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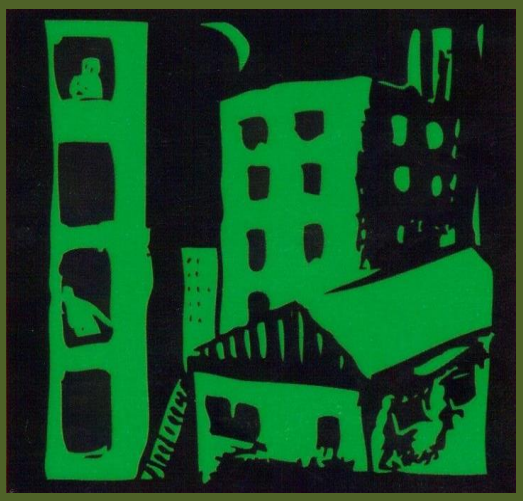

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Ex parte Somers (1927) 48 NPD 1: A story of racial exclusion in the South African legal profession

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ABSTRACT

The article critically examines the judgment in ex parte Somers (1927) 48 NPD 1 from both a legal and personal perspective. The judgment details the case of an Indian South African who requested the Court to grant his admission as a candidate attorney. The Court refused his application on the basis that he could not complete the set of courses required by the Supreme Court Rules, as his admission to Natal University College had been denied. Without detailing the reasons for the College's refusal, the Court reinforced the College's racial discriminatory policies. The article examines the judgment from two perspectives: courtrooms as a space of protest; and racial exclusion at law schools and the legal profession.

Keywords: Racial discrimination, courtroom as a space of protest, law schools, legal profession

"The past was never beautiful but through its knotted strings my ancestors speak to me with apocryphal gestures and languages you will never understand and dances that would strain your gait." – Ari Sitas[1]

1 INTRODUCTION

The courtroom has always been a space where views are contested. The battle lines are drawn and the rule of law is used as a shield and a sword. Even during the darkest days of oppression in South Africa, the courtroom was used by people of colour to resist the injustices they suffered at the hands of the minority political elite. For Nelson Mandela and others, the courtroom provided a space to express and convey their views to the outside world. Of course, a favourable judgment would be first prize, but often these litigants were forced to settle for this consolation prize. Despite the work of a few activist judges, the judiciary at that time was not known for its impartiality. It is thus curious why the courts were used by some to resist and fight a losing battle against the oppressive racist State.

One such story is from the year 1927, *ex parte Somers* (1927) 48 NPD 1.[2] It is not a case cited in courses at law schools, nor is it generally well-known in legal circles. Indeed, the judgment itself is barely two pages long, but its message resonates even today.

It is important to state my interest at the outset. This is a personal story. Bahadur Somers was my maternal great-grandfather and a descendent of an Indian indentured labourer in South Africa. I grew up listening to the legendary tales of his kindness and wisdom. In 2003, I was accepted as a law student at the University of KwaZulu-Natal. My grandfather then related to me the story of his father's ambition to study law in Natal in 1926 and his subsequent unsuccessful High Court application to become a candidate attorney. As a young and eager law student, I exercised my new-found library skills and retrieved the judgment. It is now a treasured part of my family's history. To me, it is the single most important judgment I have ever read. In many ways it has carved out and inspired the direction of my life.

[1] Sitas A *Slave trades* Cape Town: Deep South Publishing (2000) at 108. See also Desai A & Vahed G *Inside Indian indenture : A South African story 1860-1914* Cape Town : Human Sciences Research Council Press (2010) at 14. This article is written in memory of Harilal Bahadur Somers (1926 – 2004) and Prof Krishna Somers (1926–2018).

[2] Hereinafter referred to as the *Somers* judgment.

This article seeks to tell a story about this judgment, its aftermath and its relevance to the present. In doing so, various themes are explored. First, the judgment highlights the importance of the courtroom as a space of protest. Despite the decision being almost 90 years old, its message is still relevant. The judgment is evidence of a quietly confident protest during a time of legislated racial subjugation. It was an act of heroism, a David and Goliath type of story. It thus begs the question: what magic did the courtrooms hold? Secondly, the judgment highlights the important issue of access to tertiary education. This part of the article examines the history of access to tertiary education and, in particular, legal education by black people[3] in Natal. It is argued that diversity and representation at law schools is an imperative given that these spaces are often sites of political and ideological debates. Finally, the article concludes with reflections on education as a generational privilege within the context of Somers's exclusion from the legal fraternity and how this possibly affected his life and his family's trajectory.

Ultimately, the purpose of this article is simple. It is an attempt to record the story of an ordinary South African who used the court to resist injustice during a time in our history when there were no guarantees of success. Since this is a story, one has to understand the context and background.

The article is divided in two parts. The first part tells the story of Somers against the historical backdrop of Indians in South Africa during the late 19th century and the beginning of the 20th century. Thereafter, the application of Bahadur Somers is placed within this context. The second part of the article critically analyses the *Somers* judgment under two broad themes: the courtroom as a space of resistance; and racial exclusion from law schools and the legal profession.

2 *SOMERS*'S STORY

The *Somers* judgment was handed down in 1927. It is difficult to fully understand the judgment without a sense of the context in which it evolved. The analysis below attempts to provide historical background of the colony and then province of Natal, as well as of the life of Bahadur Somers.

2.1 The Natal Colony and the Somers family

In the year 1860, the first wave of Indian indentured labourers reached the Port of Natal in South Africa.[4] Slavery had been abolished in the British empire in 1834.[5] The British

[3] I have chosen to refer to people of colour collectively as "black" or "black people" rather than the apartheid era term "non-white".

[4] See Desai & Vahed (2010) at 1.

[5] South African History Online "Slavery is abolished at the Cape" (2011) available at https://www.sahistory.org.za/dated-event/slavery-abolished-cape (accessed 26 February 2019).

realised that the climate in the Natal colony was optimal for sugar crops.[6] With great ambition to develop the sugar industry in their colony, the project hit a setback when the local Zulu community refused to work on the sugar cane plantations.[7] Desperate for labour, the British were able to entice 152 184 Indians over the period 1860 – 1911 to embark on the long voyage to Natal.[8] Hailing from all parts of India, these men, women and children were promised good working conditions on sugar plantations, fair wages and ample accommodation.[9] Many saw this as an opportunity to escape poverty, to start afresh and to build a new life.[10] In the end, these promises were largely unmet, and many returned to India after the contractual period of five years had ended, poorer than when they had left.

