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The Delivery of Civil Legal Aid Services in South Africa

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David J. McQuoid-Mason

Abstract

This paper is intended to deal with the different methods of delivering civil legal aid services in South Africa. Before doing so, however, brief mention will be made of the structure of the legal profession and the impact of the new South African Constitution (or “Constitution”), as both have influenced the development of legal aid services in the country. Mention in passing will also be made to special procedures and courts that can be used to access justice in civil matters.

THE DELIVERY OF CIVIL LEGAL AID SERVICES IN SOUTH AFRICA

*David J. McQuoid-Mason**

INTRODUCTION

This paper is intended to deal with the different methods of delivering civil legal aid services in South Africa. Before doing so, however, brief mention will be made of the structure of the legal profession and the impact of the new South African Constitution¹ (or "Constitution"), as both have influenced the development of legal aid services in the country. Mention in passing will also be made to special procedures and courts that can be used to access justice in civil matters.

I. SOUTH AFRICAN LEGAL PROFESSION

The South Africa legal profession consists of approximately 12,000 practising lawyers who serve 40,000,000 people. As in the United Kingdom, South African lawyers are divided into advocates (barristers) and attorneys (solicitors). Advocates, who constitute about thirteen percent of the practitioners, largely practice in the high courts, while attorneys, who constitute the rest, work mainly in the lower courts and brief advocates for high court work. This system is changing with certain attorneys being given the right to appear in the high courts.² With the introduction of a common LLB degree for all legal practitioners in 1998, it is likely that the move towards fusion of the two professions will gain momentum. As a result of the legacy of apartheid, eighty-five percent of the legal profession is white and only fifteen percent are black. Conversely, eighty-five percent of the total population is black. The twenty-one law schools in South Africa annually produce about 3000 graduates, all of who have to do an internship either as pupil advocates or candidate attorneys

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1. S. AFR. CONST. (Constitution of the Republic of South Africa Act 108, 1996).

2. *See* Right of Appearance in Courts Act § 62 (1995) (S. Afr.) (mandating that attorneys who wish to appear in high court must hold LLB degree or have at least three years practical experience).

before they can be admitted to practice.³ These statistics must be born in mind when considering the challenges of delivering civil legal aid services in a country where over eighty percent of the state-funded Legal Aid Board's budget⁴ is spent on criminal legal aid because of the demands of the new South African Constitution.⁵

A. South African Constitution

The new South African Constitution has had a considerable impact on the delivery of civil legal aid services because it widens the scope of standing and provides for class actions in cases of violations of the South African Bill of Rights. The Constitution provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum."⁶ It seems that this section does not impose a duty on the South African government to provide legal aid or assistance to any person in a civil case who cannot afford it because, unlike in the case of arrested, detained, and accused persons,⁷ there are no specific constitutional duties imposed on the South African government to provide the services of a legal practitioner to litigants in civil cases.⁸

The South African Constitution, however, includes broad provisions for standing to enable people to act either on their own behalf or on behalf of others in situations where their fundamental constitutional rights have been infringed or threatened. It provides that anyone may approach the court who is acting:

- (a) in his or her own interests;
- (b) on behalf of another person who cannot act in his or her own name;

3. Nic Swart, *Entry Into the Profession: What About Articles? 1* (1994) (unpublished memorandum for the Law Society of South Africa) (on file with author).

4. Minister of Justice and Department of Justice, *Enhancing Access to Justice Through Legal Aid: Position Paper For National Legal Aid Forum 3* (1998) (unpublished position paper) (on file with author) [hereinafter *Enhancing Access to Justice*].

5. S. AFR. CONST. (Constitution of the Republic of South Africa Act 108, 1996), § 35.

6. *Id.* § 34.

7. *Id.* § 35.

8. *Id.* § 38.

- (c) as a member of, or in the interest of, a group or a class of persons;
- (d) in the public interest; or
- (e) as an association acting in the interests of its members.⁹

This provision introduces class actions into South African law with respect to constitutional violations of the South African Bill of Rights, and it has already been used by ratepayers who have been discriminated against in terms of property rates and taxes imposed upon them by a local authority.¹⁰ In the ratepayers' case, the court went on to say that no unnecessary restrictions should be placed on the application of the constitutional provisions concerning class actions.¹¹

The ratepayers' case was decided under the provisions of the interim South African Constitution,¹² but the wording of the final Constitution is the same.¹³ The South African Constitutional Court has held also that it is unconstitutional under an identical section of the interim South African Constitution¹⁴ for the South African government to try to limit claims against it by imposing very short notice and prescription periods on litigants seeking to enforce their rights.¹⁵ Such provisions are in breach of the right of access to the South African courts.¹⁶

II. SPECIAL COURTS AND THE LEGAL AID BOARD

Whatever provisions are made for legal assistance in civil matters will also depend upon the type of procedural system that operates in the country. For many years, South African rules of civil procedure have provided for *in forma pauperis* proceedings for people who could not afford lawyers in civil cases.¹⁷ In criminal cases, victims of crimes may ask for compensation and restitution during the trial, and an order to this effect has the same

9. *Id.*

10. *Beukes v. Krugersdorp Transitional Local Council*, 1996 (3) SA 476 (W).

11. *Id.*

12. S. AFR. CONST. (Interim Constitution of the Republic of South Africa Act 200, 1993) § 7(4)(b)(iv).

13. S. AFR. CONST. (Constitution of the Republic of South Africa Act 108, 1996), § 38.

14. S. AFR. CONST. (Interim Constitution of the Republic of South Africa Act 200, 1993) § 22.

15. *Mohlomi v. Minister of Defence*, 1997 (1) SA 124 (CC).

16. *Id.*

17. Criminal Procedure Act 51 of 1977 §§ 300-301 (1977) (S. Afr.).

weight as a judgement in a civil court.¹⁸ In addition, special procedures for the recovery of small claims were introduced in 1985, for amounts of less than R3000 (less than US\$600).¹⁹ Consumer affairs courts are also about to be introduced.²⁰ In rural areas, there are traditional chiefs' and headmans' courts, which are now required to operate within the constraints of the new Constitution.²¹

III. MECHANISMS FOR DELIVERY

For the past decade the South African Legal Aid Board (or "Board") has been the main vehicle for the delivery of legal aid services in South Africa. The apartheid state had previously recognized the need to provide legal aid in civil matters and had established the Board for this purpose in 1969.²² The Board began operating in 1971 and, during its early years, spent most of its budget on civil matters, such as divorces and personal injury claims, at the expense of criminal cases. Recently, however, an ever-decreasing amount has been spent on civil matters, and the vast majority of expenditure is now earmarked for criminal cases.²³ For the 1998-99 year, the Board received R260,000,000 (less than US\$45,000,000) mainly for constitutional criminal cases, and it expects to receive R224,670,000 (less than US\$37,440,000) for the 1999-2000 year.²⁴

18. *Id.* In terms of Section 300(1) of the Criminal Procedure Act 51 of 1977, the victim of an offense involving damage to, or loss of, property (including money), or the prosecutor acting on the instructions of such a victim, may apply to court for a compensation order against the accused person if he or she is convicted. *Id.* § 300(1). Provision is also made for payment to be made from any money taken from a convicted person upon his or her arrest. *Id.* § 300(4). A compensation order has the same effect as a civil judgement in the magistrate's court. *Id.* § 300(3). Compensation orders are not issued very often, but when they are, they are usually linked to suspended sentences.

19. Small Claims Courts Act 61 of 1984 (1985) (S. Afr.); see generally D. McQUOID-MASON ET AL., *CONSUMER LAW IN SOUTH AFRICA* 308-10(1997) [hereinafter *CONSUMER LAW*] (discussing South African small claims court); see also DEPARTMENT OF JUSTICE, *ANNUAL REPORT 1995-1996* 131 (1997) (S. Afr.) (noting that between 1995 and 1996, 27,890 trials were heard in small claims courts).

