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Introduction: Kaiser Matanzima's proposition

In 1943, while Nelson Mandela was studying law at the University of the Witwatersrand, he was urged by his kinsman and then close friend Kaiser Matanzima to return to the Transkeian Territories, where both men had been born, brought up and schooled. Matanzima suggested that the cousins should open a law practice in Transkei's main town, Mthatha. 'But Mandela demurred: his place was in Johannesburg' (Lodge 2006: 23). In the coming years, the cousins' paths diverged. Mandela made his name as a Johannesburg lawyer, forming a prominent law partnership with Oliver Tambo, their busy legal practice one of the centres of nationalist politics in the city. In these accounts, 'struggle lawyers' such as Nelson Mandela typify broader patterns of anti-colonial nationalism and legal activism forged within the circuits and urban centres of the colonial/settler state (cf. Dezalay and Garth 2010).

By contrast, Matanzima abandoned law for traditional leadership, and then drove Transkei's chieftaincies towards tribal, Bantustan self-government in 1963 – a cornerstone of apartheid's project of separate development. Yet Matanzima's proposition to Mandela was not just a whimsical counterfactual. South Africa's patterns of settler colonialism – both the concentrated patterns of ownership in the industrial economy, and an acute history of racial discrimination – persistently excluded African lawyers from the prosperous circuits of commercial and legal practice across the twentieth century. Consequently, the majority of African lawyers were educated and trained, and many made moderately prosperous careers, in the 'Native Reserves'.¹ Indeed, Transkei was the hub of the black legal profession. In 1970, Mthatha had as many African lawyers as Durban and Johannesburg combined – a direct consequence of the rapid growth of its bureaucracy and the commercial opportunities offered by Bantustan 'independence' ruthlessly, brutally and corruptly pursued by Matanzima (Gibbs 2014: 36; Uys 1970). Such legal legacies carry into the post-apartheid era. Two-thirds of the African justices who have sat on the bench of the post-apartheid Constitutional Court – the acme of the profession – practised or trained in the Bantustans.²

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¹This pattern can be traced to the turn of the twentieth century: George Montsioa (born in 1885), one of the founders of the African National Congress in 1912, was the most professionally successful of the first generation of African lawyers, drawing his clients from landed, Christian, chiefly lineages (Moguerane 2016).

²Namely, Chris Jafta, Pius Langa, Mbuyiseli Madlanga, Tholakele Madlala, Mogoeng Mogoeng, Yvonne Mokgoro, Sandile Ngcobo, Bess Nkabinde and Thembile Lewis Skweyiya.

The purpose of this article is thus to trace the ambiguous role played by the Native Reserves/Bantustans in shaping the African legal profession in South Africa.³ How did African lawyers, persistently marginalized by century-long patterns of exclusion, nevertheless construct an elite profession within the confines of segregation and apartheid? How might we link the histories of lawyers inside the Native Reserves and Bantustans with the better-known nationalist historiography that emphasizes the role of activist ‘struggle lawyers’ in the cities? And what are the implications of South Africa’s segregated history for debates about the ‘decolonization’ of the legal profession in the post-apartheid era? In short, what was the relationship between lawyers and liberation?

Debates: elites, class formation and the professions

Often, the narrative about South African lawyers focuses on politics: it tells of the struggles for political emancipation and to defend rights (Abel 1995; see also Halliday *et al.* 2012). More broadly, Sarah Dezalay (2015: 10) argues that lawyers across the African continent ‘have [either] been idealised as protectors of liberty ... or condemned as handmaidens of corruption’. This article, by contrast, looks to contribute to an emerging historiography that studies the ‘prosopography of the colonial legal spaces’ in order to understand ‘how law relates to the field of state power’ (Dezalay 2015: 12; see also Dezalay and Garth 2002: 4).

In engaging with these debates, I intervene in three broader historiographies. One set of arguments emphasized the close connections between black lawyers and anti-colonial nationalism. Peter Walshe (1970: 36) was the first to note that African lawyers played a leading role in the early African National Congress (ANC), arguing that they ‘represented the ideals of the new African elites ... striving for personal [and professional] as well as national advancement’ (see also Odendaal 2012). Many more South African legal histories and ‘struggle memoirs’ have recounted the interwoven biographies of a tight-knit coterie of Johannesburg lawyers – most notably Nelson Mandela – whose professional and political lives were first spun together in the 1940s and 1950s.⁴ Much of this writing on nationalist lawyers, both in South Africa and elsewhere on the continent, idealizes the values of activist lawyers (Abel 1995; Broun 2012; Ngcukaitobi 2018; Sachs 1973). One account of Nigeria’s lawyers, for instance, describes them as ‘the fighting brigade of the people’ (Pue 2016: 480).

At the other end of the spectrum, a second strand of research takes a far more sceptical view of the entanglement of African elites in the workings of state power. These arguments became important inside apartheid South Africa as radical, class-based analyses focused on the corrupted black elites co-opted into the apartheid system. Kaiser Matanzima’s Bantustan project was seen to exemplify these processes of co-option and class formation. Investigative journalists exposed the

³Karekwaivanane (2016: 59–60) and Luckham (1978) discuss how structures of segregation shaped the legal professions in Southern Africa (Zimbabwe) and West Africa (Ghana).

⁴On Johannesburg’s lawyers, see Basner (1993), Bizos (2007), Broun (2012), Callinicos (2004), Klingman (1998) and Ngqulunga (2017). Kuper (1964: 234–8) writes on Durban’s mid-century lawyers.

role of crooked businessmen and commercial lawyers in the Bantustans (Streek and Wicksteed 1981). Roger Southall's landmark *South Africa's Transkei* (1982: 125) argued that a burgeoning African bourgeoisie – government officials, teachers, traders – was formed because of access to the expanding Bantustan state. (The same could be said of Bantustan lawyers.) Looking more widely across the continent, there is a wider body of literature that portrays lawyers in other regions of Africa as emissaries of empire and 'mercenarys of neo-colonial interests' (Shafari 2007: 1061; see also Luckham 1978; Ncube 1997).⁵

My article seeks to nuance these approaches, taking impetus from a new seam of research that has sought to provide a more subtle account of how elites have shaped processes of politics and state formation (Adebanwi 2014; Booth 2009; Werbner 2004). Contemporary South Africans' interest in these questions has been shaped by the realization of the extent to which post-apartheid elites have been patterned by the legacies of the Bantustans (Beinart 2012; Gibbs 2014). Many professions – not just lawyers, but teachers and nurses too (Lekgoathi 2007; Hull 2017; Marks 1994) – have institutional histories rooted in the Native Reserves. Elsewhere on the continent, a new generation of legal historians is studying how African legal professions were patterned by the shadow of segregation, colonialism and empire (Brett 2015; Dezalay 2015; Karekwaivanane 2017). Writing in this vein, my article charts the careers of a generation of black South African lawyers whose professional and political trajectories were shaped by their engagements with the Native Reserves and the Bantustans.⁶

My concern is the formation of the 'legal field' (Bourdieu 1987; Dezalay and Garth 2011): the complex relationship between professional formation, elite reproduction and the exercise of political power. For at the heart of this article is a paradox: that the Bantustan project – synonymous with deep-seated patterns of repression and corruption – also produced many of the leading African lawyers of the post-apartheid era. In the first section I explore how the apartheid project shaped the rapid growth of the African legal profession inside the newly formed Bantustans. The second section stresses the deep professional and political connections between city lawyers and the Bantustans during the final years of apartheid. Finally, I conclude with a discussion of how the vexed historical legacies of the Bantustans have shaped the legal field of post-apartheid South Africa.

The homeland project

The histories of African lawyers in South Africa are often written in a major key: a direct line is drawn from the entry of the first black lawyers into the profession and the founding of the ANC at the turn of the twentieth century, to the first successful

⁵Dezalay summarizes the debates (2017).

⁶I primarily draw on interviews with lawyers: my own; those conducted by the Legal Resources Centre Oral History Project (LRCOHP) and the Constitutional Court Oral History Project (CCOHP) found at the Historical Papers archive at the University of the Witwatersrand; and Padraig O'Malley's Heart of Hope project (see <<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv00017/04lv00018.htm>>, accessed 17 June 2017). Published memoirs were another important source; so too were biographical articles found in the South African legal journal *The Advocate*.

African legal partnership set up by Mandela and Tambo at Chancellor House in 1952, to the legal struggles fought against apartheid (see, for example, Broun 2012; Sachs 1973). Yet in many ways the early 1960s marks a caesura, in which apartheid repression shattered the networks established in the mid-twentieth century. Struggle lawyers, such as Nelson Mandela (1918–2013), were jailed on Robben Island or forced into exile, as were Duma Nokwe (1927–78), A. P. Mda (1916–93) and Oliver Tambo (1917–93). Instead, this article begins in South Africa's Bantustans. It was here that many of the next generation of African lawyers (born in the 1940s and 1950s) spent their formative years, their legal careers ambiguously entangled with the apartheid project of turning South Africa's Native Reserves into self-governing Bantustan Territories.

