

**SECOND CARNEGIE INQUIRY INTO POVERTY  
AND DEVELOPMENT IN SOUTHERN AFRICA**

**The Law and Poverty**

**by**

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## THE LAW AND POVERTY

1.

The research papers presented and discussed during the conference have established beyond any doubt, I believe, the existence in South Africa of a distressing state of poverty among a very substantial section of the community.

The problem which I as a lawyer have been required to address myself to, is the relationship between Law and Poverty.

This raises two basic questions:-

- (a) Why should law and jurisprudence concern itself with the issue of poverty at all?
- (b) In which way does the law, and the legal system in our country help to alleviate, neutralise, or aggravate poverty?

I propose to offer a few thoughts on each of the two questions, in general terms. A detailed treatment of specific laws and practices would be more appropriate for treatment in a book.

2. Why should law, jurisprudence and lawyers concern themselves with the phenomenon of poverty at all? Why is poverty a matter of special interest and responsibility for the law, for jurisprudence and for lawyers? There are, I think, two answers to these questions:-

- (i) Conceptually and jurisprudentially, one of the two chief objects of the law is to ensure justice.

It was that great English Judge, Lord Wright, who said: "I am most firmly convinced by all my experience and reflection upon law that its primary purpose is the quest of justice."

This is not a peculiarly English view of law. It expresses the basic temper of all civilized systems of law, and in a South African case the Judge President of the Supreme Court in Natal accepted that it

is part of the South African legal tradition by expressing himself as follows in sentencing a political offender who had committed certain acts of violence from political motives:-

"It is because injustice is intolerable that humanity, over the centuries, has developed systems of law designed to secure that there will be, as far as possible, justice between man and man and between man and the community to which he belongs."

What is "justice"? It has been variously defined, but common to all the definitions are the elements of fairness and equality of treatment and opportunity. "Justice" says the Institutes of the Roman Emperor Justinian "is the set and constant purpose which gives to every man his due".

Each generation, each age, makes its own value judgement as to what is due to the citizens of its times. Avoidable poverty is not acceptable to our age, as being the due of any man. Avoidable poverty is therefore not acceptable to our age as just. If it is not just it is the legitimate business of the law and of lawyers to say so, because it would be subversive of one of the chief objects of law. Thus it was the collective wisdom of a chastened and much bruised humanity, after the Second World War, which declared through its jurists and through a legal document, this aversion to poverty. Section 25 of the Universal Declaration of Human Rights states:

"Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance."

The pursuit of freedom from want has accordingly become a non-negotiable ethic of modern law.

(ii) The other chief object of law is order. Order is crucial to civilized society. Hobbes in a celebrated passage in the Leviathan stated that without law and order men-

"are in a condition which is called war, and such a war is of every man against every man..... In such condition, there is no place for Industry,.... no culture of the Earth, no Navigation... no commodius Building.... no knowledge of the face of the Earth; no account of Time, no Arts, no Letters, no Society; and, which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short."

Much of what Hobbs wrote has rightly been the subject of bitter controveeay, but there can be no disagreement with this passage. Order is not only essential to civilization, but "the greatest achievement of an enduring civilization".

It is therefore said that without order there can be no justice. But, is the converse not equally true? Can there be a lasting order without justice?

Although the ultimate sanction of the law is the physical force of the State, its practical survival is possible only if it secures the respect of those subject to it. Such subjects must be able in some measure to identify themselves with the need for the enforcement of such laws, and bring to bear upon the transgressors of such laws, the moral censure of the community.

Avoidable poverty, affecting substantial sections of the community, imperils this order. It imperils order because it alienates the poor from the system of law. It delegitimizes its moral censure. It subverts the respect for the law which is essential for its survival.

Law, therefore, has a vested interest in the crusade against poverty. Mass poverty does not only degrade the poor, but threatens order. It therefore has the potential to imperil both the poor and the rich.

3. I have thus far dealt with the first question: Why should law and jurisprudence concern itself with the issue of poverty at all. My answer is that the issue is fundamental to the very objectives and ends of the law.