20. *CONSUMER LAW*, *supra* note 19, at 310.

21. David McQuoid-Mason, *Access to Justice in South Africa*, 17 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 230, 244 (1999).

22. Legal Aid Act 22 of 1969 (1969) (S. Afr.).

23. LEGAL AID BOARD, *BUSINESS PLAN COVERING THE PERIOD 2000 TO 2003*, 20 (1999) [hereinafter *BUSINESS PLAN*].

24. See *id.* (estimating that Legal Aid Board ("Board") has been under-funded by

South Africa has tried a wide variety of mechanisms for delivering civil legal aid services. These services include the following: (i) uncompensated private counsel (*pro bono*); (ii) state-compensated private counsel (*judicare*); (iii) state-funded candidate attorneys in rural law firms; (iv) state-funded law clinics; (v) state-funded justice centers (one stop legal aid shops); (vi) private, specialist law firms; (vii) independent university law clinics; (viii) paralegal advice offices; and (ix) legal insurance schemes. More recent developments have been the proposed recognition of contingency fees and the possibility of introducing compulsory community service for all law graduates to enable them to assist in the delivery of legal aid services.

None of the above schemes, however, will work effectively if members of the South African public remain ignorant of their legal rights and where they can get help in civil matters. Therefore, all of these measures should be complemented by law-related education programs. The role of each of these different mechanisms for assisting with the delivery of legal aid services in South African civil matters will be analyzed.

A. *Uncompensated Private Counsel (Pro bono)*

In South Africa, as in other countries, there has been a tradition of lawyers doing some *pro bono* or *pro amico* work,²⁵ but this has never been mandatory. No statistics of the annual number of *pro bono* cases are kept. The “cab rank” ethical rules of the advocates’ profession require advocates to take on legal aid work,²⁶ while the rules of the International Code of Ethics to which the attorneys’ profession subscribes, expects lawyers to take on cases assigned by a competent body,²⁷ which could include a court or the Board.²⁸

about R425,800,000 (less than US\$71,000,000) for 1998-1999 and R428,000,000 (less than US\$71,000,000) for 1999-2000).

25. G.W. Cook, *A History of Legal Aid in South Africa*, in *LEGAL AID IN SOUTH AFRICA* 28 (1974).

26. GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA, *UNIFORM RULES OF PROFESSIONAL ETHICS* R. 6.3.1.

27. INTERNATIONAL CODE OF ETHICS R. 17 (1998 ed.) *reprinted in* *LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW* (Edwin Godfrey ed., 1995).

28. ROBIN PALMER & DAVID McQUOID-MASON, *BASIC TRIAL ADVOCACY SKILLS* ¶ 2.5.2 (2000).

1. *In Forma Pauperis* Proceedings

For many years in South African civil cases, free legal aid has been provided in the high court under the *in forma pauperis* procedures in the Rules of the High Court,²⁹ whereby the registrar of the high court refers poor people³⁰ to private practitioners (attorneys who brief advocates) for help. The private practitioners must take the cases without compensation,³¹ but may recover their fees and disbursements at ordinary tariff rates if the litigant is awarded costs.³² At one stage it was thought that *in forma pauperis* proceedings should be expunged from the statute book as they would be superceded by the activities of the Legal Aid Board. This, however, has not happened because of the Board's increased expenditure on criminal matters and concomitant reduced expenditures on civil cases. The procedure can be used to assist claimants in civil cases that would otherwise be excluded by the *Legal Aid Guide* ("Guide").³³ From 1996 to 1997, 822 *in forma pauperis* cases were heard.³⁴

The first attempt to set up a national legal aid scheme in South Africa, by the then apartheid government, was in 1962. The South African Department of Justice negotiated with the advocates' and attorneys' professions to provide free legal services to persons referred to them by local legal aid committees set up at every lower court.³⁵ The system never became fully operational and eventually failed, probably because: (a) there was a lack of publicity; (b) members of the profession were not paid for their services; and (c) there was too much unwieldy red tape.³⁶

2. Lessons Learned

The advantages of a *pro bono* scheme are that it is cheap and, if supported by the legal profession, can imbue legal practition-

29. Uniform Rules of Court R. 40.

30. People with assets of less than R10,000 (less than US\$1667).

31. Uniform Rules of Court R. 40(5).

32. *See id.* R. 40(7); DAVID J. MCQUOID-MASON, AN OUTLINE OF LEGAL AID IN SOUTH AFRICA 17-22 (1982) [hereinafter OUTLINE OF LEGAL AID]

33. OUTLINE OF LEGAL AID, *supra* note 32, at 62.

34. DEPARTMENT OF JUSTICE, ANNUAL REPORT FOR PERIOD 1 JULY 1996 TO 30 JUNE 1997 (1998).

35. Cook, *supra* note 25, at 31-32.

36. P.H. GROSS, LEGAL AID AND ITS MANAGEMENT 176-77 (1976).

ers with an ethos of public service. The disadvantages are that *pro bono* clients may not receive the same level of service as paying clients and many lawyers are reluctant to take on *pro bono* cases to the extent that, even if they are mandatory, they may buy out the time they would be required to devote to them. The lesson learned from the 1962 South African experience is that unless lawyers are paid to deliver legal services, the chances of mounting a successful comprehensive legal aid scheme based on *pro bono* work are minimal.

B. *State-Compensated Private Counsel (Judicare)*

As previously mentioned, the main vehicle for the delivery of access to justice for the poor in South Africa has been the Legal Aid Board, which has opted for a judicare model, since its inception. Since 1994, the South African government has contracted with the Board to deliver legal services in criminal cases. The South African Constitution mandates that the government provides such services.³⁷ This has had a major impact on the Board's ability to continue using the judicare approach.

In terms of the Legal Aid Act, the Board is required "to render or make available legal aid to indigent persons."³⁸ It has representatives from the bench, the advocates' profession, the attorneys' profession, government departments, and independent experts on legal aid. The Board's offices are in the main cities, and it relies on assistance from designated legal aid officers employed by the South African Department of Justice in the magistrates' courts in towns where the Board has no offices.

1. Operation of Legal Aid Board

The Board was given complete discretion as to how it would offer legal assistance to indigent persons. It initially decided to adopt a referral (judicare) system, rather than a salaried lawyer approach. To this end the Board established a set of working rules which are incorporated in the *Guide*.³⁹ The *Guide* provides for the Board's resolutions to be carried out under the supervi-

37. S. AFR. CONST. (Constitution of the Republic of South Africa Act 108, 1996), § 35.

38. *Id.* § 3.

39. LEGAL AID BOARD, LEGAL AID GUIDE (1996) [hereinafter GUIDE]. A new LEGAL AID GUIDE ("Guide") is being prepared to put before the South African Parliament.

sion of the Director of Legal Aid ("Director"), who is an officer of the Board. The *Guide* recognises that legal practitioners should be remunerated for their work, and a tariff of fees has been introduced for both attorneys and advocates. Generally, legal aid officers attempt to assist applicants who qualify, but if they cannot, they refer them to a legal practitioner, who may be chosen by the applicant. If the applicant does not qualify, the legal aid officer must refer him or her to another suitable government department or another institution.⁴⁰

2. Financial Constraints

There is not a definition of an indigent person in the Legal Aid Act, but the Legal Aid Board has laid down a means test, which has been revised from time to time. The ceiling at present is R600 (less than US\$100) a month for single or estranged persons and R1200 (less than US\$200) for married couples, plus R180 (less than US\$30) for each child. For example, a family of six, with a husband, a wife, and four children, would be entitled to earn a monthly income of up to R1920 (less than US\$320),⁴¹ R1200 + R720 (4 x R180). In exceptional cases, however, the Director of the Board may grant legal aid to a person who falls outside of the means test.⁴²

3. Exclusions

The objective of the Board is to render or to make available legal aid to indigent persons as widely as possible within its financial means.⁴³ To this end, the *Guide* excludes assistance for legal aid in certain categories of criminal⁴⁴ and civil cases,⁴⁵ even if a person qualifies in terms of the means test. In civil matters, legal aid will not be rendered: (i) in debtors courts proceedings; (ii) for the administration of an estate or the voluntary surrender of an estate; (iii) in actions for damages on the grounds of defamation, breach of promise, infringement of dignity, invasion of privacy, seduction, adultery, and inducing someone to desert or

40. *Id.*

41. LEGAL AID BOARD, ANNUAL REPORT 1991/92 13 (1993) [hereinafter 1991/92 REPORT].

42. GUIDE, *supra* note 39, ¶ 2.5.

43. *Id.* ¶ 1.2.1.

