

ACCESS TO JUSTICE: FROM LEGAL REPRESENTATION TO PROMOTION OF EQUALITY AND SOCIAL JUSTICE – ADDRESSING THE LEGAL ISOLATION OF THE POOR

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SUMMARY

From the perspective of the legal system, the first decade of democracy has been characterised by the dominant discourse of access to justice. Section 35 of the Constitution guarantees the right of an accused person to legal representation at state expense, where a “substantial injustice” might otherwise result.

Thus, access to justice has routinely come to be defined as access to legal representation in criminal trials. This interpretation of the notion of access to justice is problematic because it fails to address a range of issues affecting the poor in our society, notably the realisation of their socio-economic rights. This article argues that the concept of access to justice needs to be redefined to incorporate the promotion of equality and social justice for the poor and other vulnerable groups in our society. Such redefinition will, of necessity, entail important shifts in the conceptualisation of legal aid provision, as well as concomitant budgetary and other consequences.

The article examines various strategies to address the legal isolation of the poor, and concludes with some recommendations as to how the reconceptualised project for access may be achieved.

1 INTRODUCTION

Reflecting on the American political and legal system, the 19th century French historian and political philosopher Alexis de Tocqueville famously remarked: “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”¹ His statement, made a good 200 years or so before George Bush’s infamous electoral victory in the 2000 presidential election, may have been somewhat prescient. One could argue, in the context of South Africa’s chequered history, that his observation can be inverted to read: “There is hardly a judicial question which does not sooner or later turn into a political one.” South African legal

¹ Quoted in Hershkoff and Hollander “Rights into Action: Public Interest Litigation in the United States, *Many Roads to Justice*” 2000 *The Ford Foundation, USA* 95.

history is littered with political connotation, whether it is the legislation of land dispossession as in the 1913 Land Act, the denial of the political franchise to the majority, or even critical debates around the nascent human rights jurisprudence in our democracy. But of course, de Tocqueville would not be enormously impressed if he learnt that his epithet was used to introduce a presentation dedicated to the eradication of poverty!

This contribution focuses on access to justice, reviewing the previous and current conceptions of the notion, and argues that the hitherto narrow interpretation of the term has resulted in a failure to address the legal isolation of the poor in our society, which begs a redefinition and reorientation of the concept of access to justice. In the era of an emerging human rights culture, such redefinition must, of necessity, address the questions of the promotion of equality and social justice for the most vulnerable and marginalised groups in society.

2 PRE-DEMOCRACY ERA

During this period, not unsurprisingly, access to legal representation was woefully inadequate, if not non-existent. In the decade preceding democracy, it was reported that “about 80% of all accused in the criminal courts are unrepresented”.² The Legal Aid Board provided a limited, mainly *judicare* service, in terms of which it paid private lawyers a reduced fee to represent clients, pre-qualified according to a means test, in predominantly civil cases. There existed no guaranteed right of legal representation for the indigent, with the result that the majority of poor (mainly black) accused conducted their own defence, with devastating consequences.

It was often left to non-governmental providers of legal services to take up the challenge to unjust laws and the erosion of rights. Public interest law practices such as the Legal Resources Centre, university-based law clinics and other progressive institutes took up the challenge of pursuing justice under the strictures of apartheid.³

3 THE ERA OF DEMOCRACY

The election of a popular, legitimate government and the adoption of the Constitution⁴ heralded the beginning of a new era in which the rights of

² Steytler “The Undefended Accused at Trial” quoted in Cappelletti “The Future of Legal Education: A Comparative Perspective” 1990 *SAJHR* 1 13.

³ Many of these organizations mounted successful challenges to a variety of apartheid regulations dealing with, *eg*, pass laws such as the *Komani* case (*Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 4 SA 448 (AD)) or permanent residence rights as in the *Rikhoto* case (*Oos-Randse Administrasieraad v Rikhoto* 1983 3 SA 595 (A)). See, *eg*, Andrews “A Resource for Justice: South Africa’s Legal Resources Centre” 1995 2 1 *East African Journal of Peace & Human Rights* 53. In addition to serving clients through their in-house law clinics, law schools initiated a variety of other programmes in popular legal education, such as the innovative Street Law Programme. See McQuoid-Mason “Access to Justice and the Role of Law Schools in Developing Countries: The South African Experience” 2003 *First All-Africa Clinical Legal Education Colloquium Materials – Day Three* 21.

