

‘THROUGH THE NARROW DOOR’: NARRATIVES OF THE FIRST GENERATION OF AFRICAN LAWYERS IN ZIMBABWE

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INTRODUCTION

While the body of historical and anthropological work on law in Zimbabwe has begun to grow in recent years (Alexander 2008; 2010; 2011; Jeater 2000; 2007; Tsunga 2009; Verheul 2014; Zimudzi 2004), a number of important questions about African lawyers remain unanswered. We still know very little about their backgrounds and what led them to join the legal profession. Even less is known about how they conceived of their roles as lawyers and about the personal and professional ideals they espoused. What is more, scant attention has been given to their contributions to the social, economic and political struggles of which they were a part. Did their actions aid the struggle against colonial rule, or did they legitimize the colonial legal system and bring Africans more firmly within the reach of the law? How did they negotiate their positions as members of the ‘colonized’ and as lawyers trained in colonial law, whose professions were tied to the legal system? Attending to these questions does more than just deepen our knowledge about this group of lawyers. It also enriches our understanding of the broader workings of the law in given historical contexts, nuances our understanding of African elites, and throws a light on the role of personal and professional ethics in shaping the decisions of social actors in Africa.

Outside a few studies on Southern Africa that have examined the role of prominent lawyers such as Nelson Mandela and Oliver Tambo in struggling against apartheid (Broun 2000; Sachs 1973) or the role played by lawyers’ organizations, including the Law Association of Zambia, as part of broader political coalitions (Gould 2006), most of the historical literature on African lawyers in countries following the common law tradition is focused on Nigeria and Ghana. A key theme in this literature has been the political involvement of these lawyers. Omoniyi Adewoye, for example, has argued that indigenous lawyers in Nigeria formed a ‘fearless bar’ and ‘constituted a threat to the prestige of the colonial rulers’ (Adewoye 1977). Chidi Oguamanam and Wesley Pue have similarly argued that Nigerian lawyers ‘challenged arbitrary power, asserted local values, [and] played to, but also promoted Nigeria’s incipient “public”’ (Oguamanam and Pue 2007: 781). For Bjorn Edsman, however, Ghanaian lawyers’ ‘opposition to the British did not signify opposition to the social order represented by alien rule, but signified resentment at being denied full recognition within it’ (Edsman 1979: 250). A second theme in the literature is the cultural role played by lawyers. Richard Rathbone, for example, has highlighted the contribution of

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indigenous lawyers in Gold Coast to the acceptance of English law among the coastal elite (Rathbone 1994). Mitra Sharafi argues that, during the early years of colonial rule, lawyers who were part of colonized populations acted as ‘cultural translators and ethnographic intermediaries’ who produced legal portraits of local communities for colonial administrators and aided the imposition of colonial rule (Sharafi 2007: 1061).

These studies provide valuable insights into the political and cultural agency of African lawyers. However, the experience of West African lawyers differed in important respects from that of their counterparts in British colonies in other regions. For instance, race was a much more important barrier to membership of the legal profession in East, Central and Southern Africa (Ghai 1987; Ross 1992; Joireman 2001). Consequently, most of the British colonies in these regions did not witness the development of a legal profession largely composed of members of the indigenous population. In addition, the argument that indigenous lawyers acted as ‘cultural translators and ethnographic intermediaries’ is more applicable to colonies where indigenous lawyers entered the profession around the time of colonial occupation. Furthermore, while these studies have documented the actions of these lawyers in some detail, their own voices remain largely absent.

There are, however, a few studies that have made productive use of the accounts and the experiences of individual legal professionals as a means of answering broader questions about politics and the administration of the law in colonial and postcolonial Africa (Widner 2001; Broun 2000). Jennifer Widner, for example, uses the experiences of the former Tanzanian Chief Justice, Francis Nyalali, as ‘a window for understanding the interaction between judges, politicians and publics’ and ‘the consequences for judicial independence and the rule of law’ (Widner 2001: 38). In this article, I build on this literature and examine the narratives of two members of the first generation of African lawyers in Zimbabwe: Kennedy Sibanda and Honour Mkushi. I focus specifically on their experiences as legal professionals between 1970 and 1990, an important period that witnessed the climax of the nationalist struggle, the transition to independence, and the brutal political repression of the first decade of independence.

I draw on Sibanda’s and Mkushi’s narratives in order to explore three main themes. First, I use their contributions to the political struggles of the period as a means of exploring the interplay between individual agency, law and politics across the two decades. In doing so, I chart a different course from much of the literature on law and colonialism (Chanock 1985; Moore 1986; Mann and Roberts 1991; Comaroff 2002) that has tended to focus on state officials, ‘traditional’ leaders and African litigants and not on lawyers who played important roles in shaping the course and outcomes of legal struggles. Second, these lawyers’ participation in the social and political struggles of the period was informed by a set of personal and professional ethics that were grounded in concerns about the welfare of the wider communities to which they belonged. Thus, their narratives enable us to uncover what Richard Werbner has described as ‘African concerns for the public good’ (Werbner 2004: 1; see also Yarrow 2008; 2011). This line of inquiry allows us to nuance the narrative of tyranny, disorder and neo-patrimonial politics that tends to dominate accounts of African politics and the role played by elites (Chabal and Daloz 1999; Daloz 2003). The narratives of Sibanda and Mkushi provide valuable insight into the development of their

personal and professional ethics over time and how these guided their work as lawyers. Of particular importance was the development, during the last years of settler rule, of their commitment to a substantive notion of justice that was at odds with the formalism espoused by the broader legal profession. However, it should be pointed out that their narratives are not reducible to simplistic accounts of personal triumph; nor did the two lawyers portray themselves as heroic individuals. During our conversations they shared stories of failure and frustration, as well as the moral dilemmas they encountered. Nevertheless, an underlying thread in their accounts was their desire to promote the common good and their efforts to contribute to this endeavour.

