

# ACCESS TO LEGAL AID IN RURAL SOUTH AFRICA: IN SEEKING A COORDINATED APPROACH

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## SUMMARY

A number of approaches to legal aid for the poor and marginalised, with special emphasis on rural communities in South Africa, are discussed. The traditional approaches towards legal education and litigation of such groups are critically analysed in the light of the constitutional protection of socio-economic rights. The lack of a clear constitutional imperative as regards legal aid in civil matters, coupled with reprioritisation of foreign funding to university-based law clinics, NGO's and paralegal advice offices, is severely hampering the provision of legal aid for civil and especially socio-economic matters. An approach centred around the maximal utilisation of existing resources, improved cooperation between the various role players, and community legal education is suggested.

## 1 INTRODUCTION

Legal aid is, by its very nature, concerned with law and poverty and, as such, constitutes an important corollary of "access to justice". With the hindsight of life beyond the first decade of South Africa's democracy and the implementation of its fledgling Constitution,<sup>1</sup> it is intended to discuss the extent to which legal aid has achieved access to justice for rural communities.

The latter category was elected chosen on the basis that rural communities, comprising 47% of a population of 44-million,<sup>2</sup> are regarded as the most vulnerable and least-served group, due to a number of factors, including the following:

- Composition of rural population: According to the 1999 October Household Survey (hereinafter "OHS"), 56% of the African population (constituting the largest racial group of previously disadvantaged people

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<sup>1</sup> Act 108 of 1996.

<sup>2</sup> According to June 2000 census undertaken in South Africa: see SITA Annual Report 2002 [www.sita.co.za/holdings/about\\_SITA/general\\_company\\_info/annual\\_reports](http://www.sita.co.za/holdings/about_SITA/general_company_info/annual_reports).

in the country) lived in rural areas (compared to 11% Coloureds, 8% Whites and 3% Indians);<sup>3</sup>

- Poverty: according to May, rural areas in South Africa contain 72% of the population who are deemed to be poor;<sup>4</sup>
- High rate of illiteracy in South Africa: according to the 1999 OHS, only 22% of African adult males and 20% of African adult females had passed matric (grade 12) and attained higher education levels, whilst 36% of African adult males and 39% of African adult females had not completed primary school;<sup>5</sup>
- An unemployment rate of 28%,<sup>6</sup> resulting in poverty;
- The effect of the HIV/AIDS pandemic on the well-being of rural communities.

## 2 ACCESS TO JUSTICE

A useful point of departure for such a discussion may be to briefly reconsider some of the basic philosophies underpinning “access to justice”. Adaptation of legal aid to new constitutional imperatives during the past decade has left little time for philosophical reflection.

The access to justice movement stemmed from attempts to use the legal system to promote social justice. It arose out of the sober realisation that legal structures and the rule of law were often themselves responsible for maintaining the hegemony between the rich and the poor and the powerful and the weak.<sup>7</sup>

## 3 DIFFERENT APPROACHES TO ACHIEVING ACCESS TO JUSTICE

A number of different approaches have evolved in achieving social justice:

### 3.1 Access through the courts

It has been argued that the poor and marginalised turn to the legal system for recourse rather than to the courts. This is based on the perception that they are intrinsically weak *vis-à-vis* the state.<sup>8</sup>

According to Handler however, the courts have been used as a powerful tool in achieving social justice for the poor and the marginalised:

<sup>3</sup> Statistics South Africa Annual Report 1999/2000.

<sup>4</sup> “Poverty and Inequality in South Africa” May 1998 [www.polity.org.za/html/reports/poverty](http://www.polity.org.za/html/reports/poverty). According to this study there is a strong correlation between the level of education and poverty, with the poverty rate of people with no education being 64%, compared to 54% of those with a primary education and 24% with secondary education.

<sup>5</sup> *Ibid.*

<sup>6</sup> March 2004 statistics issued by Stats SA [www.statssa.gov.za](http://www.statssa.gov.za).

<sup>7</sup> See Budlender “Lawyers and Poverty: Beyond ‘Access to Justice’” (Centre for Intergroup Studies, Rondebosch) 1988 *Law and Justice in South Africa* 1.

<sup>8</sup> Steytler “Access to Justice: The Role of Legal Aid” (Centre for Intergroup Studies, Rondebosch) 1988 *Law and Justice in South Africa* 25 26.

"The powerful rarely need the courts; they can exert their influence in politics, administration, and the private market ... They [the social reform groups and law reformists] are seeking to curb the most powerful economic interests and to obtain social justice for the despised, the discriminated individuals and groups ..."

In India, Judge Bhagwati's judicial activism provided the main impetus for a jurisprudential shift of the Indian judiciary from a bias in favour of capitalist markets and landed classes, to a public interest arena and in the transformation of Indian courts.<sup>10</sup>

Whilst it may not have followed the same judicial activism displayed by Judge Bhagwati, the South African Constitutional Court has nevertheless followed an approach towards socio-economic rights that gives tangible effect to such rights,<sup>11</sup> but without giving judgment on the prioritisation thereof.<sup>12</sup>

### 3 2 Access through the law

During the post-1994 era, the focus in South Africa shifted from the use of the law as a tool of suppression, domination and marginalisation, to a catalyst for achieving social and economic development and equality for mainly marginalised and disadvantaged groups.

