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South Africa: Law and the Search for Justice

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South Africa under apartheid did not present a promising prospect for lawyers concerned with the search for justice.

The entire population was classified into racial groups. This classification determined political power. It also determined where you could live, go to school, work, play, go to hospital, and be buried. Nearly eight million South Africans were denationalised, and declared to be citizens of mini-'states' set up and controlled by the South African government. The government had the power to detain people indefinitely without trial and in solitary confinement, to ban organisations and people, to ban books and newspapers, and to force communities to move from their homes. It exercised these powers freely, even promiscuously.

All of this was done by law. It took place in a system in which the courts could not pronounce on the validity of any statute passed by parliament.

Even within the context of such wide powers vested in the authorities, there was widespread official lawlessness. Allegations of assault by the security forces were routinely made (and routinely denied). Detainees died in detention, after 'slipping on a bar of soap', 'falling down a flight of stairs', and even 'falling from a window'. There was widespread evidence of security force support for, or inactivity in the face of, right-wing vigilantes.

Yet in the midst of this hostile environment, there was a paradox. Courts ordered the reinstatement of striking mineworkers. They declared unlawful the forced removal of African tribes from their land. They ordered the re-building of shanty structures demolished by police without the authority of a court order. They declared unlawful policies and practices, which prevented millions of Africans from living in urban areas. They ordered the release of detainees because the police had failed to provide adequate reasons for the detention. They acquitted people prosecuted in some major 'treason' trials for their active resistance to apartheid.

To be sure, the famous victories were outnumbered by the not-so-famous cases which were lost, or which were not brought at all. But the victories were real. Subsequently, when South Africa attained democracy, commentators came to the view that the legal challenges had made a significant contribution in the struggle to end apartheid.

The explanation of this paradox lies in the fact that the system of legal discrimination and repression operated within a fairly sophisticated judicial system. The judges in the higher courts believed that they were independent of the executive, and generally acted as if they were, in the sense that they did not take instructions - though it was said that they did not need instructions, as many of them shared the mind-set of the government. A judiciary made up almost exclusively of middle-class white males inevitably shared many of the prejudices and social values of those

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who ruled. Yet the formal independence was of real significance, and the government generally obeyed orders of the court. It was this that created the 'space' for lawyering on behalf of those opposed to apartheid.

The cases that were brought generally fell into three categories.

The most celebrated form of legal intervention was the 'test' case. This involves an attempt to obtain a definition or re-definition of a legal rule in such a way that it will have a beneficial effect on a large number of people who are similarly placed. Perhaps the best known of these was a series of cases dealing with the 'pass laws', which restricted the freedom of movement of African people.

Of course, parliament could easily legislate to reverse the outcome of these cases. But by the 1980s, when these cases were brought, the apartheid government faced increasing international pressure. There was an international sports boycott of apartheid South Africa, there was a growing disinvestment campaign, and economic sanctions of various kinds were starting to take effect. The government was anxious to present a reformist image to the international community to stave off further isolation. Reversing judicial defeats through legislation would therefore carry a high price in the international community. This acted as a significant restraint on the government.

A second form of legal work was simply holding the legal system to its promises. For example, in the early 1980s, the government started many hundreds of criminal prosecutions in Johannesburg to enforce compliance with the Group Areas Act, which made it a crime for someone not classified as 'white' to live in a 'white' area. Given the state of the law and the lack of a bill of rights, there was very rarely a valid defence to the charge. But public interest lawyers and private practitioners banded together to create a large panel of lawyers who were willing to take on these cases without charge. In every case, the state was compelled to prove every element of the offence charged, which included various technical matters. Appeals were launched on a variety of grounds, in the knowledge that they were very unlikely to succeed. The failed appeals dramatised the injustice of what was taking place. And the system started to clog up as the prosecutions became very slow. An imaginative decision by a judge in one case made it difficult for the state to obtain eviction orders, even where the accused had been convicted of the offence. After two or three years, the Group Areas Act prosecutions came to an end, simply because the legal system was held to its promise of a proper trial for everyone who wanted it. By making the prosecution do its time-consuming job in every case, lawyers played a key role in bringing the racist prosecutions to a grinding halt.

A third form of legal work was less dramatic, but may have been the most significant. The 1960s were years of relative political quiescence in South Africa, after the banning of the main liberation movements and the jailing and exiling of most of its leaders. The 1970s saw a re-awakening, with the growth of resistance on many fronts. Black trade unions became a potent economic and potentially political force. Resistance started to re-grow in many areas of society. The law became an important means of protecting political organisations against repression. The trade union movement made very skillful use of the law, and was the leader in this respect.

Communities under threat of forced removal from their land learned to use lawyers and the law to strengthen their resistance. Often, the lawyers could provide no relief against the removal

itself, because the law placed such vast powers in the hands of the government. But forced removal was not a once-off event. It generally started with the systematic demoralisation of the communities concerned and the undermining of their resistance by cutting off social services (for example the payment of pensions), by banning meetings, and by detaining or even killing community leaders. This provided fertile ground for legal work. Community groups, community workers and lawyers learned to work together to challenge these methods of destroying communities, and to provide support to those who resisted. They mobilised international opposition to this practice, in part by highlighting and dramatising the removals in the courts. Forced removals came to an end as a result of a combination of sustained community resistance, growing international opposition, and challenges in the courts.

In 1994, many things changed. A democratic Constitution was adopted, with an expansive bill of rights. A strong Constitutional Court was appointed, many of its members having been very active in legal work against apartheid.

Yet some things have not changed quickly. The poverty and inequality created by generations of apartheid and dispossession did not disappear when the legal scaffolding, which created those patterns, was removed. There were and are still huge numbers of people inadequately housed, of children without access to adequate education, and of the needy who require social welfare grants. New problems have emerged, in particular HIV/AIDS.

South Africa represents a bold and ambitious experiment in constitutionalism and democracy - can they succeed and thrive in a society still deeply divided by the consequences of generations of dispossession and oppression, and with hugely pressing social problems?

The legacy of the past has become very important in dealing with these new problems of a democratic South Africa, for two reasons. First, the history of struggle in the courts has created an important tradition and expectation that vulnerable people can turn to the courts when they are in trouble. The use of the courts has become part of our political culture. There is a widespread acceptance of the importance of rights, and of the role of the courts in protecting the vulnerable and the marginalised. This will be important as we seek to entrench the bill of rights in our new democracy.

Second, the lessons of the past have not been entirely lost. We have learned that the key to addressing political problems is social and political mobilisation. This is what makes for a democracy, which is deeper and more profound than voting once every five years. We have also learned that the courts can be an important forum for ventilating popular concerns, for dramatising them and bringing them to public attention, and in some cases for finding a satisfactory resolution.

And so in the democratic South Africa, the courts have adjudicated important cases dealing with matters such as HIV/AIDS, homelessness, and social welfare grants. They have made a real difference to the lives of literally millions of people.

It was not lawyers and the courts that ended apartheid. It was popular resistance, supported by the mobilisation of international pressure. But looking back, it is fair to say that the legal work against apartheid played a significant role in the downfall of apartheid. Today, we can see that this work has created a legacy, which is important as we seek to strengthen and deepen our

democracy.
For more information, see:

Legal Resources Centre - www.lrc.org.za
Constitutional Court of South Africa – www.concourt.gov.za
Richard L. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (New York: Routledge, 1995) at 26-27.