Broadly speaking, there were three interconnected institutional spheres by which the project of separate development advanced African lawyers inside the Bantustans. The first was the growth of officialdom in the nine self-governing Bantustans, including the gradual Africanization of legal posts once held by white officials. The annual reports of the Transkei Department of Justice (which took over the district magistrates' courts) illustrate this process. In 1963, the year in which Transkei received 'self-government', there were only two legally qualified African officials in the department; the vast majority were white officials seconded from Pretoria. In 1968, the first African magistrates were appointed to two of the twenty-six districts of Transkei; by 1980, the department employed fifty-two legally qualified African officials.⁷

This was a very slow process. The first chief justice appointed to the newly inaugurated Transkei High Court in 1974 was G. G. A. Munnik, a staunch conservative, who in the 1950s had unsuccessfully tried to block the application of Duma Nokwe to the Johannesburg bar. Only when Munnik retired in 1994 was he replaced by Advocate (Adv.) Thololakele Madala – the first African lawyer to be raised to the bench in the whole of South Africa.⁸

Nonetheless, the early career of Pius Langa (1939–2013) within the districts of KwaZulu indicates how individual lawyers used the magistracy as a springboard into other parts of the profession. In 1960 he started as an interpreter and then worked as clerk, successively posted to four district magistrate's offices. Having studied privately for a BJuris and LLB with the University of South Africa, he was promoted to prosecutor and then was a district magistrate at Ndwedwe.⁹

Dial Ndima's (2004) wry memoirs provide a rich account of government service. He describes the daily grind of cases that came into the district magistrate's court. He describes the political pressures put on black magistrates when scions of powerful political and business families appeared in the dock. He also speaks of the travails faced by magistrates posted to the more remote districts of the Homelands. In one instance, Ndima's family lived in such squalid government housing that their live-in nursemaid, who had accompanied them from another posting, fled her employment in the night.

⁷See the Transkei Department of Justice annual reports for 1968 (p. 5), 1977 (p. 3), 1979–80 (p. 4) and 1987 (p. 4).

⁸'Retired con court judge dies', *News24*, 26 August 2010. On Munnik, see Bizos (2007: 138) and Randell (1985: 107).

⁹CCOHP interview, Pius Langa, 1 December 2011.

While district magistrates held a prestigious professional position within the Bantustan state, this was not a rewarding career. This is probably one reason why – like most ambitious lawyers – Pius Langa left government service in 1977 for the Natal bar in Durban, later becoming one of the first African senior counsels in 1994.¹⁰ From there, Langa was appointed directly to the Constitutional Court, becoming the second chief justice of the post-apartheid era in 2005.¹¹ Indeed, half of African justices who have sat on the Constitutional Court since 1994 started their career in magistrates' courts in Bophuthatswana, KwaZulu, Lebowa and Transkei – an indication of the importance of this professional trajectory for many black lawyers.¹²

Second, to staff the growing Bantustan bureaucracies, the apartheid government expanded tertiary education, with specific bursaries established for law students. Previously, the handful of African mid-twentieth-century lawyers (such as Nelson Mandela) had studied at their own initiative at the University of the Witwatersrand or by correspondence through the University of South Africa (UNISA). Now the apartheid government systematically inaugurated law degrees at the University of Fort Hare, the University of the North and the University of Zululand, and, later, at the Universities of Bophuthatswana and Transkei.

In one sense, this expansion of African tertiary education entrenched patterns of segregation. For one, black enrolment in 'white' universities was virtually closed off for a few decades. (There were striking exceptions: John Hlope, the son of a farm labourer, was admitted to the University of Natal on a South African Sugar Association scholarship, following special pleading by the well-connected sugar planter who employed his father – an act of benevolence lauded by the liberal press.¹³) Moreover, the Bantustan universities rushed African students through a BJuris or BProc degree that equipped them to serve the Bantustan state as district magistrates; it was much harder to obtain the postgraduate LLB degree that allowed graduates to practise as attorneys. Additionally, studying law in the Bantustan universities was often a fraught experience riven by the tensions of apartheid. Conflicts between African students and white lecturers – the rote learning of discriminatory 'Bantu' legal codes was a particular snub for law students – was a contributing factor in the student unrest on the University of Zululand campus, for instance.¹⁴

¹⁰Importantly, Langa was deeply enmeshed in the ANC networks that were centred on Griffiths and Victoria Mxenge's Durban law practice.

¹¹CCOHP interview, Langa.

¹²Namely, Chris Jafta, Pius Langa, Mbuyiseli Madlanga, Mogoeng Mogoeng, Yvonne Mokgoro, Bess Nkabinde, Sandile Ngcobo and Thembile Louis Skweyiya. Cf. CCOHP interviews: Chris Jafta, 2 December 2011; Mbuyiseli Madlanga, 18 January 2012; Mogoeng Mogoeng, 2 February 2012; Yvonne Mokgoro, 24 November 2011; Bess Nkabinde, 14 December 2011.

¹³'The story of John Hlope', *Natal Witness*, 28 August 2009. Hlope discussed his upbringing in another interview: 'The judge whose middle name is controversy', *Sunday Times*, 28 October 2007.

¹⁴Padraig O'Malley interview, Vuso Tshabalala, 25 February 2002; CCOHP interview, Penuell Maduna, 3 February 2011.

At the same time, professional education was for a tiny elite. While there was a rapid growth in student numbers – 618 Africans attended university in 1958, 1,600 in 1968, 8,200 in 1981 and 19,600 in 1985 – they numbered less than 0.5 per cent of their age cohort.¹⁵ Alongside medicine, law remained the most prestigious of degrees. In 1974, for instance, only thirty-nine of the 488 graduates from the four Bantustan universities were in law (SAIRR 1959–60: 22; 1968: 254; 1976: 152–3; 1981: 379). The law students who won the score of Bantustan bursaries on offer each year were generally the most academically successful and ambitious students in their cohorts, and they often hailed from educated Christian families. Jabulani ‘Mzala’ Nxumalo – the son of mission schoolteachers – was one University of Zululand law student with first-class marks and a taste for debate. ‘Once fired by a topic, Mzala would not relent. He would want to pursue the topic to its very end, much to the exasperation of others,’ remembered an obituary published by the South African Communist Party.¹⁶

Like most elite professions, it seems that places in the Bantustan university law schools went to a narrow group of students who hailed from the most selective of the schools open to black South Africans. Reading through the biographical accounts of black lawyers, one is struck by these tight-knit schooling networks – the repeated mentions of schools such as Lovedale (Ciskei), St John’s College (Transkei) and KwaDlangezwa (Zululand).¹⁷ Nevertheless, the provision of Bantustan law bursaries that also guaranteed training and employment within the expanding Bantustan state offered a ladder into the profession for students from much poorer backgrounds too. Mogoeng Mogoeng, South Africa’s fourth post-apartheid chief justice, was one bursary student at the University of Zululand who hailed from what he described as a ‘semi-literate’ migrant family. Mogoeng’s mother later told journalists of the transformation of her quiet, studious son: ‘[H]e came back [from university] a changed man; his dad and I concluded that maybe people in Zululand talk a lot.’¹⁸

The University of Transkei’s (UNITRA) law school, in particular, gained a short-lived reputation as an institution of professional learning.¹⁹ Looking to snub the apartheid government, Kaiser Matanzima’s government hired a cosmopolitan mix of lecturers. The law faculty, for instance, was filled with lecturers who would take prominent positions on the post-apartheid bench. John Hlope – who had capped his education with a PhD from Cambridge – was an imperious faculty dean. Mbuyiseli Madlanga, who won the Juta law prize when a bursary student, served his apprenticeship as a Transkei government prosecutor and then came back to UNITRA as a lecturer. Tholakele Madlala, who practised at the Transkei bar while lecturing part-time, involved his students in a law clinic and the Prisoners’ Welfare Programmes – a political provocation given that

¹⁵Badat (1990) provides an excellent overview.

¹⁶Jabulani Mzala Nxumalo: biography’, South African History Online <<http://www.sahistory.org.za/people/jabulani-mzala-nxumalo>>, accessed 17 June 2017. Mzala fled into exile before finishing his degree.

¹⁷See, for instance, Ndima (2004: 12) and Pikoli and Weiner (2013: 8–17, 22–6). On the extent to which patterns of Bantustan schooling perpetuated black elites, see Gibbs (2014: 84–90, 124–8).

¹⁸‘Villagers salute a man who made it’, *The Star*, 19 August 2011.

¹⁹The same seems true of the University of Bophuthatswana (Manson 2011; more generally, see Gibbs 2014: 118–24).