The question is whether, and to what extent, the Bill of Rights and the equality clause,<sup>13</sup> specifically, have changed such perception. Davis argues from an instrumentalist view of law that:

"Law has no intrinsic value of its own ... It is essentially because the law is a tool of power, that the cry for human rights to be written into a legal system is so futile."<sup>14</sup>

The conclusion thus reached by Davis is that:

"[T]he purpose of the entrenchment of human rights, far from being that of reducing conflict, is to contain and combine that conflict within acceptable boundaries."<sup>15</sup>

In post-1994 South Africa the law indeed became a powerful tool of the government to implement a policy of social and economic development and transformation. In contrast to the pre-1994 era, the focus has shifted to the previously marginalised and disadvantaged groups. The instrumentalist

<sup>9</sup> Handler *Social Movements and the Legal System* (1978) 232.

<sup>10</sup> See Davis, Chaskalson and De Waal "Democracy and Constitutionalism: The Role of Constitutional Interpretation" in Van Wyk *et al* (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 45.

<sup>11</sup> *RSA v Grootboom* 2000 11 BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC); and *Khosa/Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC).

<sup>12</sup> See Davis "Socio-Economic Rights in South Africa: The Record of the Constitutional Court After Ten Years" December 2004 5(5) *ESR Review* 4 *et seq.*

<sup>13</sup> S 9 of Act 108 of 1996.

<sup>14</sup> Davis "Human Rights: A Re-Examination" 1997 *SALJ* 94 101-102; see also Davis "Legality & Struggle: Towards a Non-Instrumentalist View of Law" (Centre for Intergroup Studies, Rondebosch) 1988 *Law and Justice in South Africa* 103 *et seq.*

<sup>15</sup> *Ibid.*

view, which regards “the law as a mere tool to be used by the dominant social actors to continue to promote their objectives”,<sup>16</sup> and which downgrades human rights to a mere conflict resolution mechanism, hardly seems to fit South Africa in 2005. Such a view is negated by a number of factors:

- The most powerful political block, the tripartite alliance (comprising the African National Congress (ANC) as ruling party, the Congress of South African Trade Unions (COSATU), as biggest trade union, and the South African Communist Party (SACP)), accommodates robust ideological debate and even public acrimony between its divergent interest groups.<sup>17</sup>
- One of the rare positives to emerge from the apartheid era is the growth of a strong, vigorous and critical civil society. A number of non-governmental organisations have taken up the cudgels on behalf of special interest groups against those wielding political and economic power. These include the Landless People Movement (struggles concerning land), the Social Movement Indaba (privatisation of state-owned assets, employment rights, the rights of tenants and the redlining by banks) and the Treatment Action Campaign (TAC) (rights of people with HIV/AIDS).<sup>18</sup>
- Section 9(1) of the South African Constitution provides for “equality before the law and the right to equal protection and benefit of the law”, aimed at ameliorating the conditions of the disadvantaged. This right provides for judicial interpretation and examination of both formal and substantive equality of laws and government programmes aimed at ameliorating the conditions of those previously and presently disadvantaged.<sup>19</sup>

These factors, however, do not *per se* guarantee the legitimacy of the legal system in the eyes of the country’s citizens. The legal system will have to develop a tradition of ensuring fairness, justice, equity and the protection of human rights.<sup>20</sup>

### 3 3 Access through legal aid representation

Legal aid is in essence the gratuitous rendering of legal advice and other legal services to the poor and the powerless, forming part of social or welfare rights.<sup>21</sup> One of the main objectives of legal aid must be to remove obstacles to equal access to legal protection. Before discussing the different types of legal aid representation, it may be useful to first consider how far

<sup>16</sup> See Davis 1988 *Law and Justice in South Africa* 103 *et seq.*

<sup>17</sup> More recently publicised sources of conflict include the government’s privatisation policies of state or parastatal organisations (*eg* the national telecommunications provider, Telkom) and dissent regarding the approaches to be adopted in addressing the attacks on democracy in Zimbabwe.

<sup>18</sup> See *Sunday Times* 1 September 2002.

<sup>19</sup> See Davis “Equality and Equal Protection” in Van Wyk *et al* (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 207.

<sup>20</sup> Mpedi *et al* “Welfare and Legal Aid” in Olivier *et al* (eds) *Social Security: A Legal Analysis* (2003) 211.

<sup>21</sup> See Steytler 1988 *Law and Justice in South Africa* 25; and Budlender 1988 *Law and Justice in South Africa* 18.

legal aid practice and the profession are able to serve the interests of the poor and marginalised, a sizeable group falling outside the profession's traditional clientele base from which it derives compensation for services rendered.

### 3 3 1 *Traditional legal aid practice and service to the poor*

In traditional legal practice the emphasis is on dealing with each single problem on an individualistic basis, with little regard to the interests of the community at large. Budlender points out that "it is naïve in the extreme to place legal representation at the centre point of any strategy for an attack on poverty".<sup>22</sup>

Judge Bhagwati forcefully addresses the failure of traditional legal aid in addressing the roots of and solutions to poverty:

[Traditional legal aid] "suffers from the vice of passive acceptance of the fact of poverty and looks upon the poor as simply traditional clients without money, regards law as a given dictum which the lawyer has to accept and work upon, treats the poor as beneficiaries ... rather than participants ... And is confined in its operation to problems of corrective justice and is blind to problems of distributive justice."<sup>23</sup>

One of the more evil practices presently faced by the poor in South Africa is the myriad of unscrupulous moneylenders. In masterful acts of manipulation, advantage is taken of bereavements, unemployment, spurious "cultural beliefs" and calamities. In rural areas the situation is exacerbated by a combination of lack of legal services, legal and general illiteracy and a prevailing inherent sense of decency and faith in humanity. For a lawyer to successfully obtain rescission of judgment against an unscrupulous moneylender is no doubt beneficial to the individual client. The individual client's success, however, remains but a hollow victory for the community unless it is accompanied by forms of intervention which address the problem universally, be it through community education, advocacy or lobbying of decision makers and legislators.

