presidency three years after a gruesome rape trial that humiliated a black queer woman. It is not farfetched to juxtapose these two men, the direct lineage of black male bigoted heteropatriarchal leadership embodied by Zuma was furthered by Maxwele.

Rape culture is so deeply entrenched in the very fabric of this country, it appears bizarre when women and queer people speak against it.²⁴⁷ This is why women like Dyantyi and Khwezi ended up being vilified when they spoke up against rape culture. As things stand, Dyantyi aims to sue UCKAR for R10 Million, and she is trying to complete second year of studies with UNISA.

2.5 CONCLUSION

In this chapter, I reflect on how the Must Fall did not centre gender and sexuality matters in their cause, which created alienation between women and gender diverse people and the Must Fall movement. I highlight how the fractures have manifested and produced the feminist-led movements. I provide an in-depth context and historical background of the Must Fall movement to show when and where the “fractures” began to show. I have narrated in length the three of the many feminist-led movements and reflected on how each were an embodiment of pf black feminist activism. This discussion helps to locate and place the women and queer people amidst the chaos and dominating narratives of the Must Fall.

I discuss space and spatial justice in the context of student movements and explain how spatial justice was at the call of the Must Fall through the call to decolonise, much like it was an imperative of the gender and sexuality related movements. The discussion on space gives another perspective into what the movement(s) sought for, at the centre of which was the struggle to belong.

In the next chapter, I explore how power and patriarchy plays out in law and university spaces and how feminist theory responds. Understanding the notion of power and how

²⁴⁶ <http://abovewhispers.com/2016/04/18/a-rapist-states-children-jacob-zuma-chumani-maxwele/>

it functions in institutions such as the courts and the universities will give us context into how and why women and queer students were subject to violence.

CHAPTER 3: UNIVERSITIES AND THE COURTS AS INSTITUTIONS OF POWER

3.1 INTRODUCTION

The main research problem guiding this study is the role played by black feminist movements led by women and queer people during the times of the Must Fall movement. The focus falls on the court case between Yolanda Dyantyi and UCKAR, focusing on how the law and universities perceive and respond to protests.

In this chapter I respond to the question on the role of the universities and the courts during students protest and how they further perpetuated the violence that women and queer people experience in the protest space. I aim to explore how the courts and universities function as institutions of “power” with deeply rooted oppressive systems that cultivate space and create a culture for the marginalisation and erasure of women and queer people. I emphasize how these institutions represent western male capitalism and continue to influence the perpetuation of heteropatriarchal belief systems and cis-heteronormative standards. I begin by reflecting on the various approaches to power, how the concept of power has been theorised and formulated, and how power is understood to exist and function in social settings. I present this theoretical framework to establish a backdrop for the case analysis in the next chapter through which I explore the gendered, classed and racialised perspectives of power. I seek to contribute to the becoming of a feminist jurisprudence that could respond to South African social, political and legal problems. Below I provide the main features of the framework that I unpack in more detail below.

I begin this chapter with taking a closer view into the notion of power, and how power informs law, *vice-versa*, followed by a discussion on the university and how power unfold and function in the context of student movements. I provide a brief overview on universities against the background of space and spatiality which I expanded on in chapter one. To conclude this chapter, I give a reflection on the law, looking into legal education and legal systems amongst many other areas and I deliberate about the law on the basis of the possibilities of a feminist jurisprudence.

3.2 THEORISING THE NOTION OF POWER, HOW IT EXISTS AND FUNCTIONS

3.2.1 Power

In order to first establish what power is, before delving into the approach of various scholars, I rely on Michel Foucault's writings and unpack some parts of his theories on power. I take this approach because it is from his work that a foundation was laid from where most scholars have derived theoretical principles of understanding and continue to postulate concept of power. Foucault has laid an extensive foundation in his writings about power and influenced the way scholars understand, theorise and argue around it. Although not all scholarship on power is derived from him and some hold strong dissenting views¹, he offers an interesting perspective on the interwoven relations between *Power and Knowledge*². He posits, amongst other positions that power and knowledge converge in a sense that knowledge is a tool of exercising power, while power is what informs or shapes what we know as knowledge.³ It is against this notorious backdrop from which the rest of Foucault's work on theorising about power would be premised. Foucault's work is imperative for purposes of this research project because, although he does not directly address issues about the law, he contributes significantly to how we understand the power dynamics and the disparities that exist in modern society and how institutions (i.e., government, universities or the courts) play a significant role in the displacement of power.⁴

3.2.2 Feminist perspectives on power

Furthermore, I draw from Allen Amy's discussions of feminist perspectives on power,⁵ where she gives a detailed overview of how power is defined. She makes a distinction between power as a resource⁶, power as empowerment⁷ and power as domination.⁸ Allen details further on how the concept of power as domination is interpreted differently by various feminist scholarly approaches. For purposes of this research, I am interested but not limited to the insight provided by intersectional, radical, post-colonial and decolonial feminist approaches of power as domination. Allen provides a constructive and instrumental insight into how to understand Foucault's theory of power through the lens of various schools of feminist thought. This is important when

¹ See Said *E Orientalism* (1978) and *Young M I Justice and the Politics of Difference* (1990) amongst others.

² Foucault 1978: 133 – 159.

³ Foucault 1978: 137.

⁴ Veitch *et al* 2018: 275.

⁵ Allen 2021: 1-31.

⁶ Allen 202: 4-5:

⁷ Allen 2021: 20-24.

⁸ Allen 2021: 5-20.

trying to understand how power dynamics and disparities impact the lives of women and gender lives and how that translates to gender and sexuality matters.

3.2.3 Institutions of power: Universities and Courts

After establishing theoretical foundations on the concept of power and unpacking the intersectional feminist approach, I begin by looking at two specific institutions of power, namely universities and courts, which are relevant to the context of this research project. I begin looking firstly into universities and interrogating how they embody and subject this notion of power, and how they therefore function as institutions of power. Universities are structured to function in very specific ways. I argue that universities through mechanisms such as the commercialisation of education, securitization of campuses and cis-gendered and racialised approaches to policies and systems that serve and determine the daily institutional operationalities, have only come to reflect an instantiation of western male capitalism which only continues to prioritise a certain demographic while suppressing the other.

For instance, the universities responded to the Must Fall protests with hostility, force and systemic violence, which affected mostly the black and poor students, considering that they are the group that is most affected by the higher education crises. It has been observed how the response to protests which were led by women and queer people was different, (i.e.: #RUReferenceList). Seeing how different these groups were treated compels one to hold a view that universities are unwelcoming spaces for black students, especially when those students identify as women, queer or gender diverse.

I delve furthermore into the dynamics of institutions of higher learning, looking into the history and development of institutions of higher learning. The structural compositions of university staff, from management (and their leadership style) to entry level, the composition of the curriculum, the pedagogical practices that the academic staff has taken upon themselves, including the spatiality of the campuses, from the architectural, the aesthetics (statues and building names) and the atmosphere of the university campus as a lived space. Making sense of the higher education space from an ontological and epistemic analysis allows for an extensive understanding into the praxis of the purpose, functionality and existence of institutions of higher learning.

This will allow us to understand, with critical theoretical underpinnings, the plight of higher education and student movements: From the lack of genuine engagement from

the university management's side,⁹ the extreme level of violence by the police and private security which produced universities to turn into states of exceptions.¹⁰ The general violent institutional culture and the toxic atmosphere, the unfounded student arrests,¹¹ primarily for this research, Dyantyi's lifetime expulsion from an institution of higher learning.¹² Institutions of higher learning have since been oscillating from one crisis to another since the Must Fall movement exposed the disparities of power and the dysfunctional institutional culture. The relationship between management, staff and student has since become cantankerous and hostile. While I acknowledge that the Must Fall motioned the exposé, I am also cognizant of the historical and epistemological sensibilities at the centre of these institutional complexities, that of which I will equally unpack through proper contextualization.

3.2.4 Law and Power

I explore the relationship between law and power, borrowing from Foucault's arguments where he proposes broader perspectives on power and urges for a shift from the traditional/ formal approach to power, positing that power is not synonym to law but law is in fact, a mechanism through which power is distributed.¹³ Analysing the relationship between law and power will assist in understanding how the courts (institutions through which the law is facilitated) embody, apply and subject this power in a social setting. I illustrate how therefore the courts, equally functions as institutions of power and thus reflect how the law is implemented and legislated in society. Looking primarily into student movements, I indicate how the courts/law have been instrumental in facilitating the misuse of power through making it possible for the universities to discriminate against students of "othered" demographics. This discrimination finds expression through systemic violence which manifest as enabling heterosexism, queerphobia and racism. How, for instance, the students of the Must Fall movement were victimised by university management, is a fitting example to understand how the law, which is supposed to ensure safety and equality,¹⁴ can be utilised to bring anarchy and intimidation. The university used the law, by imploring the

⁹ Scott 2022: 81.

¹⁰ Reinders 2019: 72 – 82.

¹¹ Van Marle 2019: 11.

¹²<https://www.seri-sa.org/index.php/more-news/530-rhodes-university-vstudent-representative-council-of-rhodes-university-and-others-rhodes>

¹³ Veitch *et al* 2018: 275.

¹⁴ Field *et al* 2021: 3.

services of law enforcement agencies and campus security, to stifle protests and intimidate students. This tactic was only possible because of the existing power disparities and maladministration of the instruments of the law. The interdicts, unfair disciplinary hearings, the suspensions and residence evictions were all possible because the applicable law can be administered in such disadvantageous ways.

3.2.5 Jurisprudence

Dyantyi's experience with the law was transpired and prolonged for a myriad of reasons, one of the reasons could be the courts' limited consideration of the how South African jurisprudence does not possess an intersectional perspective on issues of discrimination.

Our jurisprudence tends to perceive discrimination from a single-axis and monotonous basis, which conflates one experience to be the experiences of an entire demographic.

This, essentialising the experience of all black people to be similar throughout, and as a result, fails to comprehend how Dyantyi's positionality and her intersecting identities, placed her in a distinctive position which influences how she experiences and how she is subjected to violence. So Dyantyi's trial, arrests and disciplinary hearings unfolded in an entirely different context from male figures (the likes of Mcebo, Cwabe, Khanyile and other) who led the Must Fall student protests. Her experiences and violation of her human rights were entangled to her womanhood, her blackness and the cause she was advocating for.

South African jurisprudence has its own complexities as a result of our history with colonialism and apartheid, both tyrannical legal systems whose impact is still lingering to this day. Although continuously evolving, our jurisprudence still rests largely on the combination of Roman Dutch Law, English Law and African Indigenous Law,¹⁵ none of which are necessarily prominent for prioritising or advancing the rights of women and queer people. A coalescence of these legal systems is subject to improvement when it comes to considering gender and sexuality matters. Through strategies such as transformative constitutionalism, we are attempting to transform our law and legal systems for the better. Feminist jurisprudence can also be a key theoretical strategy that can be exhausted to facilitate deeper and critical consideration of gender and

¹⁵ du Plessis 2021: 63-128

sexuality, in conjunction with race and class, in litigation, policies and the law in general.

MacKinnon writes extensively on feminist jurisprudence where she argues that the legal system is central to the perpetuation of disparities that exists between women and men (queer and cis-heterosexual people) because the law is always interpreted through a male perspective and rooted in cis-heteronormativity beliefs.¹⁶ She unpacks the relations between gender differences, law and power and the social inequalities that are produced in relation to this contexts.¹⁷ As a feminist legal theorist, MacKinnon's work gives crucial insight on how power (as domination) and gender differences function,¹⁸ linking that with the relationship power and law brings into context how relying on gender binaries when writing and interpreting the law, only further perpetuate violences on women and gender diverse people. Her work is relevant here because it exposes the material and systemic violence that is produced in those small crevices of the intersections of gender, sexuality and class. Furthermore, she provides an in-depth gendered context on how the law/legal system informs and perpetuates the power disparities we are navigating in the modern society.

3.2.6 Institutional culture as power

Court rooms and universities spaces reflect an institutional culture that is rooted in heterosexism. The Dyantyi case gives insight into the institutional culture of courts. How women are perceived in court /in practice has a direct bearing on how gender related issues are interpreted in court. How universities respond to gender, broadly the aesthetics of the university space, has direct impact on how women and queer people are treated by fellow students, the staff and university management. In essence, these institutions, the universities and the courts and in a sense the government, are institutions of power and that have a social responsibility to ensure that power is distributed and accessed adequately. However, they are often directly responsible for a lot of power disparities in the society because they continue to prioritise the needs of the western, male and capitalist class.

¹⁶ Mackinnon 1989: 214-234.

¹⁷ MacKinnon 1989: 214-234.

¹⁸ Allen 2021: 8.

In the next chapter I read Dyantyi's experience through the lens of intersectional radical feminism because her experience is an appropriate case-study on how very often when a black woman or a queer person experiences some kind of violence, the dynamic is interpreted in singularity, neglecting other contributing factors, which is the queerness of their womanhood. It is often the blackness that is simultaneously highlighted and undermined, but always treated as separate from gender and sexuality. I am reminded of Audre Lorde, who was Black, Women and Lesbian when she said, "there is no such is as a single-issue struggle, because we do not live single-issue lives",¹⁹ warning against the insistence to apply monolithic solutions to layered and intersecting struggles that are evidently impacted by the power disparities that exist where social categorizations of class, gender, and sexuality intersect. Scholars like Crenshaw and Collins warn about how the intersecting categories created new systems of oppression.²⁰ I also rely on the feminist scholarship of Davis and hooks who would also echo and amplify these sentiments in their writing.

I focus on Dyantyi's life-time expulsion from UCKAR in an attempt to understand how black woman experience institutions of power in general, but primarily institutions such as universities and courts. It is for these reasons that I highlight that her expulsion was only possible because the UCKAR management and their counsel exhausted legal remedies, and furthermore, the courts enabled the maladministration of those legal remedies. I posit that the reason why this happens is because at the core, these institutions are not sensitive to gender and sexuality matters because they are rooted in cis-hetero-patriarchy beliefs, which will disadvantage women and queer people at any given chance.

It must be noted that the dominant narratives of discrimination have always revolved around those who possess more power in the society. The people who possess less power are those who have been historically marginalised on issues of gender discrimination or sexual violence, the white women are more often to be prioritised. On issues of racial discrimination, it is the black men will get more attention. Gender and sexuality dissents are not recognised by law as human beings. We are situated at the peripheries of everything. All the women are only deemed women if they are

¹⁹ Lorde 2007: 138.

²⁰ Crenshaw 1989: 140.

See also Collins et al: 2021: 690 – 675. *Intersectionality as Critical Social Theory*

white. Black people are only deemed white if they are cis-heterosexual men and the rest of us are not deemed to even be human, and we are decentred from the general human existence narrative. So, if you are woman, queer, black and poor or fall into any of the “othered” categories or lower social class, one is inevitably subject to some sort of discrimination only because they are manoeuvring spaces that were designed particularly to exclude them.

The concept of ‘power’ is still heavily contested, and it is theorised in different ways by various schools of thought. To make sense of it, scholars have distinguished between power as “power-to” and “power-over”. In the Weberian perspective “power-to” is to define the occasion where “one actor with a social relationship is in a position to execute their own will, regardless of resistance.”²¹ The alternative, “power-over,” is offered by Foucault who said, “mechanisms or structures of power function in such a way that a person exercises power over other”.²²

These dichotomies remain contextually contentious amongst scholars, even throughout feminist interpretations. While some feminists interpret “power” to mean empowerment, which is the ability/capacity to empower oneself, inclining towards the “power-to” angle. and defined in a way that seeks to denounce the putatively masculine notions of power as “power-over.”²³ Liberal feminists understand power as a resource that is currently unfairly and unjustly distributed between women and men and must, eventually, be redistributed in equitable ways.²⁴ Feminists scholars who are influenced by radical, intersectional, decolonial and socialist theories amongst others, have defined “power” as a tool of domination, informed by socially constructed differences such as race, class and gender.²⁵ They lean more towards a “power-over” perspective which views power as an illegitimate domination/subjection/oppression over others.²⁶ For purposes of this study, and for the trajectory of this chapter the idea of “power” will be understood from this very perspective. On a generic perspective, power is not necessarily a good or evil notion, how it is exercised by the institutions or

²¹ Allen 2021: 1.

²² Allen 2021: 1.

²³ Allen 2021: 21-24

²⁴ Allen 2021: 45.

²⁵ Allen 2021: 5.

