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Striking a Regulatory Bargain. The Legal Profession, Associations and the State in South Africa

Abstract: This article examines the regulation of the legal profession in South Africa from colonial times, through apartheid and into the post-apartheid period. It narrates the changing relationship between professional associations and the state, locating these events within the debates on professional self-regulation. Taking the view that professional self-regulation is as a result of "an arrangement" between professions and the state it explores the regulatory bargain struck between associations and the state. The paper demonstrates that during the apartheid period the profession utilised apartheid legislation to exclude black legal professionals. However, in the post-apartheid period, when the state proposed legislative interventions in order to enable access to both the profession and justice, a new regulatory bargain had to be negotiated.

Keywords: Professions, professional regulation, self-regulation, states, South Africa, legal profession.

This article explores the regulation of the legal profession in South Africa. Taking a historical perspective it examines the changing relationship between professional associations and the state. Moving from the colonial period to contemporary times it traces the regulatory bargain/s struck between the state and professional associations that allowed the South African legal profession to self-regulate. The historical perspective allows me to demonstrate the alignment between professional associations and state interests; even if state interests have changed over time. The overall argument is that by conceding to the interests of the state and redefining 'the citizen' in whose interests the profession should also act, the professional associations have been able to renegotiate and maintain the "bargain" that allowed self-regulation.

I begin by discussing the development of the legal profession in the four colonies located in southern tip of Africa. When these colonies formed the Union of South Africa (a self-governing dominion under the British Empire) the profession was differentially regulated across provinces depending on the colonial legacy. The second section examines professional self-regulation in the twentieth century, briefly outlining the establishment of the professional project, investigating the ways professional associations facilitated (or not) access into the profession and exploring the regulatory bargain made between (white) legal professionals and the state during apartheid. During this period there develops a consensus between pro-

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fession and state as to who is "the public" and thus who constitutes "a citizen". The self-regulatory project required that the legal profession accede to the political demands of the Apartheid state and act in accordance. In the state's view the citizen was white, primarily male and urban. The quid pro quo was that the state then allowed the profession to manage itself. Furthermore, the profession was able to exploit the discriminatory legislation passed by the Apartheid State to advance its professional project and utilise the wider structures of racial and gender power to ensure white male legal professionals dominated the labour market.

In the final section, the article examines the legislative interventions made by the post-apartheid state in order to ensure access for previously excluded groups (black and female) and thus transform the profession. The first draft of the Legal Practice Bill (DoJ, 2009) indicated the state's intention to remove the power to self-regulate. I suggest that the state's attempt to weaken the power of professional groups was linked to the imperative to transform and enable access in a context where professional closure had been (and still was) used to exclude people on the basis of their race and gender. Faced with a threat to their self-regulation, professional associations found ways to enable access to both the profession and the justice system. Thus a new regulatory bargain was agreed to.

Professionalisation and the regulation of professions

Professionalisation is a complex process whereby professional groups acquire recognition from the broader society. Alongside recognition is the occupational control of that work by the profession (Friedson, 1986; Larson, 1977). It is through the process of professionalisation and regulation that states' consent to some occupations acquiring professional power and privilege in the labour market (Flood, 2011). Not only do professions play a role in maintaining social order but they have become integral to the way modern states govern (Saks, 2010). Thus the regulation of the professions not only allows professional groups to control markets to their benefit it also benefits states (Adams, 2009, p. 196). Evetts (2002, p. 341) points out that while self-regulation has been keenly defended by professional bodies it equally reflects the trust that the state has in a professional group.

Earlier theorisations of the professions, located within the trait and functionalist paradigms, understood professions to be generally beneficial to society and argued that they acted to use their knowledge for the society at large (Saks, 2014, p. 85). These theorisations have since been critiqued (see Saks, 2010; 2014) and much of the contemporary literature draws on Weber and neo-Weberian theories to suggest that professions petition the state to enact legislation allowing for their self-regulation in order to secure their control over the market (Evetts, 2002, p. 345; Saks, 2010, p. 887-888). Professional groups seek social closure in order to "monopolise rewards for self-gain" (Adams, 2016, p. 2) and as such, they have little interest in the public good (Saks, 2014).

