

# The Bar, the community and public interest law

L Nowosenetz, Pretoria Bar

**T**HE unresponsiveness of our legal order to changing social conditions has contributed towards a crisis of legitimacy that the entire legal system is facing. The spotlight of public criticism has fallen as never before upon the courts and the very independence of the judiciary. Scepticism has been expressed on issues such as the efficacy of the courts in mitigating the rigours of statutory discriminatory laws, the effectiveness of judicial review to curb certain executive acts and the access of litigants to the courts. Sadly, among those who have been excluded from the political process, a large body of cynical opinion has formed that the legal regime is likely to frustrate their access to justice further.

## Legal Practitioners

Legal practitioners have not escaped criticism either, on the grounds of the high cost of litigation, the unavailability of legal representation for the accused in lower courts and the reluctance of lawyers to engage themselves in unlucrative work relating to social issues. Allied to this is the perceived quiescence of lawyers in the face of emergency measures, press restrictions, detentions, etc. The challenge facing the legal profession is to respond with imaginative and innovative steps to relate legal practice to the conditions prevailing in our times, thereby maintaining and enhancing the reputation of the law.

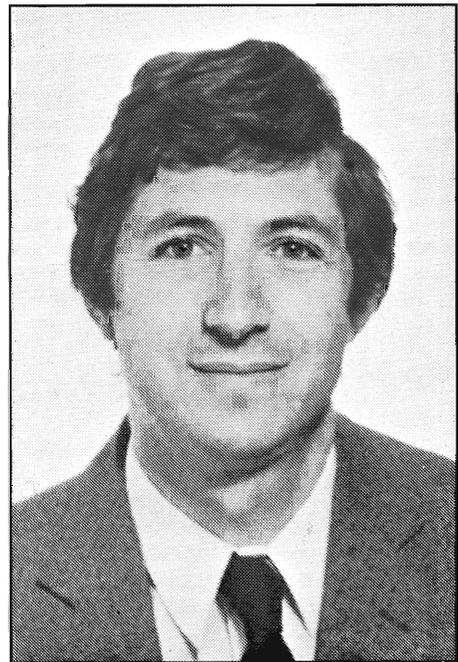
## Universities

Some responses have emerged over the past few years. Public Law, Human Rights Law and the inter-relationship of law and society are receiving increased attention at our universities, where new teaching posts and research institutes have been established during the past few years. A stream of learned writing, as well as new journals dedicated to these hitherto neglected areas of public law, is now appearing.

Practical legal studies are now included in the curriculum for law degrees, and several universities are running full-time law centres under the supervision of qualified lawyers. Law students are receiving practical legal training while serving the community through the provision of legal clinics for the needy.

## Street law programmes

Street law programmes have also recently been introduced with the aim of disseminating to the public a basic under-



standing of how law affects ordinary people in everyday life. The goal of educating the lay public on their legal rights is as necessary as it is hard to accomplish. As long as the broad mass of the population sees law as an instrument of social control rather than a guarantee of fundamental rights and democratic values, our system risks the fate of the dodo.

## Public interest Law Centres

Probably the most significant development is the growth of public interest law centres, of which the foremost example is the Legal Resources Centre (LRC) established approximately ten years ago, now with branches throughout the country. Independently run, the LRC operates like an attorneys' firm but provides free legal services in matters of public law, labour and human rights to indigent and socially distressed litigants. Unique is the employment of both attorneys and advocates in these offices, of which more will be said later.

## Streamlining petty criminal matters

The advent of the Small Claims Courts in 1985 has undoubtedly been an enormous success in enabling litigants to

pursue civil claims in court, unassisted by lawyers, in a simple and informal manner, and costing them virtually nothing. The time has also come for a streamlining of petty criminal matters possibly through a Justices of the Peace system. The decriminalization of certain traffic and other petty offences is already on the agenda.