²⁶ Allen 2021: 5.

individuals (whether it is dominate/empower) is often what determines whether in that dynamic, power is a negative or a positive thing.²⁷

Adducing from scholars such as MacKinnon, who gives a gendered perspective on the notion of power and writes about how gender differences are not necessarily prioritised or important but are what defines and therefore establishes power.²⁸ We can derive from this view that power is manufactured by social differences, and it is possessed by those who fall into categories deemed to be of privilege. How gender differences are determined is what determines who possesses power and who does not. Essentially, men (who are regarded as superior) have power and women (who are regarded as inferior) are deemed powerless. This dual distinction is rooted in and sculptured by patriarchal constructions, and it establishes the socio-political differences between freedom and subjection.²⁹

Other social differences to be considered when determining what “power” is and who possess it, include race, sexuality, gender and class (amongst others). Feminist scholars investigate the complicated and interconnected relations of these differences and theorise on how they produce more nuanced and layered modes of domination. Crenshaw underpins this view and explains how power translates as domination in the context of legal discrimination. She explicates on how social differences such as race and gender intersect and create a new and different layer of oppressive system.³⁰ She further warns against how the dominant and general understandings of discrimination pose a misleading impression that, oppression occurs on a single dimension,³¹ which utterly alienates how black women and queer people experience discrimination. Collins has theorised this phenomenon of intersecting social differences as a “matrix of domination” or “interlocking systems of oppression” and explains it in two-fold, firstly as:

“macro level connections linking systems of oppression such as race, class, and gender. This is the model describing the social structures that create social positions. Second, the notion of intersectionality describes micro level processes-namely, how each individual and group

²⁷ James 2018: 34.

²⁸ MacKinnon 1989: 219.

²⁹ Allen 2021: 9.

³⁰ Crenshaw 1989: 139-130.

³¹ Crenshaw 1989: 140

occupies a social position within interlocking structures of oppression described by the metaphor of intersectionality. Together they shape oppression.”³²

Essentially alluding to the idea that people are categorised according to social differences and certain categories are regarded as inferior while others are superior, making a distinction between power and powerlessness.³³ This distinction creates class, placing those who are superior at the upper echelons of societal hierarchy, granting them “power-over.” The lesser categories and the upper class categories subjugate their power, producing oppressive systems such as racial inequality, gender disparity, class differences and sexual discrimination. It is for these reasons why Collins said that “ the difference is the velvet glove on the iron fist of domination”.³⁴

Because power must be disseminated and regulated in its functionality, it is then allocated to various official institutions, each serving a particular purpose. Institutions of “power” are therefore, those entities which comprehend, possess and execute power as explained above. They are those institutions, which, according to the law, are granted the right to exercise power of the public.³⁵ These includes entities such as Government, Churches, the Courts and Universities and others. They possess an institutional power which they implore to ensure some sort of control and influence over the society.³⁶ If we then conclude that power is layered, meaning that it is influenced by other social categories, and it is, in many ways, gendered (racialised and sexualised), as explained above, then I posit that institutions of power, taking Universities and the Courts (the law) as an instance, are inherently designed to function in a manner that marginalises and discriminates against those in the lesser categories. The episteme of the notion of power inevitably cascades into the structures and systems of these institutions, which means the institutions become an embodiment of eurocentric and androcentric beliefs, and therefore instantiations of western male capitalism.

³² Collins *et al* 1995: 495.

³³ Collins *et al* 1995: 495.

³⁴ MacKinnon 1989: 219.

³⁵ <https://www.umu.se/en/research/groups/institutions-of-power/#:~:text=The%20name%20%E2%80%9Cinstitutions%20of%20power,central%20part%20of%20constitutional%20law.>

³⁶ <https://www.umu.se/en/research/groups/institutions-of-power/#:~:text=The%20name%20%E2%80%9Cinstitutions%20of%20power,central%20part%20of%20constitutional%20law.>

Power and knowledge are intertwined in a sense that how knowledge is constructed and disseminated is in fact an action of expressing power and this is informed by how knowledge is constructed and disseminated.³⁷ Which is to mean that knowledge as we have come to know, accumulate and consume it today is influenced by the mechanism and politics of power in the society. ³⁸ Knowledge is essentially constructed by a contestation of ideas, and it is not necessarily the explanations and ideas which are consistent with the reality which become most favoured. Instead, it is the views of those who are deemed to be effective with exercising power, whose narrative will be deemed more sensible and accurate. ³⁹ This is how power shapes knowledge, which means the dominant narratives of knowledge are rooted in specific ethos and values.

Quijano and Mignolo write about the coloniality of power, where they unpack it as a process of dismantling the knowledge systems, the customs and mores of other demographics.⁴⁰ The dismantling is done so as an act to instil their own conceptions of knowledge with the aims of monopolising and exercising dominance over the knowledge systems. The coloniality of power ultimately shapes other societies' constructions, such as gender, race and sexuality. Which is essentially a production of fundamentally new ways of understanding and identifying.⁴¹ Quijano writes about the coloniality of power to bring colonial histories into context while making sense of the power disparity dynamics of society.⁴² For instance, the racial division was manufactured primarily to serve economic interests of the dominant race, therefore ensuring that despite being divided systemically, the racially divided groups still "need" each other, although they do not need each to exist. ⁴³ Lugones uses this framework to make sense of gender and sexuality and how they are produced by the coloniality of power.⁴⁴ Women and Queer people are subject to disempowerment because they are deemed less than in terms race, gender and sexuality positions of coloniality. ⁴⁵

³⁷ James 2018: 38

³⁸ James 2018: 38.

³⁹ James 2018: 38.

⁴⁰ <https://globalsocialtheory.org/topics/coloniality-of-gender/>

⁴¹ <https://globalsocialtheory.org/topics/coloniality-of-gender/>

⁴² Quijano & Ennis 2000: 536.

⁴³ Quijano & Ennis 2000: 536.

⁴⁴ <https://globalsocialtheory.org/topics/coloniality-of-gender/>

⁴⁵ <https://globalsocialtheory.org/topics/coloniality-of-gender/>

The law, as a structure of power, has been a central auxiliary in facilitating violence towards student protesters, in criminalising the right to protest and in stifling student movements. What I attempt to portray here overall, is how courts and universities become oppressive institutions where power is exercised dominantly over marginalised demographics. I focus furthermore on the South African legal system to make sense of its structure in order to contextualise it within our history with oppressive regimes and the lingering aftermath thereof. I unpack how the power is structured, allocated and disseminated and most importantly, how it is limited throughout government structures and public institutions. The concept of trias-politica, which means power is divided accordingly between the three spheres of government, seeks to maintain the supremacy of the constitution.⁴⁶ The separation of power is important to ensure that power is not abused by the various institutions of government, but to equally ensure that checks and balances are maintained, and that the constitutional mandate is prioritised consistently

There are evidently clear relations between the law and power, considering how we have come to understand the purpose and function of law, primarily in so far as it has to function as a regulatory mechanism. Foucault makes two important assertions regarding the relationship between law and power. Firstly, he posits that the law is a strategy of power. Secondly, that the law is just one of the many strategies of power. This means that the law is a strategy of power that is utilized by an authoritative institution such as state/government and/or others in order to influence the law-making processes which will determine what is deemed acceptable and what is punishable by law.⁴⁷ A significant part of what law is and how it operates is essentially a product of conflicts and contestations in the legal and political spheres and an exercise of dominance of everyone else.⁴⁸ Juridical institutions, such as courts seem to dissipate in the background of the law, because when the law begins to function as the general authoritative norm, the institutions just become an apparatus that only serve to facilitate the law.⁴⁹

⁴⁶ Currie & De Waal 2014: 18 – 19.

⁴⁷ James 2018: 39.

⁴⁸ James 2018: 39

⁴⁹ Foucault 1978: 144.

The clarification on law not being the absolute strategy of power but just one of its many strategies⁵⁰ is necessary to avoid the assumption that law and power are synonymous. This also stems from how power is centralised, “power is everywhere” and how power is localised.⁵¹ Power does not entirely determine law because society is not just shaped by the legal rules and legislation and therefore juridical, it is also shaped by other societal factors and institutions, like religion, media, education and others.⁵²

The notion of governmentality helps to expand the relationship between law and power primarily on how instances of law function a strategy of power. Governmentality refers to how institutions of power, like government understands the idea of power and how it exercises it over the society they ought to govern.⁵³ Governmentality concerns the broader scheme of government, from the institutions, policies and managing of the population.⁵⁴ In the book, *Power: Essential Works of Foucault*, Foucault explains the notion of governmentality as coming to the fore in three components. Firstly, as a collection of institutions, procedures and reflections, and tactics that are used to exercise an intricate kind of power over the people.⁵⁵ Secondly, it refers to the tendency that has, over the years, accumulated as culture on how to exercise this complex power, the culture of governmentality then produces further complex concepts of power and new forms of governing mechanisms.⁵⁶ Lastly, governmentality is a process where state of justice transforms into an administrative state.⁵⁷

Governmentality produces different kinds of power which exists in society, these powers emanate from a collective amalgamation of various factors concerning state and society. Foucault propose that normalising power can be positive and proactive for society because then power can function as a system that informs rules , and not as exerted over people.⁵⁸ He emphasises that power in governmentality is centralised and operates through multiple systems and networks, which means institutions or

⁵⁰ James 2018:39.

⁵¹ James 2018: 39.

⁵² James 2018: 40.

⁵³ Veitch *et al* 2018: 278.

⁵⁴ Veitch *et al* 2018: 278.

⁵⁵ Foucault 1997: 219 – 220.

⁵⁶ Foucault 1997: 220.

⁵⁷ Foucault 1997: 220.

⁵⁸ Veitch *et al* 2018: 278.

individuals cannot be a source of power.⁵⁹ Moreover, power cannot be monopolised, it is not possessed by a social body as either a right or a consequence.⁶⁰ In essence how we come to know and understand these institutions and the problems that come with their functionality must be analysed through the lens of power and knowledge that has been produced through governmentality.

Furthermore, Foucault introduces the concept of bio-power in making sense of law and power. Bio-power refers to ways in which institutions exercise power over the individuals' bodies and their lives, essentially how power is exercised over the production of life.⁶¹ He asserts that power is central to the production of capitalism because bodies have been produced to exhibit behaviour that is considered acceptable, or normal through the monitoring of health and wellbeing of the population. Ultimately, bodies adhere and that they just operate as machinery which functions to serve and maintain the status quo.⁶²

The idea of sexuality and gender is a form of bio-power because it is used to regulate and control how people, primarily women and queer people should behave to be deemed acceptable and productive to the society. MacKinnon critiques the broader perspective of bio-power and asserts that bio-power essentially reproduces a hetero-sexist world which reinforces oppression based on gender and sexuality.⁶³ Since bio-power refers to "conditions of biological existence become the concern of politics",⁶⁴ we cannot omit how gender and sexuality is relevant to the context. On *Women, Race and Class*, Davis expands the notion of bio-power with regards to how marginalised bodies continue to be criminalised by institutions of power⁶⁵ and the ways on which bio-power institutionalizes obstetric violence against black women.⁶⁶

Van Marle opines on the law's incapacity to allow for a radical politics.⁶⁷ This discussion is important when interrogating the role of the law in as far as student movements are concerned, particularly the Must Fall movement and the

⁵⁹ Veitch *et al* 2018: 278.

⁶⁰ Veitch *et al* 2018: 278.

⁶¹ Veitch *et al* 2018: 277.

⁶² Veitch *et al* 2018: 227

⁶³ Mackinnon 1989: 214-234.

⁶⁴ Veitch *et al* 2018: 277.

⁶⁵ Davis 1981: 155 – 181.

⁶⁶ Davis 1981: 182- 198.

⁶⁷ Van Marle 2019: 112-113

#RURReferenceList protest. Considering the draconian ways in which the law has been weaponised against student protest and how students have been criminalised for exercising their constitutionally granted and protected right to protest, the dichotomy between exercising your legally protected rights and being violated by the same instrument (that is ought to protect them) requires an interrogation.

3.3 THE UNIVERSITY

Research shows that some of the oldest university-esque institutions have deep ties with religion, particularly Christianity. One that was found in Egypt during the 200BC was built like a temple, and operated as a library predominantly for religious, philosophical, scientific and medical materials.⁶⁸ The oldest institution to offer formal education was found in Ethiopia during the fourth century and was founded by a man who had converted into Christianity.⁶⁹ Blackhouse writes about how formal education during that era was designed in such a way that the men were mostly taught on church and state leadership. Simultaneously, the lower classes of the education system offered literature in the form of poetry or hymns.⁷⁰ Blackhouse gives an extensive historical perspective on the formations of higher education,⁷¹ which gives insight on how far reaching religion has influenced the formalisation of higher education to be what we know it as today.

Universities exists as spaces where disagreements should be acknowledged, encouraged and celebrated. It is a space that should nurture different opinions, to be rewarded and even incentivised.⁷² Universities are spaces where knowledge and skilled labour is produced. They function as ideological apparatus and provide platform for the selection and socialisation of the elite members of society's demographic.⁷³ The knowledge produced in universities ought to be of critical, unorthodox and rigorous quality which can be applied for the advancement of human lives and improvement of societal conditions.⁷⁴ The knowledge is produced through contestation of ideologies and universities must allow platform for these intellectual engagements. Often universities tend to overly focus on producing skilled labour, and maintaining

⁶⁸ Blackhouse 2009: 18.

⁶⁹ Mabelebele 2013: 2.

⁷⁰ Blackhouse 2009. 18-19.

⁷¹ Blackhouse 2009. 18 – 21.

⁷² Mabelebele 2013: 3.

⁷³ Mabelebele 2013: 4.

⁷⁴ Mabelebele 2013: 4.

and protecting their elite status which can come at expense of decentring knowledge and ideological production.⁷⁵

Knowledge function as an instrument which determines power⁷⁶ and institutions of higher learning are platforms for knowledge production, which means universities can shape narratives and the truth. Knowledge and Power are two notions that can influence each other, the relationship between universities as the production space for knowledge and power structures and systems becomes important to make sense of the modalities of power functions in the society.⁷⁷ Academia determines power, what is deemed as knowledge and truth is therefore determined by those who possess power, influencing dominant narrative and epistemically erasing narratives that do not align with their position.

South African higher education is in a complex dynamic because most universities are essentially an extension of colonial and later apartheid imaginations.⁷⁸ They often struggle to find balance between maintaining autonomy and exercising academic freedom, as well as accounting to the public, including finding balance between protecting institutional history and transforming to adapt to current times.⁷⁹ Often universities are conflated when having to take decisions in, especially in times of crises. They sometime resort to diplomatic approaches, like forming committees, hosting dialogues and working streams to evade from taking a public stance on socio-political matter.

I establish earlier how universities are productions of unjust geographies; hence they essentially operate as extensions of oppressive regimes. It almost inherent for universities to resort to militant measures when addressing student protests because they are innately designed to be inaccessible and would resort to violence measures to ensure that violence in that context would unfold in a manner that seeks to ensure that people are regulated and disciplined, and in a way that ensures that they adhere to the structures and systems put in place.⁸⁰ Rendering the universities spaces as ungovernable during student protest by adopting militating measures and suspending

⁷⁵ Mabelebele 2013: 5.

⁷⁶ Ntuli & Smit 1991: 1.

⁷⁷ Ntuli & Smit 1991: 2.

⁷⁸ Van Marle 2022: 208.

⁷⁹ Mabelebele 2013: 4

⁸⁰ Goba 2018: 18.

rights, and reminiscent to apartheid governing measures and how people were stripped of their humanity and their dignity which was abandoned⁸¹.

3.3.1 Campus Militarization

During student protests in various universities in South Africa, the university management across different institutions would frequently utilise the South African Police Services (SAPS)⁸² or hire external private security companies such as Mafoko.⁸³ On several occasions, the already existing campus guards was deployed for purposes of “managing” the protest crowd. All these interventions by law enforcement and private securities almost always turned violent because they often implored disproportional⁸⁴ measures of force to “diffuse” the situation. They would use crowd controlling measures such as water cannons, stun grenades, teargas, rubber bullets, pepper sprays, and often resorting to their bare hands⁸⁵ to collapse and stifle the crowds of students. Protests became increasingly violent in almost every instance because when students were met with hostility from the police/securities they were placed in a position where they had to defend themselves.⁸⁶ It must be duly noted that, although SA students politics have an undeniable reputation and long standing history of violence,⁸⁷ it does not necessarily imply that protesting is inherently violent, or that the protesters always resort to violence.

As more and more protest actions resulted in some level of violence, many universities became heavily militarised. UP upgraded all their security systems and they now use a complex dual verification which includes biometric and card system. This means, one is required to use fingerprint and access card to exit and enter the university, and to access buildings around campus.⁸⁸ In 2017, WITS announced that they are considering the use of drone surveillance and installing more CCTV cameras.⁸⁹ At the UFS, Bloemfontein Campus, they have now installed surveillance cameras at the entrance and exit of the Student Centre. They have also barricaded the entrance and

⁸¹ Goba 2018: 10.

⁸² Reinders 2019: 72.

⁸³ Mafoko Security Patrols (PTY) LTD is a private security company that was frequently contracted by the management of the University of the Free State during student protests.

⁸⁴ The State of Protest Report 17: 2017.

⁸⁵ Kujeke 2017: 75.