Third, I examine the process and impact of 'translation' within the legal arena and the role played by lawyers in this process. Building on studies in legal anthropology (Englund 2004; Merry 2006a; 2006b), I take the idea of indigenous lawyers as 'cultural translators' in a different direction to that which Sharafi has followed. I argue that these lawyers were cross-cultural brokers who were constantly involved in a two-way translation. On the one hand, they translated the concepts and stipulations of state law for their African clients; on the other, they translated their clients' grievances into the language of the law. This process of translation acted as a catalyst in the reshaping of African subjectivities and their conception of their relationship to the state. This was particularly important given the efforts of the Rhodesian authorities from the 1960s to define Africans as custom-bound ethnicized subjects (Comaroff 2002; Karekwaivanane 2011). In these circumstances, the work of lawyers as translators and intermediaries was also important in enabling Africans to claim and assert a different form of membership in the colonial polity: that of rights-bearing citizens (Cooper 2002; Cooper and Stoler 1997).

This article is primarily based on my interviews with these two lawyers in 2010 and 2011, in addition to archival sources from the National Archives of Zimbabwe and Sibanda's private archives. As with most narratives, the ones I draw on have been shaped by the context of their telling. I have therefore approached them both as sources of the past and as texts that are the product of concerns and agendas that are related to the present (Miescher 2001; Geiger 1997; Bozzoli 1991). In order to frame my core source material, I have also used thirteen interviews with lawyers who practised during the period as well as archival and secondary sources that document their experiences.¹ This has enabled me to come up with a clearer picture of the legal profession as a whole, and to gauge the experiences of Sibanda and Mkushi against those of other lawyers. Unfortunately, I was unable to interview the female lawyers who were part of this generation of African lawyers. The few whom I could locate were employed as High Court judges and were unavailable during the time I was conducting interviews. This certainly marks out an area for future research.

I begin by providing a brief account of the nature of the Rhodesian profession and the two lawyers' different paths into it. I then turn to an examination of the

¹Interviews with Simplisius Chihambakwe, Harare, 15 March 2009; Godfrey Chidyausiku, Harare, 14 March 2011; Simbi Mubako, Harare, 26 April 2012; Simpson Mutambanengwe, Harare, 13 April 2011; Kennedy Sibanda, Bulawayo, 28 November 2010; Honour Mkushi, Harare, 23 March 2011; Mordecai Mahlangu, Harare, 8 August 2014; Prince Machaya, Harare, 31 August 2014; and Sobuza Gula Ndebele, Harare, 20 August 2014.

role these lawyers played as ‘translators’ of the law. Next, I analyse the development of a self-image among African lawyers that transcended formalism and investigate how it informed their involvement in the nationalist struggle. Lastly, I focus on these lawyers’ efforts to navigate the complex political terrain of the first decade of independence.

BECOMING A LAWYER

Godfrey Chidyausiku, the sitting Chief Justice and a classmate of Honour Mkushi’s at university, summed up the difficulties that his generation of Africans were confronted with on their journey to become lawyers in the following terms: ‘we really had to push our way through the narrow gate from the beginning right up to the end.’² This assessment was confirmed by the oral and archival evidence that I collected. The first African lawyer in the colony, Herbert Chitepo, entered the profession in 1953, and as late as 1960 there were only three African lawyers in Southern Rhodesia. A similar situation prevailed in South Africa, where there were only thirteen African attorneys in 1962 out of a total number of 3,000 (Sachs 1973: 211). This was in stark contrast with Nigeria, where there were approximately 540 lawyers (Adewoye 1977: 179). By 1978, the situation in Rhodesia had improved marginally, but of the 175 attorneys and forty articulated clerks in the country, only five attorneys and seven clerks were Africans.³ The situation was similar with respect to advocates, as only seven of the country’s fifty-six advocates were Africans. Despite their modest numbers, during the 1970s these lawyers actively challenged the strictures of the legal profession and ultimately ‘revolted’ in 1973. The 1976 amendment to the Advocates and the Attorneys Acts I discuss below bore testimony to the success of their efforts to create space for themselves in the profession.

The difficulties faced by Africans who aspired to a career in the law were, in part, a reflection of the restrictive and conservative nature of the legal profession in Rhodesia. They were also the product of the settler state’s anxieties about members of the ‘colonized’ becoming lawyers: anxieties which, in turn, indicated the importance of law in the maintenance of settler rule. As Pierre Bourdieu observes, the law is a form of symbolic violence that imposes and consecrates the state’s vision of the social world (Bourdieu 1987). Importantly, it derives a significant degree of its symbolic power from within the ‘juridical field’ composed of legal professionals, where ‘juridical authority is produced and exercised’ (Bourdieu 1987: 816). Consequently, the distribution of the symbolic capital of this social field, or the question of who gets to be an ‘authorized interpreter’ of the law, is inherently political. The obstacles placed in the way of Africans who aspired to become lawyers were thus efforts to control the distribution of the symbolic capital of the juridical field. State officials in Rhodesia, and indeed in other parts of East and Southern Africa, were concerned that those Africans who

²Interview with Godfrey Chidyausiku, Harare, 14 March 2011.

