



# Lawyers & Truth Recovery Mechanisms in South Africa

August 2016

# LAWYERS & TRUTH RECOVERY MECHANISMS: SOUTH AFRICA

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## 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](http://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](http://www.lawyersconflictandtransition.org/contact)



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

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## Acknowledgements & Disclaimer

This report was prepared by Dr Rachel Killean, in association with the *Lawyers, Conflict and Transition* project. Rachel is a lecturer at the School of Law, Queen's University Belfast. Her PhD focused on victim participation at the Extraordinary Chambers in the Courts of Cambodia (ECCC). Her most recent publications deal with procedural justice in the international criminal courts and the specific challenges of prosecuting sexual crimes at the ECCC.

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## Executive Summary

This report examines the role of lawyers in truth recovery mechanisms in post-apartheid South Africa. When a country seeks to address past human rights violations, the legal profession often plays a central role such as in the trials of alleged perpetrators. Indeed, critiques of transitional justice as being dominated by legal processes and professionals are becoming increasingly common.<sup>1</sup> However, when states pursue less overtly legalistic processes, such as truth recovery mechanisms, the role and agency of lawyers is more subtle. Often such truth recovery processes are accompanied by discussions with regard to amnesties or immunities from prosecution in return for truth recovery, which again place the role of lawyers front and centre. Questions arise as to how exactly lawyers interact with such processes - the extent to which they influence procedures and ultimately contribute to findings.<sup>2</sup> In light of the fact that lawyers tend to assume a central role in transitional justice processes, we might expect that lawyers will seek to protect their professional turf by directly engaging with and influencing truth recovery processes. However, lawyers may be more than professional players in such processes. Indeed, the legal profession itself may become the subject of investigation and lawyers too may face criticisms for their actions (or inactions) in a state's violent or authoritarian past. In such cases, lawyers may be reluctant to subject themselves to such scrutiny, particularly from non-lawyers - and may seek to detach themselves in order to protect their profession from criticism.<sup>3</sup>

This report explores these issues by examining the roles and attitudes adopted by the legal profession in relation to truth recovery mechanisms within South Africa. The report draws on a series of interviews conducted with judges and

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<sup>1</sup> K. McEvoy and L. McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Social Change* (2008); P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (2010); N. Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (2015).

<sup>2</sup> H. Rombouts, 'The Legal Profession and the TRC: A Study of a Tense Relationship', Research report written for the Centre for the Study of Violence and Reconciliation, February 2002.

<sup>3</sup> H. Rombouts and S. Parmentier, 'The Role of the Legal Profession in the South African Truth and Reconciliation Commission' 20(3) *Netherlands Quarterly of Human Rights* (2002) 273,274.

lawyers in South Africa for the 'Lawyers, Conflict and Transition Project', a three-year initiative funded by the Economic and Social Research Council which explored the role of lawyers during conflicts, dictatorships and political transitions.

This report highlights two key ways in which lawyers in South Africa have engaged with truth recovery mechanisms. First, it explores how lawyers have acted as *professional participants* in truth recovery, whether working for the Truth and Reconciliation Commission (TRC), or representing individuals who appeared before truth recovery bodies. Secondly, it explores how lawyers responded to the TRC hearings into the judiciary and legal profession where they were the *subjects* of truth recovery.

The first half of this report explores the role of lawyers as professional participants, focusing primarily on the TRC, which was established as a means of addressing the human rights violations perpetrated during apartheid. It also considers the role of lawyers in the Marikana Commission of Inquiry, which was established following the killing of 34 men at a mine in the Marikana area by the South African police. The latter offers a useful illustration of the continued utility of truth recovery in modern South Africa and allows for an examination of the capacity of the contemporary South African state to engage with truth recovery. The report argues that truth recovery mechanisms are marked by legalistic language and procedures. It finds that while the involvement of legal professionals and procedures has played an important role in protecting individuals' rights, in some instances the processes have become overly legalistic.<sup>4</sup> Such a legalistic focus arguably detracts from the broader political and social goals of truth recovery. Drawing from the relevant literature and the suggestions of the interviewees, the report therefore makes some suggestions

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<sup>4</sup> "The urge to draw a clear line between law and non-law has led to the constructing of more refined and rigid systems of formal definition. This procedure has served to isolate completely from the social context from which it exists. Law is endowed with its own discreet, integral history, its own science, and its own values, which are all treated as a single 'block' sealed off from general social history, from politics, from morality ... This procedure served its own ends very well; it aims at preserving law from irrelevant considerations, but ended by fencing legal thinking off from contact with the rest of historical thought and experience": J. Shklar, *Legalism* (1963) 2.

as to how lawyers' contributions to truth recovery mechanisms can best be managed, maximising the benefit of their involvement without allowing processes to become overly legalistic and formalised.

The second part of the report considers the Truth and Reconciliation Commission's efforts to analyse the role that the judiciary and legal profession played during the apartheid era. It explores the extent to which legal professionals engaged with this process, arguing that a wish to protect their profession limited the sincere and honest engagement of lawyers and judges.

Before commencing this two-fold analysis, the paper offers some context, briefly introducing the various roles the legal profession has played in South Africa both during the apartheid era and post-transition.



## I. The Changing Roles of Lawyers in South Africa

From 1948 until 1994, South Africa was governed by an official system of racial segregation and white minority rule known as apartheid.<sup>5</sup> Under this system, the social and civil rights of the black majority and other ethnic groups were significantly restricted, as black people were deprived of citizenship and access to public services.<sup>6</sup> Successive governments used national laws to implement and legitimise repressive policies,<sup>7</sup> and the legalistic nature of the regime meant that the law invaded many South Africans' lives on a routine and daily basis.<sup>8</sup> Wide ranging restrictions on political activities and increased police powers led to violations of civil rights, while sweeping provisions for detention without trial created conditions in which torture and other abuses were routine.<sup>9</sup> Crimes such as sexual violence, extra-judicial killings and assassinations of anti-apartheid activists were also widely perpetrated.<sup>10</sup>

For the duration of apartheid, law and lawyers played crucial roles both in implementing and resisting the regime's repressive policies.<sup>11</sup> Undeniably, there were lawyers who supported and/or engaged the system in a manner that perpetuated the status quo.<sup>12</sup> Many others within the profession can be criticised for their silence, and for their assertion that by following the letter of the law, they were upholding the rule of law.<sup>13</sup> However, there were also those who

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<sup>5</sup> See e.g. P.E. Louw, *The Rise, Fall and Legacy of Apartheid* (2004); W. Beinart and S. Dubow, *Segregation and Apartheid in Twentieth-Century South Africa* (1995).

<sup>6</sup> M. Merideth, *In the Name of Apartheid* (1988); S. Mallaby, *After Apartheid* (1992).

<sup>7</sup> J. Dugard, 'Retrospective Justice: International Law and the South African Model' in A. James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (1997) 270.

<sup>8</sup> J. Lelyveld, *Move Your Shadow: South Africa, Black and White* (1985), 81; S. Ellman, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

<sup>9</sup> G. Bizos and S. Kentridge, *No One to Blame?: In Pursuit of Justice in South Africa* (1999) 39.

<sup>10</sup> C.L. Sriram, *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition* (2004) 148.

<sup>11</sup> R.L. Abel, *Politics by Other Means: Law and the Struggle Against Apartheid in South Africa 1980-1994* (1995); A. Caiger, *Cause Lawyering in South Africa: The Process of Empowering a Rights Based Legal Culture and its Socio-Political Impact* (2005).

