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Access to justice and the role of law schools in developing countries: some lessons from South Africa: pre-1970 until 1990: Part I*

Summary

The term 'access to justice' is generally used to refer to the provision of access to state-sponsored health, housing, welfare, education and legal services, particularly for the poor. In the narrow sense it refers to access to legal services which include access to legal advice and legal representation. In law schools this access can be provided by students and staff working in 'live client' law clinics and by using law students in 'Street law' programmes to provide access to information about legal rights and responsibilities to the general public. Thus, in developing countries law schools can play an important role by not only providing legal aid services to the poor but also by educating lay people about the law, human rights and democracy.

South African law schools became directly involved in the delivery of legal advice and services during the early 1970s when the first 'live client' law clinics were set up by law faculties and non-governmental organisations (NGOs). During this period very few law schools sought to change the apartheid system by becoming directly involved in human rights issues. In the mid-1980s 'Street law' programmes began to be introduced at law schools to educate people about their legal rights and the need for change. By the 1990s an increasing number of law schools became actively involved in the promotion of human rights and democracy, and several legal academics were involved in the drafting of the new Constitution.

Toegang tot geregtigheid en die rol van regsfakulteite/-skole in ontwikkelende lande: 'n aantal lesse uit Suid-Afrika: die periode voor 1970 tot 1990: Deel I

Die woorde 'toegang tot geregtigheid' word in die algemeen gebruik om te verwys na die verskaffing van toegang tot staatsgesubsidieerde gesondheidsdienste, behuising, welsyn, onderwys en regsdienste aan veral die armes. 'n Enger betekenis stel toegang tot regsdienste voor. Toegang tot regsdienste sluit in toegang tot regsadvies en regsverteenwoordiging. In regsfakulteite/-skole kan hierdie toegang verskaf word deur studente en dosente wat werk in die 'lewende kliënt' regsklinieke. Toegang kan verder verskaf word deur studente wat deelneem aan die Allemansreg program wat inligting

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oor die reg aan die algemene publiek verskaf. In ontwikkelende lande kan regsfakulteite/-skole 'n belangrike rol speel deur die volgende dienste te verskaf, naamlik regshulpdienste aan die armes te verleen en opleiding in die regte, menseregte en demokrasie aan die algemene publiek te verskaf.

Suid-Afrikaanse regsfakulteite/-skole het gedurende die vroeë 1970's direk betrokke geraak by die verlening van regsadvies en die verskaffing van regsdienste toe die eerste 'lewende kliënt' regshulpklinieke deur regsfakulteite en nie-regeringsorganisasies tot stand gebring is. Gedurende hierdie periode het min van die regsfakulteite betrokke geraak by menseregte ten einde die vorige apartheidsregering tot 'n einde te bring. In die middel 1980's is Allemansregprogramme by universiteite begin ten einde die algemene publiek te onderrig in die bepalings van die reg en die noodsaaklikheid van verandering. Teen die 1990's was die meeste van die regsfakulteite aktief betrokke by die bevordering van menseregte en demokrasie en verskeie regsakademici was betrokke by die opstel van die nuwe Grondwet.

1. Introduction

The term 'access to justice' is generally used to refer to the provision of access to state-sponsored health, housing, welfare, education and legal services, particularly for the poor. In the narrow sense it refers to access to legal services which include access to legal advice and legal representation. In law schools this access may be provided by students and staff working in 'live client' law clinics. The narrow meaning of access to justice can be expanded to include the provision of access to information about legal rights and responsibilities to the general public. This can be done by law schools introducing 'Street law' education programmes whereby law students are trained to educate lay people about the law. In developing countries law schools can play a crucial role in supplementing the sometimes rudimentary legal services provided to the poor by the state, and in educating ordinary people about the law, human rights and democracy.

This paper is concerned with the role that law schools in South Africa have played in promoting a rights culture by providing access to the civil and criminal courts and educating the public about their legal rights. Where appropriate, reference will be made to broader human rights issues that are relevant to such access. Unlike during the apartheid era, the present South African Constitution[1] provides everyone with a right of access to the courts in general,[2] a right to legal representation at state expense in certain circumstances for arrested, detained and accused persons,[3] and the right of access to certain social and economic rights.[4] However, the mechanisms set in place by the government to achieve these aims are not always adequate and people often have to rely on non-governmental agencies for assistance. In recent years the university law schools have played an increasingly important role in this regard.

1 Constitution of the Republic of South Africa Act 108 of 1966.
2 Section 34.
3 Section 35.
4 Sections 26 (housing), 27 (health care, food, water and social security), 28 (children) and 29 (education).

In this paper it is intended to consider the role of law the schools in South Africa in delivering access to justice during the following periods:

(a) the apartheid era prior to the 1970s;

(b) the apartheid era during the 1970s;

(c) the apartheid era during the 1980s;

(d) the era of declining apartheid from 1990 until 1994; and

(e) the era of a democratic South Africa since 1994.

In each instance an attempt will be made to reflect on the lessons learned.

2. The apartheid era prior to the 1970s

Prior to the 1970s law clinics were unknown in South Africa and law schools made little contribution to access to justice apart from training future lawyers and judicial officers. Despite the manifest and widespread injustices under apartheid, few attempts were made by law schools directly to assist the victims of the system or inform them about their legal rights. Most legal research was focused on private rather than public law[5] and the majority of legal academics were not prepared actively to confront the apartheid state's policies concerning justice and access to justice.

There were a variety of reasons for this apparent collaboration with the apartheid authorities by the law schools. Some of the reasons persisted from the early years of apartheid until its ultimate demise. They included the following: (a) fear of official retribution; (b) fear of contravening the law; (c) a feeling of powerlessness; (d) a belief that law teachers should not become involved in politics; (e) ignorance as a result of self-censorship by the newspapers, and official censorship of the electronic media; (f) a refusal to believe that the system was unjust and morally corrupt; (g) a fear of peer disapproval; and (h) a fear of harming their professional careers.[6]

The few legal academics who did undertake criticism and analysis of the injustices of apartheid[7] were themselves subjected to considerable criticism for becoming involved in politics from their peers, the legal profession and the bench. Sometimes they were prosecuted for what they wrote. Professors Anthony Mathews and Ronald Albino[8] were criticized by the Chief Justice of South Africa for suggesting in a law journal article[9] that the laws allowing detention without trial and the attitudes of the judges towards them were permanently

5 For an early article on access to justice in the narrow sense (written by a practitioner not an academic) see Abromowitz 1960:351, 473. See also Selikowitz 1965-1966:53.