³National Archives of Zimbabwe RG4, Committee of Enquiry into the Legal Profession, *Provisional Report*, April 1978. These figures exclude African lawyers who were training or practising outside the country.

became 'authorized interpreters' of the law would appropriate its power and undermine the authority of state officials. Opposition to African entry into the legal profession was also driven by the fear that Africans would gravitate towards politics. These fears found expression in the area of scholarship provision: while the government provided a limited number of scholarships for Africans to pursue university studies related to the teaching and medical professions, there was no such provision for the study of law (see also Ghai 1987; Ross 1992).⁴

As in South Africa, the exclusion of Africans from the Rhodesian legal profession was made easier by the existence of a large settler population from which lawyers could be drawn. In addition, the government found willing allies in members of the Rhodesian legal fraternity who jealously guarded the gates to the profession. From the early colonial period, the legal profession had been set up as a 'divided profession' consisting of attorneys and advocates. Attorneys could be approached directly by clients but were only permitted to appear on their behalf in the lower courts. In contrast, advocates could appear in the higher courts but could not be approached by clients directly and therefore had to rely on briefs from attorneys. This 'division of juridical labour' was in large part a means of controlling the supply and, by implication, the price of legal services in the colony. It also gave law firms a substantial amount of power that they used to restrict entry into the profession on the basis of race and gender. On the one hand, they had direct control over who could become an attorney, as this entailed serving for a period as an articled clerk in a law firm. On the other, law firms had indirect control over who could practise as an advocate as the latter depended on law firms for clients.

The specific circumstances that led individual members of the first generation of African lawyers into the legal profession were diverse. However, they generally shared an understanding of the instrumental and symbolic power of the law in the context of settler rule. This, in turn, fuelled a desire to gain possession of the symbolic capital that came with being a lawyer. Many hoped that the legal profession would provide an avenue for personal advancement and a means of aiding other Africans in their everyday struggles. Honour Mkushi's reasons for joining the legal profession were a combination of a desire to defend the rights of Africans and more personal concerns around honour and masculinity (Illiffe 2005: 282–305). He was born to a relatively well-off family in Gutu District, which formed part of what was then called Victoria Province. His father was a trained teacher who had taught for a few years before going into business. As a result, Mkushi was able to attend two prominent boarding schools for Africans: Bernard Mizeki College and Goromonzi High School. After completing his high school education, he went on to the University College of Rhodesia and Nyasaland (UCRN), where he elected to study law. Regarding his decision to become a lawyer, Mkushi explained:

my father had schooled me into believing the law profession was the right profession for a man, and it was the sort of profession he thought would equip me to go into the world and fight for myself ... I know very well that he pounded that into my mind and I

⁴Interview with Simbi Mubako, Harare, 26 April 2012.

never really let go, and thank God up to now I don't think I could have done any other profession.

As Jocelyn Alexander's work on political prisoners' memoirs shows, this concern with defending a threatened masculinity was something that Mkushi and his father shared with a host of African nationalists who were held in Rhodesian detention camps (Alexander 2008). Significantly, Mkushi spoke of his legal career almost as a vocation and much of his narrative revealed how being a lawyer was an important aspect of his identity.

By contrast, Kennedy Sibanda was born into a farming family of modest means in Plumtree District in Matabeleland South Province. Whereas Mkushi's lawyerly aspirations were partly rooted in the routine humiliation of African men under colonial rule, Sibanda's were more connected to the social struggles of African women. Sibanda had gone to school 'purely by accident', thanks to the relocation of the Tshabanda primary school to a new site that was within walking distance of the family's homestead. After three years at Tshabanda, he transferred to Solusi, a prominent Seventh Day Adventist mission school in the area, and completed his Junior Certificate there. He subsequently left for South Africa, where he got a place at the Kilnerton Institute in Pretoria to study for his matriculation board examinations. Sibanda's interest in the legal profession was kindled during his time in South Africa; there, he took part in discussions at a women's club meeting in a Johannesburg township where he spent his school holidays. It is not surprising, therefore, that in the mid-1970s Sibanda would work closely with the Bulawayo Young Women's Christian Association (YWCA) in their efforts to fight for the rights of African women in Rhodesia.

Entering the profession proved to be difficult for both men. For Mkushi, the difficulties ahead were made clear to him in law school. 'When I was at the university,' he recalled, 'they used to laugh at us [saying], "These are just going to fill up the unemployed ranks" because you didn't get a job.' These taunts were, in fact, founded on reality. In 1968, the year he began his studies, the first two African law graduates from the UCRN were struggling to get employment and ultimately left Rhodesia.⁵ For several months after his graduation, Mkushi was unable to find a job as a lawyer. However, he was fortunate to get the first opening that arose for a black articulated clerk in the 1970s at the law firm Winterton, Holmes and Hill. Mkushi joined the firm in 1971 and qualified as an attorney after three years. He stayed on for a further four years before leaving in 1979 to form his own law firm alongside Sidney Sawyer, a lawyer and a liberal politician. A few other lawyers, including Simplisius Chihambakwe, Prince Machaya and Patrick Chinamasa, would also become articulated clerks in the 1970s.

For most of Mkushi's colleagues, however, the experience was one of constant rejection by law firms.⁶ The only path that was open to them was to undertake another year of studies for a postgraduate law qualification that would enable them to join the Rhodesian Bar as advocates. However, those who entered the profession via this route soon found that they had to depend on the same law firms

⁵Interviews with Godfrey Chidyausiku, Harare, 14 March 2011; Simplisius Chihambakwe, Harare, 15 March 2009.