⁴ Republic of South Africa Constitution Act 108 of 1996.

accused persons, in particular, began to be asserted with vigour, in keeping with constitutional imperatives for accused persons to “have a legal practitioner assigned to the detained person by the State, and at State expense, if substantial injustice would otherwise result”.⁵

Whereas during 1992, the Legal Aid Board sponsored some 67 100 legal defences, the figure rose to 196 749 for the 1995/1996 financial year.⁶ In the 2003/2004 year, the Board provided legal aid in 236 663 new cases.⁷ This represents a substantial increase in the level of coverage.

Particularly since 1994, the Board has undergone a sea change with regard to the model of legal service delivery adopted. Whereas at its inception, it operated primarily on the model of the *judicare* system, it is presently utilising, in the main, the salaried lawyer or public defender type of model.⁸ Indeed, *judicare* comprises a mere 19% of the Board’s allocation, as opposed to the salaried lawyer or justice centre model which accounts for 76% of its legal services budget.⁹

Currently, it utilises a mixed bag of delivery options which include justice centres with full-time salaried in-house lawyers; *judicare*; co-operation agreements with NGOs; impact litigation, and a national legal internship programme.¹⁰

4 INTERPRETING CONSTITUTIONAL IMPERATIVES

The Legal Aid Board, under pressure to meet the challenge posed in section 35 of the Constitution, found its attention increasingly focused on criminal representation. As a result, access to justice has routinely come to be interpreted as the right of accused persons to legal representation, particularly where a sentence of imprisonment of some length might be imposed, in order to circumvent the “substantial injustice” potentially befalling an unrepresented accused.

Confining the provision of legal services primarily to criminal matters, and defining access so narrowly, has other serious consequences. It has been argued, for example, that the focus on criminal defence has implications for gender discrimination. The channeling of limited resources into the provision of representation to accused persons takes away resources from other areas where legal services are required, and as the majority of criminal accused are men, women (and other groups) are underserved by the legal aid system.¹¹ The areas of law affecting women, children, the disabled and the poor – domestic and family issues, access to facilities, jobs, education

⁵ S 35(2)(1).

⁶ Sarkin “Legal Aid: Promoting Access to Justice” 2002 *Indicator* 19 3 41.

⁷ Legal Aid Board *Annual Report 2003/2004* 17.

⁸ See Van As “Legal Aid in South Africa: Making Justice Reality” (unpublished paper, by kind permission of the author), for historical background of the Legal Aid Board. Also McQuoid-Mason *An Outline of Legal Aid in South Africa* 1982.

⁹ Legal Aid Board *Annual Report 2003/2004* 18.

¹⁰ *Ibid.*

¹¹ Allen “Focusing Legal Aid on Criminal Defence Marginalises Women’s Legal Service Needs” 1995 *SAJHR* 15 1 143.

and social services – are inadequately catered for in the current delivery models.

The narrow interpretation of access and its consequences cannot be justified. Several provisions in the Constitution impact on the rights of the individual as regards the law and justice.

The preamble envisions “a society based on democratic values, social justice and fundamental human rights” in which “every citizen is equally protected by law”, and commits to “improve the quality of life of all citizens”.¹² The founding values include “human dignity, the achievement of equality and the advancement of human rights and freedoms”.¹³ The Constitution, additionally, imposes a positive duty on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”.¹⁴

The equality provision is unequivocal in respect of the relationship of the individual to the law: “Everyone is equal before the law and has the right to equal protection and benefit of the law” and that “equality includes the full and equal enjoyment of all rights and freedoms”.¹⁵ Similarly “everyone has inherent dignity and the right to have their dignity respected and protected”.¹⁶

But it is not only civil and political rights which enjoy protection of the law. A whole range of socio-economic rights, relating to the environment, housing, health care, food, social security and education¹⁷ are also justiciable under our Constitution.¹⁸ Furthermore, as one of the most vulnerable groups in our society, children enjoy special protection.¹⁹

It is contended that this range of constitutional provisions demands a wider interpretation of access, one which enjoins the state to, on the one hand, actively support the realisation of the totality of human rights; and, on the other, to devise and implement programmes to sustain them, including the appropriate budgetary provisions, as well as to address the eradication of poverty.