Matanzima's government was particularly repressive. Another lecturer caused a scandal when he boycotted a law conference held at the University of Zululand, protesting the use of Afrikaans – for he had trained in the English language as a barrister in London.²⁰ Practising law in the Transkei was refreshingly egalitarian – certainly compared with deeply racially segregated legal circles elsewhere in South Africa – remembered Jeremy Pickering, who worked at the Mthatha bar and had friends on campus.²¹

Third, from the mid-1970s onwards, a number of semi-autonomous, self-governing Homelands took full Bantustan 'independence': Transkei (1976), Bophuthatswana (1977), Venda (1979) and Ciskei (1981). These 'fully sovereign', 'independent' Bantustans each established separate divisions of the South African Supreme Court with their own attorneys' societies and bar councils that self-consciously pushed business towards black lawyers.²² The creation of new court divisions was closely tied to a project of 'Africanization' (at least within the confines of the Bantustans). There was a bonanza for a new generation of black property lawyers – mortgages, conveyancing, etc. – when African elites were allowed to buy houses in the small rural towns that had once been racially segregated. Kaiser Matanzima's Bantustan government had been the first to systematically transfer many of the 17,000 white-owned houses (worth 20 million rand in 1965 prices) in the twenty-six small towns dotted across the territory to the black middle class.²³ Indeed, the advancement of black professionals was physically embodied in the changing circumstances of Transkei's small towns. One black lawyer later recalled the racially segregated towns of his youth in the early 1960s – 'Whites only!', 'Beware of the dog!'; a decade later, now a magistrate employed by the Bantustan government, he lived in a house that had once been owned by white people (Ndima 2004: xiii).

In the Transkei in particular, Kaiser Matanzima relaxed restrictive certification processes in order to bring black lawyers into lucrative areas of commercial law that had once been dominated by white attorneys. The changing texture of Bantustan legal practice was epitomized by the demise of the Transkei circuit court in the late 1970s. This group of (white) Grahamstown advocates (i.e. barristers) had journeyed together across the Transkei Territories each year since the turn of the twentieth century, dining, rather pompously, in the racially segregated, small-town hotels, their well-remunerated commercial briefs coming from the old Transkei trading families. These Grahamstown lawyers now found themselves displaced by the new generation of black advocates, based in Mthatha, who gained work on the back of the Bantustan project. Thus, George Randell (1985: 108–50)

²⁰*Daily Dispatch*, 16 August 1984; CCOHP interviews: Nomahlube Mzladume, 29 November 2011; Mbuyiseli Madlanga, 18 January 2012.

²¹LRCOHP interview, Jeremy Pickering, 18 December 2007.

²²Brief histories of the bars appear in the April 2004 edition of *The Advocate*.

²³*Daily Dispatch*, 19 February 1965; personal communication, Dumisa Ntsebeza, 17 September 2009.

wrote a 'Requiem for the Transkei circuit court' in his retirement – his wife providing the accompanying black-and-white drawings of the sentimental, timeless, rural landscape.

Randell's elegy to the old Transkei circuit court contrasts sharply with Adv. Matobela Shisuba's upbeat account of the history of the Transkei Society of Advocates, which displaced the old circuit court in the mid-1970s. 'This Bar, probably more than any other society of advocates in the country, [has come to] reflect the population demographics of the area it serves,' concludes Shisuba (2004: 19), who served as the secretary of the Advocates for Transformation lobbying group.²⁴

Of course, practising law inside the Homelands during this scramble for property and assets was replete with ambiguity. One report suggested that the Transkei government had systematically underestimated the values of transferred assets, losing at least R5.5 million when conveyancing residences, R4.2 million transferring hotels, R16.3 million for garages and R18.5 million for other businesses.²⁵ Commercial lawyers were in the thick of these business deals, transfers and contracts that created a corrupt Bantustan elite.

Ironically, the vision of economic empowerment offered by the Bantustans proved attractive for a time. In the mid-1970s, for instance, Tom Karis came across a number of Black Consciousness activists who were forming syndicates bidding for hotels and liquor licences in the Bantustans.²⁶ This was particularly the case in the Transkei, where Kaiser Matanzima's speeches were charged with the Africanist rhetoric of the Non-European Unity Movement, the movement he had briefly joined when a law student at Fort Hare in the 1940s. He actively courted Unity Movement and Pan Africanist Congress (PAC) exiles who had fallen foul of émigré intrigues. Perhaps the most prominent dissident to return to Transkei was T. T. Letlaka, who had trained as an attorney with George Matanzima in the 1950s before fleeing to London in the 1960s, where he had eked out a living lecturing on law at Isleworth Polytechnic. Apparently, it was the de-segregation of Transkei's towns that convinced him that Bantustan 'independence' was worth participating in (Koyana-Letlaka 2014: 187–9, 204–9).²⁷ Digby Koyana, another close ally of the Matanzima brothers during this period, was another ex-Unity Movement leader at the centre of spoils politics. Koyana also joined the Mthatha bar in the early 1980s – his legal practice presumably benefiting from his government connections.²⁸

²⁴Indeed, 93 per cent (twenty-six out of twenty-eight) of the advocates practising at the Transkei bar were African in 2014, at a time when the proportion was 19 per cent (482 out of 2,571) across the whole of the country. The Bhisho bar came in second at 47 per cent (nine out of nineteen). Cf. 'Black advocates cite racism as they feel the financial pinch', *Sunday Times*, 10 May 2015.

²⁵Karis Gerhart Collection (KGC), Reel 89, biographical files: Bantu Holomisa.

²⁶KGC, Thomas Karis interview, Pongomile Samson Fadana, 2 October 1977. Moseneke (2016: 2922–61) is also illuminating.

²⁷On the charm offensive targeting PAC and All African Convention (AAC) exiles, see *Daily Dispatch*, 25 September 1974, 24 July 1975, 21 December 1978 and 15 November 1979.

²⁸*Daily Dispatch*, 7 January 1980. See also Berkley (1979). Incidentally, Digby's brother, Beresford Koyana, was one of the first practising advocates at the Mthatha bar and played a

Despite being excommunicated by their erstwhile comrades who remained in exile, it seems that many of the ex-PAC and Non-European Unity Movement lawyers who entered Bantustan politics convinced themselves that they were engaged in an act of radical economic transformation. Indeed, there was a deep history to Africanist politics in the Transkei Territories, which in the 1940s and 1950s had been home to around a dozen politically active lawyers with links to the Unity Movement and PAC.²⁹ Then, the assertive politics of the Unity Movement and PAC lawyers was rooted in the commercial competition of these bustling rural towns: the middle decades of the twentieth century were the moment when Africans made inroads into the businesses monopolized by the white trading families and legal practices. Archives and memoirs are full of radicalized rivalries and confrontations.³⁰ This meant that the supporters of the Bantustan project argued, much like Kaiser Matanzima, that they ‘too wanted a free South Africa; but thought that the goal could be achieved faster and more peacefully through the [apartheid] government’s policy of separate development’ (Mandela 1994: 171).

Yet while the rhetoric of Bantustan independence was one of ‘decolonization’, these impoverished, fragmented, financially hamstrung territories were dependent on external sources of finance and infrastructural support. Thus, the Transkei Bantustan developed its own diplomatic service in the 1970s, at various stages largely run by three lawyers – Digby Koyana, T. T. Letlaka and Liston Ntshongwana – who aggressively pursued commercial contracts abroad.³¹ The quick profits promised by hotels, casinos, mining and infrastructure projects attracted a slew of commercial lawyers and businessmen from apartheid South Africa and beyond. David Bloomberg, a self-described ‘man of theatre, lawyer, businessman, and former mayor of Cape Town’, was one of the many adventurers seeking partnerships and joint ventures inside the Bantustans who were drawn into the web of corruption.³² His law firm worked closely with Sol Kerzner, the hotels and casinos magnate who built his empire by investing in Mauritius, Swaziland and South Africa’s Bantustans – most famously the sanctions-busting Bophuthatswana resort of Sun City. Kerzner’s lawyers organized the contracts, deals and licences: a brutally competitive game of liar’s poker played by ‘cunning, ruthless men’ (Berkley 1979).³³

key role in setting up the law degree at the University of Transkei prior to his death in a car accident in 1976 (Shisuba 2004: 18).

²⁹AAC lawyers active in the Eastern Cape in the 1950s included Richard Canca, Digby and (later) Beresford Koyana, Livingstone Mqotsi, Nathaniel Honono, Mda Mda and Louis Mtshizana. Two key leaders in the PAC breakaway – A. P. Mda and T. T. Letlaka – also established legal practices in Transkei’s towns.

³⁰Cf. Koyana-Letlaka (2014: 59, 93–4), Mda (2012: 42–6) and Mqingwana and Peires (2010: 29).

³¹*Daily Dispatch*, 7 May 1975, 7 January 1980. See also Berkley (1979) and Koyana-Letlaka (2014: 215–56).

³²Bloomberg’s memoirs (2007) are circumspect on these matters; the commission of inquiry led by Judge Alexander (1988: 4–5, 9–19) was not.

³³‘Sun sets on Sol’s empire’, *City Press*, 17 January 2012; ‘Sol’s legacy haunts Wild Coast’, *Mail and Guardian*, 3 August 2008. See also Alexander (1988: 49–56, 160, 199, 419–23) and Berkley (1979), and, more broadly, Gibbs (2014: 141–4).

Later commissions of inquiry (discussed below) would reveal the ingrained – sometimes bizarre – patterns of corruption across all the Bantustans. Legal fixers promised to get ‘the blessings’ of ‘the Big Man’. Indeed, it was practically impossible to legally enforce any commercial contracts given the shambolic state of the tender boards. One major commercial contract ‘would have shamed a first year law student. It consisted of scraps of handwritten paper, referring in turn to a miscellany of other documents and having the appearance of a labyrinth with no clear end in sight’ (van Reenen 1988: 19).