⁸⁶ Reinders 2019: 73.

⁸⁷ Reinders 2019: 73.

⁸⁸ Reinders 2019: 77.

⁸⁹ [Drones, biometrics and the public university – The Mail & Guardian \(mg.co.za\)](https://www.mailandguardian.co.za/news/technology/2017/07/20/drones-biometrics-and-the-public-university)

exist of the student centre with trellis doors. The Steve Biko Building, which houses the offices of the Student Affairs staff, the Dean of Students and the entire SRC council, now has an in-house security guard. The entryway to the building now only grants access to staff and SRC members, a regular student must report first and be granted access by the security guard.⁹⁰ Most universities increased security measures during the protests, some of the measures were retained and even modified, although the constant protesting had dissipated. Some of the militarization tactics include the unnecessary suspensions, unreasonable expulsion and the constant arrests of students⁹¹ - very often for contravening some ambiguous interdict. (i.e. Yolanda Dyantyi). I explain in detail later in this chapter how the law was instrumental in stifling and curbing student protest.

Many would argue that the securitisation project was necessary for ensuring the safety of the staff and students, and the measures served to “protect” them from potential violence from the public,⁹² in times of protests. This may be logical on face value, but in hindsight, it is not the case. Existing inside the perimeters of a university space as a black student became even more suffocating, the students felt unsafe, black students were treated as criminals under constant surveillance of heavily armed guards. Moreover, students (especially those who are black, women and queer) across various universities have claimed that they felt unsafe and targeted in the presence of heavily armed security guards and the police.⁹³ The atmosphere was thick with militant and violent masculinities, that which is re-produced by this militarisation.

3.3.2 Universities as State of Exception

In the light of these exaggerated responses to the student protests, many scholars have postulated extensively about how institutions of higher learning have modelled a “state of exception” or a “state of emergency” as others would refer. The idea of a state of exception was first introduced by Carl Schmitt who suggested that if an exception takes place, it is adequate proof of how fragile and inefficient the rule of law is, with regards to framing human life.⁹⁴ Schmitt thinks more broadly about how a state of

⁹⁰ [Drones, biometrics and the public university – The Mail & Guardian \(mg.co.za\)](https://www.mailandguardian.com/2019/05/20/drones-biometrics-and-the-public-university/)

⁹¹ Reinders 2019: 75-76.

⁹² [Drones, biometrics and the public university – The Mail & Guardian \(mg.co.za\)](https://www.mailandguardian.com/2019/05/20/drones-biometrics-and-the-public-university/)

⁹³ Maringira & Gukurume 2017: 44.

⁹⁴ Schmitt 1985: 6-7.

exception is limiting the very function of the law and the entire idea of a liberal democracy.⁹⁵ Walter Benjamin investigates the idea of state of exception by asking whether state violence can be rationalised in anyway without having to consider if the use of violence is just or unjust.⁹⁶ He thinks of a state of emergency in a more fictional sense and opines that a genuine state of exception would be one where we are improving the people's state of living, and fighting against oppression and asserting the possibility of creating human existence that is outside of the law.⁹⁷ Most notorious for fallist scholars, are the teachings by Giorgio Agamben, who said "If the law employs the exception – that is the suspension of the law itself – as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds. At the same time, it abandons the living-being to the law."⁹⁸ Agamben understands the state of exception to be a unique situation where "normative and legal order is set aside and replaced with an opposite and ambiguous law."⁹⁹ For all intent and purposes, it can therefore be gathered from the three scholars' contemplations that a state of exception is a circumstance where there is suspension or complete abandonment of the rule of law.¹⁰⁰ The rule of law being the mighty idea that the state and its people account and adhere to the same laws.

Kamga opines that a state of exception represents "political nihilism and a vicious circle of violence".¹⁰¹ Which is to say that in that state there was total repudiation of the fundamental human rights, a collapse of institutional authority and complete disregard of the rule of law. Considering the three scholars' view on the state of exception, we can also gather that there is doctrinal perspective that give a justification and explanation as to how a state of exception comes into fruition.¹⁰²

If we rely more on Agamben's teachings, we can understand through his theory of exception, how the heavy militarization of university campuses and the violence that ensued in the space resembles, by the very definition, a "state of exception". Agamben

⁹⁵ Kamga 2019: 91.

⁹⁶ Benjamin 2003: 115

⁹⁷ Kamga 2019: 92.

⁹⁸ Agamben 2005: 1.

⁹⁹ Shingange 2021: 11.

¹⁰⁰ Reinders 2019: 79.

¹⁰¹ Kamga 2019: 91.

¹⁰² Kamga 2019: 93.

explains that in such a state, democracy is abused in a way that seeks to justify the deviation from the rule of law.¹⁰³

Reinders goes as far as alluding that universities curated state of exception through a fascist approach. Fascism as

“a form of political behaviour marked by obsessive preoccupation with community decline, humiliation, or victimhood and by compensatory cults of unity, energy, and purity. By which in a mass-based party of committed nationalist militants, working in uneasy but effective collaboration with traditional elites- it abandons democratic liberties and pursues with redemptive violence and without ethical or legal restraints goals of internal cleansing and external expansion.”¹⁰⁴

Foucault’s bio-power is also seen in the militarization of campuses, because that functioned as form of control over student’s bodies that was justified as a method to maintain order and safety. But it only served to stifle the ongoing protests and to compel students to a form of dispositional behaviour and locomote campus within acceptable ways that will not render them suspicious or violent and therefore criminalised.

Goba makes sense of states of exception from a gendered and racialised lens and asserts that in states of exceptions a person’s right to exist is suspended, so is their humanity.¹⁰⁵ In a suspension of law, life is reduced to nothing. Human beings are grouped according to race, gender, and class to determine whose’ life is worthy for protection in a lawless state.¹⁰⁶ Power functions differently then, it is weaponised to manage people, to determine their humanity and to legitimise the action of suspending all laws.¹⁰⁷ The lives of those who belong at the bottom of the food chain, render their lives unliveable and they are no longer subjects of the law in any sense and essentially not human.¹⁰⁸

3.4 THE LAW

In our first year of LLB studies, introductory modules such as Legal Foundations, we are taught that the standard definition of law is “the body of rules governing human

¹⁰³ Shingange 2021: 10.

¹⁰⁴ Paxton 2004: 218.

¹⁰⁵ Goba 2023: 113.

¹⁰⁶ Goba 2023: 113.

¹⁰⁷ Goba 2023: 114.

¹⁰⁸ Goba 2023: 114.

conduct, recognised as binding by people and enforced by public authorities”.¹⁰⁹ The notion of law can be derived from the idea of a “social contract” as theorised by philosophers like Thomas Hobbes, who says that the concept of law is understood from the fact that people existed in a “state of nature”, which, according to him, is a society that is engulfed in fear, selfishness and living in chaotic conditions.¹¹⁰ But because human beings, by their very nature, desire to exist in a space with order, peace and security, they therefore entered into a “social contract” with intentions of materialising this inherent idea of preservation and protection that they possess.¹¹¹ A social contract can then be understood as an agreement entered into by people who agreed to relinquish their rights and freedom to an “authoritative institution” - which came about as a result of the contract. Furthermore, that authority then establish rules, command obedience¹¹² and guarantees order and protection.¹¹³ Various theorists have different philosophical perspectives about what the law is and what function it serves, but I think the technical essence of “the law” as a set of rules and prescribed regulations as agreed upon by the society and imposed by an authoritative institution with the purpose of maintaining the socio-economic status quo prevails.

There have also been scholarly critiques and debates about the function of law and its role in creating social disparities. Some scholars argue that the basic function of law is to protect and regulate relationships (amongst people and between the people and the state) in a fair and just manner¹¹⁴. We must interrogate the role of the law in perpetuating these social disparities, how it is weaponised and its ability to allow reflexive politics. For instance Marxist lawyers would say that the law lacks neutrality because it inherently favours the upper class. A critical race theorist believes that the law is rooted in racial inequality; and a decolonial scholar will highlight the largely European influences that are visible in our legal system. A feminist legal scholar is of the view that the law is deeply patriarchal and rooted in gender inequality.¹¹⁵ All these deliberations, when explored more profoundly, essentially interrogate the relationship between the law and power and analyses that relationship in the context of the societal

¹⁰⁹ Field *et al* 2021: 2.

¹¹⁰ Laskar 2013: 1-3.

¹¹¹ Laskar 2013: 1-3.

¹¹² Laskar 2013: 2.

¹¹³ Field *et al* 2022: 2.

¹¹⁴ Field *et al* 2022: 2.

¹¹⁵ Field *et al* 2022: 2.

impact. The rule of law has also been translated to be tangential with political and civil rights. However, other scholars, including feminist scholars, have questioned the adherence to the rule of law to basically being an instance to follow the general and acceptable principles of the law, which can be deemed as a limitation.

3.4.1 South African Legal System

The context of South Africa's complex legal history is relevant here because the discussion centres, firstly Yolanda Dyantyi's trial with UCKAR which speaks to how black womanhood is understood by the institutions of power, and secondly the overall criminalization of right to protest, not just in Dyantyi's case but in relevance to the entire Must Fall movement. Our legal system played a crucial role in a majority of these experiences and must therefore be analysed and understood in the contexts of these events.

We are now a democratic country and we have adopted the final Constitution in 1996, which means our legal system relies on the idea of constitutionalism, entailing a prescription of what the constitution is and what constitutional law ought to be.¹¹⁶ The doctrine of constitutionalism seeks to ensure that the powers of the government are limited, for the interests of the society, to ensure that we do not end with an autocratic regime again.¹¹⁷ The idea of constitutionalism is supported by the notion of the rule of law which protects the rights that are entrenched in chapter 2 of the constitution. The rule of law ensures that these rights are protected by all state institutions throughout all judicial processes.¹¹⁸ Most imperatively, the rule of law compels the government institutions to not exercise or precede the limitations granted to exercise their powers, unless it falls within the perimeters of the law.¹¹⁹ The rule of law ensures checks and balance and that the principle of *trias politica* are maintained. The three spheres of government, namely the judiciary, the legislature the executive are all allocated specific functions, which comes with specific powers which cannot conflated with that of other branches.¹²⁰ So the drafting of the law, how that law is executed and how it is

¹¹⁶ Currie & De Waal 2013: 8

¹¹⁷ Currie & de Waal 2013: 8.

¹¹⁸ Currie & de Waal 2013: 10.

¹¹⁹ Currie & de Waal 2013: 11.

¹²⁰ Currie & de Waal 2013: 18.

implemented to resolve disputes are all separate functions, independent from one another and the duties are taken by different institutions.¹²¹

South Africa's current legal system has historical ties with totalitarian regimes such as the colonial era and the apartheid regime and although we have not transitioned into a democratic country, we are left with the atmospheric and systemic remnants of that period. The remnants of the oppressive laws are now more subtle, diluted and found in the inconspicuous and intangible fabrics of the society. For instance, we may live in a country where everyone ought to be equal and treated the same, as per the constitution. Legislation has been implemented to ensure this reality, but what use is any of that if black women and queer people are still murdered, raped and killed on a daily basis, without any efficacious punitive consequences for the perpetrators and all the other systems in place do not respond adequately to the needs of the victims?

Our legal culture is ingrained in western male capitalistic belief systems which become visible in the nuances as we interpret the law. It is for these reasons that Klare suggests the notion of "transformative constitutionalism" to respond to the stagnant parts of our legal system that are either still nostalgic of the past regime. The law does not respond adequately and effectively to the current plight of human rights violations. The South African legal culture is conservative, limiting the way we think, argue and practice the law. It maintains rigid laws and reproduces the hierarchy of the status quo,¹²² which further alienates the minority demographics.

Klare suggests transformative constitutionalism as a strategy for improving legal education but also legal practice and legal scholarship, where legal practitioners engage substantively and critically with the politics and morals of our society.¹²³ Transformative constitutionalism urges us to think about the constitution as not just a mere document which prescribes the law of the country, but a tool that can be used to foster radical change in the society, which means a shift in the interpretation and enactment of the law, which puts into context our historical background and the current socio-political and economic climate.¹²⁴ Because transformative constitutionalism urges for a consideration of issues on a broader scale, it is possible that we can have

¹²¹ Currie & de Waal 2013: 18.

¹²² Langa 2006: 355-358.

¹²³ Klare 1988: 150

¹²⁴ Klare 1988: 150.

judicial practice that insist in a wholistically progressive consideration, and interpretation of gender and sexuality rights, as well as the intersection of other related social factors and identities.

3.4.2. LEGAL EDUCATION

Part of the problem with the lack of transformation in the law stems from legal education and legal pedagogical practice in general. Law students are taught to understand and interpret the law from a perspective that maintains societal power disparities and maintains the societal hierarchy. Kennedy posits that tertiary institutions teach law in such a way that ensures the reproduction of western capitalist systems and maintenance of societal hierarchies.¹²⁵ Students are taught law in a manner that enforces a strict adherence to the traditional rules and applications of the law.¹²⁶ The law is taught as though it is just a system of prescripts, without any ideological or policy-driven foundations guiding the curricula.¹²⁷ This approach to teaching and learning the law produces graduates who interpret the law in very limited ways and practice it with an understanding that they cannot deviate from the rules and this tarnishes any ambitious left-wing aspirations to “change the system” that some first-year student walks into class with. This formalistic and rigid way of teaching the law only models and recreates hierarchal power relations in the society, which is sustained and reproduced in other institutions outside the perimeters of the university, such as the courts and within the university space.

This approach to teaching and learning about the law produces graduates who rationalise the problematic parts of the legal system because they are deemed as the norm.¹²⁸ The students end up assimilating into the status quo and its hierarchal dynamics, where they see the politics and humanities to be separate from law.¹²⁹ They only aspire to be “legal eagles” without exploring alternative practice because they have been taught to only aspire to the traditional legal careers.¹³⁰ In any case, alternative practice has been incapacitated by the pedagogical doctrine of the law ,and has been divorced from application, as though they are two separate entities, when

¹²⁵ Kennedy 1984: 961.

¹²⁶ Kennedy 1984: 961.

¹²⁷ Kennedy 1984: 962.

¹²⁸ Kennedy 194: 962

¹²⁹ Kennedy 1984: 963.

¹³⁰ Kennedy 1988: 64.

they are in fact intertwined.¹³¹ The content of the curriculum is designed in such a way that students cannot fathom the possibilities of alternative careers¹³² and the education system has a disgruntled approach to teaching and learning. It entails students already believing that they are incompetent and insecure and must therefore endure the hardships to be absolved by bigger institutions later.¹³³ Legal education and legal practice are complicit, and are creating and perpetuating legal culture that is not reflexive at all. The result is a puppeteering of students who become complicit in the light of injustice because they are not taught critically to engage and confront with the system and its laws.

In the recent years, the LLB curriculum in various South African law faculties has been a topical matter, one of the major concerns, besides the content of the curricula is the poor writing (and reading) skills from the law graduates. Legal practitioners have adopted writing that is immersed in legal jargon and phrases, which is just the use of inaccessible language that is incomprehensible to the laymen and only see writing as a technical skill that is used to draft court documents. The lamentations regarding how we write and read about the law as scholars and legal practitioners is imperative because it a reflection on how we engage with, think about and respond to the crises of social justice.¹³⁴ There is an urgent need to entrench the culture of critically writing and reading about the law for legal practice and legal scholars because the entire legal profession is dependent on the quality of research and argument (written or oral) which is presented in the form of a written document.¹³⁵ Instilling the essence of critical writing and reading re-shapes the entire legal pedagogy and practice towards thinking about the law outside the formalistic and the conservative parameters we are restricted to. In addition, it allows for a reflexive approach and indulgence with the humanities and politics.

The call to decolonise the curriculum was one of the key factors of the Must Fall movement, from which the need to decolonise the law/ legal education can be derived. What is central to the decolonising of the law, is the urgent need to produce progressive legal scholars and practitioners who engage critically with the law-

¹³¹ Kennedy 1988: 65.

¹³² Kennedy 1988: 64 -65.

¹³³ Kennedy 1988: 65.

¹³⁴ Van Marle 2014: 210.

¹³⁵ Van Marle 2014: 209.

because how we teach the law and South Africa jurisprudence is critical to the South African law landscape.¹³⁶ Decolonising legal education, practically, will mean the inclusion of African jurisprudence in the curricula content¹³⁷, referencing the pluriversality that exists between the legal theories¹³⁸ and the fields of practice and more teaching and reading of indigenous law.¹³⁹ Through the decolonisation project, we can cultivate lawyers/lecturers/students who approach the law from a progressive angle. Teaching decolonisation affords us an opportunity to entrench progressive elements of the law, from the very grassroots level, in the lecture hall. Through this, we create a pipeline from which can tackle a change in the legal practice and transformation of the legal culture which is more considerate of the gendered, racialised, ableist and cis-heteronormative aspects of the law, and which calls to be challenged.