A number of public scandals have resulted in a view that the professions have little interest in the public and put their interests first. In the wake of these the power of professions in many countries has been reduced along with their ability to self-regulate (Adams, 2017; Adams & Saks, 2018; Flood, 2011; Lester, 2016). Some have argued that the self-regulation of professions is a relic of the past and that governments have instituted regulatory changes in order to substantially limit professional autonomy (Evetts, 2002).

Adams (2015, p. 159) suggests that the argument that self-regulation belongs in the past is often based on researchers generalising limited empirical examples from one or other profession or nation and then making "bold theoretical statements" regarding the way in which professions are regulated. There is increasing recognition that professionalisation and the professional control of work is located in a particular historical and economic context; one that involves constant negotiation

and renegotiation between states and professions (Faulconbridge & Muzio 2008, p. 10). State-profession relations have changed in many different ways over the last decades of the twentieth and twenty-first century (Adams & Saks, 2018, p. 62).

Furthermore, Adams and Saks (2018, p. 66) have suggested that the argument that professions are only in it for self-gain is somewhat simplistic. They argue that professions may simultaneously act in terms of public interest; honour their ethical considerations; and, try to improve their market position. Similarly states respond to their own contextual situation based on the history and social situation of a particular society as well as their own particular political interests and values. States have "their own agendas—including pursuing regulatory change for reasons that appear to be politically, ideologically and financially motivated" (2018, p. 62). Thus decisions around regulation may arise from a complex variety of interests, concerns, and values from both states and professional groups.

States and professions over time come to an arrangement, a regulatory bargain, whereby professions are given the power and freedom to manage their own affairs as long as it's in the public interest (Adams, 2016, p. 2; Flood, 2011, p. 509). However, as Adams (2016, p. 1) comments the concept of "public interest is a social construction and therefore "subject to contest and change". Furthermore, the public has race, class, gender, and ethnicity, among other identities. In South Africa, as argued above, the regulatory bargain initially agreed upon between the state and the profession was based on a common understanding of who constituted this public. But as Adams and Saks (2018) indicate states have their own agendas; agendas that are fundamentally political. When the interests, concerns, and values of the South African state changed, it became necessary to renegotiate this bargain or forfeit the support of the state for self-regulation.

Adams (2016, p. 12) in her discussion of the changing regulatory context in Canada argues that "regulatory change is actually linked to the changing conceptualisations of the public interest", she demonstrates that when the interests of the professions and the public were seen as compatible then self-regulation and autonomy "made sense" but that it is the changing definition of public interest away from service to "open competition and cost reduction" that contributes to the decline of self-regulating professions. In South Africa the concern of the state was to ensure that the profession aligned to its broader political agenda and it was on this that the regulatory bargain hung.

Methods

This article uses an historical sociological method. Four data sources were reviewed.

Firstly I sourced secondary literature (both published material and unpublished dissertations) on the development and regulation of the legal profession in South Africa. An analysis of the secondary material provided a broad picture of existing knowledge as well as demonstrating the gaps in the literature. It confirmed Klaaren's (2010) view that the way(s) in which the South Africa legal profession developed and became regulated has not been studied in-depth.

Secondly, I reviewed legislation pertaining to the regulation of the legal profession going back as far as possible into the colonial period. Unfortunately it was not always possible to locate colonial legislation, particularly for the early colonial period. For the discussion of legislation and regulation in this period I relied on secondary literature.

Thirdly, I reviewed publications and newsletters published by professional associations. In the main these were *Advocate* and *De Rebus*, but I also searched for material from other associations particularly the non-statutory bodies. *Advocate* (formerly *Consultus*) is the official publication of the General Council of the Bar. It has been published since 1988; at first four per annum but now three. *De Rebus* is

the official publication of the Law Society of South Africa. It has been published monthly since 1955. I searched them using keywords associated with the key pieces of legislation.

Fourthly I sought information, both "official" and "unofficial, that related to the legal associations (statutory and non-statutory). This information was frequently anecdotal and often found in "histories" published in the newsletters, magazines, and websites of the different professional associations. The "official" information contained many silences on the way in which professional closure embraced race or gender. I, therefore, looked for literature that explicitly spoke to questions of closure and the experiences of black and female legal professions. Here critical reflections from legal professionals on the role of these associations, submissions to the Truth and Reconciliation Commission (TRC) (1997) as well as new interpretations of this history from biographies and autobiographies of black legal professionals (Meer, 2002; Moseneke, 2016; Ngcukaitobi, 2018) were useful.

