COORDINATING FREE LEGAL SERVICES IN CIVIL MATTERS FOR IMPROVED ACCESS TO JUSTICE FOR INDIGENT PEOPLE IN SOUTH AFRICA.

By D. Holness*

1. Introduction and rationale for the study

> "A system of justice that closes the door to those who cannot pay is not deserving of the name."[1]

South Africa's law and legal system can and should be a vehicle through which the lives of all people there are enhanced through the protection and promotion of the rights guaranteed in its Bill of Rights.[2] This paper focuses on free (mainly 'legal aid') service delivery for the indigent in South Africa by and through registered law clinics and other legal services providers in civil rather than criminal matters. In this regard there have been and continue to be considerable gaps between the proper access to civil justice imperatives of constitutional South Africa and the *status quo* which has existed from the advent of a democratic South Africa until today. As has been aptly asked:

> "But what happened to all the justice reforms promised to us ... to provide equality before the law, such as, in civil cases where cost rather than justice, often remains the deciding factor?"[3]

Law as a vehicle for necessary positive change in the daily lives of those resident in South Africa is considered to be particularly pertinent within the country's socio-economic climate. This nation has paradoxically "one of the most unequal societies in the world" in a land that enshrines equality as one of its founding and core constitutional values.[4] South Africa's gross inequality is evidenced by the international *Gini index showing South Africa to have*

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[1] Wachtler "Symposium on Mandatory Pro Bono" 1991 19 *Hofstra Law Review* 739 744.

[2] These transformational imperatives are espoused in a number of parts of the Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution'). For example: the Constitution's Preamble; Section 2 thereof headed "Supremacy of the Constitution"; and Section 7 thereof headed "Rights".

[3] Benson "Justice for All" (1995-01-07) *The Weekend Post* 8.

[4] Mqabi "*Adaptation experiences in South Africa.* Given at the SouthSouthNorth Group Conference" (2013). http://www.google.co.za/search?sourceid=navclient&aq=&oq=Lwandle+Mqabi&ie=UTF-8&rlz=1T4ADFA_enZA486ZA487&q=Lwandle+Mqabi&gs_l=hp....0.0.3.293597.....0.KDIgdggCiLU (accessed 2014-05-17).

the most extreme inequality of any country on the planet.[5] It is in this context that legal services, particularly in civil matters, remain unavailable to the majority.

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health services."[6]

The above description is a tragic, lived reality for many, many people living in South Africa. This passage from a seminal socio-economic rights judgment of South Africa's Constitutional Court echoes the more specific, empirical research findings and statistics of the United Nations Development Programme (UNDP).[7] These statistics show unequivocally that South Africa is a society of 'haves and have-nots', with a myriad of unfortunate people living under the yoke of considerable poverty and hardship. Although there may be debate as to the yardstick(s) for measuring poverty in South Africa and elsewhere, that poverty is a reality for a significant percentage of South African residents is incontrovertible. A South African government-commissioned report (although now somewhat dated) provides a useful, basic working definition of poverty as:

> "the inability to attain a minimal standard of living, measured in terms of basic consumption needs or the income required to satisfy them."[8]

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[5] The *Gini index* measures the extent to which the distribution of income or consumption expenditure within an economy deviates from a perfectly equal distribution. South Africa's gaping inequality is evidenced by its *Gini index* being at an alarmingly high 63.1 as of 2009.The Gini index measures the extent to which the distribution of income or consumption expenditure among individuals or households within an economy deviates from a perfectly equal distribution. A Gini index of 0 represents perfect equality, while an index of 100 implies perfect inequality. By way of comparison with two other developing countries in the same year, Fiji listed at 42.8 and Paraguay and 51.0. Of the countries listed for 2009, South Africa's Gini index indicated the very highest level of inequality of any country.
World Bank "Gini Index" (2013) http://data.worldbank.org/indicator/SI.POV.GINI (accessed 2013-05-27).

[6] *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 765 (CC) 8.

[7] Statistics from detailed studies by the UNDP back up this judicial observation. Using data from 2000 to 2010, the extent of deep poverty is shown by 17.4% of the population in South Africa living on below 1.25 United States Dollars per person per day. During the same period life expectancy at birth has been only 52.8 years. United Nations Development Programme "Human Development Reports" (2012) http://hdrstats.undp.org/en/countries/profiles/ZAF.html (accessed 2012-02-06).

[8] In terms of this government (so-called 'Taylor Commission') report, around the start of the new millennium just under 50% of South Africa's population fell below a poverty line of a monthly household expenditure level of R353 per adult equivalent. The number of people in South African living in poverty depends on the poverty line used and on that basis, at the time of the Commission's work, between 20 and 28 million people were living in poverty depending on where that benchmark is drawn. Taylor *et al Transforming the Present – Protecting the Future* "Poverty and Inequality in South Africa" (2002) http://www.polity.org.za/html/ govdocs/reports/ poverty.html at 28-29 (accessed 2009-06-05) .

This study builds upon existing research and court precedent which reflect the role of access to justice as a significant catalyst for a more equal and just society. To elaborate on this point: if one has the financial means to procure the expensive services of legal practitioners in civil matters, then access to justice (in so far as the facts and law allow) is readily attainable. However, the flip side to this is where someone is denied 'access to justice'[9] through lack of legal representation because they cannot afford the cost of a lawyer[10] and no adequate alternative is provided.[11] It is submitted that in such circumstances such an unfortunate, unrepresented litigant faces a high probability of being denied meaningful access to an intimidating and complex legal system. A corollary to such vulnerability is the threat to other legal rights; because such persons are rarely able to use the law as a shield or sword to ensure the respect, protection and promotion of their legal rights in general. McQuoid-Mason cites the jurisprudence of the European Court of Human Rights which supports such a need for even playing fields in what that Court has termed the need for "equality of arms" between two civil litigants.[12]

The rationale for this paper's focus on (free) legal aid services to the indigent in *civil and not criminal matters* is two-fold. Firstly, the vast majority of legal aid in South Africa is provided in criminal and not civil cases.[13] This grossly uneven split between criminal and civil legal aid is best illustrated through the legal service policies and provision of by far the largest provider of legal aid services in South Africa, the state-funded Legal Aid South Africa (LASA).[14] LASA places considerable limitations on the ambit of civil matters it will consider assisting with.[15] In

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[9] How one interprets the concept of 'access to justice' in civil matters is admittedly open to much speculation and debate.

[10] In this paper, when reference is made to the generic term 'lawyer' in South Africa, this refers to both attorneys and advocates as a collective.

[11] The focus of this study is promoting access to justice in civil matters through the legal assistance or representation provided or facilitated by legal aid bodies. Insofar as alternatives to conventional legal representation are concerned, the paper will consider these with regard to the role which law clinics could and should play to facilitate alternative avenues.

[12] Cited by McQuoid-Mason in "Lessons from South Africa for the delivery of legal aid in small and developing commonwealth countries" 2005 *Obiter 207* 213. In this regard see also Section 9 of the Constitution which, paraphrased, refers to the guarantee of equality before the law and its fair and equal application and protection.

[13] van As cites various statistics which show that the significant majority of legal aid in South Africa is of the criminal variety. van As "Legal Aid in South Africa: making justice reality" 2005 49 *Journal of African Law* 54 54.

[14] The statistics of Legal Aid South Africa (formerly called the Legal Aid Board) over the last decade are reflected in their published Annual Reports. Legal Aid South Africa "Annual Reports" (2001-2013) http://www.legalaid.co.za/index.php/Annual-reports.html (accessed 2014-10-08).

[15] Legal Aid South Africa "Legal Aid Guide 2014". See the Guide at paragraph 4.9.1 which notes that in civil matters legal aid will not be rendered: (i) in debtors courts proceedings; (ii) for the administration of an estate or the voluntary surrender of any estate; (iii) in actions for damages on the grounds of defamation, breach of promise, infringement of dignity, invasion of privacy, seduction, adultery and inducing someone to desert or stay away from another's spouse; (iv) in a claim for maintenance and which can be determined by a maintenance court without the assistance of a legal practitioner; (v) in undeserving divorce matters; (vi) for any action which may be instituted in the Small Claims Court or where the amount of the claim does not exceed the jurisdiction of the Small Claims Court by more than 25%; (vii) in a civil appeal unless the Director is satisfied that there are

addition to the preclusions on types of civil matters excluded from LASA's work, only a very small proportion of its work is civil as opposed to criminal. In LASA's most recently published annual report for 2012/2013, 383 567 new criminal matters (which equates to 87% of all opened cases) were accepted by the organisation, compared with just 55 277 (or 13%) new civil matters.[16] This shows a very marginally more equal split than in 2011/2012 when 382 125 new clients in criminal matters (or over 89% of that year's total) were accepted by LASA in comparison with only 46 528 (or under 11%) new civil cases.This huge gulf between the number of new criminal matters versus civil clients taken on by LASA is replicated in every annual report of LASA since its inception.[17] Whilst this massively lopsided split between LASA's criminal and civil work persists and remains perhaps the most telling indication of where its service delivery priorities lie, there have been fairly recent signs of a very slight swing in the pendulum of its service allocation towards a marginally increased focus on civil matters. However, notwithstanding (encouraging) relative and absolute increases (however slight) in LASA's civil legal aid services, the *status quo* remains that LASA's provision of assistance in criminal matters utterly dwarfs the civil legal aid provided.