44. *Id.* ¶ 3.1.

45. *Id.*

stay away from another's spouse; (iv) in a claim for maintenance which can be determined by a maintenance court without the assistance of a legal practitioner; (v) in undeserving divorce matters; (vi) for any action which may be instituted in the South African Small Claims Court or where the amount of the claim does not exceed the jurisdiction of the South African Small Claims Court by more than twenty-five percent; (vii) in a civil appeal unless the Director is satisfied that there are reasonable prospects of the appeal succeeding; (viii) in arbitration, conciliation, or any other form of alternate dispute resolution; (ix) in matters where there is no substantial and identifiable benefit to the client; (x) in matters excluded by the Board from time to time; (xi) in matters where enforcement of an order in favor of the applicant will yield little benefit; (xii) in inquiries in the South African Children's Court without the prior approval of the Director; and (xiii) for an application to obtain an interdict with respect to the prevention of family violence or harassment as a result of domestic or family disputes, since an interdict in these matters can be obtained without the assistance of a legal practitioner.⁴⁶ Applicants who are denied civil legal aid in divorce matters may apply to the registrar of the high court for help by way of *in forma pauperis* proceedings.

In civil matters, the Board must always be satisfied that there is merit in the case and that there is a reasonable prospect of success and recovery. Furthermore, if there is good reason to believe that an applicant is wilfully abstaining from entering into employment within his or her capabilities or that he or she has resigned from employment merely to obtain legal aid, assistance will be refused.⁴⁷

4. Applications

Under the *judicare* system in South Africa, legal aid applicants were never able to apply for assistance directly to private lawyers. Applicants first had to be screened by legal aid officers and then referred to lawyers. If they did approach a private lawyer first, the lawyer would have had to refer them to the local legal aid officer in order to obtain instructions to act as a legal-aid funded lawyer. The screening by legal aid officers was to en-

46. *Id.*

47. *Id.* ¶ 3.5.1.

sure that the applicants satisfied the means test and were not excluded in terms of the *Guide*. If they qualified for legal aid, they were referred to a practising attorney or a public defender's office or Board law clinic. More recently, the legal aid offices, public defender's offices, and Legal Board clinics have been amalgamated into justice centers which act as one-stop legal aid shops.

5. Refusals

A legal aid applicant has the right of appeal to the Director of the Board for a refusal of legal aid by a legal aid officer. The legal aid officer is obliged to inform the applicant of his or her rights. The grounds of the appeal must be submitted to the legal aid officer in writing and the latter must forward these to the Director. An applicant has a right of appeal to the Chairman of the Board for a refusal, termination, or suspension of legal aid by the Director.⁴⁸

6. Statistics on Referrals to Private Practitioners

During the past twenty-eight years, the Board has operated mainly by using the *judicare* system, where private lawyers who render legal aid services in accordance with the Board's rules are paid for their services at fixed tariffs. During this period, a total of 997,707 legal aid cases have been referred to attorneys, the vast majority of which involved criminal matters, and 559,238 of which have been granted since 1995 and the advent of the new South African Constitution. This means that the number of legal aid applications granted during the last four years consists of fifty-six percent of all legal aid applications ever handled by the Board.⁴⁹ The overall increase during the period of 1990 to 1999 has been 709%.⁵⁰ This unprecedented growth in the number of *judicare* cases regarding criminal matters eventually led to the abandonment of the *judicare* model as the prime method of delivering legal aid services by the Board.

In 1998, private attorneys were paid for completing 105,732 cases of which 87,469 (83%) involved criminal cases. Only sev-

48. *Id.* ¶ 4.12.2.

49. Legal Aid Board, Legotla: Overview of the Board and Its Activities 8 (Nov. 1998) (unpublished report, on file with author) [hereinafter Legotla Overview].

50. *Id.*

enteen percent of cases concerned civil matters: 14,156 (13%) divorce cases, 3617 (3.5%) other civil cases, and 490 (0.5%) labor cases.⁵¹ The average cost per case finalised by the Board during the same period was R864 (less than US\$144) per case for ordinary criminal matters, R1707 (less than US\$284.50) for constitutional criminal matters, and R1498 (less than US\$250) a case for civil matters under the judicare system. The average cost of all judicare cases was R1423 (less than US\$237).⁵²

The judicare model is considerably more expensive than the salaried lawyer scheme. In 1990, a pilot public defender program was introduced to cope with the ever increasing demand for legal aid in criminal matters.⁵³ In 1994, Board law clinics were introduced for the same reason, which, unlike the public defender's office, also catered to civil legal aid cases. During 1995, it was estimated that while the average cost of a judicare criminal case was R822 (less than US\$137) and the average cost of a public defender criminal case was R555 (less than US\$92.50), the cost of the state-funded law clinic cases was even less.

7. Lessons Learned

The South African experience is that the judicare system works where there is an adequate administrative structure to support it, where proper accounting systems are in place to deal with claims for fees and disbursements expeditiously, and where budget constraints keep pace with demand. Once a centralised staffing establishment cannot keep pace with the demands of practitioners for payment within a reasonable period of time, however, the judicare approach breaks down.⁵⁴

Despite new computer systems, the incoming-daily new accounts exceeded the daily number of old accounts that the Board's head office staff were physically able to process. This led

51. Legotla Overview, *supra* note 49, at 8.

52. *Id.*

53. 1991/92 REPORT, *supra* note 41, at 32-33.

54. LEGAL AID BOARD, BUSINESS PLAN COVERING THE PERIOD 2000 TO 2003 10 (1999) (noting that inability to keep track of payments to practitioners can lead to accounting errors, fraudulent claims by lawyers, double payments, and corruption). In 1999, the Legal Aid Board (or "Board") managed to reduce its error rate from 60% to 1% by installing stricter controls and radically reducing the number of judicare cases, as well as by capping the fees that lawyers could claim for judicare. *Id.*

to long delays in payment, sometimes stretching into years, and loss of confidence in the system by practitioners who were no longer prepared to accept legal aid work. In some instances, these practitioners sued the Board for outstanding fees. Matters were compounded by the build-up of huge contingency sums to cover amounts owed by the Board for matters that had not been completed, something with which the Auditor-General was not comfortable.

Thus, in desperation, the Board placed severe caps on fees for criminal cases. This further alienated the legal profession, but will result in savings of about forty percent to the Board in criminal and civil matters.⁵⁵ Some firms believe that tendering is a feasible solution and that they could tender to do cases at cheaper rates than salaried lawyers employed by the Board. The Board, however, has opted for a salaried lawyer justice center model as the norm, with *judicare* as a subsidiary method of delivery where such centers are not viable.⁵⁶

C. *State-Funded Candidate-Attorney Interns In Rural Law Firms*

In 1995, the Board entered into an agreement with Lawyers for Human Rights, a human rights non-governmental organization, to establish a pilot project whereby the Board would arrange with private attorneys in rural towns to employ candidate-attorney interns who would be funded by the Board to do legal aid work. The firms are identified by local legal circles, and the Board negotiates with the partners to assist with the payment of the salaries of the candidate attorneys. Lawyers for Human Rights assists with the recruitment of appropriate attorneys and, thereafter, monitors the progress of the project. The project not only expands access to legal aid services in rural areas, but also enables formerly disadvantaged persons to be employed in the legal profession in the areas where they live.⁵⁷

The candidate attorneys are required to handle at least ten new legal aid cases per month for free on behalf of the Board, as well as to perform community service one day a week. Two

55. *Id.*

56. David McQuoid-Mason, *National Legal Aid Forum, Kempton Park, 15-17 January 1998: Working Commission Recommendations*, 12 *SOUTH AFRICAN LAW JOURNAL* 48, 49 (1999) [hereinafter *Kempton*].