Regulation and professionalisation in colonial South Africa

The South African legal profession traces its roots to the four territories that formed the Union of South Africa in 1910, with the profession's form laying in the legal tradition of the colonising powers. The Cape was first colonised by the Dutch in 1652 and while there were no restrictions or qualifications needed to practise as an attorney only those with a Doctor of Laws from the Netherlands could be admitted as an advocate (Erasmus, 2015, p. 221). After the Napoleonic wars, when the Cape once more became a British Colony more fundamental changes mimicking the British legal system were introduced. The First Charter of Justice, passed in 1827, gave the Cape Supreme Court the powers to admit and suspend legal practitioners. From 1829 the Supreme Court determined that to be admitted as an attorney a person needed to serve as a clerk for five years (Ehlers, 2003, p. 80). To be recognised, advocates had to have qualifications from the "mother" country, admitted as a barrister in England, Ireland or Scotland, or hold a Degree of Doctor of Laws from Oxford, Cambridge, or Dublin or have graduated in law from Holland (Erasmus, 2015, p. 224). Only fifty years later when Act 12 of 1858 (Cape Colony) was passed could advocates qualified in the Cape be admitted (Erasmus, 2015, p. 224). In 1883 the Law Society of the Cape of Good Hope was initiated through the Incorporated Law Society Act 27. Its purpose was to "promote the uniform training, examination, and admission of attorneys and notaries and to maintain uniform practice and discipline among its members" (Ehlers, 2003, p. 81). However, membership was not compulsory for attorneys and many attorneys in the Colony were not members. The Act also allowed for admission on the basis of a university law examination and three years of clerkship (Ehlers, 2003, p. 81).

Natal was proclaimed a British Colony in 1843 following the annexure of the Boer Republic of Natalia (Morrell, Wright & Meintjes, 1996). Cape Ordinance 14 of 1845 was the first legislation to regulate the profession in the Colony of Natal; allowing the Court to admit and enrol advocates and attorneys already admitted in the Cape (de Beer, 1988, p. 93). This Ordinance was repealed by Law 10, a Natal Ordinance in 1857. It established the Supreme Court and admitted English and Cape legal practitioners as well as those qualified in terms of the Rules of the Court. The Rules allowed admission provided a person had a degree and had served articles with a practising attorney. Attorneys were free to practise as advocates, but formal admission was only possible after three years of practise and the passing of a higher examination. A further set of rules were enacted in December 1906, with a requirement that aspiring attorneys had to attend a minimum number of lectures before being able to take examinations. "Dual practice", whereby attorneys directly represent clients in the High Court, became entrenched in the laws of the Colony (de Beer, 1988, p. 93-97).

The Natal Law Society was formed on 16 February 1871. The Association registered under the Literary and Other Societies Act 35 of Natal (1874) with voluntary membership Legal Practice Council, n.d.). In 1907 the Natal Law Society was incorporated under the Incorporated Law Society of Natal Act, 10 of 1907 (Natal)—a private Bill. This incurred fierce opposition with some legislators likening the move to "trade unionism", claiming it was not in the public interest (Legal Practice Council, n.d.). The profession argued that it was essential to its development and success that all attorneys fell under the disciplinary ambit of one law society (de Beer, 1988, p. 99). The Incorporated Law Society of Natal regulated both advocates and attorneys (Legal Practice Council, n.d.).

The regulation of the legal profession in the Boer republics, the Orange Free State and the South African Republic, was minimal; little importance was placed on qualifications or legal training with no statutory regulation at first (Black Lawyers Association [BLA], n.d.b., p. 2). At the start of the South African War, the law societies in both territories were disbanded (BLA, n.d.b., p. 2). In 1902, following the British victory both became British colonies (South African History Online [SAHO], 2019). The new British rulers moved to reconstruct the state in these two territories, a state which Chanock (2004, p. 222) argues they saw as corrupt in all its practises. Integral to this was the project of "actively remak(ing) the public and legal institutions of the state" (Chanock, 2004, p. 222). A new Supreme Court Bench was established and tasked with, amongst other things, the professionalisation of the legal profession. In both colonies Law Societies were re-established through proclamations, their purpose to regulate the profession and "look after" members' interests in the profession (BLA, n.d.b., p. 2-3).