By concentrating all efforts and resources on individual client cases, the class interests of communities are neglected.<sup>24</sup>

Of further concern remains the manner in which legal disputes are resolved. The welcome focus by the Constitutional Court on socio-economic issues is often obfuscated by a system in which form and procedure tend to dominate the substance.<sup>25</sup> This applies especially to legal practice in the lower courts. It is here where the majority of cases are heard, pitting the worker against the employee company, the tenant against the landlord or the debtor against the hire purchase seller or micro-financier. It is a system through which the imbalance in opportunities for legal redress between the

<sup>22</sup> See Budlender 1988 *Law and Justice in South Africa* 4.

<sup>23</sup> Bhagwati 1982, unpublished address to the International Bar Association, New Dehli 8; and see also Budlender 1988 *Law and Justice in South Africa*.

<sup>24</sup> See Steytler 1988 *Law and Justice in South Africa* 26 *et seq.*

<sup>25</sup> See Budlender 1988 *Law and Justice in South Africa* 18.

poor, illiterate and defenceless and those with resources and means, the powerful companies and finance houses is accentuated.

In South Africa both criminal and civil cases are conducted according to an adversarial process, in which the court's decision is based on the value of evidence presented.<sup>26</sup> The skills and comprehensive knowledge required regarding to procedural and evidentiary rules and litigation techniques, fall outside the realm of both the poor and the illiterate. A further impediment to the vast majority of litigants in this country is that proceedings are conducted in a language other than their mother tongue.

One of the greater challenges thus facing practitioners and especially those engaged in legal aid, is to change the way in which one interacts with clients, to be less controlling and more inclusive in legal decision-making, whilst ensuring that clients have a greater understanding of processes and rules.

### *3.3.2 Does legal training empower professionals to serve the poor?*

The standards, contents and ideological nuances of academic and practical legal training necessarily impact on the quality of legal representation.

Budlender<sup>27</sup> points out that the tendency of lawyers to take control of situations, whilst possibly solving a client's immediate problem, tends to further reinforce the client's position of powerlessness and dependence. He contends that this tendency is ingrained in the whole ethic of professional legal training and that a greater effort should be made to empower the "poor and powerless to act cohesively and effectively on their own behalf".<sup>28</sup>

Traditional legal education in South Africa focused primarily on what the law is and how to apply it, rather than how to challenge unjust laws<sup>29</sup> or how to use the law as a tool for achieving social justice. Whilst public law has undoubtedly achieved greater prominence in legal training following South Africa's post-1994 constitutional dispensation, lawyers largely remain ill-equipped in areas of law which directly affect the poor and powerless.<sup>30</sup> McQuoid-Mason points out that "most law courses teach students how to operate in a First World commercial legal environment rather than a Third World poverty law situation".<sup>31</sup>

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<sup>26</sup> Suttner "The 'Loading' of Procedures in the South African Judicial Process" (Centre for Intergroup Studies, Rondebosch) 1988 *Law and Justice in South Africa* 117 121 *et seq.*

<sup>27</sup> 1988 *Law and Justice in South Africa* 22.

<sup>28</sup> *Ibid.*

<sup>29</sup> Bengtsson "Justice for All? Law Clinics in South Africa, and in Sweden?" June 2003 material for First All-Africa Clinical Legal Education Colloquium, Durban 9.

<sup>30</sup> See Suttner 1988 *Law and Justice in South Africa* 126.

<sup>31</sup> McQuoid-Mason "Teaching Social Justice to Law Students Through Community Service: The South African Experience" selected proceedings from the "Capacity Building of Law Schools of Historically Black Universities Challenges and Strategies for the Next Millennium" held at Fort Hare University August 1998 *Conference Report Africa Institute and Fort Hare University* 91.

Through clinical legal education the foundation is laid for professional commitment to the ethics and values of service to the public.<sup>32</sup> In South Africa clinical legal education is offered at law clinics established at most of the 21 universities. The Association of University Legal Aid Institutions (AULAI), formed in 1997, has been instrumental in facilitating funding for a number of programmes. One of the externally funded projects is the provision of back-up legal services to paralegal advice offices. This project has enabled many law clinics to extend their services to communities, especially in rural areas, to which access to legal services had previously been denied.

From an experiential point of view, students who accompany clinic professionals to consult clients at paralegal advice offices are exposed to legal practice far removed from the marble-halled, wooden-panelled and air-conditioned offices associated with law offices in cities. The Law Clinic of the University of the North West (Mafikeng campus) has been providing back-up legal services to a paralegal advice office in the settlement of Hartebeesfontein (near Brits). A non-electrified, one-roomed and barely furnished zinc structure houses three volunteer paralegals. Students interview clients perched on rocks under the shade of acacia trees. According to comments by a number of these students,<sup>33</sup> such experiences had opened their eyes to a completely different dimension of law, resulting in a paradigm-shift regarding the role of legal practitioners in South Africa. Some of them have since chosen careers in public interest law at legal aid clinics, justice centres or human rights organisations. The exposure of students to such programmes necessarily plays an important role in conscientising them to the plight of the disadvantaged and in inculcating notions of access to justice, fairness and equity.