4. The next question is the role played by our legal system in South Africa in alleviating or aggravating poverty.

Before dealing with certain specific areas of law, I wish to make two general observations which are relevant to the role of law in the problem:-

- (a) A crucial distinction must be made between the Roman Dutch common law of South Africa and the body of statute law enacted by the Parliament of South Africa. The Roman Dutch common law is basically as fair, as just, and as lofty in its aspirations as any of the systems of modern law which we would want to compare ourselves with. Its basic temper is perfectly consistent with the humanistic impulses of modern man, which has propelled so much of the thinking of civil rights and public interest lawyers. The criticism against certain laws of application in this country, voiced by activists against poverty, is a criticism against some laws enacted by the legislature, which the Courts in our system of constitutional law have no jurisdiction to review or strike down.
- (b) There is no dispute between lawyers and politicians in South Africa as to the duty of the modern state to concern itself actively in the alleviation of poverty. The image of the State as a retiring, uninvolved policeman in the struggle of society to overcome poverty, has long receded into history. The amelioration of poverty is the legitimate business of all modern states, including South Africa. Laws authorising subsidised housing, welfare grants, subsidised education, unemployment benefits, accelerating taxation against the affluent, subsidised food and medical benefits, are all based on the accepted, if inarticulate, theory that the State in South Africa, has an active duty to combat and ameliorate poverty. The debate is not whether this responsibility exists; but whether it is discharged in a manner which is effective, just and defensible.

5. In the analysis of this debate, it is necessary to examine certain areas of crucial relevance in man's quest for freedom from want and poverty. This freedom involves many other freedoms:-

- (a) The first is the freedom to sell his labour and to utilise his talents in the market which rewards him most fairly and adequately.

Undoubtedly that market is largely concentrated in the urban centres of industrial, mining and commercial power in South Africa.

The right of Black persons to gain access to this market, however, is severely constricted by legislation and, more particularly, Section 10 of the Black Urban Areas Act, which makes it a criminal offence for any Black person to be in a "prescribed area" for more than 72 hours, unless he is able to claim the protection of Section 10, which exempts persons born and residing continuously within the area, whose working in the area for a specified number of years without having been sentenced to a fine in excess of R500,00, or imprisonment exceeding 6 months, and certain dependents of such persons; all other Black persons must obtain special permission from a labour bureau.

These, and other related measures, seek to restrict Black urbanisation by law. The law is transgressed every minute. Mr Justice Hoexter has found, in his latest report, that there can be only one reason for this. Poverty in the rural areas. If the rural areas were not impoverished, there is no rational ground why thousands upon thousands of persons, every day, should risk their freedom and dignity, by leaving their children and families behind and flocking to the towns in breach of the law. At page 580 of his final report Mr Justice Hoexter says that our prisons are overcrowded by "hordes of Blacks" who land in prison as a result of influx control. The learned Judge continues:-

"Judged by civilized norms these people are not real malefactors. They are needy victims of a special system that controls the influx of people from the rural to the urban areas by penal sanction. The reason for this virtually unstemmable influx is poverty."

According to information given in Parliament, 206,022 persons were arrested by certain agencies in 1982, for contravening certain pass laws designed to stem this flow of Black urbanisation; 564 every day, 23 every hour. These numbers can only grow with the continued growth of the economy and the process of urbanisation. Accelerating urbanisation has been the most conspicuous consequence of the Industrial Revolution. It is not confined to Blacks and it is not confined to South Africa. The problem is Universal; the legislative response only is peculiarly South African.

The number of persons affected by these laws will increase for another reason: Very large numbers of Blacks who formerly qualified for South African citizenship, in terms of the Citizenship Act, have by law forfeited their citizenship upon the independence of the territories of Transkei, Ciskei, Bophuthatswana and Venda. This will also happen with the independence of other Homelands. Many millions of these persons have lived and worked lawfully in the Industrial and Mining heart of South Africa, fully protected by Section 10 of the Urban Areas Act. But, their children born after the independence of the relevant homelands are not so protected, even if they have lived in Soweto all their lives. The ultimate result of this approach must eventually render every Black person, living or working outside the homelands, a potentially illegal resident of South Africa. Criminal prosecutions must increase. The prison population must accelerate. The jurist is distressed by these facts. Not only because of their impact on labour, mobility and poverty. His distress arises from considerations fundamental to an effective system of law and justice. It is succinctly set out in the following words of Mr Justice Hoexter, a judge of the Highest Court in the country:-

