



Lawyers, Conflict & Transition: South Africa

December 2016

LAWYERS, CONFLICT & TRANSITION: SOUTH AFRICA

Contents

PREFACE	1
ACKNOWLEDGEMENTS & DISCLAIMER	3
EXECUTIVE SUMMARY	4
GLOSSARY	5
INTRODUCTION	6
I. THE ANTI-APARTHEID ERA (1948-1990)	7
Apartheid and the Law	7
The Law as a Site of Struggle	9
Black Consciousness and the Rise of Civil Society	11
Legal Responses to Detention and Repression.....	12
II. NEGOTIATIONS AND THE TRANSITION PERIOD (1990-1994)	14
The Truth and Reconciliation Commission	15
III. POST-APARTHEID, DEMOCRATIC SOUTH AFRICA (1994-2015)	18
Access to Justice	18
Public Interest Litigation	19
The Criminalisation of Resistance and Police Brutality.....	21
The Transformation of the Legal Profession.....	23
CONCLUSION	25
REFERENCES	26
Legislation.....	27
Case Law.....	28

Preface

This report was commissioned as part of the *Lawyers, Conflict & Transition* project – a three-year initiative funded by the Economic & Social Research Council.

The wider project explores the role of lawyers during conflicts, dictatorships and political transitions. Despite the centrality of the rule of law to the contemporary theory and practice of transitional justice, there is little emphasis in the relevant literature on the role of lawyers outside the courts – or indeed as ‘real people’ at work in the system.

Drawing on six key case studies (Cambodia, Chile, Israel, Palestine, Tunisia and South Africa) we set out to establish a comparative and thematic framework for lawyering at historic stages in conflicted and transitional societies. Taking a holistic approach to the role and function of law and lawyers, the project is intended as a bridgehead between transitional justice and the sociology of the legal professions.

Project staff members are based at the School of Law, Queen’s University Belfast, and the Transitional Justice Institute, Ulster University.

This project has at its core a ‘real-world’ dimension and seeks to make a difference both to theory and practice. In addition to academic outputs, we were determined to produce a body of work that will assist the societies we have researched. We were also conscious from the outset that academic fieldworkers are sometimes guilty of ‘parachuting in’ and then moving on, with little demonstrable benefit for participants. As part of our ethics policy we thus developed this series of practice-orientated reports, specifically tailored for each jurisdiction under scrutiny, as well as briefing papers for international audiences.

The individuals interviewed for the wider project (more than 120) were each invited to suggest research topics and themes that are of direct relevance to them and the organisations and networks with whom they work. The core team sifted and analysed these suggestions and commissioned two key reports per jurisdiction. In some instances the work was completed in-house; in other cases we drew on the resources and talents of our international consultants.

The reports are designed to be of immediate value to practitioners and as such we have sought to avoid complex academic terminology and language. We have made the texts available in English and relevant local languages.

The anticipated readership mirrors the diverse range of interviewees with whom we engaged:

- National and international legal professionals (including cause / struggle lawyers and state lawyers)
- Scholars interested in the role of lawyers as political and social actors (with a particular focus on transitional justice)
- Government officials
- International policymakers
- Civil society activists
- Journalists and other commentators

The entire series will be made available on our website (www.lawyersconflictandtransition.org) and will be circulated via our various networks and twitter account (@lawyers_TJ).

We hope that you will enjoy reading this report and encourage you to disseminate it amongst your networks.

For further information about the wider project please feel free to contact us at:

www.lawyersconflictandtransition.org/contact



Kieran McEvoy PhD
Director, *Lawyers, Conflict and Transition* Project

December 2016

Acknowledgements & Disclaimer

This report was prepared by Ms Venitia Govender and Dr Rachel Killean, in association with the *Lawyers, Conflict and Transition* project. All views expressed, and any errors, remain the responsibility of the authors.

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Executive Summary

This paper traces the role played by legal practitioners in the struggle for equality and justice in South Africa. That struggle is framed by decisive junctures in South Africa's history, namely, the *Anti-Apartheid Era* from 1948-1990; the *Negotiations and the Transition Period* from 1990-1994; and the *Post-Apartheid Era* from 1994 onwards.

The first section of this paper explores the role of lawyers during Apartheid, examining their role in bolstering the regime, in challenging the Apartheid legal order in the courts, and in protecting those subjected to detention and repression. It also explores the rise of the Black Consciousness movement, and highlights the importance of the rise of civil society, and the support received from abroad, in making legal resistance to oppression possible.

The paper then turns to the process of transition in South Africa. In analysing the negotiations and transition period, the paper examines the drafting of South Africa's post-Apartheid constitution, and in particular the creation of a Bill of Rights. It highlights the role of lawyers in the negotiations and drafting process, and the role of human rights discourse in the post-Apartheid polity. This section also explores the work of the Truth and Reconciliation Commission (TRC). It explains the compromises that led to the specific functions of the TRC, and notes the TRC's attempt to investigate the role of the legal profession during Apartheid.

The final section of this paper explores the challenges that persist in the post-transition period and the role law and lawyers continue to play in defending human rights. The 1996 Constitution of South Africa Act is regarded by many as a masterpiece of post-conflict constitutional engineering. However, its ability to transform the lives of the most vulnerable South Africans remains highly debated, with significant levels of disillusionment at continued social injustice, manifest problems of political corruption, police brutality and a resistance within government to judicial oversight. In such a context, public interest law and lawyering remains a key vehicle for delivering post-Apartheid promises on the ground. The final section also assesses the ways in which the legal profession has changed in recent years, and in particular the attempts that have been made to ensure that the profile of the profession becomes more diverse. It finds that while there has been some significant progress, there is still much to be done - especially regarding the gender imbalance in the upper echelons of the judiciary.

The paper concludes by noting the historic contribution of some legal professionals in helping to bring an end to Apartheid. It finds that courts continue to be a 'site of struggle' in the quest for social justice in South Africa, and that access to justice remains uneven. It highlights lessons that can be learned by lawyers seeking to 'make a difference' in other contexts, namely, that it is the combination of complementary social mobilisation *with* litigation strategies that has the greatest potential to alter laws and policies and thus effect social change.

