THE LEGAL RESOURCES CENTRE:

Why it was established and what it hopes to achieve

Extracts from an article by A Chaskalson SC

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Origins of public interest law

Much has been written about lawyers and by and large most of what has been written is not complimentary. The *Oxford English dictionary* tells us that from an early period the word "attorney" was often used reproachfully in the sense of a knave or a swindler[1] and Boswell records an observation by Johnson that *"he did not care to speak ill of any man behind his back, but he believed the gentleman was an attorney".*[2]

In Sussex the name "lawyer" is given to a bramble full of thorns because: *"When once they gets a holt an ye, ye doant easy get shut of em."*[3]

In Australia there is a plant called the lawyer palm, so named because the stems and leaves are studded with the sharpest thorns which continually cling to you and draw blood.[4]

Honourable profession

Lawyers see themselves differently. We belong to an honourable profession which takes pride in its integrity and independence. Traditionally lawyers have stood for the protection of individual rights and freedom and there are many examples of lawyers having fought strenously for such causes. It is not unusual for lawyers to act *pro amico* for persons who cannot afford their services and in South Africa the profession has given its support to the legal aid scheme under which attorneys and advocates work at reduced rates for people who qualify for legal aid. Both the attorneys' profession and the bar have supported voluntary legal aid agencies such as the Johannesburg Legal Aid Bureau and the bar also supports the *pro deo* system under which its members go to court for extremely low fees in cases in which the death sentence is competent. Although there is clearly a gap between the way lawyers perceive themselves and the way they are sometimes seen by the general public, most South African lawyers would agree with the president of the USA when he said in a speech delivered on the occasion of the one hundredth anniversary of the Los Angeles County Bar Association: *"No resources of talent and training in our society even including the medical care, are more wastefully or unfairly distributed than legal skills."*[5]

The skills are unfairly distributed because they are available to the rich and the powerful but are not readily available to the poor or in an increasing degree to the middle class. They are used wastefully because protracted litigation consumes the time and skills of the lawyers engaged upon it. A single case can last for months during which the judge, the court officials and the lawyers engaged in the contest do nothing else. It is a catastrophe for an ordinary person to find himself caught up in such litigation and many persons are afraid to turn to the law for that reason.

Complex process

It is not that lawyers are unwilling to work for the poor or the weak. It is simply that the legal process is so complex, so time consuming and thus so expensive that the poor cannot easily gain access to the system. And the irony of this is that the poor probably have a greater need for legal assistance than any other group in society. Poverty is frequently associated with ignorance upon which unscrupulous persons prey; the poor and the weak are easily overreached. And *"the very fact of poverty fiercely intensifies an individual's need for legal representation in almost all facets of life".*[6]

The provision of legal services to the community at large has never been viewed in the same way as e.g. the provision of medical services. Less money is spent on the provision of public legal services than on the provision of public medicine and the legal profession itself has had to subsidize legal aid in a way that no other profession has been required to subsidize public services. Understandably the profession has not been able to meet all needs and the result is that a large section of the public is unable on economic grounds to gain access to the profession. This may not be the view of all legislators, but few lawyers would disagree with Lord Gifford when he said to the House of Lords in a recent debate on legal aid that legal representation *"is not. . . some luxury of life (it is) a service without which one could say that people cannot be fully citizens of a democracy. If there is unequal access to law then society is not governed by the application of law but controlled by those who can afford to use the law"?*

It is the need for legal representation on the part of individuals and groups who are unable to secure such services that has led in England and America to the growth of what the Americans call public interest law.