6 McQuoid-Mason and Loots 1998:101.

7 Most notably Professor AS Mathews of the University of Natal, Durban; Professor B v D van Niekerk of the University of the Witwatersrand, Johannesburg, and then of the University of Natal, Durban; and Professor CJ Dugard, previously of the University of Natal, and then of the University of the Witwatersrand, Johannesburg.

8 Professor RC Albino was a psychology professor at the University of Natal, Durban.

9 Mathews and Albino 1966:16.

undermining the rule of law in South Africa.[10] Professor Barend van Niekerk was prosecuted for contempt of court[11] for publishing an article in which a survey conducted by him amongst legal practitioners showed that nearly 50% believed that 'capital punishment is meted out on a differential basis to the different races'.[12] The decision to prosecute him was roundly condemned by legal academics including the Society of University Teachers of Law.[13] He was eventually acquitted.[14]

During the 1960s the clinical legal education movement began developing in law schools in the United States[15] but it did not reach South Africa's shores until the 1970s.[16]

2.1 Lessons learned

Where law teachers regard themselves as apolitical the tensions within law school faculties are usually related to personal and management issues rather than politics. In the 1960s, with few exceptions, law teachers at the traditionally white universities tended to be apathetic while those at the newly created historically black universities[17] were subservient. The comparatively passive role adopted by the vast majority of law school faculties on social justice issues meant that there were fewer tensions among the law school staff and students, the profession and the state than had occurred during the first decade of the apartheid era when the new regime was still finding its feet.

10 See Chief Justice Steyn's criticism of the article in Steyn 1967: 101. The Chief Justice said, *inter alia*: 'My present concern is the reproach leveled at our Courts, and the disparaging tone in which this has been done ... it is not our function to write an indignant codicil to the will of Parliament' — at 106-7.

11 *S v Van Niekerk* 1970 (3) SA 655 (T).

12 Van Niekerk 1969:467.

13 Society of University Teachers of Law 1970:467. The Society voiced 'a most disquieting sense of insecurity' after van Niekerk's prosecution — Rhadamanthus 1970:81. See also Milton 1970:424.

14 On the grounds that he did not have 'the requisite evil intention' as demonstrated in the second part of the article — Van Niekerk 1970:72 — where he said: 'Whatever explanation there may be for these figures, it is unacceptable to assume that it lies in a conscious distinction between races in capital cases for the purposes of sentencing' — *S v Van Niekerk* 1970 3 SA 655 T: 660.

15 The clinical legal education programmes came of age in the United States with the establishment of the Council on Legal Education for Professional Responsibility (CLEPR) in 1968 with a grant of $6 million from the Ford Foundation — Marden 1973:8. CLEPR replaced the earlier initiatives of the National Council on Legal Clinics (NCLC) from 1959-65 and the Council on Education in Professional Responsibilty (COPC) from 1965-68, both of which were also funded by the Ford Foundation — Marden 1973:5-7.

16 The history and development of the clinical law movement in the United States was first brought to the attention of South African legal academics by William Pincus, President of CLEPR at the 1973 Legal Aid Conference held at the University of Natal, Durban — Pincus 1974:123.

17 The new ethnic universities for the different tribal and racial groups were established in terms of the ironically named *Extension of University Education Act* 45 of 1959.

3. The apartheid era during the 1970s

During the 1970s a number of important academic works concerned with access to justice were published and university law clinics began to be established for the first time.

3.1 Academic writings and other endeavours

Mathews[18] and Dugard[19] published major works on aspects of the rule of law and human rights in South Africa, and Van Niekerk[20] continued writing prolific articles on the injustices of apartheid. Van Niekerk was soon faced with two further court actions for his comments on access to justice in the apartheid state. The first concerned his utterances in 1971 at a public meeting when he called for the courts to ignore the evidence of persons forced to make incriminating statements while detained without trial in solitary confinement. The statement was made while the local high court was hearing a 'treason trial' and he was prosecuted for contempt of court and subsequently convicted.[21] His conviction was criticized by academic colleagues for stifling public criticism of public officials, including the judiciary.[22] Van Niekerk's second court action was a statement released to a Sunday newspaper in 1974 in his capacity as President of the Society for the Abolition of Capital Punishment. Two convicted criminals, one white and one black, had been sentenced to death for murder. The white criminal, who took the leading role, was subsequently reprieved while the black person was executed. Van Niekerk criticized the government by saying that they would have also been expected to save the life of the black person 'to avoid the obvious inference of discrimination' and that their decision 'speaks volumes for their lack of concern for justice and the reputation of our law'.[23] He was successfully sued by the Minister of Justice for defamation,[24] and the case was again criticized by academics for limiting freedom of speech.[25] Van Niekerk was irrepressible and all attempts at silencing him by the government, the bench and the profession failed. Sometimes the editors of law journals

18 Mathews 1971 and Mathews 1978.
19 Dugard 1978.
20 For instance, Van Niekerk 1973:234 and Van Niekerk 1978:362, 534.
21 *S v Van Niekerk* 1972 (3) SA 711 (A). Van Niekerk had by then taken up an appointment at the University of Natal. It later transpired that the complaint was laid at the instance of a sitting Natal judge who was also a member of the board of the Faculty of Law, University of Natal at the time.
22 Dugard 1972:271.
23 *Pelser v SAAN Ltd and Another* 1975 (1) SA 34 N: 36.
24 The cases were reported as *Pelser v SAAN Ltd and Another* 1975 (1) SA 34 (N) and *SAAN Ltd and Another v Estate Pelser* 1975 (4) SA 797 (A) and Van Niekerk was the second respondent. Van Niekerk later recorded his views of all the cases against him in Van Niekerk 1977:647.
25 See Forsyth 1977:19.