5 LEGAL ISOLATION OF THE POOR

But what of the “poor”? Is the legal and social system attempting to meet their needs? How does poverty affect their ability to claim the rights enshrined in the Constitution, and how can these rights help them address their poverty and its effects?

A number of different measures are utilised to assess the extent of poverty in society, among them, income levels, unemployment and hunger.

¹² Preamble to the Constitution.

¹³ S 1(a).

¹⁴ S 7(2).

¹⁵ Ss 9(1) and 9(2).

¹⁶ S 10.

¹⁷ Ss 24, 26, 27 and 29.

¹⁸ The Constitutional Court has pronounced on some socio-economic rights in such landmark decisions as *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

¹⁹ S 28 of the Constitution.

Official unemployment, as at March 2003, stood at 31.2% or some 5.2 million economically active people.²⁰ But the figure is closer to 40% if one factors in the people who have abandoned efforts to find work.²¹ Job creation is lagging, with a mere 280 000 jobs created since 2000,²² and the majority of poor workers still earning less than R1000 per month.²²

The research confirms that poverty is endemic in South Africa. Almost half of South Africans, some 48.5%, are considered to subsist below the national poverty line.²³ Furthermore, South Africa is one of the most unequal societies with a highly skewed income distribution. The Gini co-efficient, which is a measure of economic inequality, rose from 0.596 in 1995, to 0.635 in 2001.²⁴

It is instructive to consider the level of poverty existent among society's most vulnerable group, namely, children. Several studies confirm that South Africa has an extensive child poverty problem. Up to 75% of the country's children (some 13.3-million) are reported to be living in poverty.²⁵ The government has attempted, through cross-departmental policy frameworks such as the Integrated Food Security Strategy for South Africa, an example of which is the Primary School Feeding Scheme, to enhance the nutritional status of school-going children. While such initiatives appear to be sufficient on paper, it is at the level of implementation that they begin to falter.²⁶

The picture is even bleaker when one considers the position of the rural population. The findings of a study on rural education suggest "that the great majority of children in rural poor communities are receiving less than is their right in a democratic South Africa".²⁷ The report highlights the grim reality that some 74% of rural South Africans between the ages of 15 and 65 earn less than R3 200 per annum,²⁸ which translates to R267 per month, considerably below the poverty line.

The situation is further exacerbated by the rampant HIV/AIDS epidemic afflicting our country and region. It is estimated that some 4.6-million South Africans (11.5%) are living with HIV, and that the disease accounts for 40% of all deaths.²⁹

²⁰ Adelzadah: South African Human Development Report 2003, The Challenge of Sustainable Development in South Africa: Unlocking People's Creativity *United Nations Development Programme* (2003) 10.

²¹ Robinson "An Embracing Social Welfare Net is Still a Work in Progress" 25 February - 3 March 2005 *Mail & Guardian* 11.

²² *Ibid.*

²³ This measure is based on the UN poverty line of R354 per month per adult. See also Robinson 25 February - 3 March 2005 *Mail & Guardian*.

²⁴ Adelzadah 5.

²⁵ Coetzee and Streek "Monitoring Child Socio-economic Rights in South Africa" 2004 *Idasa* 17.

²⁶ Coetzee and Streek 2004 *Idasa* 117.

²⁷ Human Sciences Research Council and Education Policy Consortium "Emerging Voices: A Report on Education in South African Rural Communities" 11-17 February 2005 *Mail & Guardian* 21 1.

²⁸ Census 2001.

²⁹ Cullinan: Basic AIDS stats for SA, Health-e www.health-e.org.za 28 November 2004 (accessed 3 March 2005).