At the same time, it is worth noting that many commercial lawyers prospered within the Homelands without being active supporters of the Bantustan project. Indeed, the largest African law firm in all of South Africa in the early 1980s, Sangoni Partners, which was based in the Transkei towns of Mthatha, Butterworth and Queenstown, defended political dissidents against Matanzima’s government. They cross-subsidized their political cases with the easy profits made from conveyancing, mortgage registrations and land transfers.³⁴ (Road accident claims were another lucrative source of legal work, given the growth of car ownership among the elite and the poor quality of Bantustan roads.³⁵) Dumisa Ntsebeza SC [Senior Counsel] is perhaps the best-known alumnus from the Sangoni Partnership. Ntsebeza studied law in the mid-1970s while imprisoned in Mthatha under the Suppression of Communism Act. Despite extensive periods of banishment in the 1980s, Ntsebeza rapidly made a name for himself within the profession, chairing the Black Lawyers Association in 1989 and later serving on the executive of the Black Consciousness offshoot the Azanian People’s Organisation (AZAPO).³⁶

If one follows the careers of men such as Liston Ntshongwana, Digby Koyana and T. T. Letlaka (or David Bloomberg, for that matter), then lawyers practising in the Bantustans seem to be little more than a co-opted comprador bourgeoisie. My suggestion is that we might also follow the trajectories of lawyers such as Pius Langa and Dumisa Ntsebeza and consider how they grappled with questions of co-option, elite accumulation and professional advancement. The fact of the matter is that, given the segregated pattern of the South African legal field, most African lawyers had little choice but to work to some extent inside the Bantustans during these decades of high apartheid.

The Black Lawyers Association and the Bantustans

From the mid-1970s onwards, the pattern of South Africa’s legal field changed again, as many of the lawyers who had been educated and/or trained in the Bantustans came to the cities of ‘white South Africa’ to take advantage of the new spaces opening in these legal centres. The establishment of the Black Lawyers Association (BLA) in 1977, a year after the Soweto revolt, signalled

³⁴Personal communication, Dumisa Ntsebeza, 17 September 2009. Rotberg and Thompson (2000: 297) also profile Ntsebeza.

³⁵Author interview, Canca. See also Mda (2012: 209–10).

³⁶Themba Sangoni finished his career as judge president of the post-apartheid Eastern Cape court division.

the growing numbers and political weight of township lawyers and their renewed demands for legal, commercial and political space. Indeed, the immediate spur to the formation of the BLA was the struggle of African lawyers to obtain office space in racially zoned town centres and gain institutional recognition from established law societies. The BLA's first case supported the application of ex-Robben Islander Dikgang Moseneke to the Pretoria bar. Initially it was rejected because Moseneke was notionally a subject of the Bophuthatswana Bantustan, despite the fact that three generations of his family had been born and lived in the townships surrounding Pretoria. Moseneke (2016: 3261) won the case, becoming the first African advocate at the Pretoria bar.

Broadly speaking, there were three factors underlying this effervescence. First, by the 1980s the Bantustan law departments, despite their lack of resources, were producing a pipeline of qualified lawyers. While official records documenting the race and gender of law school graduates were not kept during the apartheid period, there are indicative statistics that give a sense of the slow transformation of the profession. In 1960, there were just fifty qualified African attorneys of whom a dozen practised law – collectively they made up 0.004 per cent of South Africa's 3,000 attorneys. By 1985, black lawyers made up 10 per cent of the 6,500 attorneys in the legal profession. By 1994, the figure stood at 14 per cent (Pruitt: 2002: 562).

Second, the rapid growth of the black urban populations opened up new opportunities for a widening group of African lawyers to develop practices based on defending an African clientele. Take the example of Vuka Tshabalala (born 1939), the first African advocate to be admitted to the Natal bar in 1969 in Durban, which was probably the fastest-growing South African city in the 1970s. (The official 1980 census counted 153,000 Africans in Durban's formal townships, but, when the figure included those living in backyard shacks and outlying informal settlements, numbers reached closer to 1 million (cf. Sitas 1985: 118).) Vuka Tshabalala lived in Clermont, a Durban township known for its wealthy taxi owners, supermarket owners, soccer moguls and business feuds – a good source of legal business. The growth of Durban's townships had created a slew of well-to-do African shop owners and traders – particularly after apartheid reforms of the late 1970s eased racialized restrictions on township traders. Tshabalala was involved in this lucrative commerce: both as a lawyer transacting business for black clients, and as a shop owner, running a series of businesses in Clermont township.

Vuka Tshabalala self-effacingly told interviewers that his legal work was mainly mundane commercial and criminal work – little more than 'running down cases ... where parties are involved in [car] collisions'.³⁷ Nonetheless, the growing numbers of township businessmen – the 1980 census counted 580 traders in Durban's townships, of whom 132 fell into the highest income bracket, earning R18,000 per year (Sitas 1985: 119) – meant that there was good work for a growing number of African advocates. Vuka Tshabalala was soon joined at the Natal bar by Thembile Louis Skweyiya (1939–2015), Pius Langa (1939–2013), Sandile Ngcobo (b. 1953) and then K. K. Mthiyane (b. 1943), who had all started their

³⁷Killie Campbell Library, Durban, Andrew Manson and Dean Collins interview, Vuka Tshabalala, Durban, 25 June 1979.

careers as KwaZulu government magistrates before retraining in Durban.³⁸ Tshabalala would become the first black judge president of the post-apartheid KwaZulu Natal court division; Skweyiya, Langa and Ngcobo would later all serve in the post-apartheid Constitutional Court.

Third, African lawyers were moving into lucrative new fields of law as the collapse of petty apartheid, amidst the mid-1980s township revolts, opened up new legal spaces. Importantly, an increasing trickle of black law students were graduating from the 'liberal' English-speaking universities.³⁹ The 'big five' corporate law firms also opened their doors to black candidate attorneys. The trajectories of Sisi Khampepe (born in Soweto in 1957) and Ray Zondo (b. 1960 in rural Ixopo), who ended their careers as justices in the Constitutional Court, illustrate these processes. Both were schooled in elite Bantustan boarding schools and took their first undergraduate degrees at the University of Zululand; they then made their careers in Johannesburg and Durban, among the first black lawyers to specialize in the burgeoning field of labour law in the mid-1980s. Khampepe trained with the Industrial Aid Society and then the blue-chip firm Bowman Gilfillan & Blacklock, along the way picking up an LLM from Harvard Law School. Zondo took his second LLB degree from the University of Natal (Durban) then served his articles in the famous Mxenge partnership, before setting up his own small law firm.⁴⁰ Both picked up work from the burgeoning independent trade unions, whose membership multiplied from 19,000 to close to 1 million in the 1980s. Khampepe, for instance, held senior roles in the International Confederation of Free Trade Unions because of her work with the Congress of South African Trade Unions.⁴¹

Ideologies of professional and political emancipation varied. Durban was particularly well known for its network of 'Charterist' lawyers who adhered to the non-racial values of the historic ANC Freedom Charter, which they argued provided foundational ideas of fundamental rights extending to all South African citizens. Here, lawyers such as Pius Langa and Vuka Tshabalala played a prominent role in forming the National Association of Democratic Lawyers in 1987, under a largely black leadership that promoted these Charterist ideals. By contrast, the PWV (Pretoria–Witwatersrand–Vereeniging) urban conurbation was known for being a stronghold of the BLA, which was close to prominent groupings of Black Consciousness activists. Its inaugural president was Godfrey Pitje (1917–97), the long-standing Witwatersrand lawyer who had been in the Africanist wing of the ANC Youth League when he served his articles under Mandela and Tambo in the 1950s. Dikgang Moseneke (2016: 3261–490), who

³⁸CCOHP interviews: Pius Langa, 1 December 2011; Penuell Maduna, 3 February 2011. Manson and Collins interview, Tshabalala.

³⁹Of the 11,500 African students enrolled in universities in all subjects in 1977, 488 attended 'English' and six 'Afrikaans' universities – 4 per cent of the total cohort. By 1988 there were 3,835 in 'English' and 674 in 'Afrikaans' universities – 9 per cent of the total cohort of 49,000 African students. (These figures exclude the 30,000 taking correspondence courses with UNISA and 21,500 at the new Vista campus in Soweto; cf. Badat 1990: 80–1.)

⁴⁰'Zondo's rise from poverty to the bench', *City Press*, 29 April 2015; 'Judges of the labour court: Ray Zondo', *Consultus*, May 1998, p. 29.

⁴¹'New judges: Sisi Khampepe', *The Advocate*, April 2001, p. 22; 'Judges: Justice Sisi Khampepe'.

had served a decade on Robben Island for his membership of the PAC, was another prominent member of the BLA executive. The BLA's activities focused on black professional training and affirmative action, looking particularly to African-American lawyers practising in the USA as a source of support and inspiration (Gibbs 2018).

The BLA also had a far more prickly relationship with the 'white liberal [legal establishment] to whom black lawyers [feel they have been professionally] subordinated'.⁴² Dikgang Moseneke (2016: 4957–82) recalled being excluded from lucrative commercial work; only after 1994 did corporate and government briefs flow across his desk. It is no coincidence that he titled his memoirs *My Own Liberator*.