<sup>12</sup> J. Dugard, *Human Rights and the South African Legal Order* (1978); D. Dyzenhaus, *Truth, Reconciliation and the Apartheid Legal Order* (1998)

<sup>13</sup> D. Dyzenhaus, *Judging the Judges: Judging Ourselves* (1998), 106-109.

opposed, challenged, and sought to change the apartheid system.<sup>14</sup> Public interest lawyers, such as Pixley ka Seme, Nelson Mandela, Oliver Tambo and Duma Nokwe, were at the forefront of the anti-apartheid struggle, representing activists and drawing international attention to the violent excesses of the system, while also acting as members of the resistance movement. These 'cause' or 'struggle' lawyers used law as a means of resisting the apartheid state.<sup>15</sup> Political trials were used to redirect the legal process towards indicting the regime, exposing the brutality of the apartheid system and winning wider empathy and support for the lawyers' clients and their cause.<sup>16</sup> Litigation interventions enjoyed widespread support and struggle lawyers were highly regarded by both their clients and members of the marginalised public.<sup>17</sup> Strategically, apartheid era struggle lawyers practised the delicate art of balancing formal engagement with state institutions, and maintaining their legitimacy in the eyes of their clients and the public.<sup>18</sup> Lawyers also engaged in what might be termed 'moral law-breaking' on numerous occasions.<sup>19</sup> For example, from mid-1961 Nelson Mandela led the armed struggle, helping to establish Umkhonto we Sizwe and subsequently spending 26 years in prison as a political prisoner; Dullah Omar passed messages between prison inmates whom he was representing; and Bram Fischer helped smuggle funds and information to assist the ANC.<sup>20</sup> Such lawyers were central to the anti-apartheid movement, both through their legal work, and through the other ways that they utilised (and risked) their privileged positions to resist and eventually conquer the

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<sup>14</sup> K.S. Brown, 'Black Lawyers under Apartheid: The Soul of South African Law' 27(2) *Millennium* (Winter 2001) 33.

<sup>15</sup> A. Sarat and S. Scheingold, 'Lawyering and the Reproduction of Professional Authority: An Introduction' in A. Sarat and S. Scheingold (eds) *Cause Lawyering: Political Commitments and Professional Responsibilities* (1998) 3.

<sup>16</sup> L. Lobban, *White Man's Justice: South African Political Trials in the Black Consciousness Era* (1996).

<sup>17</sup> *Supra* n.11.

<sup>18</sup> P. Harris, *In a Different Time* (2008) 70; G. Bizos, 'Address to the School of Practical Philosophy Plato' (Salisbury House, Johannesburg, April 2013).

<sup>19</sup> See S. Ellmann, 'To Live Outside the Law You Must be Honest: Bram Fischer and the Meaning of Integrity' 17 *South African Journal on Human Rights* (2001) 451; S. Ellmann, 'Two South African Men of the Law' 28 *Temple International and Comparative Law Journal* (2014) 431.

<sup>20</sup> Ellmann (2001), *ibid*.

regime.<sup>21</sup> To this day, they are venerated and celebrated for their role in ending the regime.

Following the end of apartheid in 1994, lawyers were also heavily involved in the transition, negotiating a new constitution and widespread legal and social reforms, as well as the establishment of the TRC. Law remained a key terrain of transitional struggle.<sup>22</sup> The adoption of a constitutional democracy made the courts rather than parliament the primary institution for determining legality,<sup>23</sup> meaning that the courts have continued to be a site of struggle in the ongoing quest for social justice in the aftermath of apartheid.<sup>24</sup> However, access to justice remains uneven and there are growing perceptions that the constitutional approach is inadequate in terms of addressing transformational deficits, or in promoting and providing an adequate level of accountability.<sup>25</sup> Lawyers' roles in post-apartheid South Africa have included using public interest litigation to assist in defining and developing constitutional rights,<sup>26</sup> representing individuals exposed to police brutality,<sup>27</sup> and engaging in truth recovery processes such as the South African Truth and Reconciliation Commission and the Marikana Commission of Inquiry. The following sections will explore this role in detail, turning first to the professional participation of lawyers in the TRC.

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<sup>21</sup> Ellmann, (2014), *supra* n.19.

<sup>22</sup> *Ibid.*

<sup>23</sup> Constitution of the Republic of South Africa Act 200 of 1993, Chapter 3.

<sup>24</sup> *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).

<sup>25</sup> D. McKinley et al., *Riding the Transitional Rollercoaster, The Shifting Relationship Between Civil Society and the Constitution in Post- Apartheid South Africa* (2015).

<sup>26</sup> *Supra* n.24.

<sup>27</sup> M. Clark, *An Anatomy of Dissent & Repression, The Criminal Justice System and the 2011 Thembelihle Protests* (2014).

## II. Lawyers as Professional Participants

### The Truth and Reconciliation Commission

The South African TRC was set up by the Government of National Unity to address what happened under apartheid, and to “promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past”.<sup>28</sup> The TRC carried out its mandate through three committees. The Human Rights Violations Committee investigated human rights abuses, establishing the identity of victims, their fate or present whereabouts, the nature and extent of the harm they suffered; and whether the violations were the result of deliberate planning by the state or any other organisation, group or individual.<sup>29</sup> The Reparation and Rehabilitation Committee provided victims with support and formulated policy proposals and recommendations on rehabilitation and healing of survivors, their families and communities at large.<sup>30</sup> Finally, the Amnesty Committee considered applications for amnesty under the terms of the TRC’s Act.<sup>31</sup> There were 17 commissioners in total, chosen from different political, professional, and racial backgrounds, six of whom were legal practitioners.<sup>32</sup> The Commission presented the first five volumes of its final report to Nelson Mandela in October 1998, in which it condemned all primary protagonists for committing atrocities, highlighted the gross human rights violations suffered by many, as well as the psychological and physical consequences of those violations, and made recommendations for reparation and rehabilitation policy.

The TRC brought notions of forgiveness and healing to the fore of the process, and in doing so stepped outside a legalistic framework (with its historic focus on retribution and accountability and only passing reference to healing and reconciliation). Despite this normative shift, legal procedures and actors played a

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<sup>28</sup> *Promotion of National Unity and Reconciliation Act*, No 34 of 1995, Section 3.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, Chapter 5.

<sup>31</sup> *Ibid.*, Chapter 4.

<sup>32</sup> M. Fullard and N. Rousseau ‘Uncertain borders: The TRC and the (UN) making of Public Myths’ 39 (1) *Kronos* (2008) 181, 224.

significant role in the Commission's processes, and the dominant discourse used within the TRC was legalistic. For example, lawyers were engaged in various aspects of the Commission's work, and the TRC was forced to mount several legal defences against legal challenges on its processes and challenges to its powers.<sup>33</sup> The setting at the hearings resembled a courtroom, legal processes such as cross-examinations were used, and legal terminology was routinely employed, e.g. *cases, witnesses, findings, evidence* and *subpoenas*.<sup>34</sup> Legal representation was provided to those subpoenaed at state expense. Several 'struggle lawyers' occupied key positions on the Commission, including Dumisa Ntsebeza (head of the investigative unit), Yasmin Sooka (Commissioner) and Richard Lyster (Commissioner).

Legal practitioners interviewed for the project were asked to reflect on whether they felt the TRC's processes became overly legalistic and dominated by lawyers.<sup>35</sup> Some interviewees agreed with this position, and provided explanations for why they felt this had occurred. For example, as one senior state lawyer noted,

I must also tell you that there were a large number of extremely committed, highly principled people involved in the Truth Commission, but it did become too legalistic.<sup>36</sup>

He suggested that this was in part a by-product of the tendency of individuals to bring legal challenges against the TRC. Certainly, the Commission faced an onslaught of litigation over the course of its life, ranging from applications for the removal of its vice-chairperson, to challenges from perpetrators with regards to the procedures followed by the committees.<sup>37</sup> These challenges inevitably led to the Commission adopting more legalistic procedures to protect itself against

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<sup>33</sup> These powers include search and seizure and subpoena, and whilst the latter was regularly employed, the Commission used its search and seizure powers sparingly.