Arguably, the majority of recipients of state-supported legal aid are indigent, as evidenced by the stringent application of various “means tests”.³⁰ But are they the most vulnerable and marginalised? There is also a degree of community backlash against the approach that “favours” accused persons, giving rise to the refrain that “criminals have better protection” under the Constitution. “What about the rights of victims?” it is often contended. Is the law serving the poor in any appreciable manner? This is precisely one of the areas that current access to justice programmes are not addressing.

What is lacking is legal assistance for poor persons in a variety of civil law matters; in administrative forums where their rights are routinely overlooked; in governmental bureaucracies which deny them access to social security, and other socio-economic rights; and in the general context of upholding their dignity, equality and social justice. Are the poor effectively excluded from the legal system?

6 AN ALTERNATIVE APPROACH TO ACCESS

Traditional legal aid models have often resulted in less than desirable outcomes. Many developed countries embarked on a trajectory commencing with equal access to legal representation and progressing to the broader reform position of improving access to justice. Some writers have suggested that the “contradiction between the theoretical ideal of effective access and the totally inadequate legal aid systems” may be dealt with by incorporating substantial modifications to the theoretical approach underlying legal services provision.³¹

Cappelletti³² observes that although the traditional interpretation of human rights (usually limited to civil and political rights) was a revolutionary development in legal and political civilization, it proved inadequate if it was not accompanied by second generation human rights or social rights. “Access is the core of social rights: that is, to make law and justice effectively *accessible to all*” (original emphasis). This, in his view, posed a major challenge to the legal system to become meaningful to those marginalised from full participation in the social, economic and cultural life of society because of poverty. As the realisation of social rights is dependent on programmes of state action, it required “an *affirmative and protracted* commitment of society” to break down the barriers to such participation³³ (original emphasis). The access to justice movement is, therefore, “the very *core* of the new ‘social’ conception of law and justice” implying both a radical new way of conceptualising the law, as well the intention to promote far-reaching reforms.³⁴ While not denying the value of extending legal aid to greater numbers of people, the rights-based approach involves more than

³⁰ Refer to the Legal Aid Guide, and the qualifying requirements of other legal service providers.

³¹ See, eg, Midgeley “Access to Legal Services: A Need to Canvass Alternatives” 1992 *SAJHR* 74 75.

³² Cappelletti 1990 *SAJHR* 9.

³³ Cappelletti 1990 *SAJHR* 9-10.

³⁴ Cappelletti 1990 *SAJHR* 12.

mere charity (such as *pro bono* initiatives) or simple economic development (such as forms of employment creation). Fundamentally, it is about the process of enabling and empowering those not enjoying economic, social and cultural rights to *claim* those rights.³⁵ These rights may be claimed through judicial and administrative processes; advocacy and lobbying of institutions and policy-makers; as well as more popular forms of action, such as strikes, demonstrations, boycotts and other mass-based activity.

As a project for reform, the access-to-justice movement, Cappelletti contends, should be considered as the central element of a political philosophy based on the idea of equality.³⁶ In effect he is arguing for a move away from formal equality (as enunciated in the “narrow” approach to access) to a more substantive equality (implying equal opportunities, and the meaningful exercise of socio-economic rights) within the context of legal assistance and representation.

7 EXPERIENCES OF OTHER COUNTRIES

While the developed world provides useful insights into the range of legal aid options available,³⁷ a more appropriate comparison involves developing country models with a comparable level of economic development to South Africa. The public defender model has been favoured and vigorously implemented in Mexico.³⁸ In the Philippines, a wide variety of delivery options is utilised, from the government-funded legal aid system (Office of the Public Attorney, other government departments, and court-appointed lawyers), legal services provided by non-governmental organisations (Integrated Bar of Philippines and alternative lawyers groups), legal aid programmes in law schools, to alternative dispute resolution and mediation (the village-level system of *barangay*).³⁹

India, through the implementation of the Legal Services Authorities Act of 1987, has opted for a judicially-driven legal aid system with all its inherent difficulties. Furthermore, the principle of automatic legal aid for arrested persons is not universally acknowledged. “The Constitution still treats free legal aid as a non-enforceable directive principle of state policy”,⁴⁰ which has resulted in less than effective delivery of access to justice.