Furthermore, LASA has traditionally not had sufficient funds to provide civil legal aid to everybody who requires it in South Africa- even when some such applicants for assistance qualify in terms of LASA's financial means testing and whose type of legal problems do not fall outside the scope of LASA's list of 'precluded civil matters'.[18] Additional funding will have to be obtained in order to provide legal assistance for human rights and other civil cases by LASA and legal non-governmental organisations (NGOs),[19] and to establish community-based advice offices for the millions in South African who cannot afford the services of a

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reasonable prospects of the appeal succeeding; (viii) in arbitration, conciliation or any other forms of alternate dispute resolution; (ix) in matters where there is not substantial and identifiable benefit to the client; (x) in matters excluded by the Board from time to time; (xi) in matters where enforcement of an order in favour of the applicant will yield little benefit; (xii) in enquiries in the Children's Court without the prior approval of the Director; and (xiii) for an application to obtain an interdict in respect of the prevention of family violence or harassment as a result of domestic or family disputes, since an interdict in these matters can be obtained without the assistance of a legal practitioner.

[16] Legal Aid South Africa "Legal Aid South Africa Annual-Report 2012/2013" (undated) http://www.legal-aid.co.za/wp-content/uploads/2012/12/Legal-Aid-SA-Annual-Report-2013.pdf (accessed 2014-10-10). LASA's Annual Report for 2012/2013 is its most up to date one as of 13 October 2014.

[17] *LASA's Annual Reports* for the reporting years 2003/2004, 2004/2005, 2005/2006, 2006/2007,2007/2008, 2008/2009, 2009/2010, 2010/2011, 2011/2012 and 2012/ 2013 are available to the public at Legal Aid South Africa's website of http://www.legalaid.co.za/index.php/Annual-reports.html.

[18] McQuoid-Mason 1999 Windsor Y.B. Access Just. 6.

[19] NGOs and similar bodies are sometimes alternatively referred to (due to applicable taxation exemptions and state registration factors) as public benefit organisations (PBOs) or non-profit organisations (NPOs) respectively. Whilst there may be subtle differences between these different bodies, for the sake of convenience in this research, only the term '*NGO*' will be used to refer to all of these categories of organisations.

legal practitioner.[20] There are admittedly other South African free/ 'legal aid' service providers, such as the various university law/ legal aid clinics, plus legal NGOs like the Legal Resources Centre, Lawyers for Human Rights, Section 27 and ProBono.Org which focus on civil rather than criminal matters.[21] However, the volume of cases taken on by the categories of free legal service providers referred in the previous sentence are minimal when compared with both LASA's considerable country-wide footprint and (comparatively) massive human and financial resources. Furthermore, the very limited geographical location, funding and staffing of these specialised non-governmental civil legal aid providers and university law clinics,[22] allied with their ordinarily accepting only very specific categories of matters, means that the matters they do take on do little to change the overwhelming legal aid focus in South Africa on criminal matters.[23] Organisations like the Legal Resources Centre[24] and Lawyers

[20] McQuoid-Mason 1999 Windsor Y.B. Access Just. 6.

[21] Excluding LASA, the exact name given to a particular free legal service provider (registered with the Law Society of South Africa) is largely a matter of choice or semantics. However, their recognised status in South African statutes is the same - differences in their descriptive names notwithstanding. The correct description in South African legislation for a recognised and registered legal aid service provider (i.e. providing legal services sans a fee to those unable to afford their own lawyer), like a university clinic, the Legal Resources Centre and Lawyers for Human Rights is a "law clinic". This is as contained in the Attorneys Act 53 of 1979 and the Legal Aid Act 22 of 1969.

[22] University law clinics (also sometimes referred to as university 'legal aid clinics') in South Africa are loosely linked with one another through an umbrella body, the South African University Law Clinics Association (SAULCA)- formerly called the Association of University Legal Aid Institutions which was established in 1982. SAULCA's most recent statistical report from its members (for 2013) shows that there are currently 19 active University Law/ Legal Aid Clinics- each linked with a Law Faculty or School and are almost all located in urban areas. This same report shows that the vast majority of the work undertaken by university law clinics is civil rather than criminal. As to the number of clients assisted in a month - this varies considerably between law clinics in a range from less than 50 to between 450 and 500; with an average of between 200 and 250. However, it must be noted that these last mentioned figures are an "average number of clients assisted and/ or represented by a law clinic per month". The South African University Law Clinics Association "Statistics" http://www.aulai.co.za/home (accessed 2013-01-17). In other words these statistics from each university law clinic provide a generous/ broad definition of 'clients assisted and/ or represented' which includes matters carried over from a previous month in the monthly average provided, as is any form of assistance given to a 'client' or prospective client where only an initial consultation is held without a file being opened for that person. It is also important to note that the provision of legal services is not the only core function of any university law clinic; in addition much of a university law clinic's resources are spent on practical legal training of law students. Practical legal training of law students should and does feed into the legal service provision capabilities of a university law clinic. However, it is submitted that various factors such as the limited duration of academic term time of students in any given year and the substantial time spent by law clinic staff in supervising student work (which may sometimes also take the form of simulated work environments as opposed to work on actual clients' matters) may also act as limiting factors to legal service delivery of university law clinics.

[23] Separate from LASA spending, there are additional indicators of minimal state spending on civil legal aid. The latest reports from South African university law clinics, the LRC and LHR, indicate that these organisations are being funded either entirely or almost entirely by donor monies rather than state resources. See respectively: Association of University Legal Aid Institutions http://www.aulai.co.za/home; Legal Resources Centre http://www.lrc.org.za/images/stories/annual_reports/2009-2010-Annual-Report.pdf; and Lawyers for Human Rights http://www.lhr.org.za/fundersa (all accessed 2012-02-02).

[24] The Legal Resources Centre (LRC) focuses largely on "impact, public interest litigation". Therefore the number of cases it takes on annually is low in number but, it is submitted, high in impact. This is evidenced in its annual reports from the LRC's establishment in 1979/1980 to 2012/ 2013 available on-line. In the post-apartheid era almost all of the LRC's cases have been civil rather than criminal. Legal Resources Centre "Annual Reports" (1979-2013) http://www.lrc.org.za/images/stories/annual_reports/2009-2010-Annual-Report.pdf (accessed 2014-10-07).

for Human Rights[25] operate within their chosen niche legal spheres and do not have a case turnover high enough to have any significant impact on the number of civil legal aid clients in South Africa compared with those benefiting from criminal legal aid. In summary then, legal aid in South Africa is heavily provided in criminal rather than civil matters which makes a study on civil legal aid there worthwhile.

There is a compelling argument that beyond the provision of criminal legal aid (which only applies to a small percentage of the total population when criminally charged for relatively serious offences), access to justice must also ensure adequate legal protection and assistance for indigent residents seeking to protect and exercise their legal rights in civil matters. Regan provides a useful bulwark against which to test the suitability of (it is argued certain parts of) any legal aid system to adequately promote access to justice in stating that:

> "... legal aid (should) provide a range of legal resources to promote citizenship for citizens generally, and especially for the poor. That is, whether the legal resources which are necessary for citizens to mobilise the law have been provided by legal aid."[26]

The reason why Regan's specified 'benchmark' for testing the suitability of a legal aid system is considered by the current writer to be only partially apt is because it highlights only the legal aid needs of (particular) "*citizens*". This fails to take the necessary cognisance of the equally pressing legal aid needs of other poor people *resident* in South Africa who may not be citizens.

The second main motivation why this research focuses on free legal services for the indigent in civil and not criminal matters is a pragmatic one; there has been plenty of academic writing (and case authority) in South Africa on the rights of an accused person to legal representation when the interests of justice require such representation.[27] However, there

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[25] Lawyers for Human Rights (LHR) also limits its work to the following espoused specialised areas of law: child rights, environmental rights, land reform and issues relating to refugees, migrants and statelessness. As with the LRC the number of cases is very low in comparison with LASA; the 2012 statistics available on the LHR's website makes reference to 24 current or recent litigious matters- although it must be noted that virtually all of these cases could be considered 'high-impact litigation'. Lawyers for Human Rights "Cases" http://www.lhr.org.za/cases (accessed 2013-02-09).

[26] Regan "Criminal Legal Aid: Does defending Liberty Undermine Citizenship?" in Young and Wall (eds) *Access to Criminal Justice* (1996) 73.

[27] A) Examples of academic writing focusing entirely or almost entirely on criminal legal aid rights only are: Abramowitz "Legal aid in South Africa" 1960 77 *South African Law Journal* 351 351. McQuoid-Mason "Public defenders and alternative service" 1991 4 *SACJ* 267 267. Quansah "Legal aid in Botswana: a problem in search of a solution" 2007 *CILSA* (2007) 209 209. Sarkin "Can South Africa Afford Justice? The need and future of a

has been considerably less case authority and academic analysis on legal aid and other free legal services for the indigent in civil matters.[28]

This paper will consider constitutional arguments in favour of a greater recognition of a 'right to legal aid' or other forms of free legal assistance in *civil matters* in South Africa. Using the an analysis of one metropolitan area (the eThekwini Municipality/ Metropolitan Area which is centred around the city of Durban in the province of KwaZulu-Natal) the study briefly notes most of the types and sources of free legal resources which are in place in South Africa to allow indigent persons there to have meaningful access to and protection of the law in civil matters.[29] The research also considers alternatives to 'conventional' civil legal aid by legal aid organisations themselves; that is other free legal service provision options for law clinics - such as partnerships with private lawyers through the latter performing *pro bono* work.[30] Where perceived gaps in, and problems with, the existing provision of free civil legal services to the indigent in South Africa are identified, this study proposes solutions and necessary changes to the *status quo* to fill these gaps and reduce these problems. The paper ultimately seeks to propose elements of a practical 'civil legal aid model' (broadly speaking) for sustainable, improved and better coordinated access to justice in civil matters in South Africa. Due to the very wide potential scope of this subject-matter, whilst most worthy of analysis in their own right, this paper will not be able to focus any detailed attention on international or foreign law or examples, the exact extent of the need for civil legal aid in South Africa or more than just basic statistics indicating the roll-out of free legal services in civil cases focusing on eThekwini.