Ironically, a portion of those who did return to India decided after some time to return to Natal because they could no longer adapt to their homeland after their experience in Africa.[11] Those who chose to remain made the most of the resources available to them and created a community. For some, however, the daily struggle for survival coupled with their experiences of unrelenting abuse and brutality at the hands of the racist plantation owners was too much to endure. Suicide rates were high among the Indian indentured community, almost sixteen times higher than the rate in India during that time.[12] Some have called these suicides during indenture an act of protest and a "rational and understandable response to a terrible and alienating situation".[13]

During this time in history, a soon to become famous English trained Indian barrister, Mohandas Karamchand Gandhi, arrived in South Africa in 1893 as a legal consultant to an Indian businessman.[14] He later found his calling as what we would now term a human rights lawyer and activist. He was greatly affected by the plight of the Indian in South Africa and helped the community to organise peaceful protests against the colonial authority.[15] His work earned him respect in many quarters and he was eventually bestowed with the name "Mahatma" , meaning "the great soul".[16] Gandhi's focus on the conditions of Indians in South Africa, and not Africans, has been

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[6] Koen G "The bitter story of South African sugar" (02 August 2015) *City Press* available at https://city-press.news24.com/Trending/The-bitter-story-of-South-African-sugar-20150802 (accessed 26 February 2019).

[7] See generally Koen (2015).

[8] See Desai & Vahed (2010) at 15.

[9] See Desai & Vahed (2010) at 38.

[10] See generally Koen (2015).

[11] See generally Desai & Vahed (2010); Gandhi MK *An autobiography or the story of my experiments with truth* Savitri: Bharadwaj Publishers (2013) at ii–iv.

[12] See Desai & Vahed (2010) at 165.

[13] Lal BV *Chalo Jahaji: On a journey through indenture in Fiji* Suva: Fiji Museum (2000) at 234, referring to the Indian indenture experience in Fiji, as quoted in Desai & Vahed (2010) at 166.

[14] See Gandhi (2013) at 81.

[15] See Gandhi (2013) at Parts II – IV.

[16] See History.com editors "Mahatma Gandhi" (18 January 2019) *History* available at https://www.history.com/topics/india/mahatma-gandhi (accessed 27 February 2019).

subjected to criticism.[17] It has also been documented by some to be the source of long term friction in social relations between Indians and Africans in South Africa.[18]

Against this backdrop, Bahadur Somers was born on or before 16 January 1906,[19] the grandchild of an Indian indentured labourer, Boodhun Singh. Boodhun Singh is thought to have arrived at Port Natal with the first wave of indentured labourers.[20] According to family folklore, he too saw the indentured system as a means to escape his troubles in India. His particular problems were fairly unique: he had allegedly beaten a Brahmin (the highest caste in the Indian caste system)[21] to death and boarded the ship to Natal as a fugitive from justice. The penalty if caught would be death. He arrived safely in Natal and worked on a sugarcane plantation along the Durban North Coast. He was never arrested and tried for his alleged crime. His son, Boodhun Somer (it was the practice at the time for children to bear their father's first name and then their own name) was among the first of the descendants of indentured labourers to read and write English. Due to this skill, he became one of the first Indian school teachers to the indentured community.[22] His first name, Somer, was anglicised in the British colony and became the family's surname, Somers. Boodhun Somer had five sons and four daughters. One of his son's was my great-grandfather, Bahadur Somers.

2.2 Ex *parte Somers* (1927) 48 NPD 1: Background and analysis

South Africa in 1927 was a unitary constitutional monarchy. This meant that the Union of South Africa was self-governing but still under the English crown with King George V as monarch. The State was governed by a Governor-General, with the Prime Minister at the time being JBM Hertzog.[23] This was the period of the Nationalist Pact government

[17] See French P "The truth about Mahatma Gandhi: he was a wily operator, not India's smiling saint" (31 January 2013) *The Telegraph* available at https://www.telegraph.co.uk/news/worldnews/asia/india/9840076/The-truth-about-Mahatma-Gandhi-he-was-a-wily-operator-not-Indias-smiling-saint.html (accessed 27 February 2019). On Gandhi's "moral ambiguity", see Rao R "India needs to know the real Gandhi" (02 May 2011) *The Guardian* available at https://www.theguardian.com/commentisfree/belief/2011/may/02/mahatma-gandhi-biography-banned-india (accessed 27 February 2019).

[18] See Desai & Vahed (2010) at 188.

[19] His passport states that he was born on 16 January 1906, but this is unlikely given that during that period it was common practice for births to be registered weeks after the actual date. It is thus likely that the date reflected merely marks the date when his birth was formally registered with the authorities. Passport copy on file with author.

[20] This fact along with many other family related details emerge from correspondence with the unofficial family historian, Prof Krishna Somers (email dated 11 February 2015 on file with author).

[21] BBC editors "What is India's caste system?" (20 July 2017) *BBC News* available at https://www.bbc.com/news/world-asia-india-35650616 (accessed 27 February 2019).

[22] Photograph "Natal Indian Teachers (circa 1870-1903)" (on file with author).

[23] South African History Online (SAHO) "James Barry Munnik Hertzog" (17 February 2011) *South African History Online* available at https://www.sahistory.org.za/people/james-barry-munnik-hertzog (accessed 27 February 2019).

and the prevailing sentiment was to slowly remove South Africa from British influence.[24]

Like all people of colour during that period, Bahadur Somers had a concrete ceiling to his ambitions. However, he was determined to become a lawyer. Natal at that time, like the rest of South Africa, was a difficult place to thrive in if you were not white. Growing anti-Indian sentiment took hold within the colonial mindset as fears loomed of the threat to urban life presented by the growing Indian population.[25] From 1921 until the 1940s, the population doubled from 50 000 to 100 000.[26] This meant that more schools were required, in addition to jobs and housing. The "Asiatic menace"[27] was documented as early as 1893 by the colonists to be as "prolific as rabbits, and almost as destructive to the welfare of Europeans".[28] The governments of India and South Africa decided at a Round Table conference in 1926/1927 that repatriation to India would be determined on a voluntary basis and that those who chose to remain in South Africa would have their social and economic position improved.[29] This necessarily meant an improvement of educational opportunities.

During this period, the newly established Natal University College (NUC) did not allow black students direct admission to the university.[30] Later, in 1936, the NUC partially relaxed its racist admission policy by allowing blacks to be admitted as students provided that they attended their classes on a separate campus, Sastri College and Adams College. The NUC then became the University of Natal in 1949,[31] and after merging in 2004 with the University of Durban-Westville, is today known as the University of KwaZulu -Natal.[32]

In South Africa, the first qualification in law was the Law Certificate and it was offered informally in the Cape in 1858,[33] and later at NUC in 1910.[34] Up until 1921 in

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[24] See generally SAHO (2011).

