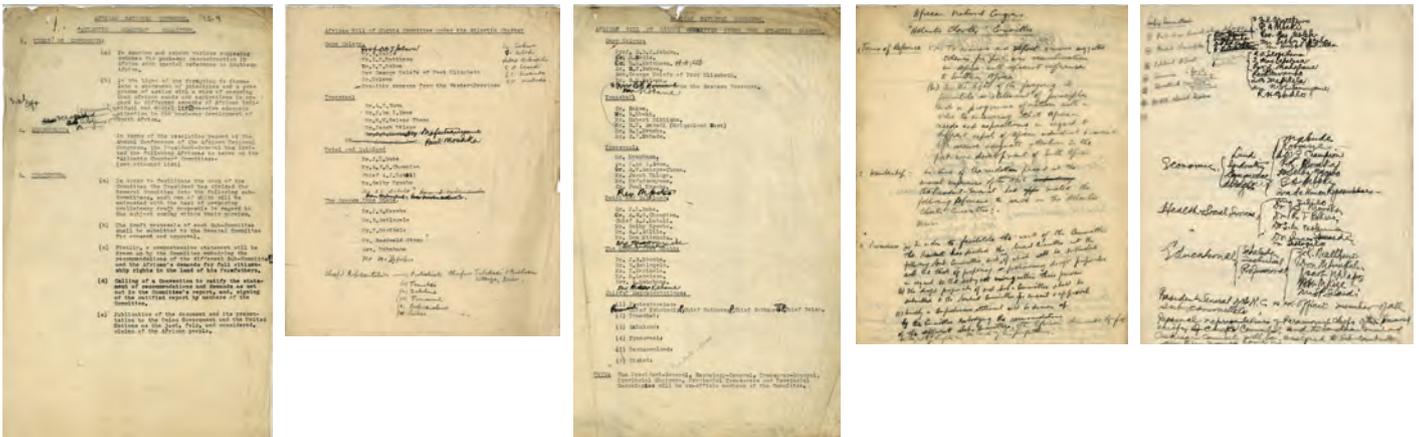




SOUTH AFRICA'S FIRST BILL OF RIGHTS: OUR MAGNA CARTA MOMENT

Tembeka Ngcukaitobi, Johannesburg Bar



The demise of Dr Alfred Xuma

Of all past presidents of the ANC, few are as maligned as Dr Alfred Bitini Xuma. Leading the charge is Nelson Mandela, who in his *Long Walk to Freedom* records two encounters with Xuma. The first was in 1943. At the time, Mandela was an emerging leader in the Congress Youth League alongside Anton Lembede, Ashby Mda, Walter Sisulu and Oliver Tambo. Xuma had been president of the ANC since 1940. In 1943 Mandela and company asked Xuma for his blessings to establish the Congress Youth League under the wing of the ANC. The young leaders expressed their concern over the possible death of the moribund ANC, unless it changed tactics and adopted mass mobilisation. Xuma, a western educated medical doctor, and very much a product of his time, dismissed the young leaders. Africans, he argued, were “too unorganised and undisciplined to participate in a mass campaign”. He would only offer them a compromise that the League “should be a more loosely organised group and act mainly as a recruiting committee for the ANC”.¹ Mandela’s biographer, Anthony Sampson, adopts the same position as his subject, accusing Xuma of a “pompous English style” obsessed with “delegations and telegrams.”² For Don Mattera, the celebrated poet, Xuma was simply “a chiefly figure”.³

Mandela and his colleagues used the small gap allowed by Xuma to organise a small youth committee for an entirely different purpose. They wanted to launch a fully-fledged and autonomous Congress Youth League for mass mobilisation and the radical confrontation with the white government of Jan Smuts. The goals were the same as those as the ANC of 1912. The urgent tasks were to resist the government encroach-

ments on African freedoms and liberties. Yet uppermost in their minds were the effects of the Native Land Act of 1913. What distinguished the Youth League from its mother body was the strategy, not the substance. The era of “deputations, delegations and telegrams” was over. Now, it was time for mobilisation, agitation and ultimate confrontation. However, when, in 1944, the youth leaders met to elect their inaugural executive, it was not Nelson Mandela who became the president. Rather, it was a young lawyer, and LLB graduate from the University of South Africa and perhaps the most intellectually gifted of his generation. His name was Anton Muziwakhe Lembede. Lembede soon became a most articulate spokesperson for the Youth League, focussing not only on the confrontation, but a new world order, envisaging what he referred to as a “non-racial” future for South Africa. His friend and colleague, Ashby Mda, gave a most fitting tribute when Lembede graduated with his MA degree:

This significant achievement is the culmination of an epic struggle for self-education under severe handicaps and almost insufferable difficulties. It is a dramatic climax to Mr Lembede’s brilliant scholastic career.⁵

In addition to his role as president of the Congress Youth League, Lembede was also serving articles of clerkship to Pixley Seme. In 1947 Lembede suddenly and unexpectedly died of natural causes. His deputy, Ashby Mda, was elected to replace him in 1948. Lembede’s vision of a non-racial South Africa, however, lived on.

The second youth encounter with Xuma, as recounted by Mandela: By 1949, the Youth League had drawn up its militant "Programme of Action". Its mission to drive the politics of the ANC towards a radical edge had reached a point of climax. Now, it no longer wanted space for young people to organise within the ANC. Instead, the ANC itself had to be reimagined. The young leaders of four years earlier – with the exception of the now deceased Lembede – returned to Xuma. This time they had a menacing message for him. He had to support the Programme of Action, failing which, at the following elective conference, they would organise for his removal as president. Xuma refused. He would not be blackmailed. He was confident in his position and prospects of re-election. For the Youth League, the task of radicalising the ANC as a liberation movement was urgent. Only the previous year, Dr Daniel Francois Malan had been elected as Prime Minister of South Africa. His electoral platform was clear. South Africa had to be turned into a white man's country. The position of the black man was that of subservience or banishment to the reserves. Apartheid was now the official, explicit and unequivocal policy of the government. Yet, Xuma reasoned with the young leaders that Malan's electoral success was no more than a natural 'extension' of the colonial and union governments. No special measures were necessary to confront Malan's government. In any event, any strategy of mass mobilisation was "premature and would merely give the government an excuse to crush the ANC". The youth leaders ultimately accepted that Xuma would not be persuaded. Not only was he admired by traditional leaders, he had special relationships with cabinet ministers and had a thriving medical practice, with Mandela describing him as projecting "an air of superciliousness that did not befit the leader of a mass organisation". For Xuma "everything was done in the English manner, the idea being that despite our disagreements we were all gentlemen".⁶ The Youth League did not yet have a candidate to contest Dr Xuma. They first approached the legal academic Zacharia Matthews (also known as ZK Matthews), who refused their entreaties. Their next candidate, Dr James Moroka, was not a member of the ANC, as proved by his constant reference to it as the African National 'Council'. But he accepted the nomination.

In December 1949, Dr Moroka defeated Xuma in the elections for ANC presidency. The Congress Youth League of Mda,



Anton Muziwakhe Lembede

Robben Island Mayibuye archives

Mandela, Sisulu and Tambo had cemented its role as 'king-maker' in the politics of the ANC. A year later Xuma was pushed out of the National Executive Committee of the ANC and returned to the obscurity of his medical practice, and replaced by Nelson Mandela. Xuma died in 1962, an isolated man, in a country he could no longer recognise.

Reimagining Xuma

I have written this piece to re-examine Xuma's legacy from a different perspective. What historians have yet to engage with is Xuma's commitment to human rights as a foundation of society. Xuma, of course, was not the originator of these ideas about the centrality of human rights in society, but its inheritor and powerful interlocutor. It was the founding members of the ANC who developed these ideas. Yet he occupied a transitional position, standing between the founding generation and the liberating generation. But who was he? Xuma was born at Manzana, Ngcobo District in the former Transkei, 1893. His parents had converted into the Wesleyan church, although they were uneducated. In 1911 he qualified as a primary school teacher at the Clarkebury Institute. After teaching for two years, he left for the United States where he would qualify as a medical doctor at North Western University in Illinois, Chicago in 1926. His decision to study medicine in the United States had been influenced by another son of Ngcobo, Henry Poswayo, who a few years earlier had made a similar trip to the United Kingdom to study law and to qualify as a barrister at Lincoln's Inn.