3.5 FEMINIST CRITIQUES OF THE LAW

Over the years, feminist scholars have also interrogated the law and its principles in the context to which they are applicable to gender and sexuality concerns. Because we have established what law is, how it functions, especially in a South African setting. It becomes easier to derive the influence that legal education has on the scholarship and practice of law. This includes how institutional culture breeds and contributes towards marginalization. It is thus imperative to understand which other areas of law are impacted, especially in the light of the hierarchal production in legal education and how our legal culture is essentially a platform which maintains the status quo and its power disparities. Feminist scholars continue to speak against the law, judicial institutions and legal systems as an embodiment of western supremacist male capitalist beliefs.¹⁴⁰ To the extent to which law serves as a tool to ensuring equality, feminism asks on which standards is equality measured on, which brings into the conversation how law is gendered, where cis-heteronormativity is the standard and men are the primary standard of humanity/superior gender.¹⁴¹ Feminist scholars have also criticised the ways in which the law further disadvantages the already marginalised demographics, such as women, the LGBTQIA+ community and disabled

¹³⁶ Langa 2006: 356.

¹³⁷ Letsoalo & Pero 2020: 5-6.

¹³⁸ Letsoalo & Pero 2020: 6.

¹³⁹ Letsoalo & Pero 2020: 6.

¹⁴⁰ Veitch *et al* 2018: 199.

¹⁴¹ Veitch *et al* 2018: 199.

people. Social categorization and identities have been institutionalised by the law, which mean gender, race and class differences are all categorizations that have been designed and institutionalised by law. This means that how we know gender and sexuality, is rooted in the patriarchal, colonial, capitalist belief systems.

Feminism interrogates the law, and seek to re-imagine the tools of the law. There has been extensive deliberation on the principle of the “rule of law” which essentially serves to protect constitutionalism through mechanisms that ensure that all spheres of government operate within their powers and duties without abusing any authority.¹⁴² These scholars have posited that the strict and consistent adherence to the rule of law only further legitimises the status quo and perpetuates the unbalanced status quo.¹⁴³ The law, in its position to ensure that the status quo remains stable and not tampered with, tends to normalise or invisibilize systemic biases and making it impossible to identify and challenge these biases.¹⁴⁴ These systemic biases, which create discrimination on the basis of gender, stem from how the law does not perceive the sexes as equal because if they were equal, they would not be structurally and systemically placed at the margins of socio-economic development, or be sexually exploited and discriminated.¹⁴⁵ These perceptions become law, which means it is deeply entrenched into our legal systems, becoming the standard from which the law is interpreted, adjudicated and deemed acceptable by the judges, the lawyers, scholars, students and the people seeking recourse through the law.¹⁴⁶ The rule of law compels a strict adherence to the standards and contents of the legal rules which restricts the law from being reflexive, self-introspective and adaptable.

We have since established that the law ought to create a free and fair society and protect the rights of the people while ensuring that institutions that are out in place to ensuring these rights do not exploit their powers. But we can also understand that this is the same system that is rooted in western male capitalism, and therefore manufactures the discrimination against demographics who are located at the bottom of the hierarchy, reflecting the law that prioritises whiteness and cisheterosexism.¹⁴⁷

¹⁴² Currie & de Waal 2013: 10-11

¹⁴³ <https://plato.stanford.edu/entries/feminism-law/#RulLaw>

¹⁴⁴ <https://plato.stanford.edu/entries/feminism-law/#RulLaw>

¹⁴⁵ Mackinnon 1989: 215.

¹⁴⁶ <https://plato.stanford.edu/entries/feminism-law/#RulLaw>

¹⁴⁷ <https://plato.stanford.edu/entries/feminism-law/#RulLaw>

Feminist scholarship is therefore of the perspective that the law is structurally designed in such a way that it impetuously adopts a male perspective on societal matters. So, sexuality and gender matters are more a question of nature, or what is deemed a norm, more than it concerns the societal arbitrariness or fair social distribution of power.¹⁴⁸

Feminists have always called to question the notion of equality, especially the distinction between substantive and formal equality. Formal equality essentially seeks to ensure that everyone will be treated the same because they are assumed to be from similar situation.¹⁴⁹ Substantive equality, which is a more practical approach to equality, considers all the parties' social standing and aims to ensure that those who are already at the margins, like women and queer people, are more centralised and prioritised to ensure that their rights are realised.¹⁵⁰ Mackinnon urges for the application of substantive equality especially where the matter of contention is regarding gender and sexuality discrimination, because formal equality will never be able to realise effective social equality.¹⁵¹ Formal equality is one other way that ensures the heteropatriarchal norms are maintained because it does not take into full cognisance the societal factors which influence the dynamics, such as the fundamental differences between men and women, in terms of biological sex, or the differences in sexual orientations, which is essentially what determines who is treated better as compared to the next person.¹⁵² Fredman gives an in-depth four-dimensional perspective into the importance of implementing and prioritising substantive equality as a strategy to achieve equality. This perspective gives a broader understanding into the broader substantive approach.¹⁵³ She says firstly substantive equality focuses specifically on the minoritised groups to redress the disadvantages created by the discriminatory system.¹⁵⁴ Inequality, at its very core does strip one of their humanity. This approach to equality addresses the very nuanced humiliation, stigma and violence that is produced by discrimination. Formal equality does not precisely capture in detail these intersecting layers that are created by discrimination.¹⁵⁵ Enhancing the

¹⁴⁸ Mackinnon 1989: 215.

¹⁴⁹ Smith 2014: 611 – 612.

¹⁵⁰ Smith 2014: 611 – 612.

¹⁵¹ Mackinnon 2020: 213

¹⁵² Mackinnon 2020: 213.

¹⁵³ Fredman 2016: 727.

¹⁵⁴ Fredman 2016: 728 – 730.

¹⁵⁵ Fredman 2016: 730 – 731.

social and political participation for marginalised people, substantive equality, unlike formal equality, fosters a sense of community which prioritises the life and experiences of individuals instead of a generic approach that deems human beings in an abstract essence.¹⁵⁶ Formal equality does not consider the social classifications which create these discrimination. The multidimensional approach seeks to accommodate these differences, understands that in some instances, these classifications can be an important aspect of a person's identity, and that by accommodating these differences, we are able to achieve structural changes.¹⁵⁷ Although some of these differences or identities are socially constructed, it does not mean that they do not serve any significance to our existence.¹⁵⁸ The participative dimension of substantive equality centres the importance of political participation, one of the many consequences of discrimination is how marginalised people are prohibited, actively and systemically, from participating in the politics of the society.¹⁵⁹

The essence of feminist jurisprudence is rooted in the qualities of substantive equality for the many reasons explored above. It is about understanding the episteme of (in)equality, which requires a fundamental understanding of people, what informs their identities and the systems that they navigate. So, if the law is rooted in western, cis-heteropatriarchal beliefs, the dispensation of equality will have a formal approach, which assumes that each individual experience inequality in the same manner. What formal equality does, is essentialising experience and approaching inequality through a blanket approach, substantive equality counters anti-essentialism.

It is Crenshaw and Harris who warn us about the dangers of essentialism in theorising and practicing law. Harris opines on the need to factor our multiple consciousness¹⁶⁰ or the multiplicity of identities. It considers the complicated and unconscious layers of

¹⁵⁶ Fredman 2016: 731 – 732.

¹⁵⁷ Fredman 2016: 732 – 734.

¹⁵⁸ Crenshaw 1991: 1296 – 1297.

¹⁵⁹ Fredman 2016: 732.

¹⁶⁰ Although this is not a topic I explore extensively here, I think multiple consciousness can also extend to spirituality as a layer of identities and experiences. Wanelisa Xaba, on the *Big Debate* briefly touches on the spiritual ramifications of white supremacy and coloniality. https://www.youtube.com/watch?v=QLGqh_ILcc. Oppression is not just material, symbolic or material or but it is also spiritual. When thinking about spatial justice, which I touch on in the previous chapter, we must equally explore the intangibles, for instance, how we experience the components of lived space post the removal of colonial statues.

See *Ngũgĩ wa Thiong'o on Decolonising the Mind, Something Torn and New: An African Renaissance*. See Also Patricia Collins Chapter 11 on *Black Feminist Epistemology*. 251.

discrimination that are created by these social categories.¹⁶¹ The law errs in assuming that black experience is a monolithic experience and therefore creating the “second voice” which is a voice that assumes to speak for everyone.¹⁶² Crenshaw echoes similar stances on the discourse on formal equality versus substantive equality. She alludes that formal equality only reverberates the experiences of the groups that are already in the upper echelons of the society, while ignoring the already marginalised, these creates an even further equality disparity.¹⁶³ She also emphasises on how substantive equality must explore matters from an intersectional approach, which looks at equality considering all the differences simultaneously, while interpreting each category accordingly.¹⁶⁴ Crenshaw in response to her critics, explains that intersectionality does not necessarily essentialises one demographic over the other,¹⁶⁵ but instead implores us to broaden the net when thinking about equality and anti-discrimination.¹⁶⁶ An anti-essentialist approach to law allows us to recognise and dispel dominant narratives, it recognises the fractures created by the categorizations and seeks to decentre class-orientated, race-specific and masculinised areas of law.¹⁶⁷

The essence of the argument brought forward in feminist jurisprudence is that the law is inherently hetero-patriarchal, because while it appears that law is neutral and seeks to facilitate equality between women and men, between white and black people, cis-heterosexuals and queer people, between the abled and disabled. The “legal person” – which means an entity whose existence is recognised and acknowledged by the law and can actively participate in legal interactions¹⁶⁸ - is inherently modelled by the law to be a man, particularly a cis-heterosexual, white, abled-bodied, male.¹⁶⁹ Which means the law, whether in practice, in academia, through jurisprudence or through institutionalisation, will always unfold as an instantiation of a mechanism of power that is already gendered, racialised and classed. Therefore, favouring and advancing a specific group of people over “the other”. Naffine’s work revolves around this very

¹⁶¹ Harris 1990: 587.

¹⁶² Harris 1990: 588.

¹⁶³ Crenshaw 1989:140.

¹⁶⁴ Crenshaw 1991:140.

¹⁶⁵ See Halley J Gay 1988. *Rights and the Identity imitation: issues in the ethics of representation.*

See also Nicholson L 1990: *Feminism/postmodernism.*

¹⁶⁶ Crenshaw 1991: 1296.

¹⁶⁷ Naffaine 1990: 12 – 19.

¹⁶⁸ du Plessis *et al* 2021: 246.

¹⁶⁹ Veitch *et al* 2018: 199.

angle, where she explores the relationship between law and gender and how that informs gendered inequality.¹⁷⁰ She highlights how the legal system is gendered and has been constructed from a white cis-heterosexual male point of view, often at the expense of the marginalised. Furthermore, she points out the patriarchal social order that is intertwined with legal rhetoric and emphasizes the law's inability to remain as consistent and logical as it claims.¹⁷¹

“Law therefore is not simply a vehicle for men’s oppression of women, as the first phase suggested. Nor is it simply an embodiment of the values of the male culture, as the second phase thought. Indeed, law is unable to muster the degree of rationality, internal coherence and consistency which both approaches necessarily imply. And yet law remains an important site of feminist struggle because of the many ways it constrains and controls the lives of women.”¹⁷²

History has shown that on many occasions, the law has always deemphasised the experiences of the minority, now the law operates mechanically, approaching issues with an assumption that the issues of inequality and discrimination are “straight forward” and unambiguous. It is for this reason why such a generic approach becomes censorious is because of its roots in patriarchy and prioritisation of the male perspective. The law always operates from the traditional “ethics of justice” which is usually the centering of individual experiences, with a very abstract and distant analysis and implores very strict rule focused approach to matters.¹⁷³

Feminism introduces the notion of “ethics of care” as an alternative to this dilemma. As explained and pioneered by Gilligan, ethics of care is a theory of morals which offers us a broader and in-depth perspective into the contentions of justice, equality and law.¹⁷⁴ Ethics of care broaden the net of jurisprudence through the lens of feminism and expands the anatomization tools which are implored to explore from the roots, the effects of inequality on an emotional, personal, communal and human extent.¹⁷⁵ Ethics of care feminism centres care in jurisprudence and legal adjudication to challenge the current status quo of law that is rooted in male-centred perspectives and continued to alienate everyone else.¹⁷⁶ Furthermore, feminist ethics of care

¹⁷⁰ Naffine 1990: 3 – 11.

¹⁷¹ Naffine 1990: 12 – 19.

¹⁷² Naffine 1990: 13.

¹⁷³ Veitch 2018: 200.

¹⁷⁴ Gilligan 1982: 167.

¹⁷⁵ Gilligan 1982: 74.

¹⁷⁶ Gilligan 1982: 74.

reinforces the need to demarginalize the existence and the experiences of the alienated demographics, focusing on repairing interpersonal relationships amongst members of the society and between the society and institutions of power.¹⁷⁷

Similar to the principles of substantive equality, ethics of care takes a genuine and distinctive approach in attending to matters of inequality, marginalization and oppression. Formal equality on the other hand, does not consider, nor does it factor the concept of care/caring in facilitating equality and justice and essentially informs the fundamentals of ethics of justice. The ethics of justice applies ethical perspectives in making ethical decision, considering mostly the universal rules and principles at the interest of remaining impartial while maintaining fairness and equitable for all.¹⁷⁸ It is about following in the interest of being coherent and consistent, and projecting objectivity and positivistic rationality.¹⁷⁹ In the end, ethics of justice in litigation, adjudication and jurisprudence embody a perspective that is disconnected from material concerns of society that is detached and offers a generic and aerial view on societal inequalities. Naffine even inculcates how this very narrow approach to justice and inequality that comes across as non- prejudicial is infact a true reflection of what male-centred law is, because this disinterest and detachment only benefits the interests and values men, while enigmatising its core belief system which already operates on the basis of biasness and prejudice of other groups.¹⁸⁰ MacKinnon and Naffine argue profoundly about the idea of “maleness of law” where they both postulate how the law as an institution, at its core, its very form and style is male, is concerned mainly with how the law serves the interests of men (be it sexual interests, or being favoured on a socio-political an economic basis) while maintaining the status quo.¹⁸¹

I elucidate on the position of feminist critiques of law to make sense of the Dyantyi case. To affirm that the law is an instrument and institution that functions primarily to advance the interests and values of a specific demographic. It is for these reasons that Dyantyi case was placed in such a tumultuous predicament for “going against” an institution whose entire function is to embody and embrace the core principles of a

¹⁷⁷ Gilligan 1983: 72-75

¹⁷⁸ Botes 2000: 1071.

¹⁷⁹ Botes 2000: 1071.

¹⁸⁰ Naffaine 1990: 10 -11.

¹⁸¹ Mackinnon 1983: 645.

western male capitalism. It is clear that the law perceives women through a gendered and racialised lens. The law does not consider women as human beings.¹⁸² This means that if the law, in the theoretical sense, centres a masculine perspective, the institutions will also uphold this position, and it will trickle down to social settings and interactions.

Feminist jurisprudence pleads for a law that centres ethics of care because even historically this is an element that has always been neglected. Care is central to the notion of justice and humanity, as it is central to the ideology of feminism because it is through caring that we can fully realise and experience humanity. We exist in a city with systems and structures which are designed to function without a full comprehension of humanity and human experiences, systems and structures which assume to be able to cater for all, but it is this very presumptuous and authoritative imperiousness which ultimately falls short to administer justice that is substantive and bound in true restoration and compassion.

3.6 CONCLUSION

The main research problem guiding this study is how universities and the law respond to the participation of black women and queer people during student protest as exemplified by the court case between Yolanda Dyantyi and UCKAR. The main research question leading this chapter is how the law and subsequently courts and universities function as institutions of power. I posit this question with the aim of making sense of Dyantyi's experience with the courts and the universities, as a black woman. While centerring Dyantyi and the RUReferenceList because it is a matter that ended up in trial, I am also consistently thinking of the activists in the Naked Protest, and I expand also my focus to queer sexualities, thinking of activists who led the Trans Collective understanding.

In this chapter I unpack the theoretical foundations of the notion of power, borrowing primarily from Foucault, while emphasising the views of intersectional feminism where power meets gender, race, class and sexuality, The principles of governmentality and bio-power prove to be imperative in understanding the institutionalisation of power in

¹⁸² MacKinnon 644: 1983

exercising control not only over individuals on a generic view, but exercising power in their bodies by manufacturing space in a way that encourages a particular behaviour, and criminalising those individuals who do not adhere to the “rules”

I explore on the feminist critiques of the law to make sense of what feminism says about the idea of power with regards to the law. My contention here was that the law fundamentally fails to recognise the humanity of groups that are already related as inferior. Which is to say, it is through the law, as an instrument, that white, cis-heterosexual, upper class and abled-bodied men are centred. The law is inherently biased and perpetuates the discrimination and marginalization of certain demographics from others. I assert that this perpetuation is furthered in how the law is taught, how it is practiced and interpreted.

