

Legal Aid Services And Human Rights In South Africa
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In this short paper it is intended to deal with the following in respect of South Africa: (a) legal aid services; (b) legal representation in human rights cases; (c) the status of clinical legal education; and (d) a description of the University of Natal legal aid clinic.

The paper will also briefly mention developments in South Africa concerning: (i) the needs of special constituencies; (ii) office management issues; (iii) alternative models of legal service; (iv) legislative advocacy; (v) working with the media to promote social change; (vi) the creation and management of law school clinics; (vii) skills training; and (viii) the social change function of law.

A. LEGAL AID SERVICES

Legal aid services in South Africa are provided by (i) the state-funded Legal Aid Board, (ii) independent university law clinics and (iii) privately funded public interest law firms.

I. LEGAL AID BOARD

The state-funded Legal Aid Board operates on a budget of about \$37 million and uses three main methods of delivery and two experimental methods. These are: (1) judicare or referral to private lawyers; (2) Legal Aid Board law clinics; and (3) a public defender office. The two experimental models are (4) subvented candidate attorneys in private practice, and (5) rural advice offices. In order to qualify for legal aid applicants have to pass a 'means' test, or satisfy the requirements for legal aid at state expense under the Constitution.

I . Judicare or Referral Svstem

At present about 79% of the Legal Aid Board budget is spent on the judicare system whereby successful legal aid applicants who approach the local legal aid office are referred to lawyers in private practice. The lawyers render the necessary service and are paid according to a reduced fixed fee tariff. More than 100 000 people are referred to private lawyers each year.

2. Legal Aid Board Law Clinics

Law graduates in South Africa have to do an internship of one or two years with a private law firm or as community service in a law clinic. Beginning in 1994 the Legal Aid Board set up law clinics in partnership with universities. The Board employs one qualified lawyer as a supervisor and up to 10 articled clerks at each law clinic to act primarily as public defenders. The law clerks satisfy their professional qualifications and

poor people get supervised legal representation. These clinics have been established at most of South Africa's 21 law schools and deal with about 25000 cases a year.

3. Public Defender's Office

The Legal Aid Board has run a pilot public defender's office in Johannesburg for the past 6 years and is looking to expand it nation wide. It has been estimated that each public defender can deal with up to 200 criminal cases a year. The 10 public defenders in the office have dealt with over 2000 cases a year.

4. Subvented Candidate Attorneys in Private Practice

On an experimental basis in some small towns in rural areas the Legal Aid Board has entered into agreements with Lawyers for Human Rights and local lawyers to pay the salary of law graduates doing their internships. Payment is made on condition that the interns do legal aid work in the region for poor people who qualify in terms of the Board's means test or under the Constitution.

5. Rural Advice Offices

On an experimental basis the Legal Aid Board has also entered into agreements with some advice offices run by Lawyers for Human Rights in rural areas. The offices provide legal advice by trained paralegals and refer clients who qualify for legal aid to attorneys. They provide a valuable grassroots level service to needy clients.

Conclusion

The Legal Aid Board is looking at ways of providing the most effective service with dwindling or fixed funding. The Minister of Justice held a Legal Aid Forum in January 1998 in which suggestions were made to improve the administration and delivery of legal aid services.

II. INDEPENDENT UNIVERSITY LAW CLINICS

The first independent university law clinics were set up in the early 1970s and by 1982 most of the 21 law faculties had established them. Some have been funded by foreign donors since their inception. In 1986 the Attorneys Fidelity Fund, (which is an insurance fund protecting clients against fraudulent use of trust funds by attorneys), agreed to provide funding for the appointment of directors at those clinics accredited by the Association of University Legal Aid Institutions. The clinics provide free legal services by law students under professional supervision to needy persons in society. They also provide practical training for law students during their academic studies.

III. PRIVATELY FUNDED PUBLIC INTEREST LAW FIRMS

The most effective privately funded public interest law firm in the country is the Legal Resources Centre (LRC). It was established in Johannesburg in 1979 and has six branches in the major cities. The LRC gives practical help, (by litigating, lobbying and negotiating), to individuals and communities affected by matters of public interest, and works with numerous para-legal advice offices. Since 1994 it has tended to focus on a wide variety of Constitutional matters. In its 19 years of existence it has improved the lives of millions of South Africans.