57. LEGAL AID BOARD, *ANNUAL REPORT 1995/96* 24 (1996).

projects involving eight candidate attorneys were operating by the end of 1997.⁵⁸ Most of the interns' work involves criminal cases, but some civil cases, primarily divorces, are also done. For instance, interns in four rural law firms during the period March 1, 1997, to February 28, 1998, completed 400 criminal cases and seventy-three civil cases.⁵⁹

1. Lessons Learned

The state-funded candidate attorney model is very cost effective and could be expanded to do more civil cases. The program could be replicated in those countries (*e.g.*, in Eastern and Central Europe or some African countries) that require law graduates to undergo a period of internship before being admitted to legal practice. This would apply particularly to countries with large rural populations and small-town law firms. In South Africa, it is much cheaper to subsidize the salaries of candidate attorneys in rural law firms than to establish branch offices of the Board in areas where there is a limited demand for legal aid services.⁶⁰

D. State-Funded Law Clinics

In 1993, the Attorneys Act⁶¹ was amended to allow prospective attorneys with the necessary legal qualifications to obtain practical experience—other than in an attorneys' office under articles of clerkship—by undertaking a period of community service.⁶² Community service may be done at law clinics accredited by provincial law societies, including clinics under the auspices of the Board. The clinics are required to employ a principal, an

58. LEGAL AID BOARD, ANNUAL REPORT 1996/97 21 (1999) [hereinafter 1996/97 REPORT].

59. Legal Aid Board, Legotla: Statistics on the Work Done by Way of Salaried Staff Models 6-7 (Nov. 1998) (unpublished paper) (supplying statistics used by author to calculate these numbers) (on file with author).

60. 1996/97 REPORT, *supra* note 58, at 21.

61. Attorneys Act 53 of 1979 (1979) (S. Afr.).

62. *See id.* § 2(1A)(b), as amended by Attorneys Amendment Act 115 of 1993, § 2 (allowing aspiring attorneys to "perform community service approved by the society concerned . . ."). An aspiring attorney may perform such community service provided that the person who engages them is practising the profession of attorney, *inter alia*, "in the full-time employment of a law clinic, and if the council [of the law society] in the province in which that law clinic is operated, certifies that the law clinic concerned complies with the requirements prescribed by such council for the operation of such clinic." *Id.* at § 3(1)(f).

attorney with sufficient practical experience to supervise law graduates in the community service program. The candidate attorneys appear in the district courts, and the principals appear in the regional and high courts. Interns who have been indentured for more than a year may also appear in the regional courts.

The Board employs candidate-attorney interns and supervising attorneys with a maximum ratio of ten interns to one supervisor. The objectives of the scheme are (i) to render legal services to persons who satisfy the means test and (ii) to alleviate the shortage of internship opportunities for candidate attorneys by providing articles of clerkship or contracts of community service to law graduates.⁶³ Between 1996 and 1997, 150 candidate attorneys qualified for admission to legal practice, forty-nine of whom were women and sixty percent of whom were from previously disadvantaged groups.⁶⁴

The Board began with a pilot project of five university law clinics in 1994, and since then has allocated up to R430,000 (less than US\$72,000) per clinic to twenty university law clinics and two others. The Board hopes that the money enables them to employ a supervising attorney and up to ten community service law clerks (interns) each. More recently, in some clinics the Board has been employing a ratio of eight interns to two qualified professional assistants, instead of ten interns, so that the professional assistants can appear in the regional (senior) magistrate's courts. The interns appear in the lower courts.

The Board has calculated that the average cost of the 24,513 criminal and 12,997 civil cases handled by the state-funded law clinics between July 1, 1994, and December 31, 1996, was R433 (less than US\$72).⁶⁵ This is less than half of the average cost per case, R976 (less than US\$163), charged under the *judicare* system during the same period.⁶⁶ Between 1997 and 1998, twenty law clinics completed 33,951 cases of which 20,042 (59%) were

63. LEGAL AID BOARD, ANNUAL REPORT 1993/94 35 (1994).

64. 1996/97 REPORT, *supra* note 58, at 20.

65. LEGAL AID BOARD, MONTHLY REPORT (Feb. 4, 1997) (including costs for clinics which have only just been established.) Ultimately the cost per case will be much less as the more established clinics cost about R350 (less than US\$58) per case. *Id.*

66. This figure is the average for criminal and civil cases—about 75% of the work in the clinics is criminal and 25% civil.

criminal, and 13,909 (41%) were civil.⁶⁷ This figure compares favorably with the 18,263 civil cases done under the *judicare* scheme for the same period⁶⁸ at probably twice the cost. The law clinics are now being incorporated into the justice centers and in cities such as Durban, the two state-funded university clinics operate as separate entities in the same justice center.

1. Lessons Learned

The state-funded law clinics provide extended legal services at a moderate cost to needy members of the public and at the same time develop fields of expertise, practical experience, and career opportunities for aspiring lawyers. They are more cost effective than the pure public defender model, because the bulk of the services are provided by law interns rather than fully qualified lawyers. This a useful model for consideration by countries, such as those in Eastern Europe like Poland and Slovakia with legal systems that require law graduates to serve an apprenticeship before being admitted as practitioners. It could also be used by other developing countries, which do not require internships, as a mechanism for integrating newly qualified law graduates into the legal profession. The South African experience has been that the standard of service of the Legal Aid Board clinic candidate attorneys in the lower courts is often better than that of qualified attorneys or privately employed candidate attorneys. This is because the interns are often more enthusiastic than established lawyers about legal aid cases. Furthermore they obtain specialist knowledge in the conducting of criminal and poverty law cases.

E. *State-Funded Justice Centers (One Stop Legal Aid Shops)*

The Board has begun to set up justice centers which provide a one stop service for legal aid clients. The centers incorporate the different constituents of the present legal aid scheme under one roof: qualified attorneys and advocates, candidate-attorney interns, paralegals, and administrative staff.⁶⁹ Legal aid officers

67. Legal Aid Board, Legotla: Delivery of Legal Aid by Way of Salaried Staff Models, Public Defenders, Attorneys and Candidate Attorneys 1-5 (Nov. 1998) (unpublished paper on file with author) (supplying statistics, as of October 30, 1998, upon which author based these calculations).

68. Legotla Overview, *supra* note 49, at 8.

69. BUSINESS PLAN, *supra* note 23, at 20.

only refer matters to private counsel where the justice center cannot handle a case. In offices where public defenders are employed, the public defenders deal with criminal cases in the regional courts and high courts.⁷⁰ Candidate-attorney interns do both civil and criminal work in the South African district courts.⁷¹ Professional assistants, interns who have qualified, attached to the state-funded law clinics appear in the South African regional courts. Intern supervisors, attorneys who have an LLB or more than three years experience, appear in the South African high courts and regional courts. Paralegals assist with the initial screening of clients, and administrative assistants and clerks provide the necessary administrative back up.