³⁵ International Human Rights Internship Programme and Asian Forum for Human Rights and Development “Circle of Rights: Economic, Social & Cultural rights Activism: A Training Resource” 2000 *IHRIP* 14.

³⁶ Cappelletti “Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform” 1992 *SALJ* 22.

³⁷ See, *eg*, the contributions of Kemp; Paterson; van den Biggelaar; Zemans, papers presented at the International Conference on Legal Aid, 6-8 April 2005, Nelson Mandela Metropolitan University, Port Elizabeth, South Africa.

³⁸ See Van As “Legal Aid in Mexico: Visions of South Africa’s Future?” 2004 *Stell LR* 137.

³⁹ See Medina “Legal Aid Services in the Philippines” 2001 *Justice Initiative CLE Database*. While the author provides a detailed description of the range of options utilized, no evaluation is made of the efficacy of this amalgam of options.

⁴⁰ Muralidhar *Law, Poverty and Legal Aid – Access to Criminal Justice* (2004) 377.

8 A SOUTH AFRICAN APPROACH

A South African approach to the project of access would derive its inspiration from a variety of sources, notably the Constitution, several international and regional treaties, which South Africa has either ratified or accepted in principle, as well as the United Nations' Millenium Development Goals which prioritise the eradication of extreme poverty within the next decade. However, there are significant differences in the divide between the developed and developing worlds which suggest that a different path may be required. For one, even with their advanced economies and relatively better resources, developed countries have not succeeded in establishing an adequate legal service provision strategy.⁴¹ This is not to suggest that particular strategies for service provision are therefore unattainable in our context, but rather to recognise the limits of a single focus approach to realising access. Secondly, the issue of socio-economic rights takes on very different proportions in a developing country such as South Africa, given the rampant poverty, unemployment, ill-health and inequality. Access to justice is therefore inextricably bound with access to social and economic rights and goods.

9 CONSEQUENCES OF WIDER ACCESS APPROACH

Such an approach will facilitate addressing the broad issues of marginalisation of vulnerable groups in society; develop a meaningful strategy to address poverty and hunger; extend legal advice, assistance and representation to matters other than criminal in nature; intervene in disputes related to civil and administrative law; strengthen and support community-based dispute resolution; confront the inequitable allocation of resources, and re-direct them to areas of greatest need. In short, access to social justice entails a holistic approach to the socio-economic problems faced by the country's poor, within which may be located the right of access to legal representation.

Given that access to justice will, of necessity, imply the protection and promotion of human rights and, more particularly socio-economic rights, important consequences follow. Again the position of children as a vulnerable group will require special attention. The Constitution, as well as international and regional conventions,⁴² obliges the government to prioritise vulnerable children in the development of its policies and the allocation of its budget. The Constitution guarantees children untrammelled rights to shelter, basic education, nutrition, health care and social services.⁴³

Yet children, particularly in the rural areas, continue to suffer deprivation. While the law requires that the state has the responsibility to provide free transport for any child where the nearest school is more than 5 kilometres

⁴¹ See, eg, Cappelletti 1992 *SALJ* 22.

⁴² South Africa ratified the UN Convention on the Rights of the Child in 1995, and the African Charter on the Rights of the Child in 2000.

⁴³ Unlike the rights accorded to all persons, these rights, contained in ss 28 and 29, are not subject to limitations of resources or progressive realisation.

away, the overwhelming majority of rural children walk to school at even greater distances from their homes.⁴⁴ The position is similar with regard to education. The same study found that only 11% of parents in Limpopo (and fewer in KwaZulu-Natal and the Eastern Cape) knew that those who are unable to pay school fees can qualify for exemption, because nobody informed them of this provision.

These are among the glaring instances of the failure to deliver fundamental rights, and they represent significant challenges and opportunities to breathe fresh life into the notion of access to justice as the promotion of equality and social justice.