Upon his return from the US, in 1927, Xuma set up his medical practice in the Johannesburg City Centre. In the days prior to the Group Areas Act, he could afford a comfortable home

"What historians have yet to engage with is Xuma's commitment to human rights as a foundation of society."

JUTA'S STATUTES OF SOUTH AFRICA



R6,395[†]
incl. FREE



EXTENDED
BY POPULAR DEMAND!

FREE
Regulations
of South Africa
on CD-ROM

While stocks last.

2016/17
PRINT SET

NOW
AVAILABLE!

CONTENTS

Updated and consolidated compilation of Acts reflecting the law as at 1 March 2017



Latest Appropriation and Division of Revenue Acts, fully consolidated



Index to the national and provincial Acts and regulations including legislation judicially considered



Approx. 11,600 pages in eight volumes

**BE LESS THAN A WEEK BEHIND
THE LATEST LEGISLATION RELEASE...**

FREE *Juta's Weekly Statutes Bulletin* e-mail updates comprising the legislation promulgated and bills of Parliament made available during the current week

FREE quarterly consolidated newsletters containing all subsequent legislative amendments affecting the Acts in your volumes

*Extended offer valid on orders for the 2016/17 edition, while stocks last. Single-user CD-ROM as at 31 March 2017 expires 31 July 2018.

[†]Price valid until 31 December 2017, incl. 14% VAT, excl. R125 courier delivery in the RSA.

CONTACT JUTA CUSTOMER SERVICES:

Email: orders@juta.co.za

Tel.: 021 659 2300

Fax: 021 659 2360



www.jutalaw.co.za

JUTA
LAW

in Sophiatown, which he named Empilweni (place of health). From the income he was drawing from his medical practice, he could afford several properties and make personal donations to the ANC. It was his work as a black doctor in a racial system that ultimately drew him to politics. His entry to formal politics occurred only in the 1930s, when he took an executive position in the All Africa Convention which had for all intents and purposes taken over the space created by the decline of the ANC under the presidency of Seme. But he would later be recruited to contest the 1940 election in the ANC for the position of president.

Despite the criticism, Mandela acknowledges Xuma's role in organising the ANC into a cohesive, functional unit. The first step was to bring discipline into the finances of the organisation, which he controlled with an iron fist. During his era, the financial coffers of the ANC increased five-fold. He centralised the operations so that the ANC powers were ultimately concentrated in the National Executive Committee. A singular achievement, in this regard, was the introduction of a new constitution in 1943, which abolished the upper house of chiefs and traditional leaders. The ANC would henceforth become a grassroots organisation where each and every office bearer held the position by election, not inheritance. It would also rely on donations from individual members and foreign funders. That ANC as reimagined by Xuma continues to date.

'Without women, we cannot go far'

The conference resolutions of the ANC in 1943 and 1944 – during Xuma's presidency – confirmed the recognition of the Youth League as a constituent part of the ANC. Thus, by facilitating the establishment of the Youth League, Xuma could ensure the injection of new ideas, new energy and new vision for the ANC. The Women's League was also established during Xuma's presidency. There is some evidence that Xuma actively campaigned for the establishment of the Women's League.



Dr Alfred Bitini Xuma

Robben Island Mayibuye archives



Bismansdakuell

For instance, in the letter of March 1944 to J. J. Maruma, Xuma stressed the necessity of "the organisation of the women into the African Women's League of the Congress" noting that "without women we cannot go far." The same sentiment appears in another letter to the president of the ANC in Natal, A. W. G. Champion, on 6 May 1946 where he states matter of factly that "the African National Congress cannot progress far as a men's organisation only." Thus, he asked that women should be encouraged as in churches and be given an opportunity to have their own section and to meet with men's organisations at mass meetings and annual conferences. Xuma's recognition of the agency of women is apparent from the fact that his wife Madie Hall, an African-American, was once asked to serve as an interim president of the ANC Women's League. Xuma's writings, paying tribute to Charlotte Manye (Mrs Maxeke) in the booklet *What an Educated African Girl can Do* (1930) are further testament to his enlightened views on questions of gender equality.

