

# LAWYERS, CONFLICT AND TRANSITION

## RESEARCH INSTRUMENT: SOUTH AFRICA

### BACKGROUND

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This is a comparative project looking at the role of lawyers in conflict and transition in South Africa, Cambodia, South Africa, Israel, Palestine, and Tunisia. We are interested in the role that lawyers play during conflict and authoritarian regimes, as well as transitional periods, in defending and promoting human rights, engaging with civil society, litigation strategies as well as conversely using law to inhibit transformation. Themes include: (a) The meaning of the **rule of law in South Africa** over time; (b) South African **legal culture** over time (c) The role of legal collectives e.g. **Bar Associations, Black Lawyers Association, NADEL etc** (c) **public perceptions** of lawyers over time (d) **Cause lawyering and social movements** (including strategic litigation and actions of lawyers outside the courtroom) (e) legal pluralism in South Africa (e.g. role of **international human rights law** or **indigenous/bottom up** law. Project is an **independent academic research** project funded by the ESRC involving QUB Law and TJI.

### INFORMED CONSENT, DIGITAL RECORDING AND ANONYMITY

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Explain anonymity and consent, and digital recording.

### INTERVIEWEE'S PERSONAL BACKGROUND

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➤ (For Lawyers) What motivated you to become a lawyer?

### RULE OF LAW AND LEGALISATION OF POLITICS

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- What does the phrase '**rule of law**' mean in South Africa?
- How is the term '**human rights**' understood in South Africa? Is it only used in relation to the past? Is it viewed as an intrinsic part of the rule of law?
- The Apartheid regime has been widely described as legalistic ? Why was the regime so legalistic ? What role did law play in how the National Party and the proponents of Apartheid saw themselves?
- Is South Africa still a legalistic society ? What does contemporary South African legalism look like ?
- On difficult political issues, do **politicians sometimes abdicate responsibilities** and expect lawyers or judges to sort things out for them - sometimes called the legalisation of politics. Can you give some examples of this happening in South Africa? Why does this happen ?
- To what extent is the legal system (courts, judiciary, legal collectives etc) today free from **political, state, or control by the ANC**?
- Are South Africans now more aware of their human rights ? What challenges remain for the rule of law in South Africa?

## LEGAL CULTURE AND GENDER

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- How would you describe contemporary **legal culture** in South Africa?
- What has shaped legal culture (e.g. legal education, the history of Apartheid and legal struggle against it ?) **How important are personalities** (e.g. chief judge, bar council head, law school Deans) in shaping legal culture?
- Are there any traces of the **colonial legacy** on South African legal culture still be felt today? (e.g. education, practicalities, cultural traits – accents, language, ceremony). Any **neo-imperial** influences ?
- Were lawyers themselves the **drivers** of changes in the legal culture driven by lawyers themselves or by other events in the transition to democracy.
- Is law (and are lawyers) responsive to issues of **gender** in South Africa? What influence does **gender** have on legal culture? Are women fully integrated into the legal profession, as judges, as lawyers, in the Bar?

## LEGAL COLLECTIVES

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- How would you describe the role of the **Bar Associations or Law Societies** in South Africa in the transition? Have they been a force for good in society? What is their role in broader public debates? Did progressive lawyers see **struggles within the legal community as worth the candle** ? (e.g. trying to get good people elected onto on committees, rights for black lawyers to practice etc etc) ?
- How important were legal collective such as the **Black Lawyers Association** or **NADEL** during the liberation struggle ? How did the BLA deal with the charge that such a grouping would be divisive in the Bar, or racist –that it would overly politicise the legal community along racial lines ?
- Did groups like BLA, NADEL, Lawyers for Human Rights see themselves as **part of the liberation movement** ? If yes, how did they deal with the charge that they were only a legal front for the ANC or other liberation movement organisations ?
- How influential is the **South African Women Lawyers Association** ?
- What is the current role of Bar Associations and Law Societies ? How have they dealt with the transition, are they doing their jobs properly (e.g. promoting rule of law in face of government opposition ?)