Because of these entrenched patterns of racial discrimination, the Bantustans remained an important nexus of black professional formation despite the growth of the township law firms in the 1970s and 1980s. One factor was the weight of numbers. While black lawyers' numbers rose to 700 by 1993, they still made up only 10 per cent of the profession. Moreover, they were still professionally sidelined. Only a handful of black lawyers regularly received lucrative briefs from the captains of mining and industry. It was only in the very final years of apartheid that Fikile Bam (1937–2011), an Eastern Cape struggle lawyer, became the first African partner in a 'blue-chip' Johannesburg law firm, for instance.⁴³

Given these persistent structural inequalities, the Bantustans played a continuing role in the careers of many African lawyers even in the final decade of apartheid. Township lawyers, for instance, got themselves admitted into the law societies and bar councils of the Bantustans in order to increase their caseload. Indeed, the close functional connections between the PWV city region and surrounding Bantustans (especially the peri-urban blocks of Bophuthatswana) meant that many black lawyers 'bounced' between different court divisions. Dikgang Moseneke's (2016: 2773–3617) memoirs provide vivid examples. A proud resident of Tshwane/Pretoria, he describes in loving detail acting as a lawyer to his favourite township football club, Mamelodi Sundowns. Yet this most urbane lawyer built an extensive caseload with businessmen in nearby Bophuthatswana. He was also given briefs by attorneys as far away as Transkei, who were anxious to support the first African advocate at the Pretoria bar.⁴⁴

⁴²Karis-Gerhart Collection, interview with Dikgang Moseneke, Pretoria, 2 July 1980. See also Broun (2000).

⁴³LRCOHP interview, Fikile Bam, 29 November 2007. Bam's career had successfully tacked between the Bantustans and the cities. After imprisonment on Robben Island, he trained as an advocate in Johannesburg. In the 1980s, he returned to the Eastern Cape, where he became president of the Transkei bar, before returning to Johannesburg around the time of South Africa's democratic transition.

⁴⁴The career trajectories of Mogoeng and Nkabinde within the North West court division are also indicative. CCOHP interviews: Mogoeng Mogoeng, 2 February 2012; Bess Nkabinde, 14 December 2011.

Such patterns of exclusion help us understand why the first African lawyer to be raised to the bench in 1994 was an advocate practising in the Transkei (Bantustan) court division, Tholakele Madala. Predictably, when Madala was placed in South Africa's Constitutional Court a year later he faced a deluge of criticism from the white legal establishment: that he was an inexperienced bumpkin from a Bantustan backwater. In turn, the BLA rushed to his defence – the first of many set-piece battles over the racial transformation of the legal profession (Ntsebeza 2004; Radebe 2012).⁴⁵ Thus, the legacies of the Bantustans fed controversies between the BLA and the liberal legal establishment.

Legacies: 'legal barbarism' versus 'Eastern Cape pride'

The collapse of apartheid's formal structures of segregation came at a time when the South African economy – and thus the legal profession itself – was transformed by globalization. South Africa was at the heart of this burgeoning commerce; its big five law firms and multinational companies were involved in deals across the continent (Klaaren 2016). This allowed some senior lawyers, who had started their careers in the Bantustans, to move to the heart of South Africa's corporate and legal establishment.⁴⁶ Take the example of the noted human rights lawyer Dumisa Ntsebeza. In the 1980s, when he worked at Sangoni Partners in the Transkei – then the largest black law firm in South Africa – his commercial work was mainly confined to handling mortgages and land conveyancing.⁴⁷ After 1994, Ntsebeza left the Transkei: first a Truth and Reconciliation Commissioner, he then practised at the Cape Town and Johannesburg bars. He also picked up a slew of directorships, including the chairmanship of Barloworld, a diversified industrial and logistics conglomerate, listed on five stock exchanges from South Africa to Switzerland, whose commercial footprint expanded across the African continent during the 1990s.⁴⁸

While most business in South Africa continued to be transacted in the established legal centres at the Cape Town, Durban, Johannesburg and Pretoria High Courts,⁴⁹ certain important fields of commercial law were connected to the former Bantustans. Government infrastructural expenditures poured into these poor regions. In particular, mining also brought corporates into the chiefdom areas – most notably in Zululand, Transkei's Wild Coast and the North West platinum belt. The role played by well-connected lawyers here is suggested

⁴⁵CCOHP interview, Albie Sachs, 15 November 2011.

⁴⁶The biographical notes on senior advocates and judges profiled in the pages of *The Advocate* are suggestive.

⁴⁷At this time, white radicals such as George Bizos and Sydney Kentridge were receiving lucrative briefs from the captains of mining and industry at the Johannesburg bar. Ismail Mahomed was probably the only black advocate to prosper from these lucrative legal briefs during apartheid (cf. Bizos 2007: 143, 307, 403, 428).

⁴⁸'Profile: Dumisa Ntsebeza', *Who's Who Southern Africa*.

⁴⁹Some sense of the geographic weighting is given by the distribution of South Africa's 2,571 advocates: in 2014, just sixty-six practised in the former Bantustans; 2,331 were based in Cape Town, Durban, Johannesburg or Pretoria (cf. 'Black advocates cite racism as they feel the financial pinch', *Sunday Times*, 10 May 2015).

by the career of Kgomotso Moroka, the daughter of the famous Sowetan power couple Dr Nthatho and Sally Motlana. Schooled in Soweto, Moroka started her career as a Bophuthatswana prosecutor and magistrate, before coming to the Johannesburg bar and eventually practising as a senior counsel. Among many company directorships, in 2010 she became the first female chair of Royal Bafokeng Platinum – a mining corporation whose holdings span the chieftaincy lands of Bophuthatswana and the North West.⁵⁰

In post-apartheid South Africa, it was also possible to make a successful judicial career in the court divisions of the former Bantustans. The best-known example of this career path can be seen in the rapid rise of Mogoeng Mogoeng, who was promoted directly from the Bophuthatswana/North West bench to the Constitutional Court and then was controversially made South Africa's chief justice in 2011. Among Mogoeng's many assumed flaws that were criticized by the liberal legal establishment (once again) was that he was a country bumpkin who hailed from a Bantustan backwater: that the cause of racial transformation threatened the integrity of the judiciary (de Vos 2009; 2011).⁵¹ Yet if we step aside from the specific controversies that surrounded Mogoeng in 2011, it is important to note that respected Constitutional Court justices such as Mbuyiseli Madlanga had spent parts of their careers in 'Bantustan backwaters'. These career trajectories were possible because, even after the Bantustans were re-incorporated into post-apartheid South Africa, the old courts at Bophuthatswana (Mafikeng), Ciskei (Bhisho) and Transkei (Mthatha) were retained as separate divisions of the High Court.⁵²

At the same time, the legal profession faced a crisis. First, an elite-driven process of economic empowerment – far greater than the Africanization programmes seen in the Bantustan era – saw a scramble for assets. Lawyers, more than most, faced difficult questions about the fashioning of commercial and state power in the new South Africa. South African debates have generally focused on corruption and malfeasance at the centre of the post-apartheid state (Bhorat *et al.* 2017; Southall 2011). Here I emphasize the significance of Bantustan legacies (see also Lodge 2005).

On the one hand, a series of lawyer/judge-led commissions of inquiry cleaned apartheid's Augean stables – not least in the former Bantustans, which had played a central role in the project of creating a co-opted African elite. In the former Bophuthatswana, an inquiry led by the Durban lawyer Thembile Louis Skweyiya discovered that Prime Minister Lucas Mangope had embezzled R22 million (Manson 2011: 69). Similarly, a series of inquiries in the Transkei uprooted

⁵⁰Executive profile: Kgomotso Ditsebe Moroka SC, BProc, LLB'. KGC, Reel 100, biographical files: Kgomotso Moroka.

⁵¹The critics of Mogoeng have now changed their minds (Tolsi 2017).

⁵²The Ciskei and Transkei were merged into one Eastern Cape court division in 2013, but Bhisho and Mthatha remain seats of the court with their own societies of advocates. Attempts to bring the Venda court division into a wider post-apartheid Limpopo division have taken longer because of administrative infighting.

deeply ingrained patterns of corruption.⁵³ Indeed, one branch of the largest black-owned accountancy firm in South Africa was founded by Nonkululeko Gobodo, an Mthatha-born chartered accountant who cut her teeth investigating Kaiser Matanzima's corrupt business deals.⁵⁴

At the same time, investigative journalists systematically covered the re-emergence in the new South Africa of the commercial lawyers and crooks, such as Liston Ntshongwana, who had once been enmeshed in the brutal world of Bantustan business deals.⁵⁵ The odyssey made by Vusi Pikoli also throws light into this murky milieu. Having studied at the prestigious St Johns College in Mthatha, he was reading for a BProc degree at Fort Hare when he fled the country to join the ANC in exile. Pikoli completed his studies in Lesotho, rising high in the ranks of the exiles. On his return to South Africa, he took a series of senior posts in the post-1994 Ministry of Justice, charged with re-incorporating the Bantustans into a single post-apartheid bureaucracy. This sensitive task rapidly dragged him into a series of investigations against old ANC comrades – not least his best friend from law school days Ngoako Ramatlhodi, who as premier of Limpopo had built himself a 'Pumpkin Palace' from the profits allegedly made through insider dealings (Pikoli and Weiner 2013: 3–7, 12–13, 22–4, 108–11, 186–93).