[25] Bhana S & Vahed G "'Colours do not mix': Segregated classes at the University of Natal, 1936-1959" (2011) 29 (1) *Journal of Natal and Zulu History* 66 at 69. See also Swanson M "'The Asiatic menace': Creating segregation in Durban, 1870–1900" (1983) 16 (3) *International Journal of African Historical Studies* 401 at 403-404. Swanson provides a comprehensive analysis of the anti-Indian sentiment at the time and the legal difficulties presented by the indentured, "free" and passenger Indians.

[26] See Bhana & Vahed (2011) at 68.

[27] See generally Swanson (1983).

[28] See Swanson (1983) at 411.

[29] See Bhana & Vahed (2011) at 70.

[30] See Brookes E *A History of the University of Natal* Pietermaritzburg: University of Natal Press (1966) at 43.

[31] See Brookes (1966) at 70.

[32] University of KwaZulu Natal Admin "History" (02 February 2017) *UKZN* available at https://www.ukzn.ac.za/about-ukzn/history/ (accessed 27 February 2019) .

[33] Greenbaum L "A history of racial disparities in legal education in South Africa" (2009) 3 *John Marshall Law Journal* 1 at 8. See also Kaburise JB "The structure of legal education in South Africa" (2001) 51 *Journal of Legal Education* 363 at 363.

Natal,[35] the only method to become an attorney was to obtain the Law Certificate. Order XXXII and Rule 26 of the Rules of the Supreme Court of Natal required that candidate attorneys completed this course of lectures, together with a period of clerkship at a law firm. The course of lectures was offered in Natal at its only tertiary institution, NUC.[36]

It was known that blacks would not be granted admission to NUC. Indeed, in 1926 NUC refused Bahadur Somers's application for admission as a student to attend the law courses.[37] Despite this, Somers, 21 years old at the time, prepared an *ex parte* application to the Natal Provincial Division for admission as a candidate attorney. The application was opposed by the Natal Law Society on the basis "of an intimation" it had received from the authorities of NUC that Somers could not be admitted to the institution as an internal student.[38] In a brief paragraph, Judge-President Dove-Wilson refused Somers's application. The reasons given were that the rules of court required Somers to complete a course of approved lectures at NUC and that he could not, due to the decision of the University Council, be granted the status of an admitted student. The learned Judge said that "… it would be futile to admit the applicant as a candidate attorney when he has no chance whatever, in the circumstances, of ever becoming an attorney".[39]

The Judge-President went on to state that if the applicant could present a good case and persuade the Court to have the rules amended, then they may be amended.[40] However, this could only be done with notice to the Law Society and the University Council. Somers did not pursue the matter any further and, for pragmatic reasons, decided to abandon his dream of becoming a lawyer and became a school teacher instead.[41] This career path was not strewn with admission hurdles. It was the safe

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[34] Kahn E "Speech celebrating the 80th anniversary of the school of law of the University of Natal, Pietermaritzburg, held on 19 October 1990" in Kidd M & Hoctor S (eds) *Stella iuris, celebrating 100 years of teaching law in Pietermaritzburg* Claremont: Juta (2010) at 3.

[35] The LLB degree was offered in Natal from 1931 onwards. See Burchell J "On the shoulders of father and son – academic leadership in the law faculty of the Natal University College (later University of Natal) in Pietermaritzburg: 1920 to 1982" in Kidd M & Hoctor S (eds) *Stella iuris, celebrating 100 years of teaching law in Pietermaritzburg* Claremont: Juta (2010) at 34.

[36] See Koen (2015) quoting Spiller P "The history of the Natal University law faculty" (1982-3) *Natal University Law Review* 1 at 12.

[37] See Brookes (1966) at 44. Brookes does not refer to Somers by name but notes that the NUC Council refused an Indian applicant admission to the law school. This unknown applicant is verified to be Somers in the later *ex parte* application where this decision of the NUC Council is mentioned - *Somers* judgment1927) at 2.

[38] Howes RB & Duncan TG "Digest of cases" (1927) 2 *South African Law Journal* 187 at 193.

[39] See *Somers* judgment at para 2.

[40] See *Somers* judgment at para 2.

[41] Interestingly, IC Meer noted that in 1926 the South African Indian Congress compiled data to bolster its demand for better education for Indians, citing Somers's case as an example. See "Part I: Appalling discrimination in education" in Meer IC *I remember, Reminiscences of the struggle for liberation and the role of Indian South Africans, 1924 – 1958* (2006) available at

choice and enabled him to provide for his growing young family. Unlike teaching, access to legal education was carefully regulated and limited by the political elite. By denying access to legal education to blacks, the elite were able to ensure that the legal profession, so critical within political circles, was dominated by white males.[42]

In his own right, Somers became an influential and well-loved teacher within the Indian community of Natal, first teaching at Sastri College.[43] Sastri College in Durban opened its doors in the year 1930.[44] The vision of the Representative of India to South Africa, Srinivasa Sastri, the college provided the only high school education for Indian boys at the time.[45] It would later be host to the segregated university lectures provided by NUC.

Bahadur Somers went on to have a large family of three sons and three daughters. My grandfather, Harilal Bahadur Somers, was his eldest son. He followed in his father's footsteps and became a school teacher. He was also revered for being a community leader and activist.

It is no surprise that education was (and still is) a well-entrenched value in the family. No matter how difficult the times, how oppressed and dark one's circumstances, education was viewed as the saver and the liberator. It was the mark of success. It elevated the immediate family and the future generations of Boodhun Somer. It gave them better prospects relative to other oppressed people during times of racist rule. All through my childhood, the importance of education was emphasised and it became engrained within my psyche.

However, I can't help but speculate about how different my life would have been had Bahadur Somers been successful in his application to the Natal Provincial Division in 1927. He would have become a lawyer, possibly inspiring and opening the path for my grandfather to become a lawyer, too. This would have altered my mother's upbringing and changed her life. Indeed, I would then have been born into a family with "legal pedigree". A different life altogether, but one that was ultimately not meant to be.

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https://www.sahistory.org.za/archive?combine=&field_media_library_type_tid=30351 (accessed 27 February 2019).

[42] See Greenbaum (2009) at 2. See generally Broun K "Black lawyers under apartheid: The soul of South African law" (2000-2001) 27 (2) *Litigation* 33.

[43] Natal Indian Teachers Society "Silver Jubilee 1925 – 1950" (1950) available at http://disa.ukzn.ac.za/sites/default/files/DC%20Metadata%20Files/Gandhi-Luthuli%20Documentation%20Centre/NatalIndianTeachersSociety/NatalIndianTeachersSociety.pdf at 22 & 62(accessed 27 February 2019).

[44] Sastri College "History of Sastri College" (2017) available at http://sastricollege.co.za/history.html (accessed 27 February 2019).

[45] See generally Sastri (2017).