The Atlantic Charter and its paradoxes

The idea of modernising the ANC included a vision for the future. The world outside of South Africa was for the most part of Xuma's presidency in a state of flux.

Xuma perceived the election of the national party of D. F. Malan as a gradual and inevitable progression of the "ar-



“Principle 2 of the Atlantic Charter was a guarantee that no territorial changes could be made within states unless they were consistent with “the freely expressed wishes of the peoples concerned. Principle 3 promised to “respect the right of all people to choose the form of government under which they will live””

aggrandisement, territorial or other”. No territorial changes would be made to countries falling under this sphere of either the United States or the United Kingdom unless it accorded “with the freely expressed wishes of the people’s consent”. They committed to “respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.”

Trade was important for sustainable peace in the world. “All states, great or small, victor or vanquished”, must be guaranteed equal terms to the trade and to the raw materials of the world as may be necessary for their economic prosperity. Economic co-operation was necessary to secure improved labour standards, economic advancement and social security of each country. After the tyranny of the Nazis was destroyed, they hoped to set up a basic dispensation that “will afford assurance to all the men in the all lands” that they may live out their lives “in freedom from fear and want”. Oceans could be travelled and traversed without hindrance. Finally, the declaration addressed the proposition that abandonment of the use of force to settle disputes was paramount. For this to be achieved there had to be “a wider and permanent system of general security” and the disarmament of nations which threaten or could threaten aggression outside their borders.

There was a paradox in all of this. In 1941 all of Africa was occupied by European countries. It had been so since Africa was carved up into colonies at the conference of Berlin in 1884, chaired by Otto von Bismarck. While South Africa was not a colony, it occupied an ambiguous political status, oscillating between a British dominion and an independent republic.

The Atlantic Charter promised not to usher in a new world as such, but a set of new normative principles that would underpin government within and between states. For Africans in South Africa, whose position of subservience had been entrenched in the South Africa Act of 1909, what resonated most were principles 2 and 3. Principle 2 of the Atlantic Charter was a guarantee that no territorial changes could be made within states unless they were consistent with “the freely expressed wishes of the peoples concerned”. Principle 3 promised to “respect the right of all people to choose the form of government under which they will live”. Self-government,

istocracy of the white colour of the skin” which had been established through the colonial and union governments as “the emblem of supremacy”. He denied that 1948 was a turning point in history. He had seen enough in his lifetime to know that history could never be reduced to a single event, but constituted a continuum of trajectories. Yet, one event was so significant for him that he seriously entertained the prospect of “common citizenship of all races” in South Africa where there shall be respect for human rights and fundamental freedoms for all “without distinction as to race, sex, language or religion”. That event had happened in 1941. At the height of the Second World War, the two leaders of the United States and the United Kingdom, Franklin D. Roosevelt and Sir Winston Churchill met “at sea”. They wanted agreement on a set of basic principles to govern their own countries, but they hoped that if they prevailed during the war the same principles would apply throughout the world. On 14 August 1941 they announced the agreed points of their meeting. The long title of their statement “Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom” was to be known as the *Atlantic Charter*. It contained eight principles around which the United States and the United Kingdom committed their respective countries. Their countries, they declared, would “seek no



ZK Matthews

it was promised, would be restored to those forcibly deprived of it. Roosevelt might have intended these principles to apply to all across the world, without exception as an antidote to Nazi aggression. Not so for Churchill, the social Darwinist, and disciple of the racial theorist of Victorian England, Thomas Carlyle. As a young army officer, Churchill had boasted about shooting the "savages" of Sudan. In 1942, while making grand human rights pronouncements on the world stage, he was instrumental in causing and then escalating the famine in Bengal, India, which killed more than 3 million Indians, arguing that the Indians were "a beastly people with a beastly religion" who "bred like rabbits". It was to be expected that when he was asked if the Atlantic Charter principles would apply to Africans, he refused. After all, he had "not become the King's First Minister in order to preside over the liquidation of the British Empire."⁷ Africans, as Steve Biko, once remarked were "on their own".