Dismissed from his post for pursuing another investigation into South Africa's corrupt police chief, Pikoli was thrown a lifeline by his old Mthatha friend Nonkululeko Gobodo. She hired him to run her firm's new forensic investigation unit. But soon after the merger of Gobodo with Sizwe-Ntsaluba to form the largest black accountancy firm in the country in 2011, Pikoli was eased out of his job. Apparently, the firm found its lucrative government contracts coming under pressure from ANC ministers.⁵⁶ Pikoli found himself shunned by South Africa's corporate establishment. Discussions with Price Waterhouse Coopers 'fizzled out ... because I was too much of a risk'. Even an organization titled Business Against Crime backed away from hiring him as its CEO (Pikoli and Weiner 2013: 326–32).

South Africa's legal profession also faced crisis on a second front. Entrenched patterns of segregation remained within the profession, leading to persistent questions about the nature of 'transformation' and 'liberation'. While the number of black attorneys and advocates increased exponentially in the post-apartheid period, white lawyers still made up the majority of the profession, particularly

⁵³*Daily Dispatch*, 24 July 1990, 28 August 1992, 3 December 1992, 2 February 1993, 3 May 1993. See also Alexander (1988) and van Reenen (1988).

⁵⁴'First black woman CA takes her roots into account', *City Press*, 4 April 2010; 'Winning women – Nonkululeko Gobodo: adding change', *City Press*, 25 August 2013.

⁵⁵See, for example, 'Liston Ntshongwana: new man in business', *Noseweek* 11 (1 March 1995) <<http://www.noseweek.co.za/article/509/LISTON-NTSHONGWANA-NEW-MAN-IN-BUSINESS-hellip;#sthash.RBClaI3Q.dpuf>>, accessed 17 June 2017.

⁵⁶Crucially, these government contracts allowed the firm to compete against established white firms that specialized in corporate and government work.

in the senior echelons: they accounted for 1,801 of the country's 2,571 advocates (i.e. barristers) in 2014, for instance.⁵⁷

One important aspect of this debate about 'transformation' concerned the persistent patterns of inequality within South Africa's university law schools, which fed the legal profession with fresh graduates each year (Klaaren 2020). In some senses, there were huge structural transformations of South Africa's segregated universities. The inferior BProc degrees, once offered by the Bantustan universities, were scrapped in favour of a new undergraduate-level LLB degree that would allow direct entry into the attorney's profession. Many law schools, which would be described by South African educationalists as HWIs (Historically White Institutions), also expanded student numbers and promoted the transformation of their student bodies. By the 2010s, the majority of students studying law were African.⁵⁸ At the same time, many indicators suggested that the rapid, poorly resourced expansion of student numbers had brought deep troubles. Only 20 per cent of law students completed their degrees within the requisite four years and 50 per cent of graduates could not find work in the profession. An LLB crisis summit convened by the South African Law Society noted that the sector 'needed a significant increase in resources ... in order to improve the quality of their legal education'. Other lawyers, speaking on condition of anonymity, bluntly claimed that South African universities were producing illiterate, innumerate, 'legal barbarians' (Jenvy 2013).⁵⁹

The crisis ran deepest in the old Bantustan universities, which trained around a quarter of LLB students in the 2010s.⁶⁰ For Thembeke Ngcukaitobi (b. 1976), one of the brightest legal stars of his generation, the collapse of legal training in the Bantustans was a particularly painful subject. Ngcukaitobi had grown up in rural Transkei in straightened circumstances after his father died, and a Bantustan law bursary had provided him with a vital springboard into the profession. He first studied law at the University of Transkei when it was still a relatively respected degree, before winning postgraduate scholarships to Rhodes University and the London School of Economics. In an interview in 2007 he reflected on the general collapse of education in the former Bantustans in the post-apartheid era.

⁵⁷In 2014, whites made up 14,694 of the 23,712-strong attorney's profession (cf. 'Black advocates cite racism as they feel the financial pinch', *Sunday Times*, 10 May 2015). More broadly, see Pruitt (2002: 563) and Klaaren (2020).

⁵⁸These figures come from the Law Society of South Africa's 'Statistics for the legal profession' for 2010 and 2017 (<<http://www.lssa.org.za/about-us/about-the-attorneys-profession/lssa-lead-annual-statistics>>, accessed 16 June 2017). The three largest law schools in HWIs – the Universities of Free State (468 first-year LLB students), KwaZulu Natal (365 students) and Johannesburg (234) – expanded their intakes by admitting black students.

⁵⁹See also the undated 'Legal education in crisis: joint press statement' from the South African Law Deans Association, the Law Society of South Africa and the General Bar Council (<<http://www.lssa.org.za/upload/documents/LLB%20SUMMIT%20PRESS%20RELEASE.pdf>>, accessed 16 October 2017).

⁶⁰A number of the old Bantustan universities – notably Fort Hare (280) and Zululand (254) – had particularly large LLB intakes. Overall, the old Bantustan universities had 1,277 (26 per cent) of the total first-year LLB students; the University of the Western Cape took another 387 students (8 per cent). The HWIs together had 1,886 students (38 per cent) and the University of South Africa, a distance-learning institution, had 1,381 students (28 per cent). Cf. p. 17 in the Law Society of South Africa's 'Statistics for the legal profession' for 2010 and 2017 (<<http://www.lssa.org.za/about-us/about-the-attorneys-profession/lssa-lead-annual-statistics>>, accessed 16 June 2017).

His secondary school in Cala village, which had once been relatively well resourced by the Matanzima government, was quite literally falling apart now that ‘those people who are lucky to have money and resources have simply left the village’.⁶¹ Much the same was true of Ngcukaitobi’s alma mater, the University of Transkei – now renamed Walter Sisulu University – whose troubled undergraduate law degree was threatened with closure by the South African Council of Higher Education. It lacked not only adequately qualified teaching staff but even functional classrooms.⁶²

By contrast, South Africa’s top-rated (and most expensive) law school at the University of Cape Town remained a privileged enclave. From 2006 to 2013, no more than 14 per cent of its LLB graduates were black. African students spoke of sniggers and snide comments when the lecturers taught modules on customary law. ‘In a country where the legal profession is still radically untransformed, the fact that UCT is producing so few black lawyers only serves to compound the larger social problems,’ wrote a group of students linked to the protest movement #RhodesMustFall (Lorenzen *et al.* 2015).

At this troubled moment, the funerals of the passing generation of senior lawyers and judges – great gatherings of South Africa’s interconnected business, political and legal worlds – provided an opportunity to reflect on what might constitute a life well lived. Often striking in these eulogies were appeals to a professional morality, identity and history rooted in the Homelands. Judge Fikile Bam (1937–2011) chose to be interred on his family’s farm in rural Transkei. The Archbishop of Cape Town preached the sermon:

God in Christ, the second person of the Trinity, who was not afraid to leave the power and the glory of heaven, to be born amongst sheep and cattle ... I thank God for him [Fikile Bam], and for Christian lawyers like him ... Let me say to those of you here, here who wield power and influence, especially in these areas of law and justice – let your lights shine as Bro Fiks did! ... Be vigilant, for the sake of our country. (Makgoba 2011)

Similar themes thread through Vusi Pikoli’s starkly titled memoir *My Second Initiation*. The back cover explains that the book’s title alludes to Pikoli’s life journey ‘from his first graduation into manhood [i.e. circumcision] in the hills of the Eastern Cape to his second life-shaping experience in the corridors of power’. One chapter explains the significance of his full name, Vusumzi: ‘Awaken the family’/‘Restore family values’. The final chapters discuss his role in the formation of the Council for the Advancement of the South African Constitution (Pikoli and Weiner 2013: 3–7, 328–31, 351–62).⁶³

⁶¹LRCOHP interview, Thembeke Ngcukaitobi, 7 December 2007.

⁶²‘WSU faces losing law degree’, *Daily Dispatch*, 18 April 2017; ‘Four universities face law degree closures’, *Mail and Guardian*, 28 April 2018.

⁶³It is no coincidence that Vusumzi Pikoli’s sons are named Mzuvukile (‘The house is restored’) and Vusisizwe (‘Awake/restore the nation’).

Perhaps the loudest expression of these sentiments came in the media and Twitter storm that followed the 2016 *State of Capture* judgment. (The ruling forced the government to release the public prosecutor's *State of Capture* report into President Jacob Zuma's corrupt business affairs.) The African advocates who defeated the government in court, live on television, were fêted. Many praised their 'black excellence' and 'pure excellence'. A handful also emphasized the regional hinterland of 'these legal giants ... [who] make the Eastern Cape proud'.⁶⁴ In fact, we can be more specific: both Adv. Dumisa Ntsebeza and Adv. Thembeke Ngcukaitobi hail from the tiny town of Cala, in the former Transkei – the historic hinterland of many of South Africa's leading African lawyers.