⁶*Ibid.*

that had refused to hire them for clients. Such was the fate of Sibanda. After leaving the Kilnerton Institute, he went on to complete a bachelor of arts degree and a law degree at the University of Natal. Owing to the fact that qualifying as an attorney in South Africa would not lead to automatic admission as an attorney in Rhodesia, Sibanda decided to look for a position as an articled clerk in Rhodesia. Upon returning to Rhodesia in 1970 he found that the local law firms were reluctant to employ him. He ultimately resorted to joining the bar as an advocate in Bulawayo. After successfully completing his exams, Sibanda became one of the first African advocates in Bulawayo. However, he was soon confronted with the challenge that most law firms were reluctant to brief him. Those that were prepared to brief him offered him 'marked briefs', which carried a fixed fee for the advocate, regardless of the amount of work involved. As Sibanda recalled: 'They would tell you that the client cannot afford more than so much, are you prepared to take this. You had to choose whether to accept or not to accept, but we simply accepted that it was better than nothing.'

This professional marginalization prompted the African advocates to organize themselves under the leadership of Edson Sithole and enter into negotiations with the Rhodesia Bar Association (RBA) in 1972.⁷ In making their case, they questioned the suitability of a divided profession in a country the size of Rhodesia, and argued that the practice also made legal services expensive, thereby limiting Africans' ability to access legal services. This argument was supported by a letter written to *The Rhodesian Herald* in 1972 by an African reader, which carried the title 'Could not pay a lawyer'.⁸ The writer described his futile efforts to secure a lawyer and his ultimate conviction because the R\$120 fee required was more than twice his monthly salary and the profession forbade African lawyers from being approached directly by clients. He concluded his letter by posing a question:

If I had been able to have secured the services of the [African] lawyer who was prepared to defend me for \$50, it would have been a different story. I am sure there are other Africans who have had similar problems. Now my question is, is it not high time that even we poor Africans have access to lawyers at a reasonably low charge?

The negotiations with the RBA were unsuccessful and the African advocates broke away in 1973 to form the African Bar Association (ABA). They took advantage of the fact that the regulations governing the RBA did not explicitly forbid advocates from dealing directly with the public, and set up their offices at Wonder Shopping Centre at the edge of Salisbury city centre. There they began to offer their services directly to members of the public in defiance of the rest of the legal fraternity. This split enabled the members of the 'Wonder Bar', as it came to be known, to begin to make a reasonable living providing legal services to the African population. The Law Society and the RBA were forced to recognize the split and, in 1976, they lobbied the government for new legislation governing the profession. However, the 1976 Attorneys Act and Advocates Act represented both a compromise with the ABA and a reassertion of control. While the new legislation allowed the

⁷Interview with Godfrey Chidyausiku, Harare, 14 March 2011.

⁸Cited by Chidyausiku in *Rhodesia Parliamentary Debates*, 27 August 1976, Col. 1619.

African advocates who had broken away from the RBA to continue dealing directly with the public, it stipulated that all advocates who qualified subsequently would be prohibited from doing so. Despite this reassertion of control, the seeds of change had been sown: the question of the viability of a divided profession began to receive serious consideration and in 1977 the Beadle Commission was appointed to look into this question. While African lawyers faced professional marginalization throughout the 1970s, this did not necessarily mean that their impact was marginal. In the following section I examine a key role they played that flowed directly from their new-found status as 'authorized interpreters' of the law: that of translation.

TRANSLATING THE LAW

A number of studies in legal anthropology have drawn attention to the role of translation in the legal arena and its influence on legal struggles and legal consciousness. Sally Engle Merry, for example, highlights the importance of translation in the reshaping of individuals' subjectivities. In her effort to explain how human rights 'become a part of local social movements and local legal consciousness', she highlights the role played by intermediaries who 'translate global ideas into local situations and retranslate local ideas into global frameworks' (Merry 2006a: 38). However, Harri Englund's work on the linguistic dimension of translating human rights discourse in Malawi and Zambia shows that the outcomes of this work of translation may not always be positive. Through a close analysis of the translation of human rights documents and legal texts, he shows that human rights discourse 'can be deprived of its democratizing potential' by the decisions taken as to what is translated, as well as the lexical choices made in the process of translation. These choices, he shows, may actually limit the range of claims that can be made by the poor (Englund 2006: 47–69; see also Merry 2006b).

These observations about the possibilities and the constraints of translation in the legal arena, at the level of language as well as of concepts, are useful in reflecting on the roles played by African lawyers. Virtually all of their clients were Africans and their work often involved a significant amount of translation of both kinds. On the one hand, they interpreted the concepts and stipulations of Rhodesian law for their clients. On the other, they translated their clients' grievances into the language of the law. In the process, they reframed the disputes into questions of rights and informed their clients of the limits of the state's authority over them. This interaction with lawyers helped to reshape how Africans viewed themselves in relation to the state. In addition, legal representation enabled them to assert themselves as rights-bearing citizens. Notwithstanding the above, the importance of translating in the literal sense must not be underrated. As was pointed out by Sol Plaatje, who had been a court interpreter in early twentieth-century South Africa, the stakes in court proceedings were generally high (Plaatje 1997: 50–61). As such, mistranslations and/or failure to understand legal proceedings could have dire consequences.

Many African lawyers entered the legal profession with the conscious aim of defending the rights of Africans. Despite Mkushi's description of the legal profession as 'unattractive' from a black man's point of view, because it was difficult to get employment after graduation, it was also 'a profession where you went in to try

and help a lot of people who were ignorant about their rights. They had ideas about what is right and what is wrong, but being able to champion what they felt was right is difficult unless you follow certain routes.' The profession did not remain uniformly unattractive, however. Once it became known that there was an African lawyer in town, Mkushi began to attract a large African clientele. Nelson Mandela and Oliver Tambo had experienced similar popularity when they set up the first black-owned law firm in Johannesburg. In this regard, Mandela notes: 'I quickly realised what Mandela and Tambo meant to ordinary Africans. It was a place where they could come and find a sympathetic ear and a competent ally, a place where they would not be either turned away or cheated, a place where they might actually feel proud to be represented by men of their own skin colour' (Mandela 1994: 173).