Chanock (2004, p. 221) argues that the primary project of the profession at the beginning of the twentieth century was to create a status for itself that matched the dignified image it wished to portray. This, he claims, is peculiar to a "colonial profession" which has to "struggle to establish for itself a place that befits the image bestowed from the metropolis" (Chanock, 2004, p. 221). As the previous discussion demonstrates legal professionals were from a variety of backgrounds with varied paths to admission and in all colonies except Natal there was a clear division between the Bar and Side-Bar. The elite, through the various law societies, moved to establish common notions of professional conduct. Broadly these related to relationships between attorneys and companies; touting; property transfers; and, what might be considered 'proper' work for attorneys (Chanock, 2004, p. 222-225). In the early years of the twentieth century the law societies moved to disbar attorneys they deemed to be behaving unprofessionally and so establish the ethics of professional conduct via the courts (Chanock, 2004, p. 224).

Professional self-regulation and access: the state and professional associations in the twentieth century

In 1910 these different regulatory frameworks were transferred into the Union. The now provincially-based Law Societies continued to drive the regulation of the profession, through provincial legislation. In the Cape and Natal these originated through Private Members Bills with the profession pushing a self-regulatory agenda. While in the Orange Free State and Transvaal the regulatory framework was driven, in the post-war environment, jointly by state and professionals.

Post-union there was determination to bring uniformity to the profession and to create a common set of rules and regulations. In this the state and profession didn't always speak with one voice. Chanock (2004, p. 227-240) points to three concerns occupying the profession at this time; firstly, "overcrowding" and "unprofessional conduct" and thus the desire for the qualification process to be more rigorous and to increase professional control; secondly, attempts to specifically exclude on the basis of gender and race; and thirdly, what I call *boundary battles* whether this be

the administrative creep of the state into what the profession saw as their domain and disquiet over the widening jurisdiction of magistrates, or, establishing the exclusive right of attorneys to conduct property transfers.

Concerned with access, status, and conduct, legal professionals organised themselves into professional associations that could control these areas. By 1910 the Cape was the only province where it was not compulsory for attorneys to be members of the Law Society. In 1916 the Cape Law Society introduced a private member's bill, The Law Society (Cape of Good Hope) Private Act 20 ("Cape Town Attorney", n.d.), its primary purpose being the closer regulation of attorneys including compulsory membership for all attorneys practicing in the Cape. This, it argued, was necessary so that "the society could exercise "proper disciplines, control and supervision" (SC 1 2016 cited in Chanock, 2004, p. 228).

In 1912 attorneys had attempted to create, through the submission of a Private Bill, a national law association to control admission, conditions and practice. The Bill was rejected primarily due to opposition from legal agencies who did not want their work curtailed (Ehlers, 2003, p.84). Law Societies continued their struggle to reserve certain work for attorneys as well as ensure uniform admission criteria (Ehlers, 2003). They saw partial success with the formation of the Association of Law Societies of South Africa in 1933 and the passing of the 1934 Attorneys, Notaries and Conveyancers Admission Act (No 23) and the Deeds Registries Act in 1937 (Ehlers, 2003, p. 92).

However, the Association did not have legal or regulatory authority and provincial-based law societies continued to conduct their own affairs. It was only in 1975 with the passing of the Law Societies Act (No 41) that there was a "uniform legislative framework within which all Societies [would] operate" (Knoll, 1975, p. 312). Law Societies had a dual function; firstly, to take care of the members' interests (through the Law Society), and, secondly, to regulate the affairs of the Society (through the Council of the Law Society) (BLA, n.d.b. p. 3-4).

The 1934 Attorneys, Notaries and Conveyancers Admission Act (No 23) repealed all the previous colonial era legislation and specified the criteria for admission. The period of articles was set at three years (at first the profession proposed five) and the Act ensured conveyancing work was only done by admitted attorneys. From here onwards no person could be admitted as an attorney, notary or conveyancer unless they complied with the provisions of this Act. Despite amendments the main provisions of this Act remained in force till the Attorneys Act No 53 (1979) repealed previous legislation including the Law Society Act incorporating its provisions.

Advocates and attorneys established themselves as different professions. The Natal exception of "dual practice" changed in the early 1920s. In 1929 the Society of Advocates of Natal was formed with the division formalised through the rules of the Court in 1932 (de Beer, 1988). The Admission of Advocates Act (No 19) was passed in 1921, stating the qualifications for admission. It, along with all other legislation passed prior to 1910, was repealed in 1964 by the Admission of Advocates Act (No 74); outlining the educational qualifications required for admission, the process of admission and creating a Roll of Advocates to be administered by the Secretary of Justice. However, the Act did not regulate the profession or appoint a regulatory body; that was left to the Bar Councils.

