

## Access to Justice in South Africa: Are there Enough Lawyers?

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### Abstract

This paper addresses head on the contention by a prominent legal practitioner in South Africa that there are too many lawyers in the country. It does not canvass the complex issues involved in determining the meaning of access to justice or the relationship between law and society in the context of legal services, and deals with access to justice in the narrow sense of the delivery of legal services in South Africa. The paper analyses the evidence presented to substantiate the contention that there are too many lawyers against the socio-economic environment in South Africa and the requirements of the Constitution. It recognizes that the country has only a minority of people who can afford lawyers and compares the ratio of lawyers to people in this category with the ratio in other developed countries. It also recognizes that large numbers of people who cannot afford lawyers may need them and that such people will have to rely largely on the state-funded national legal aid body, Legal Aid South Africa and other mechanisms. The paper discusses the different modes of delivery of legal aid services by Legal Aid South Africa, as well as those provided by the legal profession *pro bono*, public interest law firms and mechanisms that compliment or are alternatives to lawyers, in the light of the number of practicing lawyers in the country. An analysis is made to determine if there are enough lawyers to provide the necessary legal services required by the Constitution in criminal matters, and for civil matters in general for those who can and cannot afford lawyers. The paper concludes that there are not enough lawyers in the country at present to provide access to justice in the narrow sense, and suggests how this shortage can be overcome by using mechanisms that provide alternatives to lawyers.

### Key words

South Africa; numbers of lawyers; access to justice; structure of legal profession; delivery of legal aid; paralegals

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## Resumen

Este artículo se basa en la opinión de un prominente abogado de Sudáfrica, quien afirma que hay demasiados abogados en el país. No aborda las complejas cuestiones implicadas en determinar el significado del acceso a la justicia o la relación entre derecho y sociedad en el contexto de los servicios jurídicos, sino que se ocupa del acceso a la justicia en el sentido estricto de la prestación de servicios jurídicos en Sudáfrica. El artículo analiza las pruebas presentadas para defender que hay demasiados abogados para el nivel socio-económico de Sudáfrica, y los requerimientos de la Constitución. Se reconoce que el país tiene sólo una minoría de personas que pueden pagar abogados y compara la proporción entre abogados y personas en esta categoría con la proporción en otros países desarrollados. También reconoce que un gran número de personas que no pueden contratar un abogado pueden necesitarlo, y que esas personas tendrán que depender en gran medida de los servicios de asistencia jurídica nacional financiados por el estado, Legal Aid South Africa u organismos similares. El artículo analiza de qué manera presta servicios de asistencia jurídica Legal Aid South Africa, así como los prestados por los abogados *pro bono*, los bufetes de abogados de interés público y los mecanismos que complementan o son alternativos a los abogados, en base al número de abogados que hay en el país. Se realiza un análisis para determinar si hay suficientes abogados para proporcionar los servicios legales necesarios exigidos por la Constitución en cuestiones penales y civiles en general, tanto para los que pueden como los que no pueden pagar a un abogado. El artículo concluye que en la actualidad no hay suficientes abogados en el país para garantizar un acceso a la justicia en sentido estricto, y sugiere cómo se puede superar esa escasez mediante mecanismos que ofrezcan alternativas a los abogados.

## Palabras clave

Sudáfrica; número de abogados; acceso a la justicia; estructura de la abogacía; oferta de ayuda legal; paralegales

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## 1. Introduction

This paper addresses head on the contention by a prominent legal practitioner in South Africa that there are too many lawyers in the country. It does not canvass the complex issues involved in determining the meaning of access to justice or the relationship between law and society in the context of legal services, and deals with access to justice in the narrow sense of the delivery of legal services in South Africa. In a recent article in the attorneys' profession's official journal the practitioner stated that there are too many attorneys in the country because '[t]here are simply too many law graduates for the market and the demand for legal services' (Dewar 2011, p. 23). This paper will interrogate the converse of this assertion – i.e. in fact are there too few lawyers? - in the context of access to justice in South Africa, and will deal with the following: (a) a brief discussion of access to justice; (b) the structure of the legal profession; (c) the nature of the work of the legal profession; (d) the delivery of legal aid services by Legal Aid South Africa; (e) the delivery of legal services by non-state funded bodies; (f) mechanisms that compliment or are alternatives to lawyers; and (g) whether there are enough lawyers to provide the necessary legal services.

The above issues need to be discussed against the background of the socio-economic situation in South Africa and the impact of the South African Constitution (Constitution 1996). Obviously the South African situation is unique and what applies there does not necessarily apply to other developing countries. It is trite that there is an increasing gap between the rich and the poor in South Africa - much of it due to the consequences of apartheid - and a lack of capacity to deliver in the public service due to cadre deployment by the ruling party. Furthermore, the lack of capacity in the public service, aggravated by the unacceptably high crime rates, has led to structural problems in the administration of justice resulting in under-resourced police services, courts and prisons; delays and lack of faith in the administration of justice; and an increasing burden on lawyers to assist ordinary people to enforce their rights. However, lawyers are not accessible to many people, either because they are located mainly in the larger towns and cities or because their fees are unaffordable to most people. As a result a number of mechanisms enabling access to justice to be provided by people and organizations other than lawyers and law firms have developed.

Comparatively few people in South African can afford to employ the services of lawyers. For example, by 2002 it was estimated that indigent rural and urban poor people, mainly black African people, consisted of 50% of the population, but earned only 3,3% of South Africa's income. Salaried middle class people made up 33,3% of population and earned 9,3% of South Africa's income. Rich people consisted of 16,7% of population but earned 72% of South Africa's income (Terblanche 2002, p. 441). As a result probably only the rich and some middle class people could afford the services of lawyers, but the majority, particularly the indigent rural and urban poor, could not. Given the growing gap between rich and poor it is likely that little has changed during the past 10 years, and is unlikely to change in the foreseeable future. This means other mechanisms that provide alternatives to lawyers in the provision of legal services need to be considered.