From a pedagogical perspective, clinical law programmes at a number of clinics provide training in substantive law subjects, many of which are not covered in the formal syllabus of the faculty, but which are relevant to the focus areas of the clinic.<sup>34</sup> Students are also exposed to the difficulties encountered in applying legal rules to socio-economic problems. They gain first-hand experience in the application of non-legal intervention mechanisms, such as mediation, advocacy and lobbying, which are often more successful than the law in attaining social justice.<sup>35</sup>

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<sup>32</sup> McQuoid-Mason "Clinical Legal Education: A General Overview" June 2003 material for First All-Africa Clinical Legal Education Colloquium, Durban 1.

<sup>33</sup> Made during informal discussions with the writer.

<sup>34</sup> McQuoid-Mason "Teaching Social Justice to Law Students Through Community Service: The South African Experience" 92.

<sup>35</sup> *Ibid.*

### 3 4 Different types of legal aid

Legal aid has developed into distinct models, each with its own ideological base:

#### 3 4 1 Referral to private lawyers/judicare

Judicare originates from charitable and voluntary work done by private lawyers for the poor. During the 20 years following its establishment in 1971,<sup>36</sup> the Legal Aid Board referred most of the legal aid cases to private attorneys, who were compensated at a reduced fee. Initially the majority of cases were civil matters.<sup>37</sup> By the mid-1990's the number of successful applications for legal aid in criminal matters had however grown considerably, mainly due to the *S v Khanyile*<sup>38</sup> case and the right to legal representation in the then Interim Constitution.<sup>39</sup> This form of legal aid is based on the assumption that "access to justice" is exclusively achieved through "access to courts", which, in turn, is premised on the ideals that laws and the legal order are just and equitable.<sup>40</sup> It is also a relatively costly form of providing legal assistance. During the 1995-96 period the average cost per finalised judicare case amounted to R976<sup>41</sup> and rose to R2 152 in the 2003/2004 period,<sup>42</sup> virtually double the costs of provision of legal aid by salaried staff.<sup>43</sup> With the average costs per finalised judicare case exceeding that of such "in-house" services by 57%,<sup>44</sup> the Department of Justice accordingly reduced its budget allocation for judicare matters to 18% against, 56% for cases handled by justice centres.<sup>45</sup>

<sup>36</sup> In terms of the Legal Aid Act 22 of 1969.

<sup>37</sup> In 1983 the ratio between civil and criminal judicare matters was 87:11%. See Steytler 1988 *Law and Justice in South Africa* 30.

<sup>38</sup> 1988 3 SA 795 (N). In terms of the test laid down in the *S v Khanyile* case, an accused is entitled to legal representation where, in cases of a complex nature with serious consequences, it appears that he is not able to properly to defend himself, due to the level of his intellectual capacity and educational level. The *Khanyile* test was largely nullified by the Appellate Division in *S v Rudman*; *S v Mthwana* 1992 1 SA 343 (A), but followed by the Constitutional Court in *S v Vermaas*; *S v Du Plessis* 1995 3 SA 292 (CC) 299D in its interpretation of the requirement of "substantial injustice" in terms of s 35(3)(g) of the Constitution Act 108 of 1996.

<sup>39</sup> McQuoid-Mason "Legal Representation in Courts" 1996 *South African Human Rights Yearbook* 177. See also s 25(3)(e) of the Interim Constitution Act 200 of 1993 and the corresponding section in the Final Constitution, Act 108 of 1996 (35(3)(f) and (g)).

<sup>40</sup> See Steytler 1988 *Law and Justice in South Africa* 26 *et seq.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Legal Aid Board Annual Report 2003/2004 20.

<sup>43</sup> Address by Gilwald, Deputy Minister of Justice & Constitutional Development, to the AGM of the Cape Law Society, Fish River Sun, 24 October 1999. During the period 2003/2004, the average costs of finalising a matter in justice centres amounted to R1 090 – see Legal Aid Board Annual Report 2003/2004.

<sup>44</sup> Legal Aid Board Annual Report 2003/2004 2.

<sup>45</sup> Budget speech in National Council of Provinces by De Lange, Deputy Minister of Justice and Constitutional Affairs, on 29 June 2004.



### 3 4 2 *Public defenders/justice centres*

During the past three years the Legal Aid Board has established a commendable number of 58 justice centres, 13 high court units and 27 satellite offices, employing 1 036 legal staff consisting of qualified attorneys, advocates and candidate attorneys.<sup>46</sup> Paralegals and administrative staff support the professional staff.

### 3 4 3 *University-based law clinics*<sup>47</sup>

Law clinics are legal offices attached to university law faculties, in which, as part of their practical legal training, students provide free legal services to indigent members of the community, under the supervision of qualified attorneys. During the struggle against apartheid, a number of law clinics were engaged in civil rights cases involving detention without trial, pass laws, forced removals, police brutality and other human rights abuses. There are presently 19 operative university-based law clinics in South Africa.<sup>48</sup> The majority are engaged in general practice. A recent trend has seen the establishment of units specialising in areas mainly regarding poverty law or with a human rights focus.<sup>49</sup>

The amendments to the South African Attorneys Act in 1993,<sup>50</sup> enabled candidate attorneys to undertake community service at law clinics accredited by the provincial law societies. This has enabled law clinics to play a meaningful role in providing training and employment opportunities for black law graduates, especially.<sup>51</sup>

### 3 4 4 *Paralegals*

The majority of paralegal advice offices in South Africa are located within poor communities, many of them in rural areas with little access to legal services. They primarily render advice regarding problems relating to social welfare and basic employment matters and also educate their communities concerning their basic rights. A number of law clinics provide back-up legal services to paralegal advice offices.<sup>52</sup>

<sup>46</sup> Legal Aid Board Annual Report 2003/2004 1.