<sup>34</sup> A. Verdooleage, *Reconciliation Discourse: The case of the Truth and Reconciliation Commission* (2008), 26.

<sup>35</sup> K. McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' 34(4) *Journal of Law and Society* (2007) 411.

<sup>36</sup> Interview with state lawyer, Cape Town, 2014.08.11.

<sup>37</sup> TRC Report, Volume 1, Chapter 7.

such challenges.<sup>38</sup> For example, a case in which Brigadier Du Preez and Major General Van Rensburg challenged notices sent to them by the Human Rights Violations Committee for being “vague in the extreme”, led to the Commission being required by court judgment to adopt more formal processes when sending notices to alleged perpetrators.

The Commission itself expressed concern about the impact of the court ruling on public opinion, feeling that the Commission would be seen as too “perpetrator-friendly”.<sup>39</sup> The Commission also expressed concern that the environment of the hearings would become too legalistic and formal, hampering the already painful and emotional process of giving public testimony and risking secondary trauma. In addition, the Commission noted that it had to contend with perpetrators demanding to be heard at the same hearings as victims and requesting that they be allowed to cross-examine witnesses.<sup>40</sup> In practice, it therefore appears that challenges associated with protecting the rights of perpetrators resulted in more legalistic and formal proceedings.

The aforementioned state lawyer not only criticised the use of legal challenges, he also expressed reservations about the attitudes of those involved, and the benefits that the commissioners received for being involved. He argued that the pecuniary benefits given to the commissioners may have changed their approach towards the process:

We paid the commissioners judges' salaries. We gave them cars; we gave them all kinds of perks, as we do with judiciary today... And the minute we did that with the Truth and Reconciliation Commission we weren't saying to them that you are fulfilling a societal function, and they looked at it from the purposes of what the benefits were.<sup>41</sup>

The idea that legal practitioners involved in the TRC were motivated by pecuniary interests, rather than the desire to contribute to an important

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<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Interview with state lawyer, Cape Town, 2014.08.11.

historical process, was also expressed by other interviewees. A professor of human rights law noted:

It's a naked fee generating exercise, is the only way to put it.<sup>42</sup>

Another former Commissioner agreed:

And both sides had an interest in sort of really fanning this out because they were making so much money and this is what has been so upsetting for the victims because it's been absolutely obscene the amounts of money that the lawyers made, particularly old state lawyers... The victims haven't seen that money.<sup>43</sup>

Another leading human rights lawyer spoke of one particularly memorable hearing of the Human Rights Violations Committee, which took place in a theatre:

I don't know whether it was from a play that had just happened, but there was low fencing with a sign called Feeding Area.... And I just thought well that just sums it up, doesn't it? But it was something of a feeding frenzy where, and they were all at the taxpayers' expense because they were all organs of state so they were all being covered. It completely suited them to drag this thing out, and what should have taken two or three days ended up taking like ten days.<sup>44</sup>

Thus, some lawyers involved in the work of the TRC were criticised for being motivated by pecuniary interests, and were perceived to be seeking to enhance their monetary gain by prolonging the proceedings. These criticisms suggest an expectation that lawyers engaged in truth recovery mechanisms should work in the best interests of the process, rather than for personal or professional advantage.

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<sup>42</sup> Interview with Professor of Human Rights Law, Johannesburg, 2014.08.15.

<sup>43</sup> Interview with former TRC Commissioner, Johannesburg, 2014.08.16.

<sup>44</sup> Interview with human rights lawyer, Johannesburg, 2014.08.15.

While there was general agreement that lawyers and legal procedures had heavily influenced the TRC generally, interviewees drew distinctions between the different committees of the Commission when considering the implications of this in practice. The Amnesty Committee was most frequently described as being legally dominated.

The Amnesty Committee was entirely made up of lawyers and judges,<sup>45</sup> exceeding the requirements of the TRC's establishing legislation.<sup>46</sup> In its 2003 report, the Committee explained why it felt that it was important for its members to be drawn from the legal profession: "given the fact that its role is largely adjudicative, the Committee remained convinced that the legal training of its members rendered them better equipped to perform this adjudicative function".<sup>47</sup> The granting of amnesties was of course a legal, political and a practical compromise, reflecting the balance of forces during the TRC's negotiations and an understanding of the limitations of pursuing a retributive agenda.<sup>48</sup> The resulting compromise was a criterion-driven amnesty process. 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.<sup>49</sup> If applications for amnesty involved political offences that constituted gross human rights violations, then a public hearing would be held.<sup>50</sup> The TRC Act required that applicants, victims or other implicated persons should be informed of the time and place of hearings and of their right "to testify, adduce evidence and submit any article to be taken into consideration".<sup>51</sup> The Committee developed its own procedural guidelines, leading to procedures that "did not differ substantially from that which applies in a court of law."<sup>52</sup>

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Promotion of National Unity and Reconciliation Act (1995) s. 17.*

<sup>47</sup> TRC Report, Volume 6, Section 1, Chapter 5, para 11.

<sup>48</sup> L. Mallinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa' Working Paper No. 2, *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast, February 2009.

<sup>49</sup> B. Hamber, D. Nageng & G. O'Malley, 'Telling It Like It Is: Understanding the Truth and Reconciliation Commission from the Perspective of Survivors' 27 *Psychology in Society* (2000) 18.

<sup>50</sup> *Promotion of National Unity and Reconciliation Act (1995) s 19.*

<sup>51</sup> *Ibid.*

<sup>52</sup> TRC Report, Volume 6, Section 1, Chapter 3, para 55.



To some extent, the appropriateness of involving legal practitioners and practices was acknowledged by interviewees. While the Amnesty Committee was described as “much more legalistic” than the other Committees, this was defended as being “probably for good reason”, due to the impact amnesty decisions could have on the lives and rights of individuals.<sup>53</sup> When reflecting on the Committee’s procedures, interviewees tended to focus on the presence of legal representatives within the hearings. The fact that the Amnesty Committee allowed both perpetrators and victims to have legal representation was praised by some:

Well you've got to balance up a few things. On the one hand, one has to accord with some basic procedure of fairness, particularly if you're accusing people of things like mass murder. They obviously need to have the opportunity to present their case and respond to the allegations and because it's serious and obviously big reputational and other consequences that flow from even a commission finding. You can't deny them legal representation.<sup>54</sup>

In the amnesty process yes, there were lawyers and probably appropriately so, because people wanted their own lawyers to be representing them.<sup>55</sup>

While the presence of legal representatives was therefore acknowledged as necessary, the disparate quality of legal representation given to perpetrators and victims was criticised:

We allowed people to have legal representation but at Legal Aid rates, which is very important because otherwise the cost would go crazy... But also victims also had the right to have lawyers; it wasn't just perpetrators, so there were victims whose legal fees were also paid. Often the perpetrators could afford more expensive lawyers; that was part of the issue.<sup>56</sup>

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<sup>53</sup> Interview with human rights lawyer, Johannesburg, 2014.08.15.

<sup>54</sup> *Ibid.*

<sup>55</sup> Interview with legal academic, Cape Town, 2014.08.11.

<sup>56</sup> Interview with Deputy Director of Human Rights NGO, Johannesburg, 2014.08.13.