The justice center approach is designed to provide legal aid applicants with a one stop shop in urban and rural areas. The centers' staff provide a service to the communities in terms of free legal advice and attendance to cases and, where appropriate, by using negotiation, mediation, or arbitration to avoid litigation. The emphasis is on providing a full service to the community. Wherever possible, the centers employ staff from the communities that they serve in order to restore confidence in the communities that their work will be done by lawyers whom they can trust.⁷² Under the *judicare* system, legal aid clients sometimes felt that their cases were not getting the attention they deserved but could do little about it. If the lawyers are linked to the community, the clients may be in better bargaining positions.

1. Lessons Learned

At one stage, it was thought that the justice centers should incorporate expanded public defender services, in addition to the state-funded law clinics. The savings, however, were not as great as expected, because a *1997 Work Study Report*⁷³ suggested that staffing levels of senior and junior public defender person-

70. Magistrates' Courts Act 32 of 1944 (1944) (S. Afr.) (providing that regional courts can impose fines of up to R300,000 (less than US\$50,000) and imprisonment of up to twenty-five years).

71. *See id.* (providing that district courts can impose fines of up to R100,000 (less than US\$16,666) and imprisonment of up to three years).

72. BUSINESS PLAN, *supra* note 23, at 20.

73. C.R. Pretorius, Work Study Report (Oct. 20, 1997) (unpublished report, on file with author).

nel should be brought into line with those of the public service in the South African Department of Justice. During 1999, the Board revised this approach to exclude the qualified public defender component and to establish justice centers. The Board relied mainly on the interns in the state-funded clinics to provide the delivery of legal aid services. It calculated that between the years 2000 and 2003, some fifty-seven justice centers and fourteen rural centers could be gradually phased in at an eventual cost of R240,600,000 (less than US\$40,100,000) per year.⁷⁴

F. *Private Specialist Law Firms*

Private specialist law firms that deal with public interest law matters play a valuable role in the delivery of civil legal aid services to indigent people. The best example of a private specialist law firm in South Africa is the Legal Resources Center (or "LRC").

1. Legal Resources Center

The first LRC was established in Johannesburg in 1979. Five LRCs are now located in Johannesburg, Cape Town, Grahamstown, Durban, and Pretoria.⁷⁵ The LRC gives practical help to individuals and communities who would not otherwise be able to obtain professional advice or to enforce their legal rights, particularly in civil cases. In the twenty-one years of the LRC's existence, South Africa's first non-profit law center has assisted millions of disadvantaged South Africans either as individuals or as groups or communities who share a common problem. In addition, the LRC has worked with numerous advice centers that are staffed by paralegals.⁷⁶

The LRC's mission statement states that:

It works for the development of a fully democratic society based on the principle of substantive equality, by providing legal services for the vulnerable and marginalized, including the poor, homeless and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic and

74. BUSINESS PLAN, *supra* note 23, at 11.

75. LEGAL RESOURCES CENTER, ANNUAL REPORT FOR YEAR ENDED 31 MARCH 1995 25 (1996).

76. LEGAL RESOURCES CENTER, ANNUAL REPORT 9 (1996).

historical circumstances.⁷⁷

Prior to the 1994 elections, the LRC primarily used litigation and the threat of litigation to assert the rights of thousands of disadvantaged South Africans in several areas of the law. The LRC has reassessed its position in post-apartheid South Africa and is now focussing on two programs: a constitutional rights program and a land, housing, and development program. The constitutional rights program deals with access to justice; gender equality; children's rights; the enforcement of socio-economic rights, such as health care, education, housing, and water; and a constitutional reform program. The land, housing, and development program includes rural and urban restitution and redistribution of land, tenure security, housing, land law reform, and land development.⁷⁸

An important part of the LRC program is the training of paralegals and lawyers. It also provides a fellowship program, primarily to bring more black lawyers into the profession, and employs twelve to fifteen young law graduates each year. More recently it has trained interns from elsewhere in Africa and the developing world.⁷⁹ The LRC charges no fees and receives no government funds. It is financed by the Legal Resources Trust. The Legal Resources Trust receives money from overseas and local donors.

2. Lessons Learned

The LRC is the most successful specialist law firm in South Africa that provides legal aid services in civil cases for the poor and marginalized in the country. The LRC owes its success to its highly professional staff and strong overseas and local donor-based financial support, which is administered by the Legal Resources Trust. It has consistently received support from leading members of the advocates' profession, attorneys' profession, and the judiciary and enjoys a high national and international reputation. In a climate of increasing competition for donor funds resulting from South Africa's new democratic status, the LRC has gone from strength to strength because of its successes in

77. LEGAL RESOURCES CENTER, ANNUAL REPORT FOR YEAR ENDED 31 MARCH 1998 1 (1999).

78. LEGAL RESOURCES CENTER, ANNUAL REPORT 4 (1999).

79. LEGAL RESOURCES CENTER, ANNUAL REPORT 7 (1999).

making access to justice a reality for large sections of the South Africa's disadvantaged communities. Public interest law firms that fail to deliver on their undertakings will become starved for funding in the new climate of shrinking donor support.

G. *Independent Law Clinics*

Law clinics independent of the Board's clinics operate at most of the twenty-one law faculties at South African universities.⁸⁰ All of the clinics employ directors who are either practicing attorneys or advocates. In cases where the director is an attorney, the law clinic may seek accreditation by a local law society, and if granted, candidate attorneys may serve their internship for admission purposes in the clinic. Funding for the law clinics is provided by outside donors, mainly the Attorneys Fidelity Fund, which subsidizes accredited clinics by providing funds to enable them to employ a practitioner, attorney, or advocate to control the clinic.⁸¹ More recently, the Association of University Legal Aid Institutions ("AULAI") has set up the AULAI Trust with an endowment from the Ford Foundation to strengthen the funding of the clinics.

The law clinics provide free legal services to poor clients. The means test applied by the clinics is less stringent than that of the Board. Clients are represented in both the lower and high South African courts in criminal and civil matters. Student practice rules were drafted in 1985 to enable final year law students attached to law clinics to appear in criminal cases for indigent people accused in the South African district courts.⁸² The new

80. David J. McQuoid-Mason, *The Role of Legal Aid Clinics in Assisting Victims of Crime, in VICTIMISATION: NATURE AND TRENDS* 559 n.1 (Schurink et al. eds., 1992).

81. David J. McQuoid-Mason, *The Organisation, Administration and Funding of Legal Aid Clinics in South Africa*, 1 N.U.L.S.R. 189, 193 (1986).

82. The author drafted Student Practice Rules for South Africa based on the American Bar Association Model Rules for Student Practice (COUNCIL FOR LEGAL EDUCATION AND PROFESSIONAL RESPONSIBILITY, *STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS* 43 (2d ed. 1973)) and submitted them to the Association of Law Societies of South Africa in April 1985 for transmission to the then South African Minister of Justice. Although the rules were approved by all branches of the practicing profession and the law schools in the late 1980s, they appear to have been consistently and clandestinely blocked by bureaucrats in the South African Department of Justice. The first South African Minister of Justice under a democratic government in South Africa, who took office in 1994, undertook to have the rules implemented, but this never happened. It remains to be seen whether this will now be done by the new South African Minister of Justice and Constitutional Development.

post-apartheid government undertook to introduce legislation to provide for such rules during its first term of office, but this was never done. As previously mentioned, approximately 3000 law graduates are produced annually by South African law schools. If each final year law student were to do only ten cases a year, mainly during the summer and winter vacations, they could provide criminal defense services for 30,000 accused.⁸³ This would ease the criminal case-load of Board law clinics, which could then spend more time on civil matters.⁸⁴

Law clinics provide training and practical skills for senior law students and, at the same time, render a valuable service for indigent members of the community. Some law clinic work is incorporated into optional or compulsory clinical law programs at universities. Not all litigation may be dealt with in clinics, as some activities, like motor vehicle insurance claims, are restricted to legal practitioners practicing for their own benefit.⁸⁵

In the past, the vast majority of cases involved labor matters, such as wrongful dismissals; unemployment insurance and workmen's compensation for injuries; consumer law problems, such as credit agreements (hire-purchase); defective products; loan sharks and unscrupulous debt collection practices; housing problems, such as fraudulent contracts, non-delivery, and poor workmanship; customary law matters, such as emancipation of women and succession rights; maintenance; and criminal cases. During the struggle against apartheid, many of the clinics at the progressive universities were involved with civil rights cases involving pass laws, police brutality, forced removals, detention without trial, and other breaches of fundamental human rights.⁸⁶ In many instances, because they took virtually all clients off the street, law clinics tended to emphasize the service rather than teaching aspects of their functions.