## 2. Access to justice

Access to justice in wide sense refers to social justice, such as the fair distribution of health, housing, welfare, education and legal resources in society, including where necessary, the distribution of such resources on an affirmative action basis to disadvantaged members of the community, and is concerned with the 'needs' rather than the 'wants' of society (Honore 1968, McQuoid-Mason 2000b). Many of these rights are guaranteed in the South African Constitution, such as property (Constitution 1996, s. 25), housing (Constitution 1996, s. 26), health care (Constitution 1996, s. 27(1)(a)), sufficient food and water (Constitution 1996, s.

27(1)(b)), social security (Constitution 1996, s. 27(1)(c)), education (Constitution 1996, s. 29), and legal representation (Constitution 1996, s. 35). Housing, health care, food, water, social security and education are guaranteed subject to the state's available resources, and the state must take reasonable legislative and other measures to achieve their progressive realization. The Constitution also provides for distribution of certain resources on an affirmative action basis to persons previously disadvantaged under apartheid, as for example in respect of property rights (Constitution 1996, s. 25(2)-(9)).

A discussion of the 'Chapter 9 institutions' in the Constitution that also provide access to justice, largely in the field of human rights, lies outside the scope of this paper. These institutions are the Public Protector (Constitution 1996, s 182-183), the South African Human Rights Commission (Constitution 1996, s 184), the Commission for the Promotion and Protection of the Rights of Culture, Religious and Linguistic Communities (Constitution 1996, s 185-186) and the Commission for Gender Equality (Constitution 1996, s 187).

Access to justice in the narrow sense focuses on access to legal advice and legal services and other methods of dispute resolution, before independent and impartial courts, tribunals or forums, (Constitution 1996, s. 34) or through consensual mechanisms such as negotiation or mediation. The Constitution recognizes the following rights in respect of legal services: (a) the right to legal counsel in criminal cases for arrested and detained persons (Constitution 1996, s. 35(2)(c)) and accused persons (Constitution 1996, s. 35(3)(g)) – paid for by the state where 'a substantial injustice' will otherwise result; (b) the right to legal counsel in civil proceedings for children – paid for by the state where 'a substantial injustice' will otherwise result; (Constitution 1996, s. 28(1)(h)) (c) the right of access to independent and impartial courts and other tribunals (Constitution 1996, s. 34); (d) a fair trial (Constitution 1996, s. 35(3)); and (e) equality and equal protection of the law (Constitution 1996, s. 9(1)). The Constitution also includes wide provisions regarding *locus standi* (e.g. acting on behalf of others, in the interests of particular groups or classes, in the public interest etc) (Constitution 1996, s. 38). This paper focuses on access to justice in the narrow sense. To complete the picture some of the mechanisms that compliment or are alternatives to traditional legal services provided by lawyers will also be considered.

### 3. Structure of the legal profession

The South African legal profession consists of approximately 20 000 practising attorneys (Dewar 2011, p. 19) and 2 000 practising advocates (Advocate South Africa 2012) who serve about 50 million people. This yields a ratio of lawyers to the general population of about one lawyer for every 2 273 people. It has been suggested that in the case of attorneys the ratio is four attorneys for every 10 000 people (Dewar 2011, p. 23), or about one attorney for every 2 500 people. This is high ratio of lawyers to ordinary people for an African country: In 2003 the present writer did a survey that indicated that Nigeria had a ratio of 1:2 857 people; Ghana 1:7 826; Kenya 1:10 000; Zimbabwe 1:10 000; Tanzania 1:63 830 and Mozambique 1:80 000 (McQuoid-Mason 2003, p. 108 n. 6).

As in the United Kingdom, lawyers in South Africa are divided into advocates (barristers), and attorneys (solicitors). Advocates may be admitted to practice on completion of the LLB degree (Admission of Advocates Act 1964, (No. 74) s. 3), but before they can join a bar association they must undertake a period of pupillage of a year. Before aspiring attorneys can be admitted to practice they must serve an apprenticeship termed 'articles of clerkship' as candidate attorneys with a qualified attorney for a period of one or two years depending on whether the attended a six month practical training school or a five week practical training course (Attorneys Act 1979, (No. 53) s. 2).

Advocates, who constitute about 10% of legal practitioners, largely practise in the high courts, while attorneys, who make up the rest, work mainly in the lower courts and brief advocates for high court work. This system has changed with certain attorneys being given the right to appear in the high courts. Attorneys who wish to appear in the high court must hold the LLB degree or at least 3 years practical experience (Right of Appearance in Courts Act 1995 (No. 62) s. 2).

With the introduction of a common LLB degree for all legal practitioners in 1998 it is likely that ultimately the two professions will be fused. However, although a Legal Practice Bill that includes the establishment of a single legal profession has been in circulation since 2000 (Draft Legal Practice Bill (Ministry of Justice) 2000), and has gone through several amendments (Draft Legal Practice Bill (Law Society of South Africa) 2002; Draft Legal Practice Bill (Ministry of Justice) 2002; Draft Legal Practice Bill (Ministry of Justice) 2009), it has not yet been submitted to Parliament because of disagreements between the legal profession and the Ministry of Justice.

The 19 university law schools in the country annually produce more than 4 000 law graduates (Legal Education and Development (LEAD) 2009, p. 24) all of whom have to do an internship either as pupil advocates or candidate attorneys before they can be admitted to practice. Many law graduates, however, go into government service or become in-house counsel for large commercial enterprises.