### Response of organised Bar

Thus some signs of a hopeful new order are emerging, tentatively dislodging the encrustations of our past. What is the response of the organised Bar as well as the role of individual counsel in relation to these developments? So far only a small corps of outstanding and dedicated lawyers have been at the forefront in developing a more meaningful societal role for the law in South Africa. Save for certain renowned counsel who have made significant contributions towards the promotion of basic rights and civil liberties through our courts, the broad profession of advocates have not wandered far beyond the usual confines of commercial practice. Some of the reasons for the inhibitions upon counsel have been structural, given the ethical and practical limitations of the briefing system and the split Bar tradition. Economic constraints too, cannot be ignored.

### Bar Rules

Nevertheless it is time to reconsider the parameters of the rules\* that restrict advocates in accepting briefs from the public and the scope of the work that they may do. Are some of our present rules of conduct really necessary, or has the Bar ensconced itself within rules designed more for self-perpetuation than its integrity and independence?

It is submitted that new and insufficiently explored possibilities exist for counsel to participate meaningfully in serving the broad community of South Africa. In the suggestions that follow it is implicit that the commitment and support of the Bar is needed.

### Small Claims Court

Already many experienced counsel (and attorneys)\*\* have volunteered to act as commissioners in the Small Claims Court. Just as important, however, are the legal assistants who are drawn from the ranks of junior practitioners to assist the litigants who wish to make use of the Court. The assistant's purpose is primarily to explain the law, to assist in formulating litigants' claims and to explain the rules of evidence and procedure. It is also surprising how the smallest claims can sometimes raise intricate questions of law. For example a person complained that a fence erected by his neighbour was encroaching upon his own property. This led to dispute about the beacons of the respective properties and rectification of the title deeds! However, such an assistant also fulfils a most important role in promoting goodwill towards the advocates' profession and generally advising the public on the broader functions of the Courts and the

legal system. Fledgling junior counsel whose practices leave considerable time at their disposal would be in an ideal position to volunteer their services, thereby enhancing the stature of the Small Claims Courts and improving the public image of the Bar enormously.

### Pro Bono Publico Briefs

The present rule is that counsel may render professional service for reward only if briefed to do so. Within the existing framework counsel may also accept briefs (not for reward) from attorneys in law clinics, law centres and ordinary law firms who may be acting *pro bono*.

The scope for opening *pro bono* briefs from referral agencies other than attorneys should be considered.\*\*\* A variety of para-legal clinics and advice bureaux have been established by community organisations, churches and welfare agencies. Advice offices can now be found throughout the country in all major towns and cities, particularly in the black townships. They are run by volunteers as well as paid community workers who, despite their lack of formal legal qualifications, are inundated with problems on wide-ranging issues such as matrimonial, housing, employment, criminal, consumer and administrative law. Through an allocation system administered by local Bars, counsel could make themselves available to lend assistance and to undertake litigation. Where necessary attorneys could be appointed in conjunction with counsel on a *pro bono* basis.

The ever-growing ranks of new junior counsel would at an early stage have access to a wealth of experience, and would be exposed to challenges which could only enhance their careers in the long term. Regrettably public funding and the State Legal Aid scheme have not significantly alleviated the financial burden of litigation on the indigent. Independent sources of legal funding are, however, sometimes available. With this in mind, contingency and speculative fees should be reconsidered and allowed in appropriate circumstances.

### The Industrial Court

Outside the political arena, the greatest societal conflict is being generated in labour relations. Legal skills are required for labour conflict resolution and adjudication in the Industrial Court. Much of the ever-growing volume of labour cases concerns not only trade unions, but individual unfair dismissal cases. In the case of domestic employees, redress is limited in this regard. However, the sophisticated procedures for reinstatement and determinations in the Industrial Court require qualified legal assistance and the remarks relating to *pro bono* work are apposite.\*\*\*\*

There is also a backlog rapidly developing as a result of the astonishing increase of cases in the Industrial Court. Thus

\*\*\*It frequently happens that, by reason of the means test applied by the Legal Aid Board, a person charged with an offence fails to qualify for legal assistance, but at the same time may be unable to afford ordinary legal services. Such a person, therefore, appears in court undefended although he is in a position to pay for his defence in a limited way. Consideration should be given to permitting advocates to accept briefs in regard to such persons directly from the Legal Aid Board at a reduced tariff – the advocate's fees to be paid by the accused *via* the Legal Aid Board. – *Editor*.