With the advent of democracy in South Africa in April of 1994, the legal aid clinics are still dealing with poverty law problems. Some poverty law problems, such as housing, the quality of police services, and social security, have continued as a

83. Enhancing Access to Justice, *supra* note 4, at 25.

84. *Id.*

85. David J. McQuoid-Mason, *Legal Aid Clinics as a Social Service*, in *LEGAL AID AND LAW CLINICS IN SOUTH AFRICA* 64 (D.J. McQuoid-Mason ed., 1985).

86. See *AN OUTLINE OF LEGAL AID*, *supra* note 32, at 139-61 (listing generally types of cases handled by legal aid clinics).

result of non-delivery by the new South African government. This non-delivery is partly due to inefficiencies and obstruction by bureaucrats employed by the old regime, many of whom retained their jobs as part of the political settlement.⁸⁷ A few clinics have moved from general practice to more specialized constitutional issues. For example, at the University of Natal, Durban, the clinical law course focuses on women and children, administrative justice, and land restitution. The majority of clinics, however, continue to engage in general practice in a climate in which fewer restrictions are being imposed by the law societies.

The funding of law clinics is a critical and a limiting factor in the capability of clinics to train candidate attorneys and provide satisfactory legal services. The independent university law clinics play a valuable role in supplementing the work of the Board, and it has been suggested that they receive some funding from the Board for their services.⁸⁸ This is under consideration by the Board as part of its plans to restructure its services.

Twenty years ago it was pointed out that law students can play a valuable role in access to justice issues in Africa, and this is still true today:

Students represent a cheap source of manpower, which in the presence of proper supervision reaches a standard at least equal to that of a young qualified lawyer . . . The well-supervised use of law students will significantly ease the limitations under which most of the legal aid programs in Africa now have to work; it is only through student programs that there is any possibility in the near future for legal services becoming widely available to the poor.⁸⁹

The value of using properly supervised law students has also been recognized by the United States Supreme Court, which stated, "law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas"⁹⁰

A recent experiment for rural areas is a mobile law clinic train. During mid-1998, the *Legal i* train, a joint project between *Legal i*, the Automobile Association, and Spoornet, made its first

87. S. AFR. CONST. (Interim Constitution of the Republic of South Africa Act 200, 1993) § 236(2).

88. See *Enhancing Access to Justice*, *supra* note 4, at 25.

89. J. REYNTJENS, *PERSPECTIVES ON LEGAL AID* 36 (1979).

90. *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972).

journey to local communities in the Northern Province, the North West, Gauteng, and Mpumalanga. The train is a fully equipped law clinic that offers free legal advice to people from local communities. *Legal i* is a community-based legal services program established by the four provincial law societies, the Black Lawyers Association, and the National Association of Democratic Lawyers.⁹¹

1. Lessons Learned

The advent of a democratic legal system and more state expenditure on legal aid should have eased the service loads of the independent law clinics. In fact, the contrary has occurred because of the reduced spending on civil cases by the Board and the increasing challenges to the state to deliver on social and economic rights in terms of the South African Constitution. The law clinics are playing a useful role in this regard.

Two lessons have emerged. First, despite the good intentions of the new South African government to introduce student practice rules, it has been no more successful than the apartheid government in doing so. This may be more due to bureaucratic bungling than political will, but time will tell whether South Africa's second democratic administration is more successful than the first in this regard. Second, financial support for the independent law clinics is somewhat precarious as they rely on annual grants from the Attorneys Fidelity Fund and the AULAI Trust. Until such time as the valuable contribution made by the independent clinics is recognized as an integral part of the national legal aid scheme, their future will continue to be uncertain. Hopefully, the restructured Board delivery model will be able to accommodate the independent law clinics so that they can receive a share of the state funding earmarked for legal aid. A strong law clinic network requires a secure financial base.

H. *Paralegal Advice Offices*

There are numerous organizations in South Africa involved in paralegal advice work. In 1998, it was estimated that there were 350 community advice centers in South Africa.⁹² Many of these also provide access to justice by educating the public con-

91. *Professional News*, DE REBUS 10 (July 1998).

92. *Kempton*, *supra* note 56, at 53.

cerning their legal rights, as well as training paralegals to give advice. Some bodies (*e.g.*, the Black Sash) concentrate in urban areas, while others (*e.g.*, Community Law and Rural Development Center in Durban and Lawyers for Human Rights in Stellenbosch) focus on rural areas. Services are provided at a variety of levels, which may vary from simple advice offices in the townships, which act as conduits to refer clients elsewhere, to those providing full legal aid services, such as the Legal Aid Bureau in Johannesburg.⁹³

Employees at advice offices are generally paid staff, but often the remuneration is very low and, in some cases, the staff works for nothing. Training of paralegal staff varies from the formal training offered by Lawyers for Human Rights, to the Community Law and Rural Development Center's diploma course, to the practical experience which is obtained on the job. Some of the more sophisticated advice offices are linked to organizations, such as the Legal Resources Center, Lawyers for Human Rights, and the Community Law and Rural Development Center, while others rely on free services provided by legal practitioners in private practice.

Most advice offices offer mainly legal advice, which often resolves the problem. Many of them have built up expertise in particular areas, including pensions, unemployment insurance, unfair dismissals, and a variety of others. Where the advice office cannot solve the problem, the party concerned is usually directed to the Board's offices or to a sympathetic law firm. Paralegals are also being included in the Board's new justice centers. A National Paralegal Institute has been set up to assist paralegal advice offices with training, certification, and fund-raising.

At the National Legal Aid Forum, it was suggested that paralegal advice offices should be incorporated into the legal aid system at two stages. The first stage should be to provide information and advice at the community level. The second should be to refer clients to legal services for representation. For the first stage, the Board should: (a) build on the infrastructure of the existing paralegal community advice centers in the country;

93. AN OUTLINE OF LEGAL AID, *supra* note 32, at 128-29 (noting that the Legal Aid Bureau was established in 1937 by South African Institute of Race Relations). In 1996, the Legal Aid Bureau experienced financial difficulties, and the Legal Board agreed to provide substantial funding for it and has continued to do so. *Id.*

(b) empower advice offices by including paralegals and law-related education trainers to provide an educational component; (c) empower advice offices by including some professional lawyers and candidate attorneys in their staff; (d) encourage the use of alternative dispute resolution to resolve disputes; and (e) deal with preliminary issues where people require representation. If disputes cannot be resolved during the first stage, the community advice offices should move to the second stage and refer clients to law clinics, public defenders, private lawyers, or to community legal service centers or justice centers.⁹⁴

Paralegal advice offices are particularly useful in rural areas. A good example of an organization involved in setting up paralegal advice offices in rural areas is the Community Law and Rural Development Center (or "CLRDC").

1. Community Law and Rural Development Center, Durban

The CLRDC in Durban was established at the University of Natal in 1989. It provides advice and law-related education to about 1,000,000 rural people living in KwaZulu Natal and the Eastern Cape. The CLRDC was established to empower rural communities to: (a) participate in a changing South Africa by increasing individual accountability, skills, self-reliance, and confidence; (b) educate rural communities about democracy, voting, and civil society; and (c) to strengthen the rule of law in rural South Africa. The CLRDC has worked on developing a self-sustaining program of legal advice, education, and training in rural communities.⁹⁵

Rural communities are taught how to raise and administer funds and to develop a broad-based understanding of the role and application of law in South Africa. The CLRDC seeks to develop the skills of rural communities so that they can participate in the transformation of the country. The latter are inculcated with a sense of self-reliance, confidence, and responsibility and are made aware that although law is important for self-reliance, it is not the only route to follow. The CLRDC promotes the attainment and maintenance of democracy through the development of a rights-based culture to ensure that all levels of South

94. *Kempton, supra* note 56, at 53.