Public interest law

Public interest lawyers provide services to non-paying clients. They are called "public interest lawyers" because they enable particular individuals or groups to have access to a legal system which might not otherwise be accessible to them. The public interest exists in making the legal system accessible and not in the particular case that is being pursued. It is, I think, an important distinction, for what is or is not in the public interest is frequently a matter of great dispute. No group of persons, least of all lawyers, can claim to have a monopoly on deciding this question and the term "public interest lawyer" if not properly understood, may prove an unfortunate one. Lawyers are agents and not principals; they have traditionally represented any client who required their services and was willing to pay their fee and it is impor-

tant that they should continue to do so. The Johannesburg bar stipulates in its rules: *"It is the duty of every advocate to whom the privilege of practising in courts of law is afforded, to undertake the defence of an accused person who requires his services. Any action which is designed to interfere with the performance of this duty is an interference with the course of justice."*

Obligation

Consistent with this rule is the requirement that counsel must accept briefs offered to him in a court in which he practises at a proper professional fee. There is also a generally recognized obligation on the part of the attorney's profession to see that members of the public are supplied with legal services but this too is subject to the proviso that a proper professional fee is paid. The proviso is obviously necessary for no lawyer could hope to survive in private practice if he were obliged to act for anybody irrespective of the fee which might be offered. But if it is a denial of justice to refuse legal representation to persons willing to pay for it, it is equally a denial of justice to refuse legal representation to persons who are unable to pay for it. The principle that everyone is entitled to legal representation which is a fundamental tenet of the legal profession, condemns a system which denies access to people or groups who are unable to afford the entry fee. The public interest requires that the legal system should be made accessible to all.

America

The development of public interest law in America is very much an aspect of the American plural society which contains many groups who see themselves as being in a disadvantaged position. Several of these groups have sought to protect and advance their interests through the legal system and defence funds have been established for this purpose. There are poverty law centres, centres serving racial or ethnic minorities, centres concerned with the rights of women, environmental law centres, consumer law centres, civil liberties centres, centres concerned with the protection of children and no doubt other types of law centres as well. There are also legal service corporations which are federally funded and which provide wide ranging legal assistance to disadvantaged persons. The annual expenditure on legal service corporations is presently substantially in excess of $200m.

Fundamental rights

Because of the American consitution which guarantees to all persons certain fundamental rights including equal protection under the law, public interest lawyers in America have engaged in "test case" litigation directed to asserting and upholding constitutional rights. But this is only a small part of their work. Law enforcement is as much the concern of public interest law firms as test cases. Gary Bellow, a well-known American lawyer and professor of law at Harvard University, makes the point: *"California has the best laws governing working conditions for farm labourers in the United States. Under Californian law, workers are guaranteed toilets in the fields, clear, cool drinking water, covered with wire mesh to keep the flies away, regular rest periods, and a number of other 'protections'. But when you drive into the San Joaquin Valley, you'll find there are no toilets in field after field, and that the drinking water is neither cool, nor clean, nor covered. If it's provided at all, the containers will be rusty and decrepit. It doesn't matter that there is a law on the books."*[8]

Law enforcement

What the agricultural workers in California required was not test cases to establish what the law was, but enforcement mechanisms to secure their entitlement under the law. For this reason some public interest law firms have concentrated on law enforcement litigation rather than on test case litigation. Other public interest law firms in America have concentrated on research and lobbying with a view to supporting particular law reform projects which might include not only the securing of changes in the substantive law but also the securing of changes in the way that the law is applied in practice.

The American style, though appropriate in that country, is not necessarily appropriate in countries having different judicial and political structures.

England

In England public interest law had developed along somewhat different lines. The doctrine of parliamentary supremacy applies in that country as it does in South Africa. This means that there is no scope for challenging the validity of acts of parliament and only limited scope for challenging subordinate legislation. Although there are some dissidents, members of parliament tend to vote along party lines and the legal profession does not engage in lobbying in the way that it does in America. There is limited scope for test case litigation, and public interest law is mainly concerned with advising and law enforcement.

