SECOND CARNEGIE INQUIRY INTO POVERTY
AND DEVELOPMENT IN SOUTHERN AFRICA

Lawyers and Poverty

by

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1. Introduction

The main thrust of this paper is to provide an overview of the involvement in international development strategy of lawyers working in the area who are searching for and making proposals which may lead up to international acceptance of an alternative strategy of development, and who are attempting to find a constructive role for law and lawyers in the alternative strategy.

Most of the international conventions and universal principles mentioned are not adhered to by the South African Government.

The unique structure which prevails in South Africa may make many of the points and ideas in this paper seem far-fetched.

However, if the ideas presented can provide critics of development strategy in S:A. with more ammunition, then this paper will be of some value.

Furthermore, I cannot believe that the present structure will last forever. One day the State in South Africa will be able to devote its full attention to eradicating poverty through a more efficient development strategy.
If the seeds for an effective strategy can be sown now, perhaps whatever means are adopted will be more effective in dealing with poverty than those which have been used internationally over the past 25 or so years.

Any approach to development must have many facets. The ideas presented in this paper are not intended to exclude all others.

From one of the roots of South African Law, Roman law, I draw a brief image: that is, of the priests in Ancient Rome, who guarded their position so jealously that they controlled the law - controlled it to such an extent that they were the only ones who knew what the law was, and a Roman seeking assistance in a legal matter had to pay dearly before the priests would pass on any knowledge.

This image is important because it helps us to understand the operation of the law in society today. For today things are not very different. The Legal Profession is a very elite one. There are probably about 2500 practising attorneys and 700 practising advocates in South Africa. Most of these professionals are concentrated around the urban areas. To give some comparison there are 50 000 solicitors in England and Wales. That is, about one per 1000 members of the
population. The rate in South Africa is ~ one per 10 000. The members of the profession may not advertise and may not breach set rates for work done. At the present rates, legal fees run from R50 - R200 an hour.

That then is an outline of the position of the present priests, many of whose number find their way into decision-making bodies throughout the country.

Despite their closeness to the sources of power, lawyers have in general a bad name amongst the lay public. Just as the priests in Ancient Rome did not manage to retain full control, so there are moves afoot in some parts of the free world to challenge the lawyers' monopoly. The USA now has so many lawyers that they cannot be accommodated in the reserved areas.

Law is a tool. It is a tool used most effectively by those who have power. It is my object in this paper to examine whether law can be used as an effective tool for development, whether in its present shape or in a different form.

There are those who believe that any attempt to dabble in or with the law is a recipe for disaster. It is my belief that this purist viewpoint arises from a theoretical analysis.
which avoids fundamental realities.

I believe that the law can be used as a tool for development - provided it is demystified and the concept of law brought down from its rarified atmosphere.

2. CURRENT ATTITUDES IN INTERNATIONAL DEVELOPMENT STRATEGY

(a) The "Trickle Down" theory is a simplistic one which operates on the premise that if enough money is injected into capital ventures the entire society will benefit from the trickle down effect. Wealth, says this now outmoded theory, is most effectively distributed from the top downwards.

For convenience sake, the Sixties and Seventies have been called the first and second development decades. Analysis of the implementation of the trickle down theory in these two development decades has shown that wealth does not trickle down at all if injected only into heavyweight projects.

(b) The "basic needs" strategy was developed after the failure of the trickle down theory. Its fundamental premise was that unless attention is paid to basic human needs, both material and non-material, no development strategy can ever succeed. As the ideas behind basic needs strategy began to
take shape, it became clear that the effects on the individual and on the smaller sociological units of any development programme had to be carefully evaluated before such a programme was implemented.

The basic needs strategy concentrates on the essential needs of those most in need. It is, however, not a fixed concept. No development strategy can ever be such. The idea of what exactly basic needs are has also caused much debate, and it is when basic needs and human rights begin to be regarded as close relations that lawyers interested in the area begin to feel that their expertise may be of some value.

One commentator has said that it was

"through basic needs strategy ... that the Carter Administration believes the US can promote economic and social human rights"

(P W Fagen "The Link between Human Rights and Basic Needs". Centre for International Policy, Background Spring 1978, p 1.)

Today human rights has become an unfashionable phrase in the United States and subsequently in the Western world.

The relationship between human rights and basic needs is
discussed later.

3. **TOWARDS AN ALTERNATIVE DEVELOPMENT STRATEGY**

(a) **International Agencies and Development Strategy**

Basic Needs Strategy has found strong support in the International Labour Organisation (ILO), the United Nations Educational, Scientific & Cultural Organisation (UNESCO), the United Nations Childrens Fund (UNICEF), The World Bank, & the Organisation for Economic Co-operation & Development (OECD). However the UN Development programme was only established in 1966. It was only in the Seventies that human rights aspects came under the microscope. In 1976 the International Covenants on Human Rights had received sufficient ratification to enter into force, 27 years after the covenants had been drafted. Most major agencies, both UN and governmental, now pay attention to Basic Needs Strategy, even though it is correct to say that in many agencies Basic Needs Strategy is viewed with a certain amount of suspicion.