Glossary

ANC	African National Congress
APF	Anti-Privatisation Forum
BLA	Black Lawyers Association
CAO	Community based Advice Office
CALS	Centre for Applied Legal Studies
CC	Constitutional Court
IDAF	International Defence and Aid Fund
JSC	Judicial Services Commission
LAB	Legal Aid Board
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre
NGO	Non-governmental Organisation
SALC	Southern Africa Litigation Centre
SERI	Social and Economic Rights Institute of SA

Introduction

This paper traces the role played by legal practitioners¹ in the struggle for equality and justice within South Africa, organised into particular critical junctures in South Africa's history both during the struggle against Apartheid and in the subsequent transition. It considers the role of law and lawyers during the *Anti-Apartheid era* from 1948-1990; the *Negotiations and the Transition Period* from 1990-1994; and the *Post-Apartheid Era* from 1994 onwards. As is detailed below, the Apartheid regime was highly legalistic in nature and, despite the manifest corrosion of the rule of law during that period, opportunities for pockets of legal resistance remained. As former President Nelson Mandela stated; "My career as a lawyer and activist removed the scales from my eyes. I never expected justice in court, however much I fought for it, and though I sometimes received it."²

The first section of this paper explores the work of lawyers during Apartheid in detail, exploring their role in bolstering the regime, in challenging the regime within the courts, and in protecting those subjected to detention and repression. It also explores the rise of the Black Consciousness movement, the role of civil society in opposing Apartheid, and the important role played by international donors – all of which had a direct effect on law and lawyers in their relationship with the Apartheid regime. The paper then shifts focus to the transition in South Africa. In this section the paper examines the drafting of South Africa's post-Apartheid constitution and explores the work of the Truth and Reconciliation Commission (TRC). In both processes, again the role of law and lawyers was highly significant, and indeed lawyers were both actors in the TRC, and were the object of a series of institutional hearings on the role of the judiciary and legal profession during the Apartheid era. The final section of this paper explores the challenges that persist in the post-transition period and the role of law and lawyers continue to play in defending human rights. In the post-1994 period, the Constitution of South Africa Act, 1996 is regarded by many as a masterpiece of post-conflict constitutional engineering. However, its ability to transform the lives of many of the most vulnerable South Africans remains highly debated with significant levels of disillusionment at continued social injustice, manifest problems of political corruption, police brutality and a resistance within government to judicial oversight. In such a context, public interest law and lawyering remains a key vehicle for delivering the post-Apartheid promises on the ground. The report analyses the ways in which the legal profession has changed, and the attempts that have been made to ensure that the profession is more diverse. It concludes by drawing lessons that could be learned by legal professionals seeking to 'make a difference' in other contexts.

¹ This term includes attorneys (solicitors), advocates (barristers), legal academics, judges, magistrates, and those working within the prosecutorial services (i.e. attorneys general).

² Franny Rabkin, 'Mandela respected the law in fight for freedom' (*Business Day*, 11 December 2013)

I. The Anti-Apartheid Era (1948-1990)

Apartheid and the Law

With the enactment of Apartheid laws in 1948, racial discrimination became institutionalised in South Africa. Wide ranging restrictions on political activities and increased police powers subverted the independence of the courts, while sweeping provisions for detention without trial created conditions in which torture and murder by the security forces were routine. Yet, the Apartheid government sought to present itself internationally as presiding over a society rooted in the rule of law. Under the National Party government, law and order retained priority status and reliance on rule based legal formalism was a defining feature of South African legal culture. An extensive court structure administered a rule based system which was in practice predicated on inequality and endemic violations of social, economic, civil and political rights.³ A positivist conception of the rule of law enabled its use and manipulation for a discriminatory agenda,⁴ while the government maintained a vocal commitment to both the supremacy of the constitution and the rule of law, long after Apartheid was pronounced a crime against humanity by the United Nations (in 1973).

The formal features replicated the constitutional structure of the British legal order. Thus, all government or executive action required a warrant in law. An 'independent judiciary' interpreted the law and could determine when government officials were acting outside their powers, although they did not have the authority to invalidate statutes. Many lawyers served the Apartheid state and ardently defended state policy. Key amongst Apartheid's legal support mechanisms were the Attorney-Generals, ostensibly civil servants, responsible for the implementation of prosecution policy. However, many of these were regarded by lawyers acting in support of liberation movements as enthusiastic participants of Apartheid enforcement, notwithstanding their self-image as impartial lawyers operating in accordance with the rule of law as envisaged by 'the will of Parliament'.

During Apartheid, access to the legal profession was calibrated on the basis of race, gender, opportunity and wealth. This meant that the legal profession was a predominantly white male domain, with a bias toward white minority interests. Nevertheless, these typically white men also represented the bulk of black people who passed through the legal system. Although the profession was not legally closed to black South Africans, the structural obstacles for any black person pursuing such a career were significant.⁵ Despite those obstacles, from the 1950s onwards a small but significant number of black lawyers emerged and began to practice in a white dominated profession, most famously Pixley ka Seme, Nelson

³ Dikgang Moseneke, 'A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa' (*Philip A. Hart Memorial Lecture*, 4 April 2012)

⁴ Leslie Green, 'Legal Positivism' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford 2009)

⁵ Kenneth S. Broun, 'Black Lawyers under Apartheid: the Soul of South African Law' [2001] *27 Litigation* 33

Mandela, Oliver Tambo and Duma Nokwe. These lawyers found themselves navigating a legal system that had as its fundamental premise their subjugation.⁶ During the early years of Apartheid, a handful of dedicated individual lawyers defended political activists, but the intensification of repression and resistance inevitably meant the limited number of struggle lawyers could not respond effectively to the growing need. Though not the first black lawyers, Tambo and Mandela started South Africa's first black law firm. As Mandela recalled:

I realised quickly what 'Mandela and Tambo' meant to ordinary Africans. It was a place where they could come and find a sympathetic ear and a competent ally, a place where they would not be turned away or cheated, a place where they might actually feel proud to be represented by men of their own skin colour. This was the reason I had become a lawyer.⁷

The nature of Apartheid and its system of legalised discrimination and police harassment meant that the law had an invasive presence in the lives of most non-white South Africans. Legal representation mitigated such experiences, but was not affordable for the majority, especially black South Africans. Not only were the white law firms often too expensive for black citizens, but many of the blue-chip firms "charged Africans even higher fees for criminal and civil cases than they did their far wealthier white clients."⁸ Attempts to address the imbalance began to emerge in 1937 with the establishment of the Legal Aid Bureau, a private organisation which offered legal assistance to the poor. This was followed in 1969 by the Legal Aid Board, which was established by the state to provide legal aid in civil cases, but went on to become the main vehicle for the delivery of access to justice for the poor.⁹ Despite these developments, legal aid services were in practice woefully inadequate during Apartheid. By way of illustration, despite the bulk of the budget allocated for criminal defence work, in 1992, just two years before the democratic shift in 1994, a staggering 150,890 convicted persons were sentenced to terms of imprisonment without any legal representation.¹⁰

In an attempt to respond to this situation, alternative community based paralegal advice offices were established. Community Advice Offices (CAOs) date back to the late 1930s, and played a vital role in providing justice-related paralegal services, particularly in areas or amongst populations where access to legal services would be limited. In 1955 a human rights organisation known as the Black Sash was formed, with a focus on mobilising around constitutional issues and the moral, legal and socio-economic consequences of institutionalised racial discrimination. These advice offices provided free paralegal services for an array of issues including: housing, unemployment, pensions, influx control, and detention without trial. Communities often relied on such grassroots based advice

⁶ *Ibid*

⁷ Nelson Mandela, *Long Walk to Freedom* (MacDonald Purnell 1994)

⁸ *Ibid*, 128

⁹ David J. McQuoid-Mason, 'The Delivery of Civil Legal Aid Services in South Africa' [2000] 24 *Fordham International Law Journal* 111

