Access to Justice:  
Developing a Pro Bono Practice  
for South Africa  

by  

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I. Introduction

- Caveat
  - Not working directly in the area over the past two years
  - Human Rights film festival (3CFF)
  - Law, Race and Gender Unit at UCT
- Experience
  - Georgetown University Law Centre
  - White & Case LLP Pro Bono Practice
  - Lawyers for Human Rights, Pro Bono Initiative
    - Vinodh Jaichand Champion – Conference in 2002
    - Ford Foundation (refusal to fund developing the initiative)

II. Defining Pro Bono

- Pro bono Publico, also referred to simply as Pro bono, is commonly understood as the provision of legal services to poor, marginalized and indigent individuals, groups or communities without a fee or expectation of compensation, in order to enhance access to justice for such persons who cannot afford to pay for legal services.
- Importance of nomenclature
- Pro Bono as opposed to "community services"
- Resistance to the term

III. Why we need Pro Bono

- Two quotes. One from Judge Navsa – quoted in a 2002 article from the South African Journal of Human Rights by J Sarkin "Promoting Access to Justice in South Africa: Should the Legal Profession have a voluntary or mandatory role in providing legal services to the poor" (v. 18, 4, 2002)
  
  There is a growing perception that in spite of South Africa's having one of the best Constitutions in the world; its legal practitioners are losing their social
consciences. Whereas the Constitution has created many opportunities for the use of law to promote social justice and democracy, there are probably fewer lawyers practising in this area than was the case under apartheid. We must return to an ethos that existed at a time when lawyers were resisting and fighting apartheid. There was a sense of mission and of moral duty.

- Second quote from Vinodh Jaichand also quoted in the same article:

  In South Africa there is no code of conduct within the legal profession in South Africa that advises or requires that legal practitioners dedicate a certain amount of their time to working on behalf of the marginalized, vulnerable and indigent persons.

- Having said this, we know that pro bono practice does take place (and has been taking place) and that schemes such as the in forma pauperis procedure in terms of the Rules of the High Court have been existence for some years.

- The issue remains, there is an incredible short fall in the requirement for legal representation and currently the responsibility being taken individually and collectively by members in private practice to address this short fall has been inadequate.

- This state of affairs led Lawyers for Human Rights, under our then National Director Vinodh Jaichand's to hold conference in 2002 entitled "The Responsibility of Lawyers to Undertake Pro Bono Publico and Public Interest Work." The conference received financial support from the Ford Foundation who internationally, especially in Latin American have shown great commitment to the issue of access to justice and pro bono in particular as an avenue for expansion.

- Numerous inputs were made by representatives from the Law Societies, GCB, academia, NGO sector and the private sector. Critically, a significant sub-text of the conference stated explicitly by Jeremy Sarkin and echoed by others including the then Minister of Justice Maduna was that "if the legal profession does not take positive steps to impose legal aid obligations on its members, it will lose the opportunity to do so on its own terms." (Sarkin) It is then likely (the argument follows) that the profession will have to contend with a system designed by the state, and imposed on the profession on the state's terms.

- This warning was given against the backdrop of much discussion in 2002 around the requirement of professional volunteerism and the much-anticipated Legal Practice Bill in which early drafts made oblique reference to the requirement of "community service."

- Notably, an early draft of the Legal Practice Bill mooted the establishment of a Legal Practice Council. One of the objectives of this council is to "promote access to justice for all members of the public." The bill goes on to state that the Minister may, on the advice of the Council, "prescribe legal community service, which may include "a minimum period of service by the legal practitioners." This minimum period of services this section continues "may be a recurring annual requirement upon which continued registration is dependant."

- Critically, and I am uncertain whether this provision has survived in later drafts of the Legal Practice Bill, or for that matter what the current state of the Legal Practice Bill is, this provision hints at the establishment of a mandatory
pro bono system. When we held the Pro Bono conference in 2002, one of the central debates that occupied delegates was whether, in pursuing pro bono as a strategy for expanding access to justice, South Africa should adopt a mandatory or voluntary system.