England has probably one of the most extensive legal aid schemes in the world. It is one under which services are in the main provided by the legal profession in the conventional way. Clients go directly to their solicitors who arrange for legal aid if the client qualifies for such assistance. The scheme which was introduced in 1949 has been amended from time to time and the money voted in its support has increased over the years. In February 1979 the Lord Chancellor informed the House of Lords [9] that the government was spending £44,5 million per annum in providing legal aid. But in spite of the large sums expended by the state on the legal aid system it was found that there were nonetheless deficiencies in that system and in 1977 the senate of the Inns of Court reported that *"a substantial proportion of those who need but cannot afford legal services cannot get them"*.[10]

Agencies

In practice the legal aid system did not provide adequately for all those who required advice or assistance. One of the reasons for this was that law schools have been training students in those areas of the law which are traditionally of concern to private practitioners and many lawyers have no experience or training which equip them to deal with problems of the poor. To meet this deficiency there grew up a support system of agencies to supplement the services proviced by the legal aid. These are neighbourhood law centres, legal advice centres, citizen advice bureaux, housing centres and consumer aid centres. As an indication of the volume of work handled by these agencies it is worth mentioning that in 1976 the citizens' advice bureaux which provide but one of the supplementary services, dealt with 2,7 million enquiries. Barristers and solicitors began working at the law centres and advice bureaux first on a voluntary basis and later as salaried employees. They were supported in this by the law society and the bar council who changed their rules to make such work possible.

In 1977 the senate of the Inns of Court in a report dealing with law centres said:

"(Its) support of law centres and its support for the extension of the legal aid limits is based on the conviction that means and methods must be found to enable all citizens to enjoy and if necessary enforce all their common law rights and those which the legislature has given them. This is essential if the cohesion of the social fabric is to be maintained and strengthened. Free legal advice for those who cannot afford to pay for it is an essential service . . .

The need for (law centres) is proved by the response of the public. All neighbourhood law centres which have been opened have a very heavy case load . . . The law centres have been effective in demonstrating the unmet need in certain areas of law . . . and in showing that such need in these areas can be met by salaried lawyers giving a free service to those in need."[11]

In the same report the senate pointed out that

"it would not be reasonable to complain that solicitors do not practise in areas where potential clients have not been able to pay them . . . or that most barristers and solicitors in private practice are not familiar with parts of the law which they have never been taught and on which in the past they have never been consulted".[12]

Because of the need to supplement and strengthen the legal system and to provide specialized advice in fields which were not adequately served by private practitioners, the senate of the Inns of Court recommended the establishment of regional legal resources centres employing full-time qualified lawyers and agreed that barristers and solicitors could work together at such centres. It stressed that legal resources centres should be independent of both central and local government as they would often be the opposite parties to an issue in which a law centre client is involved. Whilst urging the central and local governments to make funds available for law centres the senate expressed the firm view that such funds should be administered by independent management committees.

South Africa – the LRC

The LRC had its origins in discussions which have taken place during recent years between advocates and attorneys including representatives of the Transvaal law society and the Johannesburg bar council in regard to new ways of making legal assistance available to the poorer people who are so often ignorant of their legal rights and who, because of their limited resources, frequently have difficulty in securing access to the legal system. By 1976 the University of the Witwatersrand had established legal clinics which it used for the purposes of an LLB credit course known as practical legal studies. Students who enrolled for this course were required to work regularly at the clinics where they received an insight into the training and the practise of law. The experience of these clinics showed that they were capable of rendering a valuable service both to the public and to the students who worked in them, but they suffered from the weakness that students did not have the right to appear in court and practitioners who were asked to assist the clinics on a voluntary basis were usually unable to take cases to court for the clinics and were also unable to devote sufficient time to the clinics to provide the ongoing thinking about problems and the follow-through which is a feature of regular full-time law practice. The idea of employing qualified lawyers to supervise the students and to work at the clinics on a full-time basis gained ground and it was felt that if such clinics could be established they would provide important educational and community services.