¹⁰ John Jeffery, 'Address by the Deputy Minister of Justice and Constitutional Development, at the Gala Dinner of the International Conference on Access to Legal Aid in Criminal Justice Systems' (Boksburg, 25 June 2014)

offices to fight injustice and address other social challenges they faced. Advice offices were both a critical centre for community struggles for justice, and a pragmatic remedial resource for engaging an array of administrative and criminal justice concerns for communities without alternatives.¹¹

The Law as a Site of Struggle

The liberation movements, in particular the African National Congress (ANC) and the Pan African Congress (PAC) considered the law and its administration as 'sites of struggle'. As much as they rejected the legitimacy of the state, they could not ignore it. When activists were apprehended they were forced to deal with the legal system. In many instances, such proceedings were unlikely to secure justice for the individual. However, they did provide a platform to publicly challenge the regime. The accused generally regarded themselves as soldiers under orders from the ANC, involved in a 'just' war against an illegal and illegitimate government. In some instances, the defence would therefore argue that their clients were in fact prisoners of war in terms of the Geneva Conventions. On other occasions, their clients refused to recognise the jurisdiction of the court, pointing out that Apartheid was regarded as a crime against humanity and the courts were representative of an illegitimate system. Peter Harris, legal representative for the Delmas 4¹² recalls his discussion on legal strategy with the accused:

*We cannot plead not guilty...because we will not allow them to place us on trial according to their rules for fighting to liberate this country. We did the acts alleged and we will not back away from that. At the same time we cannot plead guilty, although we are in fact guilty, our acts cannot be seen in purely criminal terms. We probably cannot avoid the death sentence... we have to face that, so we need to conduct our trial in a manner which does not compromise our beliefs and the reputation of the ANC.*¹³

An iconic example of the law as a site of struggle was the Rivonia trial.¹⁴ In October 1963, ten leading opponents of Apartheid were put on trial on charges of sabotage. Nelson Mandela made a speech in the dock in which he condemned the court as illegitimate and argued that defiance of the laws under which they were being accused was justified. The accused argued that the law was drawn up without the consent of the majority and was enforced to ensure the perpetuation of an unjust system. Consequently, they argued this situation inevitably led to the struggle to establish a new legal and political paradigm that would embody the values of a non-racial constitution that protected human rights. Mandela's statement from the dock was not standard legal practice or procedure, but established a precedent

¹¹ Richard Abel, *Politics by Other Means: Law and the Struggle Against Apartheid* (Routledge 1995)

¹² The Delmas 4 included Jabu Masina, Ting Ting Masango, Neo Potsane and Joseph Makhura. They belonged to Umkhonto We Sizwe (the armed wing of the ANC) and were among its most effective underground operatives.

¹³ Peter Harris, *In a Different Time* (Umuzi SA 2008) 70

¹⁴ Awol Allo (ed), *The Courtroom as a Space of Resistance: Reflections on the Legacy of the Rivonia Trial* (Routledge 2015)

that was subsequently employed in several high profile cases, including the 1980s Delmas treason trial.¹⁵

Political trials provided important platforms for the liberation movement to attempt to redirect the legal process towards a public indictment of the regime. This task was largely left to the legal representatives to implement, and was by no means straightforward, requiring a high level of technical skill and navigational acumen. Lawyers nuanced process and procedure to create precedents as a means of redirecting the court space. Although difficult to measure, such trials undoubtedly helped expose the brutality of the Apartheid system and won wider empathy and support for the clients and their cause.¹⁶ On occasion, the courts also provided important space for constraining the Apartheid apparatus, even if only at the level of slowing down the bureaucracy. For example, the Campaign of Defiance against Unjust Laws (1952) and the call for a Congress of the People (1953–55) in response to the introduction of reactionary legislation did not stop the country's legal transformation from segregation to Apartheid. But such campaigns delayed and frustrated implementation, and increased opportunities to mobilise the opposition.

Public litigation in this context was thus employed to further the political objectives of the liberation movements and formed part of the broader strategy of resistance and defiance. This provided a sense of coherence and focus to the litigation, at the same time giving additional impetus to the broader political campaigns and strategies. An organic link between public litigation and the mass movement enabled the manipulation and exploitation of gaps in the legal system. Litigation interventions enjoyed popular support and 'struggle lawyers' were held in high esteem by clients and more broadly by the marginalised masses. Strategically, Apartheid era struggle lawyers sought to strike a delicate balance between formal engagement within the institutional sphere of the state while maintaining the confidence of their clients and the broader political and military movements to which these clients belonged. For many struggle lawyers, the tensions of being both a lawyer and a dissident reflected the friction between law, justice and morality in South Africa at that time.¹⁷ Former Constitutional Court judge, Albie Sachs explained the tensions and contradictions this dual existence brought about:

*The fact is that for much of my life I lived simultaneously as lawyer and as outlaw, anyone will know how split the psyche becomes when you work through the law in the public sphere, and against the law in the underground.*¹⁸

¹⁵ The Delmas Treason Trial ran from 1985-1988. It involved the prosecution of 22 anti-Apartheid activists under so-called security laws including three prominent leaders Moses Chikane, Mosiuoa Lekota and Popo Molefe, known as the "Big Three". The prosecution was designed to 'break the back' of the United Democratic Front, a broad coalition of anti-Apartheid organisations including trade unions, churches, student organisations and sports bodies.

¹⁶ Richard Abel op cit

¹⁷ George Bizos, 'Address to the School of Practical Philosophy Plato' (Salisbury House, Johannesburg, April 2013)

¹⁸ Albie Sachs, *The Strange Alchemy of Life and Law* (OUP 2009) 1

Black Consciousness and the Rise of Civil Society

As the force of Apartheid strengthened in the 1970s, so did the determination of anti-Apartheid movements and organisations. The Black Consciousness Movement emerged from black-only universities, championing black African empowerment through internal strength and self-reliant struggle. Black Africans were urged to lead their own emancipation movement through community re-organisation and student activism. Widespread coordinated mobilising ensued and community-based organisations, labour movements, think-tanks and special interest organisations started to emerge.

Independent civil society organisations such as the Centre for Applied Legal Studies (CALs),¹⁹ Lawyers for Human Rights (LHR),²⁰ the Legal Resources Centre (LRC)²¹ and the Black Lawyers Association (BLA) were all formed during this period.²² These organisations focused on using the law as a tool with which to further justice, democratisation and social change. This was advanced by means of a combined strategy of free legal services, litigation, advocacy, training, mentorship and research. In 1979, CALs and LHR developed a programme to provide free legal assistance in the pass courts, where previously such representation had been rare. Pass laws were designed to control the movement of Africans under Apartheid, and failure to produce a pass was a criminal offence, which often led to Africans being brought before 'pass courts'. Representation before these courts had a dramatic impact, as the defence challenged the prosecution on process and substantive concerns, significantly slowing down the processing rate, generating delays and blockages and frustrating the courts' operability. The programme laid the seeds for the subsequent roll-out of community based paralegal advice centres across the country during the 1980s.