## ROLE AND RESPONSIBILITY OF LAWYERS IN SOUTH AFRICAN SOCIETY (MODERN AND HISTORICAL)

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- What are the **responsibilities** of lawyers in South African society? Are they **simply representing their clients** or do they have **broader social or political responsibilities** ? What are the characteristics of a typical (South African) lawyer?
- **How** are lawyers seen by the public in South Africa? Are they ever seen as **arrogant? Greedy** ? Does the fact that so many of the **heroes of the anti-**

**apartheid struggle** were lawyers **mitigate** the usual negative views of lawyers one often finds in other societies ? Did being a lawyer bring kudos in the liberation movement ?

- **Cultural Capital:** Do lawyers **have power or influence** on local debates? Does the state care about what lawyers say publicly? Does the public? Do lawyers use their power wisely? **Do lawyers bring hope for a better South Africa?**
- **Do lawyers ever –oversell the product of law and what it can achieve ?** **What is the relationship between lawyers and the state** in South Africa? How do lawyers see the state? Does state **try to intimidate lawyers** ? How challenging is it for progressive lawyers now dealing with the **ANC in government** when once they felt part of or ‘on the same side’ as the liberation movement ?
- **FOR WHITE LAWYERS ?** – was there a particular moment or injustice that motivated you think this is wrong I need to **do** something?

### *Historically - During the Liberation Struggle*

- How relevant was **the legal background of some of the key ANC leadership** to the liberation movement and its tactics, approach to law etc ?
- Was **boycotting legal proceedings** ever seriously considered by the liberation movement – particularly courts where there was little chance of justice (probe re PAC/ ANC differences) ? If not why not? What about the arguments that they were ‘legitimizing an unjust regime’ ?
- Did the regime **targeted lawyers** ? If not why not ?

### *During the Transition*

- What were the biggest **challenges** for the legal community at the start of the democratic period? Were lawyers **instrumental to strengthening** the rule of law, or peripheral to this process?

## **CAUSE LAWYERING AND SOCIAL MOVEMENTS**

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We are particularly interested in activist lawyers – those who work for or with civil society groups, or victims, or social movements – lawyers who litigate on behalf of these groups or help them with strategy – sometimes called ‘**cause lawyers**’ – (very common term in South Africa I suspect)

- (For Lawyers) Do you see yourself as such a lawyer? If so, **why** did you become a cause lawyer? How would you define your ‘cause(s)’?
- Why was there so much **cause lawyering** during the anti-apartheid struggle? What about cause lawyering now since the transition ? Other types of cause (or ‘activist’) lawyers in (e.g. HIV, land rights, gender, indigenous rights, LGBT rights, labour rights ? dealing with the past)? Were some of these

issues (e.g. LGBT, gender) marginalised by the larger struggle historically ?  
Are there any lawyers **who stand out**? Why ?

- Are there types of cases **that you would not take because of your cause lawyer or political commitments** ? If yes, which ones and why ?
- Doing such work, how does one maintain **professional 'neutrality'**? Does **professionalism mean neutrality**?
- How does one balance **competing obligations** (to clients, social movement, community, livelihood, family)? **main obstacles to legal activism** in South Africa (e.g. resources, personal safety, effect on professional standing, legal culture ?) **NB press on this with lawyers who were in the ANC. Albie Sachs** has described this as **being a lawyer and outlaw**, splitting the psyche between the public law performance and the work in the underground – against the law
- Are such lawyers seen as **trouble-makers in the profession**?
- What was your **greatest success** as a lawyer – why are you proud of it ? What do you **most regret** ?
- Do lawyers tend to **dominate civil society organisations** – have the loudest voices with the most technical information? Or are they more likely to be **assistants** to civil society leaders? Within social movements, do lawyers **'professionalise' activism**? Are they viewed as conservative? Are lawyers ever **inspirational** or dynamic in social movements or **can they suck the lifeblood** of a movement through legalism? Are there any **power imbalances** in relationships between lawyers and activists? Which lawyers are **trusted** and why ?
- ? **Can one be a cause lawyer and work for or within the state ?**

### **STATE LAWYERS**

- How did **cause -lawyers who became judges or state lawyers** adapt to the transition ? For cause lawyers who went into state structures, what kind of compromises were involved ? What were the challenges of working alongside lawyers from the old regime.
- **What about state lawyers who remained in place before, during and after the transition** ? How did they **adapt** ? Did they respect their new ministers who were previously seen as terrorists ? If so, how, why ?