Memorandum

The director of the practical legal studies course at the University of the Witwatersrand was Felicia Kentridge. She prepared a memorandum in which she suggested that a law foundation should be established to provide alternative forms of legal aid and to work in the field of legal education. This memorandum suggested that law centres should be set up along the lines of neighbourhood law centres which existed in England, and that qualified lawyers should be entitled to work at such centres and to advise and represent persons in certain fields of civil law. This memorandum was submitted to the Johannesburg bar council which considered the principle and decided in May 1977 after full discussion that it would give its support to the establishment of such a foundation and to the setting up of what were then referred to as "legal workshops" at which advocates as well as attorneys could work on a full-time basis. As a result of this decision a firm proposal was formulated to set up a pilot scheme for the extablishment of a law centre in Johannesburg. The SA legal aid system and its judicial and political structures are closer to the English than the American model and the proposed law centre was in many respects similar to the law centres which had been accepted by the profession in England.

Law Clinics

The proposal which was put to the Johannesburg bar council and the Transvaal law society was that they should agree to the setting up of a legal resources centre which would work in co-operation with student law clinics. The legal resources centre would help to supervise the students' working at the existing law clinics which were being run by students from the University of the Witwatersrand and it was suggested that other universities should be encouraged to set up their own clinics and to draw upon the assistance which could be provided by the legal resources centre. Based on the English experience it was argued that the centre would not be effective unless it was staffed by competent practitioners working on a full-time basis and that in accordance with the English model the centre should employ both attorneys and advocates. A similar structure had been adopted by the legal profession in England after full investigation and special rules had been devised by the English bar and the English law society to govern the conduct of barristers and solicitors who took up such employment.

The Johannesburg bar council considered the proposal and decided that it should follow the example of the bar in England and support the establishment of such a centre. It felt that the centre would not only provide a community and education service of great importance but if backed by the profession would enhance its reputation. The rules for law centres which had been formulated by the English bar council were adopted in principle. The Johannesburg bar council having taken this decision consulted the general council of the bar of South Africa. The proposal was first considered by the executive committee of the general council itself when it met in July 1978. At its meeting in July 1978 the general council gave its unanimous approval to the proposal. The Transvaal law society also considered and agreed to the implementation of the scheme and by the end of 1978 both branches of the profession had consented to the establishment of the Legal Resources Centre.

Constitution

In January 1979 the LRC was constituted as a non-profit making association. It has offices on the second floor at Innes Chambers. I was appointed by the trustees as the first

director of the LRC. This is a full-time position; there are in addition two advocates and two attorneys on the full-time staff of the LRC. The LRC's funds come from the Legal Resources Trust whose trustees are Mr C. Cilliers who is the chairman of the trust, Mr C. Geach, Mr J. Kriegler SC, Mr S. Kentridge SC, Mr I. Mohamed SC and Mr B. Wunsh. I am also an ex-officio trustee. The Legal Resources Trust is supported by a number of companies and charitable foundations and has raised sufficient money to ensure that the LRC will be able to employ lawyers on a full-time basis at reasonably competitive salaries commensurate with their experience, and that it will be able to operate according to its fixed budget for a period of at least three years.

The work of the LRC

The LRC seeks to perform a community service through its supervision of law clinics and through the handling of cases itself, and to assist in the training of lawyers both by the instruction which it gives to the law students who work at the clinics and by the employment which it will offer to recently graduated law students.

Clinics

At present there are four clinics which have been established by the University of the Witwatersrand which are now supervised by members of the LRC. The LRC has itself opened a new clinic in Hoek Street, Johannesburg which is staffed by students from Unisa operating under supervision of members of the LRC. The students working in the clinics get course credit from their universities and so the work is done not on a voluntary basis in their own time but as a requirement of their degree course. The fact that the students are obliged to work in the clinics makes for regular attendance and continuity. The students have without exception set about their tasks with zest and enthusiasm. There are over thirty students and five clinics working with five lawyers. They can and do accomplish a great deal. In the first two months of its operation the Hoek Street clinic had taken on over 140 cases and it is already providing a valuable service to persons who might not otherwise have access to the legal profession. The LRC has also established links with other universities and has offered to make available to them its services to help with the setting up of clinics by such universities.