These initiatives galvanised a broader campaign to promote access to justice, as a tactical organising and implementation tool as well as a broader contribution to the goals of mass mobilisation. Labour law presented a further terrain for testing Apartheid regulations. CALs focused on labour issues at a time when there were very few labour lawyers in South Africa. The labour unit litigated and conducted research into the field of labour relations, and provided legal advice to the burgeoning black trade union movement. These interventions influenced the shift in the terrain around labour law and struggles for increased worker representation. The labour movements in SA went on to become a bedrock for the anti-Apartheid movement internally and externally.

The BLA was also intent on increasing the number of qualified black lawyers in the country. By 1985, of the 6000 attorneys in South Africa, 600 were black. Student enrolment expanded significantly after all universities in the country introduced a law department for black South Africans and received increasing student enrolment. Unsurprisingly, the few black law firms could not accommodate the rising numbers. Efforts to persuade white firms to take on black candidate attorneys had limited success. The BLA established a Centre for Continuing Legal Education, which focused on research and publication, and establishing, directing

¹⁹ A legal academic research institute attached to the University of the Witwatersrand.

²⁰ An organisation focused on mass based education and providing legal representation.

²¹ A public interest litigation organisation.

²² A professional association of lawyers.

and administrating law clinics. This included a program for placement and training of candidate attorneys.

Legal Responses to Detention and Repression

As Apartheid became increasingly oppressive, detention laws were introduced which placed detainees at the mercy of the interrogator, without access to the courts, lawyers, independent doctors or family for extensive periods of time. Detention laws provided for visits to detainees by designated visiting magistrates and district surgeons, but implementation was not routine and government officials were rarely proactive in defence of detainee rights. In these conditions, systematic torture became widespread, resulting in several deaths. During successive states of emergency in the 1980s, thousands of individuals were detained without trial, some for periods of up to thirty months.²³ Thousands of cases of torture, assault and other abuses were also recorded, and nearly 70 detainees died in detention.²⁴

Despite overwhelming medical and forensic evidence, inquest magistrates tended to make implausible findings which overlooked both scientific evidence and blatant anomalies in the official police version of events. Robust legal representation was not available in every instance, and limited resources compounded the lack of evidence and information necessary to challenge the state's version of events. Struggle lawyers often had little confidence that inquest proceedings would be conducted in a fair manner or that magistrates would actively seek out the truth. Yet, in certain instances, the rigour of their work exposed the insufficiency and bias of the presiding state officials. Cross-examination also afforded a rare opportunity for inquiry into the sensitive and secretive policing apparatus, and provided an important chance to mould public opinion. For example, the Aggett case in 1982 received widespread international publicity, further exposing Apartheid detention practices.²⁵ However, it was the inquest into the death of Black Consciousness leader Steve Biko that most effectively exposed the savagery of treatment in detention. Biko had died of a brain haemorrhage after a severe beating in police detention. It "was not a trial in the formal sense, but it became a trial of the South African system in the court of world opinion"²⁶ and contributed to the acceleration of South Africa's international isolation. The family's legal team established beyond a reasonable doubt that crimes had been committed. Yet, the

²³ Max Coleman (ed), *A Crime Against Humanity: Analysing the Repression of the Apartheid State* (Human Rights Committee 1998)

²⁴ 'List of deaths in detention' South African History Online <www.sahistory.org.za/topic/list-deaths-detention> accessed 11 August 2016

²⁵ Neil Agge was a white anti-Apartheid activist working for the black trade union movement who committed suicide after 70 days of torture in police detention. He had been subjected to intensive beatings, electrocution and mock drowning with a wet towel placed around his head. He was the only white South African to die in police detention during the anti-Apartheid struggle. See Donald McRae, 'The Death Of Anti-Apartheid Campaigner Neil Aggett And South Africa's Dark Past' *The Guardian* (London, 13 November 2013) <www.theguardian.com/world/2013/nov/22/death-anti-Apartheid-campaigner-neil-aggett> accessed 11 August 2016

²⁶ Thomas G. Karis and Gail M. Gerhart, quoted in George Bizos and Sydney Kentridge, *No One to Blame?: In Pursuit of Justice in South Africa* (David Philip Publishers 1999) 39

magistrate still found no one responsible, and in so doing exposed his prejudice and the institutional bias of South Africa's courts.

Detention without trial was a matter of special interest to the activist lawyers who helped establish the "Detainees Parents Support Committee" (DPSC) in 1981. DPSC was banned in 1988, but remodelled as the Human Rights Commission in 1988 (and subsequently the Human Rights Committee of SA). Legal and other activists were also involved in the establishment of the Independent Board of Inquiry into Informal Repression in 1989; this research organisation was set up to research, investigate and collate the relevant information pertaining to state responsibilities for extrajudicial executions and other forms of organised violence and torture.

Much of this work obtained financial support from outside of South Africa. An International Defence and Aid Fund was initially established to raise the bail money required by the 156 accused in the 1956 treason trial, but subsequently extended its focus to support public interest litigation and representation for those caught up in the web of discriminatory Apartheid laws. Increased repression in the 1980s saw a corresponding expansion of the fund, as support was provided to lawyers who defended those arrested and detained for their acts of opposition to Apartheid. By the mid-1980s, IDAF supported approximately 170 attorneys and almost 80 advocates inside South Africa, and provided funding for 16,551 legal matters. In addition, IDAF provided support to families of those imprisoned. As IDAF resources were focused on capital crimes and other political defences, many other potentially relevant cases relied on the widely mistrusted legal aid which paid for often inadequate private legal representation.

This section has sought to provide an overview of the various roles played by the law and lawyers during the anti-Apartheid era. It has shown how law was used both to bolster and resist the Apartheid regime, and how lawyers sought to further the causes of their clients in public interest litigation, pass courts and in cases of detention. It has highlighted the importance of the rise of civil society, and the support received from abroad, in making legal resistance to oppression possible. The following section moves to consider the role of lawyers and law during South Africa's Transition Period.

II. Negotiations and the Transition Period (1990-1994)

As the Apartheid regime began to crumble and negotiations between the National Party and the ANC commenced, it was inevitable that law and lawyers would play an essential role in any settlement and transfer of power. Both the National Party and the ANC promoted a Bill of Rights as a central plank of their political program, and the ANC explicitly recognised the vital role that paralegals and CAOs had played during Apartheid.²⁷ The first public negotiating session of the Convention for a Democratic South Africa was held in December 1991, and led to a Declaration of Intent, which included a commitment to the supremacy of a constitution, an independent non-racial judiciary, regular elections, universal adult suffrage, separation of powers, and an entrenched and justiciable bill of rights with a legal system which guaranteed equality before the law.