I focus on the university as an institution, its nature, purpose and function. I aim to make sense of black women and queer people inside universities and their existence and belonging there.

I proceed to detail the South African legal system and legal education and how that influences the legal culture as we have come to know it today, establishing primarily the “maleness of law”. I consider robust feminist views of the law, as an institution and its principles. The overall aim of the chapter is to set up a framework on power, the university, and the law and feminist jurisprudence from where I can analyse the case of Yolanda Dyantyi in the next chapter.

CHAPTER 4: DYANTYI, UCKAR AND THE TRIAL.

4.1 INTRODUCTION

The main research problem guiding this study is the role played by black feminist movements led by women and queer people during the times of the Must Fall movement. The focus falls on the court case between Yolanda Dyantyi and UCKAR, focusing on how the law and universities perceive and respond to protests

The research question that this chapter addresses how does the case of Dyantyi and UCKAR underscore the prevalent cisheteropatriarchy that is present in legal culture, university culture and in the “male-led” student movements. I highlight firstly the proceedings of the disciplinary hearing and the outcome thereof. I then highlight some of the arguments presented by the UCKAR legal representation and some of the judgements from the different courts throughout the years, including the most recent judgement from the Supreme Court of Appeal (SCA). I highlight some parts of this court case in order to accentuate ways in which the university and the courts may have been biased throughout the matter. I conduct a close reading of the case. Firstly, I unpack the array of charges that were launched against Dyantyi (and her fellow activists). Secondly, I look at what each of the charges entail and the weight they carry. Throughout the discussion of the case, I also factor some parts of Dyantyi’s personal life because the consequences of the trial did impact her personal life.

4.2 DYANTYI VS UCKAR CASE DISCUSSION

4.2.1 Feminist protest/ anti-rape activism

The details of the trial and the disciplinary hearing shed light on the negative perceptions that the society harbours against feminist protest/anti-rape activism. These negative perceptions are not just words that people utter to express dissatisfaction, it is not merely how people behave, it is as subtle and light as we have come to believe and accept. Rather, it translates into a norm- an acceptable standard ingrained within the institutions, systems and culture of the society. On *Blackwashing Homophobia* Judge writes about how violence towards marginalised groups had been so continuously present throughout various regimes that it has become embedded in the fabric of society, so much that it is ingrained in the historical and contemporary

arrangements of societal power.¹ She adds that violence against marginalised people has become normalised in society through a “common-sense consensus of gendered vulnerability and compliance”.² Gqola explains further how the *female fear factory* is manufactured through normalisation and eventually acceptance because society becomes accustomed to how women are treated. We hear the slurs, the catcalling, we see the violence on the media and in our back-yards so often that it becomes the norm, a white-noise that is now part of the reality.³ This becomes ingrained in society, it becomes acceptable to the extent that it transfers into instances such as university disciplinary processes and a flawed justice system which further victimises the people it ought to protect. A close reading of the disciplinary hearing, followed by some of the arguments and the decisions of the various courts will shed light on and give perspective into how marginalised groups are often criminalised by the law.

4.2.2 Universities and courts as institutions of power

I provide better context of the contentions between UCKAR vs Dyantyi by exploring the history of the university from the time it was established to current times. This will make sense of the institution’s ethos, to establish the nature of the institutional culture and understand how that could have informed how they approached the Dyantyi matter. An exploration of the university’s history will give insight into the university’s foundational principles and elucidate the dynamics surrounding the student protests by looking into how the Must Fall unfolded, including the #RURerenceList, particularly when considering the reputation that UCKAR has constructed for themselves for championing the fight against gender and sexual violence.

In the previous chapter I highlight the hetero-patriarchal and sexist nature of institutions of power such as the courts and universities. I have equally established the nature of law and unpacked from a feminist perspective how the very fabric, form and style of the law is rooted in cis-heteronormative maleness and whiteness. Because the law, through its gendered, classed and racialised approach, will consistently seek to advance and maintain the status quo. It is against this backdrop that I highlight the proceedings of the hearing and some of the arguments and judgements from the trial.

¹ Judge 2018: 11.

² Judge 2018: 28.

³ Gqola 2016: 79.

I narrate this dynamic in chronological order to be able to establish and follow a timeline and explain in specific details, how each decision and outcome, led to another.

I deliberately centre Dyantyi's positionality throughout this research project because her blackness and her womanhood inform how she experienced these institutions. I am deliberate in highlighting specific demographics because black women, the LGBTQIA+ community and disabled people are often "othered" and relegated to the peripheries while the dominating narratives circulate and become accepted as the truth. The Dyantyi case shows specifically what it means to be black, women and poor in this country. It brings us an in-depth understanding of how the universities and courts perceive blackness and womanhood.

4.2.3 Dyantyi, Madikizela Mandela and Khumalo

In further accentuating Dyantyi's experience with institutions that perpetuate the oppression and erasure of marginalised demographics, I refer to other black women who have dared to challenge powerful figures and institutions, which lead to them being vilified and rejected by their own communities, the society and chastised by those very institutions they were challenging. These women are considered a threat because their courageous actions are contradicting and threatening the status quo, and this is only because they are advocating against repressive systems. I deliberate on how Dyantyi is not an isolated occurrence and indicate that this is how black women have been treated throughout history. I juxtapose her experiences with that of Winnie Madikizela Mandela, who was deemed a threat by the Apartheid government because she was black woman publicly defying a white oppressive regime.⁴ Winnie was turned into an enemy of the state and was even rejected by her own comrades and exiled from her own home and community.⁵ Fezeka "Khwezi" Khumalo publicly accused the then President Jacob Zuma of sexual violence, rape in particular.⁶ This accusation was not well received by the public, because it is was not fathomable to the public how a head of state can be capable of such a heinous crime. Zuma's supporters shunned Khwezi for these accusations.⁷ Dyantyi, Winnie and Khwezi's instances are all similar in that they were all three black women who were audacious enough to confront

⁴ Chasi 2021]: 97.

⁵ Msimang 2018: 88 – 95.

⁶ Tlhabi 2017: 3 -4.

⁷ Gqola 2015: 110 - 111.

institutions of power, yet they were all villainized and punished for being fearless. Although all these instances take place in different periods of history, it unfolds in various forms or fashion, indicating how throughout history, even in “less” oppressive regimes, black women have always suffered because society expects us to always follow authority, “toe within the lines” and behave as expected.

4.2.3 Must Fall

The Must Fall movement and the protests that followed revealed the innate crises in the higher education sector. The movement has also given insight into how institutions of power can fraternize to ensure that the status quo is maintained. One of the ways in which this collaboration of power happens is evident in the criminalization of young black people who participated in the student protests. For purposes of consistency, I shed some light into how the male leaders of the Must Fall were also criminalized for participating in and leading the protests. Criminalizing right to protest, regardless of the right being stipulated in section 17 of the Constitution, has been one of the ways in which institutions have responded to protests, which aims at stifling the movements. Thus, instilling fear in the students and publicly humiliating them. The criminalization of the black male leaders such as the Mcebos, the Maxweles and others is an angle that has been explored extensively in research, particularly when looking into racialised violence in the form of the criminalization of black student protesters.⁸ While I acknowledge their experiences to be true and equally disconcerting, I only rely on that part of the narrative in order to understand how institutions of powers navigate and understand the notions of gender and race. .

As I continue with this chapter, it becomes clear that that the law is very instrumental in the criminalization of the right to protest- primarily the criminalisation of black women as advocates for liberation, and confronters of patriarchal powers that are embedded in various institutions. The university attempted to immediately put an end to it by attaining and issuing interdict within three days from the day the protests commenced, restraining a wide range of people, without observing due protocol for attaining the interdict (to inform/alert the involved parties in advance) and inhibiting various

⁸ See Booyesen S 2016: *Fees Must Fall: Student revolt, decolonisation and governance in South Africa*.

See Also Ahmed A 2020: *#RhodesMustFall: How a Decolonial Student Movement in the Global South Inspired Epistemic Disobedience at the University of Oxford*.

constitutional rights.⁹ This interdict became a cause for concern for the students and staff, most of which were listed as respondents, as they were sceptical about the validity of the interdict since the basis for it was vague. Added to that, the short time within which the university was able to acquire it was alarming.¹⁰

Various researchers reflect on these critical times of student uproars when management across various universities would weaponize legal remedies against student protesters¹¹ by acquiring interdicts at an alarmingly quick rate and which resulted to students' protesters frequenting the courts. The criminalization of the right to protest and subsequently the criminalization of black youth was at all-time high.¹² Dyantyi, Heleni, Ferguson and other student protesters were met with the same fate when they embarked on the #RURferenceList protest.

The chapter unfold with a discussion on the case first, unpacking matters surrounding the interdict, followed by the disciplinary hearing which was the subsequent measure to isolate and target Dyantyi. I analysis some areas of the case, imploring a feminist lens and I conclude by telling the stories other black women whose experiences are somehow similar to that of Dyantyi.

4.2.4 The Interim Interdict

The #RURferenceList protest took place at UCKAR from the 17th to the 20th of April 2016. When the gathering took place, the university's first instinctive approach was to find ways to stifle movement and disperse the gathering. Essentially the first time this matter was litigated, it was a matter between *Rhodes University versus the Student Representative Council and others*. Where the UCKAR sought for an interim interdict, which was granted by the court on the 20th of April, and was effective immediately from the day it was granted. The "others" named in the matter included Ferguson, Dyantyi, and Heleni as the only respondents who were named explicitly, while the other respondents were named as generic groups. The purpose of the interdict was to

⁹ <https://seri-sa.org/index.php/more-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

¹⁰ <https://seri-sa.org/index.php/more-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

¹¹ <https://www.csvr.org.za/hashtag-an-analysis-of-the-feesmustfall-movement-at-south-african-universities/>

¹² <http://www.r2p.org.za/wp-content/uploads/2020/06/State-of-Protest-Report2016-2017.pdf>

address the “conflict” between the students and the university,¹³ even though the application for the interdict on behalf of the university was *ex-parte*, which meant that the respondents were not made aware of the application as it was sent through, because it was not served to them. As a result, they did not have the opportunity to respond, nor could they challenge the evidence.¹⁴

4.2.5 Application for the final interdict

Dyantyi and two other respondents filed a notice of intention to oppose the interdict in June 2016, while the intervening party, which was made up of a group of university staff members, had requested to be discharged from the said interim interdict while they sought for leave to participate as intervening parties in the main application.¹⁵ The matter to finalise the interim interdict was then heard on the 3rd of November 2016, when the university was sought to finalise the interdict. This followed months after the protest action had subsided. The court dismissed the final interdict application but proceeded to grant one specifically for the students who were named.¹⁶ It was at this point during the application where a myriad of contentions regarding the interdict were raised and argued. This matter was anticipated to be resolved with urgency since it was not based on any factual concerns, but it ended up amounting to 1153 pages and took up a whole day in court.¹⁷

The interdict was restraining the student protesters from various and a wide range of issues such as “participating, encouraging, facilitating and/or promoting any protest related activities on the campus,” including kidnapping any member of UCKAR. Moreover, it included disrupting academic programs and functioning of the residence system, or causing damage to any university property and acting in any way which warrants unlawful damage and other prohibitions.¹⁸ The university had singled out Dyantyi and two other students on the interdict because they believed that they were actively involved in the organisation of the protest, and that it was Dyantyi who was

¹³ <https://seri-sa.org/index.php/more-news/530-rhodes-univeristy-student-representantive-council-of-rhodes-unveristy-and-others-rhodes>

¹⁴ <https://seri-sa.org/index.php/more-news/530-rhodes-univeristy-student-representantive-council-of-rhodes-unveristy-and-others-rhodes>

¹⁵ Rhodes University vs Student Representative Council of Rhodes and Others 193/2016 (EC): par 7-8.

¹⁶ <https://seri-sa.org/index.php/more-news/530-rhodes-univeristy-student-representantive-council-of-rhodes-unveristy-and-others-rhodes>

¹⁷ Rhodes University vs Student Representative Council of Rhodes and Others 193/2016 (EC): par 9.

¹⁸ Rhodes University vs Student Representative Council of Rhodes and Others 193/2016 (EC): par 4.

directing the kidnapping and assault of the alleged perpetrators.¹⁹ The court only further confirmed the isolation of the three respondents when it ordered the narrower interdict against them. They also alleged that on the 10th of May, after the interdict had been granted, the protesters proceeded to block access doors of some university buildings, unlawfully threatening access and free movement on campus,²⁰ and this was a direct disregard of the prohibited actions that are listed in the interim order.

The argument raised by the respondents was that it cannot be possible for only the three of them to be singled out and named explicitly from a group of about two hundred students in the protest.²¹ Although the university was able to show the unlawful activity that took place during the protest, they could not indicate how Dyantyi, Heleni and Ferguson are responsible for such, when there was a crowd of two hundred people.²² The three of them had already established the context in which they joined, which is in support and solidarity with a protest against rape and GBV.²³

They further argued that the interdict was interfering with their constitutionally protected right to protest which is Section 17 of the Bill of Rights. UCKAR had initially conceded that they are seeking to restrain “unjustifiable” or “unreasonable” interference with access to and movement around campus. Still, their approach to the interdict was consistent with this concession.²⁴ These women denied any wrongdoing in this matter and alleged that the university’s argument against them was not adequate to place them in the alleged unlawful activities.²⁵ The university alleged that Dyantyi kidnapped three male students from their respective university residences and that she posted a social media message claiming to have caused a disruption. Dyantyi denied the kidnapping but admits having been at the residence at the time and explained that she posted the said message on Facebook, but that the purpose was

¹⁹ Rhodes University vs Student Representative Council of Rhodes and Others 193/2016 (EC): par 13.

²⁰ Rhodes University vs Student Representative Council of Rhodes and Others 193/2016 (EC): par 16.

²¹ Rhodes University vs Student Representative Council of Rhodes and Others 193/2016 (EC): par 44.

²² Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 52.

²³ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 53-54.

²⁴ Rhodes University vs Student Representative Council of Rhodes and Others 193/2016 (EC): par 46.

²⁵ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 56 – 57.

to engage the participants regarding the cause of the protest, and she was doing this within her constitutionally protected right.²⁶

The women argued that the university failed to build a case against any of the respondents named, even those named individually or any ascertainable person.²⁷ An interdict can only be issued against a definite class of ascertainable people. Therefore, it is impossible to want to take a blanket approach and interdict against crowds and or “vigilante” groups.²⁸

The women were also of the view that the contents of the interdict was not clear with regards to what it prohibits and what it allows. This lack of clarity and directness was only stifling and disruptive to the protest”.²⁹ The prohibitions listed in the interdict were too broad and vague, the interdict was used to threaten the participation of the staff and students in the protest against rape and sexual violence.³⁰ While seeking for the discharge of the whole interdict, they were of the view that in an instance where the protesters were found guilty of any criminal conduct, they must be held accountable for their actions. However, this very vague and broad interdict is presumptuous and does not seek to hold people accountable, and the university can just deploy other alternative remedies to deal with this matter.³¹

These allegation were based on the fact that some of the academic staff received threatening letters from the university, which stated that their involvement in the protest encouraged the disruption of academic activities and this goes against the interim interdict and they must therefore dissociate themselves from the protest.³² In the light of this circumstance, an intervening party asked a very crucial legal question which is “whether this interim interdict is constitutional and lawful on the grounds of its vagueness, the infringement of the right to protest, freedom of expression, academic

²⁶ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 61.

²⁷ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 51.

²⁸ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 49-51

²⁹ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 26.

³⁰ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 22-23.

³¹ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 27.

³² Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 29.

freedom and the absence of any prior attempt to meaningfully engage with the protesters who are spearheading the complaints.”³³

The university claimed that the letter was sent as an “advisory letter” that had no legal consequence³⁴ and alleged they were just “criticising” their staff’s involvement.³⁵ They denied that the academic staff had any merit to intervene in this matter and denied any allegations regarding their resistance to enter a dialogue on the issues that they are protesting against.³⁶

Responding to the interfering party’s submissions, the judge was of the view that the alternative remedy that they were suggesting is misconceived, because an alternative remedy must be one that is able to afford the university the same remedy that they are seeking with the interdict.³⁷ The court was of the view that there is no reasonable alternative measure that would have been as effective or served the same purpose as the interdict. The mediations and engagements they suggested may have been a desirable approach but the outcome of it does not serve the university as compared to what an interdict does.³⁸

With regards to the question regarding the legal validity of the interdict and seeking to finalise it, the court was essentially satisfied that the circumstances surrounding the urgent request for an interim interdict were adequately compelling.³⁹ The court believed that the university met all three required elements to be granted a final interdict, which are namely a clear right, injury actually committed/reasonably apprehended and that there was no other suitable alternative remedy.⁴⁰ Once that has

³³ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 24.

³⁴ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 29.

³⁵ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 33.

³⁶ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 30 & 33.

³⁷ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 86.