The above statistics must be borne in mind when considering whether there are enough lawyers in South Africa. The statistics are also relevant when examining the access to justice challenges of delivering civil legal aid services in a country where over 90% of the state-funded Legal Aid South Africa's budget is spent on criminal legal aid (Legal Aid South Africa 2010, p. 26). In 2010 Legal Aid South Africa dealt with 387 121 new criminal cases and only 29 028 new civil cases (Legal Aid South Africa 2010, p. 26). This means that 93% of the cases were criminal and only 7% civil, and probably also explains why Dewar's article does not refer to private legal practice in criminal cases (Dewar 2011, p. 23). The reality is that indigent civil litigants have to rely on the private sector or self-help, or other mechanisms that are alternatives to lawyers, for legal services.

#### **4. Nature of the work of the private legal profession**

It has been pointed out that in the private sector attorneys draw clients from:

- (a) 'services for individuals such as drafting of wills, administration of deceased estates, antenuptial contracts, divorces, conveyancing, personal injury, compensation, and similar services provided to individuals in their personal capacity'; and
- (b) 'services for businesses and other commercial entities, that flow from commercial enterprise, such as debt collection, drafting of contracts, registration of companies, commercial conveyancing, and other services provided to a person or juristic entity that relate to trade' (Dewar 2011, p. 23).

The above categories make no mention of legal services to clients in criminal cases. This is probably because a small minority of attorneys specializes in criminal cases. Furthermore, the majority of criminal cases are handled by the justice centres of Legal Aid South Africa. For example, by 2007-2008 it was estimated that Legal Aid South Africa provided 45%-60% of all criminal defences in the district magistrates' courts, 50%-75% of all criminal defences in the regional magistrates' courts and 80%-95% of all criminal defences in the high court (Legal Aid Board 2008, p. 3). It is not clear, however, whether the remaining 55%-40% of district criminal court cases, 50%-25% of regional court cases and 20%-5% of all high court criminal cases involved clients who paid for the services of private lawyers or were cases that did not qualify for state-funded legal aid in terms of the Constitution (Constitution 1996, s. 35).

What is clear is that about 10 000 people a year are still being sentenced to terms of imprisonment without being legally represented. This emerges from the statistics of automatic reviews conducted by high court judges during 2008-2009 (Legal Aid South Africa 2009, p. 8). In terms of the Criminal Procedure Act (Criminal Procedure Act 1977) any sentence imposed upon an unrepresented accused by a magistrate is subject to automatic review by a judge of the provincial division having jurisdiction, where the accused is sentenced to imprisonment exceeding 3 months or a fine exceeding R2 500 (about US\$333) by a magistrate of less than 7 years standing, and 6 months or a fine exceeding R5 000 (about US\$667) by a magistrate of more than 7 years standing (Criminal Procedure Act 1977, s. 303).

## **5. Delivery of legal aid services by Legal Aid South Africa**

Legal Aid South Africa (LASA) is one of the largest employers of criminal defence lawyers in the country. On average LASA employs about 1 048 qualified lawyers and 615 candidate attorneys at any one time (Legal Aid South Africa 2009, p. 102). LASA is the agent of the state responsible for providing state-funded legal aid in South Africa and has established a network of justice centres and satellite offices using a mixed system of delivering legal aid services (Legal Aid South Africa 2010, p. 10.). The justice centres and satellite offices employ in-house qualified public defenders, candidate attorney public defenders, paralegals and support staff. The LASA head office operates a nation-wide impact litigation unit and a telephone legal aid advice line. In addition LASA uses *judicare* (i.e. contracts with private lawyers), cooperation agreements with non-state-funded organizations and impact litigation to deliver legal services.

### *5.1. Justice centres and satellite offices*

Legal Aid South Africa uses a combination of justice centres and satellite offices to provide a full range of legal and paralegal services to indigent clients in the larger cities and towns. The justice centres are one-stop state-funded law firms that are fully staffed to provide comprehensive legal services to legal aid clients. The centres employ qualified public defenders and candidate attorney public defenders, in addition to professional assistants, supervising attorneys, paralegals, administrative assistants and administrative clerks. The satellite offices provide similar services to the justice centres but on a much reduced scale.

The smaller towns and villages are served by the satellite offices, staffed by paralegals, who do the initial screening of legal aid clients regarding the means test and the nature of the client's problem, give basic advice or refer clients to other agencies, enter client details in the office data base, visit prisons and conduct community outreach legal literacy workshops. At the same time the satellite offices are serviced by one or two public defenders and intern public defenders, who operate out of the parent justice centre in the nearest large town.

At present LASA has 64 justice centres and 64 satellite offices (Legal Aid South Africa 2010, p. 10.). During 2009-2010 75% of the new matters handled by the justice centres and satellite offices involved the district courts, 16% the regional courts, 2% the high courts and 6% by other courts (Legal Aid South Africa 2010, p. 10.).

### *5.2. Impact litigation unit*

Legal Aid South Africa has established an impact litigation unit to deal with public interest cases that are likely to impact on the community at large. The unit only takes on cases that are likely to affect large numbers of people, in particular those involving child-headed households and AIDS orphans, women, the rural poor, the landless and farm workers, and those concerned with the socio-economic rights of the poor. The unit tends to refer public interest law cases to specialist organizations such as the Legal Resources Centre, a non-governmental public interest law firm

that specializes in impact litigation (Legal Aid South Africa 2009, p. 33), particularly in respect of constitutional cases.

### 5.3. Cooperation agreements with non-governmental organizations

Legal Aid South Africa has entered into cooperation agreements with several universities and NGOs, although such agreement partners accounted for less than 1% of all new matters handled by LASA during 2009-2010, some 3 463 out of 416 147 new matters (Legal Aid South Africa 2010, p. 26). LASA hopes to increase the number of cooperation agreements through 'improved networking with NGOs, CBOs and community advice offices' (Legal Aid South Africa 2010, p.10).