2. The constitutional and other statutory justification for free legal services to the indigent in civil matters in South Africa

Section 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution) states:

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public defender system" 1993 4 *Stellenbosch LR* 261 261. Sarkin "The development of a human rights culture in South Africa" 1998 20 *HRQ* 628 628.
B) South African case authority which has made pronouncements on criminal legal aid is plentiful and includes: *Legal Aid Board v Msila* 1997 (2) BCLR 229 (SE) and *S v Mhlungu* 1995 (3) SA 867 (CC).

[28] For an example which does provide civil legal aid discussion see: Kemp "Targeting civil legal needs: matching services to needs" 2005 26 *Obiter* 285.

[29] This will hereinafter be referred to as 'eThekwini'. Whilst equal worthy of analysis, this research does not attempt to set out (at least to any great degree) the exact extent and nature of the need for free legal services in civil matters in South Africa generally or in eThekwini. eThekwini is easily the largest city in KwaZulu-Natal and the third largest centre in South Africa. It has a population exceeding 3 468 088 people. Its land area of 2 297 square kilometres is comparatively larger than other South African city. eThekwini Municipality "About eThekwini Municipality" (2014) http://www.durban.gov.za/Discover_Durban/Pages/default.aspx (accessed 09-10-2014).

[30] It will be necessary to define what should and should not be considered *pro bono* legal work.

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

In so far as section 35 of the Constitution makes special provision for fair trial rights of criminal accused, including far-reaching rights to legal representation in criminal matters (at state expense in particular circumstances), section 34 casts the net wider in providing for the right to fair judicial adjudication in all matters, including civil disputes. The need for civil legal aid (or some other form of free legal assistance) is paramount where the legal system is either so complex as to make an indigent litigant's prospects of successfully bringing or defending their civil case themselves very small, or there exists a lack of knowledge of a legal right or how to exercise such a right.[31] Where someone lacks money for civil representation in such circumstances, it will be submitted that such a person's section 34 rights are very likely to be denied to them in the absence of adequate free legal services.

The segment of the paper which follows considers the extent to which section 34 provides a constitutional imperative for the provision of free legal services in certain civil matters for particular (indigent) litigants. This part of the paper is structured as follows: Firstly, an examination is made of the South African constitutional right of access to justice. Whilst international law (and to a lesser degree foreign law) is applicable to interpreting rights in South Africa's Bill of Rights (in terms of section 39 of the Constitution), these sources will, for the sake of brevity and not wanting to make this paper's focus too broad, only be briefly alluded to. Arguments as to a constitutional entitlement to a (limited) right to civil legal aid may also be augmented by other constitutional provisions such as section 9 of the Constitution's guarantee of equality both before the law and in its application and section 10's promise of human dignity for all. But for the same reasons as were given above apropos the limited attention to be given to international law, this research will not concentrate detailed attention on these related rights in section 9 and 10 of the Constitution. Specific South African legislation which sets requirements for civil legal representation are analysed. The question is then asked, why civil legal aid and what should it encompass? Thereafter, as with any right in the South African Bill of Rights, reasonable and justifiable limitations on the 'right to civil legal aid' must be examined. The (constitutional and other statutory sources) segment ends with factors to consider when granting civil legal aid.

2. 1 The constitutional right of access to justice

[31] It is clearly critical to formulate a reasoned definition of 'indigence' within this context.

South Africa is still a relatively young democracy with one of the most progressive Constitutions in the world that promotes and gives everyone the right of access to justice.[32] With this said, as a developing economy, it is a country that remains rife with poverty and low-income earners, the majority of whom live in rural areas and who cannot afford the legal services of a qualified attorney or advocate.[33] Paradoxically, South Africa has "one of the most unequal societies in the world" in a country that enshrines equality as one of its cornerstone, founding constitutional values. Legal services, particularly in civil matters, remain unavailable to the majority,[34] primarily as a result of economic limitations on the exercise of the right to legal assistance. [35]

Brickhill interprets "access to courts" in section 34 as part of the right of access to justice requiring a legal institutional framework to better serve the whole population and to make good on constitutional promises of genuine socio-economic advancement.[36] He argues that the right to a fair civil trial in section 34 imposes duties upon lawyers and law students to act *pro bono*.[37] It has been rightly concluded that there exists a "continuum between access to legal services and access to justice and the need for individualised access to legal services in order for constitutional rights to be enforced."[38] Section 34 has been described as a "leverage right"- allowing those approaching the courts to leverage their other rights.[39] In comparing section 34 with section 35 it has been argued that "the right to free legal representation" (vis-à-vis criminal matters) in section 35 should inform the content of a "fair hearing" in section 34.[40] There is different academic opinion as to whether section 34 imposes positive obligations on the state to provide free legal representation to certain civil litigants. One argument is that whilst the section does not guarantee such a right expressly,

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[32] The Economist, "*A South African Rabble Rouser: free speech versus hatred*" (31 March 2010) http://www.economist.com/node/15825764 (accessed 2013-02-02). Cf Sections 34, 35 and 38 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
[33] The Black Sash and Education Training Unit "Paralegal Advice Website" (November 2011) http://www.paralegaladvice.org.za/ (accessed 2011-09-20).
[34] Quote taken from a speech by Ms Lwandle Mqabi entitled "*Adaption Experiences in South Africa*" given at the *SouthSouthNorth Group Conference* (undated). The severe bias in favour of criminal over civil legal aid provision in South Africa has been spelt out already.
[35] Grant "The right to counsel: recent developments in South Africa" 1989 2 *SACJ* 48 55.
[36] Brickhill 2005 *SAJHR* 293.
[37] *Ibid.* See the later sections of this paper which propose that law students and graduates perform 'compulsory legal community service' and admitted, practicing legal practitioners must perform a certain amount of *pro bono* work.
[38] Heywood and Hassim "Remedying the Maladies Of 'Lesser Men Or Women': The Personal, Political And Constitutional Imperatives For Improved Access To Justice." 2008 24 *SAJHR* 263 263.
[39] Brickhill and Friedman *Constitutional Law of South Africa* 2nd Edition Original Service 11-07 59-3.
[40] Brickhill and Friedman *Constitutional Law of South Africa* 59-5.

the “fairness” requirement of the section implies such an obligation.[41] Stated somewhat differently, section 34 imposes limited positive obligations on the state to provide free legal assistance in civil matters when not doing so would make a hearing "unfair".[42] In terms of this line of argument, section 34 does confer the right to state-funded legal aid in certain civil matters.[43] However, a counter-argument is that section 34 should not be interpreted in such a way as to impose such obligations due to the limited resources of the state.[44]

There have been limited South African judicial pronouncements on the ambit of section 34. The South African Constitutional Court in *Modderklip* found a relationship to exist between section 34 and the right under section 38 to approach a court for “appropriate relief” when a constitutional right has been threatened or denied.[45] *Modderklip* also extended the state’s obligations beyond just making available dispute-resolution mechanisms; it must also provide effective enforcement remedies.[46] In *Bernstein v Bester,* in interpreting section 22 of the South African Interim Constitution- the forerunner of the Final/ Current Constitution’s section 34 - the Constitutional Court suggested that the lack of a reference to a “fair hearing” suggested a deliberate exclusion of the right to a fair trial as a constitutional right.[47] It has been suggested that section 34’s express provision of a “fair public hearing” is a deliberate reaction to *Bernstein*.[48]

In *Shilubana v Nwamitwa* the Constitutional Court heard arguments from the respondent that he should receive state funding towards his legal costs.[49] The respondent contended that because the state attorney had refused to fund the respondent, the two parties were not “represented on an equal basis” before the court.[50] The court understood the respondent’s

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[41] Brickhill and Friedman *Constitutional Law of South Africa* 59-68.
[42] Brickhill and Friedman *Constitutional Law of South Africa* 59-71.
[43] This line of argument was made by McQuoid-Mason as far back as 1999. McQuoid-Mason 1999 Windsor Y.B. Access Just. 3 at footnote 35. However, as will be seen below, the present author humbly, but strongly, disagrees with this assertion. For example, in the (quite lengthy) intervening period since McQuoid-Mason arrived at the above conclusion, there have been numerous legal developments which could conceivably result in the issue needing to be considered in a different light. This ostensible ‘legal evolution’ on the issue of the ‘right to civil legal aid’ in South Africa (in certain matters and circumstances) includes, but is not limited to, judicial pronouncements by South African and foreign courts and international tribunals, which could well be said to put a significantly different slant on this vexing question. In an extensive succession of paragraphs and sections which follow, the writer will attempt to illustrate this (arguably) transformed legal landscape in this particular context.
[44] de Waal, Currie and Erasmus (eds) *Bill of Rights Handbook* (1997) 447 708-709.
[45] *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).
[46] *President of the RSA v Modderklip Boerdery (Pty) Ltd* 59-66.
[47] 1996 (2) SA 751 (CC).
[48] Brickhill and Friedman *Constitutional Law of South Africa* 59-68.
[49] [2007] ZACC 14.
[50] *Ibid.* A similar inequality of arms argument was recognised by the Constitutional Court *In ex parte Institute for Security studies: in Re S v Basson.* 2006 (6) SA 195 (CC).

submission as to being hampered by insufficient funds that there was no "equality of arms" between the litigants.[51]

In the case of *Nkuzi*[52] it was held that applications could not be properly brought by farmworkers without legal assistance in terms of complex land legislation like the Extension of Security of Tenure Act.[53] It has therefore been argued that the right of access to court equates to more than bringing a case to court. It includes the ability to achieve that which would inevitably, in the prevailing high levels of poverty and illiteracy, require the assistance of a legal practitioner.[54] This means that access to justice is something more than mere physical access to courts - it includes the ability to be *effectively* heard.[55] This idea is borne out by the part of the decision in *Nkuzi* where it was held that:

> "Labour tenants and occupiers are entitled to a fair trial before they can be evicted and for the trial to be fair it is necessary that the labour tenant or occupier understands his or her rights under the law and the complexities of a trial. Where he or she does not understand, there is a need for legal representation, or at the very least, an explanation of his or her rights by the judicial officer".[56]

The court order in *Nkuzi* was even more explicit in stressing the right to legal representation by stating that the applicants "have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result and they cannot reasonably afford the cost thereof from their own resources."[57] The court found the state duty-bound to provide such legal representation or legal aid.