Explaining the reasons why many Africans preferred to consult him, Mkushi noted that:

It was language and culture and the fear of being misinterpreted in an oppressive system. Going to somebody who you don't actually have confidence in, okay he may be a professional, but the whites were at that time looked at generally as people who belonged to an oppressive system. So they [clients] would obviously feel much better sitting down and speaking in their vernacular language telling you everything, the relevant and the irrelevant stuff, and you then have the time to sift through whatever is coming on your desk.

Mkushi's reference to sifting 'the relevant and the irrelevant stuff' indicates the ways in which the 'translation' at play here reduced a complex set of grievances into a narrower 'cause of action' that could be taken up in court. However, although aspects of the dispute were lost in translation, something important was gained: the ability to question the status of Africans in the Rhodesian polity and the extent of the state's authority over them. In this regard, legal representation was important both in reshaping Africans' conceptions of themselves and their relationship with the state, and in enabling them to assert themselves as rights-bearing citizens.

Sibanda's work with the Bulawayo YWCA in the mid-1970s illustrates the ways in which lawyers could contribute to the reshaping of African subjectivities and enable Africans to assert new political imaginaries. Owing to the numerous difficulties experienced by their members on account of their gender (and race), the YWCA leadership requested Sibanda and Washington Sansole, another African advocate, to address them on the legal status of women. Constance Mabusela, the regional secretary for the YWCA at the time, recalled that Sibanda and Sansole explained to them that:

You are minors from birth until death. When you are born you are a child of your father, you are a minor under your father. When you get married you are a minor under your husband. And if your husband dies you are still a minor under your sons! That, we thought, that, we can't take that! So we said how do we strategize?⁹

⁹Interview with Constance Mabusela, Bulawayo, 27 November 2010.

The YWCA decided to organize a rally in Bulawayo, where Sibanda and Sansole addressed the crowd alongside the group's leaders.¹⁰ The legal advice given by Sibanda and Sansole played an important role in triggering shifts in the YWCA members' understanding of their situation and in enabling them to make claims for a different legal status. Of course, this was part of a wider set of factors that were contributing to the reshaping of African subjectivities; these included education, Christianity, rural-to-urban migration and nationalist politics (Jeater 1993; West 2002). Nevertheless, lawyers played a key role in helping the women to understand their position in legal terms and in enabling them to effectively articulate their claims for a different legal status, that of equal rights-bearing citizens.

TRANSCENDING FORMALISM

Legal scholars who have written about the law profession in Rhodesia have argued that the commitment to formalism was a key feature of the self-image of many European lawyers.¹¹ As Geoff Feltoe notes, despite the increasing legal repression of the 1960s and 1970s, many lawyers continued to have 'unwavering faith in the essential fairness and integrity' of the legal system because they judged it 'from the stand-point of its procedural functioning rather than in terms of the substantive goals which were aimed at by the use of the procedures' (Feltoe 1978: 82). Welshman Ncube attributes their approach to the law to the narrow positivist training given to lawyers in Rhodesia (Ncube 1995: 70). My own interviews with some European lawyers who practised law during this period confirmed the centrality of formalism to the legal fraternity.¹² It should be pointed out, however, that there was a handful of progressive lawyers who played important roles in challenging Rhodesian repression, such as Leo Baron, Anthony Eastwood, Bryant Elliot and Ken Reagan. Many of these lawyers were significant as mentors to the young African lawyers who entered the profession during the 1970s and 1980s and figure in their narratives.

My interviews with African lawyers, however, revealed that many of them viewed their roles as going beyond a formalist adherence to rules and procedures to encompass a commitment to the pursuit of 'justice' in a substantive sense. This understanding of justice was concerned with the moral content of the laws as well as the fairness of the outcomes of legal processes. This difference in how they imagined their roles as lawyers was partly the result of the discrimination and marginalization that they experienced within the legal profession and in broader Rhodesian society, which made them more inclined to identify with other Africans than with the predominantly conservative legal fraternity. This marginalization also meant that they were not subjected to the same professional socialization as the rest of the legal fraternity, which allowed them space to develop alternative conceptions of their roles as lawyers. Studies on Nigeria and South Africa have shown that it was not unheard of for African lawyers to buy into

¹⁰*Sunday Mail*, 16 November 1975.

¹¹Chanock offers a similar reading of lawyers in South Africa (see Chanock 1999).

¹²Interviews with Alex Masterson, Harare, 28 April 2011; Ken Reagan, Harare, 13 April 2011; Harry Simpson, Harare, 16 April 2009; and Bryant Elliot, Harare, 4 April 2011.

the ‘civilizing mission’ and take on conservative views (Sachs 1973; Adewoye 1977). However, this does not appear to have been the case with a number of African lawyers in Rhodesia. Mkushi’s description of his early years as a lawyer captures the sentiments of many of his peers. He recalled that it was ‘a fighting phase where you are fighting what you felt was unjust generally around you. Unjust in the sense that you felt that you were part of the society which was being victimized.’

The self-image of African lawyers was also influenced by the fact that they entered the profession amidst the political turmoil of the last years of settler rule. This period was marked by nationalist agitation, which culminated in a bitter guerrilla war between the armies of the Zimbabwe African National Union (ZANU) and the Zimbabwe African People’s Union (ZAPU) on one side, and the Rhodesian Security Forces on the other.¹³ The Rhodesian regime responded by building up an extensive legal armoury designed to repress political dissent. In the course of the 1960s and 1970s, laws such as the Law and Order (Maintenance) Act were repeatedly amended to criminalize virtually all forms of political protest, and to expand the range of capital offences. The procedural safeguards of the legal system were also significantly undermined. It was in this context that many African lawyers decided to become active members of the nationalist parties and decided to put their legal training to use in the service of the nationalist cause.