refused to publish his articles[26] but he persevered in his crusade against injustice right up until his untimely death at an early age.[27]

Raymond Suttner, a lecturer in customary law and human rights at the University of Natal, Durban, engaged in underground activities directly related to the liberation struggle for justice. In 1975 he was convicted of 'terrorism' and imprisoned for inciting people to rise up against the apartheid state and for distributing copies of the Freedom Charter.[28] After his arrest, the senior professors in the law school failed to support him because they believed that he had abused his position by involving a law student in his activities.[29]

3.2 The emergence of university law clinics

South African law schools became directly involved in the delivery of legal aid during the early 1970s when the first 'live client' law clinics were set up by law faculties and non-governmental organisations. However, very few law schools sought to change the apartheid system by becoming directly involved in human rights issues. The programmes tended to be palliative rather than systemic.[30]

South Africa has vast economic and social disparities between rich and poor, and the majority of the population do not have access to proper legal services. As a result law clinics tended to deal predominantly with poverty law matters.[31]

3.2.1 The establishment of university law clinics

The first South African university law clinic was set up in 1972 by law students at the University of Cape Town and was managed and staffed on a voluntary basis by law students with some supervision by private practitioners.[32] At the

26 Compare Kahn 1981:406. One of the articles refused publication by the editor of the *South African Law Journal* was published in its unexpurgated form by the present writer as editor of the *Natal University Law Review* (see Van Niekerk 1975:147).

27 He died in a small inn on the shores of Lake Titicaca in Peru in 1981 at the age of 42 — compare Kahn 1981:404.

28 The Freedom Charter was adopted by the Congress of the People at Kliptown, a 'coloured' township outside Johannesburg by 2844 delegates on 26 June 1955. For the history and impact of the Freedom Charter see generally Steytler *et al* 1991.

29 Ironically the senior professors who failed to support Suttner were Mathews and Van Niekerk — two of the most courageous critics of detention without trial in the country. Some of Suttner's junior colleagues, however, supported him by visiting him while awaiting trial in prison and by subsequently attending his trial — Management Committee, Howard College School of Law 1997:10.

30 For the reasons see the text accompanying note 6 above.

31 See generally McQuoid-Mason 1982a:139-163.

32 Ellum 1975:44; Gross 1976:187 note 80; compare McQuoid-Mason 1982a:139-143, who states that the University of Cape Town clinic initially ran a campus office and some off-campus clinics in and around Cape Town in the poverty stricken township areas. By 1981 it involved 100 students and 64 supervising attorneys on a roster basis.

beginning of 1973 an off-campus legal aid clinic was established by law students at the University of the Witwatersrand, Johannesburg and a campus clinic in August 1973 assisted by law school staff.[33] Student work in the Witwatersrand law clinic was integrated into the practical legal studies programme.[34] The third law clinic in the country was established at the University of Natal, Durban in August 1973[35] immediately after the international Legal Aid Conference held at the University in July 1973.[36]

The Durban Legal Aid Conference funded by the Ford Foundation provided the catalyst for the growth of the clinical law movement in South Africa.[37] By mid-1975 four other university law clinics had been set up in South Africa and one in Zimbabwe.[38] Another three clinics were established during the next four years.[39] Thus by the end of 1979, six years after the Conference, 10 of the 21 law schools in South Africa had legal aid clinics.

3.2.2 The 1973 Durban Legal Aid Conference

Participants in the 1973 Durban Legal Aid Conference made a number of far-sighted suggestions concerning the role of law schools in the provision of legal aid services in South Africa, many of which had become a reality by the end of the century. These included the following: (a) Legal aid should be a compulsory course in the law curriculum or at least an elective course; (b) academic credit should be given for legal aid work; (c) universities should encourage research into the administration of justice and the effectiveness of legal aid; (d) law students should be used to reduce the manpower shortage in respect of legal aid work; (e) the feasibility of student practice rules should be investigated; (f) properly supervised legal aid clinics should be set up at all universities; (g) academic lawyers should be represented on the Legal Aid Board; (h) university legal aid clinics should assist in labour law matters; and (i) a co-ordinationg committee on legal aid consisting of the universities and the legal profession should be set up.[40] Many of these suggestions have been implemented over the past 30 years.

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33 Kahn 1974:139, 148; compare Ellum 1975:45. See also McQuoid-Mason 1982a: 148-151: The clinic began operations in Riverlea township in 1972 and by 1981 had expanded to an on-campus clinic assisted by staff, an urban training project clinic and an industrial aid society clinic.

34 Kahn 1974:139, 148.

35 The campus clinic began in the present writer's office and off-campus clinics were held on Saturday mornings, initially at a trade union hall, then a church hall, and eventually at the offices of the Durban Legal Resources Centre: see generally, McQuoid-Mason 1974b:106.

36 The proceedings of the Conference were published in the Faculty of Law, University of Natal, Durban: 1974.

37 Compare McQuoid-Mason 1982a:139.

38 At the Universities of Natal (Pietermaritzburg), Port Elizabeth, Stellenbosch and the Western Cape in South Africa, and the University of Zimbabwe — Ellum 1975:39.

39 These were at the Universities of Durban-Westville (1978), Zululand (1978) and Rhodes (1979) — McQuoid-Mason 1982a:139.