### **LITIGATION STRATEGIES ON HUMAN RIGHTS ISSUES**

- **How effective is litigation** as a tactic compared to other strategies (e.g. political lobbying, demonstrations)? **one or two examples where you can say yes, good lawyering, good litigation made a real difference to these people?**
- **What lessons were learned about litigation strategies during the struggle years** – styles of argumentation, legal knowledge, human rights talk etc

- **Has human rights litigation** had a significant positive impact on **events outside of the courtroom**? Are there instances when **litigation distracted** people or resources ? **Cases which have provoked a backlash ? Failed triumphs ? (e.g. the victory in the first treason trial in 1960?)**
- **What is the relationship between lawyers and victims?** Who controls the relationship and the approach taken **in cases – the victims or the lawyers?** Has this dynamic changed over time?
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- **LAWYERS AND DEALING WITH THE PAST DURING THE TRANSITION**
- To what extent did lawyers **drive the human rights agenda** during the transition? (compare victims; victims' groups; other civil society) ?
- What impact did the inclusion of an amnesty in the TRC have on the human rights movement in South Africa?
- What role did **lawyers play in creating/ shaping the truth commissions** in South Africa ? **Several 'struggle lawyers' were truth commissioners** – what did they bring to the commission in terms of skills, knowledge and legitimacy? Are there any problems with having too many lawyers within the commission? Did the lawyers manage expectations re the TRC?
- How good were lawyers at **dealing with vulnerable victims and witnesses** during the TRC process ?
- **Why did the TRC hold a hearing on the legal professions? What impact did those hearings have on the legal profession ?**
- **How important was the televised elements of the TRC for people to see transitional justice being performed ?**
- **How did more right leaning lawyers and their political masters use law during the transition ?** (e.g. to delay the transitional process with the 1990 and 1992 indemnity processes or the legalistic nature of the amnesty hearings under the TRC)

## **LAWYERS AND POLITICAL NEGOTIATIONS**

- What role did lawyers play in **political negotiations** which saw the emergence of a democratic South Africa ? Was the legal background of so many of the ANC leadership a **help** or a **hindrance? What about on the other side (the NP)?**
- How justifiable is it to use **exceptional** measures during a transition? Is transitional justice really so **exceptional** ? (ask esp the TJ people Varney, Curran etc)\_ Isn't any political system struggling with **the law and politics relationship** and it's just a question of degree?

## GAL PLURALISM/ROLE OF INTERNATIONAL LAW AND INTERNATIONAL LEGAL NETWORKS

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- **How significantly do international human rights discourses feature in** South African legal discourse? Are **human rights** part of South African legal culture or seen as 'Western' or 'neo-imperialist'? Are **judges receptive** to international human rights law arguments? Is this because of the deployment of international law during the struggle ?
- How important was the role of **South African lawyers** (sometimes in exile e.g. Kadar Asmal) in forging international networks and relationships during the anti-apartheid struggle ? Did being a lawyer help them do this (e.g. understanding what buttons to press, language to use etc) – as **brokers/bridges** between the local and international ?
- How did **international funding** effect anti-apartheid struggle work ? What impact does it have on the **legitimacy** of contemporary human rights work?
- Is local or **informal justice** important in South Africa? If so, what role does it play now, and did it play a different role during and just after Apartheid?

## ETHICS QUESTIONS

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Explain ethical **commitment to put something back** – two reports for local community – ask if they have any ideas? **Have you had any previous experiences (good or bad) with international researchers?** What made them good or bad in your view? **Does international research actually help the people of South Africa? Why did you agree to take part in this research?**