Advocates organised themselves independently with each local division of the High Court forming a Bar. In 1946 the various societies formed the General Council of the Bar (GCB), a federal body with ten affiliated societies of advocates. The Orange Free State and Pretoria Bars refused to admit black members; to accommodate them, and avoid disagreements on membership, it was agreed that Bars would formulate their own constitutions. The Pretoria Bar was to maintain its "all-white membership clause" until 1980 (Ellis, 2004, p. 17).

Chanock (2004) argues that the profession's attempt to exclude women (for a while) and black people was not unique to South Africa during this period. He

(Chanock, 2004, p. 31) notes; "empire, segregation … were fundamental parts of the world within which South Africa's race-based law developed". In 1909, the Transvaal Supreme Court denied Sonja Schlesin (Schlesin v. Incorporated Law Society, 1909 TSC 363) the right to register her articles. Mr. Justice Bristowe refused the application with costs, saying "the articling of women is entirely without precedent in South Africa and never was contemplated by the law" SAHO, 2011). In 1912 Madeline Wookey applied for an order against the Incorporated Law Society (Cape) compelling it to register her articles of clerkship so she could be admitted as an attorney. The Law Society's appeal was upheld by a full bench of the Court (Incorporated Law Society v Wookey 1912 AD 623) on basis that although "persons" could be admitted as attorneys, women did not fit the definition of "person" (Manyathi-Jele, 2015). Only in the early 1920s did the Law Societies remove their opposition (Chanock, 2004, p. 226) and the Women's Legal Practitioners Act 7 (1923) was passed. Three years later the first two (white) women were admitted to the profession (Chitapi, 2015, p. 5). The first black female attorney, Desiree Finca, was only admitted in 1967 (Manyathi-Jele, 2015).

The Law Societies also opposed the admission of black attorneys. The first black (male) South African lawyers trained at Lincolns Inn (London) in the early twentieth century. In 1910 when Alfred Mangena filed an application for admission to the High Court (in the Transvaal) it was opposed by the Law Society of the Transvaal (Ngcukaitobi, 2018, p. 97-100). They claimed there was little possibility of him finding work from the white population and argued "natives" were encouraged to take their grievances to the Department of Native Affairs rather than litigate. The court disagreed, and he and other London-trained attorneys were admitted (Ngcukaitobi, 2018, p. 130-131). Only in 1956 was the first black (male) advocate, Duma Nokwe, admitted to the Johannesburg Bar (South African History Archive [SAHA], n.d.a).

Despite few legal impediments to black students registering at universities in the early twentieth century other measures of discrimination impacted the possibilities of them training as lawyers. In his autobiography, Ismail Meer (2002, p. 69-79) explained that his legal studies at the University of Natal "black section" was terminated in 1942 as "the Natal Law Society was against non-whites entering the legal profession. … the council of the university bowed to the wishes of the Law Society." He was one of ten black students forced to terminate their law studies (Meer, 2002, p. 70).

In 1948 the National Party was voted into power and began to pass legislation institutionalising racial segregation and oppression. The introduction of Bantu Education in 1954 shifted the primary institution of social closure to the State (Bonnin & Ruggunan, 2016). In 1959 the Extension of Universities Education Act was passed and tertiary institutions became segregated on the basis of race and ethnicity. The net effect being that by 1962 of the 3000 registered attorneys only 13 were African, 26 Indian and five 'coloured' (Sachs, 1973). By the mid-80s only ten percent of 6500 registered attorneys were black; seven percent of 650 advocates were black; and, there were only two black senior council (Pruitt, 2002, p. 562). In the main the profession was happy to cooperate with the State in excluding black lawyers.

The Group Areas Act (1950) was among the most serious obstruction faced by black lawyers. Urban areas were divided into racially segregated zones, making it illegal for people to live or rent business premises in an area not defined for their race. Lawyers (and other professionals) were prosecuted if they rented offices in the (white) city centre unless they had been granted a Group Areas Permit (Mosenekе, 2016, p. 179-180). Numerous black attorneys were prosecuted. Advocates were particularly affected as they were obliged to utilise the chambers of their bar association yet the law did not permit this. Some black advocates squatted in the chambers of sympathetic white advocates, forced to keep a low profile to avoid being informed upon (Broun, 2001, p. 34; SAHA, n.d.b.)