After three years of intense negotiation the Constitution of South Africa Act 1993 was passed, providing for an interim constitution, a Bill of Rights and a government of national unity over a five-year transition. When the parties began negotiating the Bill of Rights, there had been some basis to believe that the interim constitution would not include such a Bill, which would be left until after elections. However, the negotiators and their legal experts had different ideas, and the interim constitution introduced a chapter of justiciable 'fundamental rights'.²⁸ Lawyers were of course heavily involved in the drafting of these documents. A constitutional committee was established which included several lawyers who had been involved in the anti-apartheid struggle, and who "pushed very hard for the structures" the Constitution contains to this day.²⁹ In the words of one former Constitutional Court judge:

if you want the triumph of idealist transformatory law with lawyers in a way at the helm, I wouldn't say driving the whole process but at the helm, I would say the South African Constitution making process was an example.³⁰

However, the involvement of lawyers has not been universally praised. Reflecting on the role of lawyers in these negotiations, a former anti-Apartheid activist observed that the presence of lawyers "was helpful to an extent and it was a hindrance in another extent". He explained that:

Most lawyers growing up in a western tradition, grow up believing in the rule of law as being the protection of property. And that played itself out in South Africa. As a result of that, we have a property clause in our Bill of Rights. The irony of the property clause is that all the land in South Africa was stolen from the people of South Africa and at our negotiations we guaranteed property rights to the people who we had been fighting.³¹

²⁷ 'Progress and Challenges in the Development of Access to Justice in South Africa', Community Agency for Social Enquiry, Paralegals and Advice Offices (CS Mott Foundation, 2000)

²⁸ *Constitution of the Republic of South Africa Act*, 200 of 1993. Chapter 3

²⁹ Interview with former Constitutional Court judge, 12 August 2014

³⁰ Ibid

³¹ Interview with former struggle lawyer, 11 August 2014

Thus, the attachment of lawyers to rule of law concepts was perceived by him as actually hindering an equitable Bill of Rights which properly addressed South Africa's history. However, a legal academic who had been involved in the negotiations argued that "people expected too much from the law", and wanted "everything in the constitution", whereas what she felt was needed were "the principles and the frameworks, and then we've got to worry about the laws."³²

Despite these reservations, much of the essential structure and content of the interim Bill of Rights was transposed into the current constitution, adopted in 1996, and drafted by parliament with the help of a technical committee, again consisting mainly of lawyers. The old system of parliamentary sovereignty was replaced by a constitutional democracy that recognised the constitution as the supreme law. Promulgated by the Constitution of South Africa Act, 1996, the constitution is as was noted above regarded by many as a masterpiece of post-conflict constitutional design. By reconfiguring political institutions, creating democracy supporting structures underpinned by a justiciable bill of rights, this new legal framework provided a platform for a transformative social, economic and political agenda. The constitution has since been amended seventeen times and remains the fundamental law of the nation. In the intervening years, human rights discourse has become central to the political arena in South Africa.³³ The more liberal human rights discourse which had been reflected within South African discussions in the late 1960s and 1970s, was replaced by an intensive debate over the transformative role of three generations of rights in the bill of rights and the state's obligations to respect, protect, promote and fulfil those rights.

The Truth and Reconciliation Commission

In July 1995, the new democratic parliament adopted law authorising the formation of the Truth and Reconciliation Commission.³⁴ The Commission, chaired by Archbishop Desmond Tutu, was tasked: to discover the causes and nature of human rights violations in South Africa between 1960 and 1994; to identify victims with a view to paying reparations and granting amnesty to those who fully disclosed their involvement in politically motivated human rights violations. The TRC in practice foregrounded notions of forgiveness and the healing of survivors, but by so doing it stepped outside the legal framework (which makes only passing reference to healing and reconciliation). Several prominent "struggle lawyers", Dumisa Ntsebeza (head of the investigative unit), Yasmin Sooka (Commissioner) and Richard Lyster (Commissioner) occupied key positions on the Commission.

The TRC captured the world's attention, in part due to its (then) unique approach to granting a form of amnesty, but largely because its victim and perpetrator processes were uniquely public. The amnesty clause reflected a fundamental compromise around the justice and accountability agenda, ostensibly a trade-off for peace. This was both a political and practical outcome, a calculated compromise, reflecting the balance of forces during negotiations and an understanding of the limitations of pursuing a retributive agenda. Ironically, both

³² Interview with legal academic, 13 August 2014

³³ Steven Robins, *From Revolution to Rights in South Africa* (University of KwaZulu-Natal, 2008)

³⁴ *The Promotion of National Unity and Reconciliation Act*, No 34 of 1995

the National Party and key sections of the ANC agreed on the need for an unconditional blanket amnesty. However, civil society lobbying prevented this having secured significant political support from heavyweights inside the ANC, led by Mandela, and key legal minds such as Justice Minister, Dullah Omar and Kader Asmal. The result was a conditional amnesty in return for 'full disclosure' of past crimes in the TRC. Amnesty was granted only if the crime was political in nature and if the individual fully disclosed the details of the act for which amnesty was sought.³⁵ The function of deciding who would be granted amnesty fell to the TRC's amnesty committee, which operated autonomously, under the direction of seconded judges. Lawyers were engaged on all sides of the Commission's works, and the TRC was forced to respond to several legal challenges on its processes and challenges to its powers. These powers included search and seizure and subpoena, and whilst the latter was regularly employed, the Commission used its search and seizure powers sparingly. Legal representation was provided to those subpoenaed at state expense although the quality varied tremendously, predicated largely on disparities in fee payments. Most amnesty applicants, applying from prison, did not benefit from legal assistance to draft their applications, compared to many of those whose cases resulted in hearings.

The Commission presented its report to Nelson Mandela in October 1998. It condemned all primary protagonists for committing atrocities. The National Party, ANC and IFP launched individual legal cases to prevent publication, but the report was published with the support of the president. For some, the TRC represented a compromise in terms of abrogating core rights in return for an undertaking to discover the truth and provide restitution. Principled positions were forfeited as a price for progress. At the time there was considerable fear that violence would continue and destabilise an already fragile situation unless a settlement was reached.³⁶ As explained by former Justice Minister Dullah Omar, "if we did not compromise and give up on some issues like amnesty, we would not have had an election."³⁷ The amnesty was a bitter pill to swallow for many activist lawyers, who had for years defended the victims of Apartheid, had spent years collecting and collating data and information on human rights violations, devising strategies intended to promote accountability and justice. Now faced with a new paradigm generated by political compromise, the understandable desire to prosecute former human right abusers was set aside under the guise of political reconciliation. Nevertheless, the TRC provided space to engage and promote accountability, albeit not through a retributive legal lens. In fact, the TRC found itself subject to criticism for being overly legalistic, despite its focus on reconciliation, and was accused of lacking sensitivity to the victims at times, particularly during the amnesty hearings.³⁸

³⁵ Brandon Hamber, Dineo Nageng & Gabriel O'Malley, 'Telling It Like It Is: Understanding the Truth and Reconciliation Commission from the Perspective of Survivors' [2000] 27 *Psychology in Society* 18

³⁶ Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press 2001)

³⁷ 'Dullah Omar, Interview' (O Malley Archive)

<www.nelsonmandela.org/omalley/index.php/site/q/03lv00017/04lv00018/05lv00245/06lv00246.htm> accessed 21 April 2016

³⁸ See Hamber, Nageng & O'Malley, *supra* note 35; Rachel Killean, 'Lawyers & Truth Recovery Mechanisms: South Africa' Report for Lawyers, Conflict and Transition Project,

The TRC constituted the first instance of a transitional justice mechanism specifically examining the role of the legal profession. Legal organisations such as LHR and LRC opened their archives to the TRC's investigative and research units and prepared submissions for special hearings into the legal profession and the relationship between the rule of law, the role of lawyers and Apartheid. The TRC found that the organised legal profession for the most part took no effective initiatives towards ensuring the administration of justice and had only taken such steps latterly.³⁹ Their complacency in the face of the challenges thrown up by government's injustices internally, and their defensiveness in international forums when foreign lawyers' organisations dared criticise, are matters of public record.⁴⁰

Queen's University Belfast and the Transitional Justice Institute, Ulster University (August 2016)

³⁹ David Dyzenhaus, *Judging the Judges: Judging Ourselves* (Bloomsbury 1998).