40 McQuoid-Mason 1974a:129, 130-1; compare McQuoid-Mason 1982a:113-121.

3.2.3 The type of work undertaken by law clinics

During the 1970s most of the work of the clinics consisted of civil matters such as divorce, maintenance, other family matters, credit agreements, housing, personal injury, unemployment insurance, wrongful dismissals, workmens' compensation and deceased estates. Criminal law work constituted less than 10% of the work.[41] The nature of the work which focused on civil matters mirrored closely the work of the Legal Aid Board at the time. During 1971-72, shortly after it opened its doors, 98% of the applications for Legal Aid Board were for civil cases. As late as 1978-1979 the figure was 90%.[42]

Even though the Legal Aid Board dealt with mainly civil matters, the majority of these concerned divorce cases.[43] Legal aid was available for most civil matters except those specifically excluded from the Legal Aid Board scheme such as: (a) Debtors proceedings in terms of the *Magistrates Courts Act*;[44] (b) the administration and voluntary surrender of an estate; (c) sentimental damages claims for defamation, breach of promise, infringements of dignity or privacy, seduction, adultery and inducing someone to desert or stay away from another's spouse; (d) claims for maintenance; and (e) law suits to which the Legal Aid Board was a party.[45]

A number of exclusions also applied in criminal matters such as: (a) Where *pro deo* defence was available;[46] (b) offences in terms of which an admission of guilt has been determined or compounded; (c) where the commission of the offence was admitted and the accused's defence or excuse was so simple that it could be advanced by the accused without aid; (d) traffic offences or other offences involving the use of a vehicle; (e) in preparatory examinations; and (f) for the institution of a private prosecution.[47]

The emerging law clinics were ideally suited to provide legal assistance to persons who fell into some of these excluded categories. In civil cases law students could provide a useful service by assisting with: (a) Writing statements reflecting the defendant's financial position for debtors' court hearings; (b) winding up small estates; (c) drafting letters of demand in respect of claims for

41 See generally McQuoid-Mason 1982a:139-163. Although over 200 000 people a year were arrested for pass law and influx-control offences most of these cases were dealt with by the Black Sash advice offices — Monama 1985:113-117. In any event most of these were excluded by the Legal Aid Board guidelines on the basis that the defences involved would have been so simple that the arrested persons could have advanced them themselves — Legal Aid Board 1974: para 13.2; compare Ellum 1975:19.

42 McQuoid-Mason 1982a:80 Table 19. During the period 1972-1973 59% of the Legal Aid Board applicants were white and 41% black, while by 1978-1979 the number of white applicants had dropped to 32% and the number of black applicants increased to 68% — McQuoid-Mason 1982a:81 Table 20.

43 McQuoid-Mason 1982a:82 Table 21.

44 *Magistrates Courts Act* 32 of 1944 sections 65 and 74.

45 Legal Aid Board 1974: para 13.2. Compare Ellum 1975:13-15.

46 In terms of *R v Mati* 1960 (1) SA 304 (A): 306, where the court held that accused persons charged with capital offences had to be provided with *pro deo* counsel.

47 Legal Aid Board 1974: para 12.2.

sentimental damages; (d) assisting women to prepare their complaints before approaching the maintenance courts; and (e) assisting with negotiations where the Legal Aid Board was party to a suit.[48] In criminal cases law students could assist by: (a) Helping counsel in *pro deo* cases prepare defences; (b) preparing statements in mitigation of sentence for pleas and admissions of guilt; and (c) providing advice on whether or not to plead guilty to traffic or motor vehicle offences.[49]

3.2.4 Academic credit for law clinic work

During the 1970s very few South African universities provided academic credit for legal aid work in law clinics. The University of the Witwatersrand programme began with informal legal aid seminars as part of the practical legal studies course in 1973.[50] The first part of the course dealt with interviewing, negotiation and the types of cases frequently encountered at the clinic and the second part with ethics.[51] The University of Natal, Durban ran voluntary legal aid seminars for law students working at the clinic from 1973 until 1978 when legal aid became an optional course.[52] In addition to the professional training course[53] the legal aid students attended seminars on practical aspects of the law relevant to work in the clinic (divorce, motor vehicle collisions, wrongful dismissals, unemployment insurance, workmens' compensation, credit agreements, debt collection, bail applications, administration of deceased estates, drafting of wills and the emancipation of black women in terms of Zulu law).[54] The University of Zimbabwe also introduced clinical work as an integral part of its post-graduate LL.B. programme.[55]

3.3 Preventive legal education programmes

During the 1970s law student bodies at a number of law schools established a Preventive Legal Education Association (PLEA) which produced pamphlets about different aspects of the law in simple English, and the relevant indigenous languages, for distribution by law clinics and non-governmental organisations. The pamphlets covered such topics as arrest, maintenance, housing, divorce, wills and credit agreements. They also advertised the local university law

48 For the role law clinics could play in such matters see McQuoid-Mason 1985:64; McQuoid-Mason 1992a:561-569.
49 McQuoid-Mason 1982a:172-181; McQuoid-Mason 1985:67-68.
50 Kahn 1974:148.
51 McQuoid-Mason 1982b:182-183.
52 Lange 1978:239.
53 Where all final year students were taught ethics, interviewing, how to draft pleadings, how to conduct *pro deo* trials, how to prepare and argue appeals, opinion work, advice on evidence, cross-examination and how to read a balance sheet. See generally McQuoid-Mason 1977:343; McQuoid-Mason 1982b:160; McQuoid-Mason 1984:62.
54 McQuoid-Mason 1982a:183-184.
55 Norris 1978:122; Donagher 1978:325.

clinics and the national legal aid scheme. The programme operated at the Universities of Cape Town, the Witwatersrand and Natal, Durban.[56]

3.4 Law school and other units dealing with access to justice

In 1979 the Centre for Applied Legal Studies was established at the University of the Witwatersrand.[57] An early project investigated the administration of justice in the pass courts,[58] while other projects involved developing expertise in the field of labour law, the administration of justice and constitutional law. The Centre was later to play an important role in preparing judges and future judges for dispensing justice under a Bill of Rights in a Constitutional democracy.[59] That same year the Legal Resources Centre was established in Johannesburg as an independent public interest law firm. Although it was not attached to a law school, it established a law clinic at Hoek Street in Johannesburg at which students from the University of the Witwatersrand worked. It also provided fellowships for recently graduated law students from disadvantaged backgrounds.[60]

In 1977 the Institute of Criminology was set up at the University of Cape Town to focus on penal law reform.[61]

3.5 Lessons learned

The few outspoken law teacher critics of the apartheid system were generally regarded as a political embarassment by their colleagues and as a nuisance by the legal profession, bench and state. On the white campuses[62] the majority of white law students tended to regard such teachers as behaving like politicians, particularly if they raised issues concerning human rights during their lectures. The few outspoken academics who taught at the black universities were regarded as heroes by the students and subversive by the staff and state. They were also regarded as heroes by the few black students who were able to study at white universities.