Perhaps even more informative for this research is the later dictum from the Land Claims Court in *Nkuzi* pertaining to legal aid at state expense:

> "There is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand. Failure by a judicial officer to inform

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[51] *Shilubana v Nwamitwa 21.*
[52] *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC).
[53] Act 62 of 1997. The Act aims to improve the security of tenure of people over the land they are living on.
[54] Budlender "Access to Courts' 2004 121 *SALJ* 339 341.
[55] Dugard "Courts and the Poor In South Africa: A Critique Of Systematic Judicial Failures To Advance Transformative Justice" May 2008 special edition *SAJHR* 3 3 (own emphasis added).
[56] *Nkuzi Development Association v Government* 6.
[57] *Nkuzi Development Association v Government* "Court Order" at para 1.1.

> these litigants of their rights, how to exercise them and where to obtain assistance may result in a miscarriage of justice."[58]

The court in the *Nkuzi* case concluded that the litigants did have the right to legal representation at state expense.[59] Whilst the dictum of this decision provides an encouraging interpretation of section 34, its reasoning appears not to have been extended much (bar the legislation mentioned a bit later in this paper) to litigants who are not labour tenants, occupiers of land or children.[60]

In terms of the Legal Aid Act, legal aid is only provided to "indigent clients".[61] Yet rather peculiarly, the term "indigent" is not defined in that (or any other South African) Act. It has been defined in *Smith v Mutual and Federal Insurance Company Limited* where the court distinguished between "indigent" and "poor". The court held that "to be indigent means to be in *extreme need or want* whereas to be poor means having few things… "[62] On the basis of the term "indigent", Legal Aid South Africa (LASA) has laid down a financial means test.[63] The indigence test adopted by LASA has the apparent 'shortcoming' (although, to be fair, it is very hard to think how this could be avoided) that it excludes a large category of people who earn (or own) in excess of the given thresholds but are nonetheless wholly unable to afford to engage the services of a private lawyer.[64] It is understandable that limited resources require that legal aid is limited to those in "extreme need or want for the basic necessities of life".[65]

A recurring theme in this paper will be a discussion of the acute need in South Africa for free civil legal representation for the indigent in pressing socio-economic matters in particular, as well the need for extending *pro bono* services generally. Suffice to say at this juncture that the constitutional matrix that protects socio-economic rights in the South African Bill of Rights (including section 27, the right to health care, food, water and social security, section 28 childrens' rights and section 29, the right to education) is a hallmark of South Africa's rich constitutional tapestry, but that without adequate legal representation to effectively assert

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[58] *Nkuzi Development Association v Government* 11.
[59] *Nkuzi Development Association v Government 12; Order* para 1.1.
[60] Ellmann "Weighing and Implementing the Right To Counsel" 2004 121 *SALJ* 319.
[61] Act 22 of 1969.
[62] 1998 (4) SA 626 (C) 632. (Own emphasis added).
[63] Legal Aid South Africa Annual Report 2012.
[64] Brickhill and Friedman *Constitutional Law of South Africa* 59-72. See the further discussion of this tricky issue in the section of this paper which considers the financial means tests of various civil legal aid providers in eThekwini, particularly the nationally-applicable means test of Legal Aid South Africa.
[65] *Ibid*.

these rights in courts, the justiciability and other value of these rights is not just watered down but rendered virtually meaningless. To elaborate on the last point, the right of access to courts and the right to a fair trial are a prerequisite to other rights. Lord Justice Sedley eloquently elucidates this idea as follows:

> "... Rights without remedies are of little value. To possess a right of free speech or movement is of little value if you lack the legal means to vindicate it when others obstruct it; and legal means include both access to the courts and *skilled representation in court".*[66]

This important point will be revisited under various sub-headings which follow.

2. 1. 1 A fleeting mention of international and foreign law on the right of access to justice as constitutional interpretative tools

The right of access to justice (and to legal representation which it is argued is its corollary) can be found in international and foreign law.[67] It has been noted that even when a right to civil or criminal legal aid is not specifically set out in domestic law, the duty to provide legal aid (to appropriately qualifying persons) forms a crucial part of the duty to ensure three fundamental rights enshrined in all international and regional human rights instruments, namely, the rights to:

> "i) equality before the law,
> ii) the equal protection of the law, and
> iii) an effective remedy, by a competent tribunal, for human rights violations."[68]

Human rights bodies of the United Nations have repeatedly and consistently pointed out the close nexus between inadequate access to justice and human rights violations.[69] It has been noted that the South African Constitution's guarantee of free legal representation in (certain) criminal matters and only a "fair trial" in civil matters mirrors the obligations contained in major international instruments.[70] The core triad of United Nations conventions, namely the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and

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[66] Sedley "The free individual and the free society" in *Freedom, Law and Justice* (1999) 3. Own emphasis added.
[67] The basis for and value of considering international law lies in section 39 of the Constitution which provides that international law must be considered when interpreting a right in the Bill of Rights.
[68] Lawyers' Rights Watch Canada. "International Law Obligations to Provide Legal Aid" (25 October 2010) http://www.lrwc.org/ws/wp-content/uploads/2012/03/Legal-Aid-LRWC-Oct-25-2010.pdf (accessed 2013-06-22).
[69] *Ibid.*
[70] Brickhill and Friedman *Constitutional Law of South Africa* 59-7.

Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), in particular, can be considered most relevant in the regard.

Article 7 of the UDHR provides for legal equality and "equal protection of the law" whilst its article 8 gives everyone the right to an "effective remedy by the competent national tribunal" for violation of human rights - although, as explained already, this paper will for logistical reasons be unable to further unpack the contents of these international law instruments.

As a state party under the ICCPR,[71] South Africa is duty-bound to guarantee equal access to effective remedies for human rights violations. The ICCPR in article 14 sets out minimum fair trial standards in criminal matters including free legal assistance for those without means. The Human Rights Committee in General Comment 13 states that:

> "Article 14 (of the ICCPR) applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law."

From General Comment 13 it is argued that the right to free legal assistance for those without means would apply to civil matters which flow from or are related to criminal charges. Article 26 of the ICCPR provides that everyone is equal before the law and is entitled without any discrimination to the *equal protection of the law* (own emphasis added). It is submitted that equal protection of the law can only be a reality in criminal or civil matters when both parties in an adversarial system have access to legal representation when the type of matter calls for such representation to prevent the likely denial of a right.

Due to the caveat of "*progressive realisation* of socio-economic rights", access to justice 'rights' under the ICESCR[72] have been considered complex.[73] Nonetheless, article 2 of the ICESCR provides for an "effective remedy" when rights and freedoms are violated and article 3 to non-discrimination. These and other articles of the ICESCR must surely be read to allow for legal representation when the interests of justice require such a right. This would also be true for legal representation in particular for children, women and persons with

[71] South Africa became a signatory to the ICCPR on 3 October 1994 and ratified it on 10 December 1998.
[72] South Africa became a signatory to the ICESCR on 3 October 1994, but together with the USA are the only countries that have not yet ratified it.
[73] Muralidhar "Legal Aid Practices: Comparative Perspectives" 2005 *Obiter* 263.

disabilities and others who have been unfairly discriminated against in the past, which receive explicit attention in specific international law instruments.[74]

The view that section 34's "fair public hearing" requires legal representation in certain instances is supported by renowned South African counsel, Advocate Geoff Budlender SC.[75] He provides a very logical, formalistic argument that when one looks at section 34's wording, there is a very close correlation to the wording of article 6, paragraph 1 of the European Convention on Human Rights.[76] The European jurisprudence on article 6, paragraph 1, Budlender maintains, provides for the right to civil legal representation in certain matters,[77] and thus it is analogously and similarly submitted that South Africa's section 34 should be read to include this too. The jurisprudence of the European Court of Human Rights has held that the right of access to court includes the right to be able to place one's case effectively before a court.[78] The European Court of Human Rights has held that article 6, paragraph 1 (which for our purposes would apply equally to section 34) contains two sub-rights which are related to one another: the *right of access to court* and the *right to a fair trial* once one is before the court (own emphasis provided).[79]