The Reservation of Separate Amenities Act (49 of 1953) legalised the racial segregation of public spaces, facilities, vehicles, and services. Black advocates and attorneys could not use facilities reserved for white legal professionals. An infamous case is State vs Pitjie (1960 (4) SA 709 (A)); Pitje a candidate attorney was charged with contempt of court for refusing to sit at the desk designated for black attorneys (Thebe, 2015).

There are many examples of Law Societies actively excluding black attorneys, thus obstructing them from practicing law. One way was through the use of the criteria of being a "fit and proper person", either not to admit a black person or have a black lawyer struck off the roll. Both the Attorneys Act (1923 and subsequent amendments) as well as the Admission of Advocates Act (1964) outlines the criteria for admission, the first criteria to be satisfied is that the person seeking admission is "a fit and proper person". Yet as Slabbert (2011, p. 209) observes what this means is not described in the legislation thus it is at the court's discretion to decide if a person is 'fit and proper' (Slabbert, 2011, p. 210). The legislation allows the Court to strike a person from the roll if satisfied that they are not a fit and proper person to continue to practise either as an attorney or advocate. Its use goes back to the first attempts by Law Societies in the late nineteenth and early twentieth century to block black people and women from practising law (Slabbert, 2011, p. 213). Later it was used against lawyers involved in the struggle against apartheid. The most notorious was the attempt by the Transvaal Law Society to strike Nelson Mandela from the roll after his conviction, during the 1952 Defiance Campaign, under the Suppression of Communism Act. In this case (Transvaal v Mandela 1954 (3) SA 102 (T)) they were unsuccessful as the Court found that the offence did not show a lack of integrity regarding his fitness to act as a lawyer. However in 1965 the Johannesburg Bar Association succeeded in its application (Society of Advocates of South Africa (Witwatersrand Division) v Fischer 1966 (1) SA 133 (T)) to strike Bram Fischer (chair of the Johannesburg Bar Council and member of the Communist Party) from the roll for conduct unbefitting a member of the Bar (Mellet, 2003).

A second example was through the use of apartheid legislation. All attorneys were obligated to seek membership of the Law Society in the area they wished to practise. For black candidate attorneys the Bantu Homelands Citizen Act (1970), which removed their South African citizenship and reallocated it to 'their' ethnic homeland, added to the discrimination they faced. They were expected to practise in their 'ethnic homeland' and join the (black) law society in that area. This was highlighted in the case of Dikgang Moseneke. Having passed the attorney's admission exam in 1977 he applied for admission as an attorney and submitted his papers to the Transvaal Law Society. The Law Society filed a notice to oppose his application on the basis that he was no longer a South African citizen and therefore not eligible for membership. The court, in a now celebrated case (Exparte Moseneke 1979 (4) SA 885 (T)), found in his favour and he was eventually admitted as an attorney (Moseneke, 2016, p. 165-167).

In the main professional associations actively discriminated against black legal professionals and enforced social closure. Self-regulating associations do not exist outside of the norms and values of the wider society and its dominant ideologies; furthermore, they used their regulatory powers to protect their interests. They were complicit in the oppressive project of the Apartheid State and used it to advance the interests of their (white) members (Gauntlett, 1998; Moseneke, 2016, p. 212-214). Furthermore I argue their complicity ensured the state never acted against the profession as a whole (TRC, 1998).

In response, black lawyers formed the non-regulatory Black Lawyers Association (BLA) in the late 1970s (BLA, n.d.a.; Moseneke, 2016, p. 206-220). Of concern were the many ways in which black legal professionals were discriminated against and the lack of support from the statutory law societies. Black legal clerks found it difficult to find employment as interns and there were strong perceptions

that the Law Societies enforced different standards for black and white lawyers (Moseneke, 2016, p. 213). Law societies did little to assist black legal professions charged with contravening the Group Areas Act. Beyond this black lawyers faced discrimination daily; "all of our professional challenges occurred within ever-increasing state repression and racial injustice" (Moseneke, 2016, p. 213).