<sup>47</sup> See also par 4 below.

<sup>48</sup> July 2005.

<sup>49</sup> *Eg*, the Durban campus of the University of KwaZulu/Natal has specialised courses focusing on the rights of women and children, administrative justice and land restitution; a family law unit has been established at Rhodes University, Grahamstown; farm tenant protection units have been established at various clinics, including those at Rhodes, Potchefstroom and Mafikeng; and the University of Pretoria law clinic runs a debt relief programme.

<sup>50</sup> South African Attorneys Act 1979, as amended by s 2 of the South African Attorneys (Amendment) Act of 1993.

<sup>51</sup> Bengtsson D *op cit* 9.

<sup>52</sup> See Bengtsson June 2003 material for First All-Africa Clinical Legal Education Colloquium, Durban 12 *et seq*; McQuoid-Mason "Legal Aid and Development: Lessons from South Africa and Some Thoughts for Nigeria" June 2003 Materials for First All-Africa Clinical Legal Education Colloquium 220.

## 4 LEGAL AID: WHICH TYPE OF CASES SHOULD BE COVERED? LEGISLATIVE AND CONSTITUTIONAL IMPERATIVES

### (a) Legal aid representation in criminal matters

Apart from a statutory obligation to provide legal aid to indigent persons,<sup>53</sup> the national legal aid scheme also has a duty in terms of section 35 of the Constitution to provide legal aid in criminal matters. As an important due process right and component of the right to a fair trial, the right to representation in criminal matters is recognised in the following situations:

- (i) Persons who have been detained, which includes sentenced prisoners,<sup>54</sup>
- (ii) Accused persons in a criminal trial;<sup>55</sup>
- (iii) Section 35(1), which deals with the rights of an arrested person, does not specifically provide for a right to legal representation. It has however been argued that the term “fair trial” in section 35(3) guarantees due process rights, which include the right to legal representation.<sup>56</sup>

In terms of section 35 detained and accused persons are entitled to a legal practitioner of their own choice.<sup>57</sup> However, in stipulating further that where “substantial injustice would otherwise result” such person would be entitled to legal representation at the expense of the state, the right to legal representation becomes more than an entitlement.<sup>58</sup> It has been suggested that the test for determining whether or not “substantial injustices” would result, should be modelled along the test laid down in *S v Davids; S v Dladla*.<sup>59</sup> legal representation at state expense should be granted if (i) the case facing the indigent accused is serious and complex of nature and; (ii) the accused lacks the intellectual capacity or educational level to properly defend himself or herself. In *The Legal Aid Board v Msila*,<sup>60</sup> the court held that the Legal Aid Board’s means test cannot apply where the right to legal representation in terms of section 25(3)(e) (which corresponds with s 35(2)(c)) is at issue.

### (b) Legal aid representation in administrative matters

The right to legal representation does not form part of the *audi alteram partem* rule and can thus not be claimed unless specifically conferred by

<sup>53</sup> S 3 of the Legal Aid Act 22 of 1969.

<sup>54</sup> S 35(2).

<sup>55</sup> S 35(3)(f) and (g).

<sup>56</sup> Devenish *A Commentary on the South African Constitution* (1998) 85 *et seq*; Milton *et al* “Procedural Rights” in Van Wyk *et al* (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 415.

<sup>57</sup> S 35(2)(c) and (3)(g).

<sup>58</sup> Which was the case in s 73 of the Criminal Procedure Act 51 of 1977.

<sup>59</sup> 1989 4 SA 172 (N) 194; and see also Milton *et al* 415.

<sup>60</sup> 1997 2 BCLR 229 (E); See also Devenish 85.

statute.<sup>61</sup> In terms of section 3(3)(c) of the Promotion of Administrative Justice Act<sup>62</sup> a party in an administrative hearing may be afforded the right to legal representation if, in the discretion of the administrator, the case is of a serious or complex nature.<sup>63</sup>

### (c) Legal representation in civil matters

Unlike in criminal matters, the Constitution does not expressly provide for a right to legal representation in civil matters. In terms of section 34<sup>64</sup> the rights of civil litigants are limited to minimum standards of procedural fairness.<sup>65</sup> However, the constitutional guarantee of equality in judicial proceedings<sup>66</sup> is arguably meaningless if indigent persons are to be denied the right to legal representation in civil matters. This is even more so in view of the adversarial nature of civil litigation and, within the South African context, the great divide between the economic classes and the incommensurable position between a poor and illiterate litigant, on the one hand, and a corporate opponent, on the other.<sup>67</sup>

The drafters of the Constitution seem to have followed international human rights trends favouring the "indivisibility" and "interdependence" of political/civil (first generation rights) and socio-economic/cultural rights (second generation rights)<sup>68</sup> and in including "positive" economic and social guarantees.<sup>69</sup> The question is whether socio-economic rights are justiciable? Does the Constitution legally oblige the government to adopt an activist and interventionist approach in facilitating equality in the provision of housing, health services, education and employment? These questions were in principle answered in the affirmative by the Constitutional Court in the *Certification of the Constitution* judgment.<sup>70</sup> The court went further, indicating that courts may make judicial decisions, even to the extent that they may have budgetary implications, mentioning the provision of legal aid as an example.