### 5.4. Legal aid advice line

Legal Aid South Africa has recently established a legal aid telephone advice line at its head office to cater for 'the poor and specifically the rural poor, by allowing them access to primary legal advice on the phone without having to travel to a justice centre of satellite office' (Legal Aid South Africa 2010, p. 11). The advice line is staffed by trained paralegals under the supervision of a qualified lawyer. The telephone calls are answered by the paralegals who, where necessary, consult with the supervising lawyer before giving advice. All calls are monitored and logged into LASA's electronic data base.

### 5.5. Judicare referrals to private lawyers

Prior to 1994 judicare or referrals to private lawyers used to be the main method of delivering legal aid services by the then Legal Aid Board (now Legal Aid South Africa). However, after democracy and the introduction of public defenders judicare now accounts for very few cases. For example, during 2002-2003 judicare still accounted for 41% of all the cases handled by the then Legal Aid Board (McQuoid-Mason 2007, p. 99), but by 2009-2010 judicare referrals had fallen to only 6% of all cases handled by LASA, some 24 672 out of 416 149 cases (Legal Aid South Africa 2010, p. 26).

It may be that until Parliament ring-fences a budget especially for civil matters LASA will continue to have most of its income spent on criminal cases in order to satisfy the criminal justice requirements of the Constitution (Constitution 1996, s. 35). The exception is the case of children who in terms of the Constitution must be provided with legal aid in civil matters 'where substantial injustice will otherwise result' (Constitution 1996, s. 28(1)(h)). LASA is acutely aware of the need to increase its delivery in civil cases and Parliament needs to ring-fence legal aid funds to enable it to do so, and to introduce other mechanisms, such as student practice rules or community service for law graduates, that can assist in increasing legal aid services in civil matters (see below para. 7.1.1).

## 6. Delivery of legal aid-type services by private lawyers and non-state funded bodies

Non-state funded mechanisms involving the provision of legal aid-type services to poor people include *pro bono* work by the legal profession, *in forma pauperis* proceedings, public interest law firms and university law clinics (for the latter see below para. 7.1.1).

### 6.1. Pro bono work by the legal profession

*Pro bono* work is not a substitute for legal aid schemes that pay for the services of lawyers, but can provide a useful supplement to them. For instance, the American Convention on Human Rights (American Convention on Human Rights 1969), seems to contemplate legal aid services being provided *pro bono* as it refers to 'counsel provided by the state, paid or not' (article 8.2.e). In South Africa there has been a



tradition of lawyers doing some *pro bono* work, and recently the law societies in five out of the nine provinces (i.e. Western Cape, Gauteng, Mpumalanga, North West and Limpopo provinces) have made 24 hours a year of *pro bono* work mandatory.

Legal Aid South Africa has been in discussions with the Law Society of South Africa (the umbrella body governing the attorneys profession) and the General Council of the Bar (the umbrella organization for the advocates profession), regarding the provision of *pro bono* legal aid services by attorneys and advocates (Legal Aid South Africa 2009, p. 33). The two lawyers' umbrella organizations should go further and take the lead in lobbying their provincial and local bodies to make *pro bono* work mandatory in all the provinces of the country.

### 6.2. *In forma pauperis* proceedings

*In forma pauperis* proceedings may be brought in terms of the Rules of the High Court (Uniform Rules of Court 1959), whereby the Registrar of the High Court refers poor people - people with assets of less than R10 000 - to private practitioners (attorneys who brief advocates) for help. Private practitioners must take the cases without compensation (Uniform Rules of Court 1959, r. 40(5)), but may recover their fees and disbursements at ordinary tariff rates if the litigant is awarded costs (Uniform Rules of Court 1959, r. 40(7)). Several hundred cases are dealt with annually in the high court under the *in forma pauperis* procedures in terms of the Rules of the High Court.

Some years ago it was suggested that *in forma pauperis* proceedings be abolished, but given the small percentage of civil cases annually undertaken by Legal Aid South Africa it is justified to retain their use. In the past *in forma pauperis* proceedings have proved particularly useful in situations when the then Legal Aid Board had to suspend legal aid for divorce matters because of budget constraints. In those instances the *in forma pauperis* proceedings were used to provide legal assistance to indigent persons (McQuoid-Mason 1982, p. 62). For this reason *in forma pauperis* proceedings should remain in the Rules of the High Court.

### 6.3. *Public interest law firms*

Public interest law plays a valuable role in the delivery of legal aid-type services to poor in civil matters (Hershkoff and McCutcheon 2000). The Legal Resources Centre (LRC) is a good example of a highly effective public interest law firm that was able to advance the interests of the poor and oppressed during apartheid. For example, during the apartheid era in *Oos-Randse Administrasieraad v Rikhoto* 1983, the LRC persuaded the Appeal Court that Africans who had worked continuously for an employer for 10 years in a 'white' area such as Johannesburg, were entitled to permanent residence in that area – even though the government had passed a regulation which had the effect of limiting employment contracts to a year at a time and argued that 10 years of continuous employment only amounted to 10 one year contracts and not continuous employment (Budlender 2009, p. 188). This decision affected the lives of thousands of black South Africans.

More recently since 1994 the LRC has focused on constitutional rights, land, housing and development, involving *inter alia* rural and urban restitution and redistribution of land, urban and rural land tenure security, housing, land law reform and urban and rural land development (Legal Resources Centre 1999, p. 4; McQuoid-Mason 2000a, p. S 128) To this end the LRC has entered into a number of cooperation agreements with Legal Aid South Africa.