⁴⁰ TRC, 'Special Hearings' TRC Final Report, Vol. 4, 1998

III. Post-apartheid, Democratic South Africa (1994-2016)

Access to Justice

Over 20 years since the end of Apartheid, many South Africans are still denied the rights articulated in the Constitution.⁴¹ In 2010, 20 percent of the population fell below the poverty line, increasing to 21.5 percent in 2014.⁴² The gap between the rights promised and the practical application of law and policy appears to be widening. Notwithstanding the progress made in addressing past imbalances, massive challenges remain regarding access to justice on multiple levels in the post-Apartheid era. Most South Africans remain unaware of their rights and entitlements and often hold misconceptions as to what rights the Constitution will uphold.⁴³ This leads to misunderstandings as to what the government is supposed to deliver. The cumulative result of South Africa's crisis of access to justice is increasing instability, potentially culminating in widespread rejection not only of the Constitution, but of the institutional and legal pillars of 'the system' itself. If the dominant lived experience of poor and working class people is one of endless frustration at the lack of practical assistance and effective redress in their search for justice and equality, then it is inevitable that they will question the value of the Constitution, its inclusive rights as well as associated legislation and policies that supposedly give these rights practical effect.⁴⁴

Constitutional rights regarding equality of arms and access to the courts for arrested, detained and accused persons have extended the Legal Aid Board's responsibilities for enhancing access to justice across South Africa. The establishment of over sixty justice centres nationwide has enabled more cost effective criminal justice representation (using salaried lawyers), with an enhanced focus on juvenile accused. Limited attention is given to civil matters, but overall the LAB acknowledges that "the majority still (do) not have access to these centres" and that "the lack of resources and appropriately qualified and experienced personnel mean that the justice centres will not be able to cater for all the needs they are presented with. A range of additional measures are necessary to ensure that this project is successful."⁴⁵ Instead, the burden of taking up civil matters rests with a small group of public litigation civil society

⁴¹ Despite the end of the Apartheid in 1994, South Africa has the highest income inequality in the world measured by the Gini Index – a level that has remained relatively unchanged between 1990 and 2011.

⁴² 'More South Africans living in poverty – Stats SA' (*City Press*, 2 February 2015) <www.news24.com/Archives/City-Press/More-South-Africans-living-in-poverty-Stats-SA-20150429> last accessed 21 April 2016

⁴³ Dale McKinley 'Human Rights Awareness and Knowledge Baseline Survey' (FHR, 2013), found that only 46% of respondents were aware of the existence of either the Constitution or the Bill of Rights. A sizeable majority of those living in rural areas (63%), farm workers (60%) and refugees / migrants (74%) were not aware of these two documents. Less than 10% of respondents had read these documents, or had either of the documents read to them.

⁴⁴ Dale McKinley et al, *Riding the Transitional Rollercoaster, The Shifting Relationship Between Civil Society and the Constitution in Post- Apartheid South Africa* (SAHA 2015)

⁴⁵ 'Justice Centres' (LAB) <legalaid.onsite.hosting.co.za/staff/justicecentres.php> last accessed 21 April 2016

organisations, private law firms and initiatives promoted by the Law Society of South Africa. Even with the emergence of new pro-bono institutions, limited capacity remains a serious challenge and adds to the notion of a fragmented remedial infrastructure. Located in metropolitan centres, their ability to respond is limited, and their reach constrained, particularly in a context where Community Advice Office infrastructure is dwindling drastically across the country.⁴⁶ In addition, most legal NGOs are constrained by funding agendas and remain focused on strategic litigation to challenge and change the law, in both High Courts and the Constitutional Court.

Public Interest Litigation

Despite these difficulties, a number of key impact cases were brought in the years following the end of Apartheid. Organisations such as the LRC undertook public impact litigation in strategic areas in order to assist in defining constitutional rights.⁴⁷ Public interest organisations also pursued the impact litigation route, based on the fact that although the state was now under a constitutional duty to provide legal representation to indigent people, it was less open to providing such representation in strategic cases that challenged state power. A number of new Public Interest litigation organisations were established, including Freedom Under Law (FUL) and the Council for the Advancement of the Constitution, the Southern Africa Litigation Centre (SALC), Section 27 and Social and Economic Rights Institute of SA (SERI).

Between 1994 and 2007, seven separate matters on gay and lesbian issues were lodged with the Constitutional Court, on issues ranging from adoption to same-sex marriage. The challenge by gay and lesbian groups to the sodomy laws was the first major public interest litigation in post-Apartheid South Africa.⁴⁸ Every case resulted in victory for the applicants and all seven judgments were unanimously supported on the merits of the case. This success is attributed to the well-defined strategy adopted by gay and lesbian groups, as part of a broader campaign by LGBTI groups that included awareness raising, mobilization and building popular support across the political spectrum. Beyond the litigation success of striking down the offensive laws and policy, LGBTI legal challenges contributed to a significant increase in public awareness as well as substantial academic discourse around gay and lesbian issues. The LGBTI community were actively part of these initiatives, providing a powerful pressure and impetus 'from below' and recreating the nexus between law and politics, reminiscent of the Apartheid era mobilisation.

One of the best known of South Africa's cases on social and economic rights, is the Grootboom case, when 4000 residents living in informal housing applied to the High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent

⁴⁶ Traditionally CAO's, being the first port of call, were the ones that often brought potential cases to the attention of the legal fraternity.

⁴⁷ *S v. Makwanyane* [1995] (3) SA 391 (CC); *Mgcina v Regional Magistrate, Lenasia* [1997] (2) SARC 711; *Hoffman v South African Airways* [2000] (11) BCLR 1211 (CC)

⁴⁸ *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* [1998] ZACC 15; [1999] (1) SA 6

accommodation.⁴⁹ The High Court granted the order. It was the first Constitutional Court judgement on social and economic rights that found that the state had not complied with its obligations and provided an order compelling government to take action. The Grootboom judgement became a foundational case for assessing state responsibility, although unfortunately it did little to temper continued widespread evictions. Another well-known Constitutional Court decision was the Treatment Action Campaign's case against the Minister of Health.⁵⁰ The case concerned the government's response to the HIV/AIDS epidemic. The High Court instructed the government to allow Nevirapine, an anti-retroviral, to be prescribed where it was "medically indicated" and where, in the opinion of the doctors acting in consultation with the medical superintendent, there was capacity to do so. The High Court also ordered the government to develop a comprehensive national program to prevent or reduce mother to child transmission (MTCT) and inform the court of progress made in this regard before 31 March 2002. The judgment, although welcomed both domestically and internationally, generated the ire of government, who expressed concerns that the principle of separation of powers had been breached. Despite reservations, government adhered to the ruling and policy shifted in 2002, resulting in the extension of the MTCT program.