<sup>61</sup> See Devenish *et al Administrative Law and Justice in South Africa* (2001) 285.

<sup>62</sup> Act 3 of 2000.

<sup>63</sup> See also *Dladla v Administrator* 1995 3 SA 769 (N); and *Libala v Jones and the State* 1988 1 SA 600 (C).

<sup>64</sup> Act 108 of 1966.

<sup>65</sup> S 34 provides that "everyone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

<sup>66</sup> S 9(1).

<sup>67</sup> See Corder "Administrative Justice" in Van Wyk *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 420.

<sup>68</sup> In *Airey v Ireland* (1979) 2 EHRR 305 the court interpreted the provisions (of article 6 of the European Convention on Human Rights) that "in the determination of civil rights ... everyone is entitled to a fair and public hearing", as sometimes compelling the state to provide legal representation in civil trials, where "such assistance proves indispensable for an effective access to court". See also Haysom "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" 1992 8(4) SAJHR 451 *et seq*; and Mpedi *et al* 213.

<sup>69</sup> See the discussions by Davis "The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles" 1992 8(4) SAJHR 475 *et seq*; Michelman "The Constitution Rights and Reason: A Tribute to Etienne Mureinik" 1998 14(4) SAJHR 499 *et seq*; and Sachs *Advancing Human Rights in South Africa* (1992) 111.

<sup>70</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) 800.

The *RSA v Grootboom*<sup>71</sup> case is illustrative of the extent to which courts are prepared to intervene. The Constitutional Court found that the state's housing policy and service delivery programmes came short with regard to the right to housing of the most vulnerable groups. The order had direct financial implications for the state. Mpedi *et al*<sup>72</sup> point out the significance of such an approach by the court to the provision of legal aid: "depriving those who are particularly vulnerable and excluded from equal treatment and access to justice could certainly have constitutional ramifications".

A question frequently asked in community workshops, imbizo's and other community fora, is why the Constitution is more generous in providing legal aid to "criminals" than to "law-abiding" citizens who wish to enforce socio-economic rights or have unwittingly run foul of complicated legal agreements. The rational response that "due process rights" enjoy an elevated status as a corollary of the first-generation right to freedom, may not necessarily make sense to the poor person living in a crime-ridden rural hinterland, with little access to information and even less recourse to enforcing her rights. Such perceptions are as incontrovertibly valid to the ordinary citizen as are the interpretation of constitutional principles to the practitioner or academic. It is submitted that such perceptions should play an important role when in contemplating legal aid strategies.

## 5 FUNDING AND THE ALLOCATION OF RESOURCES FOR THE PROVISION OF LEGAL AID

The obligation on the state to provide legal aid services does not, however, constitute an absolute right. Apart from limitations imposed by the Constitution,<sup>73</sup> reality dictates that South Africa is a developing country with limited resources, which are fully utilised towards obliterating past gross inequalities as regards the provision of basic needs and social and health services.

The advent of the Constitution and the entrenchment of the right to legal representation in criminal cases, have seen a considerable shift in legal aid state funding, via its agency, the Legal Aid Board, from civil towards criminal litigation. During the 2003/2004-year, criminal cases constituted 88% of all cases handled by justice centres.<sup>74</sup> The Board's civil litigation is mainly restricted to cases involving the rights of women and children and of other marginalised groups.

Post-1994 South Africa has seen a considerable shift in the legal aid landscape, with the state assuming its rightful place as main provider. The prioritisation by the state of funding criminal matters necessarily places the focus on legal aid for civil litigation and especially on assistance in the enforcement of socio-economic rights. Between them, the 58 justice centres and 19 law clinics, as the two main providers of legal aid, handle

<sup>71</sup> *Supra*; and see also par 4(c) above for a brief discussion on the *RSA v Grootboom* case.

<sup>72</sup> 213.

<sup>73</sup> S 36.

<sup>74</sup> Legal Aid Board Annual Report 2003/2004 20.

approximately 40 000 civil cases annually.<sup>75</sup> With most justice centres and law clinics situated in urban areas, the number of potential indigent civil litigants excluded from legal aid would be significant.<sup>76</sup>

Financial and institutional constraints are, however, impeding the capacity of law clinics from substantially increasing their present output of civil litigation. At present the funding of most law clinics in South Africa is received from the following sources:

- Grants from AULAI Trust, sourced from a large endowment by the Ford Foundation and the ICJ (Sweden) covering the salaries of additional professional staff, administrative expenses as well as the costs for providing back up legal services to paralegal advice offices. The funding agreements pertaining to practical legal education are due to expire at the end of 2005;
- Grants from the Attorneys Fidelity Fund of the Law Society of South Africa are utilised towards salaries of directors or other clinic expenses. The continuation of such grants is, however, shrouded in uncertainty due to increasing other commitments of the Fund;
- Universities are increasingly assuming financial responsibility for some of the salaries of clinic staff;
- In many instances Universities also provide assistance in the form of free or highly subsidised office accommodation, furniture, copying, telephone and fax facilities as well student assistants.

Generally, most law schools regard the core business of law clinics as consisting of practical legal training, rather than community services. Coupled with a pattern of decreasing state subsidies to tertiary institutions during the past few years, the prospects for increased university funding to clinics remain bleak.

The majority of the non-governmental legal aid and paralegal sectors have been financially dependent on foreign grants. The impact of international donor agencies in empowering, building organisational capacity and in facilitating legal aid to marginalised groups and rural communities is immeasurable. However, donor agencies have other pressing demands and priorities and inevitably, international funding is increasingly diverted to other global regions.