Such concerns mirror those of the Commission when they suggested that they might be becoming too “perpetrator friendly”. Indeed, interviewees noted that members of the Human Rights Violations Committee feared that the amnesty hearings were not sufficiently sensitive to the needs of victims. Concerns were expressed that victims often received weak legal representation (in comparison to the legal representation of the perpetrators), and that the Amnesty Committee did not use evidence obtained by the Human Rights Violations Committee that could assist victims.<sup>57</sup> As remembered by one of the Commissioners:

At one point, I went to the Archbishop and I said, Father, why don't you let us bring an act, from the Human Rights Violations Committee, maybe bring an amicus brief and argue in the amnesty hearing. He said do you realise what an adversarial environment you will create. I said better be adversarial environment in which the victims are able to see us argue their points of view than to have this process like that. And then in the end we used to give the information to the victims' lawyers and hope that they would do a better job. You know, it was painful watching that process.<sup>58</sup>

Thus, the legalistic procedures and use of representatives were found by some to impinge on the victim-centrism of the proceedings. Given that the amnesty hearings were inevitably of an emotive nature, they were constrained by the legalistic focus of the committee members and legal representatives.<sup>59</sup> The hearings were often dominated by legal arguments and processes, such as cross-examinations, and took on a far more legalistic tone than the associated victims' hearings.

It also appeared that the involvement of lawyers had implications for the forms of truth that emerged from the amnesty process. The disclosures made by applicants who received legal advice have been described elsewhere as “tightly interlocking submissions and testimonies” which were “limited, adding to the

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<sup>57</sup> Mallinder, *supra* n.48, 61.

<sup>58</sup> Interview with former TRC Commissioner, Johannesburg, 2014.08.16.

<sup>59</sup> H. van der Merwe and G. Lamb, 'Transitional Justice and DDR: The Case of South Africa' *International Center for Transitional Justice* (June 2009), 17.

frustration of victims and families".<sup>60</sup> This became more pronounced when lawyers represented multiple applicants, leading to a silencing of their clients and the creation of a common narrative.<sup>61</sup> In some cases, it seems that lawyers prevented their clients from amending their testimony, even where the changes might have revealed something closer to "the truth".<sup>62</sup> The Committee has been criticised for allowing lawyers to manipulate the process in this way, for example, a former Commissioner stated:

You could actually watch the way in which they manipulated the process. So they would tell the Presiding Officer what the order of witnesses should be, so once I went to this Presiding Officer and I said can't you see that they're tailoring their stories and you're not really probing it. And I think the problem we had is that also a lot of the judges in the Amnesty Committee were not international human rights lawyers, so they didn't have a sense of the real, you know, they saw the political objective that they had a particular role to play. They never saw the bigger picture in terms of the truth seeking and the contribution to transitional justice. For them that was very immaterial.<sup>63</sup>

Indeed, it appears that the Committee's openness to common narratives, extending to allowing one applicant to testify, and others to merely confirm what that applicant said, led to the results being seen as unacceptable by many and to the victim-centrism of the Committee being brought into doubt.<sup>64</sup>

Although the work of the Human Rights Violations Committee was considered less legalistic in its procedures than the Amnesty Committee, it retained some legalistic powers which differentiated it from other truth finding mechanisms.<sup>65</sup> For example, the Committee had the right to subpoena people to give evidence and the right to search and seizure. While lawyers were less involved in its work,

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<sup>60</sup> P. Pigou, 'False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission' in D. Posel and G. Simpson (eds), *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (2002) 40, 48.

<sup>61</sup> Mallinder, *supra* n.48, 93.

<sup>62</sup> *Ibid.*

<sup>63</sup> Interview former TRC Commissioner, Johannesburg, 2014.08.16.

<sup>64</sup> Mallinder, *supra* n.48, 94.

<sup>65</sup> Interview Deputy Director of Human Rights NGO, Johannesburg, 2014.08.13.

a fact that was praised by some,<sup>66</sup> legal representatives still appeared on behalf of the different actors involved in the hearings, as noted by one such human rights lawyer:

Lawyers were permitted to appear on behalf of perpetrators and parties and organisations, even before the Human Rights Violations Committee, you know, and it was that committee that, you know, pursued the thrust of the Truth Commission's investigations.<sup>67</sup>

This lawyer was particularly critical of the role lawyers had played before the Human Rights Violations Committee, describing one particular hearing in which 29 lawyers were present, representing “the Buthelezi, Inkatha member, police officers, military officers”.<sup>68</sup> He argued that the lawyers on occasion presented more of an obstruction than an aid to the Committee’s processes, and that they had slowed down proceedings by going to court to (unsuccessfully) apply for his removal from the list of witnesses. Our interviewee reflected on one experience, where a lawyer shouted at him for refusing to answer a question with either yes or no. The lawyer grew increasingly agitated and claimed that he was doing the cross-examining and that this lawyer should therefore do as asked. Our interviewee countered that it was his right to request a more expansive answer, as the Commission was about the truth, and was not a court of law. While in that case, the commissioners backed up our interviewee,<sup>69</sup> this example demonstrates that despite the truth-finding goals of the Human Rights Violations Committee, legalistic procedures crept in through the involvement of legal professionals, and that lawyers may have found it hard to adjust to the shift in narrative within the TRC.

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<sup>66</sup> Interview legal academic, Cape Town, 2014.08.11.

<sup>67</sup> Interview with human rights lawyer, Johannesburg, 2014.08.15.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

## The Marikana Commission

The Truth and Reconciliation Commission is one of the most well-known truth recovery mechanisms in the world. However, it does not constitute the only example of South Africa using truth recovery as a means of responding to violence. On the 16 August 2012, members of the South African Police Service killed 34 men at a Lonmin Plc owned platinum mine in the Marikana area in the North West province of South Africa.<sup>70</sup> The killings were preceded by a number of other incidents of violence and confrontation in the area from Friday 10 August onwards, relating to an unfolding conflict linked to an unprotected strike that a group of miners had embarked on at the mine. In addition to the 34 people killed on 16 August, 10 other people were killed between Sunday 12 – Tuesday 14 August, 70 people were injured, and approximately 250 people were arrested.<sup>71</sup> The Marikana Commission of Inquiry was appointed by the President on 23 August 2012.<sup>72</sup> Its mandate was to investigate matters of public, national and international concern arising out of the incidents at the mine. Chaired by retired Judge Ian Farlam, the Commission ruled that the police's response had been disproportionate; that the commanders' conduct had been wrongful, negligent, and contrary to both law and policy. The decision to shoot the miners was unreasonable, unjustifiable, and illegal.<sup>73</sup> The Commission sat for almost 300 working days and had an estimated cost of R153 million, making it more expensive than the TRC. It has been heavily criticised for its cost, for its overly legalistic proceedings and for long delays.<sup>74</sup>

One of the lawyers involved in the Legal Resources Centre's representation of a victim's family before the Marikana Commission described the challenges which the Commission faced in managing over fifty legal representatives and attempting to reach agreement amongst the different stakeholders as to the

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<sup>70</sup> R. Chetty, 'The Marikana Massacre: Insurgency and Counter-Insurgency in South Africa' 25(2) *New Labor Forum* (2016) 62, 68.

<sup>71</sup> D. Bruce, 'Summary and Analysis of the report of the Marikana Commission of Inquiry', Document prepared for the Council for the Advancement of the South African Constitution.

<sup>72</sup> In terms of section 84(2)(f) of the *Constitution of the Republic of South Africa of 1996*.

<sup>73</sup> Chetty, *supra* n.70, 68.