95. *CONSUMER LAW, supra* note 19, at 249.

African government are made accountable to their communities.

The CLRDC operates fifty-six paralegal advice offices in rural communities, which are governed by customary law and tribal authorities, consisting of chiefs, headmen, and unpaid tribal councilors. There is no formal training for tribal authorities who are expected to administer increasingly complex affairs in their communities. This often results in conflicts between Western law and customary practices. The conflict is likely to increase under the new South African Constitution.

The CLRDC responds to requests from communities who have established paralegal committees to provide training for paralegal advisers. The CLRDC uses an intensive three month training program, during which selected paralegals from rural communities are trained to operate paralegal advice offices. At the end of the training period, the paralegals are issued with diploma from the Faculty of Law, University of Natal, Durban.⁹⁶ By the end of 1996, the CLRDC had handled approximately 6500 cases for rural residents, provided numerous community legal education workshops, monitored South African administrative functions to measure accountability, and provided widespread voter education in the KwaZulu Natal region.⁹⁷ Every year the CLRDC attracts a number of interns from developing countries.

2. Lessons Learned

Paralegal advice offices are a useful adjunct to conventional lawyer-based legal aid service schemes. Access to justice must be considered holistically, and paralegals are in the front line in the field when communities make their first contact with the law. Paralegal advice offices can play a valuable role in screening initial legal complaints and referring potential litigants to lawyer-based services. This role has been acknowledged by the Board, which is integrating paralegals into its new justice centers.⁹⁸ For the effective functioning of paralegal advice offices, workers should be paid for their services and properly trained. The of-

96. The only other paralegal university certificate courses are run at Rhodes University for Lawyers for Human Rights, and more recently at Rand Afrikaans University.

97. 1996/97 ANNUAL REPORT, *supra* note 58, at 10 (1997).

98. *Id.*

fices themselves should be placed on a sound financial footing, and this can best be done by integrating them into the national legal aid scheme.⁹⁹

I. Prepaid Legal Service Insurance Schemes

Prepaid legal service insurance schemes have been introduced in South Africa and have a membership of about 600,000, mainly from the lower and middle income groups. The largest scheme has 350,000 members and charges monthly premiums of between R35 (less than US\$6) and R70 (less than US\$12). A premium of R35 yields cover for legal expenses for a family, including children under twenty-one years old, in criminal, civil, and labor matters of up to R35,000 (less than US\$6000), while a premium of R70 would cover costs of up to R70,000 (less than US\$12,000). A cheaper scheme only covering legal costs for labor matters is also available for R18 (less than US\$3) a month.¹⁰⁰

At one stage, the Board was investigating the possibility of introducing a telephone advice service by subscription, which, at a fee of about R10 (less than US\$1.60) or R15 (less than US\$2.50) a month, would enable subscribers to obtain legal advice and access to lawyers for an initial consultation. It was estimated that such a scheme could raise up to R350,000,000 (less than US\$58,000,000) a year for the Board if it was run under its auspices. This is considerably in excess of what the South African government provides to the Board on an annual basis.¹⁰¹

1. Lessons Learned

Prepaid legal insurance schemes work for some lower and middle income groups, but given the high unemployment rates in South Africa, there will always remain a large group of people who cannot afford even the very low premiums. A major burden will remain on the South African government to provide funding. The initiative by the Board to consider income generation through a subscription fee should still be explored, although traditionalists might argue that it is not the function of the Board to become involved in such activities.

99. *Kempton, supra* note 56, at 53.

100. This information was provided telephonically to the author by the human relations section of South Africa's largest legal insurance scheme on March 9, 2000.

101. Enhancing Access to Justice, *supra* note 4, at 34.

J. Contingency and Speculative Fees

Contingency fees are another method of giving indigent people access to justice in civil cases. Contingent fees work on the understanding that a lawyers' fees are calculated on a percentage of the moneys recovered by them on the basis that the parties bear their own costs. Contingency fees are an exception to the general rule in South Africa that a lawyer should not acquire a propriety interest in the cause of action or subject matter of litigation that he or she is conducting for a client. The reason is said to be that since a lawyer has a financial interest in the outcome of any of the litigation, it may cloud his or her judgment. Contingency fees, however, make the courts accessible to people who cannot afford lawyers but do not qualify for legal aid.¹⁰² In the past, they have been outlawed,¹⁰³ but the South African Law Commission has recommended that they be allowed with respect to class actions.¹⁰⁴

1. Speculative Fees

Although provincial law societies in South Africa have frowned on contingency fees, they have allowed speculative fees for many years. This includes allowing attorneys to agree that a fee will be charged only if the attorney succeeds in the case. If the attorney is unsuccessful, he or she only charges for disbursements, not for a fee. If the attorney succeeds, a charge of up to twice the usual tariff for the work done is allowed by the local law society.

South African law societies believe that speculative fees avoid many of the abuses that may occur under the contingency fee system, such as the following possibilities: (a) an attorney may negotiate an unreasonable percentage of the claim; (b) lawyers, with a substantial stake in the outcome, may be tempted to induce witnesses to change their evidence; and (c) the danger of attorneys becoming party to their clients' causes, which might

102. Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and the Solution*, U. PITT L. REV. 811 (1965).

103. EARL LEWIS, *LEGAL ETHICS: A GUIDE TO PROFESSIONAL CONDUCT FOR SOUTH AFRICAN ATTORNEYS* 27, 239 (1982).

104. South African Law Commission, *The Recognition of a Class Action in South African Law 49-50* (1995) (unpublished working paper on file with author).

interfere with their independence.¹⁰⁵ There is no doubt that speculative fees, like contingency fees, can make legal services much more accessible to poor people. The South African Law Commission has made an investigation into the desirability of charging contingency and speculative fees.¹⁰⁶

2. Lessons Learned

The distinction between contingency fees and speculative fees is more apparent than real. In both instances lawyers have a share in the outcome of the litigation because they are only paid if they succeed on behalf of their clients. The International Code of Ethics allows for a contingency fee system.¹⁰⁷ Ethical rules can be drafted and enforced to ensure that clients are not charged unreasonable fees, witnesses are not persuaded to change their evidence, and attorneys do not lose their independence.¹⁰⁸

K. *Compulsory Community Service For All Law Graduates*

In 1997, Justice Arthur Chaskalson, the President of the South African Constitutional Court, suggested that compulsory community service for law graduates could help to solve the problem of delivery of legal aid to poor sections of the community, particularly in respect to criminal cases.¹⁰⁹ A similar proposal had been mooted as an alternative to military conscription during the apartheid era.¹¹⁰

These views were discussed by a working commission on internship and training at the National Legal Aid Forum in 1998. The commission recommended the following: (a) community service should be introduced to improve the administration of justice, primarily to provide legal aid services; (b) the question of whether it should be compulsory (like medical internships) or voluntary should be further investigated; (c) community service

105. David J. McQuoid-Mason, *Consumers And Access To the Courts*, in *CONSUMER LAW IN SOUTH AFRICA* 320 (DJ McQuoid-Mason ed., 1997).

106. SOUTH AFRICAN LAW COMMISSION, *SPECULATIVE AND CONTINGENCY FEES* (1997) (on file with author).

107. INTERNATIONAL CODE OF ETHICS, *supra* note 27, R. 18.

108. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.5(c) (1981).