- You won’t be surprised to hear that most delegates from private practice including the LSSA and the GCB felt that a voluntary unlegislated pro bono system was preferable to a legislated or rule based system. By the end of the conference however delegates endorsed a carrot and stick approach (or mixed system) whereby a combination of a reinvigorated volunteer system – including the establishment of an Australian or US style clearinghouse model along with some mandatory rule based system should be established. The mandatory elements of any new system envisioned by the conference included:
  - mandatory community service by law students
  - and rules for mandatory pro bono practice to be adopted and enforced by the law societies and the GCB

### IV. The Pro Bono Initiative and Conference Recommendations

- Notably, the conference endorsed the following Statement of Commitment:
  - Recognising that the majority of South Africans live in conditions of poverty and inequality;
  - Noting that most people in South Africa cannot afford the cost of legal services;
  - Accepting that the legal community has an ethical and professional responsibility to assist in bridging the access to justice divide that exists in our country;
  - We, the delegates of this Conference, as members of the South African legal profession commit ourselves to promote and provide pro bono legal services to the marginalised, vulnerable and indigent individuals and communities of our country.

The conference further endorsed the following recommendations:

- The need for a new model for pro bono practice recognising the current informal pro bono work, coupled with Legal Aid and work being done already by NGOs and law clinics is inadequate to address the country's legal needs, particularly the needs of the poor
- As I have already stated a mixed mandatory and voluntary system was advised
- Further, the conference report adopted the view that a mechanism needed to be put in place to engage the private bar to get their support for a new system. This should include:
  - Articles in law journals
  - Workshops with attorneys and advocates on pro bono
  - Consultations with partners in law firms
  - The creation of a data base of areas of legal expertise
  - Pro bono internships to be considered as a form of articles
  - Development of a task team to further development a South African model for pro bono
• So the issue remains, what steps have taken place between the middle of 2002 and the beginning of 2005 on this issue?
• In terms of guidance from the State on this issue, in terms of the Legal Practice, very little progress has been made.
• In terms of the development of initiatives from the Law Societies and the GCB some progress has been made (and I will address this shortly).
• In terms of LHR's commitment to the issue, I can say honestly that with the departure of Vinodh Jaichand to the Human Rights Centre at the University of Ireland in Galway some momentum was lost. A funding proposal was submitted to the Ford Foundation to take the conference recommendations forward but Ford inexplicably chose not to take up this opportunity.
• In light of this development and increasing concern about the financial viability of the organisation in an era where many NGO's are struggling to meet the requirement of basic core funding, the establishment of Pro Bono clearinghouse, on the lines of an Australian model which would link up prospective clients with a range of legal service providers was seen by some at LHR to be beyond our organisation capacity.

V. Current Initiatives

• Despite an impasse at LHR, in terms of developing a comprehensive Pro Bono Initiative to redraw the face of pro bono practice in South Africa, its notable that numerous other organisation initiatives including moves by the Cape Law Society, the GCB, Weber Wentzel Bowens and the University of Cape Town have taken this issue forward in the past couple of years.
• Perhaps the Cape Law Society initiative has been the most significant of these developments and merits some discussion. I stand open to correction, but it appears that The Law Society of the Cape of Good Hope is the first legal association in South Africa to institute a mandatory pro bono rule for its members.
• Adopted in 2003, the Cape Law Society in Rule 21, under 21.1 define Pro Bono Services to include:
  o "the delivery of advice, opinion or assistance in matters, falling within the professional competence of an attorney, to facilitate access to justice for those who cannot afford to pay, through recognised structures....
  o "Recognised structures shall include, but not be limited to, the office of the Registrars of the High Court when issuing in forma pauperis instructions, Legal i, small claims courts, community (non-commercial) advice offices, university clinics, non-governmental organisations, the office of the Inspectorate of Prisons, Circle and specialist committees of the Society, etc. Those who cannot afford to pay shall be those who ordinarily qualify for assistance through recognised structures.
  o Under 21.2, its states "Practising members who have practiced for less than 40 years and who are less than 60 years of age, shall, subject to being asked to do so, perform pro bono services of not less than 24 hours per calendar year, save that –
    ▪ an attorney who becomes a practising member during the course of the year shall perform pro bono services equal to not
less than 2 hours per month, or part thereof, of practising member status acquired in the first year of practice;

- in the year of publication of this Rule, practising members shall perform pro bono services equal to not less than 2 hours per month, or part thereof, from the month of publication to the end of that year.

- Under 21.3, the rule states "members may refer to the Society, for approval by Council as pro bono services, a written description of areas of professional work proposed for recognition as pro bono services."

- Under 21.9, "members shall submit to the Society a certificate providing full particulars of pro bono services delivered, within 60 days of delivery thereof, failing which, the services shall be treated as not having been rendered under this Rule.

- 21.11 states, "the Society shall keep a record of services delivered per member, which record shall be raised from member certificates. A report of all services rendered shall be extracted annually and shall be retained by the Society but individual member records substantiating the report shall be expunged. On 1 January of each year, all individual member records shall be refreshed to show an availability of hours for the new year. The record of hours served or not served in the previous year shall be expunged. The Society shall report to its members annually and at the Annual General Meeting shall make such report generally available on the total delivery of pro bono services by members."