During the 1970s, Sibanda travelled the length and breadth of Rhodesia tracing and defending hundreds of Africans who had been arrested by the Rhodesian authorities, and representing those who instituted lawsuits against the state. While he benefited financially from this work, Sibanda’s actions stemmed from his political convictions. His account of his efforts to defend people accused of political offences reveals the close link between his conception of his role as a lawyer and his political beliefs. Reflecting on his difficulties in getting a position as an articled clerk, Sibanda observed: ‘The question is why? Why did they refuse to take me, to give me articles ... Well I discovered later that the reason they wouldn’t give me articles is because I had a role to play in the armed struggle defending “terrorists” and I defended them. Yes I defended them!’ For Sibanda, practising the law during the 1970s was not simply about adherence to rules and procedures; he saw himself as contributing to the broader liberation struggle. The irony in Sibanda’s career path as a lawyer was that his failure to get a position as an articled clerk allowed him the freedom to devote more of his energies to the nationalist cause.

Like Sibanda, Mkushi was also involved in defending Africans accused of political offences. However, Mkushi’s memories about the political cases of the 1970s were mainly about fighting injustice. What emerges clearly from his narrative is a belief in upholding the ‘law’ as well as pursuing ‘justice’ in its substantive sense.

¹³ZANU and ZAPU were the two main nationalist parties that participated in the anti-colonial struggle. In the 1970s, they united forces to form the Patriotic Front; however, relations between the two parties and their supporters remained tense and their marriage of convenience unravelled soon after the liberation war. During the 1980 elections, ZANU (PF), led by Robert Mugabe, won the majority of seats in parliament and proceeded to form the first government of independent Zimbabwe. In the early years of independence, the ZANU government launched a brutal campaign to persecute ZAPU members and officials.

Mkushi also expressed a degree of ambivalence about the increasing overlap between politics and law during the period. However, he did acknowledge that sometimes there was no option but 'to be very political' when fighting injustice. Steering our conversation towards the political cases of the 1970s, Mkushi remarked: 'Yes, but let me go back because we left a big portion of the legal practice, the politically oriented cases. Now the politically oriented cases were very emotive! ... they really fired you into having to fight and they fired you into sometimes having to be very political because sometimes you came face to face with injustice.' He went on:

I remember one case which made me very, very angry, of a headman down in Nyazura who obviously was forced to supply certain things to the freedom fighters and he had a son who was a medical doctor here in Harare and we fought! He was sentenced to death, and three days before the execution I managed to get that sentence reduced to life imprisonment.

As the 1970s wore on, it became increasingly difficult for lawyers to locate, let alone defend, their clients. They had been able to achieve some measure of success in the early 1970s due to the government's desire to give the appearance of adhering to the rule of law (Feltoe 1978). This progressively changed as the government repeatedly amended the law and ultimately declared martial law in large parts of the country in the late 1970s. However, the involvement of Sibanda and many of his peers in the political struggles of the period went beyond the courtroom. Much like their counterparts in South Africa, such as Mandela, Tambo, Godfrey Pitje and Griffiths Mxenge, Sibanda and Mkushi were actively involved in nationalist politics. Sibanda was part of the ZAPU legal team at the constitutional conferences in Geneva and London in 1976 and 1979 respectively. His account of the negotiations consisted of a series of anecdotes about the backroom exchanges in Geneva and at Lancaster House and the deadlocks he managed to resolve. He recalled: 'At Geneva, when we were headed for a deadlock over what was called the "interim period", I worked out something and behind the scenes contacted one of the lawyers on the British side and got them to accept [a compromise position].' Mkushi, then a junior lawyer, was part of the ZANU legal team in Geneva and worked alongside the likes of Simbi Mubako and Eddison Zvobgo in advising the ZANU leadership and translating their demands into legal language.

For both Mkushi and Sibanda, and indeed for many of their colleagues, the practice of the law in the 1970s could not merely be about adherence to rules and procedures, as these had been drafted to preserve settler rule. The justness of the outcomes of legal procedures was much more important to them. It was also clear to both lawyers that, in the political turmoil of the 1970s, the practice of law could not be detached from politics.

POSTCOLONIAL DILEMMAS

If, in the 1970s, African lawyers were struggling to push their way 'through the narrow door', in the 1980s they were welcomed in. With the attainment of independence and majority rule in 1980, many of the black lawyers who had been

marginalized in the 1970s and/or were part of the nationalist movement were appointed to senior positions in the new government. Simbi Mubako, for example, was appointed Minister of Justice, while Godfrey Chidyausiku was appointed as his deputy before becoming the attorney general. These lawyers oversaw the efforts to overhaul the legal legacies of colonial rule in the early years of independence. As part of these efforts to 'Africanize' the legal system, the government turned to Sibanda and Mkushi's generation of lawyers, and this saw many lawyers move from the margins of the legal system to the centre as they took up senior roles in the Ministry of Justice.

However, this proximity to the government came with new challenges. African lawyers were soon faced with the difficulty of reconciling their principles with the new roles they were asked to play. Notwithstanding the many progressive legal changes, key elements of the settler state's repressive legal armoury were retained, such as the Law and Order (Maintenance) Act. The state of emergency imposed by the Rhodesian Front in 1965 was also renewed every six months for another decade. These laws were used by the new ZANU (PF) government to victimize its political opponents and to institute a brutal crackdown on leaders and supporters of the opposition party, ZAPU. This resulted in the death of thousands of citizens at the hands of state agents during the 1980s (CCJP and LRF 1997). Many African lawyers who had cut their teeth as defence lawyers challenging the repression of the Rhodesian state were called upon by the new government to assist it in silencing its political opponents.