The use of such litigation strategies has not always been successful. In 2001, the City of Johannesburg introduced a project to limit water consumption in Soweto through the mass installation of prepayment water meters (PPMs). The project began with a pilot in Phiri, one of Soweto's poorest suburbs. These meters were designed to automatically disconnect once the FBW supply was exhausted, unless additional water credit was loaded. In August 2003, Phiri residents embarked on a resistance campaign, supported by the Anti-Privatisation Forum (APF), a socialist social movement that had brought together an array of disparate community initiatives to challenge government service delivery. The resistance managed to delay the installation of PPMs, and when it looked as though community resistance had failed, the APF turned to rights-based litigation. However, the Constitutional Court found that the installation of pre-paid meters in Phiri did not constitute discrimination or violate the residents' administrative justice rights as set out in the Constitution. The legal campaign in this instance did not suspend the resistance campaign, indeed far from detracting from each other, they served to reinforce and reinvigorate each other. Thus, litigation has its limits. Legal victory may establish an important precedent, but often its impact may take time to register in the most affected communities. Invariably, a precedent-setting case is the beginning of a longer journey to building new jurisprudence, changing government's behaviour and shaping societal attitudes.

Public statements by senior government and ANC officials indicate a growing hostility to public interest litigation. For example, several senior ANC politicians have blamed unfavourable judgments on 'untransformed' courts, and have accused the judiciary of playing an oppositional role in South African politics.⁵¹ In

⁴⁹ *Ors v Grootboom & Ors* [2000] (11) BCLR 1169 (CC)

⁵⁰ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)

⁵¹ 'Constitutional Court used as Opposition to ANC Government: says Mantashe' (*Times Live*, 18 August 2011); 'Malema Takes Aim at Judiciary' (*Independent Online*, 14

April 2014, while sitting on the Judicial Service Commission (JSC), a senior member of government commented that she found it disturbing that candidates wanted to be appointed judges while espousing very fervent human rights activist tendencies.⁵² Another senior member of government and of the JSC has argued that civil society and opposition parties have used litigation to constrain the exercise of power by Parliament and the executive.⁵³

Court victories are often met by difficulties in ensuring government compliance. In the 2015 al-Bashir case,⁵⁴ a full bench of the North Gauteng High Court made an order in favour of SALC for the arrest of the President of Sudan, who was in South Africa attending the African Union Summit. President Umar al Bashir stands accused by the International Criminal Court (ICC) of genocide, war crimes, and crimes against humanity committed in the Darfur region of Sudan. The High Court upholding South Africa's responsibility in terms of the Rome Statute (South Africa is a signatory to the Statute) ordered that al-Bashir be arrested and handed over to the ICC. By the time the order was handed down, al-Bashir had left the country. In this instance the government's failure to comply with a court order was patently obvious, and little attention was paid to the local and international condemnation. In response to media, public and reprimand from the judges, the ANC Secretary-General responded by deflecting and calling into question the integrity and mandate of SALC and of the presiding judges. In 2016 the South African government announced its intention to leave the jurisdiction of the ICC, arguing (in the wake of al-Bashir scandal) that the Rome statute was inconsistent with domestic law which guarantees the diplomatic immunity of the sitting heads of state and an incompatibility between 'its obligations with respect to the peaceful resolution of conflict and interpretations given by the ICC.'⁵⁵ This move by the South African government has been widely criticised by human rights NGOs and others as '...a huge reversal of its role as a leader promoting victims' rights and the values in its post-apartheid constitution.'⁵⁶

The Criminalisation of Resistance and Police Brutality

While criticising the role of domestic and international courts in critiquing state policies, the state has become increasingly intolerant of political resistance and grassroots public protests more generally. South Africa has experienced a significant increase in the number of local protests in poor urban areas. These protests, often referred to as 'service delivery' protests, are often tied to living conditions in poor communities, including a lack of basic services and social

September 2011); 'What Mathole Motshekga really said – ANC' (*Politicsweb*, 2 October 2011)

⁵² Franny Rabkin and Niren Tolsi 'Few Magistrates Make the Grade with JSC' (*Business Day*, 10 April 2014)

⁵³ Ngoako Ramatlhodi, 'ANC's Fatal Concessions' (*Times Live*, 1 September 2009).

⁵⁴ *The Southern Africa Litigation Centre v. The Minister of Justice and Constitutional Development & Others*; (27740/2015) [2015] ZAGPPHC 402

⁵⁵ The Guardian 'South Africa to Quit International Criminal Court.' 21st October 2016

⁵⁶ Human Rights Watch 'South Africa: ICC Move Betrays Victims' <https://www.hrw.org/news/2016/10/24> 24th October 2016

amenities. Protest reflects frustration and anger, but also a dynamic and proactive effort to protect and realise rights.

A 2011 case study of community protests in Lenasia's Thembelihle informal settlement highlighted a tendency by the state to respond to protest by increased police brutality and the arrest, prosecution and lengthy detention of activists predicated on little or no substantial evidence. Court proceedings in these instances are often manipulated and delayed to prolong the detention of activists and to intimidate their supporters. In effect, many activists involved in these protests believe that the police and courts are being used to protect the state against dissent under the guise of upholding the rule of law in similar fashion to the Apartheid era regime.⁵⁷ This 2011 case-study concluded that South Africa has failed to address issues of criminality and brutality within police ranks. There was a 313 percent increase in reported cases between 2001/2 to 2011/12. Despite this, impunity predominates. A total of 11,880 criminal cases were opened with the Independent Police Investigative Directorate during the five years to 2011/12, resulting in 2,576 prosecutions, but only 129 convictions.⁵⁸

One particularly violent example of police brutality occurred on 16 August 2012, when 34 people, mostly employed by Lonmin platinum mines, were killed after police opened fire on striking miners. The shooting was the worst incident of police brutality witnessed in the country since the advent of democracy in 1994. The Marikana Commission of Inquiry,⁵⁹ headed by retired judge Ian Farlam, was established by President Zuma to investigate the deaths. Inadequate provision was made for representation of the injured and arrested miners by the state. Legal Aid SA's decision to fund the representation of the families of the deceased miners, but not the injured and arrested miners, was challenged by the LRC and lawyers acting on their behalf, on the basis that the distinction between the two groups was arbitrary and therefore irrational.⁶⁰ The High Court upheld the LRC's arguments and held that the decision of Legal Aid South Africa failed to meet the constitutional requirement of rationality. Makgoka J rejected the reliance by the State and Legal Aid South Africa on budgetary constraints as a defence to the application. Legal Aid SA complied with the order. The judgment is also significant in recognising that the Constitution guarantees the right to state-funded legal assistance in some civil proceedings and commissions of inquiry, where the circumstances require legal representation in order to secure a fair hearing. The Commission findings criticised the police and questioned the fitness of National Police Commissioner Riah Phiyega and former North West provincial commissioner Lieutenant-General Zukiswa Mbombo to hold office. However, nobody was held directly accountable for the deaths at Marikana and no compensation was recommended. The Commission has been heavily criticized for its cost, for its

