

## Political imagination in African and South-Asian legal history: a reappraisal

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This piece, first presented at the Africa-Asia international conference in Dar es Salaam in 2018, was inspired by the possibility of encountering transcontinental conversations about law and history at the conference. African legal history, as a loosely defined field, has been primarily concerned with the relationship between law and colonialism. African legal history was part of the pursuit 'for African voices' within African history as a whole since the 1970s. This goal felt imperative for scholars of colonialism, for whom legal sources offered a means to reconstruct the lives and social worlds of Africans, whose stories had been erased by colonial rule and colonial scholarship. Out of this work emerged accounts of domination, invention and agency.

In consulting this work as a doctoral student, a key question emerged for me: what are the possibilities and limits of reconstructing political thought through court cases? While earlier generations of legal historians have debated this issue, new intellectual histories from Africa and economic histories from South Asia suggest the time is right for a reappraisal. This piece puts into conversation some recent interventions in South-Asian and African legal history to consider how one might write histories of black South Africans' political imaginaries of land during the 20th century.

### The challenge: an example from South Africa

'Communal land', 'private property', 'quitrent tenure', 'land in Trust', 'chiefs' land' and 'Crown land'. These are all terms associated with the history of land conquest, acquisition, dispossession and reclamation in 20th century South Africa – and in many

other former colonies. But do they capture how black South Africans conceptualized, managed and regulated land over the course of the last century? Anthropologist Marilyn Strathern asks what we see and occlude when we use only conceptual categories developed from histories of Euro-American property forms.<sup>1</sup> Here is an example to illustrate the challenge.

Founded by lawyer and African National Congress stalwart Pixley ka Seme, the Native Farmers Association (NFA) bought and sold land to hundreds of black farmers in South Africa in the early 20th century. The NFA purchased land in 1912, one year before South Africa's notorious 1913 Land Act, which made it more difficult for black South Africans to own land in the form of titles. In promoting the NFA, Seme encouraged black land buyers to see "the importance of economic interests in land and the advantage of individual land tenure over and above communal or tribal tenure."<sup>2</sup>

One group of black farmers who bought land from the NFA comprised 25 people from the Free State province, accompanied by Chief Maitse Moloi. For several years Seme had known the group members, all of whom had put money towards the purchase. But Seme signed the deed in the name of Chief Moloi alone. When Moloi defaulted on the payment, the contract was broken, as he had been the sole purchaser listed. Everyone lost out on land. Seme argued that the land buyers were all members of Chief Moloi's tribe, stating "I know that an individual member of a tribe has no right to land, there is no individual tenure."<sup>3</sup> The land buyers opposed this interpretation, arguing they had bought their land in the name of a group, not in the name of Chief Moloi – and all the other group members had paid up. Seme's approach seems to contradict his earlier advocacy of individual land tenure. When it suited him he was sympathetic to a narrow view of African land tenure, common to colonial administrators and anthropologists of the

time: communal land under a chief. There was no room for forms of land tenure that complicated the binary of individual titles and communal land.

From biographies and newspaper editorials we know about Seme's approach to land. But what about those who bought or rented from the NFA? What debates took place about land amongst NFA members? The broader question, which animates my work as well as other legal history, is how we can reconstruct a history of political thought about land law and property.

### African legal history as social history

Writing against histories of colonial legal 'enlightenment' vs. local 'tribal' customs, from the 1980s onwards, historians of Africa have portrayed law as an arena of struggle, where power and inequalities were played out and/or contested. Legal histories of Africa have focused on the rich insights into everyday life offered by court records.<sup>4</sup> This scholarship has revealed the social engineering behind colonial legal regimes and foregrounded the legacy of colonial violence and inequality.

However, African legal history based on court records has been a little constrained by debates about oral vs. written law (playing into a dichotomy entrenched during the colonial era). How do we write histories of what people understood and imagined beyond the binaries of individual vs. communal, written vs. oral, official vs. customary etc.? If we fail to tackle such divides, Partha Chatterjee's words will ring true: "if the rest of the world have to choose their imagined community from certain modular forms already made available to them by Europe and the West, what do they have left to imagine?"<sup>5</sup>

One way out of this impasse has been to study political thought through traditions that are dynamic, dialectical and contested. This has involved focusing on the moral economies of civic virtue and political community that Africans have debated in vernacular language texts.<sup>6</sup> Another attempt to move beyond the dichotomy between the 'colonized' and the 'colonizer', has been to focus on 'intermediaries' who served as direct employees of the colonial state. But what about 'intermediaries' who were not only 'cultural-brokers', but also members of a whole group of economic and social 'entrepreneurs'? Here studies from South Asia on intermediaries and economic legal history might be useful.