10 STRATEGIES TO ADDRESS ACCESS

10.1 Economic, social and cultural rights and constitutional litigation

Van Bueren⁴⁵ contends that human rights litigation has a potential role in poverty eradication, but that new litigating tools need to be developed which are more appropriate for litigating economic and social rights. These include human rights budgets and indicators; the need to identify the minimum core of government obligations in respect of each right and appropriate standards of review by the court; a judiciary with vision and a profession with compassion. She proposes that, in devising a test case strategy for combating poverty, there is a need to focus on a specific group, for example, children.

This strategy has several advantages, as identified in the piece. Among the disadvantages are: the time, cost and complexity of bringing a case before the Constitutional Court; the fact that litigation invariably takes away the initiative and decision-making out of the hands of the broader community and locates it in the hands of a few brilliant lawyers; and that it can only be effective as a complementary strategy, combined with both popular action in advocating, implementing and monitoring the reform measures, and policy shifts by government with regard to resource allocation, in particular.

Other, critical, shortcomings have been identified in the ability of our constitutional jurisprudence to rise to the challenge of delivering socio-economic rights. In the past five years, the Constitutional Court has pronounced on key provisions in our Bill of Rights, notably in the *Grootboom*⁴⁶ and *Treatment Action Campaign*⁴⁷ decisions. While these judgments represent important steps in realising access to housing and health care, several years after these judgments were handed down, major problems persist.

The delivery of the programme for the prevention of mother-to-child transmission of HIV continues to falter for a host of reasons, primarily

⁴⁴ HSRC 2.

⁴⁵ Van Bueren "Alleviating Poverty Through the Constitutional Court" 1999 *SAJHR* 15 1 52.

⁴⁶ *Government of the Republic of South Africa v Grootboom supra*.

⁴⁷ *Minister of Health v Treatment Action Campaign supra*.

because of a lack of political will on the part of government. In similar vein, the aspiration of a better housing policy promised by the *Grootboom* decision remains unfulfilled. Davis attributes this to the “reluctance of the court to exercise any form of tangible control over the process of implementation”⁴⁸ through, for example, the granting of a structural interdict to enable the court to monitor the efficacy of its orders. He attributes this to a deferential approach on the part of the court to the realities of limited resources and government economic policy.⁴⁹

10 2 Budget analysis

Resources are required for government to meet its obligations. A government’s expression of its human rights obligations is embodied in national and local policies, and government budgets ought to reflect these policies. Those involved in monitoring our democracy should look at government’s revenue, allocations and expenditure as reflected in the budget. While budget analysis will not provide all the answers, it adds a great deal of value to human rights work by: adding technical expertise to the “moral” power of the human rights approach; pinpointing inadequacies in expenditure and the misdirection of funds; assessing how efficiently resources are employed; putting forward concrete proposals together with detailed costing for new programmes; and integrating budget analysis in advocacy strategies.⁵⁰

Reflecting on South Africa’s most recent Budget⁵¹ the question again arises: how far does the budget go towards meeting the needs of the most vulnerable children? While significant progress has been recorded in extending the age at which children may be eligible for the Child Support Grant (CSG); all round increases in the amount of pensions and grants; an increase in the allocations for land restitution, the salaries of educators, and infrastructure for housing and sanitation in poor communities, there remain many gaps. Among these are the failure to extend the CSG to children between the ages of 15 and 18, to fully fund statutory services for children delivered by non-governmental organisations, and to provide clarity as to allocations to different social welfare services for vulnerable children to ensure the realisation of their rights.⁵²

10 3 Role of the legal profession

There remains the important question of how to engage the organised profession in the delivery of legal aid, and its role in the access to justice project. The gradual phasing out of the *judicare* model has caused some commentators to suggest that the profession is being “elbowed out” of legal

⁴⁸ Davis “Socio-economic Rights in South Africa: The Record of the Constitutional Court After Ten Years” 2004 *ESR Review* 5 5 5.

⁴⁹ Davis 2004 *ESR Review* 6.

⁵⁰ International Human Rights Internship Programme: *Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights* 2004 IHRIP 1-3.

⁵¹ Tabled by the Minister of Finance in Parliament on 23 February 2005.