## **7. Mechanisms that compliment or are alternatives to traditional legal services provided by lawyers**

The mechanisms that compliment or are alternatives to traditional legal services provided by lawyers may be divided into (a) legal and quasi-legal services that require people apart from lawyers with certain skills; (b) legal and quasi-legal services that involve structural mechanisms and organizations; and (c) norms and procedures that facilitate access to justice.

### *7.1. Legal and quasi-legal services that require people apart from lawyers with certain skills*

Examples of people apart from lawyers who can provide legal and quasi-legal services are law students, paralegals and, particularly in the South African context, traditional chiefs and headmen and headwomen.

#### 7.1.1. Law students in university law clinics

University law clinics were first established in South Africa during the early 1970s (McQuoid-Mason 1982, 139–140), and nearly all 19 university law faculties now have clinics. As a result the law clinics have become an important adjunct to the national legal aid scheme (McQuoid-Mason, Ojukwu and Wachira 2011, pp. 23-36). As far back as 1997 it was estimated that law clinics were giving advice and assistance in about 80 000 cases a year, 75% of which were in respect of civil matters (South African Law Commission 1997, para. 518(h)). Law clinics supply free legal advice and assistance to indigent persons under the supervision of legal practitioner staff members. Most university law clinics either require law students to work in a university law clinic, or place students in outside partnership organizations where they can provide legal services under supervision.

Funding for law clinics is provided by the universities and outside donors. The Attorneys Fidelity Fund provides grants to accredited law clinics to help pay staff and operate the clinics. The Attorneys Fidelity Fund is similar to the IOLTA (Interest on Lawyers' Trust Accounts) programme that is in place in Australia, Canada, New Zealand, and the United States. However, while IOLTA programmes directly fund legal aid in those countries, the Fidelity Fund in South Africa only supports legal education and accredited university law clinics as it believes that legal aid should be funded by the state.

The Association of University Legal Aid Institutions (AULAI) has set up the AULAI Trust with an endowment from the Ford Foundation and contributions from other donors to strengthen the funding of the clinics (Golub 2000, p. 38). The AULAI Trust has encouraged law faculties and law schools gradually to include the funding of their clinics in their university budgets. The AULAI has been the inspiration for similar associations elsewhere, such as Nigeria which has set up the Network of University Legal Aid Institutions (NULAI) that is closely modeled on AULAI and Poland which established a similar Polish Association of Law Clinics.

Legal Aid South Africa has entered into cooperation agreements with some university law clinics whereby it pays them to provide legal aid services that LASA itself cannot – particularly in civil cases. Law clinics can also be contracted to provide back-up legal services to clusters of paralegal advice offices. Cooperation agreements with LASA help to make the university law clinics more financially viable.

It has been suggested that if final year law students were able to represent indigent clients in the criminal district magistrates' courts under student practice rules they could free up the justice centres to do more civil legal aid work (McQuoid-Mason 2008, p. 580). Likewise, it has been pointed out that if law graduates were required to undertake community service they could make a significant contribution to the national legal aid scheme by undertaking district criminal court cases and enabling

the justice centres to focus more on civil actions. This could result in about 2 100 community service law graduates handling about 210 000 criminal cases a year if each graduate handles about 100 district cases a year which is the norm in the justice centres of Legal Aid South Africa (McQuoid-Mason 2011, 180-181). The different drafts of the proposed Legal Practice Bill include provisions for compulsory community service, but the details have not been worked out (Draft Legal Practice Bill (Ministry of Justice) 2000); Draft Legal Practice Bill (Law Society of South Africa) 2002; Draft Legal Practice Bill (Ministry of Justice) 2002; Draft Legal Practice Bill (Ministry of Justice) 2009).

#### 7.1.2. Law students in legal literacy and awareness programmes

Access to legal information is an important component of access to justice. Unless ordinary people know that they have certain legal rights and where to obtain the services of lawyers – even when they cannot afford them – they will not be able to access justice. Legal Aid South Africa has recognized the importance of legal literacy and awareness as a component of legal aid, particularly in respect of constitutional rights awareness (Legal Aid South Africa 2010, p. 8). In order to achieve this LASA should enter into cooperation agreements with NGOs and paralegal advice offices that run legal literacy programmes in peri-urban and rural areas. LASA could also enter into cooperation agreements with law schools that run Street law programmes in high schools, prisons and community organizations in urban areas.

'Street law' is an example of a national legal literacy and awareness programme. The programme provides ordinary people, predominantly school children and prisoners, with an understanding of how the legal system works and how it may be used to empower people 'on the street' (McQuoid-Mason 1994, pp. 347-348). University students in the Street law programmes are taught how to use interactive learning methods when teaching school children, prisoners, and ordinary people about the law. Other non-state-funded organizations that conduct legal literacy and awareness programmes are the Black Sash and the Community Law and Rural Development Centre (see below paras. 7.1.3.1 and 7.1.3.2).

#### 7.1.3. Paralegals in community-based and paralegal organizations

Community-based paralegals and paralegal organizations can make an important contribution to access to justice. The services of community-based paralegals differ from those provided by legal secretaries in law firms who are sometimes also known as 'paralegals'. For instance, Dewar states: 'The role of legal secretaries has developed to such an extent that they are now referred to as paralegals rather than secretaries' (Dewar 2011, p. 24)

Very often community-based paralegal advice offices deal with women and children, the urban and rural poor, and other indigent marginalised groups. In this context paralegals not only give legal advice and assistance but also try to resolve disputes through alternative dispute resolution. In addition, many community-based paralegal organizations educate the public about their legal rights (see generally, McQuoid-Mason 2000a, pp. S131-133). Some concentrate their work in the cities and towns, while others focus on rural areas. The services provided by community-based paralegal advice offices vary from advice only, to full legal services if they employ in-house lawyers or cooperate with outside lawyers (McQuoid-Mason 2000a, pp. S131-133).