"Particularly the fact that the prisons are crammed with thousands of breadwinners who have landed there for minor technical offences .....has a two fold psychological effect on the largest population group in the country. In the first place it breeds in many Blacks - especially those who have actually suffered the shame and indignity of imprisonment for minor offences - contempt for the administration of justice in general and the criminal courts in particular. In the second place, the result is that contrary to sound norms, the serving of a prison sentence, is no longer regarded as a stigma by many Black inhabitants of the country,



and that imprisonment as a punishment for the commission of a crime is consequently losing its power as a deterrent.

The learned Judge goes on to say that because of the over-crowding of the prisons, 20 or 30 vicious thugs have to spend a night together in a cell and serious criminals have to be prematurely released.

I have used the Black Urban Areas Act as an illustration of the problems which concern us, because of its high visibility. It is only part of a complex network of legislation dealing with Black labour, residence, mobility and housing, with a direct or indirect impact on the levels of poverty prevailing in our country.

- (b) The freedom from want or poverty involves not only freedom of movement. It involves also freedom to follow the occupation or trade of your choice. There have been both customary and statutory barriers to this freedom, which have precluded substantial sections of the population from engaging in trades and occupations of skill, attracting the highest rewards.

Section 77 of the Black Labour Relations Act, provided for the reservation of specific types of jobs for specific races. Many determinations were made under this section, precluding Blacks from following various occupations. The sections and the determinations have now been repealed. But its economic effects can not be repealed by law. Moreover, there is other legislation which is still operative in this field. Blacks are for example excluded by law from certain skilled work on the Mines. Workseekers, seeking to enter a prescribed area in terms of Section 10(1)(d), have to be registered at the age of 15 for particular categories of work by the Labour Bureau, which effectively controls and regulates what labour can, in practice, be performed by such a worker. Various proclamations under the Group Areas Act, provide that a disqualified person in a Group Area, is entitled to occupy premises as an employee, but not if he is employed in an administrative, managerial, executive, technological or supervisory capacity, unless he is issued with a permit. All persons who are not White are disqualified persons in a White group area.

The effect of this kind of legislation is two fold:-

- (i) Firstly, it impoverishes the worker by excluding him from work for which he is adequately remunerated;
- (ii) Secondly, it prejudices the national economy by limiting the pool of skilled workers, exaggerating the pool of the unskilled and unemployed, and retarding productivity and economic growth. The skilled worker with a potential for contribution to the national wealth, becomes a potent charge upon the State for subsidised benefits. Poverty is compounded individually and nationally. It is mitigated only by de facto transgressions of the law, which attracts derision if it is ineffectively policed, and contempt if it is effectively enforced. Either way, the serious jurist is deeply distressed.

The impoverishing effects of impeding the emergence of a substantial pool of skilled Black workers, are not caused exclusively by labour legislation. Inadequate expenditure on Black education is equally devastating in its ultimate impact. Fear, ignorance and poverty seduce and sustain each other. Massive education of the Black community must be a priority. Not only is it a priority in order to render justice to Blacks, but a priority for the ultimate defence and progress of our entire society. Massive Black education will corrode ignorance, insecurity and fear, stimulate productivity and enrich both Black and White, materially and spiritually.