Conclusion: 'clever blacks'

This article has examined the deeply ambiguous role played by the Homelands in shaping the African elites and professions across the twentieth century, a consequence of South Africa's deeply patterned history of settler colonialism and apartheid. In particular, I have focused on the 'legal field': the complex relationship between professional formation, elite reproduction and the exercise of political power (Bourdieu 1987; Dezalay and Garth 2011). Writing in the late 2010s, at this moment of political crisis in South Africa, it seems important to think about how professions – and lawyers in particular – have historically grappled with questions of elite accumulation and advancement, professional probity, and the public good (Ngcukaitobi 2018).

How might the histories of the legal profession in the Homelands relate to these broad themes? One theme threading through this article is the irony that the segregated, marginal Homelands nonetheless 'created space, which was singularly absent in urban apartheid, for [the development of] black enterprises' and professions (Moseneke 2016: 2922–61). These spatially entangled legacies of segregation have continued long into the post-apartheid era. On the one hand, broader debates around the 'decolonization' of the legal profession point towards the deep, unresolved, historic inequalities: that African lawyers (and black professionals in general) remain marginalized from the lucrative, urban centres of commercial enterprise. On the other, repeated declarations of 'black excellence' – that assert the deep histories of professional accomplishment across the twentieth century – challenge the detractors who slight African lawyers as 'legal barbarians'.

The celebration of black legal excellence, which followed the *State of Capture* judgment, also speaks to a second set of controversies about professional formation and identity. After a quarter century of unbroken ANC rule, with the dominant party system in crisis, the legal and democratic activism of South Africa's civil society organizations has become increasingly strident (Brett 2015). Black lawyers (and more generally the professional middle class) have played an important role

⁶⁴See, for example, 'The three legal giants who fought to bring you the State Capture report', *Times*, 3 November 2011; 'The sheer brilliance of advocate Thembeke Ngcukaitobi', *Drum Digital*, 2 November 2016.

in organizations such as the Council for the Advancement of the South African Constitution. Such constitutional activism led by a professional middle class has been important elsewhere in Southern Africa – for instance in Zimbabwe (Ncube 1997; Tsunga 2009), Zambia (Gould 2006) and Botswana (Werbner 2004). In the dying years of Jacob Zuma’s government, judicial activism played an important role in curbing the executive authority of the presidency. During his many ongoing court battles, President Zuma repeatedly admonished “the clever blacks” who have become the most eloquent in criticizing themselves’.⁶⁵ If South Africa’s polygamous president, Jacob Zuma, made play of his plebeian, Zulu hinterland, then celebrations of ‘black’ and ‘Eastern Cape excellence’ point towards alternative histories of elite formation, which, I would argue, are often rooted in the Homelands (Nkosi 2016).

This article has focused on the ways in which the legacies of apartheid – and in particular the Bantustans – have shaped the South African legal profession. Such questions about how the legal field has been shaped by ‘the shadow of empire’ are pressing in many other parts of Africa and the global South too (Dezalay 2015; Dezalay and Garth 2010). In this wider sense, my article is a contribution to these broader debates.

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References

- Abel, R. (1995) *Politics by Other Means: law in the struggle against apartheid, 1980–1994*. Oxford: Taylor and Francis.
- Adebanwi, W. (2014) *Yoruba Elites and Ethnic Politics in Nigeria: Obafeni Awolowo and corporate agency*. Cambridge: Cambridge University Press.
- Alexander, G. (1988) *Commission of Inquiry into the Department of Works and Engineering: third report with particular reference to gambling rights and related matters*. Mthatha: Government Printer.
- Badat, S. (1990) ‘The expansion of black tertiary education’ in H. Wolpe, E. Unterhalter and T. Botha (eds), *Education in a Future South Africa: policy issues for transformation*. London: Heinemann.
- Basner, M. (1993) *Am I an African? The political memoirs of H. M. Basner*. Johannesburg: Witwatersrand University Press.
- Beinart, W. (2012) ‘Beyond the Homelands: some ideas about the history of African rural areas in South Africa’, *South African Historical Journal* 64 (1): 5–21.

⁶⁵‘Zuma scolds clever blacks’, *City Press*, 29 April 2015.

- Berkley, H. (1979) 'The mission that failed', *The Spectator*, 4 August.
- Bhorat, H., M. Buthelezi, I. Chipkin, S. Duma, L. Mondli, C. Peter, M. Qobo, M. Swilling and H. Friedenstein (2017) *Betrayal of a Promise: how South Africa is being stolen*. Johannesburg: Public Affairs Research Institute, University of the Witwatersrand.
- Bizos, G. (2007) *Odyssey to Freedom: a memoir by the world-renowned human rights advocate, friend and lawyer to Nelson Mandela*. Houghton: Random House.
- Bloomberg, D. (2007) *My Times: the memoirs of David Bloomberg: man of theatre, lawyer, businessman and former mayor of Cape Town*. Cape Town: Fernwood Press.
- Booth, D. (2009) 'Elites, governance and the public interest in Africa: working with the grain?' Discussion paper 6. London: Overseas Development Institute.
- Bourdieu, P. (1987) 'The force of law: towards a sociology of the juridical field', *Hastings Law Journal* 38: 805–53.
- Brett, P. (2015) 'Cause lawyers sans frontières: juristes Sud-Africains et judiciarisation du politique en Afrique australe', *Politique Africaine* 138 (2): 93–119.
- Broun, K. (2000) *Black Lawyers, White Courts: the soul of South African law*. Athens OH: Ohio University Press.
- Broun, K. (2012) *Saving Nelson Mandela: the Rivonia trial and the fate of South Africa*. New York NY: Oxford University Press.
- Callinicos, L. (2004) *Oliver Tambo: beyond the Engeli Mountains*. Cape Town: Longman.
- de Vos, P. (2009) 'What do we mean when we talk about transformation?', *Constitutionally Speaking*, 27 July <<http://constitutionallyspeaking.co.za/what-do-we-talk-about-when-we-talk-about-transformation/>>, accessed 16 June 2017.
- de Vos, P. (2011) 'On the appointment of a chief justice', *Constitutionally Speaking*, 29 July <<https://constitutionallyspeaking.co.za/on-the-appointment-of-a-chief-justice/>>, accessed 16 June 2017.
- Dezalay, S. (2015) 'Les juristes en Afrique: entre trajectoires d'État, sillons d'empire et mondialisation', *Politique Africaine* 138 (2): 5–23.
- Dezalay, S. (2017) 'Lawyers' empire on the (African) colonial margins', *International Journal of the Legal Profession* 24 (1): 22–30.
- Dezalay, Y. and B. Garth (2002) *The Internationalisation of the Palace Wars: lawyers, economists and the contest to transform Latin American states*. Chicago IL: University of Chicago Press.
- Dezalay, Y. and B. Garth (2010) *Asian Legal Revivals: lawyers in the shadow of empire*. London: University of Chicago Press.
- Dezalay, Y. and B. Garth (2011) 'State politics and legal markets', *Comparative Sociology* 10: 38–66.
- Gibbs, T. (2014) *Mandela's Kinsmen: nationalist elites and apartheid's first Bantustan*. Oxford: James Currey.
- Gibbs, T. (2018) 'Nelson Mandela and South Africa's transformative constitution'. Paper presented at a seminar, Johannesburg.
- Gould, J. (2006) 'Strong bar, weak state? Lawyers, liberalism and state formation in Zambia', *Development and Change* 37 (4): 921–41.