The struggle to navigate the complicated political terrain of the 1980s and to reconcile their principles with the expectations of the establishment featured in both Sibanda's and Mkushi's narratives. Their accounts of this time consisted of reflective passages that dwelt on the moral dilemmas they faced after independence and how they tried to resolve them. Importantly, their actions were not consistent with those of the prototypical 'big men' who seek to accumulate wealth and power at whatever cost (Daloz 2003). Rather, they tried to follow their principles under fairly difficult circumstances.

After independence, Mkushi continued in private practice. However, due to the shortage of experienced legal staff in the civil service, he was requested by the government to prosecute in the prominent political trials of the early 1980s. As a result, he was soon faced with the difficult task of reconciling his ideals as a lawyer and the role he was asked to play by officials in the new government. He explained:

You know when you are a lawyer ... unconsciously you are fighting the injustices of [the] establishment or of any administration. Now the administration has become black so your mind has got to stick to the focus of what is unjust regardless of who is the source of the injustice. It's another mindset which came in and you had to make up your mind where you belong – to achieving what you think was legally the right thing to do, or assisting the political system to override the injustices of the past.

This dilemma of how to engage with a new majority government that was deviating from some of the key ideals of the nationalist struggle at a time when the transition was still fragile was something that former anti-apartheid activists in South Africa would also confront in the 1990s, when it became increasingly evident that the ANC government was not fulfilling its promises (Gumede 2007). Mkushi

acknowledged that 'you can never say you picked one and forgot about the others'. However, he felt the need to refuse requests from political leaders and say: 'No, no, no, I am just going to go ahead and apply the law and support the law and defend the rights, and that is the way I see the society of Zimbabwe being able to develop and to get enriched.' In the end he shifted his practice away from criminal and political cases towards corporate law, or, as he described it, 'developmental law'.

Sibanda's circumstances in the 1980s were somewhat more complicated as both his principles and his loyalties were tested. While he had been an active member of ZAPU in the 1970s, after independence he crossed over to ZANU (PF) and served on the ZANU (PF) Central Committee for a period. He was also appointed to the board of the government-owned financial institution Zimbank. In addition, in the early 1980s he became a government representative on the Law Society Council and later vice president. However, when he was offered a seat in the High Court, he felt compelled to decline the offer for fear that he might be put in the difficult position of having to try his former ZAPU colleagues. Instead, Sibanda stated that he would prefer to be appointed to the position of attorney general, as this would allow him to assess the cases before prosecuting them. This request, however, was denied.

Despite refusing the offer, Sibanda continued to grapple with the tension between his close relations with the new government and his position as a lawyer and a former ZAPU member. Given that he was based in Matabeleland, where much of the government crackdown on ZAPU was happening, a significant amount of his work involved defending people accused of the same list of political 'offences' that he had dealt with in the 1970s. The case of Swazini Ndlovu, one of his clients, illustrates some of the challenges he faced. Ndlovu was arrested in March 1982 on suspicion of being connected to arms caches that had been found in various locations in Matabeleland. He was first detained in Khami prison near Bulawayo before being transferred to Chikurubi prison, on the outskirts of Harare. Despite having been cleared of any involvement with the arms caches, Ndlovu was kept in custody and new investigations into his possible involvement in the murder of a ZAPU official were initiated. Later enquiries by Sibanda revealed that, while no evidence of his involvement in the murder was found, Ndlovu was kept in custody and new investigations were initiated into his possible involvement in yet another case, this time involving a shooting at the Prime Minister's residence in June 1982.¹⁴ What was troubling about the whole affair was not only that the shooting had happened after he had been detained, but that when he was brought before the magistrate for a remand hearing, it emerged that there was no official record of his detention. Consequently, after eight months in custody he had neither been formally remanded nor had he been issued with a detention order. As a result, Ndlovu wrote to Sibanda informing him of his circumstances, emphasizing that: 'My rights as a citizen have been curtailed and I am not told why.'¹⁵

¹⁴Sibanda Private Archives, File: State vs Swazini Ndlovu, Sibanda to Senior Public Prosecutor, 1 December 1982.

¹⁵*Ibid.*, Ndlovu to Sibanda, 3 November 1982.

On receipt of the letter, Sibanda entered into correspondence with the senior public prosecutor in an effort to secure Ndlovu's release. What is notable in Sibanda's letters is the tone of restraint he adopted and his regular references to the efforts he and his client had made to accommodate the government. In one such letter he wrote:

We have considered the prospects of approaching the High Court for an Application for the release of our client in terms of sub paragraph 2 of the second schedule on the basis that the state has contravened the provisions of the sub paragraph 2 of the Constitution but have stowed of (sic) this procedure for the reason that this would give due embarrassment to the Courts. However, the interests of the state should surely be balanced against the rights of the individual and on this basis it may be imperative to take this course of action, if that may be then the only way by which we can secure further release of our client or what charges are levied against our client.¹⁶

That Sibanda should adopt this tone, despite the fact that the rights of his client had clearly been violated, should be understood in light of the fact that the government often reacted vindictively when a detainee sought to challenge its action using a lawyer (LCHR 1986: 151). Sibanda's choice of words therefore represented an attempt to walk the fine line between asserting his client's rights and not provoking government retaliation. However, it was only after Sibanda had met with the attorney general to explain his client's case that Ndlovu was released.