³⁸ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 95.

³⁹ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 84.

⁴⁰ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 65.

been established there is not much room to refuse the relief.⁴¹ The court was of the view that UCKAR is well within their rights to seek for a remedy that can protect its interest, its property, the safety of students and staff and including ensuring that their staff carry out their duties and responsibilities.⁴²

When responding particularly to Dyantyi, the court found that she played a role in the direct disruption of the lectures and academic activities, although the video evidence was initially declared inconclusive. They also concluded that Dyantyi played a significant role in inciting the crowd towards the kidnapping of the male students. This conclusion was based on the fact that Dyantyi herself admitted that she was present at the scene of the day of the alleged kidnapping.⁴³

The court was strongly convinced of the view that the men were actually kidnapped and held against their own will and were exposed to a volatile situation by a crowd of hostile and “angry” protesters.⁴⁴ The judge was also satisfied that Dyantyi had a substantial involvement in the unlawful activities, that she participated in a leadership capacity in the protest, especially threatening the safety and freedom of the male students.⁴⁵

In the end the court said that these three women’s behaviour was unlawful and not in alignment with their constitutionally granted rights and that based on this reason, UCKAR must be given the final interdict.⁴⁶ UCKAR’s relief was indeed spread too widely for this particular matter, and they were not able to defend otherwise.⁴⁷ The three women were ordered to pay their own costs and were interdicted against a

⁴¹ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 77.

⁴² Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 78.

⁴³ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 101.

⁴⁴ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 113.

⁴⁵ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 151

⁴⁶ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 147

⁴⁷ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 156

myriad of issues,⁴⁸ all of which in culmination were a violation of their constitutionally granted right to protest.

4.2.6 Review Application for the final interdict

On the 23rd of December 2016, SERI filed an application for leave to appeal the decision of the Grahamstown High Court because SERI believed that the High court erred in their decision on various issues. SERI argued that it was inappropriate for the court of first instance to rely merely on association as the legal basis to grant an interdict,⁴⁹ they argued that the interdict was not sustained on the facts of common cause,⁵⁰ that the court did not give appropriate weight and adequate consideration to the three women's constitutional rights that are provided in Section 16 and Section 17.⁵¹ Lastly, SERI argued that the court wrongly relied heavily on the *Hotz* case⁵², because it is not relevant to the central issues of this case.⁵³ SERI argued that there is no binding authority guided the court in resolving this matter, including the conflicting rights that were also at play.⁵⁴ SERI explained that there are compelling reasons for leave to appeal to be granted, including that an interdict of this nature not only affected the #RUGReferenceList protest against rape and GBV, but it also affected larger communities and movements who also desired to exercise their right to protest.⁵⁵

On the 2nd of July 2017, the SCA dismissed SERI's application for leave to appeal with costs.⁵⁶ SERI escalated to the Constitutional Court (CC) and on the 7th of November 2017. The CC set aside the cost orders of the SCA and the High Court and granted the leave to appeal the SCA judgment where they upheld the decision of the High Court.⁵⁷ In the SCA they were arguing the same factual basis brought before the SCA

⁴⁸ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 158.

⁴⁹ Sian Ferguson and others vs Rhodes University 1937/2016 (EC) Heads of Argument: para 4 -17.

⁵⁰ Sian Ferguson and others vs Rhodes University 1937/2016 (EC) Heads of Argument: para 18 - 23.

⁵¹ Sian Ferguson and others vs Rhodes University 1937/2016 (EC) Heads of Argument: para 24-32.

⁵² The *Hotz vs University of Cape Town* case deals with the precise meaning of section 16(1) which provides for the right to freedom of expression, section 17, right to assemble and section 18, which is the right to freedom of opinion. The court decided that the right to protest against injustices is protected simultaneously by other rights in the constitution, but this does not negate the rights are still subject to constitutional regulation.

⁵³ Sian Ferguson and others vs Rhodes University 1937/2016 (EC) Heads of Argument: para 34.

⁵⁴ Sian Ferguson and others vs Rhodes University 1937/2016 (EC) Heads of Argument: para 35.

⁵⁵ Sian Ferguson and others vs Rhodes University 1937/2016 (EC) Heads of Argument: para 36.

⁵⁶ <https://www.seri-sa.org/index.php/latest-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

⁵⁷ Sian Ferguson and others vs Rhodes University 2017 ZACC: para 29-30.

and interrogating the legal basis of which the HC and SCA awarded them costs.⁵⁸ Kollapan AJ reprimanded the lower courts for giving an impression that one must be chastised for requesting an appeal for a court decision, as it is within the applicants' constitutional right to do so as they see appropriate.⁵⁹ The judge was also of the view that the court of first instance was privy to the *Biowatch*⁶⁰ principle but felt that the applicants should not benefit from it and that an overall discretion was not exercised when allocating costs.⁶¹

4.3 THE DISCIPLINARY HEARING

Almost a year after the protest, on the 28th of March 2017, the university served Dyantyi with a notice of a disciplinary inquiry. She was charged with four accounts of misconduct, in accordance with UCKAR'S code of conduct. Firstly, she was accused of the **common law crime of kidnapping**, because she deprived the three male students (the alleged perpetrators who appeared on the list) of their freedom of movement.⁶² The second charge was **insubordination**, because Dyantyi failed to comply with the lawful instructions from the Vice Chancellor, Prof Mabizela, and the inhouse counsel, who were demanding for the release of the three alleged perpetrators.⁶³ Thirdly, she was charged with **common law assault**, because she allegedly manhandled/grabbed the three male students by the collar, she pushed them and spat on them.⁶⁴ Lastly, Dyantyi was charged with **defamation** because she called another student (excluding the other three) a rapist on social media.⁶⁵ Two other students, Heleni and Ferguson, were charged with only kidnapping and

⁵⁸ Sian Ferguson and others vs Rhodes University 2017 ZACC: para 12.

⁵⁹ Sian Ferguson and others vs Rhodes University 2017 ZACC: para 28.

⁶⁰ The *biowatch* principal stems from the landmark victory case of *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14 (3 June 2009) provides that public interest litigants acting in good faith should not have to fear that costs will be awarded against them, and the state is ordinarily expected to pay the costs if they lose a case.

⁶¹ Sian Ferguson and others vs Rhodes University 2017 ZACC: para 26 – 27.

⁶² Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 4

⁶³ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 4.

⁶⁴ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 4.

⁶⁵ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 4.

insubordination during the same disciplinary inquiry as Dyantyi.⁶⁶ These charges were the beginning of persecution against Dyantyi, because from there on, the matter against her continued for over five years. The proceedings of the disciplinary hearings and the outcome thereof were one of the many points of contention and was often reflected on during the court appearances.

According to clause 7.1 of the University's Student Disciplinary code, a student has a right to representation during the hearing, and the right to legal representation at own cost. Dyantyi was, at the time, represented pro bono by Adv Irene de Vos, Mr Zweli Makgalemele and an attorney Mr Lindokuhle Mdabe and a candidate attorney, who were either instructed by or attached to SERI.⁶⁷ The proctor was assigned according to provisions of the university's disciplinary code, which also outlines how the process of the inquiry should unfold, the same code also grants the proctor with the power to impose whatever sanction they see suitable if they find a student guilty.⁶⁸

The disciplinary hearing proceedings spanned over a period of four months, with each of the sittings happening respectively from 26-28 June, 7-10 August and 4-7 September and the final sitting set between 9–11 October 2017.⁶⁹ Some of the inconsistencies and flaws of the proceedings began to arise in October. On the 9th of that same month, after lunch time, the proctor excused Dyantyi and her team so they can prepare for Dyantyi's testimony that was scheduled for the following day. When the day of the testimony arrived, Mr Powers presented his client's case instead, as per an agreement between both legal teams and the prosecutors did not object to this.⁷⁰

This new development necessitated for a continuation and new dates had to be set. The proposed dates were set for between 25 to 27 October , 6 to 8 November and then 13-15 of November.⁷¹ It reflects on the records that the proctor and the prosecutors were available on the proposed dates. However, Mr Powers was actually

⁶⁶ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 5.

⁶⁷ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 7.

⁶⁸ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 6.

⁶⁹ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 9.

⁷⁰ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 9.

⁷¹ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 10.

only available on the 26-27 October and Dyantyi's legal counsel was not involved in these discussions about the new dates.⁷² Mr Powers mentioned that his client was due to sit for examinations from 6–10 November, the same applied for Dyantyi and he was also available on the first suitable dates for Dyantyi's counsel.⁷³ Mr Mlilo was insisting that the proceedings have to be concluded by a certain date, without giving any substantive reasons as to why.⁷⁴ Although Dyantyi's counsel raised the gross irregularities surrounding the circumstances of the continuation dates, and Mr Powers raised the same concerns, the proctor simply overlooked this submission and concluded the matter.⁷⁵

In highlighting some of the issues that led to the court-case, Van Der Merwe J scrutinized some of the inconsistencies and irregularities that transpired from the very beginning and throughout the proceedings of the hearing. The judge explains that some of these issues should have been considered by the court of first instance, and such exhaustive legal battle would have been completely avoided by all parties involved. Furthermore, it is stated in the judgement that the university initiated the disciplinary inquiry with a preordained decision that they want to exclude all the students who were facing charges.⁷⁶ This is reflected in how the continuance dates were decided. Some of the critical rulings on this matter at the most crucial stages of the proceedings, placed Dyantyi at the most disadvantage. At some point, the university suggested that Dyantyi must proceed with the inquiry with limited legal counsel, and this was clearly an unreasonable request that would clearly disadvantage her.⁷⁷ The assumption that Dyantyi waived her right to further participate in the hearing was simply incorrect,⁷⁸ but they came to this conclusion just to compromise her case.

⁷² Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): *par* 10.

⁷³ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): *par* 10

⁷⁴ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): *par* 11.

⁷⁵ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): *par* 14.

⁷⁶ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): *par* 24.

⁷⁷ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): *par* 24.

⁷⁸ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): *par* 29.

The proceedings and findings of this disciplinary hearing violated Dyantyi's right to procedural fairness that is granted under section 3 of the Promotion of Administrative Justice Act (PAJA)⁷⁹ which is a very crucial aspect that the court of first instance should have dwelled on more and the court should have reviewed this matter.⁸⁰ PAJA is applicable in this instance because UCKAR is a public institution and therefore an entity of the state as per section 239 of the Constitution.⁸¹ In the review application, the details on which I dwell on later, Dyantyi's legal counsel requested the matter to proceed with a different proctor, considering the unfavouring trajectory that the hearing was taking under that proctor. It is also imperative to consider that the judge was of the belief that the proceedings should have continued without him.⁸² Dyantyi was never given the opportunity to provide evidence for her defence because on the day of her testimony, they proceeded with another client in the matter, they thought at some point Dyantyi waived her right to participate further in the hearing, and they refused to set a date where the senior members of her legal team would be available.

In the end of the disciplinary inquiry, in Dyantyi's absence⁸³, the university found her guilty on all charges. One other student was found guilty of two charges. The sanction for the guilty charge was handed on the 17th of November 2017, clearly stating the repercussions of being found guilty, one of which included a lifetime expulsion from the university, and discontinuance of her studies from UCKAR.⁸⁴ SERI initially contested this decision with an urgent application at the High Court the following day. The urgent application aimed to find a way for Dyantyi to write her remaining two final examinations. This request was not an anomaly because the university always allowed students to continue writing their exams while undergoing a disciplinary hearing.⁸⁵ The negative conclusions from the hearing and the inconsistencies were all convenient and shaped a specifically biased narrative about Dyantyi which only worked to her

⁷⁹ Act 3 of 2000.

⁸⁰ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 31.

⁸¹ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 19.

⁸² Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 32.

⁸³ <https://www.seri-sa.org/index.php/latest-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

⁸⁴ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 17.

⁸⁵ <https://www.seri-sa.org/index.php/latest-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

disadvantage. After the disciplinary hearing was concluded, and the outcome was unfavourable for Dyantyi, SERI escalated the matter and challenged the matter by initiating litigation proceedings.

4.3.1 Contesting the outcome of the disciplinary hearing

Dyantyi and SERI were back in court again on the 4th of December 2019. Before the court was an application to review her lifetime expulsion from the university that was affected in 2017.⁸⁶ In the previous year, Dyantyi and her team had attempted to have the decision of the disciplinary hearing set aside, but they were not successful.⁸⁷ SERI argued that Dyantyi was not granted an opportunity to be heard before the decision of the disciplinary hearing was given and the sanction was imposed.⁸⁸ There is a reasonable apprehension to believe that the proctor was biased throughout the process.⁸⁹ Dyantyi was never given the opportunity to exercise her right of internal review, which was unlawful.⁹⁰ The evidence that the university relied on to find Dyantyi guilty was questionable.⁹¹ Furthermore, the decision to find Dyantyi guilty on all those charges was based on material errors of law, and fact and therefore it is not possible for any reasonable person who makes the decision, to have reached such a decision considering the evidence placed before inquiry.⁹²

In their defence, UCKAR said that Dyantyi denied legal representation when the hearing was postponed and, therefore, forfeited her right to be heard.⁹³ The evidence before them adequately satisfied all the charges they alleged Dyantyi with. The problem lay with the fact that her representative failed to counter the evidence that the witness brought forward.⁹⁴ On being denied the internal review, UCKAR said that section 8.5 of the university's disciplinary code requires that a student advises the

⁸⁶ <https://www.seri-sa.org/index.php/latest-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

⁸⁷ <https://www.seri-sa.org/index.php/latest-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

⁸⁸ Dyantyi vs Rhodes University and others EC 1604A/2018: Heads of Argument Para 10-13 13 November 19

⁸⁹ Dyantyi vs Rhodes University and others EC 1604A/2018: Heads of Argument Para 14-25 13 November 19

⁹⁰ Dyantyi vs Rhodes University and others EC 1604A/2018: Heads of Argument Para 26-33: 13 November 19

⁹¹ Dyantyi vs Rhodes University and others EC 1604A/2018: Heads of Argument Para 34-44 13 November 19

⁹² <https://www.seri-sa.org/index.php/latest-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

⁹³ Dyantyi vs Rhodes University 1604A/2018: 19 November 2019 Respondent HOA Para 12-28

⁹⁴ Dyantyi vs Rhodes University 1604A/2018: 19 November 2019 Respondent HOA Para 29-54.

Registrar within five days of the outcome if they wishes to have the matter reviewed and Dyantyi did not do so within the specified days. This meant, she failed to request for a review on time, and although she had the choice to seek condonation, she chose the litigation route and therefore essentially denied her right to internal review.⁹⁵

The court dismissed this case in March 2020, with costs. SERI, determined to ensure that Dyantyi is granted the decision she deserves, and put forward yet another application to appeal that decision in April 2020. SERI argued that the court erred in their decision because they failed to consider extensively the argument around the postponement of the disciplinary hearing at the very beginning, when her legal counsel was not there to represent her. They argued that the rushed decision eventually resulted in the disciplinary processes to unfold unfairly, without proper and extensive consideration of all the facts and factors of the matter, which ultimately placed Dyantyi at a great disadvantage.⁹⁶

The judge lamented on a few areas of this matter, beginning with how the grounds of appeal as presented by SERI were unnecessarily “lengthy and confusing”⁹⁷ and he proceeded to summarise them to his own accord, in a manner that is clear and concise, from paragraph 8(i) to 8(vi). The judge was also not convinced that the independent disciplinary body was biased in the university’s favour.⁹⁸ In so far as the area of contentions regarding Dyantyi’s right to legal representation are concerned, the judge was of the view that this aspect does not hold any merit.⁹⁹ There were also deliberations regarding a media statement¹⁰⁰ which was issued a few days prior the judgement. The university brought forward this statement as complaint towards the courts, on which they were alleging that the contents of the statement can impact the integrity of both the court and the university and negatively influence the proceedings of the matter at hand. ¹⁰¹ The court just resorted to referring this complaint (and the interruption that took place during the proceedings) to the National Prosecuting

⁹⁵ Dyantyi vs Rhodes University 1604A/2018: 19 November 2019 Respondent HOA Para 59-67.

⁹⁶ <https://www.seri-sa.org/index.php/latest-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

⁹⁷ Dyantyi vs Rhodes University 1604/2018 17.09.20 par 8

⁹⁸ Dyantyi vs Rhodes University 1604/2018 17.09.20 par 14.

⁹⁹ Dyantyi vs Rhodes University 1604/2018 17.09.20 par 12 & 15.