South Africa's *Magna Carta* – the First Bill of Rights

At the December 1942 conference of the ANC Xuma devoted a substantial part of his address to the Atlantic Charter. The freedoms promised by the Charter, he began, such as freedom from fear, freedom from want and freedom from oppression, were vital and fundamental. "They have a special meaning and significance to the Africans in South Africa. With police raids, mass arrests, landlessness, homelessness, low wages, pass laws and other restrictions and disabilities, there are no such freedoms for them."

To translate the promises of the Atlantic Charter to a reality for Africans, Xuma argued, it was necessary to develop an At-

lantic Charter for Africans of the Union of South Africa. But any charter could not apply selectively on the grounds of race. "The test of the people is their aim, not their colour." He closed his address by recommending the drawing up of an *Atlantic Charter for Africans*, which was unanimously endorsed at the conference. And so was the recommendation for its universal application, regardless of race. While the first 30 years of the existence of the ANC had been spent in opposition to the racial hierarchy of the whites-only Union Government, the next would focus on mobilising around a common set of principles, crystallised in the envisaged Atlantic Charter for Africans.

Three black lawyers were among those asked by Xuma to formulate this Atlantic Charter for Africans. The Chairperson was Z. K. Matthews. Matthews was highly accomplished. He was the first African to obtain the LLB degree at the University of South Africa. After completing the degree, he sought advice from Colonel Deneys Reitz, himself an attorney practising in Johannesburg and a prominent member of the South African Party, about practising either as an attorney or an advocate. Reitz recommended the attorney route. The Transvaal rules of court did not require the holder of a law degree from a South African University to serve articles before being admitted as an attorney. While he did become an admitted attorney, he did not stay in the law. The black lawyers that he knew at the time, Pixley Seme, Richard Msimang, H. Bikitsha, George Montsioa and Alfred Mangena, did not appear "to have a particularly distinguished career at the Bar". African doctors, on the contrary, had done better. In 1932, Matthews was offered a scholarship to study at Yale University for a master's degree in anthropology. He completed that degree in 1934 and spent a few months at the London School of Economics for further specialisation in anthropology. When he returned to South Africa in 1936,



DR. P. KA ISAAC SEME
B.A. LL.D.
Pixley Seme

Robben Island Mayibuye archives

Robben Island Mayibuye archives

Matthews had made up his mind. He would not practise law, but would become a legal academic. He took up a lectureship at the University of Fort Hare, teaching anthropology and native law and administration, becoming the first black man to be appointed professor of law a few years later. One of Matthews' students at Fort Hare was Dimalisile Nokwe (better known as Duma Nokwe), who became an advocate in 1956.

Another member of the committee was Lionel Mtinkulu, at the time practising as an attorney in the Eastern Cape. Mtinkulu was the first African to graduate with a law degree from the University of Cape Town. His father, Reverend Abner Mtinkulu, had wanted him to be a doctor, asking the University of Cape Town in February 1923 if young "Lionel could be allowed to attend lectures in medicine in the University". But Lionel eventually qualified in law, embarking on his practice as only the second African attorney in the Eastern Cape. The venerable Seme was also part of the Committee. By this stage, Seme's life in the law had gone full cycle. Between 1932 and 1941 Seme he had been suspended from his practice as an attorney as a result of complaints made by his clients that he took their deposits, but failed to carry out their instructions. He returned to practice in 1942, taking on Lembede as his candidate attorney and, later, partner. Seme & Lembede, the firm would be called. It was only the second partnership by African attorneys, with the first having been Seme & Mangena, which existed between 1916 and 1918.