The jurisprudence of the European Court of Human Rights provides also that the right of access to court includes the right to put one's case effectively before the court.[80] The writer submits that effectively putting your case before court invariably requires access to a legal representative well versed in the rules of the court, particularly in complex matters. For example, in the European case of *Airey,*[81] the court found it "most improbable" that a lay person such as the applicant in that matter could effectively present their own case (in this instance a complex judicial separation order request). Importantly, in making this finding the European Court of Human Rights has interpreted article 6, paragraph 1 as providing for the right to representation in certain civil cases.[82] On a similar basis it is argued that in South Africa, civil litigants acting without legal representation in complex civil matters are almost

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[74] For example, under the International Convention on the Elimination of All Forms of Racial Discrimination, parties are required to provide legal aid when it is necessary to do so to ensure the enjoyment by all of protected rights. In the context of post-apartheid South Africa where racial inequality remains a distinct reality, the obligations under this Convention can be seen to have particular significance.
[75] Budlender 2004 *SALJ* 339.
[76] Signed in Rome, Italy, on 4 November 1950 by 12 member states of the Council of Europe and entered into force on 3 September 1953.
[77] Budlender 2004 *SALJ* 339.
[78] Budlender 2004 *SALJ* 340.
[79] *P, C and S v United Kingdom* (2002) 35 EHRR 31 paras 89 and 91.
[80] Budlender 2004 *SALJ* 340.
[81] *Airey v Ireland* 32 Eur Ct HR Ser A (1979).
[82] Brickhill and Friedman *Constitutional Law of South Africa* 59-69.

certain to be denied effective "*access to court*",[83] as the premise that justice will be served as both litigants have the ability to influence the presiding officer equally is considered a flaw in an adversarial legal system.

Like article 14 of the ICCPR, article 7 of the African Charter of Human and People's Rights establishes a general fair trial guarantee that applies to both criminal and civil cases.[84]

Turning very briefly to a foreign law precedent,[85] in the Canadian Supreme Court case of *G (J)*, in a case involving children, it was held that there exists the right to free representation in civil matters in terms of section 7 of the Canadian Charter of Rights and Freedoms.[86] Section 7 provides that:

> "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice "[87]

In deciding whether fundamental justice necessitated the provision of legal representation in that particular case, the court referred to "the best interests of the child" as the main consideration.[88] So long as these were not compromised, the court would then consider the interests at play, how complex the proceedings were and the capacities of the parent.[89] In situ, the Canadian Supreme Court held the government duty-bound to provide the appellant with state-funded legal representation.[90]

2. 2 Civil legal aid and the right to equality

The equality provision in section 9 of the South African Constitution includes that "equality includes the full and equal enjoyment of all rights and freedoms".

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[83] Sarkin "Restructuring the Legal Profession and Access to Justice: The Duty of Law Graduates and Lawyers to Provide Legal Services" 1993 9 *SAJHR* 223 226.
[84] African Charter of Human and People's Rights (1981). The overarching right is to be found in article 7 thereof which applies equally to civil as to criminal matters - the right of "every individual... to have his case heard."
[85] The value of considering foreign law is to be found in section 39 of the Constitution which provides that "foreign law *may* be considered" (own emphasis added) when interpreting a right in the Bill of Rights. The Canadian jurisprudence is considered due to its similar constitutional scheme to South Africa.
[86] *New Brunswick (Minister of Health and Community Services) v G (J)* 66 CRR (second) 267 (1999).
[87] Canadian Charter of Rights and Freedoms, Constitution Act 1982.
[88] *G (J)* 291.
[89] G (J) 292 – 293.
[90] G (J) 296.

According to Budlender:

> "Access to justice should be a core concern of the courts, for it goes to the very essence of their function. If people in need are not able to bring their cases to court and *present them effectively*, then the courts cannot satisfactorily perform the function entrusted to them by the Constitution."[91]

It is arguable that the right to equality is tied in with the right of everyone to legal representation in certain types of civil cases. This point is echoed in the sentiments of Justice Yacoob (formerly of the Constitutional Court of South Africa) who argues (in an academic as opposed to judicial context) that there can be no equality without socio-economic upliftment.[92] It must be remembered that socio-economic rights, promised to all, are fully justiciable in a South African context.[93] The apartheid era was a time of appalling inequality between racial groups. South Africa has (thankfully) moved on to a period of what can at least be termed 'formal equality'. But whilst a universal franchise and other aspects of equality and other core rights are espoused in the Constitution, these first generation rights can be said to have questionable meaningful value in a society of huge socio-economic inequality and where civil legal representation to enforce such rights is largely enjoyed by a privileged minority. Ensuring that everyone has access to legal representation in certain civil matters before the courts would go some way towards closing the gap between the so-called 'haves' and 'have-nots'.

The need for civil legal aid (or some other form of free legal assistance such as *pro bono* work by private lawyers) is paramount where the legal system is either so complex as to make an indigent litigant's prospects of successfully bringing or defending their civil case themselves very small, or there exists a lack of knowledge of a legal right or how to exercise such a right.[94]

Where someone lacks money for civil representation in such circumstances, it is submitted that such a person's section 34 rights are very likely to be denied to them in the absence of adequate free legal services. It is therefore argued that section 34 provides a constitutional

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[91] Budlender 2004 *SALJ* 355. Own emphasis added.
[92] In Jagwanth and Kalula *Equality Law: Reflections from South Africa and Elsewhere* (2003) 7.
[93] See for example *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) and *Khosa/ Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC).
[94] When this research refers to 'civil legal aid' for the indigent, the concept is used broadly to encapsulate all forms of free legal services for this group including from state entities and legal non-governmental organisations, community service by students or graduates and *pro bono* work by private legal practitioners.

imperative for the provision of free legal services in certain civil matters for particular (indigent) litigants. Furthermore, such arguments and constitutional entitlements are augmented by section 9 of the Constitution's guarantee of equality both before the law and in its application. Referring to section 34, Sarkin states that:

> "Equality before the law demands that at least all people have access to legal assistance and the courts to enforce their legal rights and to protect themselves against injustice and exploitation."[95]

The equality clause in section 9 promises equality in the protection afforded by and benefit of the law and includes complete and equal enjoyment of rights. Bodenstein says that section 9's promise is arguably meaningless if the indigent are denied the right to a lawyer in (certain) civil cases. He stresses this point in light of the complex adversarial nature of South African civil litigation not to mention the reality of gross socio-economic inequality and considerable inequality between a poor and illiterate litigant coming up against a corporate (or otherwise represented) opponent.[96]

Ultimately, the equality clause {in section 9(1)} provides that "everyone is equal before the law and has the right to equal protection and benefit of the law". Section 9(1) therefore stipulates that equality includes the full and equal enjoyment of *all* rights and freedoms, for example socio-economic rights. This right links with section 34 in that it is submitted that equal protection and benefit of the law should therefore accrue to all persons and to all law, including criminal and civil legal service provision. The unfair discrimination provisions in section 3(3) to (4) of the Constitution entrench protection against listed grounds of discrimination, including *inter alia,* race, gender, sex, age and disability. These grounds of discrimination point directly to the need to protect the right of equality of vulnerable persons on the basis of race, gender and sex, age and disability. Their right to access justice is critical.

If one accepts, as has been argued above, that there is a duty on the state to provide civil legal aid in certain circumstances (such as genuine indigence of a litigant allied with a case which is complex and will have serious practical and legal ramifications), it becomes necessary to consider what free legal services are indeed being provided in the chosen

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[95] Sarkin "Current Developments: Promoting access to justice in South Africa: Should the profession have a voluntary or mandatory role in providing legal services to the poor?" 2002 *SAJHR* 630.
[96] Bodenstein 2005 *Obiter* 314.

Metropolitan area (of eThekwini).[97] A factor to consider at this stage is resource limitations on the provision of civil legal aid. It has been said that Legal Aid SA does not have sufficient funds to provide civil legal aid to everybody who requires it in South Africa.[98] Additional funding will have to be obtained in order to provide legal assistance for human rights and other civil cases, and to establish community-based paralegal advice offices for the millions of South Africans who cannot afford the services of a legal practitioner.[99] There is comparative legal authority from Canada and India that cost limitations are not a valid ground for limitation of a constitutional right.[100] However, on the basis of the just limitation of rights provided for in section 36 of the South African Constitution, in a resource-scarce country like this, a limitation of resources (to meet section 34's requirements) will always be a necessary and acceptable reality in gauging the degree of adequate fulfillment of a constitutional right. In this context, van As makes the point that for legal aid (services) to be (properly) developed requires both funding and the political will to implement the developments.[101]

In addition to those who qualify for legal aid (be it criminal or civil), there is a broad group - who Brickhill identifies as the "working poor, lower middle class and parts of the rural population"[102]- who fall through the cracks of the system as it were. This group of potential civil litigants would not qualify in terms of the financial means tests (discussed further on in this article) of Legal Aid South Africa or the various law clinics, but would still be unable to afford private legal representation. This was mentioned above with regard to the 'indigence test' adopted by Legal SA. A significantly expanded network of free legal services to be provided by properly supervised law students at law clinics, post-study graduate community service, community-based paralegals and private lawyers acting *pro bono* could all play a role in meeting this need as well as filling other gaps in South Africa's legal aid 'net'. Later parts of this paper deal with how these different aspects could operate as part of a more sustainable, improved and coordinated response to the need for free legal services in eThekwini and in South Africa generally.

2. 3 Civil legal aid and the right to dignity

[97] This is done in the statistical analysis of the next main section which focuses on these services in eThekwini in the year 2012.
[98] McQuoid-Mason 17 *Windsor Y.B. Access Just.* 230 (1999) 6.
[99] *Ibid.* A later section of this paper covers legal service provision by community-based paralegal advice offices.
[100] See Muralidhar's discussion thereof. Muralidhar 2005 *Obiter* 275.
[101] van As "Taking legal aid to the people: unleashing local potential in South Africa" 2005 *Obiter* 187 188.
[102] Brickhill 2005 *SAJHR* 294.