¹⁰⁰ SERI STATEMENT https://www.seri-sa.org/images/SERI_Press_statement-Dyantyi_v_Rhodes_Appeal_FINAL.pdf

¹⁰¹ Dyantyi vs Rhodes University 1604/2018 17.09.20 par 22

Agency (NPA) for further investigation.¹⁰² Eventually, after careful and much needed extensive consideration, the high court eventually ordered SERI and Dyantyi the leave to appeal on the 17th of September 2020.¹⁰³

4.3.2 The Supreme Court decision

Two years after the High Court judgement, on the 29 of March 2022, the SCA upheld the application for leave to appeal and set aside the decision of the disciplinary hearing, which included all the charges against her and the sanction for permanent exclusion.¹⁰⁴ In their judgement, the SCA deliberated all relevant points of contention, determining what is law and how the facts apply to the law. The court held a view that that the court of first instance should have reviewed and set aside the decision of the hearing, from the very beginning when SERI initially requested for a review to specifically protecting the right to procedural fairness, that of which Dyantyi deserves.¹⁰⁵

The SCA said that the finding that Dyantyi waived her right to participate was incorrect.¹⁰⁶ To allege that Dyantyi had no intentions of testifying at her own defence was also wrong because SERI had mentioned multiple times that she can and is willing to testify but she was never called to the front to do so.¹⁰⁷ Overall, the court held that Dyantyi's right to procedural fairness as per PAJA was violated, the high court should have implored a proper balancing of relevant considerations and that would have allowed for the injury to be postponed to a date on which Dyantyi's legal counsel was available,¹⁰⁸ and subsequently not disadvantage her. The decision taken by the disciplinary hearing was remitted back to the university for reconsideration under the instruction that the proceedings should have taken place in front of a different proctor, alluding to the allegations that the proctor was biased through the entire process.¹⁰⁹

¹⁰² Dyantyi vs Rhodes University 1604/2018 17.09.20 par 25

¹⁰³ Dyantyi vs Rhodes University 1604/2018 17.09.20 par 26.

¹⁰⁴ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 30.

¹⁰⁵ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 31.

¹⁰⁶ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 28-29.

¹⁰⁷ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 30.

¹⁰⁸ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 31.

¹⁰⁹ Dyantyi vs Rhodes University and Others SCA (Case no 846/2020) [2022] ZASCA (29 March 2022): par 31-33

4.4 MAKING SENSE OF THE DYANTYI CASE

As indicated in the discussion above, the UCKAR vs Dyantyi case is two-fold, and besides there being other parties involved throughout, it is only Dyantyi who was involved in both matters. The matter deals firstly with the legal validity and other general circumstances surrounding an interdict that was initially interim, which the university proceeded to finalise only for the courts to grant a narrower interdict for three specific people. Secondly, it concerns the draconian and unjustified outcomes of the disciplinary hearing, which took place a year after the #RURReferencelist protest took place. The findings from the disciplinary inquiry concluded that Dyantyi must be found guilty on exaggerated charges of kidnapping, defamation, common law assault and insubordination. They also concluded that Dyantyi must be expelled for life from the very university, without any chance of recourse; litigation went on for about five years.

The irregular and exaggerated circumstances around this case are compelling to ponder further about. For instance, the many constitutional rights that exist and interact with one another and how those rights are possibly violated throughout the entire process. Thinking about the case more critically, through an intersectional feminist lens, requires a consideration of areas of gender, race and class. Dyantyi has intersecting identities and layered experiences. She is a black woman from an impoverished background, navigating an institution of higher learning, the same place where she was sexually violated. She then took a stance to challenge an institution of power and spoke against rape culture. It therefore becomes crucial to reflect on the case of Dyantyi vs UCKAR against the framework of the power of the law and universities.

When the matter first appeared in court, all the parties involved were cognisant of the various conflicting aspects of the case, including the tumultuous political climate around the right to protest, primarily in reference to the Must Fall protests which were taking place in that same period. This aspect was completely and explicitly distanced from the case, because according to the courts, the Dyantyi case does not concern any of those issues, since it does not concern the legitimacy or merits of those protests.¹¹⁰ The court stated clearly it does “not seek to purport or make any

¹¹⁰ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 5.

judgements on the views of the students and their supporters, including university staff, politicians and others”¹¹¹ In the same breath, the court acknowledged how integral the issues of rape and gender violence were to this matter,¹¹² and recognised the “chilling effect” that the interdict posed on the right to protest especially in as far as it concerns the plight of rape and gender violence.¹¹³ It would appear that on a broader scheme of socio-political matters, the court could not recognise how the plight of student protest was material to the matter at hand. The court indicated that it understood how the plight of femicide and gender violence is relevant but then still proceeded to take a decision conflating the two issues. The court proceeded to grant the final interdict as per UCKAR’s requests, despite those reflections.

It is not unwarranted to expect UCKAR to investigate rigorously the rape allegations against the men named on the list, or to consider Dyantyi’s experience with sensitive and care. Over the past few years, before the #RURReferenceList protest, UCKAR has crafted their image as a university that challenges and seeks to eradicate rape culture,¹¹⁴ and it could be expected that they address this matter from an informed approach. Sexual violence and GBV is a national epidemic and institutions of higher learning are mandated as per the Constitution, various legislations¹¹⁵ and policies¹¹⁶ (including university policies) to carry out their social responsibility and address such issues.

The various courts played a significant role in enabling the university’s agenda against Dyantyi. Circumstances surrounding the legal validity of the interim interdict were questioned by SERI and the university staff (as intervening party). They posited that that UCKAR failed to observe due diligence when acquiring the interdict,¹¹⁷ comprising her right to procedural fairness, they questioned the broadness and vagueness of the

¹¹¹ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 5.

¹¹² Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 6.

¹¹³ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): par 90.

¹¹⁴ <https://www.ru.ac.za/perspective/2016archives/deborahseddon.html>

¹¹⁵ Sexual Offences and Related Matters) Amendment Act, 32 of 2007
Domestic Violence Act, 116 of 1998

Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000

¹¹⁶ the Department of Higher Education and Training policy.

¹¹⁷ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): 24-37.

interdict¹¹⁸, and how the interdict was used to silence staff and students.¹¹⁹ and some of the unfulfilled requirements for acquiring an interdict.¹²⁰ These were all critical and valid arguments, but the courts overlooked some of them.

I am positing that Yolanda Dyantyi was targeted by UCKAR for protesting rape culture and calling out institutional bigotry and the courts played a significant role in perpetuating the targeting and further criminalised her and her right to protest. I put forward that it had been possible for the university to weaponize the law against Dyantyi, because at its very essence, the law only seeks to maintain the status quo by protecting the “ideal” person of law,¹²¹ and therefore alienating anyone who possibly threatens the stability of the status quo.

4.4.1 The Ideal Legal Person

Feminist jurisprudence propels us to think about gender discrimination in the context of multiple categories of identities, which I apply in thinking about how Dyantyi’s possession of multiple identities indubitably placed her in a position where she experienced discrimination against her on such basis. Naffine and Mackinnon emphasise that the nature of law is predisposed to be discriminatory towards women because of its innate “male” nature. In chapter five of her book, titled the “the man of law” Naffine writes about the “ideal legal person” being the person who possess values and beliefs which reflect that of the most “powerful” person in the society.¹²² How powerful that person is, is determined by their social standing in categories of sex, gender, class and race. So, the ideal legal person will be a cis-heterosexual sexual white man, belonging to the upper/middle class and who perfectly embodies and exudes a specific kind of masculinity.¹²³

Law and rules of society exists because there is an agreement that was reached from which a social contract is conceived.¹²⁴ This contract determines how society functions

¹¹⁸ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC):24-37.

¹¹⁹ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): 45 – 63.

¹²⁰ Rhodes University vs Student Representative Council of Rhodes and Others 1937/2016 (EC): 45-63.

¹²¹ Naffine 1903: 100- 122.

¹²² Naffine 1903: 100.

¹²³ Naffine 1903: 100 -101.

¹²⁴ Laskar 2013: 1-3.

by distinguishing what is wrong from right, and what is acceptable from what is shunned upon. As a result, this set of norms are regulated and institutionalised by establishing an authoritative body, with the powers to regulate and control the society.¹²⁵ A social contract essentially sets the standards and values of the society, but we make the mistake of assuming that everyone participating in the social contract is deemed to be equal to one another, across all categories. This is not always the case especially when considering that these social categories are constructs implemented as a method of some sort of social control and organizing.¹²⁶

In critiquing the contract theory, feminist scholars refer to the idea of a “sexual contract” for a better understanding of the functionality of a social contract in terms of gender and sexuality. A “sexual contract” essentially underscores societal gender binaries where the differences between women and men are emphasised through the establishment of patriarchal institutions such as family, churches, marriages etc.¹²⁷ A sexual contract is the inadvertent consequence of a social contract which ultimately excludes persons who do not perfectly embody the qualities of an “ideal” legal person. This idea sheds light on how power works in relation to gender differences, highlighting patriarchal subjugation and class domination.¹²⁸ Pateman writes on how the notion of a sexual contract underscores women’s exclusion from the social contract from the start, which is how cis-heterosexism patriarchal domination were legitimized.¹²⁹ Social contract theory has therefore set a foundation and legitimized domination on the basis of gender, race and class difference, and continues to perpetuate class imperialism through essentialised narratives that appear as homogenous.¹³⁰ Feminist scholarship proposes a rethinking of the social contract theory towards an acknowledgement of the evident politics of difference. This approach will allow for a much broader and inclusive societal ordering that considers all the differences holistically.¹³¹

I elaborate on the idea of a social contract here, following on the discussion in chapter 3 on the relation between law and power. In this chapter, I am positing that it is from the contract theory where normative systems of society are set, and it is therefore from

¹²⁵ Laskar 2013: 2.

¹²⁶ Belkhir & Barnett 200: 159.

¹²⁷ Naffine 1903: 103-104.

¹²⁸ Pateman 1988: 3

¹²⁹ Pateman 1988: 30.

¹³⁰ Young 1988: 162 - 165

¹³¹ Young 1990: 163

the social contract where foundational principles of law are derived, including the “legal person” who is envisioned as the abstract human of the *gesellschaft* of law, on the basis of the agreement of contract. This abstract human is already assumed to embody an essence that aligns with that of an ideal person who can participate in the social contract.¹³² So a social contract determines the qualities of a person who can participate and exist in society; the ideal person falls into the social categories and reflect a status quo that was agreed upon in the social contract.

To maintain the status quo, the law therefore constructs categories of the legal person and grants them natural rights on which basis they can exist in society, which then establishes a class biasness and perpetuates the disparities.¹³³ The authoritative body gives power to control and organise society therefore creates class conditions through the dis/possession of property, with the intention of the maintaining the disparate status quo. The social contract factors in property possession, the ideal legal person will be the person who owns the most valuable property, and by that virtue deemed to be the most esteemed since they occupy the middle class of the market.¹³⁴ Gendered economic disparity is produced through the social contract that of which already relegates women to an un-ideal status.¹³⁵ Legal systems and institutions are designed to uphold a upper class and patriarchal structures which will maintain the gender and class inequalities.¹³⁶ This logic was also ingrained in legal practice where the most profitable and respectable cases were the ones with the most commercial interests.¹³⁷ This meant that the people who can access and use tools of law would the ones who could afford to, thereby further alienating the poor. The law has modelled a person who is recognised by law to be a man who belongs to a certain “better” class.

Fundamentally, the law becomes so committed with embodying and protecting the status quo, it becomes masculinised.¹³⁸ The very fabric, style and culture of law become so inundated in maintaining objectivity and rationale that it neglects to be introspective. It progresses inwardly and fails to consider the existence of women

¹³² Naffine 1903: 100.

¹³³ Naffine 1903: 111.

¹³⁴ Naffine 1903: 111-112.

¹³⁵ MacKinnon 1989: 163.

¹³⁶ MacKinnon 1989: 168.

¹³⁷ Naffine 1903: 112.

¹³⁸ Naffine 1903: 115.

outside their relation to men.¹³⁹ The masculinity of law is one that reflects that of a middle class man, which removes him from any alignment with the lower class man, and distances from any relations, activities and relations that that could render him feminine.¹⁴⁰

With an understanding of what makes an ideal legal person, a black woman from an impoverished background does not fit any of these categories. Which means the law inherently fails to recognise people like Dyantyi as a valid legal person and therefore negating her humanity and the validity of her experiences. Dyantyi's entire existence is the total opposite of the ideal kind of person that the patriarchal nature of law seeks to protect. Dyantyi expressed that she joined the protest because she was in solidarity with the students protesting against rape, because she was also a victim of rape, and the incident took place in the same institution. She was already relegated in front of the law for being a black woman from an impoverished household, her experiences as a victim of rape are an immaterial aspect to the case and the protest. UCKAR did not seem to show any care or concern regarding the traumatic experiences of a student they were prosecuting. Furthermore, the university implored minimum efforts when it came to investigating the alleged perpetrators. One can allege that they were in fact protecting the men and protecting the reputation of the university. The case of Dyantyi vs UCKAR is yet another example of essentialised narratives that Crenshaw warns us about, the essence of black women's lives and experience becomes immaterial in front of the law because they do not fit the scope of an idealised person and their experiences are analysed through a single-axis approach, negating their holistic existence.¹⁴¹

Yolanda Dyantyi's politics and the stance she took to join the protest, was informed by her individual and communal experiences and her identity as a young, black, poor woman navigating a post-apartheid South Africa. Many feminist scholars write about the notion of the "personal is political" which I think it is so well embodied by Dyantyi's activism.

¹³⁹ Naffine 1903: 114.

¹⁴⁰ Naffine 1903: 115.

¹⁴¹ Crenshaw 1989: 140.

4.4.2 Legal Reasoning and Adjudication

The discussion above sheds light on who the law perceives as ideal and therefore worthy of protection by virtue of their recognised humanity. This is to say that the basis of legal reasoning and adjudication, which purports itself as impartial and unbiased only furthers the inherent patriarchal, capitalist and western agenda of law.¹⁴² Feminist legal theorists have critiqued how the law has been interpreted and reasoned through a lens that is only advantageous to the substance of the status quo. The law is modelled in the image of the white, cis-heterosexual, middle-class man,¹⁴³ meaning jurisprudentially, the law will always adopt and reflect the perspectives of this demographic, even in a way the law is written, it will reflect the interests of ideal legal person¹⁴⁴ Finlay weighs in on how gendered language of law influences the interpretation and reasoning of law. The language of law is ingrained in heteropatriarchal norms and views and their constructs and control social and economic relations of the society, primarily between the society and institutions of authority.¹⁴⁵ Feminist concerns around legal reasoning and adjudication are derived from the real-life impact and precedent that adjudication had over the lives of women and marginalised people.

Gilligan's work has been imperative in highlighting the need to transform the basis of legal reasoning where she proposes the need to expand beyond the austere and restricted perimeters of rational and begin to transcend the logic of law to consider how justice, equality and the element of care function to create a transformed and equal society.¹⁴⁶ Ethics of care introduces a more humanised and emphatic approach to law, through which we can create an inclusive, equal and transformed society that deviates from regressive normative systems.¹⁴⁷ Gilligan implores a psychological analysis in her book to argue that the abstract nature of ethics of justice uphold the maleness nature of law.¹⁴⁸ Gilligan's perspective is that the law fails to reflect the essence of women's beliefs, experiences and values. She emphasizes that legal reasoning and adjudication must integrate human connection, apply rational thinking,

¹⁴² Veitch 2018: 201

¹⁴³ Finlay 198: 893.

¹⁴⁴ MacKinnon 1989: 163

¹⁴⁵ Finley 1989: 890.

¹⁴⁶ Gilligan 1982: 167 – 168.

¹⁴⁷ Gilligan 1982 167.

¹⁴⁸ Gilligan 1982:74

pointing out that the notion of care can be integrated ethically in processes of adjudication.¹⁴⁹

The notion of care has been neglected over the years because we have viewed justice and transformation through abstracted and narrow ways, when in fact care can be instrumental in dismantling institutions and systems of oppression while simultaneously building communities that are rooted in mutual responsibility and communal accountability.¹⁵⁰ Even the work of many intersectional theorists is rooted in centring the ethics of care when addressing systemic violence.¹⁵¹ Through applying care we can look beyond the traditional formal approaches to law and create frameworks that consider holistic humanity.

The proctor, who was appointed by the university, was biased in the whole process, in one of the sittings he arrogantly said, “I am the University”,¹⁵² which was his way of establishing his authority in the hearing. In the entire history of UCKAR, this was the first time a student was handed such a severe sanction of lifetime expulsion.¹⁵³ Even going as far as reflecting the sanction in her academic life ensuring she will not be able to access any other university in the country.¹⁵⁴ The proctor became the embodiment of white male capitalism and by declaring himself to be “the university” became a vessel of an institution of power through which Dyantyi was intimidated.

The law possesses the power to shape the trajectory and outcomes of societal development. It is for these reasons discussed above why feminism jurisprudence centres an ethics of care, substantive equality and anti-essentialist approaches to law and legal reasoning as disruptive views of law. The Dyantyi case could have unfolded differently in circumstances where these principles were embedded in our approach to justice. Dyantyi was never given the platform to defend herself or narrate her version

¹⁴⁹ Gilligan 1982: 178

¹⁵⁰ hooks 1982: 163 -213.

¹⁵¹ Crenshaw 1991: 412.