3 EXPLORING *EX PARTE SOMERS* AND ITS CONTEMPORARY RELEVANCE

This story from 1927 could be analysed in many ways. The two lines of thought below critically analyse the judgment from the perspective of courtroom strategy (the courtroom as a space to resist) and racial exclusion in the legal profession.

3.1 The courtroom as a space within which to resist

What made my great-grandfather believe that the rule of law and the legal system would right the wrong done to him? What power do the courts have as a space for resistance? What is known is that Somers approached the NPD to grant him admission as a candidate attorney knowing full well that NUC had denied him admission as a student. He had to have known that the one was dependent on the other. One can deduce then that this act of going to court was his way of forcing NUC to provide the courses required in terms of the Supreme Court Rules. Having a court order in hand is a good strategy. He thus intended to use the courts to right the earlier wrong done to him.

It is of course impossible to fully answer this question as all the relevant individuals who would have had first-hand knowledge of the application have passed on. Enquiries made to the National Archives, the archives of the Natal Law Society and the University of KwaZulu -Natal have not yielded any useful background information regarding the application.[46] The analysis below thus draws parallels from other historical political cases and reaches tentative conclusions by knitting together personal facts from the life of Somers.

Courts have always held a significant, if not even sacred, position in empowering people to feel seen and heard.[47] To have one's day in court is an important act, a reclaiming of dignity. The right to confront is an essential aspect of the adversarial system.[48] During the time of colonialism and apartheid, this view of the court as an "impartial space of truth and justice"[49] was untenable. The courtroom, like any space, carried its own agency or energy.[50] The composition of the courts at that time carried its own bias, with all participants, save the accused or claimant, (i.e. prosecutor, advocate, judge, magistrate, orderly, stenographer, clerk etc.) being white.[51]

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[46] Enquiries and responses to these institutions are kept on file with the author.

[47] See generally Allo A (ed) *The courtroom as a space of resistance: Reflections on the legacy of the Rivonia trial* Dorchester: Dorset Press (2015).

[48] Van der Merwe SE "An introduction to the history and theory of the law of evidence" in Schwikkard P & Van der Merwe SE (eds) *Principles of evidence* 4th ed Cape Town: Juta (2016) at 6.

[49] See Allo (2015) at 9.

[50] See Allo (2015) at 6, where Allo quotes Derrida J *Positions* (translated by Alan Bass) London: Continuum (2002).

[51] Mandela notes this at his trial – see O' Malley P "Nelson Mandela's First Court Statement - 1962*" O' Malley Heart of Hope* available at https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01600/05lv01624/06lv01625.htm (accessed 14 February 2019).

In other words, the courtroom may have looked like a neutral and objective space and may have called itself independent and impartial, but in reality it was often used as an instrument of political power.[52] It had become a race itself, the dominant white race.[53] Likewise, the law carried its own bias. In this context, an attempt at reclaiming dignity had an even deeper and more conflicted meaning when a litigant or claimant was a "black man in a white man's court".[54] The courtroom may perhaps always be a place characterizing an imbalance of power, between the dominant and subordinate groups of society.[55] Despite this, over the course of history, people of colour have used the courts, in South Africa and elsewhere, as a performative space and as a means to critique the political and legal paradigm.

Apartheid courts were seen to be deeply legalistic spaces.[56] Legal positivism was employed by the courts to "apply the harshest of laws with an easy conscience".[57]The Appellate Division during the pre-apartheid years was no different. It generally promoted a legal culture of racial inequality, consistent with the ideology of the ruling group.[58] This observation can be used to understand the lower courts as these courts had to uphold the decisions of the Appellate Division. Despite being formally impartial, the judiciary at this time maintained injustice even at times when it had an opportunity to do otherwise.[59] The Appellate Division implemented government policies, giving due respect and acceptance to parliamentary sovereignty.[60] In other words, the judiciary was more inclined to preserve racial hierarchies (i.e. uphold the status quo) than dismantle them.[61] The result was that the judicial system which followed ,namely, the apartheid era judiciary, inherited a system which was already "deeply flawed".[62]

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[52] Forsyth C "The judiciary under apartheid" in Hoexter C & Olivier M (eds) *The judiciary in South Africa* Cape Town: Juta (2014) at 26.

[53] See Carlin A "The courtroom as a white space: Racial performance as noncredibility" (2016) 63 *University of California Law Review* 449. See also Modiri JM "Reading choreographies of black resistance: Courtroom performance as/and critique" in Allo (ed) (2015) at 217.

[54] Taken from Nelson Mandela's statement in the incitement trial 1962 in O'Malley P "Nelson Mandela's First Court Statement – 1962", *O'Malley Heart of Hope* available at https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01600/05lv01624/06lv01625.htm (accessed 14 February 2019).

[55] See Modiri (2015) at 217.

[56] Allo AW "The courtroom as a site of epistemic resistance: Mandela at Rivonia" (2016) *Law, Culture and the Humanities* 1 at 16.

[57] See Allo (2016) at 16, quoting Dugard J "The judicial process, positivism and civil liberty" (1971) 88 (2) *South African Law Journal* 181 at 187.

[58] Corder H *Judges at work: The role and attitudes of the South African appellate judiciary 1910 - 50* Cape Town & Johannesburg: Juta (1984) at 229 & 237. See also Forsyth (2014) at 27.

[59] See Corder (1984) at 241.

[60] See Corder (1984) at 171 & 237.

[61] See Corder (1984) at 236–237, quoting Dugard CJR *Human rights and the South African legal order* Princeton: Princeton University Press (1978).

[62] See Forsyth (2014) at 27.

However, one must understand this failing against the limitations imposed by parliamentary sovereignty. The system ensured that the judiciary could not easily strike down legislation.[63] Courts hid behind the "screen of legislative intent"[64] and parliament held the true reins. In response, many lawyers representing the disenfranchised, used the regime's obsession with procedure and rules as a means to obtain limited justice for their clients.[65] Our law books are scattered with these stories of lawyers using technical interpretations of laws as a way to obtain a positive outcome.[66]

However, one should also acknowledge that even during this time, a few beacons of the judiciary tried their best to dispense justice. It is evident that the judiciary during apartheid (and pre-apartheid) was unrepresentative of South African society and the legal profession, chosen mainly from the ranks of white male advocates.[67] Based on this alone, one could wholeheartedly condemn the judiciary of the time. However, this does not take into account those who silently (and at times loudly), singularly (and as a division), used the law to dispense justice to the marginalised. It is perhaps better, as put by Forsyth, to ask the question : "When judges had a choice, how did they exercise it?"[68]In other words, given the limitations imposed by parliamentary sovereignty, did judges use their skills to interpret legislation or apply the common law in ways which promoted justice? The dismal answer is that more often than not, when faced with a choice, judges chose the "pro-executive" interpretation of the statute.[69]

However, a few judges (and even a division as a whole) stood out. From the pre-apartheid era Appellate Division, Justices Schreiner, Innes and Centlivres have been documented to be the more liberal judges on the bench.[70] The research on the case of my great-grandfather has led me to believe that Judge- President Feetham of the Natal Provincial Division could also be categorised in this way.[71] During the 1980s, the Natal Provincial Division (as a division rather than as individual judges) was seen to be more willing to promote justice than preserve the status quo.[72] Hoexter argues that the case of *S v Ramgobin*[73] is an example of the NPD choosing an interpretation of the law which countered executive policy and ideology. This decision, chorused along with others from that division[74], seemed to cumulatively show an activist approach by the bench.[75] These

[63] See Forsyth (2014) at 30.