<sup>74</sup> 'Marikana inquiry cost R153m: Report' News 24, [www.news24.com/SouthAfrica/News/Marikana-inquiry-cost-R153m-report-20150705](http://www.news24.com/SouthAfrica/News/Marikana-inquiry-cost-R153m-report-20150705).

correct rules of procedure to be used. While he acknowledged that the commissioners were dealing with an extremely sensitive subject area, he observed that attempting to reach consensus was never going to happen amongst so many parties:

So commissions of that nature, and frankly truth commissions as well, do need to have ground rules as to how you conduct yourself, and I think the Marikana Commission took some time to work out what those rules should be. Because it was such a sensitive subject matter [the Commissioners] would give great latitude to all the parties to lead evidence, cross-examine. So it would mean that each witness could take three weeks to a month. And we did a very simple calculation that it could take four or five years to finish.<sup>75</sup>

This lawyer spoke of the Commission's excessive delays and of his attempt to streamline proceedings by making a number of proposals to cut down on time, such as restricting cross-examination and imposing time limits:

We actually made a proposal to the commissioners that they introduce rules that firstly there'd be no right to cross-examination, you need to set out the broad areas of subject matters of your cross and you need to indicate how long you expect to be, we even suggested time limits, and we then suggested that the likeminded lawyers, can we pick one person to be the lead cross-examiner and the rest of us only come in if something new must start.... That didn't sit well with some of the legal teams, so at the beginning it wasn't accepted, although a few weeks later when they started doing their own calculations then they started to introduce the rules and eventually those rules were imposed.<sup>76</sup>

It is notable that while these measures were eventually imposed, some lawyers resisted at the outset, demonstrating a reluctance to concede any of their 'court' time, but an eventual willingness to amend legalistic procedures to allow truth recovery to progress efficiently.

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<sup>75</sup> Interview with human rights lawyer, Johannesburg, 2014.08.15

<sup>76</sup> *Ibid.*

The legalistic nature of the Commission's proceedings was also acknowledged by other interviewees. A legal academic opined that the legalistic approach which appeared to dominate the Marikana Commission could be attributed to the way it had been run, and to the fact that it had been chaired by a judge described as "a really traditional lawyer".<sup>77</sup>

Just as matters of legal aid and lack of adequate representation had become an issue for victims participating at the TRC, cost also appeared to be an issue before the Marikana Commission. One of the lawyers who represented a number of victims at the Commission spoke of the costs associated with the process, and of the fact that the miners' union and the families ran out of money, and that the state attempted to deny them Legal Aid. This caused further delays, and raised access to justice issues. Indeed, it was noted that the Commission did not sit for more than a month, while legal aid was sought in the courts. This lawyer proceeded to express his astonishment at such resistance from the state, and highlighted the impact of varying access to legal resources on the legality and legacy of the Commission:

The police legal team is costing the taxpayer, we estimate, around R5 million a month. The senior counsel leading the police team, we estimate, is probably earning close to around a million a month... the lawyers for the families are working on an absolute shoestring and part of the time working for nothing. The miners team is headed up by Dali Mpofu, who is seeking support at the Legal Aid tariff, which is still a sizeable sum of money but nothing compared to what taxpayers are forking out for the police with the different ministers and of course nothing like the corporate lawyers are getting for the mining company...And, you know, even though we pointed out that this would completely undermine the very purpose of this commission where you have key stakeholders who can't engage properly with the commission and maybe won't even be there because of this refusal, it is a violation of so many principles, not to mention the rule of law and equality and so on and so forth.<sup>78</sup>

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<sup>77</sup> Interview with legal academic, Cape Town, 2014.08.11

<sup>78</sup> Interview with human rights lawyer, Johannesburg, 2014.08.15.

One of the state's arguments was allegedly that by hearing challenges against the decision to deny legal aid, the judges were interfering in budgets. The state thus invoked the separation of powers argument to deny Legal Aid to the families of those who had been murdered by the state. In this way, legal processes and legal resources were arguably used as a way of hindering the truth recovery mandate of the Commission.

Overall, it can be seen that both Commissions faced similar challenges as they pursued truth-seeking mandates, while incorporating legalistic proceedings and legal professionals as participants. Issues arose concerning the quality of representation available to different actors, and of the varying access to legal resources. While it was acknowledged that principles of procedural fairness required that legal representation be offered to those whose rights were implicated in the TRC's Amnesty Hearings, lawyers were criticised for limiting the truth which emerged from the work of the TRC. Lawyers were additionally criticised for being motivated by pecuniary interests, rather than the broader goals of the Commissions, and for causing unnecessary delays. Legal proceedings in the courts were used to challenge aspects of the Commissions' procedures, leading in the TRC's case to the adoption of more formal legal processes. Given the impact that both Commissions' findings could have on individuals engaged in their work, it is perhaps understandable that courts pushed the Committees to protect individual rights. However, the involvement of legal professionals and procedures raised fears as to how successfully these Commissions protected the rights and needs of victims.

This section has demonstrated the range of criticisms expressed with regards to the involvement of lawyers in the TRC. Interestingly, many of the criticisms were made by individuals who worked in the legal profession themselves. It is perhaps unsurprising therefore that, despite the criticisms expressed, those interviewed for this study did not propose to entirely exclude lawyers from truth recovery mechanisms:



You need a mixture of people and some definitely need to be lawyers.<sup>79</sup>

The role of lawyers is essential in these processes, absolutely essential.<sup>80</sup>

You need lawyers who understand the process and procedure and what is fair and what isn't.<sup>81</sup>

However, there was wide agreement that in order to avoid the issues that have arisen in the South African context, there is a need to manage the involvement of lawyers. A number of interviewees shared their suggestions as to how this could be done, in order to benefit from the professional expertise of legal professionals without obstructing the work of the truth recovery mechanism. Two interlinked solutions which were raised a number of times were;

- (a) the appointment of authoritative chairs who were able to control the lawyers, and
- (b) making the procedural framework clear to the lawyers from the start.

As observed by a leading human rights lawyer: "You need firm chairs... you've got to also, I think, make sure that the lawyers understand how it works".<sup>82</sup> Some opined that the solution was to put in place chairs who did not have a legal background themselves, in order to balance the presence of lawyers, and prevent them from dominating the proceedings. For example, a politician and former struggle lawyer spoke in praise of the role of non-legal chairs in combatting legalism and lawyer dominance:

Having Archbishop Tutu who was not a lawyer and having Alex Boraine as a co-chair who was not a lawyer and they were both ministers and very strong people, they probably intimidated the lawyers from being too lawyerly, because they could tell the lawyers, look, just cut all this stuff. Whereas if you had had a judge

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<sup>79</sup> Interview with human rights lawyer, Johannesburg, 2014.08.15.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

chairing it, then the lawyers would have felt empowered and things. If you do have lawyers then I think it's important that you've got strong people with moral authority who are not lawyers, who are going to actually direct the proceedings.<sup>83</sup>

A lawyer who was instrumental in the establishment of the TRC and who also worked in Northern Ireland cited the Northern Ireland Sentences Commission as an example of chairs exerting control over lawyers, and preventing proceedings from becoming overly adversarial:

I said to the group of commissioners let's design an inquisitorial process rather than an adversarial process. And before every hearing we said this is inquisitorial and although we allow the right to cross-examine and so on and so forth, remember it's not adversarial. And we managed that tightly and because it was inquisitorial we came in quite often and interrupted and told them to sit down. And they understood the process and we would go through a number of witnesses. Very few of those cases went on for longer than a day. So it is possible to have, I think, a process which is inquisitorial, which is much less formal. And it's a question, I think, of training the lawyers and explaining to the lawyers this is the nature of the process.<sup>84</sup>

While having non-legal chairs was suggested as a way of balancing the presence of lawyers, it was also suggested that a legal chair could also effectively combat legal dominance through the clarifying of procedural rules from the beginning. One former commissioner on the TRC (herself a lawyer) spoke of her experience of managing lawyers, and of the importance of making clear the procedural rules from the beginning:

The funny thing about lawyers is you have just to lay down the rules and I said to each of them you have 20 minutes to make your point and that's it. And that was okay. The interesting thing was in the Amnesty Committee the judges allow the lawyers to take charge of the hearings and that is why you had this interminably long process.... [the Committee] didn't manage them and that's why the process was controlled by the lawyers mainly. I think, in a way,

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<sup>83</sup> Interview with politician and former struggle lawyer, Pretoria, 2014.08.14.