¹⁵² Dyantyi vs Rhodes University 1604A/2018: 19 November 2019 Respondent HOA Para 15-18.

¹⁵³ <https://seri-sa.org/index.php/more-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

¹⁵⁴ <https://seri-sa.org/index.php/more-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

of events.¹⁵⁵ This was not merely a procedural error, but it is rooted in how women are perceived by the law - as a black woman, her fate always already has been decided.

4.5 VILLAINIZATION OF BLACK WOMEN

Earlier in this chapter I discuss the details of Dyantyi's case from the time the protest began, to the questionable attainment of the interdict, the back and forth between the courts, and the recent SCA history. I narrate the matter from beginning to end to underscore the procedural maladministration that she experienced at the hands of the law. Although there were two other students who were named as respondents, Dyantyi is essentially the only person out of a crowd of hundreds of other student protests who was targeted from the beginning of the protests in 2016. She was targeted because the institutions such as universities are always persistent in needing to remind a black woman of her place,¹⁵⁶ which is following the rules or otherwise chastised for disobedience and relegated to the peripheries.

Foucault's idea of bio-power as interpreted by Davis's can shed light on why black women are often targeted and criminalized for confronting institutions of power. Bio-power functions in two ways, as means to discipline and as means to regulate.¹⁵⁷ Although Davis's work focuses on the prison system in the American context, she urges for a critical focus on how the criminal justice system, the criminalization of already marginalised demographics benefits white capitalist imperialism, which can be extended to gender and sexuality.¹⁵⁸ The need to discipline and regulate is evident in the Dyantyi case, in the Khwezi trial and also with how Winnie Madikizela-Mandela was treated by the apartheid police. Violence against black womens' bodies is not just limited to the physical, it is systemic and structural

4.5.1 Khwezi and the Jacob Zuma Trial

Dyantyi's experiences, from how she was treated in the courts, by the university and the public, share some similarities with the Zuma rape case. In 2005 Khwezi¹⁵⁹ (real name Fezeka Khuzwayo) accused a prominent male South African politician, Jacob

¹⁵⁵ <https://seri-sa.org/index.php/more-news/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes>

¹⁵⁶ Naffine 1903: 142-143.

¹⁵⁷ Veitch et al 2018: 275.

¹⁵⁸ Davis 2003: 60 -83.

Davis 1981: 182- 198.

¹⁵⁹ Khwezi was a pseudonym given to her to protect her identity during the trial because she had been receiving threats about the rape allegations.

Zuma, of raping her. The allegations were escalated to court and the trial was on mainstream media throughout, until Zuma was acquitted in 2006.¹⁶⁰ Amidst being accused of such an egregious crime, Zuma, who was a deputy president of the governing party at the time, was still voted into presidency of the country in 2009.¹⁶¹

From the moment Khwezi spoke up against Zuma, she was demonized and threatened for alleging a man like Zuma could have possibly raped “her”, she lived in constant fear for her life so much that she was placed under witness protection, but even there she was not completely safe.¹⁶² During the course of the trial, Khwezi was stripped off her dignity and dehumanised in public. Her sexuality was used against her,¹⁶³ and her sexual history was thoroughly dissected in court.¹⁶⁴ Her HIV status was weaponised against her¹⁶⁵ and she was blamed for the rape because she seemingly “lured” Zuma into bed with her. Some of Zuma’s supporters even accused her of being an “agent of the apartheid state” sent by white people to destabilize the leadership of black men leading a democratic country.¹⁶⁶

It was not fathomable for many of Zuma’s supporters that such a heroic male figure could be capable of such a heinous crime as rape. They also could not believe that a person like Khwezi can be raped by a person like Zuma. Since they fall in such different social classes, it was even more shocking to them that Khwezi had the courage to speak publicly about this matter. Her allegations and the support she received from other feminist activists and organisations was reduced to the “angry black woman” trope and according to them, the only reason these allegations were valid is because Khwezi (and her supports) had ulterior motives against Zuma and his leadership. It would appear from this case it was Khwezi, the victim, who was put on trial for alleging rape, instead of the perpetrator Zuma, who was instead idolised.

Khwezi’s story is one of the many which indicates how this country has not been attentive to sexual violence against women, children and queer people, even in a post-apartheid South Africa.¹⁶⁷ She is an embodiment of yet another black women who was

¹⁶⁰ Gqola 2015: 101

¹⁶¹ Tlhabi 2017: 3.

¹⁶² Tlhabi 2017: 92.

¹⁶³ Gqola 2015: 115.

¹⁶⁴ Tlhabi 2017: 118-119.

¹⁶⁵ Tlhabi 2017: 122.

¹⁶⁶ Gqola 2015: 159.

¹⁶⁷ Tlhabi 2017: 41.

chastised and shamed for fighting against institutions of power and to dismantle the strong ties of political and patriarchal power,¹⁶⁸ rooted in the very fabric of the South Africa society.

Institutions of power, such as the courts, the universities can be embodied by persons who upholds its values and stands to benefit from it. Zuma at the time was an embodiment of an institution of power by virtue of being a black man, occupying one of the most powerful jobs in the country. The rage behind Khwezi's allegations stems from the perceptions and image of black masculinities as progressive and protective of women. Patriarchal norms of society have relegated women as fragile beings who need to be defended and protected and spoken for,¹⁶⁹ so it cannot be possible for a person who occupies such a position to be a person who violates you.

In trying to make sense of the trial, Gqola highlights the many issues that were of concern when looking into the proceedings of a typical South Africa rape trial. To begin with, the case was concluded in such a short period time, which is unusual for many rape cases of such a nature.¹⁷⁰ Khwezi being placed in witness protection was also unusual because this was never a courtesy that is extended to any rape victims.¹⁷¹ There were questions about how the DNA evidence was collected and presented in the court because there have been many instances where DNA evidence is an issue in rape case due to the forensic backlog.¹⁷² Gqola highlights these issues because on face-value it does appear not to be a problem, procedurally and administratively every protocol was followed appropriately and Khwezi was granted a fair trial. But in-depth view requires us to remember that the courts are inherently patriarchal, and the legal instruments available are not necessarily as impartial as they have professed.¹⁷³ The Khwezi case was treated light, oversimplified and there was over-reliance on court remedies over issues that were consequences on societal incompetencies.¹⁷⁴

4.5.2 Winnie Mandela and the Apartheid Government.

¹⁶⁸ Tlhabi 2017: 7.

¹⁶⁹ hooks 1982: 91.

¹⁷⁰ Gqola 2015: 104

¹⁷¹ Gqola 2015: 105

¹⁷² Gqola 2015: 105.

¹⁷³ Gqola 2015 119

¹⁷⁴ Gqola 2015: 119

Before Dyantyi and Khwezi, we had Winnie Madikizela-Mandela, a woman who was vilified and punished by the apartheid officials and shamed and abandoned by her fellow comrades for speaking publicly and without fear against the apartheid government calling for democracy and the liberation of black people.¹⁷⁵ Her work and her life story is very often told in the context of her then husband, Nelson Mandela, which further perpetuates the erasure of her selfless actions of activism and commitment to the liberation of black people.¹⁷⁶ It becomes important to acknowledge that Winnie had an identity outside being a wife to Mandela, she was an educated black woman, with a promising career, a mother and loved but still chose to commit her life to the liberation movement.¹⁷⁷

When calling for the release of people who had been detained by the apartheid police, including Nelson Mandela, there were speculations that she was only so committed to the struggle because her husband was imprisoned and to further tarnish her image and raise qualms about her role in the struggle movement, her private life became a matter of public indulgence when it was communicated that she was adulterous in her marriage with Mandela.¹⁷⁸ When she publicly advocated for the act of necklacing, her fellow comrades in the MK¹⁷⁹, which were mostly male, shunned her for taking such a stance publicly¹⁸⁰ because it was incomprehensible how a woman of her “stature” as a woman, a mother, a wife and a Christian, could possibly publicly advocate for such a violent act.¹⁸¹

In recent years, many scholars have written extensively about Winnie’s life, her experiences and contribution to the struggle movement in an attempt to salvage and protect her legacy. She was placed on trial in an actual court room, and also placed on trial in the court of public opinion. The vilification of Winnie Mandela was rooted in the patriarchal society’s disdain for black women. As a “mother of the nation” she was expected to behave, be respectful and obedient to her husband, who was a political figure, but she did the total opposite and was demonised for it.¹⁸² Her fight was against

¹⁷⁵ Xaba 2: 2020

¹⁷⁶ Xaba 2020: 2:

¹⁷⁷ Xaba 2020: 4.

¹⁷⁸ Chasi 2021: 102.

¹⁷⁹ Umkhonto weSizwe, a paramilitia wing of the African National Congress.

¹⁸⁰ A violent method of training, which was mostly used by the apartheid police to kill a person by placing a burning rubber tyre around their neck, this was often done in the public eye.

¹⁸¹ Chasi 2021: 104-105.

¹⁸² Msimang 2018: 145-146.

the apartheid state as an institution of power, layered with being married to a man who was a prominent political figure and enjoyed a lot of respect.

Dyantyi, Khwezi and Winnie were all are confronting a monster that was embodied in different ways but rooted in the same cis-heteropatriarchal belief system. They all share the experiences of most black women in South Africa, that of sexual violence, racism and sexism. Their stories take place in different timelines, under different regimes. Their experiences with the law, with the courts and other institutions confirms our generational gendered and raced history

4.6 CONCLUSION

The main aim of the chapter is to provide a close reading and analysis of the case between Dyantyi and the university. I begin by discussing the interim interdict and the concerns that were raised around how it was attained and its general validity. I proceed to reflect on the decisions of the various courts as the interdicted was being contested by the two parties. I then discuss in full details the disciplinary hearings where I highlight some of the irregularities and concerns that were raised, such as the proctor's behaviour and the outcomes of the inquiry.

I discuss this to highlight how the law was instrumentalised by the universities and the courts to chastise Dyantyi for protesting rape culture. I reflect on the notion of an ideal legal person through a feminist lens to show how the law is rooted in heteropatriarchal beliefs, which always relegates a black woman. I discuss some feminist critiques on how the law is reasoned and adjudicated fundamentally to advance status quo.

While I understand that the Dyantyi case is completely different from that of Khwezi in terms of facts, I juxtapose these two, including Winnie Mandela, to show how institutions of power have treated black women over the years. I make the comparison to highlight the criminalisation of black women's rights and the vilification of their advocacy against oppressive governments.

CHAPTER 5: CONCLUSION

The main research problem guiding this study is the role played by black feminist movements led by women and queer people during the times of the Must Fall movement. The focus falls on the court case between Yolanda Dyantyi and UCKAR, focusing on how the law and universities perceive and respond to protests.

Black feminist activism has contributed significantly to revolutionary movements throughout history, the Must Fall movement was no different. We have witnessed how the contributions of women and queer people had been subject to erasure throughout history. The same form of erasure unfolded within the Must Fall movement when women and queer people were relegated to the peripheries, and the movement decentred issues of gender and sexuality in the general mandate. It is for this reason why I offer an alternative narrative where I explore the contributions of black feminist activism with regards to the Must Fall. The dominant narrative does not entirely account for all versions of the story and instead, insistent on a version of the narrative which portrays the movement as ideal, without much account for internal shortcomings, and if there are is any accountability, it is often reduced to mere intellectual differences or just rationalised as typical contestation of leadership.

Black feminist activism implored the Must Fall movement to think about how women and queer people are just as affected, central and imperative to the call to decolonised, accessible and free education. One of the many principles of feminist activism is the need to foster community and solidarity. The inception of Must Fall was organized with this very principle at its core. Abandoning it later was a betrayal to the very foundational idea of the movement, its identity and its people. I highlight the scholarship of intersectional feminism because it was an instrumental theory in the formation of the break-away movements. The intersectional theory offered language, framework and ideological foundation through which we can expand our thinking and understanding of social and political matter aspects concerning the crises in higher education.

In the first substantive chapter, I argue that the Must Fall movement failed to centre the politics of gender and sexuality in the call for free, accessible and decolonised education. I further posit that it was from this very dereliction where the alternative break-away movements were born. I begin the chapter by giving a history of the

movement, how and where it started and the various areas the movement sought to address. An exploration of the history of the movement helps in understanding its initial objectives and helps in identifying the key role-players. Many feminist fallist activists have asserted that the idea of feminist activism was integral to the movement from the very beginning and not a later thought like many had assumed.

I delve more into the context of the Must Fall and think about the movement in conjunction with spatial (in)justice in an attempt to make sense of the (un)belonging of women and queer people in spaces. The space in question being the Must Fall space and the university space. I highlight the hypocrisy of a movement that is essentially fighting for belonging and to be considered in a space such as a university, but still insists on alienating other people, the same people with whom they claimed to share common interests. I think about space and protests again to make sense of the notion of (student) protests spaces and how they are an amalgamation of layered and intersecting social aspects all co-existing in the same eco-system. This angle of exploration affords us to think about universities in more spatial and geographical terms and how the locality of universities informs or impacts their social and political awareness and how that related to current plight in higher education space.

To conclude this chapter, I point to the direction of the three of the movements that I earlier asserted that they were a product of the Must Fall's failure to consider gender and sexuality politics. The Trans Collective Movement at UCT, the Naked Protest at Wits University and the #RURferenceList at Rhodes University were all an embodiment of black feminist activism. These movements are imperative to mention because they often get lost in the reverberations of the Must Fall narrative. I mention the universities where these took place to establish their geographical location. I do this against the backdrop of the idea of the right to the city and right to university as explored by Lefebvre and van Marle.

In chapter three, I look closely into universities and the courts and argued that they are institutions of power and that this power that they possess is of a western, male, and capitalist nature. So, I explore theories of the notion of power to make sense of their nature and to expand on how the institutionalisation of such power becomes a perpetuation of heteropatriarchal belief systems and cis-heteronormative standards. An exploration of the courts and universities as institutions of power is important in this

regard because they too, are part of the key role players in student protests. The court as an institution of power becomes, clearer when I unpack the relationship between the law and power, where I rely on Foucault's teachings to assert that the law is fundamentally an instrument that is used to establish control and to exercise societal discipline. This relationship between the law and power expands on knowledge and knowledge production.

It is from this point of understanding the ideas of power and its relation to the law that I begin to unpack on universities and their relationship with power and ultimately the law. Going back to the space of student protests, I investigate how universities responded to student protests in general, and the common trend across all universities in South Africa is the militarisation of campuses with heavily armed security guards, police men, interdicts, disciplinary hearings and expulsions. I demonstrate ways in which the universities have been able to weaponize the law against student protest, discouraging student participating in activism, targeting student leaders and turning campuses into states of exceptions.

My arguments rests on the unpacking of the South African legal system and its complex history with repressive regimes. I highlight the ways in which our legal culture is ingrained in western and capitalist beliefs systems which only seek to advance the interests of the minority and not the public. Although we rely on the notion of transformative constitutionalism to redress past injustices and utilise law as an instrument of progress and change, there are still shortcomings that are rooted in how our law is fundamentally conservative, inflexible and therefore limited.

I indicate how the other crisis with our law lies not only in how we interpret and practice law, but in how we teach it our universities. Universities are spaces of knowledge production and knowledge is produced through governmentality. Hence, I assert that that there is an urgency in implementing legal education that is developed and explores the law from themes of decolonialisation and feminism. Evidently, the law is central and foundational to how institutions are formed or how government exist and are led. How the law it is taught inadvertently determines how these areas of society will unfold. I conclude this discussion with feminist critiques of law, this part of the discussions weaves in the initial argument regarding the law's inherent limitations and

flaws, but I also bring forth alternative concepts that feminist jurisprudence has proposed.

I argue that the failure to consider gender and sexuality politics in the Must Fall triggered break-away feminist-led protests. I rely on the theoretical foundations which have informed ways in which how the courts perceived and responded to these protests to develop my argument. In the final chapter I place the overall research problem against the backdrop of chapter two and three and argue that the courts and the university were unfairly prejudiced in their reaction towards the #RURestroom protest. I do a reading of the case between Dyantyi and UCKAR in order to offer a comprehensive overview of events.

This discussion offers a perspective on how the disproportionate and biased allocation and use of power perpetuates the systemic gendered and racialised violence, particularly towards Dyantyi as the primary focus here. In chapter three I make mention of the feminist critiques of the law, and explore the work of feminist jurisprudence scholars in an attempt contextualise those critiques further, looking into legal reasoning and adjudication. This exploration gives us an analytical framework which can be used in making sense of the Dyantyi case.

Seeing how very recent the Dyantyi case was concluded at the SCA, and how familiar her experiences were, I turn to examples for recent South African history. And compare Dyantyi's experience with that of Khwezi and Winnie Mandela. All these women's experiences are evidence that institutions of power are inherently biased, particular against those who seeking to disrupt the status quo. It is an indication that throughout history, women and queer people have been subject to violence, because they are deemed inferior and not belonging.

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