B. LEGAL REPRESENTATION IN HUMAN RIGHTS CASES

The Constitution provides that everyone shall have access to the courts with special provision for criminal cases. In the latter arrested and detained persons are entitled to choose and consult with a lawyer, and if substantial injustice would result, to be assigned a lawyer for this purpose at state expense. Likewise every accused person has the right to a fair trial which includes the right to choose and be represented by a lawyer, and if substantial injustice would result, to be assigned a lawyer to represent them at state expense.

In criminal cases legal representation for poor people is usually provided by the Legal Aid Board through referral to private lawyers, Legal Aid Board law clinics or the public defender's office. In civil matters human rights cases for the needy are dealt with by a variety of bodies including the Legal Resources Centre, independent university law clinics, lawyers organisations like the Black Lawyers Association, the National Association of Democratic Lawyers and Lawyers for Human Rights. In addition complaints may be laid with the Human Rights Commission and the Public Protector (Ombudsman).

C. STATUS OF CLINICAL LEGAL EDUCATION

Clinical legal education at universities in South Africa takes two main forms (i) law clinics, and (ii) Street law. Only a few of the 21 university law schools give academic credit for student work in the two programs and most students participate on a voluntary basis.

1. LAW CLINICS

Law clinics in South Africa developed in the 1970s and 1980s with a strong service element with live clients and none are run on an entirely simulated basis. Most law clinics began as general practice clinics dealing with labour law problems, consumer law, housing, indigenous customary law, women's issues, succession and criminal cases. During the Apartheid era clinics at the progressive universities were involved in human rights cases dealing with pass laws, police brutality, forced removals from land, detention without trial and other breaches of fundamental rights. Since democracy in 1994 law clinics are still dealing with poverty law problems and human rights issues dealing with delivery by the new Government, and some have begun to focus mainly on constitutional human rights issues.

Although the majority of university law schools have law clinics, only about half provide academic credit for work in them either as full courses or part courses. Full courses include Clinical Law, Legal Aid, Practical Legal Studies, Practical Legal Practice, Practice Law, Legal Services, Legal Practice, Introduction to Legal Practice and Advanced Procedural Law. Some other law schools include work in the clinic as part of Professional Training. It is hoped that with the new LLB degree introduced this year more use will be made of law clinics.

II. STREET LAW

Street Law programmes at universities developed in South Africa during the mid-1980s. The first programme was established by the present writer at the University of Natal, Durban in 1986 as an adaptation of the American programme. The Street Law programme is primarily aimed at training law students to go into high schools to teach schoolchildren about their legal rights and where to obtain assistance. The programmes empower young people, and others, by explaining what the law expects people to do in certain situations, what kinds of legal problems they should watch out for, and how they can resolve such problems.

Street Law is a clinical programme in that it teaches legal writing skills, communication skills, questioning skills, trial advocacy skills and analytical skills. It also exposes law students to the realities of the types of legal problems ordinary people face on a day to day basis. It operates together with its sister programme, Democracy for All, in one form or another at 17 of the 21 law schools in the country. Students are given credit at several universities for courses entitled Street Law, Allemansreg (the Afrikaans equivalent of 'Street Law'), Legal Literacy, and in the case of courses in Legal Aid, Applied Law, Public Interest Law and Legal Practice, as an option to law clinic work.

D. UNIVERSITY OF NATAL, DURBAN LEGAL AID CLINIC

The University of Natal, Durban legal aid clinic was established by the present writer in 1973. For the first 5 years the students attended informal clinical law seminars and worked in the clinic without academic credit. Eventually in 1978 a credit-bearing course entitled Legal Aid was introduced. In 1996 a further credit course entitled Clinical Law was introduced.

The clinic began as a general practice clinic, but for the past two years with the establishment of a Clinical Law course has tended to specialise in cases involving women and children, administrative justice and land restitution. Each specialist area is supervised by a qualified lawyer who works with a team of law students. Some students involved in the Legal Aid course also assist in the law clinic, while the rest are required to participate in the Street Law programme.

The goals of the Clinical Law course are to help students develop lawyering skills that are necessary in practice within the context of social justice. Students are trained how to develop skills and strategies for addressing the problems of poor communities and to

develop reflective and self-critiquing skills. These goals are achieved through case work in the law clinic and participation in clinical law lectures, seminars and simulations.

E. LEGAL AID SERVICES AND HUMAN RIGHTS WORKSHOP TOPICS

The Workshop will be dealing with the following topics: (i) strategies for effectively serving the needs of special constituencies (women, children, prisoners, the elderly); (ii) office management issues (intake procedure, case file management, staffing and lawyer training issues, problems of funding); (iii) alternative models of legal service (citizen advice bureaus, traveling legal aid clinics, alternative dispute resolution and mediation); (iv) working with the media to promote social change); (v) the creation and management of law school clinics; (vi) skills training (client interviewing and counselling, legal writing, developing simulations); and (vii) the social change function of law.