- Halliday, T., L. Karpik and M. Feeley (eds) (2012) *Fates of Political Liberalism in the British Post-colony: the politics of the legal complex*. Cambridge: Cambridge University Press.
- Hull, E. (2017) *Contingent Citizens: professional aspiration in a South African hospital*. London: Bloomsbury.
- Jenvy, N. (2013) 'Low-skilled lawyers prompt calls for law degree reform', *University World News* 276 (15 June) <<http://www.universityworldnews.com/article.php?story=20130613155812925>>, accessed 16 June 2017.
- Karekwaivanane, G. (2016) "'Through the narrow door": narratives of the first generation of African lawyers in Zimbabwe', *Africa* 86 (1): 59–77.
- Karekwaivanane, G. (2017) *The Struggle over State Power: law and politics since 1950*. Cambridge: Cambridge University Press.
- Klaaren, J. (2016) 'African corporate lawyering and globalisation', *International Journal of the Legal Profession* 22 (2): 226–42.
- Klaaren, J. (2020) 'The contemporary South African legal profession and its transformations' in R. Abel, O. Hammerslev, U. Schultz and H. Sommerlad (eds), *Lawyers in 21st-century Societies*. London: Hart Publishing.
- Klingman, S. (1998) *Bram Fischer: Afrikaner revolutionary*. Amherst MA: University of Massachusetts Press.
- Koyana-Letlaka, P. T. (2014) *This is My Life: a South African journey*. Bloomington IN: Xlibris.
- Kuper, L. (1964) *An African Bourgeoisie: race, class and politics in South Africa*. London: Yale University Press.
- Lekgoathi, S. P. (2007) 'Teacher militancy in the rural northern Transvaal community of Zebediela, 1986–1994', *South African Historical Journal* 58 (1): 226–52.
- Lodge, T. (2005) 'Provincial government and state authority in South Africa', *Journal of Southern African Studies* 31 (4): 737–53.
- Lodge, T. (2006) *Mandela: a critical life*. Oxford: Oxford University Press.
- Lorenzen, J., T. Malusi and K. Minofu (2015) 'On being black in UCT's law faculty', 6 May <https://www.groundup.org.za/article/being-black-ucts-law-faculty_2907/>, accessed 16 June 2017.
- Luckham, R. (1978) 'Imperialism, law and structural dependence: the Ghanaian legal profession', *Development and Change* 9 (2): 201–43.
- Makgoba, S. (2011) 'Funeral sermon for Judge Fikile Bam', 28 December <<http://archbishop.anglicanchurchsa.org/2011/12/funeral-sermon-for-judge-fikile-bam.html>>, accessed 16 June 2017.
- Mandela, N. (1994) *Long Walk to Freedom*. London: Abacus.
- Manson, A. H. (2011) "'Punching above its weight": the Mafikeng Anti-Repression Forum (Maref) and the fall of Bophuthatswana', *African Historical Review* 43 (2): 55–83.
- Marks, S. (1994) *Divided Sisterhood: race, class and gender in the South African nursing profession*. Basingstoke: Macmillan.
- Mda, Z. (2012) *Sometimes There Is a Void: memoirs of an outsider*. New York NY: Farrar, Straus and Giroux.
- Moguerane, K. (2016) 'Black landlords, their tenants, and the Natives Land Act of 1913', *Journal of Southern African Studies* 42 (2): 243–66.
- Moseneke, D. (2016) *My Own Liberator: a memoir*. Johannesburg: Picador Africa.
- Note: 'page' numbers in citations refer to Kindle locations.

- Mqingwana, V. and J. Peires (2010) *Chris Hani Municipality Liberation Heritage Route: icon site guide*. Grahamstown: Rhodes University.
- Ncube, W. (1997) 'Lawyers against the law? Judges and the legal profession in Rhodesia and Zimbabwe', *Zimbabwe Law Review* 14: 108–25.
- Ndima, D. (2004) *The Law of Commoners and Kings: narratives of a rural Transkei magistrate*. Pretoria: University of South Africa Press.
- Ngcukaitobi, T. (2018) *The Land Is Ours: black lawyers and the birth of constitutionalism in South Africa*. Cape Town: Penguin.
- Ngqulunga, B. (2017) *The Man who Founded the ANC: a biography of Pixley Ka Isaka Seme*. Johannesburg: Penguin.
- Nkosi, T. (2016) 'The clever blacks have spoken – Phosa', *News24*, 5 August <<https://www.news24.com/elections/news/the-clever-blacks-have-spoken-phosa-20160805>>, accessed 26 October 2019.
- Ntsebeza, D. (2004) 'Why a majority black bench is inevitable', *Sunday Times*, 25 July.
- Odendaal, A. (2012) *The Founders: the origins of the ANC and the struggle for democracy in South Africa*. Johannesburg: Jacana.
- Pikoli, V. and M. Weiner (2013) *My Second Initiation: the memoir of Vusi Pikoli*. Johannesburg: Picador.
- Pruitt, L. (2002) 'No black names on the letterhead? Efficient discrimination and the South African legal profession', *Michigan Journal of International Law* 23 (3): 545–676.
- Pue, W. (2016) *Lawyers' Empire: legal professions and cultural authority, 1780–1950*. Vancouver: University of British Columbia Press.
- Radebe, J. T. (2012) 'Paying tribute to the late judge of the Constitutional Court, Justice Tholi Madala'. Address given at the Annual General Meeting of Advocates for Transformation, Savoy Hotel, Mthatha, 23 June <http://www.justice.gov.za/m_speeches/2012/20120623_justice-madala.html>, accessed 17 June 2017.
- Randell, G. (1985) *Bench and Bar of the Eastern Cape*. Grahamstown: Grocott and Sherry.
- Rotberg, R. and D. Thompson (2000) *Truth v. Justice: the morality of truth commissions*. Princeton NJ: Princeton University Press.
- Sachs, A. (1973) *Justice in South Africa*. Berkeley CA: University of California Press.
- SAIRR (1959–60) *A Survey of Race Relations in South Africa*. Johannesburg: South African Institute of Race Relations (SAIRR).
- SAIRR (1968) *A Survey of Race Relations in South Africa*. Johannesburg: South African Institute of Race Relations (SAIRR).
- SAIRR (1976) *A Survey of Race Relations in South Africa*. Johannesburg: South African Institute of Race Relations (SAIRR).
- SAIRR (1981) *A Survey of Race Relations in South Africa*. Johannesburg: South African Institute of Race Relations (SAIRR).
- Shafari, M. (2007) 'A new history of colonial lawyering: Likhovski and legal identities in the British Empire', *Law and Social Inquiry* 32 (4): 1059–94.
- Shisuba, M. (2004) 'Notes on the history and development of the Transkei Society of Advocates', *Advocate* 18–22.
- Sitas, A. (1985) 'Inanda, August 1985: "Where wealth and power and blood reign worshipped gods"', *South African Labour Bulletin* 11 (4): 85–121.

- Southall, R. (1982) *South Africa's Transkei: the political economy of an 'independent' Bantustan*. London: Heinemann.
- Southall, R. (2011) 'Family and favour at the court of Jacob Zuma', *Review of African Political Economy* 38 (130): 617–26.
- Streek, B. and R. Wicksteed (1981) *Render Unto Kaiser: a Transkei dossier*. Johannesburg: Ravan Press.
- Tolsi, N. (2017) 'Mogoeng: from pariah to saviour', *Mail and Guardian*, 15 April.
- Tsunga, A. (2009) 'The professional trajectory of a human rights lawyer in Zimbabwe between 2000 and 2008', *Journal of Southern African Studies* 35: 977–91.
- Uys, J. F. (1970) *Biographical Directory of South African Lawyers*. Johannesburg: Juridata.
- van Reenen, T. H. (1988) *Report of the Commission of Inquiry into the Department of Works and Energy on the Butterworth and Ezibeleni Housing Contracts*. Mthatha: Government Printer.
- Walshe, P. (1970) *The Rise of African Nationalism in South Africa: the African National Congress, 1912–1952*. London: C. Hurst.
- Werbner, R. (2004) *Reasonable Radicals and Citizenship in Botswana: the public anthropology of Kalanga elites*. Bloomington IN: Indiana University Press.

Abstract

The history of South Africa's urban-based 'struggle lawyers' – a trajectory epitomized by Nelson Mandela – is much discussed by historians and biographers, reflecting a broader vein of historiography that celebrates anti-colonial legal activism. However, it was South Africa's 'Native Reserves' and Bantustans that produced the majority of African lawyers for much of the twentieth century. Indeed, two-thirds of the African justices who have sat on the post-apartheid Constitutional Court either practised or trained in the Bantustans during the apartheid era. The purpose of this article is thus to reappraise South Africa's 'legal field' – the complex relationship between professional formation, elite reproduction and the exercise of political power – by tracing the ambiguous role played by the Native Reserves/Bantustans in shaping the African legal profession across the twentieth century. How did African lawyers, persistently marginalized by century-long patterns of exclusion, nevertheless construct an elite profession within the confines of segregation and apartheid? How might we link the histories of the Bantustans with the better-known 'struggle historiography' that emphasizes the role of political and legal activism in the cities? And what are the implications of South Africa's segregated history for debates about the 'decolonization' of the legal profession in the post-apartheid era?

Résumé

L'histoire des « struggle lawyers » d'Afrique du Sud, juristes engagés urbains (une trajectoire dont Nelson Mandela est l'illustration parfaite), est l'objet de nombreuses discussions d'historiens et de biographes, reflétant une veine d'historiographie plus large qui vante l'activisme juridique anticolonial. Or, pendant une grande partie du vingtième siècle, la majorité des juristes africains étaient issus des « Native Reserves » et des bantoustans d'Afrique du Sud. En effet, les deux tiers des juges africains qui siégeaient à la Cour constitutionnelle post-apartheid

avaient soit exercé, soit effectué leur formation, dans les bantoustans durant l'apartheid. L'objet de cet article est donc de réévaluer le « champ juridique » d'Afrique du Sud (la relation complexe entre la formation professionnelle, la reproduction des élites et l'exercice du pouvoir politique) en étudiant le rôle ambigu joué par les Native Reserves/bantoustans dans le façonnage de la profession juridique africaine tout au long du vingtième siècle. Comment les juristes africains, marginalisés de façon persistante par des schémas d'exclusion durant tout un siècle, ont-ils malgré tout construit une profession élitaine dans un cadre de ségrégation et d'apartheid ? Quels liens pourrions-nous faire entre les histoires des bantoustans et l'« historiographie de la lutte », mieux connue, qui souligne le rôle de l'activisme politique et juridique dans les villes ? Et quelles sont les implications de l'histoire ségréguée de l'Afrique du Sud pour les débats sur la « décolonisation » de la profession juridique dans l'ère post-apartheid ?