When law clinics were first introduced at some law schools they were treated with scepticism by local law societies and the state. Law societies sometimes expressed reservations about their establishment because local lawyers thought that the clinics would take work away from them or because the clinics would not be properly supervised. In some instances the state initially saw law clinics as subversive and some clinics were subject to scrutiny

56 See McQuoid-Mason 1982a:141, 148, 154.
57 The Centre was established under the leadership of John Dugard.
58 Monama 1985:38-39, 113-117.
59 See below para 4.5.
60 Chaskalson 1980:19-22.
61 Institute of Criminology, University of Cape Town 2001:1.
62 The terms 'white' and 'black' are used to describe what are today referred to as the 'historically white' or 'historically black' universities, or the 'historically advantaged' and 'historically disadvantaged' universities, respectively.

by the security police. These fears were overcome by inviting law society officials and state Legal Aid Board officers to sit on the law clinic management committees. Law clinics were popular with students not necessarily because they were assisting with access to justice but because they were learning practical legal skills. However their exposure to social justice issues sometimes bore fruit in determining the direction of their future careers.

The non-governmental organisations that were set up to provide access to justice escaped censure by the legal profession and the state if they involved highly respected practitioners and members of the judiciary in their establishment. In some instances added protection was provided when the organisation was attached or linked to a university. The fact that the bodies had reputable legal practitioners and judges on their boards also made them more acceptable to conservative law school faculties and students.

4. The apartheid period during the 1980s

Despite the state of emergency in South Africa for several years during the mid- and late1980s, law schools and legal academics increasingly began to focus on problems of access to justice. More law clinics and access to justice interventionist programmes were set up at law schools and elsewhere, and the Association of University Legal Aid Institutions was established. Student practice rules were drafted at the request of the Association of Law Societies of South Africa. 'Street law' programmes were introduced at law schools to educate lay people about their legal rights and access to justice. The newly established Street law programmes and the law clinics began to receive financial support from the Attorneys Fidelity Fund.

Small claims courts were introduced with the assistance of some law schools. Several law schools set up semi-autonomous specialist centres dealing with human rights, criminal justice, public legal education, para-legal training and community development. A handful of legal academics became actively involved in the Defiance Campaign that eventually led to the release of Nelson Mandela and the beginning of negotiations for a democratic South Africa in 1990. A group of legal academics from inside South Africa went to meet the African National Congress legal team in Zimbabwe to discuss proposals for a new constitution.

4.1 Academic activities

During the 1980s increasing numbers of publications focused on human rights issues. In 1984 Raymond Wacks publicly suggested that moral judges should resign if they were required to administer unjust laws,[63] while John Dugard argued that they should not.[64]

63 During his inaugural lecture at the University of Natal, Durban — see Wacks 1984a:266.

64 Dugard 1984:286, which prompted a rejoinder from Wacks — Wacks 1984b:295.

In 1985 the *South African Journal of Human Rights* was established by the Centre for Applied Legal Studies, University of the Witwatersrand. The journal closely monitored the violation of human rights in the country and devoted special editions to important access to justice issues. One such issue was the exclusion of the right to counsel and the *audi alterem partem* rule by the Appellate Division[65] when interpreting the emergency regulations,[66] even though there was no clear authorization to do so, express or implied, in the enabling statute.[67] The decision was strongly criticized by a number of academic lawyers.[68] The first book providing an overall analysis of the state of legal aid in South Africa and the role of the law clinics was also published,[69] as well as a book on the undefended accused.[70] In 1983 a Legal Aid and Law Clinics in South Africa Conference was held at the University of Natal, Durban 10 years after the 1973 Legal Aid Conference.[71]

These writings undoubtedly had an influence on the development of the law regarding access to justice towards the end of the 1980s. In 1988 the courts began to insist that in non-capital criminal cases[72] undefended accused should be informed of their right to counsel and where to get legal aid.[73] Furthermore, it was held that in certain circumstances unrepresented accused should be provided with counsel at state expense.[74]

65 *Omar v Minister of Law and Order* 1987 (3) SA 859 (A).

66 The relevant regulations and rules appeared in Proc R121 GG 9877 of 21 July 1985 (Reg Gaz 3849), Proc R201 GG 9993 of 26 October 1985 (Reg Gaz 3892), Proc R207 GG 10003 of 31 October 1985 (Reg Gaz 3895), Proc R109 GG 10280 of 12 June1986 (Reg Gaz 3964), GN 2483 GC 9994 of 26 October 1985, and GN 1196 GC 10281 of 12 June1986; compare Dugard 1987: 296.

67 The *Public Safety Act* 3 of 1953 sections 2 and 3(1)(a).

68 Dugard 1987:296; Rabie 1987:300; Mathews 1987:312; Baxter 1987:317; McQuoid-Mason 1987a:323; Davis 1987:326; Van der Leeuw 1987:331; Van der Vyver 1987:331.

69 McQuoid-Mason 1982a.

70 Steytler 1988.

71 McQuoid-Mason (ed) 1985.

72 Undefended accused in capital cases were provided with *pro deo* counsel at state expense in terms of the rule laid down in *R v Mati* 1960 (1) SA 304 (A): 306.

73 *S v Radebe* 1988 (1) SA 191 (T). This right was subsequently confirmed by the Appellate Division in *S v Mabaso* 1990 (3) SA 185 (A): 203; compare McQuoid-Mason 1991:130-132.