- (c) Basic to the pursuit of freedom from want and poverty is adequate land for each citizen to house and feed his family. This problem has dominated the history of South Africa, and provides the structural foundation for the real problems generated by influx control legislation. The effect of the Black Land Act of 1913, and the Development and Trust Land Act of 1936, was crucial: It pegged the claims of Blacks to land ownership effectively to 56,000 square miles or, approximately, 13% of the total land area of the country. The controversy as to whether this division was based on the established historical possession of Blacks is irrelevant to the enquiry to its effect on poverty. The size of land made available for Black ownership has caused overstocking,

overgrazing and over population of some of these areas, with scant opportunities for industrial or mining development. Young men flock to the cities for employment in industry, mining and commerce, sometimes legally, sometimes illegally. They leave behind children, women and aged parents, substantially dependent on remittances from migratory labour. The homelands simply cannot generate enough income for economic viability. Their budgets are hopelessly dependent on South African grants. The Bureau for Economic Research has reported that during 1980 over 5,2 million of the 6,2 million Blacks living in the homelands, had no measurable income for the year.

There are some signs of a serious search for escape from this historical logjam. The pretence that millions of Blacks living for generations outside the homelands, are part of the homelands is being questioned on the basis that it constitutes economic mythology and political escapism. The irreversible recognition of this is the first crucial step necessary to combat some of the deep foundations of rural poverty in South Africa.

- (d) Freedom from want and poverty also involves the right to influence the making and unmaking of laws affecting the subject. The ultimate weapon of a dissatisfied citizen in a democracy, is to make his public representative accountable to him for his actions. The ultimate sanction against unfair treatment is the censure of electoral rejection. Depressed economic groups, in history, have wielded the weapon with effect and power. The Welfare State in some form or another has become an essential ingredient of modern government. Poor Whites in South Africa have proved this at home.

The vast complex of laws and budgetary allocations, pertaining to discrepancies in salaries and subsidies for Black Education, housing, land, social welfare, health services, pensions and other fields of human endeavour and aspirations have a cumulative effect on poverty. Much of this might have to yield and soften, if those responsible for the making of the law were accountable to a constituency which included the majority

of the poor. The exclusion of Blacks from the most important parts of this mechanism is a formidable legal obstacle in the struggle to combat poverty. This problem is compounded because the Supreme Court, often consisting of men of great scholarship and learning, has no power to strike down Parliamentary legislation and has yet to be graced by any man of colour on its bench.

- (e) Apart from formal laws and regulations of this kind, the poor are often the victims of perfectly fair laws, unfairly exploited, and an inability to protect and assert their rights through the process of the law. Thousands of such victims have neither the education nor the financial means to pursue their lawful rights in Courts of law, otherwise quite ready and willing to assist them. Access to the law is a vital ingredient of justice. Poverty often precludes such access, thus feeding on itself and compounding more poverty. Legal Aid needs to be elevated into a national priority, subsidised and funded by the State on a massive and visible scale.

6. I have highlighted my perceptions of the problem relating to law and poverty. It is necessary, however, to make two qualifications. Firstly, in a paper on poverty and the law it is natural and relevant to concentrate on the pathological features of the legal system. This does not mean that there is not much in that system which is healthy, honourable and fair. Indeed the pathology is identified precisely through the healthy moral foundations on which the system is based on common law.

Secondly, the reform of the law will not in itself magically secure the eradication of poverty. A semester, as a visiting academic at Columbia University and several sessions on the bench of Swaziland, Lesotho and Botswana, have cured me of any such delusions I might unconsciously have entertained. The loftiest constitution and the most powerful Court of the World, has not succeeded in eliminating some of the most appalling differences between Black and White incomes in the United States. The absence of discriminatory legislation in Botswana and Lesotho has not helped to protect me from the agony and impotence of seeing poverty paraded before my very eyes in the Courts.

But, that having been said, let me say that law, lawyers and the legal system have a responsibility, duty and a power to influence the struggle against poverty. They dare not shirk this duty.

Widespread poverty amid affluence, desperate hunger amid abundance debases our legal values and imperils our legal order. Avoidable economic inequality materialises and trivialises the upper class, vulgarises the middle class and brutalises the lower class. We are all impoverished in the process.

Law and lawyers are powerful, but their power must be united with the power of others to make a more compassionate society. The spiritual fuel necessary to propel us all for this endeavour is the universal quality of LOVE for all men, and a willing and joyous acceptance of the thesis that everyman is his brother's keeper.

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.

The Second Carnegie Inquiry into Poverty and Development in Southern Africa was launched in April 1982, and is scheduled to run until June 1985.

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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