⁵² IDASA “Budget 2005 and Support for Vulnerable Children” 2005 *Budget Brief No 151*.

aid.⁵³ The reality is that judicare is costly, and therefore unsustainable. Much has been made of the quality of legal representation provided by private lawyers versus public defenders. While there is admittedly a level of unevenness in the type of representation provided in the public defender model, the judicare system does not always deliver the best quality service, as the legal aid brief is invariably passed on to the most junior staff. However, a variety of mechanisms have and can be used to involve the profession, such as the placement and funding of candidate attorneys with private firms in far-flung areas with a view to undertaking free legal representation for the indigent, and their participation in a formal, organised and structured *pro bono* scheme.⁵⁴

10 4 Mass community education and action

Neither benevolent policies by government nor favourable judgments by the courts will suffice in realising access if the beneficiaries of those policies and decisions are not involved in the process. This would entail continuing the ongoing programmes by various NGOs and university-based service providers and devising additional ones to create greater awareness and participation in the access to justice initiative. These beneficiaries must additionally be involved in devising strategies and choosing options most appropriate to their immediate situations. Skilled personnel, such as lawyers, students and other professionals must play a supportive role in such a process.

There exists a dialectical relationship between community mobilisation and public interest litigation. While lawyers are not adequately equipped to conduct organising activities, their legal strategies can empower historically disadvantaged groups to claim and enforce their rights through raising consciousness, providing resources and creating alliances.⁵⁵

Such collaboration and alliances need not be restricted to litigation strategies alone. These partners could also explore more popular, community-based methods of resolving legal disputes, with significant gains for cost-saving, speedy resolution and the rehabilitation of damaged relationships.

10 5 International compliance mechanisms

An added strategy to ensure access to social justice, is to utilise international forums to monitor the progress that government is making in discharging its obligations under both national and international law. One example is recourse to the United Nations Committee on the Rights of the Child which

⁵³ See Van As "Legal Aid in South Africa" (fn 8 above).

⁵⁴ Lawyers for Human Rights: "Arise and Act' Towards a Model for South Africa" 2002 *Indicator South Africa* 19 3 54-55. See in particular, the contribution of de Klerk who proposes a model that, inter alia, is integrated; has clear eligibility criteria; renders free services subject to a disbursement policy; offers high quality services in cases appropriate to the expertise of the practitioner; is properly monitored; and gives recognition for services rendered.

⁵⁵ Hershkoff and Hollander 2000 *The Ford Foundation, USA* 106-107.

monitors expenditure on services to children and scrutinises unaffordability arguments.⁵⁶ While such pronouncements may not be enforceable, they do carry moral authority and act as a watchdog on government policies and priorities.

11 RECOMMENDATIONS

An expanded access to justice project which embraces the promotion and protection of socio-economic rights cannot be accomplished by a single agency, and will be dependent on the participation by, and harmonisation of a wide variety of institutions, notably the government, the judiciary, the Legal Aid Board and other service providers, non-governmental organisations and other organs of civil society (such as trade unions, civic bodies, faith-based organisations and consumer groups), as well as the organised legal profession. Above all, it will require the commitment and political will of government to facilitate the realisation of these fundamental rights through the implementation of people-friendly policies and budgets.

11.1 What can government do?

In the first instance, it is the responsibility of government to create an enabling environment to facilitate access to justice. What this means, in effect, is that the policy and legal framework must be in place to ensure that all levels of government and all institutions are geared towards the mission of realising social justice in its fullest content. Secondly, it has to make the necessary budgetary provisions to sustain such initiatives, and to attain the ideal of full coverage of legal assistance to the needy. Thirdly, it must give increased infrastructural and other support to Chapter 9 institutions, in particular the Human Rights Commission, the Commission for Gender Equality, and the Public Protector. These bodies have a singularly critical role to play in advancing the project of equality and social justice, which is the very foundation of access to justice. It also needs to give teeth to other institutions created by legislation, such as the Equality Courts, to become fully functional and accessible to the public. Finally, government needs to confront the problem of poverty head-on through the implementation of various measures, among them, increasing the level of social assistance to the poor and other vulnerable groups.⁵⁷

11.2 The Legal Aid Board

While the Board has made significant strides in extending the legal aid network over the past decade, a further reappraisal needs to take place, in particular, as regards its bias towards criminal case representation. It increasingly needs to adopt a greater focus on socio-economic issues, if it is

⁵⁶ See Coetzee and Streek 2004 *Idasa* xv. In this instance, the UN Committee criticised Egypt and Indonesia for the proportions of their budgets spent on defence, as compared to that spent on children's social expenditure.