[64] See Corder (1984) at 171.

[65] See Broun (2000-2001) at 37.

[66] See Broun (2000-2001) at 37.

[67] See Forsyth (2014) at 26.

[68] See Forsyth (2014) at 27.

[69] Hoexter C "Judicial policy in South Africa" (1986) 103 *South African Law Journal* 436 at 437.

[70] See Corder (1984) at 225.

[71] It must be acknowledged that Corder's analysis of the Appellate Division (1910–1950) finds Feetham (when appointed to the AD from the NPD) to be more conservative. See Corder (1984) at 225.

[72] See Hoexter (1986) at 446.

[73] *S v Ramgobin and others* 1985 (3) SA 587 (N).

[74] *S v Meer & another* 1981 (1) SA 739 (N); *Magubane v Minister of Police* 1982 (3) SA 542 (N); *In re Duma* 1983 (4) SA 469 (N); *Gumede and others v Minister of Law and Order & another* 1984 (4) SA 915 (N).

glimmers of fairness could not however detract from the "executive-mindedness"[76] ethos of the South African courts at the time.

In response to this, some litigants used the courtroom for political purposes. During his political trials, Nelson Mandela used "the law as a sword and a shield".[77] His legendary "I am prepared to die" speech rendered from the dock at the Rivonia treason trial[78] was his way of putting apartheid on trial for all the world to see. It was a public proclamation of resistance. Prof ZK Matthews famously said that the Rivonia Trial was about ideas being tried and not people.[79] In other words, "questions of guilt and innocence" were replaced with "ethical questions of state power and political morality".[80] The Treason and Rivonia trials skilfully used the courtroom for political ends. The litigants were not concerned with the legalities of the charges against them but rather with the politics of it.[81] In a sense, the trial was used as a historic opportunity to publicly articulate their grievances.[82]

Inside the courtroom, Mandela and others transformed the space into a site of struggle and choreographed performance.[83] These scenes of resistance in the courtroom were matched by what happened outside the court. These trials created political rallies and events where speech, song and dance were used as mediums to convey resistance to the apartheid State.[84] It was this defiant creative expression which became an outlet and means for the powerless and voiceless to reclaim dignity.

The SASO/BPC trial of Saths Cooper and others in 1975-1976[85] is an example of resistance not being just theatre or a performance but also a substantive critique of the law itself. It has been depicted to be quite a dramatic trial where it appeared as if the Black Consciousness Movement itself was being put on trial.[86] The accused persons

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[75] See Hoexter (1986) at 446.

[76] See Cameron E "Legal chauvinism, executive-mindedness and justice - L C Steyn's impact on South African law" (1982) 99 *South African Law Journal* 38 at 52, where he explains that the term 'executive-mindedness' means to support executive interests when these are in dispute, whether consciously or not.

[77] See Allo (2015) at 2.

[78] An inventory of an almost complete set of the trial records is available at http://www.historicalpapers.wits.ac.za/?inventory/U/Collections&c=AD1844/I (accessed 28 February 2019).

[79] Sampson A *The treason cage:The opposition on trial in South Africa* London: Heinemann (1958) at 28, as quoted by Durbach A "Book reviews" (2018) 27 (2) *Social & Legal Studies* at 266.

[80] Wilderson FB "The vengeance of vertigo: Aphasia and abjection in the political trial of black insurgents" (2011) 5 *InTensions* 1 at 7, as quoted by Modiri (2015) at 220.

[81] See Allo (2015) at 2.

[82] See Allo (2015) at 3.

[83] See Modiri (2015) at 213.

[84] Cole CM "Justice in transition: South Africa's political trials, 1956-1964" in Allo (ed) (2015) at 88.

[85] See Biko S (Stubbs A (ed)) *I Write what I like* Johannesburg: Picador (1978) at 109 for an extract of Biko's evidence at the trial.

[86] See Biko (1978) at 109.

entered the courtroom singing freedom songs with the raised fist "Amandla" salute.[87] One of the defendants, Saths Cooper, initially refused to plead to the charges.[88] Biko provided witness testimony at the trial. His now famous responses to questions posed by defence attorney, David Soggot, is described as a statement of the philosophy and tenets of the Black Consciousness Movement.[89] He defied the space of the court by refusing to testify within the conformities of the accepted legal language and instead spoke a counter-narrative based on the experiences of the oppressed.[90]In this way, he critiqued the law and the legitimacy of the "white" court and the power structures in the State.[91] One could say that this was an example of critical race theory in action.[92]

This reliance on law and procedure and the need to be seen and heard are perhaps what drove my great-grandfather to rely on the courts to rectify the wrong done to him and to give him a voice. The act of going to court became in this way his act of resistance, to not acquiesce and accept the status quo. In many ways, the court did not give him a voice. He was a black man in a white man's court. A powerless victim to its racism. The *Somers* judgment is poorly reasoned. The actual reason why NUC could not admit Somers as an internal student is not mentioned at all. Perhaps it was self-evident to all at the time and did not need to be said. To analyse the rationale would be tantamount to stating the obvious. The effect is powerful - Somers was left silenced and made invisible by the judgment. To further intensify the silence, there is no (known) press coverage of the case. One can only imagine the indignity of the entire experience for the 21-year-old Somers – from developing the resolve and courage to challenge the plainly racist NUC exclusion, to approaching legal counsel at some expense to defend the matter, only for it to result in a flimsily written judgment fringed with the veneer of racism.

As is the practice today, the Judge-President, as the most senior judge, would preside over cases where the subject matter was of importance. Within the colonial context, this would no doubt mean that the Judge-President would preside over matters relating to racial friction. The Judge-President presiding over the *Somers* case was Sir John Dove-Wilson. Scottish born, he was well-liked by the local legal fraternity for his

[87] See Modiri (2015) at 221.

[88] See Modiri (2015) at 221.

[89] See Modiri (2015) at 221. See also Biko (1978) at 109.