At the February 1979 session of the Commission on Human Rights the Indian delegate indicated that there is no simple equation between Basic Needs Strategy and Human Rights ....

"Unfortunately the basic needs strategy has been used as"
a convenient excuse to imply that the only problem of
developing countries is [providing] the minimum neces-
sary for subsistence ... A strategy which aims only at
satisfying basic human needs would, if followed, reduce
the stature of the human race".
(E/CN 4/A/SR 1489)

(b) Basic needs and Human Rights

There has been in the International Debate and in the field,
considerable discussion by designers of Development Strategy
about the 'trickle down theory' of development and the
'basic needs strategy'. At present neither school of thought
is fully in favour and it would appear that the strong
reaction to the perceived failure of the application of pure
'trickle down theory' which resulted in strong support for
the 'basic needs theory' has served its purpose.

The road to the establishment of a recognised Right to
Development has as part of its make-up an examination of the
Basic needs theory in relation to Human Rights.

Non-material needs

"are a vital component of a Basic needs approach, not
only because they are important conditions for meeting
It is strongly argued by Philip Alston ("Human Rights & Basic Needs: A Critical Assessment" - Human Rights Journal (Strasbourg) 1979) that

"the major advantage of making human rights objectives an integral part of the Basic Needs Strategy would be to provide the latter with a comprehensive and acceptable ethical basis ..."

(Op. cit. p 51)

This is necessary, says Alston because the lack of consensus as to exactly what are basic needs weakens the efficacy of any argument for the implementation of any Basic Needs Strategy.

He is looking here at the problem from an international law point of view, on the basis that enforcement is dependent upon acceptance which itself is dependent on consensus.

Alston also argues that some of the criticisms of Basic Needs Strategy may fall away if Basic Needs Strategy is
linked to an acceptable ethical base.

But perhaps the strongest argument for linking Basic Needs Strategy and Human Rights is that this will assist in the creation of a Right to Development.

(c) The Right to Development

Human rights as an issue has fallen from favour on the international political scene. There are however people presently working towards having the Right to Development accepted as a fundamental Human Right. How that will ultimately affect those with whom this conference is concerned may appear to the cynical an easy question to answer. Not at all, they will say. This is probably true in the short and medium term. But on the basis that, one day, internationally recognised Human Rights conventions may provide some guidance here, the context of the goal should be examined.

Once the Right to Development has been formulated and internationally accepted then it becomes easier to put pressure on governments which do not acknowledge the Right nor pay proper attention to proper development strategy.
Another advantage of the availability of clearer guidance in this area is that it will enable there to be less difficulties with controls over funds/aid which are transferred from rich to poorer countries. At the moment any strings attached by donor countries enables arguments about neo-colonialism to rear their heads.

(d) **An Alternative Development Strategy (ADS)**

Out of the failures of the development decades of the 60s and 70s, and the debates about basic needs and trickle down has evolved not a little confusion and some new ideas. There is a small group of lawyers scattered in different parts of the world who have been actively involved in the putting into practice of the idea of law as a tool for development. Out of their thinking and experiences has developed what they call an Alternative Theory of Development.

In an ideal Alternative Development Strategy, the following elements must receive attention:-

- the realisation of the potential of human beings in harmony with the community as a central purpose of development
- the idea that human beings are the subject of and
not the object of the development process
- the realisation that both material & non-material
  needs should be satisfied, and that a respect for
  human rights is fundamental
- the realisation that human beings should
  participate as fully as possible in any development
  plans which concern them, and that individual and
  self reliance are critical goals.

It is this lastmentioned point which provides the kernel of
Altemative Development Strategy. Participation and self
reliance are the key elements of what proponents of Alter-
native Development Strategy consider to be one of the ways
to deal with the failures of the Development Strategies of
the first two development decades. It is conceded by its
proponents that Alternative Development Strategy is not a
holistic theory of social change but it is rather a variety
of interrelated strategies.

Basically Alternative Development Strategy is suspicious of
State-directed strategy and is critical of

(i) state monopolies of control over
essential resources
(ii) state monopolies of control over
distribution of such
(iii) state-planned co-option of local groups
(iv) state acceptance of and catering to
* traditional elites
* caste differences
* traditional norms regarding for
  for example, sex and age roles

ADS is concerned with assisting the individual and the community to free itself from anachronistic customs which can reinforce tendencies towards segmentation and subsequent repression.