It was held in *Dawood and Another v Minister of Home Affairs and Others, Salabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* that:

> "dignity … informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights."[103]

The aforementioned interpretations of the ambit of the right to dignity highlight its intrinsic linkage with many, if not all, other fundamental rights. The same *Dawood* judgment illustrates that socio-economic rights are rooted in a respect for human dignity because a lack of basic necessities like food, health care and others will invariably mean that a person deprived of such basic needs is denied a dignified existence.[104] As is argued elsewhere in this paper, to meaningfully enforce socio-economic rights when these are wrongfully denied to a person calls for legal representation to do so most effectively.

The *interconnectedness* of the right to dignity with the right to civil legal representation (in certain matters) is, it is submitted, clear. The dignity clause, section 10, enshrines inherent dignity for all including its respect and protection. The sheer indignity of being unfairly refused access to civil legal aid, on any basis, but particularly on grounds enumerated in section 9(3), is clearly unacceptable. The Constitutional Court was quick to point out in the *Dawood* case that in terms of section 10 of the Constitution, human dignity is a valid, enforceable and justiciable *right* (own emphasis added) not simply an intangible value.[105]

In light of all the aforementioned (and other) rights in the South African Bill of Rights, it is contended that section 34 be interpreted widely and generously so as to include the 'right to civil legal aid' where the interests of justice so require.

2. 4 (Other) specific South African legislative requirements for civil legal representation

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[103] *Dawood and Another v Minister of Home Affairs and Others, Salabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 35.

[104] *Dawood* para 34.

[105] *Dawood* para 35.

There are other pieces of legislation where the South African legislature has specifically recognised the need for legal representation in certain civil matters. For example, section 149 of the Labour Relations Act,[106] section 22(2) of the Restitution of Land Rights Act,[107] section 15(2) of the Mental Healthcare Act[108], section 14 of the Children's Act[109], the various sections of the Legal Aid Act applicable to civil cases[110] and parts of the very new Legal Practice Act (only gazetted on 22 September 2014)[111]. In each of these statutes it is argued that legal representation is acutely important due to the vulnerability of the affected person, the complexity of the sections and the serious consequences provided for in the legislation.[112] It is contended that a more generalised recognition of a 'right to civil legal aid' (broadly construed) is called for in South Africa when *substantial interests of justice* are at stake - albeit with reasonable limitations on the 'right' being necessary because of genuine and considerable ongoing hurdles to its provision, the most obvious of which is a finite pool of state resources. Such an expanded provision of civil legal aid (when appropriate to meet the particular needs of a client and the nature of that person's case calls for such free legal assistance) would be preferable to the 'piecemeal' approach which it is argued is created by the narrow confines of free civil legal assistance laid out in the aforementioned statutory provisions. Whilst for reasons of length this paper cannot do so in any detail, it is then necessary to enumerate just what such interests of justice may be. A useful starting point as to what should be considered "*substantial injustice*" is to be found in the "Legal Aid Guide 2014" of Legal Aid South Africa (LASA):

> "When a person without legal aid would experience significant injustice by being sentenced, or having the possibility of being sentenced, to direct imprisonment of more than 3 months in a criminal case, or *where his/ her constitutional or personal rights are affected in a civil matter*."[113]

It is submitted that LASA's test or threshold of a civil litigant merely having her "constitutional or personal rights *affected"* (own emphasis added) in order for there to be said to be substantial injustice in the absence of representation is extremely wide in so far as the 'net'

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[106] Act 66 and 1995.
[107] Act 22 of 1994.
[108] Act 17 of 2000.
[109] Act 38 of 2005. Here it is the provision on access to justice for children, discussed below, which is of relevance.
[110] Act 22 of 1969.
[111] Act 28 of 2014 (published on 22 September 2014 in Notice 740, Government Gazette 38022).
[112] For example, someone facing dismissal from their job, a litigant seeking the return of land taken away from them, a person whose mental faculties are impaired or are alleged to be impaired, a child with a legal problem and indigent clients in need of the *pro bono* assistance of private legal practitioners, respectively.
[113] Legal Aid South Africa *Legal Aid Guide 2014*. 18. (Own emphasis indicated in so far as this part relates to civil legal matters).

of civil legal aid entitlement is concerned. This does impose a quite considerable burden and responsibility on LASA to ensure that its civil legal aid offerings to the indigent are sufficient to adequately meet this espoused (broad) civil legal aid provision undertaking. However, this has to be weighed up against the very real financial limitations faced by LASA.

2. 5 Why civil legal aid and what should it encompass?

> *Ubijus ibi remedium* - There is no right without a remedy.

In their seminal work on civil justice systems, Garth and Cappelletti highlight the emergence of the right of access to justice as "the most basic human right"[114] due to the fact that one must have mechanisms to ensure enjoyment of other rights.[115] In this way those authors could be said to be echoing the above-mentioned Latin maxim. It has been asserted that legal aid is intrinsically concerned with law and poverty and thus forms a significant corollary to 'access to justice'.[116] However, 'access to justice' in South Africa seems to have commonly come to be understood as legal representation in (certain) criminal matters. Such an understanding of access to justice is inadequate to cover many of the needs of the poor, in particular the realisation of their economic and social rights. Heywood and Hassim state:

> "whether in relation to health, housing, education, food or access to social assistance access to legal services is often the lever that enables the realisation of rights."[117]

Legal Aid South Africa[118] has focused attention on criminal defences in matters where a conviction could result in imprisonment. van As describes the status of civil legal aid in South Africa as "almost non-existent and it is here that the greatest need lies".[119] It has been argued that focusing resources on criminal defences may perpetuate gender discrimination on the basis that by far the majority of criminal accused are men. The consequence being

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[114] Cappelletti and Garth "Access to Justice- the Worldwide Movement to Make Rights Effective: a General Report" in Cappelletti and Garth (eds) *Access to Justice- A World Survey* Vol 1 (1978) 5 8-9.
[115] Bhabha states similarly that there can be no legal right without a remedy and, further, that the remedy must be accessible if it is to be meaningful. Bhabha "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" 2007-2008 33 *Queen's L.J.* 139.
[116] Bodenstein 2005 *Obiter* 304.
[117] Heywood and Hassim 2008 *SAJHR* 275.
[118] Legal Aid South Africa was established by the Legal Aid Act 22 of 1969. In terms of section 3 thereof it was established with the aim of providing or making available legal aid to indigent clients. It is worthwhile for the sake of this research to note that that stated aim does *not* prioritise criminal over civil legal aid representations.
[119] van As 2005 *Obiter* 187.

that women and other vulnerable groups are underserved by the legal aid system.[120] The law affecting the poor, the disabled, children and women - which include family issues, access to facilities, jobs, education and social services - are consequently underserviced areas of law.[121] Vawda states that "what is lacking is legal assistance for poor persons in a variety of civil matters".[122] Those not enjoying socio-economic rights or cultural rights should claim those rights.[123] It is submitted that such a claiming of rights can only adequately be met through full and proper access to civil legal aid (or other related sources of free legal services) for those unable to pay for their chosen legal representative.

In a perversely unequal society such as South Africa, the realisation of socio-economic rights is critical and deserving of adequate legal and administrative measures to access these rights to the greatest extent and in the best manner possible. Many authors have called for stronger legal access measures to secure socio-economic rights. There have been calls for a move from a narrow equality to a more substantive equality in terms of greater socio-economic rights realisation which may be aided by satisfactory civil legal assistance.[124] Vawda is of the opinion that "access to social justice entails a holistic approach to the socio-economic problems faced by the poor in South Africa, within which may be located the right of access to legal representation."[125] It has been recommended that an expanded access to justice project, encompassing improved socio-economic rights, would require a cooperative and integrated effort by public, private and voluntary sectors.[126]

Unlike other socio-economic rights (like the rights to health care and adequate housing) which are limited in the relevant sections of the South African Constitution by "resource limitations" and the proviso of "progressive realisation", the rights of children in section 28 and 29 are not limited. In particular section 28(1)(h) of the Constitution provides for legal representation of children. Section 14 of the Children's Act 38 of 2005 states that every child has the right to bring and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court. Children's access to courts is strengthened by section 15 of the Children's Act which has broad *locus standi* provisions and sets out that

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[120] Allen "Focusing legal aid on criminal defence marginalises woman's legal service needs" 1995 *SAJHR* 15 1 143.
[121] Vawda 2005 *Obiter* 236.
[122] Vawda 2005 *Obiter* 239.
[123] Vawda 2005 *Obiter* 240.
[124] Cappelletti "Access to justice as a theoretical approach to law and a practical programme for reform" 1992 *SALJ* 22.
[125] Vawda 2005 *Obiter* 241.
[126] Kemp and Pleasence "Targeting Civil Legal Needs: Matching Services to Needs" 2005 *Obiter* 301.

these applicants (with legal standing) may approach a competent court, alleging that a right in the Bill or Rights or the Children's Act has either been infringed or threatened and the court may then grant "appropriate relief", including a declaration of rights.[127] The right of children to access justice is thus strongly and clearly delineated in the Constitution and other legislation, but the practical implementation thereof (which is not so clear-cut) requires further consideration.