[90] See Modiri (2015) at 225. In a moving account, Biko describes how he was told by an Indian worker in Durban that he lives in order to work rather than working in order to live. This was used by Biko in his testimony to explain the oppression of the black man by the external world, where his humanity is diminished by outside forces. See Biko (1978) at 111-112.

[91] See Modiri (2015) at at 223.

[92] Modiri develops this line of thought. See Modiri (2015) at 214, where he "… suggests that the acts of resistance encountered in the political trials of the black radicals … exhibit[ing] the core themes of critical race theory …". He does not consider Nelson Mandela to be a black radical. See Modiri (2015) at 215.

extrovert personality and oratorical skills.[93] However, he was later criticized for being at the helm of the court when its judgments were treated by other jurisdictions with "patronising tolerance" and sometimes ridicule.[94] It is clear that his judgment in the *Somers* application does not deal substantively with the issues. Indeed, his refusal of the application is based on a suggestion from the Law Society that the admission rules of NUC excluded Somers. It is noteworthy to point out that NUC was not a party to the application. Is this not an example of the Court accepting hearsay evidence? In any event, this tardiness and failure to deal with the issues in a thorough manner diminished the dignity of litigants like Somers, who against all odds, courageously brought matters to the Court. It amounted to a grave injustice and a denial of a fair legal process.

A point must be made regarding the use of language in the judgment, and about the power of words. Admitting the applicant as a candidate attorney is termed "futile" since he "… has no chance whatever, in the circumstances, of ever becoming an attorney". Later in the same paragraph, the Judge-President states that given the decision of the University Council and the rules of court, "… the applicant can never become an attorney". The words used have a clear sense of finality. The rules cannot be amended unless good cause is shown and it is made clear that the Judge-President cannot be taken as "… indicating any view whatever as to what may happen or what view the Court may take …" should a case be made in this respect.[95] The seemingly insurmountable burden is on the applicant's young shoulders. This short and brief judgment, with its succinct and conclusive words, would alone be enough to deflate the sails of even the most optimistic applicant.

3.2 Exclusion at law schools and the legal profession

Over the last few years, the increase in student protests at tertiary institutions has been unprecedented in post-apartheid South Africa.[96] Our students are questioning the presence of colonial artefacts on campus, fees and admissions policies, racial and gender disparities in staff and student bodies, and the content of syllabi. They have demanded that we decolonise the LLB curriculum. Indeed, despite more than ninety years passing between the case of Bahadur Somers and the current student protests, it seems as if the crux of the resistance is the same, a challenge to the status quo in legal education.

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[93] De Beer M *A history of the Natal Provincial Division of the Supreme Court of South Africa during the Judge Presidency of Richard Feetham (1930-1939); with particular reference to the bench and the bar* (unpublished LLM thesis, University of Natal, 1988) at 5-6.

[94] See De Beer (1988) at 9.

[95] *Somers* judgment at para 1.

[96] See *Hotz and others v University of Cape Town* 2018 (1) SA 369 (CC). See also *Williams v The University of the Western Cape* 2017 JDR 0349 (WCC); Pather R "Students demand presidential pardon for #FeesMustFall charges" (22 August 2018) *Mail & Guardian* available at https://mg.co.za/article/2018-08-22-students-demand-presidential-pardon-for-feesmustfall-charges (accessed 28 February 2019); Soudien C "Looking backwards: How to be a South African university" (2015) 4 (2) *Educational Research for Social Change* 8 at 9.

Access to legal education and the profession was always well guarded by those in power. As a result, membership of the profession was not reflective of the demographic profile of the country during colonialism and apartheid.[97] Women and people of colour were not granted immediate access to the legal profession. The cases of *Schlesin*[98] and *Wookey*[99] from the early 1900s showed a reluctance on the part of the profession to admit white women as attorneys, despite universities opening their doors to white women. Adopting a narrow interpretation of the applicable statutes, the courts in these two cases held that the longstanding male-only tradition of the profession could only be altered by clear and unequivocal legislation, and not by the courts.[100] Despite changes to the admission laws and policies allowing women to practise law, the first African female attorney in the country, Desiree Finca, was initially ignored by the presiding magistrate and her admission status questioned due to her race.[101]

Tertiary education was historically a whites only privilege in South Africa. The Afrikaans medium universities were not open to blacks during the pre-apartheid and apartheid years.[102] By the 1920s, the University of Cape Town and the University of the Witwatersrand had small numbers of black students.[103] Despite both these universities being "open" to all race groups, blacks were *de facto* excluded from non-academic activities and had separate dormitories.[104] In 1916, the South African Native College at Fort Hare initially admitted African students only. By the 1920s, all black students (including coloureds and Indians) were welcomed to the institution.[105] The institution developed a type of dualist management with the neighbouring Rhodes University, the "white" university.[106] In essence, what was achieved was a "close academic association"[107] but with separate facilities for whites and blacks.

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97 See Kaburise (2001) at 364.

98 *Schlesin v Incorporated Law Society* 1909 TS 363.

99 *Incorporated Law Society v Wookey* 1912 AD 623.

100 See *Schlesin* (1909) at 365–366 and *Wookey* at 635. Interestingly, the court *a quo* in *Wookey* found in her favour but the decision was overturned on appeal - see *Wookey v Incorporated Law Society* 1912 CPD 263. On another note, Sonya Schlesin was articled to Mohandas Karamchand Gandhi.

101 Jele NM "Gender transformation, is enough being done?" (01 February 2015) *De Rebus* available at http://www.derebus.org.za/gender-transformation-is-enough-being-done/ (accessed 28 February 2019).

102 Guest B *Stella aurorae: A history of a South African university, Volume 1 Natal University College (1909 – 1949)* Pietermaritzburg: Occasional Publications of the Natal Society Foundation (2015) at 175. However, there is evidence suggesting that two coloured students were admitted to Victoria College in Stellenbosch (now University of Stellenbosch) in the 1910s. See Brookes (1966) at 43. This admission practice did not continue.