CONCLUSION

The narratives of the first generation of African lawyers in Zimbabwe provide a useful vantage point from which to examine the interrelated changes in the spheres of politics and law across two important decades and periods in Zimbabwean history. Their self-image and roles as lawyers were significantly influenced by the social, economic and political events of the period, and they, in turn, played an important role in shaping those events. Mkushi and Sibanda both entered the legal profession during the 1970s, in the context of the liberation struggle, and they put their legal skills to use in the service of the nationalist cause. While the broader legal profession espoused a formalist identity, for the two lawyers – and, indeed, for others of their generation – the practice of the law could not be limited to adherence to rules and procedures that were designed to preserve settler rule. Instead, their conceptions of what it meant to be a lawyer were intimately tied to their efforts to secure justice for an oppressed African majority. As a consequence, their interactions with their clients went beyond a simple contractual relationship involving the exchange of money for the provision of services. Sibanda and Mkushi went above and beyond the call of duty to defend clients who had been arrested by the authorities for political offences. They also played an important function as cross-cultural brokers who translated the

¹⁶*Ibid.*, Sibanda to Senior Public Prosecutor, 1 December 1982. NB, 'stowed of' appears in the original document. It is possible that 'stowed' was used here in the sense of 'stored for future use' or in the more colloquial sense of 'refrained from'.

concepts and stipulations of state law for their African clients, and translated their clients' grievances into the language of the law. Over and above its practical purpose, this translation also served as a catalyst in the reshaping of African subjectivities. In addition, the legal representation these lawyers provided facilitated their clients' assertion of themselves as rights-bearing citizens, in the context of a state that insisted on treating them as ethnicized, custom-bound subjects.

The attainment of independence saw African lawyers move from the margins of the legal system to its centre. However, this new proximity to the centre of power came with a different set of challenges. Whereas in the 1970s they had defended Africans accused of political offences by the Rhodesian state, in the 1980s they found themselves being called upon by the new government to assist in silencing its perceived enemies, using the legal machinery put in place by successive settler governments. However, the response by Mkushi and Sibanda to these pressures does not correspond to the view of African elites as 'big men' who are primarily driven by the need to acquire wealth and positions of status. Instead, their responses were rooted in personal and professional ethics that had developed over a long period of time. It is not my intention to imply that all lawyers responded as Mkushi and Sibanda did, or indeed to hold the two up as faultless heroes. I do, however, maintain that they are representative of a significant number of African lawyers who have challenged state repression and acted on behalf of marginalized individuals and communities in postcolonial Zimbabwe, often at great risk to themselves (see also Moore 1998). Their life histories highlight the need to avoid a default cynicism with regard to African elites and move instead towards a more nuanced understanding of the motives of such individuals and their contribution to the social, economic and political struggles of the communities of which they are part. In the same vein, a narrow focus on documenting tyranny, 'disorder' and neo-patrimonial politics risks obscuring an important avenue of inquiry: the place of personal and professional ethics in shaping the choices and actions of social actors in Africa.

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ABSTRACT

Given the important role played by lawyers in formal legal systems, the study of legal professionals can help us understand the efforts to maintain law and social order in Africa. This article examines the narratives of two Zimbabwean lawyers, Kennedy Sibanda and Honour Mkushi, about their experiences as legal professionals between 1970 and 1990, and makes three main arguments. Firstly, these narratives reveal the complex interplay between individual agency, politics and law across the two decades. Secondly, lawyers' participation in the social and political struggles of the period were informed by a set of personal and professional ethics that were grounded in concerns about the welfare of the wider communities to which they belonged. This highlights the need to avoid a default cynicism with regard to African elites and move instead towards a more nuanced understanding of the motives of such individuals and their contribution to the social, economic and political struggles of which they are a part. Lastly, these lawyers were cross-cultural brokers who were constantly involved in a two-way translation. On the one hand, they translated the concepts and stipulations of state law for their African clients; on the other, they translated their clients' grievances into the language of the law. This process of translation acted as a catalyst in the reshaping of African subjectivities and their conceptions of their relationship with the state, and enabled Africans to assert themselves as rights-bearing citizens.

RÉSUMÉ

Compte tenu du rôle important que jouent les avocats dans les appareils judiciaires formels, l'étude des professionnels du droit peut nous aider à comprendre l'action de maintien de l'ordre juridique et social en Afrique. Cet article examine les récits de deux avocats zimbabwéens, Kennedy Sibanda et Honour Mkushi, sur leurs expériences en tant que professionnels du droit entre 1970 et 1990, et présente trois principaux arguments. Premièrement, ces récits révèlent l'interaction complexe entre l'action individuelle, la politique et la loi au cours de ces décennies. Deuxièmement, la participation des avocats aux luttes sociales et politiques de cette période était informée par un ensemble d'éthiques personnelles et professionnelles fondées sur le souci du bien-être des communautés auxquelles ils appartenaient. Ceci souligne la nécessité d'éviter un cynisme par défaut à l'égard des élites africaines et de s'orienter plutôt vers une compréhension plus nuancée des motifs de ces personnes et de leur contribution aux luttes sociales, économiques et politiques dont ils faisaient partie. Troisièmement, ces avocats étaient des intermédiaires inter-culturels constamment impliqués dans une traduction bidirectionnelle. D'une part, ils traduisaient les concepts et les stipulations du droit étatique pour leurs clients africains; d'autre part, ils traduisaient les griefs de leurs clients en langage juridique. Ce processus de traduction a servi de catalyseur dans le remodelage des subjectivités africaines et leurs conceptions de leur relation avec l'État, et a permis aux Africains de s'affirmer en tant que citoyens porteurs de droits.