74 In *S v Khanyile* 1988 (3) SA 795 (A), the court held that the circumstances that a court should take into account when deciding whether legal representation should be provided at state expense were (a) the complexity of the case in fact and law; (b) the personal 'equipment' of an accused to fend for himself or herself; and (c) the gravity of the case, the nature of the offence alleged, and the possible consequences for the accused if convicted — Didcott J at 810. Because of the limited resources in the country Didcott J's judgment was based on the approach adopted in the American case of *Betts v Brady* 316 US 455 (1941) rather than *Gideon v Wainwright* 372 US 335 (1963); compare McQuoid-Mason 1999a:236. The guidelines listed in *Khanyile*'s case were subsequently overruled by the Appellate Division in *S v Rudman* 1992 (1) SA 343 (A): 390, but later reinstated by the

4.2 Law clinics

During the 1980s the number of law clinics continued to grow. New clinics were established at the Universities of Pretoria, the North, Venda, Bophutathatswana, Potchefstroom, the Orange Free State and the Rand Afrikaans University, as well as in the distance learning programme of the University of South Africa.[75] By 1982 sixteen of the twenty one law schools in South Africa had law clinics.[76]

4.2.1 Types of work done in law clinics

The law clinics tended to continue to engage in general practice, although certain areas of law such as divorce, motor vehicle assurance (third party) claims and deceased estates (except for very small estates), were closed to them by the law societies in some provinces. The vast majority of cases continued to involve labour matters (eg wrongful dismissals, unemployment insurance, workmen's compensation); consumer law problems (eg credit agreements, defective products, unscrupulous debt collection practices); housing problems (eg fraudulent contracts, non-delivery and poor workmanship); customary law matters (eg emancipation of women and succession rights); maintenance; and criminal cases. Increasingly as the struggle against apartheid intensified many of the clinics at the progressive universities dealt with civil rights cases involving police brutality, forced removals, detention without trial and other breaches of fundamental human rights.[77]

4.2.2 Structure and funding of law clinics

A variety of different models of law clinics continued to operate. Some used suitably qualified academic staff on a part-time basis, others employed full-time staff as clinic directors, while the University of Cape Town law clinic remained a student initiative for many years.[78] The Association of University Legal Aid Institutions (AULAI) was established in 1987. In 1988 the Attorneys' Fidelity Fund agreed to begin funding law clinics by paying for the salary of a full-time director at clinics affiliated to the AULAI and accredited by the local provincial law society.[79]

Constitutional Court on the basis that they were compatible with the requirements necessary in terms of section 35 (3)(g) of the Constitution to determine whether or not a 'substantial injustice would otherwise result' if legal representation at state expense was not provided — *S v Vermaas* 1995 (3) SA 292 (CC); compare McQuoid-Mason 1999b: para 228.

75 McQuoid-Mason 1992:539.

76 McQuoid-Mason 1982a:139-161.

77 Generally for the types of cases handled by legal aid clinics see McQuoid-Mason 1982a:139-161.

78 McQuoid-Mason 1986:189.

79 McQuoid-Mason 1986:189.

4.2.3 The development of student practice rules

In 1985, at the request of the Association of Law Societies of the Republic of South Africa, student practice rules were drafted for students attached to law clinics.[80] The rules were approved by all branches of the legal profession and the law schools but met opposition from the Department of Justice.[81] The rules provided that in order to be eligible to appear in the district courts on behalf of indigent persons a student must: (a) be registered as a student in the faculty of law of a recognised university in South Africa; (b) have completed three years of an undergraduate law degree or one year of a post-graduate law degree; (c) be certified by the dean of the faculty of law to be of good character and adequately trained to perform as a student practitioner; (d) be a student practitioner in the legal aid clinic of a university, the Legal Resources Centre, or a salaried member of the Legal Aid Board; and (e) be introduced to the court before whom he or she is appearing by an attorney or advocate admitted to practice in the court.[82] In order to appear in court, the student practitioner would require the written consent of the client and of the supervisor unless the supervisor was also in court to supervise the student.[83] The rules were never implemented under the apartheid regime, nor under the new democratic government despite a commitment to do so.[84]

4.3 Street law programmes

4.3.1 Meaning of Street law

Street law is a programme designed to train law students and others to make lay people, (usually school children), aware of their legal rights and where to obtain legal assistance. It helps people to understand how the law works, how it can protect them, what kinds of legal problems they should be aware of, and how they can resolve these problems.[85] Street law not only makes people aware of how the present legal system can protect them, but also encourages them to think about the type of legal future they would like in the future. This was particularly important during the negotiations for the new Constitution in South Africa when there was widespread consultation with the public concerning its contents.[86] The programme encourages tolerance by making participants argue and experience opposing viewpoints. It also encourages

80 The rules were drafted by the present writer.

81 The Student Practice Rules were influenced by the model student practice rules approved by the American Bar Association — Council for Legal and Professional Responsibility 1973b:43. They were drafted by the present writer at the request of the Association of Law Societies. The Rules were based on the rules suggested by Ellum — Ellum 1975:64 — as modified by the present writer in McQuoid-Mason 1982a:194-197.

82 Draft rule 3(1); compare McQuoid-Mason 1982a:195-196.

83 Draft rule 2(1); compare McQuoid-Mason 1982a:195.

84 Compare Ministry of Justice 1994:73-74.

85 McQuoid-Mason 1994:348.

86 McQuoid-Mason 1996.

the use of alternative dispute resolution such as mediation, arbitration and negotiation to discourage people from resorting to violence by taking the law into their own hands.[87] Law students who teach in schools and communities are exposed to the legal needs and aspirations of the people involved. At the same time they have an opportunity to assist in community development and capacity building.[88]

4.3.2 The development of Street law in South Africa

The first Street law programme was established at the Georgetown University Law Centre in Washington DC in 1972. Law students were trained to teach the law in the inner city schools where many young black children and youths felt oppressed by the legal system. It was brought to South Africa in 1985 and a pilot project set up at the University of Natal, Durban for six months during 1986. The latter was so successful that it was converted into a full-time programme at the University of Natal in 1987.[89] Shortly thereafter similar programmes were established at the Universities of Pretoria and the Witwatersrand.[90] By the end of the 1980s Street law programmes had spread in one form or another to 17 of the 21 law schools in South Africa. The programmes were mainly funded by the Association of Law Societies with money from the Attorneys' Fidelity Fund.

4.3.3 Street law materials and methodology

The Street law programme uses text books and teacher's manuals that are written in simple English for pupils in the last three years of high school and community-based organisations. They involve student-centred exercises and experiential learning and are user-friendly and illustrated with cartoons. The books cover an introduction to South African law and the legal system, criminal law and juvenile justice, consumer law, family law and welfare and housing law.[91]

The Street law programme uses a wide variety of student-centred activities in its teaching methods. These include role plays, simulations, games, small group discussions, opinion polls, mock trials, debates, field trips and street theatre.[92] At a national level it hosts an annual mock trial and human rights debating competition as well as a youth parliament. The school children are drawn from all sections of the community, including from very disadvantaged backgrounds.