103 See Guest (2015) at 175; Brookes (1966) at 43.

104 See Guest (2015) at 175-176.

105 See Guest (2015) at 175; Brookes (1966) at 43.

106 See Guest (2015) at 175.

107 See Guest (2015) at 175.

This exercise in separate tertiary education facilities was experimented with in Natal. In 1936, NUC took the decision, after intense consultation with the University Council and Senate, to begin offering university courses to a small number of black students at a separate location. The Principal of NUC at the time, JW Bews, was sympathetic to the admission of blacks to the university and initially proposed that he be granted the discretion to admit such students, as was done at UCT and Wits.[108] However, the University Senate was conscious of the conservative public sentiment which was fearful of blacks dominating at the University.[109] It was believed that an increase of blacks at the institution would lead to "white flight", especially white female students. This possibility, together with the withdrawal of endowments by benefactors, posed a financial risk to NUC.[110] Hence a compromise of sorts was reached: a limited number of separate lecture facilities was offered to blacks. For all its flaws (of which there were many)[111], this system was pioneered with the philosophy of Prof Mabel Palmer - half a loaf is better than none.[112] She pressured the university for parallel facilities for blacks at a time when no such facilities were available.[113] Later, this policy was furthered by Prof EG Malherbe when NUC became a fully-fledged university.[114] The general view was that it was unrealistic to offer integrated classes in a deeply conservative white Natal, where the threat of domination by the majority black population was all too present.[115] To Malherbe, incremental separate but equal tertiary education was a means to achieving equality at a gradual pace.[116]

This "crude power" exercised by the universities of the past allowed them to exert "a kind of physical violence" on people of colour by means exclusionary admission policies.[117] There have been countless cases of universities exercising this power in the past, my great-grandfather's case being just one of them.[118]

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[108] See Guest (2015) at 177.

[109] Special mention is made of the fear that Indian students would dominate the engineering departments. See Guest (2015) at 179.

[110] See Guest (2015) at 177.

[111] As is the tradition of separate never being equal, it comes as no surprise that the facilities and conditions of learning offered to these students are recorded to be sub-standard. In addition, the indignity of a segregated graduation left many students bewildered with the "half loaf" approach. See Bhana & Vahed (2011) at 92-94. The Natal Indian Congress opposed racial segregation at universities and stated that it was "repugnant to the high ideals and traditions attaching to a seat of learning". See Guest (2015) at 190.

[112] See Guest (2015) at 186. Despite the obvious flaws in a system of segregated tertiary education, it must be noted that Palmer was much loved and appreciated by her students, many of whom became community leaders and formed part of the growing black intelligentsia at the time. See Guest (2015) chap 5; Brookes (1966) chap IX , and generally Bhana & Vahed (2011).

[113] See Bhana & Vahed (2011) at 77.

[114] See Guest (2015) at 228.

[115] See Guest (2015) at 228.

[116] See Guest (2015) at 228.

[117] See Soudien (2015) at 19.

[118] See Bhana & Vahed (2011). See also Soudien (2015).

With regard to legal education, NUC faced a "persistent difficulty"[119] in that over the years it was often approached by mainly Indian articled clerks requesting admission to the Law Certificate classes. Just ten years after my great-grandfather's unsuccessful application, two Indian candidate attorneys approached NUC in 1937 for admission as part-time students in the law department.[120] According to Milton and Mcquoid-Mason, the Dean of the Law School was prepared to accept these students but found that the NUC authorities were unwilling to have an integrated institution.[121] These applicants were denied admission and turned to the Supreme Court for assistance.[122] Instead of bringing an application to the court, the applicants approached the Judge President of the Natal Provincial Division, Feetham JP, and explained that they had registered articles with a law firm but could not complete the required courses at NUC because of their race.[123]

Judge President Feetham was known for having a towering intellect and being a dynamic leader.[124] De Beer notes that during his tenure as Judge President, the Natal Provincial Division became highly respected for its judgments, bench and legal profession.[125] Most progressively for his time, Judge President Feetham did not brush off the approach made by the two Indian applicants in 1937. History records that he took the matter very seriously. He notified Dean Burchell of the NUC Law School, and indicated that if NUC failed to provide instruction to the two applicants as required by Rule 26 of the Supreme Court, the Court would issue a further rule withdrawing recognition of NUC as the only institution providing such courses.[126] Under such pressure, NUC had to accept the students but arranged for parallel classes to be held, segregated from the white law students.[127]

It must be noted that this system of parallel tuition came at some expense to the teaching staff who were already subject to immense teaching burdens.[128] It can only be assumed that this "additional burden" to the Law School was not met with great enthusiasm, and so it came with some relief when this system was discontinued in 1942.[129] Black students were eventually accepted to the LLB programme in 1956 but on a separate campus.[130] However, the hurdles increased for black students when the

[119] See Brookes (1966) at 43.

[120] See Brookes (1966) at 44. See also Burchell (2010) at 34; Milton JR & Mcquoid-Mason DJ "The faculty of law, University of Natal: two in one" (1995) *Consultus* 37 at 45.

[121] See Milton & Mcquoid-Mason (1995) at 45.

[122] See Brookes (1966) at 44.

[123] See Brookes (1966) at 44.

[124] See De Beer (1988) at 8.

[125] See De Beer (1988).

[126] See Brookes (1966) at 44.

[127] See Brookes (1966) at 44; Milton & Mcquoid-Mason (1995) at 45.

[128] See Milton & Mcquoid-Mason (1995) at 45; Burchell (2010) at 34 fn 7 & 35 fn 8; Brookes (1966) at 44.

[129] Milton & Mcquoid-Mason (1995) at 45.

[130] Milton & Mcquoid-Mason (1995) at 46.

Extension of Universities Act 45 of 1959 made it a criminal offence for a black student to register at a historically white university without Ministerial permission. As a result of this, the number of black students fell dramatically at the then Natal University during the 1960s and 1970s.[131]

Law schools have always been a political and ideological space[132] where important issues are contested and , importantly, young leaders and intelligentsia are created. Our colonial and apartheid past is evidence of this. Law schools were maintained as elite institutions to allow for a particular ideology to flourish. Indeed, legal education supported the apartheid policy and influenced it.[133] In the Natal context, it is clear that access to tertiary education was in the hands of the white elite. The college, and then university, authorities were aware of the conservative community sentiments with regard to integration, and provided segregated classes as a pragmatic compromise. It was not meant to create radical change or to overturn the prevailing racist policy.[134]

Post-apartheid South Africa still has many challenges to creating a diverse and pluralistic law school environment. Section 29(1) of the Constitution[135] grants everyone the right to further education. The State must take reasonable measures to progressively provide further education. From an admissions perspective, the rules in place may not be directly discriminatory but their strict application often has the result of blocking the pathway to the legal profession for people of colour. To be simplistic, a challenged public schooling system, especially in poor socio-economic neighbourhoods, coupled with a high unemployment rate, means that students of colour can often not comply with the merit based admission criteria or pay the university fees. One could argue that these structural challenges today inflict an invisible violence. Whilst Somers knew that he was fighting against a set of racist laws, the students of today have an enemy which cannot be clearly seen. The effect, however, is the same: exclusion.

Democratic South Africa inherited a relatively untransformed legal fraternity, both in gender and race. In 1994, only 20 per cent of the legal profession were black South Africans.[136] It was thought that racial inequality could be addressed by changing the length of the LLB degree.[137] The LLB degree was initially a post- graduate degree. The Black Lawyers Association and other interested groups lobbied for the conversion of the

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131 Milton & Mcquoid-Mason (1995) at 46.