The training of community-based paralegal staff varies from formal training leading to a diploma, to mainly practical experience learned 'on the job'. Some of the more sophisticated community-based paralegal advice offices are linked to organizations employing lawyers such as the Legal Resources Centre and Lawyers for Human Rights. Most community-based advice offices offer mainly legal advice which very often resolves the problems. However, several offices have built up expertise in particular areas such as HIV and AIDS, pensions, unemployment insurance, unfair

dismissals etc. Where the community-based paralegal advice office cannot solve the problem the person concerned is usually directed to Legal Aid South Africa's (LASA's) offices, the Legal Resources Centre, university law clinics or to sympathetic private lawyers. Community-based paralegals are also employed in LASA's justice centres and satellite offices, and LASA has on occasion entered into cooperative agreements with community-based paralegal NGOs (McQuoid-Mason 2000a, pp. S131-133).

The National Alliance for the Development of Community Advice Offices (NADCAO) has been formed to assist community-based paralegal advice offices in the country with training and fund-raising, and to investigate paralegal accreditation and certification procedures. NADCAO works closely with the Association of University Legal Aid Institutions (AULAI) and the AULAI Trust to coordinate clusters of advice offices that are supported by law clinics at the different universities (NADCAO 2009, p. 1). Recently LASA has entered into a cooperation agreement with NADCAO (Legal Aid South Africa 2010, p. 10).

Many small rural towns and villages are without lawyers or access to LASA satellite offices. This problem could be solved by paralegals being employed at state expense and attached to each town office to advise and educate citizens about the law. This was the model used for primary legal aid in many of the Eastern and Central European countries where each city and town had to provide its residents with a citizen's advice bureau, which included primary legal advice. The independence of the paralegals could be maintained by them being accountable to a paralegal committee with a majority of non-governmental members. This is similar to the model suggested for paralegals working near chiefs' offices at tribal authorities (see below para. 7.1.4).

Two well-known examples of community-based paralegal organizations that provide access to justice in South Africa are the Black Sash and the Community Law and Rural Development Centre.

#### 7.1.3.1. Black Sash

The Black Sash engages in advocacy, rights education, advice giving and monitoring. It deals with basic services, consumer protection, corruption and price-fixing, debt and credit, health, refugees, migrants and asylum seekers, service delivery, social grants, social insurance, security reform, socio-economic rights and unemployment (see generally, Black Sash 2013). The Black Sash compiles reports on aspects of justice and publishes its highly acclaimed *Paralegal Manual* (Black Sash 2011) which provides practical advice for paralegals, as well specialist guides for paralegals such as its *Debt and Credit: A Reference Guide for Paralegals* (Black Sash 2008a).

#### 7.1.3.2. Community Law and Rural Development Centre

The Community Law and Rural Development Centre (CLRDC) in Durban provides about 1 million rural people living in KwaZulu-Natal with legal advice and assistance as well as legal awareness training (McQuoid-Mason 2000a, p. S134). The CLRDC also refers community members to Legal Aid South Africa, the Legal Resources Centre, law clinics or private *pro bono* lawyers where this is necessary (McQuoid-Mason 2000a, p. S134). During its early years the CLRDC helped rural communities to establish paralegal committees to select certain community residents for training as paralegal advisers and educators. The paralegals underwent two full-time two month programmes on law-related topics, including customary law and human rights, after which they did one year practical training in their communities under the supervision of the CLRDC staff (Community Law and Rural Development Centre 2001, p. 10). At the end of the course the successful candidates were issued with a diploma by the Faculty of Law, University of Natal, Durban, South Africa. The CLRDC also provided continuing legal education for paralegals that had already

completed the programme. Apart from giving advice the paralegals were required to conduct law-related workshops in their communities.

The CLRDC operates in 35 rural communities that are governed by tribal chiefs, tribal administrators and unpaid tribal councillors who sometimes find themselves in conflict with the requirements of the Constitution.

#### 7.1.4. Chief's and headmen's and headwomen's courts

The vast majority of rural South Africans probably rely on the chief's and headmen's and headwomen's courts (there are very few headwomen), rather than the mainstream Western-style court system. In these courts indigenous law and custom are applied and no legal representation is allowed. However, if either of the parties is not satisfied with the judgment of a chief's or headman's court he or she may appeal to a magistrate's court.

The chiefs' and headmen's courts are required to operate within the constraints of the Constitution, but the 'Western concept' of judicial independence and impartiality does not apply because there is no separation of powers between the judicial, executive and legislative powers of chiefs. However, despite the lack of separation of powers the subjects of African customary law seem to believe that the chiefs will exercise their judicial functions in an impartial manner (*Bangindawo v Head of the Nyanda Regional Authority* 1998).

The chiefs and headmen and their subjects require education and training on how customary law relates to the Constitution. The Constitution provides that customary law must be developed so that it promotes the spirit, purport and objects of the Bill of Rights (Constitution 1996, s. 39(2)). A draft Traditional Courts Bill will bring the traditional courts into line with the provisions of the Constitution (Traditional Courts Bill 2008, Preamble). The Bill states that persons appearing before the courts may not be represented by lawyers (Traditional Courts Bill 2008, s. 9(3)(a)), although they may be represented by spouses, relatives, neighbours or community members in accordance with customary law or custom (Traditional Courts Bill 2008, s. 9(3)(b)).