87 McQuoid-Mason 1994:348.
88 Sometimes in the poorer schools Street law students are called upon to assist with the administration of the school.
89 The programme was introduced into South Africa by the present writer. Generally on the history of the programme see McQuoid-Mason 1994:349-350.
90 McQuoid-Mason 1994:349-350.
91 See McQuoid-Mason 1987b; McQuoid-Mason 1987c; McQuoid-Mason 1990a; McQuoid-Mason 1990b; McQuoid-Mason 1992b.
92 See generally McQuoid-Mason 1994:353, and companion Teacher's manuals for the different books.

Law students are trained to teach interactively and to draw on the real life experiences of the communities when discussing the law.[93]

A 13-part television series in English and Zulu, and comic books, entitled 'Max' and featuring Max Mboya the Street lawyer were produced during the late 1980s to make people aware of their legal rights.[94] Extracts from the Street law books were also published in popular newspapers to educate the public concerning their legal rights.

4.3.4 Integrating Street law into the academic programme

Some law schools have optional courses in Street law[95] while others make it part of optional public interest law[96] or other optional[97] courses. The University of Natal, Durban Street law course includes regular seminars, an examination, the production of a mock trial package and community service by way of practical teaching in schools. Two seminars a week are held during which students are taken through lesson plans for a wide variety of teaching techniques and subjects from the Street law texts. They are also trained to prepare and present a mock trial involving up to 24 participants. The law students experience a mock trial for themselves as a class and are then required to compile their own mock trial packages.

4.4 Small claims courts

The *Small Claims Court Act*[98] was passed in 1984. The government established the courts with help from the Association of Law Societies. The Association approached university law schools to assist with the training of small claims court commissioners and to provide facilities for a pilot programme. The idea was to make the courts accessible to ordinary people after work and for the proceedings to be conducted informally and inquisitorially without the parties being represented by lawyers.[99] The courts were to be staffed by practising advocates, attorneys and academics for no remuneration.

93 For the national activities of the Street law programme see Centre for Socio-Legal Studies 2001:4-8.

94 The present writer met with a television script writer and produced a story board based on incidents that had occurred in the University of Natal, Durban legal aid clinic. The series dealt with such matters as where a tout had gone into hospital wards with a power of attorney for third party personal injury claims and placed the thumb prints of unconscious patients on the documents for subsequent action by unscrupulous lawyers; and where nine year old children were persuaded by unethical furniture traders to sign voluntary repossession forms for household goods bought on hire-purchase, while their parents were away at work.

95 For example, the Universities of Natal, Pretoria, the North-West and Fort Hare.

96 For example, the University of the Witwatersrand.

97 For example, the University of the Orange Free State.

98 Act 61 of 1984.

99 Section 26(3). See generally McQuoid-Mason (ed) 1997:308-310.

The law schools at the Universities of the Orange Free State, Natal (Durban and Pietermaritzburg), Port Elizabeth and South Africa[100] provided facilities for the small claims court pilot project that was established in October 1985 and ran for a year. The law clinics assisted applicants with preparing their claims and defences.[101] The pilot project was successful and small claims courts now provide useful means of allowing thousands of ordinary people to have their day in court every year.[102]

4.5 Law school centres concerned with access to justice

During the 1980s the Centre for Applied Legal Studies, University of the Witwatersrand, began its annual 'Mount Grace' seminars to which judges and senior legal practitioners and academics were invited for 'off the record' discussions on human rights and access to justice issues. At the same time a number of other centres and units concerned with access to justice and human rights were set up.

In 1986 the Centre for Human Rights Studies was established at the University of Pretoria to study, promote and protect human rights. It also housed the Pretoria Street law programme, ran LLM programmes in human rights, organised the integrated bar project whereby black law students are placed in law firms during the winter vacations, and instituted a human rights awareness programme. Another important initiative of the Centre was the organisation of the annual Southern African Moot Court Competition[103] which eventually became the All African Moot Court Competition.[104]

In 1987 the Centre for Socio-Legal Studies was established at the University of Natal, Durban to house the Street law programme and provide training in negotiation and mediation skills for trade union workers. In 1989 the Community Law Centre[105] was also established at the University of Natal, Durban, to promote access to justice, democracy and good governance, community capacity-building and gender awareness in rural communities by setting up rural para-legal advice offices that were supported by a network of lawyers.[106] During 1987 the Legal Education Action Programme (LEAP)

100 See Strauss 1985:105-106.

101 See Middleton 1985:73-75; compare McQuoid-Mason 1994:564-5.

102 For instance, by 1993 the small claims courts were dealing with 109 325 inquiries, issued 24 945 summonses and heard 23 930 cases — Department of Justice 1994:12.

103 Faculty of Law, University of Pretoria 1993.

104 The first All-African Human Rights Moot Court Competition was held at the University of Pretoria 5-7 July 1995 — Brand, Heyns, de Meyer and Maitland (eds) 1995.

105 Now the Community Law and Rural Development Centre.

106 The Community Law and Rural Development Centre required the participating communities each to appoint para-legal advice office committees to identify two people from their communities who would be sent to the Centre for training. After an intensive four month training programme and twelve months practical certification the para-legals were issued with a diploma from the Faculty of Law, University of Natal, Durban and returned to live in their communities and staff the para-legal

moved to the Institute of Criminology at the University of Cape Town to provide para-legal training for communities.[107]

4.6 Other related law school activities

During the state of emergency several law schools were involved in protecting their students from harassment and arrest by the security police. For instance, the present writer as Dean of Law, University of Natal, Durban formed a Legal Reaction Unit to counter the South African Police Reaction Unit which acted as a riot squad.[108] The Legal Reaction Unit was on call 24 hours a day to deal with arrested and detained students and spent many hours negotiating with the Security Police and Reaction Unit whenever they entered the university campus during the 1988-89 Defiance Campaign. On numerous occasions arrested students were released as a result of the Unit's activities. For instance in 1988, 300 medical students were released after being arrested for an illegal march.[109] The Unit was on standby during all anti-apartheid street and campus marches by university students.[110]

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advice offices. The Centre encouraged rural communities: (a) to participate in transforming the country by increasing individual accountability, skills, self-reliance and confidence; (b) to educate their communities about democracy, voting and civil society; and (c) to strengthen the rule of law in rural areas — Community Law and Rural Development Centre 1999:10.