\*\*\*\*Sources of referrals could include Registrars of the Industrial Court, the Department of Manpower and trade unions.

\*Rule 5.12.1 of the Pretoria Bar Rules states: "No member shall take instructions or fees except through the medium of an attorney . . ."

\*\*This usually includes practitioners with at least seven years experience.

there is a constant need to find suitably experienced persons to act as members and additional members of this rapidly growing Court. Consideration should be given to relaxing the rules restricting the appearance of counsel in the Industrial Court while serving as a member.

### Law Centres

Counsel have been employed at the Legal Resources Centres as full-time salaried employees ever since their inception. The directors of the Port Elizabeth and Durban offices, for example, are practising advocates as well as members of their respective Bars. So too, the national director is a member of the Johannesburg Bar. There is scope for the employment of both advocates and attorneys in law centres where each still performs his own work. Counsel in a law centre may be briefed for court appearance only by an attorney in the law centre and according to the usual rules applicable to briefing. Consultations and dealings with clients are however more informal. Advocates are not permitted by law to do the work of attorneys but a permissible overlap does occur, and the following work of counsel without the instructions of an attorney has been sanctioned\*:

- Interviewing and taking statements from clients or witnesses at his own discretion;
- Writing and signing letters on behalf of the law centre provided that the description of advocate is not added after his name;
- Carrying on correspondence with third persons on behalf of clients;
- Drafting letters and pleadings for signature by clients of the law centre.

Provision for part-time employment\* at law centres opens new possibilities to counsel who, while understandably reluctant to give up their practices at the Bar, may wish to work in closer association with law centres than was formerly possible.

Despite the General Council of the Bar having already

stated its support for members of affiliates to practise at a law centre and despite the full-time employment of members of the abovementioned Bars at the Legal Resources Centre for some years now, the Pretoria Bar in 1986 refused to allow a member (the writer) to retain membership of the Bar when joining a newly established law centre in Pretoria. The objections bear consideration:

- The position is in conflict with the rule that a member is not entitled to practise as an advocate while actively engaged in the carrying on of any other professional or commercial or industrial undertaking.
- The recognised exceptions to the above principle (such as university lecturers) should not be extended to law centres and an amendment to the Constitution and Ethical Rules is not warranted.
- An amendment of the rules is particularly not warranted because the member will be doing the equivalent of attorneys' work.

The necessity for an amendment of the Constitution and Rules is indeed justified – several other Bars have in fact taken this step. The underlying assumption that a member practising in a law centre is pursuing another professional undertaking (i.e. doing attorneys' work) is, as shown, not strictly accurate nor correct, nor is there any reason why exceptions should be made for academics but not practising advocates in law centres. Further, this approach reflects an unsound policy at variance with the organised Bar.

### Modernise Bar traditions

To date, counsel have acquitted themselves admirably and honourably in *pro Deo* defences in capital cases. From time to time, though less frequently today, counsel have appeared *in forma pauperis*. So too, counsel are called upon to assist the Court as *amici curiae* for no reward. A fine tradition of service has always been upheld by the Bar but these services no longer suffice. The stage is now set to modernise and adapt this tradition to our times. □

\*Johannesburg Bar Rule 3.5.

## Obituaries

*Mr Namie Philips* (79) an eminent jurist, died of a heart attack during January 1988 in Tasmania while on holiday. Mr Philips was a well-known personality at the Johannesburg Bar. In 1961 he was appointed a Queen's Counsel and in 1972 he was appointed an acting judge of the Transvaal Provincial Division of the Supreme Court, in which capacity he acted until his retirement in 1986. He leaves his wife, Mrs. Joan Philips, four children and four grandchildren.

*John Coaker*, advocate of the Johannesburg Bar. He was a former Chairman of the Johannesburg Bar Council and he also represented the Council at a General Council Meeting.

*W S McEwan*, recently retired Judge. Member of the Johannesburg Bar for many years. At one time honorary secretary of the General Bar Council.