Teaching

The teaching done by members of the LRC consists of conducting seminars at which students are instructed in interviewing techniques, in the conduct of cases, in ethics, and in the practical side of law generally. This makes for greater efficiency at the clinics and the practical and theoretical side of the instruction complement each other. The importance of this type of instruction has been recognized in America and many universities now give course credits for work done by students at law centres with the result that law centres are increasingly becoming places at which students are trained and at the same time are able to make a practical contribution to social services. Well known law schools such as Harvard, Yale, Columbia, New York State, UCLA, Stanford, Georgetown and others run such programs.

Test Cases

The LRC, apart from supervising the clinics and teaching students, will itself take on cases which may have a particular community interest in the sense that they affect a large number of persons where a ruling in one case can be of benefit to many other persons in a similar position, and also cases which are of particular interest to the work done in the clinics in the sense that they are typical of a particular form of abuse or exploitation which calls for redress. It is not contemplated that the LRC will deal directly with the public; it will take cases which are referred to it by the clinics or by other legal aid agencies.

The clinics, though not limited thereto, deal mainly with problems relating to consumerism and labour and it is contemplated that a substantial portion of the LRC's work will be in these fields; the LRC will also deal with other problems which are encountered at the clinics such as housing, influx control and complaints by individuals who feel that they have been exploited or overreached in some way by private individuals or government employees. The very fact that the LRC is able to take on cases itself provides a strength to the clinics which they would not otherwise possess. In clear cases where persons have been exploited and cannot obtain redress through negotiation, the clinics can see that legal rights are enforced. The knowledge on the part of respondents of this capacity by the LRC will almost certainly lead to many settlements which might not otherwise have been possible. It is not intended that the LRC and the clinics should work in opposition to the Legal Aid Board or the Legal Aid Bureau. On the contrary, it is hoped that there will be a good relationship between the LRC, the clinics, the board and the bureau. Until now the relationship has been good and in appropriate cases the Legal Aid Board provides assistance to persons referred to it by the clinics. The bureau has referred cases to the legal aid clinics and in turn has taken cases referred by clinics – such as matrimonial disputes – which are not handled at the clinics. The LRC will obviously not be able to take on every case that comes to the clinics but by adopting the criteria mentioned above it will be able to utilize its resources to the maximum extent. Of course the fact that the LRC conducts cases itself adds to the value of the educational service it provides, for students can see how the cases which they initially dealt with are taken through the courts.

Help by profession

Although it is contemplated that the LRC will itself handle litigation through its full-time employees, there will be occasions on which it will turn to the private profession for help. It may request attorneys in private practice to handle cases (possibly on a *pro amico* basis) and may also turn to members of the bar for assistance with its own work-load. This type of co-operation between public interest law firms and the private profession has grown up in America and several of the bigger firms in America have established departments to deal with *pro bono* work and others have undertaken to make employees available for such work. The LRC has had many offers of help both from members of the bar and from attorneys and is confident of the support of the profession. With such support the LRC will be able to broaden the scope of the services which it offers to the public.

Practical training

It has previously been mentioned that the LRC intends to give practical training to recent graduates by offering them employment. In particular, employment will be offered to recently qualified black lawyers, many of whom have been trained at places where they will have had no practical experience and who may find difficulty in obtaining articles of clerkship or in coming to the bar. It is hoped that by offering such persons employment for a year during shich they will work in the clinics and at the LRC under the supervision of the lawyers employed there, the LRC will be able to contribute towards their training and that it will be able

to offer some sort of a bridge between university and private practice. Naturally the presence of these graduates will enable the clinics to take on a greater workload.