107 LEAP was responsible for developing a number of very successful workshops and training manuals for para-legal work — see eg Legal Education Action Programme (LEAP) and Black Sash 1992. It also trained communities in the taking of statements to lay the foundation for legal action, often with the assistance of the Legal Resources Centre, against human rights violations by the apartheid authorities. LEAP left the Institute of Criminology in 1998.

108 The Legal Reaction Unit consisted of the Dean as Chairperson, and two members of staff, an advocate and an attorney.

109 At the time the present writer warned the police that bail would be applied for and that court clerks and magistrates would be kept up all night dealing with bail applications and writing bail receipts. His advice was ignored and the 300 students were arrested. They all applied for, and were granted, bail by the Durban magistrates courts. The University Registrar produced a suitcase full of money and the students assisted the clerks of the court by writing out their own bail receipts until 2 am!

110 The late 1980s proved a busy time for the present writer. His position as Dean involved him in many other aspects of the struggle for justice such as: (a) Preventing students conscientious objectors from being called up for military service by arranging for continuous extensions of their LLM registrations; (b) Keeping students out of army camps by requiring them to do legal research for their degrees during their long vacations; (c) Arranging safe houses for students who were on the run from the apartheid authorities; (d) Acting as a custodian for the End Conscription Campaign; (e) Participating in, marshalling, and negotiating with the Security Police and Police Reaction Unit during, anti-apartheid street marches by the Mass Democratic Movement; (f) Disclosing to a Sunday newspaper that the Chief Magistrate of Durban had required all prosecutors and magistrates to be briefed by the police and shown a 'total onslaught' video at the time they were dealing with United Democratic Front prosecutions. The disclosure resulted in a judicial commission of inquiry and an order that none of the magistrates who participated be allowed

In February 1989 a group of legal academics met the African National Congress legal team and members of the executive in Harare to discuss the ANC's *Constitutional guidelines for a democratic South Africa*.[111]

4.7 Lessons learned

By the end of the 1980s the political climate began to change after reaching a climax of repression during the several states of emergency. The changing circumstances provided opportunities for law teachers and law schools to start influencing the direction of the law concerning access to justice.

Once the law societies appreciated that law clinics and Street law programmes not only provided access to justice but were also valuable training tools for educating future lawyers they were prepared to provide funding to assist in their establishment. The value of law clinics was recognized to the extent that the law societies supported the introduction of the ill-fated student practice rules for law clinic students. The support of the law clinics and Street law programmes by the legal profession led to much closer cooperation between the participating law schools and the law societies. These links were further strengthened, as were links with the state, when several law schools assisted the legal profession and the Department of Justice to establish one year pilot small claims courts in their buildings. The law schools not only provided the premises but also trained the small claims court commissioners. The pilot programme successfully showed that small claims courts could be introduced at very little financial cost if members of the legal profession were prepared to act as presiding officers after office hours without remuneration.

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to sit in any 'political' trials; (g) Persuading the Natal Law Society and the Natal Society of Advocates to join for the first time with the National Association of Democratic Lawyers, the Black Lawyers Association and Lawyers for Human Rights in condemning at a public meeting the detention without trial of political activists who had gone on a hunger strike; (h) Warning medical practitioners, particularly psychiatrists and district surgeons, that it was unethical and illegal to assist the Security Police by treating detainees held in solitary confinement so that they could be further interrogated by the Police; (i) Using public meetings to educate the Security Police present about the violations of human rights carried out by them during the previous weeks and to explain to the audiences what their rights were concerning such infringements; (j) Assisting the Mass Democratic Movement in negotiations with the Police Reaction Unit during the 1988 Durban beach and hospital desegregation Defiance Campaigns; (k) Being called upon in KwaZulu Natal during the State of Emergency to issue increasing numbers of public statements to the press and address public meetings as more and more political leaders in the Mass Democratic Movement were prevented from doing so; (l) Frequently assisting members of the liberation movement in negotiations with the Police to arrange proper joint patrols with the Defence Force to prevent outbreaks of violence in different Durban townships, particularly where 'Third Force' activities were suspected — Management Committee, Howard College School of Law 1997:8-11.

111 African National Congress 1989:129.

If law schools were prepared to become involved in access to justice and human rights work there were always sufficient loopholes in the apartheid system to enable them to do so. Thus a number of human rights centres and programmes were set up by law schools at the height of repression during the different states of emergency. At the same time with the easing of racially-based entry requirements, increasing numbers of black students were admitted to the historically white universities. The new generation of students believed in direct action to redress human rights abuses and in several law schools major tensions arose between conservative faculty members and the more radical students. Law students at the historically black universities also became much more militant in their demonstrations against human rights abuses and the states of emergency. Sometimes these resulted in violence and intimidation which led to the closing of the universities and expulsion of the students.[112] These tensions also spilled onto the historically white campuses, including those that had accommodated expelled students from the black universities, particularly where such students were refused readmission for academic or financial reasons. Depending on the issues involved, the students frequently divided along racial lines regarding the strategies to be followed. Probably as a consequence of their apartheid experiences, black students often tended to favour direct action while white students, apart from *agents provocateurs*, usually suggested a less confrontational approach.

(To be continued)

112 See for instance, South African Institute of Race Relations 1985:699-703; South African Institute of Race Relations 1986:403-407; South African Institute of Race Relations 1988a:469-479; South African Institute of Race Relations 1988b:183-187. During the writer's law deanship at the University of Natal in the late 1980s large numbers of law students who had been expelled from historically black universities for 'political' reasons were admitted into the law school.

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