Both the BLA and the National Association of Democratic Lawyers (NADEL) formed in 1987, drew their membership from all sectors of the legal world—attorneys, advocates, paralegals, judges, and students. The BLA concerned itself with matters that discriminated against black legal professionals while NADEL focused on ensuring justice within the legal system for those excluded and discriminated against (BLA, n.d.a.; National Association, n.d.).

Transforming the profession—associations post-1994

In April 1994 South Africa held its first democratic elections. The country embarked on a process of transformation and redress to atone for the violations of the past. The legal profession was part of this process. The Truth and Reconciliation Commission (TRC) which began its work in 1996 held a special hearing on the Judiciary (TRC, 1997). One of the areas of investigation was "racial and gender discrimination in the judiciary, legal profession and law schools" as well as the role of major role players which included the Bar Councils and Association of Law Societies (TRC, 1998, p. 94). The TRC found that the "organised legal profession generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice," most commonly by silence but also through "active contributions" (TRC, 1998, p. 101).

The Association of Law Societies began a process of transformation in 1994. This involved discussions and negotiations with the BLA and the NADEL to enable the unification of the profession (Whittle, 1998). In March 1998 a new organisation, the Law Society of South Africa (LSSA), a national non-statutory body, was launched. The council comprised 50 percent representation of statutory bodies and 50 percent representation from the two non-statutory bodies (Whittle, 1998). The LSSA committed itself to "access to the profession, access to all areas of practice and the fusion of the attorneys … [and] … advocates professions" (van der Merwe & Whittle, 1998, p. 6).

The General Council of the Bar was challenged as the sole organisation of advocates with other Bars being formed. Mostly these new organisations framed their purpose in terms of equity and access to both the profession and legal services, sometimes with the implicit support of the state. In 1994 a group of fifty advocates met and constituted themselves as the Independent Association of Advocates of South Africa (IAASA). They were concerned with the way the legal profession was structured, including 'dual practice' and the accessibility of the profession to the public. Furthermore, they felt that the existing bars were sometimes exclusionary (Venter, 2015). There was a strong backlash from within the profession. The Society of Advocates of Natal set in place a motion (Society of Advocates of Natal v De Freitas and Another (Natal Law Society Intervening) 1997 (4) SA 1134 (N) at 1174) to strike the founder off the roll of advocates. The matter reached the Supreme Court of Appeal who dismissed the application, ruling that de Freitas was not a member of the Society of Advocates (Natal) therefore was not bound by their rules or disciplinary jurisdiction. In June 2013 IASSA changed its name to the National Bar Council of South Africa (NBCSA). They currently have in excess of 500 members and are accepted as a Bar Council (National Bar Council [NBCSA], n.d.).

The National Forum of Advocates (NFA) was established in May 1997. Advocates with at least three years of recognised practical experience were eligible for membership. Unlike the NBCSA the NFA observed the rules of referral. Their stated purpose was to create an association of advocates with expertise in criminal

law and to provide a legal home for those entering the profession after working in the courts, for example magistrates, hence the focus on criminal court experience and not pupillage (National Forum of Advocates [NFA], n.d.). By implication the association was not accessible to recently qualified legal practitioners wishing to qualify as advocates.

A new regulatory framework—The Legal Practice Act 2014

A draft Legal Practice Bill was released by the Department of Justice and Constitutional Development in August 2009 (DoJ, 2009). The major concerns of government, as stated in the Preamble, was that the legal profession was fragmented and divided due to it being regulated by different laws; it was not representative of South African society particularly as there were barriers to entry; and, the majority of South Africans were denied access to legal services because of costs. To address these issues and ensure the "accountability of the profession to the public" it was necessary to overhaul the existing regulatory framework.

Initially, government wished to remove the distinction between attorneys and advocates and create a unified legal profession, they planned to remove the practice of advocates only being briefed by attorneys and disband the Law Societies and Bar Councils. The South African Legal Practice Council (and Regional Councils) would become the new regulatory authority, with all members appointed by the Minister (DoJ, 2009). The Council would regulate all legal professionals (both attorneys and advocates), set norms and standards, allow for admission, enrolment, and registration as well as regulate the professional conduct of legal practitioners in the public interest through the establishment of an Office of a Legal Service Ombud (DoJ, 2010). In effect any semblance of self-regulation would be removed.