Assistance to the poor

It cannot be disputed that all individuals and groups who feel that they are not dealt with according to law should be able to turn to the legal system to protect their interests. That after all is the function of the legal system – it is the institution provided by society for the resolution of disputes and the settling of grievances. The work which the students and lawyers do in the clinics and the LRC should demonstrate to the public the capacity which the legal profession has for assisting all sections of the community and not only the rich. Hopefully that experience will lead to a greater awareness on the part of lawyers of the problems of the poor – who number amongst their ranks the majority of the black population in this country, to the development of new skills necessary for dealing with such problems, and to an awareness on the part of the people who experience these problems that some of them can be resolved constructively through the institutions created for that purpose – the courts. □

Footnotes

[1] Attorney sb 3 *Oxford English dictionary.*
[2] James Boswell *The life of Samuel Johnson 1831 vol 1 385.*
[3] Lawyer sb 3 *Oxford English dictionary.*
[4] Lawyer sb 6 *Oxford English dictionary.*
[5] Cited by the Honourable Lawrence H Cooke, Chief Judge of the Court of Appeals of the State of New York in the *Record of the Association of the Bar of the City of New York* vol 34 at 6.
[6] Borosage and others "The new public interest lawyers" 79 *Yale Law Journal 1072.*
[7] *House of Lords debates* 8 February 1979 at 918.
[8] Cited by Borosage and others 79 *Yale Law Journal 1077–1078*
[9] *House of Lords debates* 8 February 1979 at 894.
[10] *Senate report XX.1 (A.1.3).*
[11] *Senate report XX.2 (A.1.6) and XX.5 (A.8.2).*
[12] *Senate report XX.2 (A.1.4).*

APARTHEID, POWER AND HISTORICAL FALSIFICATION

by Marianne Cornevin (UNESCO, 1980)

reviewed by T.R.H. Davenport.

The author of this work, a French historian, tries here to nail apartheid by demolishing the historical myths through which it seeks to justify itself. It is an avowedly propagandist work, which relies almost entirely on secondary (mainly South African) authorities for most of its judgments, and performs a rather crude hatchet job on a piece of timber which others have been cutting into for years.

The pity is that a book like this, which will almost certainly encourage new myths, was probably necessary as a counter to the historical arguments still used internationally to bolster the policies of the South African Government.

I do not have much quarrel with Ms Cornevin's selection of myths for demolition, though perhaps her defence of Shaka is a trifle exaggerated, and certainly not properly substantiated. The synchronic arrival of blacks and whites south of the Limpopo, the myth of the empty land into which the Voortrekkers moved, the notion that land legislation since 1913 has tried to protect black interests, and the suggestion that the Homelands of today actually comprise territorially the limits to which Africans have a valid historical claim, all need to disappear. Even if there has been some movement away from the crude formulations of Theal's 1890 phase, as I think there has been, especially on the archaeological points of which Ms Cornevin makes so much, there is still a long way to go before official postures catch up with authenticated research. Nor is this a simple case of inertia, which undoubtedly plays a part, for resistance to new interpretations can be shown to have been very very stubborn.

There is little that South Africans can do about the propagation of counterfactuals in the outside world, if we cannot control the outpourings of our public relations officers. But we need to ponder seriously the extraordinary fact that, in a country dominated by a racist philosophy, the only academic debate among historians worth mentioning is that between opponents of racism, the liberals and the Marxists, which has now been moving at a cracking pace for a decade or so without involving the racists at all. Racist historiography still does sit on the ideological distribution points, and Ms Cornevin is right to stress this. School textbooks are of particular significance, as Frans Auerbach was able to demonstrate years ago, though the textbook is not the only, or perhaps even the main, vehicle of prejudice. At bottom, but with the noteworthy exceptions of the Joint Matriculations Board and the Natal Education Department, our high school public examination system encourages the propagation of historical myths rather than their extinction. This is where we need to strike. □