⁵⁷ Michael Clark, *An Anatomy of Dissent & Repression, The Criminal Justice System and the 2011 Thembelihle Protests; Socio-Economic Rights Institute of South Africa* (SERI, 2014)

⁵⁸ '5 Cases of Police Brutality Caught on Camera (video)' *The Citizen* (4 December 2015), (23 April 2015)

⁵⁹ Established in terms of section, 84(2)(f) of the *Constitution of the Republic of South Africa of 1996*, on 23 August, 2012

⁶⁰ *Magidiwana and Others v. President of the Republic of South Africa and Others* (CCT 100/13) [2013] ZACC 27

overly legalistic proceedings and for long delays; it sat for almost 300 working days and had an estimated cost of R153 million, making it more expensive than the TRC.⁶¹

The Transformation of the Legal Profession

Transformation in the South African context at base means the process of making South African society, look, work, think and be like the Constitution says it should. Transformation necessarily includes - but is not limited to - attaining demographic representativeness in the profession. Some progress has been made in addressing race and gender imbalances in Magistrates Courts. Of the 1661 magistrates, 974 are black and 687 are white, 647 are women and 1014 are men. Whilst this represents significant progress, there is still much to be done - especially regarding the gender imbalances in the upper echelons of the judiciary, the Constitutional Court, the Supreme Court of Appeal and the ranks of the Judges President. However, the untransformed state of the legal profession remains a stumbling block to the further transformation of the judiciary as well as to greater access to justice.

The legal profession is a key provider of services that promote access to justice and it also constitutes a pool from which the judiciary is appointed. Using the terminology employed in South Africa to measure diversity, of the 2384 advocates (as at April 2012) who fell under the umbrella of the General Council of the Bar: 1367 were white men, 366 white women, 295 African men, 89 African women, 47 coloured men, 37 coloured women, 114 Indian men and 69 Indian women. Of the 473 senior advocates: 382 are white men, 20 white women, 29 African men, 4 African women, 9 coloured men, 1 coloured woman, 24 Indian men and 4 Indian women. The attorneys' profession is marginally more representative. As at June 2011 there were 20,077 practicing attorneys of whom 36% were black and 64% were white. Women constituted 34% and men 66%. The profile of law students is much more reflective of South African society. In 2011 of all first year law students, 78% were black, 22% white, 54% were women and 46% men. In the same year, of the 3751 LLB graduates, 68% were black, 32% white, 59 % women and 41% men.⁶²

After almost two decades of negotiations, discussions and concessions, the Legal Practice Act⁶³ came into force on 22nd September 2014.⁶⁴ The legislation is aimed at healing the divisions of the past and establishing a legal community committed to the democratic values of social justice and human rights. It provides a

⁶¹ 'Marikana inquiry cost R153m: Report' (News 24, www.news24.com/SouthAfrica/News/Marikana-inquiry-cost-R153m-report-20150705).

⁶² Andries Nel, 'The Legal Practice Bill and the Transformation of the Legal Profession' (*The New Age*, 10 May 2013)

⁶³ Act 28 of 2014. The Act has been in the making for over a decade, dating back to the time of the late Dullah Omar, South Africa's first democratic Minister of Justice.

⁶⁴ The Act is to take effect in staggered stages; Section 120 provides that chapter 10 (National Forum) will come into operation on a date to be fixed by proclamation. Chapter 2 (South African Legal Practice Council) will only come into operation 3 (three) years after Chapter 10 and the rest of the Act will come into operation on a date to be proclaimed after the commencement of Chapter 2.

legislative framework for the transformation and restructuring of the legal profession into an integrated profession, accessible to and representative of the country's constitutional ideals. During the drafting and comment stages of the new law, concerns were raised about the alleged encroachment by the executive on the independence of the legal profession, resulting in the inclusion of certain provisions to address this concern.⁶⁵ All lawyers, being advocates and attorneys, would for the first time fall under a single regulatory body, the SA Legal Practice Council. Another important development was the establishment of a legal services ombudsman to handle complaints against the profession. The Legal Practice Act is intended to transform South Africa's legal landscape and should enhance access to justice for indigent South Africans although this could have been developed further; Section 29 of the Act contains a provision for lawyers to carry out community service. Paralegal advice offices, however, have been excluded from the legislation.

⁶⁵ This was one of the core issues that led to the long delays in getting the legislation passed and remains an area of controversy.

Conclusion

Elements of the legal profession in South Africa - particularly those regarded as 'struggle lawyers' - have had a long history of engagement in voluntary legal service. During the Apartheid era, it was largely such lawyers (many but not all acting on a pro-bono basis) who actively challenged the racist and oppressive laws of the time. The historic impact of this notable cohort within the legal profession in bringing to an end the dark days of Apartheid is undeniable. Amongst the enduring features of this type of legal work are an interconnectedness with broader political and social struggles and strategies and popular mass support. Indeed law remains an important terrain of struggle in post-Apartheid South Africa; the adoption of a constitutional democracy placed the courts rather than parliament as the primary institution for determining legality - and, as such, the courts have continued to be a "site of struggle" in the ongoing quest for social justice. However, access to justice remains uneven and there are growing concerns that reliance on the law is inadequate in terms of addressing both transformational deficits and the provision of adequate levels of accountability.

The lesson for contemporary lawyers who wish to 'make a difference' is clear. It is the combination of complementary social mobilisation *with* litigation strategies that has the greatest potential to alter laws and policies and thus effect social change. Much needs to be done to strengthen the capacity of existing public interest litigation organisations, both to enable them to survive and to develop their work. These organisations are the main avenue for poor people seeking access to social justice. Their diminished capacity or, in a worst case scenario, collapse will deprive the poorest and most vulnerable people of the chance of their basic rights being asserted through access to the courts. The lack of resources, especially when compared to those of the state is a major challenge in this regard, as is persistent corruption within the state.⁶⁶ Concomitantly, maintaining public credibility and support requires lawyers and the organisations they work with to be honest about the limitations of law and to ensure that litigation does not come to dominate as the only means of lawful political and social struggle in a society such as South Africa which has historically been shaped by exactly such political and social mobilisation.

⁶⁶ Gareth Newham, 'Why is Corruption Getting Worse in South Africa?' (*Corruption Watch* 17 January 2014) <www.corruptionwatch.org.za/why-is-corruption-getting-worse-in-south-africa/> accessed 11 August 2016

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