A sober and non-partisan approach is called for in overcoming the looming crisis facing the non-governmental legal aid sector and, more importantly, its beneficiaries, including rural communities serviced by paralegals and law clinics, especially with regard to civil litigation and legal advice on socio-economic issues. Inevitably, solutions to the pending funding crisis will have to be found within South Africa.

During the period immediately prior to and beyond 1994, a number of consultative meetings and conferences were held on the transformation of

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<sup>75</sup> During the 2003/2004 year Justice Centres accepted 27 280 new civil matters (see Annual Report *supra*), whilst during 2004, law clinics accepted a total of about 13 000 cases (according to reports submitted to the AULAI Trust).

<sup>76</sup> The Annual Report of the Department of Justice is silent on the number of civil cases heard annually in the district courts.

the justice system and access to justice. Such events were marked by an incredible synergy between the various role players and an acute sense of urgency, goodwill and commitment by all to find communal solutions to the transformation of the justice system and to improve access to justice. It may be unrealistic to sustain such levels of interaction over a number of years. However, in considering the present situation (2005), one has to ask oneself whether legal aid in this country is not rapidly regressing towards its former ways, characterised by lack of cohesiveness and a piecemeal approach by the individual role-players?

The laudable initiatives by the Legal Aid Board in both drastically reducing costs per case and increasing the impact of state legal aid have been mentioned. This begs the question of what role, if any, the non-governmental legal aid sector should play within the new environment? One option would be for the state to assume total control over all activities currently undertaken by law clinics, legal aid organisations and paralegal advice offices. Such a drastic step would, it is argued, be untenable for the following reasons:

- (a) The role played by civics and NGO's, in defending the rights of the poor and marginalised during the struggle, may, in a post-democracy, have changed both in focus and target. The main protagonists at least now share identical goals, namely the realisation of the values underpinning the Constitution.<sup>77</sup> The struggle for the meaningful attainment of human dignity, equality and freedom continues, however. Historically, civic organisations, non-governmental legal aid organisations, paralegals and law clinics, rather than the state, were the flag-bearers for human rights. In the face of great opposition from the former government, they sustained public debate on how to achieve equality through legal aid;
- (b) Such organisations conceptualised and implemented innovative projects aimed at conscientising communities of their rights,<sup>78</sup> maximising the impact of litigation,<sup>79</sup> offering specialised litigation services to victims of apartheid<sup>80</sup> and extending legal assistance to rural communities;
- (c) The expertise and skills of non-governmental legal aid organisations and their "grassroots" linkages with communities, constitute irreplaceable resources, which the justice system can ill afford to lose;
- (d) The existence of a strong, vibrant and independent legal aid sector, which is fearless in protecting the rights of the poor and marginalised, should remain an important cornerstone of democracy;
- (e) Law clinics handle a wider variety of civil cases than justice centres. They also enjoy the advantage of having access to communities in rural areas through their cooperation agreements with paralegals; and

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<sup>77</sup> S 1.

<sup>78</sup> Through community educational programmes such as, for instance, "Street Law" and "Democracy for All".

<sup>79</sup> Test cases instituted by the Legal Resource Centres.

<sup>80</sup> Especially organisations like Lawyers for Human Rights, law clinics, *etc.*

- (f) Law clinics play an important role in providing basic training to graduates and candidate attorneys, many of whom are at a later stage recruited by justice centres.

## **6 THE DICHOTOMY FACED BY LAW CLINICS: PRACTICAL LEGAL EDUCATION OR LEGAL ASSISTANCE TO INDIGENT COMMUNITIES**

The standard and contents of practical legal training programmes at law clinics attached to South African universities has varied greatly.<sup>81</sup> Training at a number of universities was detrimentally affected by a combination of factors, including under-resourcing, lack of experience, insecurity of tenure, lack of growth and career opportunities and non-competitive salaries.<sup>82</sup> According to an invaluable survey conducted by Maisels in 1999/2000 on law clinics, only one-third of the directors of law clinics in South Africa had been employed in excess of five years at the clinic.<sup>83</sup>

The efforts by AULAI during the past decade to facilitate greater equity as regards resourcing and empowerment of professional staff at law clinics are noteworthy. A trust was created and funding procured.<sup>84</sup> In a series of workshops organised by AULAI, clinicians were empowered in grant proposal writing and project management, whilst they also produced standard law clinic manuals and designed comprehensive clinical law curricula and assessment guides. The product of such efforts is likely to impact positively on the standing of law clinics within their faculties and on the standard of training.

Whilst the dual function as training institution and provider of legal aid has enabled law clinics to realise two important objectives of access to justice, it has also placed clinics in a constant state of tension. Clinics have to do justice to teaching and training, regarded as core function by their faculties. In providing a legal service, clinics are, on the other hand, operated along similar lines as firms of attorneys, with the focus on client satisfaction and effective file and case management. The provision of legal aid to the indigent constitutes a further dimension, with the additional focus on impact and efficiency, fundraising and project management.

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<sup>81</sup> McQuoid-Mason "Teaching Social Justice to Law Students Through Community Service: The South African Experience" 91.

<sup>82</sup> See Maisel "The Position of Clinicians in South African Law Schools" presented at the South African Teachers' Conference, Durban, July 2000. According to Herring, clinical faculty members in the United States have been experiencing similar problems of lack of tenure. This is attributed by the author to (a) the perception that clinical educators do not fall in the traditional mould of "stand-up" teachers; and (b) which prevent clinical education from fitting "easily" in the "traditional tenure-track" system (see Herring "Clinical Legal Education: Energy and Transformation" <http://law.utolcdo.edu/lawreview/Herring.html>).