The Committee finished its work by November 1943. Its product was no longer the Atlantic Charter for Africans. Rather, they produced South Africa's first Bill of Rights – it was called the *African Claims*. Its contents were a testament to the extraordinary abilities and the farsightedness of its members. Racial discrimination, as exemplified by a racially-based franchise, should be outlawed, declared the Bill of Rights. Voting should be extended "to all adults, regardless of race". The right to vote and to be elected to parliament, provincial councils and other representative institutions should not be based on race. Courts should dispense equal justice to all, read the second clause. Freedom of movement and freedom of residence should be guaranteed and laws like the Native Land Act and the Urban Areas Act that restricted one's movement and residence had to be scrapped. The right of freedom of the press was guaranteed. The press, it must be noted, was an important platform for the expression of the concerns and demands of Africans in those days. Some of the leading members of the era were themselves either owners of newspapers or editors of black newspapers. Newspapers like *Abantu Batho* and *Umteteleli Wabantu* were

owned by Africans. They provided a platform for the expression of African views in a repressive system. Hence, freedom of the press was central to any Bill of Rights. The sanctity and inviolability of the home and the right of family were guaranteed. Everyone regardless of race had the right to own, buy, hire, lease and occupy land or any other form of immovable or movable property. Legislative restrictions had to be abolished. The right to engage in any occupation, trade or profession was guaranteed regardless of race. Employment in the public service had to be open for all. Every child had the right to free and compulsory education, including admission to technical schools, universities and other institutions of higher learning. Social services and social security had to be guaranteed to all by the State. The principle of equal pay for equal work as well as equal opportunity for all work and a minimum wage was entrenched. Workers had the right to engage in collective bargaining under the legislation.

The African Claims live on

When the Bill of Rights was endorsed in the 1943 Conference, it became policy of the ANC. From this moment, its vision for a new South Africa would be informed by it. When Xuma sought a meeting with Smuts to discuss the African Claims, Smuts replied that he was "not prepared to discuss proposals which are wildly impracticable". Yet, this did not deter the forward movement towards a new foundation for South Africa. Recently, Kgalema Motlanthe, the former deputy president of the ANC, reflected on the enduring nature of the African Claims, noting the "continuity of both the aspirations of our people and their loyalty to a particular world view". He drew parallels between the African Claims and today's Bill of Rights. He was of course right. When in 1989, another group of African lawyers, this time including Penuell Maduna and Zola Skweyiya, drew up the ANC's *Constitutional Guidelines for a Democratic South Africa*, they did not do so out of a position of ignorance. Their guiding light was the African Claims of 1943. The African Claims have weathered the storms of racism, colonialism and apartheid. Their spirit lives on in the Constitution's Bill of Rights. When, as in today, questions are posed about the "Eurocentric origins" of our constitutional order, it is worth to investigate history as it unfolded. That way, perhaps we could discover that history, as Basil Davidson says, "is not a calculating machine. It unfolds in the mind and the imagination, and it takes body in the multifarious responses of a people's culture, itself the infinite circle mediation of material realities, of underpinning economic fact, of gritty objectivities."

Tembeka Ngcukaitobi is a member of Duma Nokwe Group of Advocates at the Johannesburg Bar.

This article is based on his book *The Land is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa, 1875-1945*, to be published by Penguin Random House in January 2018. [A](#)

Notes

- 1 Nelson Mandela, *Long Walk to Freedom*, pp 112-113
- 2 Anthony Sampson, *Mandela: The Authorised Biography* (1999).
- 3 Blake Modisane, *Blame Me on History* (1990), 33-34.
- 4 Anton Lembede, *Freedom in Our Lifetime*, edited by Robert R. Edgar and Luyanda Msumza, p 21
- 5 *Long Walk to Freedom*, p112-113
- 6 Richard Toye Churchill, *Empire: The World That Made Him and the World He Made* (2011).
- 7 Basil Davidson, *Africa in Modern History: The Search for a New Society* (1978)

"The Committee finished its work by November 1943. Its product was no longer the Atlantic Charter for Africans. Rather, they produced South Africa's first Bill of Rights – it was called the African Claims. Its contents were a testament to the extraordinary abilities and the farsightedness of its members."

We understand the
legal landscape
better than anyone.



Navigate the complexities of the legal landscape with Lexis® Library, our comprehensive online research tool, and access easy-to-use practical aids with Lexis® Practical Guidance. Everything you need to help you make inspired, insightful decisions quickly and easily.



Call us on 0860 765 432 or
email customer@lexisnexis.co.za
www.lexisnexis.co.za

Legal information?
All you need to know