### Intermediaries and political economy in South Asian and African legal history

Fascinating work is emerging in South Asian legal history on intermediaries and capitalism. Just two examples are Mitra Sharafi's work on Parsi legal culture and Ritu Birla's study of Marwari family firms. There is also recent African scholarship which intersects with this approach – for example, Fahad Bishara, Bianca Murillo, Parker Shipton, Benjamin Lawrance, Liz Thornberry and Bonny Ibwahoh.

Ritu Birla argues that colonial administrators, like some legal historians, tried to impose a story of 'status' to 'contract' on Marwari family firms in India. But even in those (supposed 'contract') moments of legal regulation of family firms, the colonial government was forced to acknowledge and incorporate aspects of indigenous capitalism into the colonial economy. By doing so, the government legitimated a space in which family firms could negotiate for the kinds of practices that served their interests.<sup>7</sup>

Mitra Sharafi argues that just because Parsi litigants and legal professionals became 'consumers of colonial law' does not mean they automatically absorbed a colonial mentality about law. Without downplaying the violence of colonial law, Sharafi offers a complex picture: though Parsis who engaged the colonial legal system conceded at times to colonial frameworks of law, they then went to work amending, and at times deconstructing those frameworks.<sup>8</sup>

In South Africa, as in India, the first generation of 'struggle' historians focused on lawyers as liberation leaders – Nelson Mandela being the most obvious example. In writing histories of liberation movements in South Africa we may have missed other stories about the law. Work on South Asia suggests the possibilities for writing histories of black lawyers in South Africa as figures who translated between various forms of vernacular law and colonial law – and also vice versa. Sharafi's work raises another interesting point, which she herself acknowledges: "How did lawyers present the outside actor (state, business etc.) to their own communities, in a context where we get plenty of sources on how these players presented communities to the state, but not the other way around."<sup>9</sup> This problem requires thinking theoretically and methodologically. It might involve looking at vernacular sources or oral histories, in addition to court records. It might also involve a difference in attention and scale. It might need to center certain actors – like the land buyers in lawyer Pixley ka Seme's schemes – and decenter others, such as Seme himself.

Why are there few legal historians of capital in Africa of the sort we see on South Asia or the Indian Ocean – histories of imperial agents, transnational markets, legal or merchant intermediaries? Part of the reason may be that African economic history flourished during the 1970s, a period dominated by neo-Marxist explanations of how the West underdeveloped the Third World. Another explanation may be that there remains a strong (and important) inclination within African history to hold colonial powers accountable for legacies of inequality they have wrought. There seems less space for the stories of figures who, like Seme, qualify as neither hero nor villain. Yet newer work by African scholars, who have taken up similar themes to their South Asianist counterparts, points in productive directions.

So, to come back to Pixley Ka Seme's land purchases. What ideas about land or property were black farmers developing at the time of the land purchase in South Africa? How can we trace them through court records, and beyond, to the pages of vernacular language newspapers and the memories and discourses of contemporary land claimants? This is a challenge I intend to take on – but it is one made easier by conversations across Asia and Africa.

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#### Notes

- 1 Strathern, M. 1999. 'Divisions of Interest and Languages of Ownership,' in Strathern, M. (ed.) *Property, Substance and Effect: Anthropological Essays on Persons and Things*. New Brunswick: Athlone, pp.136-158.
- 2 Article 3(b) of Memorandum and Articles of Native Farmers' Association, quoted in Ngqulunga, B. 2017. *The Man Who Founded the ANC: A Biography of Pixley Ka Isaka Seme*. Cape Town: Penguin Random House South Africa, p.149.
- 3 Seme's affidavit, NTS 3440, 56/308 (National Archives of South Africa).
- 4 Mann, K. & Roberts, R. 1991. *Law in Colonial Africa*. Portsmouth, NH: Heinemann Educational Books.
- 5 Chatterjee, P. 1996. 'Whose Imagined Community?', in Balakrishnan, B. (ed.) *Mapping the Nation*. Verso, p. 216.
- 6 See for example, Steven Feierman, John Lonsdale, Derek Peterson and Emma Hunter on East Africa; Carolyn Hamilton and Isabel Hofmeyr on South Africa.
- 7 Birla, R. 2009. *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India*. Duke University Press.
- 8 Sharafi, M. 2014. *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772-1947*. Cambridge University Press.
- 9 Sharafi, M. 2018. personal communication.