⁵⁷ One proposal is the universal basic income grant, advocated by a large majority of civil society, trade union and faith-based organisations.

to truly serve the poor. The public defender model of salaried professionals remains the best available option to achieve the scale of coverage necessary to respond to our compelling needs. Other options can complement this core strategy, involving some of the other role players and service providers identified in this section.

11 3 The legal profession

As a relatively privileged group within our social formation, the profession has much ground to cover in aligning itself with the project of democratic transformation. While much of the debate has centred on issues of race and representivity, the profession needs to determine its approach to the major questions of economic transformation and the eradication of poverty, and re-define its role as an agent of access to justice. In the first instance, it needs to play a supportive and complementary role to the main vehicle for legal aid delivery, namely the Legal Aid Board. This could entail existing initiatives such as accepting the placement of candidate attorneys in areas not served by justice centres. The profession has a key role to play in the adoption and implementation of a comprehensive national *pro bono* scheme which is focused and properly monitored, and which must be devised in a manner that closes the gaps in any basic legal aid scheme. It could also make a significant contribution to public education and awareness about rights.

11 4 Non-governmental organisations

These may be divided broadly between those which offer some type of legal service, and those which do not. Public interest law firms, though few and small in terms of operation, have historically played a critical role, disproportionate to their size.⁵⁸ They can continue to offer valuable services, particularly with regard to impact litigation given the expertise developed over decades, with some degree of rationalisation between different service providers to avoid duplication. Important organisations in this category are the community-based paralegal advice offices. They can be a valuable resource tasked with screening legal problems and providing support on the ground. Their participation in the access to justice strategy will no doubt be enhanced by the recognition and formalisation of these structures.⁵⁹ Other NGOs, which do not provide legal assistance, can be engaged in education and awareness work at community level.

All non-governmental organisations additionally play an important role as watchdogs of public representatives and institutions, and can make valuable input into the planning, policy and legislative process.

11 5 Universities

The contribution of universities can take various forms, including the training of future lawyers to practise law with compassion and a sense of social

⁵⁸ See fn 3 above.

⁵⁹ See Draft Legal Practice Bill 2002, which is still in the process of being legislated.

responsibility; research which is grounded in the realities of our society and responsive to its needs; and the involvement of students and teachers in providing access to legal services, as well as to the transformation to a society free from want.

11 6 Business/private sector

Business is often criticised, not without justification, for not being concerned with social justice issues. However, some companies are beginning to implement social responsibility programmes and, in respect of the HIV/AIDS pandemic, have introduced significant treatment plans for their employees and their families. Such initiatives need to be encouraged, and complemented with a range of support services including increasing benefits, employment opportunities and other measures to address poverty. Business must be persuaded to invest in the attainment of a culture of human rights.

11 7 Articulation

The key to the success of any access project will be the proper articulation of its various components, and effective consultation and co-operation between the different providers of services.

11 8 National co-ordinating structure of legal aid service providers and communities

Clearly the situation demands greater cohesion and co-operation, and this can only be accomplished if there is a mechanism to co-ordinate all the efforts. One option is to establish a national co-ordinating structure, whose mandate, terms of reference and modus operandi will have to be determined in consultation with the constituencies identified here, as well as others.

12 CONCLUSION

There can be no access to justice in the face of poverty, unemployment and inequality. Any strategy to tackle poverty will be contingent on, firstly, government having the political will and deploying the necessary resources to meet these challenges. Secondly it will depend on people having the capacity to action their rights. Access to justice is therefore the key to ensuring that both conditions are realised.