- On the issue of disbursements, in 21.14, the rule states that "members who travel a distance of more than 50 kms from their office in order to deliver pro bono services may, in special circumstances, make written application to the Society to recover actual cost of travel, excluding the first 100km."

- Under 21.15, the rule states "disbursements incurred, save for travel expenses referred to in 21.14, in respect of pro bono services shall be borne by the client."

- Lastly, under 21.16 the rule states "It shall be unprofessional conduct for a practising member who has still to perform pro bono service hours to refuse, with no good cause, to delivery pro bono services.

- Based upon the discussions held at the LHR led Pro Bono conference, the Cape Law Society rule is a really positive development and can be seen as a mandatory pro bono practice rule. It remains to be seen what the impact of this rule will be on access to justice and how the Society intends on exercising its policing powers over its members but as pro bono goes, this is arguable the boldest step taken by any organisation of legal practitioners in the country.

- It's interesting to compare this rule with the rule proposed by the General Council of the Bar at their 2002 AGM.

- Under the heading "Pro Bono work" rule 5.12.4 states "A local Bar Council may require its members to undertake pro bono work on the basis that:
  o 5.12.4.1 it allocates such work amongst its members on the basis that it fair, reasonable, equitable and transparent;
5.12.4.3 a member may recover fees in terms of a written contingency fee arrangement lodged with and approved by the Bar Council prior to the commencement of the work

- That's it! The rule seems to be permissive as opposed to mandatory and there appears to be no mechanism in place to record the pro bono work by members or provide recognition or sanction to members who either chose to engage or not engage in pro bono practice. I would love to find out how this rule is working in operation and whether or not it has had any impact.

- Lastly a brief comment on a few other initiatives. I am not certain exactly when, but Webber Wentzel Bowens have appointed a permanent pro bono partner to coordinator the firm's pro bono practice. Again, I am not certain how this is operating in practice, but if it is anything like what happens in the United States, it has the potential to positively impact on the provision of free legal services to those individuals and communities most in need.

- Particularly in terms of civil practice, the commitment by corporate and tax lawyers in the US to assisting small and micro enterprises has been a central part of the pro bono practice in places like NYC. Also in other civil matters such as immigration, notably relating to refugee and asylum seekers and in the criminal arena such as prisoners' rights, private firms in New York have been extremely active in taking on cases. It would be interesting to hear from Weber Wentzel how this appointment is affecting their practice and how many new pro bono matters they have taken on this past year.

- Lastly, I am aware of an initiative at the University of Cape Town to make mandatory community legal service a requirement for graduating LLB students. I believe the proposal, as mooted, envisions law students completing up to 60 hours of community service as a requirement for graduation. While the details of this proposal are still being considered, it is my understanding that this year, under the leadership of Esther Steyn in the Criminal Law Faculty, a pilot project will be embarked upon with law students working on prisoners' issues along with the office of the Inspectorate of Prisons.

- I believe this proposal is truly exciting development on a number of levels not least of which is giving law students practical legal experience. In terms of pro bono, if we agree with the argument that there is a major short fall in terms of access to justice that requires a shift in the mindset of private practitioners - what better way to address this problem then by initiating the next generation of South African lawyers into pro bono work while they are still studying.

- I can tell you that as a law student at Georgetown University Law Centre, perhaps my most fulfilling educational experience was that of working in a refugee and asylum law clinic where I was given the opportunity to manage my own case from the initial client interview to final hearing before an Immigration Judge ensuring that a human right activists from the Democratic Republic of Congo was able to gain asylum and refugee status in the USA.

**VI. Concluding Remarks**

- In closing, I just want to say that if we accept the proposition that lawyers have a professional responsibility to address the access to justice divide, then everyone in the profession from private practice, to academia, the NGO sector, government and even the judiciary must continue to engage in developing creative new initiatives in order to expand access to justice.
• It may be useful to remember that South Africa is not alone in tackling this problem. I attended a conference in late 2003 on this very issue in Sao Paulo, Brasil and the Brazilian legal community in cooperation with broader sectors of civil society are grappling with this very same issue.

• Whatever solutions we come up with, the approach I would argue should continue to be multi-pronged with commitment from the various sectors of the legal community. Critically, in this regard some leverage must be exerted on the Ministry of Justice that the Legal Practice Bill explicitly address the issue of Pro Bono and that with some urgency, the bill be submitted for passage this year by Parliament.