<sup>84</sup> Interview with human rights lawyer, Johannesburg, 2014.08.15.

because of their training, lawyers adapt really well when you lay out the rules. And so the moment in which you make it very clear that this is the way in which the game is going to be played and these are the rules of the game, it's kind of funny; they all fall into line because they're conditioned into accepting.<sup>85</sup>

She also suggested that as well as ensuring that lawyers understood the procedures, it would be beneficial to limit the role lawyers played. She argued that you could have lawyers involved in the truth recovery process, who did not involve themselves in the actual dialogue. Thus, she identified a difference between the design and procedure of a truth recovery mechanism, and the actual substance of the truth recovery process:

In my view, in a truth recovery process you'd have no need for lawyers; you need to treat it like you treat a commission where you're allowed to be there to safeguard the rights of your client but your client must speak, not you. Very much like a Grand Jury system; you're there, you can protect them, you can step in and say okay, we don't think you should answer that question, but you should be allowed to have a minimal role in the proceedings, which is what we did with the lawyers to protect the rights of victims.<sup>86</sup>

Another prominent law professor also spoke of having the lawyers' role limited to that necessary, and of having lawyers that looked after the interests of both victims and perpetrators, but did not work for the individuals.<sup>87</sup> Thus, the criticisms levied at the lawyers who had involved themselves in the work of both Commissions did not lead to a belief that lawyers could not have a role in truth recovery, but rather that their role should be limited to what was necessary, and controlled by strict procedural rules and authoritative chairs.

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<sup>85</sup> Interview with former TRC Commissioner, Johannesburg, 2014.08.16.

<sup>86</sup> *Ibid.*

<sup>87</sup> Interview with legal academic, Cape Town, 2014.08.11.

### III. Lawyers as Subjects of Truth Recovery: The Special Legal Hearing

The key objective of the TRC was to establish as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period between 1 March 1960 and the cut-off date of 10 May 1994. This included an overview of the antecedents, the circumstances, the factors and the context of such violations, as well as the perspectives of the victims and the perspectives of the perpetrators. In the furtherance of this goal, the Human Rights Violations Committee organised a number of 'institutional hearings', which considered the role of important institutions and groups in society, including the health sector, the media, the prisons, and the legal profession.

The Committee invited participants from the legal community to address a range of themes on the role of the judiciary and legal profession during apartheid.<sup>88</sup> The invitations expressly explained that the hearings were not to establish guilt or hold individuals responsible, and would not be of a judicial or quasi-judicial nature. Rather, the goal was to gain a deeper understanding of the broader role of the legal system during the apartheid era.<sup>89</sup> In particular, the invitation urged judges, both serving and retired, to present their views.<sup>90</sup> The Commission requested that attention be paid to twelve issues, including the relationship between law and justice, the appointment of members of the judiciary, the role of the judiciary in applying security legislation, the exercise of judicial discretion, and the attempt (if any) to undermine the independence of the judiciary and racial and gender discrimination within the legal sector.

It is evident from the invitation that the Special Legal Hearing aimed to clarify the impact and role of the legal system during apartheid, and expected honest

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<sup>88</sup> TRC, Institutional Hearing Report (1998) 94.

<sup>89</sup> K. McEvoy and A. Schwartz, 'Judges, Conflict, and the Past' 42(4) *Journal of Law and Society* (2015) 528, 551.

<sup>90</sup> TRC Report, Volume 4, Chapter 4, para. 95.

and sincere cooperation from the legal profession.<sup>91</sup> The rejection of a focus on specific cases, and the clarification that the hearing would not be of a judicial nature, demonstrated a wish to avoid a tribunal-like approach, or even that adopted by the amnesty hearings.<sup>92</sup> The hearings were held on the 27, 28 and 29 October 1997. 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. 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, became matters of public record.<sup>93</sup> At the same time, the TRC praised the efforts of those legal actors who had been prepared to break from the norm, and challenge the regime. Those lawyers, claimed the TRC, had been "influential enough to be part of the reason why the ideal of a constitutional democracy as the favored form of government for a future South Africa continued to burn brightly throughout the darkness of the apartheid era".<sup>94</sup>

All the key players and organisations within the legal profession participated, but the extent to which they did so varied greatly. For this project, interviewees were asked about the attitudes of the legal profession to this hearing, the extent to which the role of the legal profession in apartheid was examined by the TRC, and what the impact of that was on the legal profession in South Africa. Interviewees made a clear distinction between the attitudes of judges, and the attitudes of other legal professionals.

### The Judges

It is known that the judges expressed reservations about the Special Legal Hearing from its inception.<sup>95</sup> When responding to the initial invitation, apartheid-era judge Michael Corbett submitted that while the courts had clearly not done all they could have under apartheid, the general picture was a positive one. He

<sup>91</sup> Rombouts and Parmentier, *supra* n.3, 277.

<sup>92</sup> *Ibid*, 278.

<sup>93</sup> TRC, Institutional Hearing Report, Volume 4 (1998).

<sup>94</sup> A. Chaskalson, 'From Wickedness to Equality: The Moral Transformation of South African law', 1 *International Journal of Constitutional Law* (2003) 590, 598.

<sup>95</sup> Rombouts, *supra* n.2.

defended any “bad spots” as being justified by the fact that Parliament was supreme, and therefore the judges were bound to interpret the law as determined by Parliament. He disagreed with the TRC’s decision to invite the judges, finding that any TRC investigation into judicial activity would be unfeasible as it would involve a review of every judicial decision without counsels’ arguments to determine if justice was done – “a mind-boggling undertaking”, and would threaten judicial independence.<sup>96</sup> Despite the TRC emphasizing that it was not going to investigate on a case-by-case basis, this argument of unfeasibility was repeated within written statements prior to the hearing, as were fears over judicial independence.<sup>97</sup> In contrast, two judges warned the TRC of adopting a collective approach, with one stating that judicial policy could only be examined on an individual basis, and another warning about the superficiality of reaching general conclusions. Thus, it appears the judges considered case-by-case and collective approaches as equally dangerous and unfeasible.<sup>98</sup>

A lawyer who was involved in the organisation of the Special Legal Hearing spoke of her experience of trying to convince judges to participate, and of the judges raising another concern, namely that the hearings would impact on the collegiality of the bench:

I remember when I first went to speak to the first Chief Justice, Ismail Mohammed, about having this hearing on the judiciary, and Ismail sat with me to draft the letter that I could send to all the judges. And one of the issues that I find really difficult is when they decided, him and Arthur, that they were not going to come to the Truth Commission, so then Dullah Omar the minister phoned me and said you have a problem, these two have decided they're not coming. I said to Ismail how can you decide you don't want to come. He said no, I think it will destroy the collegiality on the bench. I said it's an artificial collegiality, we have not dealt with the race issues, we have not dealt with the fact that the majority of them in fact follow the parliamentary system blindly. I said the best of them did it and you're standing there and you're defending them. And then afterwards, Albie Sachs and Richard Goldstone came to

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<sup>96</sup> Dyzenhaus, *supra* n.13.

<sup>97</sup> Rombouts and Parmentier, *supra* n.3, 279.