Chiefs and headmen need guidance in working within a constitutional framework and people living in their communities need legal literacy education. Legal Aid South Africa (LASA) should consider placing paralegals at each chief's office to advise and educate the chief and their communities about the Constitution and the law. (This provision was included by the present author in the Legal Aid Act for Sierra Leone he drafted for Sierra Leone which was recently passed by their Parliament (Sierra Leone Legal Aid Act 2012, s. 14(2)), and he helped to establish a similar model for Mongolia in respect of district governors' offices (Open Society Justice Initiative 2010, 24)). This could be done by LASA entering into cooperation agreements with NGOs that have offices near the chief's place or if there are no such offices, by requiring the chief to allocate an office for paralegals. The paralegals can preserve their independence by being accountable to a paralegal committee rather than to the chief based on the model used by the CLRDC in KwaZulu-Natal and the Ministry of Justice in Mongolia. To make this work effectively, paralegal advice offices in rural areas should be mainstreamed into the national legal aid scheme by LASA through cooperation agreements.

#### *7.2. Legal and quasi-legal services that involve structural mechanisms and organizations*

Legal and quasi-legal services that involve structural mechanisms and organizations are self-help legal assistance mechanisms such as small claims courts, consumer protection agencies and prepaid legal services insurance schemes.

### 7.2.1. Small claims courts

In the cities and towns people are able to use the small claims courts to access justice in civil cases. For claims of less than R12 000 (US\$1 600) plaintiffs may sue in the small claims courts that were established under the Small Claims Courts Act (Small Claims Courts Act 1984). Advocates and attorneys are not allowed to appear in small claims courts (Small Claims Courts Act 1984, s. 7(2)), but preside there as small claims commissioners. The small claims courts may hear most civil matters except divorce, interpretation of wills, whether or not people are insane, defamation, malicious prosecution, wrongful imprisonment, seduction and breach of promise to marry (Small Claims Courts Act 1984, s. 16). The small claims court may also not hear cases which the small claims commissioner thinks involve difficult questions of law and should be heard by a magistrate's court (Small Claims Courts Act 1984, s.23).

The small claims court commissioners are appointed by the Minister of Justice and are practising advocates, attorneys or academics that are not paid to preside (Small Claims Courts Act 1984, s. 9(2)). The courts sit in the evenings after hours. Very few legal documents are needed and the commissioners run the courts on an inquisitorial basis and ask all the questions (Small Claims Courts Act 1984, s. 26(3)). Actions in the small claims court may only be brought by natural persons (Small Claims Courts Act 1984, s. 7(1)). An action begins with a letter of demand followed by a simple summons requesting the parties to appear in court on a particular day (Small Claims Courts Act 1984, s. 29(1)). There is no appeal from the small claims court's judgements (Small Claims Courts Act 1984, s. 45) but the commissioners may be taken on review (Small Claims Courts Act 1984, s.46).

It has been said that it is not worth clients using the services of a lawyer to litigate for less than R20 000 (US\$2 667) 'because the difference between the costs recovered and those spent can exceed the value of the claim' (Dewar 2011, p. 24). If this is true then the jurisdiction of the small claims court should be increased to R20 000.

### 7.2.2. Consumer courts and other consumer protection mechanisms

In certain cities consumer courts and other consumer protection mechanisms have been established under the recently promulgated Consumer Protection Act (2008), that came into effect on 31 March 2011, and allows complainants to lodge a consumer complaint in a variety of forums. Complaints may be brought by: (a) anyone who uses the goods and services that are the subject of a complaint; (b) anyone who is authorised to act on a person's behalf if that person cannot act in his or her own name; (c) anyone who acts as a member of, or in the interests of, a group or class of affected persons; (d) anyone who acts in the public interest – with the permission of the National Consumer Tribunal or the court to which the complaint is directed; or (e) an association that acts in the interest of its members (Consumer Protection Act 2008, s. 4)).

The Consumer Protection Act allows consumers a wide choice of forums in which to bring their complaints, including: (i) the National Consumer Tribunal; (ii) the National Consumer Commission; (iii) the appropriate ombudsman's office; (iv) the use of alternative dispute resolution through mediators or arbitrators; (v) consumer courts; and (vi) the criminal courts (Consumer Protection Act 2008, s. 69). How accessible these structures are and how they will work in practice remains to be seen.

### 7.2.3. Prepaid legal services insurance schemes

People who require legal assistance and can afford it may subscribe to a prepaid legal services insurance scheme for a modest monthly fee. A number of prepaid legal service insurance schemes exist in South Africa. The services offered depend on the premiums paid by members. For instance, a very basic policy may just cover

the legal costs for labour matters, while a more expensive policy could cover the legal expenses for a family, including the children under 18 years of age, in criminal, civil and labour matters (McQuoid-Mason 2000a, p. S136). Prepaid legal service insurance schemes provide access to justice by enabling middle and lower income members of society to obtain the services of lawyers for reasonably modest monthly premiums (McQuoid-Mason 2011, p. 192).

### 7.3. Norms and procedures that facilitate access to justice

Norms and procedures that facilitate access to justice included contingency fees and restitution orders.

#### 7.3.1. Contingency fees

Contingency fees allow a lawyer's fees to be calculated on a percentage of the moneys recovered by them on basis that the parties bear their own costs. The Contingency Fees Act (Contingency Fees Act 1997) provides that lawyers may enter into agreements with their clients in terms of which the lawyers shall not be entitled to any fees for services rendered unless their clients are successful to the extent set out in the agreements (Contingency Fees Act 1997, s. 2(1)(a)). The lawyers will be entitled to fees equal to or higher than their normal fees as set out in the agreement (Contingency Fees Act 1997, s. 2(1)(b)) – provided that such 'success fee' shall not exceed the normal fees by more than 100% and, in the case of claims sounding in money shall not exceed the total amount awarded, excluding costs, by 25% (Contingency Fees Act 1997, s. 2(2)).