It has been said that Legal Aid South Africa needs to refocus its attention from criminal representation to a greater focus on social and economic issues.[128] Muralidhar provides a different view that criminal legal aid is intrinsically more necessary than civil legal aid due to factors such as the severe consequences (such as a of loss of liberty) in criminal matters and the complex laws and procedures of criminal trials.[129] It is respectfully submitted that Muralidhar's distinction is not a valid or prudent one to draw in a South African context. For example, as outlined above, the result of losing one's house in civil eviction proceedings is nothing if not severe and the complexity of South Africa's civil procedure could be said to be equally if not more complex than its criminal procedure. As to legal non-governmental organisations (NGOs), such as the Legal Resources Centre, they have acknowledged the need for representation in complex civil matters like eviction cases and continue to offer valuable legal services through legal advice, impact litigation and other means.[130]

2. 6 Acceptable limitations on the 'right' to civil legal aid

An interpretation of section 34 and other fundamental rights contained in the South African Constitution would be incomplete without consideration of constitutionally permissible limitation of rights in the Bill of Rights. Section 34 does not contain a so-called internal limitation such as the "progressive realisation" caveats in the sections in the South African Bill of Rights relating to social and economic rights. It therefore falls upon the limitations clause (in section 36) to establish whether the rights in section 34 may be validly limited.[131]

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[127] The *locus standi* provision is found in section 15(2) of the Children's Act which provides that the persons who may approach a court are: (a) a child who is affected by or involved in the matter to be adjudicated; (b) anyone acting in the interest of the child or on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; and (d) anyone acting in the public interest.
[128] Vawda 2005 *Obiter* 245.
[129] Muralidhar 2005 *Obiter* 264.
[130] Andrews "A Resource for Justice: South Africa's Legal Resources Centre" 1995 2 1 *East African Journal of Peace and Human Rights* 53.
[131] Section 36 states:

For example, the Legal Aid Act[132] provides a law of general application (along with LASA's Legal Aid Guide) whereby current state resources are channeled far more into criminal as opposed to civil legal aid. However, the jurisprudence of the Canadian courts may be used to argue that a budgetary consideration alone should not be used to limit a right in the Bill of Rights- unless, of course, the section provides for a financial limitation.[133] In a similar vein it is inherent in the nature of constitutional rights for those to have a higher priority in the distribution of the available resources than policies or programmes which are not constitutional rights.[134] However, balanced against this should be the South African courts' hesitancy (in the *TAC* cases and others) to enter into the executive's rightful domain of budget allocation.[135] Nonetheless, to be balanced with this is the Constitutional Court's *Certification* judgment which found that the South African Constitution does allow and require government to adopt interventions to facilitate socio-economic equality. The same judgment held that judicial decisions are possible even when they have budgetary implications- *legal aid* was specifically mentioned as an example.[136] The *Grootboom*[137] case showed the extent that South African courts are prepared to intervene, even when their order has direct financial implications for the state. Mpedi and others highlight the significance of the *Grootboom* case to legal aid provision in stating:

> "depriving those who are particularly vulnerable and excluded from equal treatment and access to justice could certainly have constitutional ramifications."[138]

There is a compellingly argument that putting forward a lack (or alleged lack) of resources as the justification for not providing legal representation to an indigent person in a criminal case,

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> "(1) The rights in the Bill of Rights may be limited only in terms of law general application to the extent of the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation on its purpose; and
> (e) less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any rights entrenched in the Bill of Rights."

[132] Act 22 of 1969.
[133] Budlender 2004 *SALJ* 349. See also the Supreme Court of Canada case of *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* which reflects this principle. [1997] 3 S.C.R. paras 281-284.
[134] Budlender 2004 *SALJ* 352.
[135] This caution was raised by the Constitutional Court in *Minister of Health v Treatment Action Campaign* (no. 2) 2002 (5) SA 721 (CC) Para 38.
[136] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) 800.
[137] *RSA v Grootboom* 2000 11 BCLR 1169 (CC).
[138] Mpedi *et al* "Welfare and Legal Aid" in Olivier *et al* (eds) *Social Security: A Legal Analysis* (2003) 213.

where an injustice would be a likely consequence, would have very minimal prospects of passing constitutional muster. Using that same premise, it can and has be contended that there exists no principled difference between such a state of affairs compared with people not having meaningful access to court or a fair trial in certain civil matters due to a lack of legal representation.[139] Pragmatically, however, in light of and in addition to section 36's permissible limitations of fundamental rights, a 'right to legal aid' in South Africa (in civil matters in particular)- even for the indigent- cannot in reality impose an absolute right to such services in light of the country's limited resources and fierce competition for those scarce resources. [140]

It is then always necessary to establish whether, as provided for in section 36, a particular limitation on the 'right to civil legal aid' (where the interests of justice would otherwise require such legal aid to be furnished) is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[141] Access to the courts and fair trial rights are patently crucial for the protection of all other constitutional and non-constitutional rights. It is therefore neither reasonable nor justifiable to deny civil legal aid when a consequence of doing so is likely to be a substantial denial of justice.

In South Africa, the worldwide difficulties of accessing justice are made worse by extreme socio-economic inequality and the prohibitively high cost of private legal services. Without legal representation, already disadvantaged litigants are placed in an even worse position when faced with complex legal issues. Such litigants face an increased risk of an unfair decision particularly where there is a socio-economic power imbalance (such as between employer and employee) and the other side is legally represented.[142]

It is therefore evident that civil legal aid should, at least in principle, be provided in certain matters to persons who are indigent. Those who fall through the cracks as it were, who do not quite meet financial means test thresholds which are (subject to certain permissible exceptions referred to below) a prerequisite for current civil legal aid assistance by LASA and other law/ legal aid clinics, would still, however, be very unlikely to be able to realise this right if the requirement imposed is strictly one of 'indigence'. This last point is made notwithstanding the limited discretionary principles (to accept certain matters even where the

[139] Budlender 2004 *SALJ* 351.
[140] Bodenstein 2005 *Obiter* 315. On this topic see also Kemp and Pleasence 2005 *Obiter* 298.
[141] Section 36 of the Constitution of the Republic of South Africa, 1996.
[142] Dugard May 2008 special edition *SAJHR* 3.

means test thresholds are somewhat exceeded) provided for in LASA's (2014) Legal Aid Guide and the available internal appeal process against a decision by LASA to decline a request for legal aid, as well as the availability of 'legal insurance' policies which may be purchased, all of which are canvassed below.[143] However, in the context of indigence seemingly being by some margin the most pivotal consideration in applications for legal aid, and in light of the limited resources available to provide free legal assistance, the factors that are necessary to consider when granting civil legal aid then become paramount.

2. 7 Appropriate tests for considering when civil legal aid should be granted

As noted above, section 35 of the Constitution provides a more direct right to criminal legal aid in particular circumstances than does section 34's "fair trial" promise which applies to civil matters. Nonetheless, South African courts' interpretation of factors to consider when granting criminal legal aid can provide useful guidance, it is submitted, on how section 34 should be interpreted *vis-à-vis* free legal services in civil matters.

In the pre-constitutional case of *S v Khanyile,* Didcott J identifies three factors to be considered in deciding if legal representation would need to be provided:[144]

(i) The "complexity" of the case in fact and in law;
(ii) The "personal equipment" of an accused to fend for himself or herself; and,
(iii) The "gravity" of the case, the nature of the offence alleged, and the possible consequences for the accused if convicted.

It is strongly argued that a (fundamental) additional factor which must always be carefully considered when weighing up an application for criminal or civil legal aid (which could be said to be most closely related to the second consideration listed above) is the ability (or lack

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[143] i) Discretionary provisions are to be found in Clauses 5.1.14 and 5.1.15: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 83-84.
ii) 'Internal' appeals are made to LASA's "Constitutional Case Management Committee" in terms of Clause 5.1.1: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 76.

[144] [1988] 3 S.A. 795 at 815. For a discussion thereof see also McQuoid-Mason 199917 *Windsor Y.B. Access Just*. 230 4. Didcott J's judgment was eventually overruled by the Appeal Court in *S v Rudman* [1992] 1 SA 343 which held that the courts should not be able to coerce the government into providing civil legal aid because this could not (held the court) be feasibly implemented, given the financial and human resources constraints existing in South Africa. It is submitted (as will be argued later under the sub-heading on *pro bono* work) that this *ratio decidendi* is no longer applicable in light of a purposive interpretation of section 34 of the Constitution. See also McQuoid-Mason "*Rudman* and the Right to Counsel: Is it Feasible to Implement *Khanyile*?" 1992 8 *SAJHR* 96.

thereof) of a litigant to afford the costs of engaging their own lawyer. However, in addition to an analysis of a litigant's ability to pay for their own legal representative, the three considerations identified above by Didcott J can be appropriately adapted to civil cases embraced by the Constitution in section 34.

The first factor, being the complexity of the case, applies *mutatis mutandis* to civil matters. For example, an unopposed divorce in the regional magistrates' court, where there are no children of the marriage or assets to be divided, could well be satisfactorily handled by the litigants without the need for legal representation. This could be contrasted with a complex high court divorce, involving a multifaceted dispute as to care of (and access to) children and division of assets, where the intricacies are such in fact and law that legal representation would be strongly advisable and very probably indispensible.

As to the second factor, the ability of a litigant to represent themselves, again this is applicable to civil matters. The socio-economic position, including educational background, of one litigant could make them far more capable of adequately representing themselves than someone from a more disadvantaged socio-economic position with a limited education and very conceivably weak(er) language skills.