<sup>98</sup> *Ibid.*

me and said we wanted to come but it was Ismail that didn't want us to come. But Ismail is dead, he couldn't answer for himself anymore. But they said if we subpoenaed them they would call a crisis, and so what we did is we made it the biggest media circus around why were the judges refusing to come.<sup>99</sup>

We weren't going to question them about the individual detail of the cases, but really about what was it like when you sat there, when you knew you were, you know, in many ways you were supporting and defending the system, what did it mean for someone like Bram Fischer to skip [referring to Fischer's decision not to appear at his trial in 1965], you know. That's what we wanted to get a sense of, because I think that if you look at where we are today, we have a transformation in the sense of numbers, black numbers, black mayors, but in terms of value system we're not there yet.<sup>100</sup>

She went on to describe the process of travelling around visiting the judges, and of being repeatedly told that the process would destroy collegiality.

I said listen, we're not here to assess your individual performance, but we're trying to understand is what kind of mindset contributes to using... I mean your real allegiance should be to the rule of law, not to an unjust law.<sup>101</sup>

In the end, although encouraged by Archbishop Desmond Tutu, as well as other Commissioners, and although called upon by organisations including the National Association of Democratic Lawyers and the Centre for Applied Legal Studies, and authors Dyzenhaus and Jana,<sup>102</sup> the judges chose not to engage directly with the process. Five important judges delivered a jointly written submission,<sup>103</sup> and others made individual submissions, but none appeared in the oral hearings. Although the Commission had the power to subpoena, it chose not to in the face of threats from the judges that to do so would prompt a constitutional crisis.<sup>104</sup>

<sup>99</sup> Interview with former TRC Commissioner, Johannesburg, 2014.08.16

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Submissions to the Special Legal Hearing.

<sup>103</sup> A. Chaskalson, President of the Constitutional Court, I. Mahomed, Chief Justice, P. Langa, Vice-President of the Constitutional Court, H. van Heerden, Deputy Chief Justice and M. Corbett, former Chief Justice.

<sup>104</sup> Rombouts and Parmentier, *supra* n.3, 284.

The judges' decision has been subjected to significant criticisms. Chief Justice Langa and his Constitutional Court colleague Justice Cameron have since made public their own conclusion that the decision not to attend was the wrong one:

Judges should have attended the hearings voluntarily, and submitted to questioning. Their participation would have legitimated both the TRC and the judiciary itself. It would have countered the perception that judges viewed themselves as somehow separate from and above the politics of the rest of the country.<sup>105</sup>

Similarly, a judge interviewed for the present study expressed his disagreement with the judges' decision not to participate, observing that they had misunderstood the purpose and goals of the TRC:

So the judge said, can you see, when they want us to come and justify our judgements in the TRC, we're not going to do that, because that's not where our judgements are to be held accountable. But they missed the plot and they missed the issue. The issue was accountability of the judiciary, not on judgements, particular judgements, sending people to the gallows on sentences, on decisions; it was how they allowed the judiciary to be part of the edifices of apartheid unequivocally and their failure to understand the role that they were playing and they were required to play in which many of them consciously and collusively played.<sup>106</sup>

While the judge attributed the judges' decision to a misunderstanding of what the TRC was aiming to achieve, a senior state lawyer adopted a more critical stance with regards to the judges' motivations, observing that:

They came from the upper echelons of apartheid society and they were going to protect that and they were happy to protect it. And they weren't going to explain that at the Truth Commission.<sup>107</sup>

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<sup>105</sup> Former South African Chief Justice P. Langa and Constitution Court Judge E. Cameron, 'The Constitutional Court and the Court of Appeal After 1994' *Advocate*, 28 April 2008.

<sup>106</sup> Interview with Judge, Cape Town, 2014.08.11.

<sup>107</sup> Interview with state lawyer, Cape Town, 2014.08.11.



Such a critique is supported to some degree by the substance of the judges' submissions to the TRC. It was evident that the judges themselves believed that, while the laws were unjust, they had acted independently from the executive and justice was seen to be done. They submitted that there was only a small margin of discretion available to them, and that they often had little option of resistance other than to resign. The submissions were remarkably silent on the issue of judge impartiality, and failed to engage with the issue of discrimination within the profession. Overall, it appears that the judges used their position in the legal hierarchy to protect themselves from scrutiny, and limited their engagement to that necessary to defend their actions.

### The Lawyers

While judges and magistrates did not participate in the oral hearings, there was broad representation of all other key players and organisations, although the extent of participation differed. These included the Society of Law Teachers, the General Council of the Bar,<sup>108</sup> and the Association of Law Societies,<sup>109</sup> as well as the Ministry of Justice and some Attorneys-General. Several legal NGOs also made submissions, as did human rights organisations such as Human Rights Watch and Amnesty International, and some academics. A number of written submissions were also made prior to the Special Legal Hearing, and legal organisations such as Lawyers for Human Rights and Legal Resources Centre opened their archives to the TRC's investigative and research units and prepared submissions. At the oral hearing, legal professionals gave representations and the special panel asked questions. Despite the expressed intention to avoid a tribunal-like process, this questioning gave the hearing a judicial feel.<sup>110</sup> This was not necessarily seen as a bad thing. As described by a former apartheid-government lawyer:

We were to go to the High Court in Johannesburg where the local branch held a meeting. You almost had to confess your sins, you know, and I know I'm putting this very jocularly. But you had to

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<sup>108</sup> Organisation of advocates.

<sup>109</sup> Organisation of attorneys.

<sup>110</sup> Rombouts and Parmentier, *supra* n.3, 281.

say you'd never realised what effect this was having on people, you know. You had to understand the process and where you had been perhaps too unrealistic, too demanding, too unaware of people's situation. You said something.<sup>111</sup>

He spoke of there being an expectation that the legal professionals would take part, and expressed his feeling that he would not have taken part had there not been this expectation, as he would not have seen the point. Indeed, the wide breadth of participation amongst legal professionals did not necessarily reflect a genuine process of disclosure and self-examination. As observed by a leading human rights lawyer:

I think those who participated probably went kicking and screaming... I mean I never got the sense that the legal profession in South Africa had openly and transparently sort of laid its soul and willing to take a whipping. I never ever got that impression.<sup>112</sup>

It appears that, similarly to many others who appeared before the TRC, the legal profession attempted to place their conduct in the best light possible.<sup>113</sup> While both the General Council of the Bar, and the Association of Law Societies expressly acknowledged that they had failed in their duty to protect individual rights and the rule of law, this acknowledgment was accompanied by defensive explanations as to why they could not have done more.<sup>114</sup> The General Council of the Bar submitted that it had adopted a position of only concerning itself with technical issues relating to the administration of justice, and that it felt it should not engage with matters of policy.<sup>115</sup> The Council also interpreted the TRC's mandate as requiring them to concentrate on grave human rights violations, and the question of how such violations could occur in what appeared to be a well-functioning judicial system. Their focus on gross human rights violations arguably diminished the attention paid to violations such as discrimination and

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<sup>111</sup> Interview with former apartheid government lawyer, Johannesburg, 2014.08.16

<sup>112</sup> Interview with human rights lawyer, Johannesburg, 2014.08.15

<sup>113</sup> K. McEvoy and R. Rebouche, 'Mobilising the Professions?: Lawyers, Politics and the Collective Legal Conscience' in J. Morison, K. McEvoy and G. Anthony (eds) *Judges, Human Rights and Transition* (2007), 307.

<sup>114</sup> *Ibid*, 308.