1. STRATEGIES FOR SERVING THE NEEDS OF SPECIAL CONSTITUENCIES

In South Africa the needs of women, children and prisoners have tended to be served by specialist organisations. The needs of the elderly have mainly been dealt with in the context of pensions.

The concerns of women have been dealt with by organisations like the Legal Resources Centre, some of the independent university law clinics and specialist gender units at certain universities. There is also a Commission for Gender Equality which has held some training workshops, but is still getting established. Womens groups have been most successful in the field of reproductive health. Lawyers for Human Rights and a number of other NGOs are busy producing a gender law training manual.

Issues affecting children have also been dealt with by the Legal Resources Centre and law clinics. Lawyers for Human Rights has a special project dealing with juvenile justice and there are a wide variety of NGOs concerned with children's rights. Children are given special protection in the Constitution. A national Youth Commission to advise the President on youth matters has also been set up.

The elderly tend to be marginalised in South Africa, and most of the focus has been on abuses in the pension system. The Legal Resources Centre, certain independent university law clinics, organisations like the Community Law Centre, University of Natal, Durban, and advice offices such as the Black Sash have been very effective in assisting the elderly to enforce their rights to a pension.

II. OFFICE MANAGEMENT ISSUES

All clinics with live clients have intake procedures suited to the' nature of their work. Some rely on administrative assistants to control the intake of live clients. Others use law students themselves to do the screening in consultation with the supervisor. Clients who are not taken into the clinic are usually referred elsewhere if they can be helped. A problem for South African clinics is the large volume of clients who have to be

screened. Like most developing countries the emphasis tends to be on service rather than education.

In good clinics case file management is carefully controlled for three reasons: (a) files are often the only record of the complete status and progress of a case; (b) several students or staff may handle the same file and need to be able to assess the status of the file without relevant information being lost in the process; and (c) an organised file can help to organise a case as it should indicate at a glance what information has been obtained and what is missing.

In most clinics staffing and lawyer training issues play a minor role as far as the professionally qualified staff are concerned. However in the more progressive clinics teamteaching with clinically trained staff is encouraged so that former practitioners can learn how clinical values and techniques are developed. Law students who staff clinics are trained during the clinical law classes.

Funding is a major problem for most South African law clinics. As has been mentioned the Attorneys Fidelity Fund pays the salary of a legal aid director for each accredited law clinic, but the clinics have to find the running costs and the salaries of other staff members. Some are funded by private donors, but the latter are encouraging the setting up of large endowment funds for umbrella bodies subject to the latter securing matching finance. This has proved a major problem for the Association of University Legal Aid Institutions in South Africa. Certain clinics involved in land restitution claims and other constitutional issues have been able to generate income by claiming costs from some Government departments.

III. ALTERNATIVE MODELS OF LEGAL SERVICES

There are a few citizen advice bureaus in South Africa, but many more para-legal advice offices which deal with a wide variety of cases, especially those concerning human rights. Services are provided at a variety of levels which may vary from simple advice offices in the high density townships which act as conduits to refer clients elsewhere, to those providing full legal aid services such as the Legal Aid Bureau in Johannesburg. As has been mentioned Lawyers for Human Rights and the Community Law Centre, Durban focus their advice offices in rural areas.

Travelling legal aid clinics have been set up by some university law clinics in South Africa. Clinics may go out to a community and run sessions in a church or community hall, or even in a rural area, weekly, fortnightly or once a month. Mobile filing cabinets can be used to ensure that files are on hand for consultations. The Legal Aid Board had been investigating running mobile clinics from a railway carriage in some rural areas but this idea has not been taken any further.

Alternative dispute resolution and mediation are growing areas of dispute resolution in South Africa. Some university law schools teach courses in the the concepts and a course is also run at the School for Legal Practice for candidate attorneys in Durban.

Training in mediation, negotiation and mediation techniques is provided by IMSSA (the Independent Mediation Services of South Africa), CDRT (the Community Dispute Resolution Trust) and ACCORD (the African Centre for Constructive Resolution of Disputes). IMSSA deals mainly with labour disputes, and has played a major role in training Commissioners for the Council for Conciliation, Mediation and Arbitration (CCMA) under the Labour Relations Act of 1995, which provides for compulsory alternative dispute resolution in labour matters before the courts can be used. CDRT deals with disputes amongst community based organisations, individuals and communities, and community leaders. ACCORD trains political leaders in dispute resolution nationally and internationally on the African continent. Alternative dispute resolution existed as an indigeneous mechanism for settling family disputes prior to the Colonial era.