Contingency fees enable poor people with good cases to access the services of lawyers without having to pay their fees should they lose the case. Should the lawyer win the case he or she will be entitled to a fee based on the terms of their agreement with the client.

#### 7.3.2. Compensation and restitution orders for victims in criminal cases

The Criminal Procedure Act (Criminal Procedure Act 1977) allows the victim of an offence involving damage to, or loss of, property (including money), or the prosecutor acting on the instructions of such a victim, to apply to court for a compensation order against the accused person if he or she is convicted (Criminal Procedure Act 1977, s. 300(1)). However, neither the prosecutor may request, nor the court make, *mero motu* a compensation or restitution order. Provision is made for payment to be made from any money taken from a convicted person on his or her arrest (Criminal Procedure Act 1977, s. 300(4)). A compensation order has the same effect as a civil judgment in the magistrate's court (Criminal Procedure Act 1977, s. 300(3)) and obviates the need to bring a civil action.

Compensation orders are not issued very often, but when they are, they are usually linked to suspended sentences in terms of s 297(1)(a) of the Act. The reason they are seldom issued is probably because the initiative must come from the complainants, or from the complainant through the prosecutors, and the courts do not inform complainants of this right. The situation should be rectified by amending the Criminal Procedure Act to provide that judicial officers are obliged to ask victims of crimes whether they would like a compensation order to be made in terms of the Act and to allow presiding officers to make such orders *mero motu* subject to the consent of the complainant (McQuoid-Mason 2011, p. 193).

## 8. Are there enough lawyers to provide the necessary legal services?

Despite the mechanisms for legal and quasi-legal services provided by non-lawyers, self-help and norms and procedures that provide access to justice, given that the vast majority of people in South Africa cannot afford lawyers, it is probably true to say that there are not enough lawyers to provide affordable legal services in the country. For instance, it is most unlikely that more than 30% of the population or

about 15 million people can afford the services of lawyers (see above Introduction). This means that for the affordable population group there is a ratio of approximately 682 people for every one lawyer. This ratio of people to lawyers – in respect of those estimated to be able to afford lawyers - is higher than that in several European countries as well as the United States, Brazil and New Zealand, and it could be argued therefore that there is room for more lawyers in South Africa. In Spain the ratio is 395 people to one lawyer, in the United Kingdom 401 to one, in Italy 488 to one and in Germany 593 to one. In the United States the ratio is 265 people to one lawyer, Brazil (which is more comparable to South Africa as a developing country) 326 to one, and New Zealand 391 to one. (The ratios are calculated as follows: Spain has 114 143 lawyers for 45 million people (395:1); the United Kingdom 151 043 for 61 million (401:1); Italy 121 380 for 59 million (488:1); Germany 151 043 for 82 million (593:1); United States 1 143 358 for 303 million (265:1); Brazil 571 360 for 186 million; and New Zealand 10 523 for 4 million (391:1) (Answers 2012)). Apart from Nigeria, South Africa probably has the smallest ratio of people to lawyers in Africa because it has the most developed economy on the continent (see above n.2 for the ratio of lawyers to people in other African countries).

When it comes to the other 70% of the population who cannot afford lawyers, particularly in civil cases, there is clearly a need for more lawyers or their alternative. The ratio of people who cannot afford lawyers (35 million) to the number of lawyers in South Africa (22 000) is approximately 1 591 people for every lawyer, or similar to the ratio for France. Thus France has 45 686 lawyers for 64 million people, yielding a ratio of 1 403 people for every one lawyer (Answers 2012). However, unlike the figure for France which includes people who can and cannot afford lawyers, this South African calculation only applies to people who cannot afford lawyers. If the ratio of people to lawyers for the total population (i.e. those who can and cannot afford lawyers) is factored in, as has been previously mentioned, the ratio is 2 273 people to one lawyer (above para 3.).

Very few civil actions are brought on behalf poor people by Legal Aid South Africa, and indigent members of the public have to rely primarily on non-governmental legal service providers and self-help mechanisms to access justice in civil matters. In this sense therefore it can be said that there are not enough lawyers to provide affordable legal services to the majority of people in South Africa, particularly in civil cases. As a result they have to find other methods of dispute resolution such as those previously discussed.

## 9. Conclusion

Although it has been argued that there are too many lawyers in South Africa it seems that this applies neither to the minority of the population that can afford the services of lawyers as well as the majority who cannot afford them. For the foreseeable future it is likely that most people in South Africa will continue to be unable to afford to employ lawyers and will become increasingly reliant on Legal Aid South Africa and mechanisms other than lawyers for assistance in legal matters.

In the light of the above the following practical solutions are offered:

- (a) As Legal Aid South Africa is required to spend most of its budget on criminal matters in order to satisfy the provisions of the Constitution, to alleviate the situation Parliament needs to allocate, and ring-fence specifically, certain legal aid funds for civil matters.
- (b) Legal Aid South Africa should increase its allocation of funding for cooperation agreements with public interest law firms, law clinics and paralegal organisations to expand its delivery in civil legal aid matters.
- (c) In order to meet the challenge of a paucity of funding for legal aid in civil cases changes need also to be made to the legislative framework to rectify



situations where litigation is unaffordable, e.g. by amending the Small Claims Court Act regulations to increase the jurisdiction of the small claims courts to R20 000.

- (d) The Criminal Procedure Act should be amended to compel presiding officers to ask complainants whether they would like a compensation or restitution order and allow the court to make such orders *mero motu* with the consent of the complainant.
- (e) Maximum use should be made of resources other than qualified lawyers such as law students and law graduates by providing a legal framework for student practice rules and compulsory community service for law graduates.
- (f) Legal Aid South Africa should employ a network of paralegals and legal literacy NGOs to assist it in providing access to justice in all rural chiefdoms and small towns.

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