132 Kennedy D "A cultural pluralist case for affirmative action in legal academia" in Crenshaw K, Gotanda N, Peller G & Thomas K (eds) *Critical race theory, the key writings that formed the movement* New York: The New Press (1995) at 162.

133 See Greenbaum (2009-2010) at 5, quoting Dhlamini C "The law teacher, the law student and legal education in South Africa" (1992) 109 *South African Law Journal* 595 at 598.

134 See also Bhana & Vahed (2011) at 68.

135 Constitution of the Republic of South Africa, 1996.

136 Greenbaum L "The four year undergraduate LLB: Progress and pitfalls" (2010) 35 (1) *Journal for Juridical Science* 1.

137 Sedutla M "LLB summit: Legal Education in crisis?" (01 July 2013) *De Rebus* available at https://www.derebus.org.za/llb-summit-legal-education-crisis/ (accessed 14 October 2019).

degree into a four year programme to allow for transformation of the profession.[138] Potential black law students from poor backgrounds were unable to pay the fees required for the lengthy degree and this hampered the transformation of the legal profession.[139] In 1997, after debate and consultation,[140] the LLB degree was offered as a four year programme.[141]

However, in the years to follow, it was clear that reducing the length of the degree did not result in the true transformation of the profession. Complaints from the profession were rife that the four-year graduates lacked the skills and competency required of a professional degree.[142] Some argued that the reduction in length of the degree resulted in less time being given to skills attributes, such as, like critical thinking and ethical decision making.[143] Others felt that the poor state of basic education in the country was to blame.[144] Importantly, the changes to the length of the degree had not significantly changed the racial composition of the profession.[145] By agreement with the South African Law Deans Association, the Council on Higher Education (CHE) undertook to conduct a national review of the country's 17 law schools.[146] Prior to the national review conducted during 2015/2016, the CHE, in consultation with stakeholders, drafted a Qualification Standard for the Bachelor of Laws.[147] This standard is underscored by certain core values, namely: transformative constitutionalism; social justice; globalisation; and information technology.[148] The qualification is achieved when the following attributes are attained: knowledge; skills (critical thinking and research); and certain applied competences.[149]

The LLB review process undertaken by the CHE highlighted the challenges on the ongoing journey towards achieving transformation and inclusion in law schools. The intensive review and the subsequent Report [150] resulted in the withdrawal of

[138] See generally Sedutla (2013).

[139] See generally Sedutla (2013).

[140] It must be noted that the reasons for changing the duration of the degree had more to do with political aims than teaching pedagogy. Indeed, law deans felt that their concerns and opinions were marginalised during the consultations. See Greenbaum (2010) at 10.

[141] Qualification of Legal Practitioners Amendment Act 78 of 1997.

[142] See Greenbaum (2010) at 13. See also Council on Higher Education "State of the provision of Bachelor of Laws (LLB) Qualification in South Africa" (November 2018) available at http://www.derebus.org.za/wp-content/uploads/2019/06/CHE_LLB-National-Report_2018.pdf (accessed on 14 October 2019) at 4 (CHE Report).

[143] See generally Sedutla (2013).

[144] Greenbaum (2010) at 4.

[145] Greenbaum (2010) at 13.

[146] See CHE Report (2018) at 4.

[147] CHE Report (2018) at 4.

[148] CHE Report (2018) at 18.

[149] CHE Report (2018) at 64.

[150] CHE Report (2018).

accreditation at one university. The remaining 16 national law schools were required to address their curricula (and related aspects) in various ways.[151]

The central ideal against which law schools were measured was the notion of transformative constitutionalism. Transformative constitutionalism, as conceived by late Chief Justice Langa, is an ongoing and permanent ideal creating social and economic revolution in society and eventual change to the legal culture.[152] The implication for legal education is this: what is taught at law school, how it is taught, and to whom it is taught , should reflect the ideal of transformative constitutionalism.[153] This ideal should be internalised by staff and students. The ultimate aim is to inculcate in students values of social justice, inclusivity, fairness, dignity and equality.[154] What is taught should be responsive to the needs of South Africa's diverse society.

Given the culturally pluralistic society in which we live, it seems only reasonable that law schools should reflect the society about which they provide commentary and analysis. This observation is reflected in the CHE Report.[155] Indeed, a diverse student body is acknowledged to enhance the academic experience of students.[156] Many law schools in the country do not have a student body which is reflective of the national demographic.[157] Academic staff demographics are not representative of the national demographic either.[158] Clearly, much more needs to be done to achieve the goal of inclusivity and transformation. It is only when law schools are culturally pluralistic (with respect to race, class, gender, and ability) that true academic excellence can occur in scholarship and teaching.[159]

4 CONCLUSION

What would have happened if Somers had been granted his application? Would NUC have offered the courses to him and other black students? Importantly, how would becoming an attorney have affected the trajectory of his family? Perhaps speculating on this last question is irrelevant. Much time has passed, and it seems trivial to focus on what could have been. Furthermore, there are too many variables. Apart from colonial and apartheid racist laws and policies in place over the course of the last century, family members would have to contend with gender discrimination prevalent within macro

[151] See CHE Report.

[152] Langa P "Transformative constitutionalism" (2006) 17 (3) *Stellenbosch Law Review* 351 at 352-354.

[153] CHE Report (2018) at 18.

[154] CHE Report (2018) at 18.

[155] For instance, see CHE Report at 19, 30, & 37-38.

[156] CHE Report (2018) at 30.

[157] CHE Report (2018) at 30.

[158] CHE Report (2018) at 38.

[159] This submission draws on Kennedy's view about the gains to be achieved if there was large scale affirmative action in legal academia. See Kennedy (1995) at 168. He argues that, among others benefits, there would be more scholarship generated on issues impacting communities of colour , and that this would enhance academia.

and micro settings. Other stumbling blocks could be very personal – perhaps there was no interest, ability or competence to follow in Somers's path. Speculating also does not achieve very much, as the tendency to exaggerate what could have been is almost irresistible.

That being said, I think one has the right to dream of what could have been. One has the right to consider a different past, one where dignity is restored. When I think of this, I am astounded by what could have been. By all accounts, Bahadur Somers was an intelligent person with sound ethical judgment. This coupled with his strong sense of humanity and community would have made him an outstanding lawyer. In the words of Madiba, he possessed that formidable combination of "a good head and a good heart".[160] His success would have paved the way for his children's success, opening their pathway to other career prospects, unrelated to the teaching profession. Perhaps the surname Somers would be well-known within legal circles, opening secret invisible doors of privilege within the fraternity. Who can tell?

In many ways the story of Bahadur Somers has come full circle. I am his great-granddaughter, an attorney and legal academic, writing his story. The irony that I attained my law degree at the very institution which denied him admission is not lost on me.

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