109. Arthur Chaskalson, *Legal Interns could solve Legal Aid Problems*, *DE REBUS* 782 (Dec. 1997).

110. David J. McQuoid-Mason, *Public Defenders and Alternative Service*, 4 *SOUTH AFRICAN LAW JOURNAL* 267 (1991).

should be primarily in the form of work in law clinics, public defender's offices, and public interest law firms; (d) community service should be for not less than one year after graduation; (e) an independent body should be set up to control the enrollment and training of community service interns; (g) community service interns should receive proper training before providing services to the public; (h) the question of whether community service should replace all other forms of internship should be investigated; and (i) a pilot project on a voluntary basis should be introduced.¹¹¹

The suggestion was greeted with some hostility in an editorial in the official journal of the attorneys' profession, which warned that representation by interns and paralegals "could be of such inferior quality that, in the worst cases, it would not satisfy the constitutional right to representation." It went on to say, "The legal aid system should not be used as an avenue to allow disadvantaged students to have access to the profession: that is not its purpose."

The introduction of community service for the 3000 law graduates in South Africa each year will be no easy matter. It will require careful planning to ensure that interns are properly trained before they start assisting the public or the state and are properly supervised when they do so. At present there are 432 magistrate's courts in South Africa¹¹² in which the interns could be required to serve. Of these, 390 have facilities where people can apply for legal aid.¹¹³ Special arrangements would have to be made to deploy community service interns at the different magistrate's courts, paralegal advice offices and justice centers. The Law Society of South Africa is adamant that the interns will have to be supervised by qualified legal practitioners, as is done in law clinics.¹¹⁴ The state-funded law clinics provide a useful model that can be used to develop the community service model.

1. Lessons Learned

Since the Legal Aid Forum in 1998, a new Board has been

111. *Kempton, supra* note 56, at 54-57.

112. Legotla Overview, *supra* note 49, at 6.

113. *Id.*

114. *Kempton, supra* note 56, at 54.

appointed and a new national government with a new South African Minister of Justice and Constitutional Development has taken over. Accordingly, the issue of compulsory community service has been put on the back-burner. The Ministry is currently examining the whole question of the requirements for entry into the legal profession, and the issue of community service will form part of this discussion.¹¹⁵ The Ministry, however, needs to drive the process in cooperation with the profession. It will take several years to achieve the transformation necessary to make justice more accessible and the legal profession more demographically representative of South Africa's population.

L. *Law-Related Education Programs*

It goes without saying that unless people are aware of their legal rights, they will not know that they have the right to seek access to justice. Accordingly, law-related education programs play a very important role in complementing legal services for the poor. One of the best known law-related education programs in South Africa is Street Law.

1. Street Law

Street Law is a preventive legal education program that originated in the United States in the early 1970s and was brought to South Africa in 1985. It provides students with an understanding of how the legal system works and how it may be utilized to safeguard the interests of people on the street.¹¹⁶ The South African national program is housed at the Center for Socio-Legal Studies at the University of Natal, Durban. The program has been conducted in hundreds of high schools throughout South Africa. The program involves training senior law students and guidance teachers from the schools to use the Street Law student texts for the pupils and teacher's manuals for the teachers.¹¹⁷ In the greater Durban area, law students teach Street Law at about a hundred high schools each week.

The Street Law books deal with a wide variety of subjects,

115. South African Department of Justice Legal Policy Unit, Transformation of the Legal Profession 8 (1999) (unpublished first draft of issue paper, on file with author).

116. David J. McQuoid-Mason, *Reducing Violence in South Africa through Street Law Education of Citizens*, in *INTERNATIONAL DEBATES OF VICTIMOLOGY* 347-48 (Gerd et al. eds., 1994).

117. *Id.*

including a general introduction to South African law and the legal system,¹¹⁸ criminal law and juvenile justice,¹¹⁹ consumer law,¹²⁰ family law,¹²¹ and housing and welfare law.¹²² There is also a text dealing specifically with human rights which was first published in South Africa¹²³ and subsequently adapted for the United States.¹²⁴ The books use student-centered teaching techniques and involve students in such interactive strategies as role-playing, opinion polls, critical thinking, and mock trials. The program, together with its offshoot, Democracy for All, runs at sixteen universities in South Africa. Democracy for All is also managed nationally from the Center for Socio-Legal Studies and is linked to the book entitled *Democracy for All*.¹²⁵ The latter is aimed at providing human rights and democracy education for school children and community organizations throughout South Africa. The Center is involved in on-going discussions with education officials to include Street Law and Democracy for All in the new school curricula.

2. Lessons Learned

Unless citizens know what their legal rights are, they are unlikely to know that they can enforce them. In contrast to criminal cases where the court can ensure that accused are legally represented, in civil cases people need to know what their rights are in order to enforce them. The Street Law program tries to ad-

118. DAVID McQUOID-MASON, *STREET LAW: PRACTICAL LAW FOR SOUTH AFRICAN STUDENTS: BOOK 1 INTRODUCTION TO SOUTH AFRICAN LAW AND THE LEGAL SYSTEM* (1987) (including a teacher's manual).

119. DAVID McQUOID-MASON, *STREET LAW: PRACTICAL LAW FOR SOUTH AFRICAN STUDENTS: BOOK 2 CRIMINAL LAW AND JUVENILE JUSTICE* (1987) (including a teacher's manual).

120. DAVID McQUOID-MASON, *STREET LAW: PRACTICAL LAW FOR SOUTH AFRICAN STUDENTS: BOOK 3 CONSUMER LAW* (1988) (including a teacher's manual).

121. DAVID McQUOID-MASON, *STREET LAW: PRACTICAL LAW FOR SOUTH AFRICAN STUDENTS: BOOK 4 FAMILY LAW* (1990), (including a teacher's manual).

122. DAVID McQUOID-MASON, *STREET LAW: PRACTICAL LAW FOR SOUTH AFRICAN STUDENTS: BOOK 5 WELFARE AND HOUSING LAW* (1991) (including a teacher's manual).

123. DAVID McQUOID-MASON, EDWARD L O'BRIEN, & ELEANOR GREENE, *HUMAN RIGHTS FOR ALL: EDUCATION TOWARDS A RIGHTS CULTURE* (1993) (including an instructors' manual).

124. EDWARD L O'BRIEN, ELEANOR GREENE & DAVID McQUOID-MASON, *HUMAN RIGHTS FOR ALL* (1996) (including an instructors' manual).

125. DAVID McQUOID-MASON, ET AL., *DEMOCRACY FOR ALL: EDUCATION TOWARDS A DEMOCRATIC CULTURE* (1994) (including an instructor's manual).

dress this issue and also to give practical advice to participants concerning when and how they can enforce their rights.

CONCLUSION

In the light of the above, the following conclusions can be drawn from the South African experience in respect of legal aid in civil matters:

1. The South African Constitution provides a general right of access to the courts, and wide grounds for standing, including in respect of public interest and class actions.

2. The main State mechanism to provide access to justice is the Board which initially focussed on *judicare* as the vehicle for delivery, but is now moving towards a salaried lawyer system.

3. A variety of creative cost effective initiatives have been introduced to provide legal aid in civil and criminal matters, the most novel of which is the employment of law graduates as interns in state-funded law clinics.

4. The question of compulsory community service for all law graduates is being explored as a mechanism to enable young lawyers to obtain practical experience, while at the same time assisting with the delivery of legal services to the poor.

5. Public interest law firms such as the Legal Resources Center and the independent law clinics play a valuable role in the delivery of legal services to the poor in civil matters.

6. Paralegal advice offices can play an important ancillary role in the preliminary stages of assisting clients who require legal aid in civil matters.

7. Pre-paid legal services insurance schemes and the concept of contingency fees may play a significant future role in providing access to justice, but are still in their infancy in South Africa.

8. Law-related education programs are essential if citizens are to be made aware of their legal rights and how to enforce them. South Africa has considerable experience in this regard.