IV. LEGISLATIVE ADVOCACY

Legislative advocacy is still in its formative stages in South Africa, but legal academics played a major role on the technical committees that fashioned the new constitution. The present Minister of Justice is very open to new ideas and has called a number of Legal Forums in which practising lawyers, public servants, judges, magistrates, prosecutors and academic lawyers have had an opportunity to influence the direction of new legislation. Good examples of this are the processes used to introduce the new LLB degree and the recent Legal Aid Forum. In any event before any new legislation is passed it is published for public comment and personal representations can be made to the Parliamentary Committee dealing with it. Lobby groups, particularly those representing labour and women's issues have used this mechanism very successfully.

V. WORKING WITH THE MEDIA TO PROMOTE SOCIAL CHANGE

Newspapers and magazines can be used to educate the public about human rights. In such cases, however, it is usually necessary to ensure that there is some newsworthy element attached to the information. Newspapers in South Africa were used to encourage people to become involved in the debate about the new Constitution while it was being drafted, and to submit suggestions to the Constitutional Assembly that was drafting it. They have also published extracts from the Street Law books to make people aware of their legal rights.

The radio was also used in South Africa to encourage people to participate in the constitution-making process, while television was used to popularise the interim Constitution and Bill of Rights and to make viewers aware of the constitutional issues involved.

VI. CREATION AND MANAGEMENT OF LAW SCHOOL CLINICS

Some law school clinics in South Africa began on a shoe-string budget using existing qualified faculty to assist with part-time supervision. Three different models emerged:

Student-run law clinics supervised part-time by legal practitioners or qualified faculty members. Here the clinics operated with a large client base, mainly gave legal advice and placed the emphasis on service rather than clinical education. Part-time supervised law clinics supervised part-time by faculty, who might or might not have been given a reduced teaching load, but could incorporate some clinical education into the programme. These programmes also tended to have a heavy client load, focused on advice and some letter writing, and provided little time for reflection and integrated education. Both these models, however, can be run at very little monetary cost.

The most sophisticated (and expensive) law clinics are those that are full-time supervised, operate as a law firm, and provide students with a fully integrated clinical legal education programme. These clinics can also use student practice rules once they are introduced into South Africa. It is intended to allow final year law students who have passed courses in Criminal Law, Criminal Procedure, Evidence and Trial Advocacy, and who have been certified by the dean of the faculty as fit to practice as student practitioners, to practice in the magistrate's courts.

VII. SKILLS TRAINING

One of the basic skills for law clinic practice is client interviewing and counselling and this is a core component of any clinical education programme. Students need to be taught how to: (1) establish an attorney-client working atmosphere; (2) elicit a description of the client's problem; (3) elicit the client's goals and expectations; (4) analyse the client's problem; (5) allow the client to make an informed choice concerning the action to be taken; and to (6) bring the interview to a satisfactory conclusion. South African law schools participated in a national client counselling competition for the first time this year.

Legal writing is only becoming part of the formal law school curriculum in some law schools with the introduction of the new LLB degree. It used to primarily take the form of legal drafting and letter writing in clinical law programmes, but is now being mainstreamed into some of the core courses from first year onwards.

Simulations are used extensively in clinical law programmes. Instructors often draw on appropriate cases handled by themselves or their colleagues in practice, and sometimes on public interest law cases handled by organisations like the Legal Resources Centre. Moot competitions are used by several law schools in their Professional Training classes, and mock trials are used widely in the Street Law programmes. Students in the latter are often required to devise and conduct their own mock trials for groups of school children.

VIII. SOCIAL CHANGE FUNCTION OF LAW

Very few law clinics in South Africa focus on developmental and social change issues aimed at removing the causes of injustice rather than simply treating the symptoms. The majority of clinics tend to deal with the individual client's problems so as to relieve

the immediate symptoms of the injustice suffered, rather than by addressing the broader societal causes lying at the root of the problem. In our country there is room for both approaches.

Law clinics that deal primarily with disadvantaged people become an important agent of reality for measuring the success or otherwise of the social and economic promises enshrined in the South African Constitution. Working in law clinics enables students to obtain first-hand knowledge of how ordinary people are experiencing social justice. Likewise students in the Street Law programme obtain valuable insights into social justice issues in the communities they serve.