<sup>115</sup> South African Press Association, 'Bar Council Provides TRC with Three Volume Submission.' 21<sup>st</sup> October 1997; McEvoy and Rebouche, *supra* n.112, 305.

racism within the profession, and classed such violations as less grave. As put by the chairman of the Johannesburg Bar: "We didn't kill, we didn't commit any offences in the strict sense of the word."<sup>116</sup> Similarly, the Association of Law Societies claimed that politics were not "the business of the organised profession", thereby claiming its neutrality as a positive, rather than something worthy of condemnation.<sup>117</sup> It further submitted that actions available to the legal profession had been limited by the principle of parliamentary sovereignty.<sup>118</sup> As summarised by one of the state lawyers interviewed for this project:

even the participation by the Law Societies and the Bar Council can at best be described as superficial. And they too were not going to acknowledge their role; rather they too want to perpetuate the myth that the profession was independent under apartheid.<sup>119</sup>

It seems that significant work was required behind the scenes to persuade the Bar to contribute, and that they may have been motivated by a desire to protect their own name, rather than to make a full and honest disclosure.<sup>120</sup> This is reflected in one interviewee's particularly critical view on the contribution of the Bar and its advocates:

The advocates of course, you know, claimed a far more different position they adopted than the attorneys, and said that they didn't do anything wrong... And we went there and we had to poke holes into this submission of theirs as they were complicit, you know, and if anything they were nothing more than just being duplicitous in their submissions to the TRC. So the advocates came off very short at the TRC.<sup>121</sup>

With such an attitude evident amongst the Special Hearing's participants, it is perhaps unsurprising that interviewees were broadly sceptical about the positive

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<sup>116</sup> Submission to the Special Legal Hearing.

<sup>117</sup> Association of Law Societies Submission to the Truth and Reconciliation Commission (1997).

<sup>118</sup> *Ibid.*

<sup>119</sup> Interview with state lawyer, Cape Town, 2014.08.11

<sup>120</sup> Rombouts and Parmentier, *supra* n.3, 282.

<sup>121</sup> Interview with High Court Judge, Cape Town, 2014.08.11.

impact the Special Legal Hearing had had on the legal profession. Both practicing lawyers and legal academics opined that for the legal profession, little changed following the hearings and the subsequent findings of the TRC:

What's happened is, you have business as usual and there isn't a real sense in this profession of how individualistic they are.<sup>122</sup>

But I think that the organised profession, much of the organised profession, it's been business as usual.<sup>123</sup>

However, a former apartheid government lawyer was more positive, finding that the hearings had brought about an awareness of the failings of the legal profession, and of the racism that had characterised the profession. Another judge interviewee suggested that for the National Association of Democratic Lawyers at least, it created a platform for engagement:

It enabled us to engage and it created the platform for that engagement... And so we put the mirror up to the profession and we said look here, you know, you don't look good and this is what needs to happen.<sup>124</sup>

The judge disputed the extent to which involvement had promoted any genuine soul searching amongst the legal profession, but found that there had been positives from their involvement:

One thing it showed them was that when you get all these black lawyers coming, the sky didn't fall down. You know, then we were equally concerned about issues of governance, we were equally concerned about issues of regulation and legal profession must be regulated, there must be ethics in the profession. So one thing we could go and say to them, you were not independent, which affected how you represented your clients and how you represented the state very often, the apartheid state. And that the Law Society wasn't simply meant to be a disguised trade union that protected

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<sup>122</sup> Interview former TRC Commissioner, Johannesburg, 2014.08.16.

<sup>123</sup> Interview with legal academic, Cape Town, 2014.08.11.

<sup>124</sup> Interview with High Court judge, 2014.08.11.

the interests of its members, but also broader governance issues they had to protect, its disciplining of its members was in the public interest. So it wasn't just a trade union function; they have a broad public interest function. And so I think we've been able, the one thing we've been able to do and we can always trace it back and we say when we went to the TRC this is what we complained about.<sup>125</sup>

Commenting on the lack of transformation brought about by the hearings on the legal profession, a senior state lawyer noted that the TRC's inability to order access to the archives, call for documents and subpoena inhibited their ability to get to the bottom of the legal profession's conduct during apartheid:

The Bar Councils and Law Societies didn't say to the Truth Commission here are our archives, examine every single document in our archives going back 100 years... And to understand the role of the Law Societies and the Bar Councils under apartheid you need access to the records so that you can start the dialogue and then look at that role and function to determine how you successfully transform the profession in a country like South Africa. But without full access to those archives you can't, it's impossible... And then insofar as there were people who cooperated, we need to understand what the basis of that cooperation was, and so how do you start transforming a Bar Council and the Law Society and the legal profession if you can't understand what determined the framework interaction with the apartheid state?<sup>126</sup>

The South African TRC was the first of its kind to attempt to include an analysis of the role of legal professionals in the previous regime. The failure of the judiciary to participate, and the attempts of the Bar Council and Law Societies to justify their conduct, undeniably undermined the effectiveness of this attempt. However, despite these setbacks the TRC Special Hearing on the Legal Profession was by its nature mould-breaking and managed to create a public record of some of the ways in which the profession had failed to uphold individual rights and the rule of law. While interviewees were generally sceptical of the impact the TRC had had on the legal culture within South Africa, it is possible that the explicit acknowledgment of the Bar and Law Societies will have

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<sup>125</sup> Interview with High Court judge, 2014.08.11.

<sup>126</sup> Interview with state lawyer, Cape Town, 2014.08.11

long term implications, and may even encourage legal collectives in the future to engage in self-examination in the aftermath of repressive regimes.

## Conclusion

This paper has examined the role of lawyers in truth recovery within South Africa, both as professional participants and as the subjects of truth recovery. Using the TRC and the Marikana Commission as case studies, it explored the ways in which legal professionals engage with truth recovery in their professional capacity, and the ways in which they can influence the procedures used by those truth recovery mechanisms. It found that while the TRC and Marikana Commission ostensibly pursued goals outside the traditional retributive framework of the law, legalism infiltrated almost every aspect of their work. Legal language was common, procedures reflected those used in courtroom settings, and legal representation for participants led to legalistic arguments and challenges. Many of the interviewees expressed negative views on this importing of legalism, finding that it interfered with the broader political and social goals of truth recovery. However, despite these negative reflections, few would seek to exclude lawyers from truth recovery processes. Indeed, there was a general view that lawyers were needed in order to protect the interests of participants. However, concrete suggestions were made as to how the involvement of lawyers could be more efficiently managed. Two recurring suggestions were that authoritative chairs should be appointed who are capable of 'managing' the lawyers, and that lawyers should be made aware of the procedural rules from the beginning. Such suggestions may be of value to future truth recovery mechanisms seeking to benefit from the South African experience.

Turning to lawyers as the subjects of truth recovery, the paper examined the TRC's Special Hearings on the role of the legal profession in apartheid South Africa. It found that many legal professionals, in particular those in the judiciary, were unwilling to have their actions during apartheid subjected to scrutiny. It is undeniable that the judges' refusal to attend the oral hearings undermined the effectiveness of the Special Hearing. Their suggestion that attendance would provoke a constitutional crisis and that it would be unfeasible and damaging to examine the role of the judiciary during apartheid inhibited the TRC in its attempt to fulfil its mandate of establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights during apartheid. While judges refused to engage in the oral hearings, many other legal

professionals did. However, many interviewees suspected that the engagement of legal professionals lacked sincerity, and were sceptical of the impact the Special Hearings had made on the legal profession. Despite these struggles, the TRC demonstrated that it was possible to subject the legal profession to some level of scrutiny, and created a record of the role of legal professionals in upholding the apartheid state. This endeavour must be applauded, in spite of its undoubted limitations. Those tasked with designing truth recovery mechanisms elsewhere have seen that it is possible to scrutinise the role of the legal profession in past conflict and that it is worth wrestling with the inevitable challenges to ensure as much genuine engagement from legal professionals as possible.



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