4. **THE ROLE OF LAWYERS IN ALTERNATIVE DEVELOPMENT STRATEGY**

The sources of relevant law are not simply legislation, court decisions and local customary law - its sources include constitutions, principles of natural law, jurisprudential concepts, and international law and conventions.

In examining the role of lawyers in development note must be taken of a broad view of law.

The criticism that lawyers are too locked into litigation may well have some validity and such lawyers are of little value in any ADS.
Just as the social anthropologist should be called on to consider the sociological implications of the introduction of a new development idea so the lawyer may be called upon to help root out, for example, traditional law principles of democracy which have been hidden or ignored by central government interference in local government structures.

Government legal aid can never be the answer because it primarily supports individual litigants, and would be reluctant to support moves which may lead to institutional change.

(a) **Suggestions for Present Day South Africa**

What is interesting about South Africa and why international thinking about Development Strategy is important is that it really is a country with a first and third world within its borders, with a vast disparity of wealth between first and third world elements.

The major stumbling block to any kind of meaningful development in South Africa is the fact that those who are most in need of development have the least possibility to participate. What structures that do exist in the homelands
for participation are based on bastardisations of traditionally democratic structures of government. Chiefs who were once accountable to their people are now dependent upon and accountable to offshoots of the Central Government. Social structures in rural areas have been fundamentally altered by the migrant labour system, and no alternative and democratically amenable structures have been allowed to develop because of the continued repression of women in traditional societies.

The fragmentation of South Africa into homelands with homeland governments has effectively removed government of the poor from any possible scrutiny by those with the most education and consequently ability to identify and highlight abuses.

Corruption in the homelands escapes detection and effective control because of this.

The electorate of Central Government is so obsessed with the issue of race that it pays scant attention to aspects of maladministration in its own areas of government, let alone those of the poor and undeveloped.

One commentator has said
"In South Africa there is again a need for a qualitatively different strategy. By the system's own definition that strategy must be inherently unlawful and basically revolutionary"

(R H Green "Procedures and Professionalism and/versus Participation and Popular Organisation: Some problems of accountability" - Third World Legal Studies (1982))

In South Africa the law turns, in the words of J P W B Mc Auslan

"homesteaders into squatters, self-built houses into 'slums' and nuisances which must be demolished, petty traders into criminals and job-seekers into vagrants"

(Law and Lawyers in Urban Development: Some Reflections from Practice" - Third World Legal Studies (1982))

What can lawyers do in South Africa? At present because any move towards institutional change outside the white political arena is regarded as revolutionary and could lead to implementation by the authorities of the draconian security legislation which is available, lawyers like most others, are restricted in the main to curative/reactive participation. The identification of and prevention of abuses towards the underdeveloped is not a creative
activity.

The lack of any kind of human rights touchstone such as a Bill of Rights confines attacks on repressive non-democratic legislation to the limited area of implementational control by way of judicial review of administrative action. No legislation in South Africa may be challenged if properly enacted.

In the one homeland which has a Bill of Rights, Bophuthatswana, very little has been done to measure legislation or government action against the given norm (which appears to be based on the OECD declaration of human rights.) This is largely due to the scarcity of lawyers in the area.

One of the most effective areas in which lawyers can be creative is in the area of labour law for it is in this field that democratic voluntary associations of the least privileged are allowed to operate. It is obviously because this area can contribute significantly to development in South Africa that unions which show a wider interest in community affairs are most carefully watched by the authorities.
(b) **Suggestions for South Africa in the Future**

In a democratically united South Africa the transfer of wealth would presumably take place on a vast and accelerated scale. Once present constraints are removed it is likely that unless a sound basis already exists for an equitable distribution, the same problems will arise here as have arisen in other newly free countries.

It is for this reason that it is critical that the foundation for a proper development strategy be laid as soon as possible, so that in the South Africa of the future, lawyers can play not only a reactive/curative role but also a proactive/creative and preventative role.

**Lawyers can:**

(i) assist in creating legislation that conforms to international norms

(ii) ensure that laws make provision for accountability

(iii) ensure that democracy can be carried out through proper participation by assisting in the creation of democratic groups

(iv) establish and maintain effective independent watchdogs to police
governmental and other digressions from Bill of Rights based norms

(v)
assist in the restructuring of, for example, the law of property to ensure equality of access to a fundamental of wealth, viz. immovable property.

If this paper provokes further constructive discussion in the area then it will have served a useful function.

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These papers constitute the preliminary findings of the Second Carnegie Inquiry into Poverty and Development in Southern Africa, and were prepared for presentation at a Conference at the University of Cape Town from 13-19 April, 1984.

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Quoting (in context) from these preliminary papers with due acknowledgement is of course allowed, but for permission to reprint any material, or for further information about the Inquiry, please write to:

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