There was an immediate outcry from the legal profession (LSSA, 2009; Mtshaulana, 2009) and legal organisations made representations to government (LSSA, 2010; Vahed, 2011). By May 2012 when the Legal Practice Bill (No 20 of 2012) (RSA, 2012) was tabled in Parliament many of the most controversial measures had been removed. Parliament then began a process which allowed stakeholders and other interested parties to engage with the proposed legislation.

All parties claimed to be acting in the public interest, but their meaning differed greatly. For government public interest related to access (both access to the profession as well as access to justice) essential to its transformation agenda (RSA, 2012, p. 2). Legal professionals argued that the public interest could not be promoted outside of the interest of the profession. For the LSSA "the promotion of the interest of the legal profession will promote a profession that has integrity, subscribing to the highest standard of service delivery and ethics. All of these are not only beneficial to the legal profession, but will promote the public interest" (LSSA, 2014, p. 9).

Legal professionals and associations were apprehensive about the continued independence of the profession. There were concerns regarding the Legal Services Ombud, which would manage disciplinary issues, as well as, the creation of a new statutory body the South African Legal Practice Council (both replacing the Law Societies). In its submissions to the Parliamentary hearings the LSSA was at pains to dispute the belief that the Law Societies were "soft" on their members (Whittle, 2013). At the heart of the issue of independence was self-regulation. The GCB pointed to the "distinction between regulation and governance and emphasised that the legal profession was best suited to govern itself, while those aspects related to the protection of the public interest, such as access to justice and to the profession, fell in the province of government to regulate" (Hawkey, 2013, p. 30). However, the BLA differed, they pointed to the racially divided profession and felt that "political oversight with the view of regularising a society which is not perfect is instructive" (Hawkey, 2013, p. 26). Government was at pains to reassure all that the independence of the profession was not up for debate (Hawkey, 2011).

Many of the controversial and difficult issues, specifically around the "election procedure of the first council, the establishment of the first regional councils and their jurisdiction, powers, duties and functions, the process to abolish the law societies, [and the] mechanism to determine a fee structure" were "transferred" to the Transitional South African Legal Practice Council to solve (Manyathi et al, 2011, p. 11). The National Forum (as it was finally called) was given twenty-four months to resolve these issues, failing which it would be referred to the Minister to formulate the necessary regulations. The Legal Practice Act (No 28) was passed in 2014 and in February 2015 the transitional measures came into effect. The National Forum, composed of representatives of different stakeholders, primarily the various legal societies but also two people designated by the Minister, had two years in which to complete its work.

The agreement to delegate these matters to the National Forum put the regulation of the legal profession back into the hands of legal professionals. The National Forum was composed entirely of legal practitioners of whom all but two were nominated by existing legal associations. Their task was to make recommendations that would become law regarding governance, rules, the code of conduct and legal education. The Legal Practice Amendment Act 16 of 2017 was gazetted in January 2018; rules, regulations and the Code of Conduct were all finalised. The legal profession is now regulated by the Legal Practice Council a body almost entirely composed of legal practitioners.

Conclusion

After a long period of negotiation, the legal profession in South Africa remains self-regulating. Adams (2017, p. 71) indicates that the term is often used in different ways, however, here the professional body has the powers to both "establish criteria relating to entry to practice […] and to ensure practitioner competence and service quality" as well as "the power to govern practitioner behaviour to ensure practice is conducted in an ethical and responsible manner". In the post-94 period the regulatory bargain between state and profession has been amended—in return for the right to self-regulate the profession has undertaken to transform its practices and ensure that barriers to entry as well as discrimination based on race and gender is removed and that the public has access to both the profession and to justice. This will be a difficult task—regulation can set frameworks in place but not necessarily eliminate continuing internal/firm mechanisms of closure. Research conducted by the Centre for Applied Legal Studies (2014) demonstrates the continued racism, sexism and discrimination in the profession now manifested more subtly through accent, class, language.

This article has provided a detailed account of the regulation of the legal profession over time in South Africa. It has demonstrated that both states and professional associations pursue their own agendas when bringing about regulatory change. The legal profession has been able to maintain self-regulation through striking a regulatory bargain with the state. During Apartheid the state allowed the profession to self-regulate provided they accede to the state's narrow definition of citizen and limit access to both the profession and justice in the interests of the white minority. After 1994, with the changes in political power, the profession negotiated a new regulatory bargain. The state allowed the legal profession to continue to be self-regulating provided the profession committed to transforming access to both the profession and the justice system.

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