<sup>83</sup> Maisel, South African Teachers' Conference, Durban, July 2000 4.

<sup>84</sup> Amongst the main funders are the Ford Foundation, ICJ (Sweden) and the Attorneys Fidelity Fund of the Law Society.

## 7 THE LACK OF KNOWLEDGE OF RURAL COMMUNITIES OF THEIR RIGHTS AND OF AVAILABLE MECHANISMS TO ACCESS SUCH RIGHTS

The Bill of Rights, which enshrines the rights of all people, is regarded as the cornerstone of democracy.<sup>85</sup> The state is obliged to “respect, protect, promote and fulfil” these rights.<sup>86</sup> The latter provision is aimed at the process of transforming South African society towards achieving equality, human dignity, non-racialism and non-sexism<sup>87</sup> and imposes a positive duty on the state.<sup>88</sup> Likewise, section 9(1) provides for equality before the law, “the right to equal protection and benefit of the law”. The considerable efforts by legal aid providers in protecting rights have already been discussed and the question has to be asked: are similar efforts in progress in inculcating respect and empowering people to fulfil their rights? Is equality before the law attainable whilst illiteracy, ignorance and inequalities in education continue to divide South African society? Respect and fulfilment of rights necessarily imply some degree of knowledge of the nature and import of such rights and the means of access and enforcement on the part of the holders of such rights. Continuous public pronouncements on the desirability for community democracy and legal education have unfortunately, due to lack of action and commitment, turned into a mantraic tedium.

The Street Law Programme was introduced to South African universities during the mid-1980's. “Street Law” or “the law for the person on the street” is a preventative law programme designed to train students in making people aware of their human and legal rights and how to enforce them.<sup>89</sup> During the 1990's Street Law programmes were offered in one form or another at most of the South African law faculties. Workshops have been conducted, benefiting hundreds of thousands of learners, educators, government officials, health workers, juvenile prisoners and rural community groups. Street Law (South Africa) has been involved in research projects<sup>90</sup> and has assisted in the drafting of various community education manuals.<sup>91</sup> Through various nation-wide programmes, including Youth Parliament, voter and democracy education, and gender sensitivity, Street Law has indeed played a prominent role in inculcating tolerance and acceptance of diversity and thus in advancing democracy in South Africa.

During the past few years staff reductions at the National Street Law office<sup>92</sup> have resulted in a drop in university-based Street Law programmes

<sup>85</sup> S 7(1) of the Constitution Act 108 of 1996.

<sup>86</sup> S 7(2).

<sup>87</sup> Constituting part of the Founding Provisions in terms of s 1.

<sup>88</sup> Devenish 45.

<sup>89</sup> McQuoid-Mason “Teaching Social Justice to Law Students Through Community Service: The South African Experience” 94.

<sup>90</sup> *Eg*, on the conditions of inmates at correctional facilities (in partnership with the Human Rights Commission (HRC)); and on discrimination (in partnership with the HRC and the Department of Justice).

<sup>91</sup> McQuoid-Mason *et al* “Democracy For All” (1994).

<sup>92</sup> Based at the Centre for Socio-Legal Studies, University of Kwa-Zulu/Natal (Durban campus).



from 17 to nine. Law schools now fund the latter. This development is symptomatic of the precarious situation of numerous non-governmental organisations, a number of which had built international reputations in their contributions towards institutionalising democracy and access to justice in South Africa.<sup>93</sup>

## 8 CONCLUSION

In conclusion, the following recommendations may be of assistance in exploring ways of fully optimising South Africa's limited resources, whilst achieving a more coordinated approach in the provision of legal aid and raising awareness among the public of their rights:

- (i) Fully utilising the wealth of experience and skills of all stakeholders;
- (ii) The establishment of a national legal aid forum<sup>94</sup> aimed at facilitating a cohesive strategy towards the provision of legal aid and legal/democracy awareness in South Africa. Such a forum should have representation from by all major role players engaged in legal aid or legal/democracy awareness, including the Legal Aid Board, Lawyers for Human Rights, the Legal Resource Centres, the Association of University Legal Aid Institutions (AULAI), National Paralegal-Based Association, Street Law, *etcetera*;
- (iii) Approaching the need for community education with far greater urgency and real commitment and including it in national strategies;
- (iv) Ensuring that national strategies include special focal areas on rural communities and other marginalised groups;
- (v) Engaging with the South African corporate sector as regards the exciting opportunities available in legal aid and legal/democracy awareness;
- (vi) State financial assistance to legal aid providers, ensuring continuity of established organisations with proven track records in project and financial management. A possible way of ensuring the continued independence of such organisations would be to channel such assistance through intermediary grant agencies;
- (vii) State financial assistance for clusters, with special emphasis on skills development of paralegal advice offices and the provision of legal services to those communities, presently falling outside the ambit of justice centres and law clinics; and
- (viii) As regards cooperation agreements entered into between the Legal Aid Board and non-governmental legal aid providers, it is suggested that there should be wider prior consultations with each contracting party and more flexibility as regards the terms and expected output.

<sup>93</sup> *Eg*, Lawyers for Human Rights, the Community Law Centre (Durban) and Street Law (South Africa).

<sup>94</sup> The National Legal Cluster Forum is already in existence, but with a limited focus on the establishment of regional clusters between legal aid providers and paralegals.