Apropos the gravity, severity or significance of the matter, in a civil case the issue is not a question of the offence committed but rather the potential or likely consequences of the case for the parties involved. For example, an eviction application can have dire, life-changing consequences for the person or persons evicted by a court order.[145] Therefore in civil matters of this ilk, a lack of legal representation might well result in extremely serious results for a 'losing' litigant (not to mention any family members directly dependent on them).

South Africa's Constitutional Court too, in *S v Vermaas; S v Du Plessis*, provided some clarity on how the concept of "substantial injustice" should be interpreted. The court held

[145] There is plenty of recent case authority showing the need for legal representation in eviction matters. As a result, the Socio-Economic Research Institute (SERI), the Centre for Applied Legal Studies (CALS), and the Legal Resources Centre (LRC), to name a few, are all non-profit organisations and registered law clinics that have represented indigent individuals and communities in ground breaking eviction cases. These cases include for example *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC)*; Joseph v City of Johannesburg* 2012 4 SA 55 CC and *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes and Others (Centre on Housing Rights and Evictions and Community Law Centre University of the Western Cape as Amici Curiae)* 2011 7 BCLR 723 (CC) respectively. See in this regard the websites of these three legal NGOs at www.seri-sa.org, http://www.wits.ac.za/law/cals and www.lrc.org.za (all accessed 2013-03-01).

here that an assessment needs to be made of the litigant's ability to fend for themselves, the complexity of the matter and its likely ramifications.[146] Although this applied to a criminal matter, again it is argued that the principles are equally applicable to civil cases. However, Ellmann has expressed the view that section 34's guarantee of a fair public hearing is less definitive than the prohibition on 'substantial injustice', thereby giving the South African courts greater discretion than in criminal or children's cases as to when civil legal aid (generally) should be granted.[147] Whilst it is conceded that Ellmann may be correct in this last assertion, it is strongly submitted that even if there is more discretion as to when civil legal aid needs to be granted, that does not mean that such discretion ought not be positively exercised in various circumstances where the urgent interests of civil justice are at stake. Such discretion should appropriately be applied in granting civil legal aid in a wide range of far-reaching civil cases (and in circumstances where an applicant for such legal assistance- and other parties directly affected by a legal dispute- are particularly vulnerable), where failure to do so is indeed likely to deny a fair public hearing.

2. 8 Concluding remarks as to constitutional arguments considered

There have been calls for a reconceptualisation of access to justice to incorporate constitutionally protected ideals of equality and social justice for the poor and otherwise marginalised members of society.[148] The existent narrow interpretation of the concept of 'access to justice' in South Africa (with its decided focus on criminal legal aid) fails to address the legal isolation of the poor. The writer has argued that civil legal aid should encompass a broad spectrum of services that protect, promote, and respect, particularly socio-economic rights. It must therefore include legal representation in matters as diverse as eviction proceedings and access to adequate housing, divorce and maintenance proceedings, and access to health care, to name but a few.The provision of civil legal aid is in essence what had been described as a move from "rule of law" to "legal empowerment".[149] Civil legal aid should encompass the right to legal representation in civil matters when a litigant cannot afford their own lawyer, particularly in socio-economic rights cases, where the failure to have representation may lead to a substantial injustice. This is borne out by the interpretation of section 34 (albeit limited by section 36) through other

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[146] *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC*).* Para 15.
[147] Ellmann 2004 1*SALJ* 329.
[148] Vawda 2005 *Obiter* 234.
[149] Golub *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* Paper presented to the 5th International Legal Services Research Centre Conference, Selwyn College, Cambridge University (2004).

sections in the South African Bill of Rights, including the rights to equality and dignity, and through foreign and international law to include the right to (and be provided with, where necessary) civil legal representation where substantial injustice would otherwise result.

3. South African free civil legal service provision from legal NGOs and other free service providers (with a focus on the example of eThekwini)

The previous section considered conceivable constitutional justifications for the provision of free legal services in civil matters to deserving clients in South Africa. In order to gauge whether or not constitutionally mandated free civil legal services are being adequately provided, it is necessary to gauge what basket of free civil legal services are available to indigent clients in South Africa. This section attempts to provide such an appraisal by considering the documented free legal services in civil matters provided to indigent people in eThekwini in 2012.

The following are the free civil legal service providers operating in eThekwini: Lawyers for Human Rights, the University of KwaZulu-Natal Law Clinic, ProBono.Org, Legal Aid South Africa's Civil Unit (based at the Durban Justice Centre), the Legal Resources Centre, the Black Sash, the Community Law and Rural Development Centre and the *pro bono* work of the KwaZulu-Natal Society of Advocates (Durban).[150] The annual statistical reports (and other available and relevant records) for 2012 of each one of these respective organisations are considered.

In addition to what is discussed in the remainder of this section, it is relevant to note that extremely limited state-referred legal assistance in civil cases is provided for under the *in forma pauperis* procedures in terms of the South African Uniform Rules of Court. In this regard the registrars of the various high court divisions around South Africa (at least in theory) refer "poor people" to private practitioners for free legal assistance.[151] However, it is submitted that because the *in forma pauperis* mechanisms have been and are so

[150] Whilst continuing to run as an advice office centre, as of 2012 the Durban office of the Black Sash ceased to operate as a fully-fledged law clinic. The Black Sash "About" (May 2014) http://www.blacksash.org.za/ (accessed 2014-05-12). The Community Law and Rural Development Centre is also not a registered 'law clinic'. The remaining institutions are all registered as 'law clinics' with the Law Society of South Africa and / or the applicable provincial law societies.

[151] Rule 40 of the Uniform Rules of Court.

insufficiently and very seldom used, that there remains a pressing and overarching (further) need for additional free legal services for the indigent in civil cases. This widely held view that there has been serious and continuing gross under-utilisation of the *in forma pauperis* system in South Africa has been made compellingly and at some length in the documented research of Jackie Dugard.[152] However, there is virtually no available empirical data to indicate the actual extent of *in forma pauperis* representations in South Africa. But is suggested that the very fact that no such records seem to have been kept (or be at all available) for anywhere in South Africa, and the very minimal academic attention the procedure has received are indicative of the extremely limited extent to which this rule has been and is being utilised. This paper does not consider the *in forma pauperis* procedures further, instead focussing on what dedicated free legal service provision is available in civil matters, particularly in eThekwini (with a focus on services available or provided in 2012).

3. 1 Lawyers for Human Rights (LHR) Durban Office

Lawyers for Human Rights has been in existence for three decades. It is an independent human rights NGO focusing on human rights activism and public interest litigation in South Africa. It provides free legal services to exposed and indigent individuals and communities, South African but especially "*foreigners"*, who are victims of unlawful infringements of their constitutional rights.[153]

The Durban LHR Office runs what it terms its "Refugee and Migrant Rights Programme". Its expressed mandate is to provide legal advice, representation and other legal assistance to refugees, asylum seekers and other vulnerable migrants.[154]

All the LHR's branches around South Africa use a (common) financial means test almost identical to that of Legal Aid South Africa (described in detail below). In practice, the LHR's means test's operation has been described as "relatively flexible" in the sense of "worthy"

[152] Dugard 2008 24 *SAJHR* 223.
[153] Lawyers for Human Rights "About us" (May 2014) http://www.lhr.org.za (accessed 2014-05-27).
[154] Lawyers for Human Rights "About Us" http://www.lhr.org.za (accessed 2013-09-13).

clients who would otherwise just miss out on qualifying in terms of the test still being assisted in some instances.[155]

As to its financial means test, it is contended that a (well controlled) degree of flexibility and discretion in the application of a means test is necessary (and laudable). This is in so far as permitting the acceptance of a mandate in exceptional circumstances when there is a genuinely very worthy case where a client's matter has considerable merits yet they cannot afford to pay a private lawyer but earn or own just too much to 'pass' the means test. In such extraordinary circumstances the case can still be accepted if the nature of the case and the client's circumstances strongly support such a discretionary call being made. However, it is proposed that some more objective mechanism needs to be introduced in such 'borderline' cases to better and more fairly determine whether such a mandate should be rightly accepted. This needs to take cognisance of the reality-driven objective and environment (which any committed legal aid service provider should appropriately have and operate in) of fostering justice and fairness but this having to transpire whilst operating in a resource-scarce setting. At the same time, however, this would have to be balanced with the reality that such a mechanism should not be unnecessarily rigid - as this would defeat the very purpose of having a discretionary option. The current LHR system of having a stated "relatively flexible"[156] approach to its financial means test provides insufficient guidance as to the extent to which someone's earnings or property ownership could exceed the means test's thresholds and yet still have their case taken on and / or what types of matters or circumstances would typically be sufficiently meritorious to warrant their acceptance notwithstanding a 'failure' in terms of a rigid application of its means test's figures. It would be fairer, more transparent and easier for potential clients to understand for the LHR to indicate a maximum level (for example, up to an additional 25% of the stated earning and property ownership levels) up to which someone who exceeds the financial means could still be considered for their gratis legal assistance. This would ensure that a prospective client who can actually afford to engage a private legal practitioner does so rather than having the LHR's finite financial and human resources being spent on such a person when in fact those limited resources should instead rightly be ploughed into the legal needs of far more financially needy clients. It would moreover make most sense for there to be put into place a policy for the 'categories' and 'classes' of matters and clients which are most deserving of

[155] *Ibid*.
[156] *Ibid.*

assistance even when the financial means test threshold is not quite attained. For example, evictions, urgent extradition application or cases involving children or other particularly vulnerable persons could be considered as the types of cases (amongst others) worthy of providing free legal assistance (if the LHR's resources allow) even when an applicant's finances slightly exceed the 'normal maximums' stipulated in the means test.

The majority of legal assistance at the LHR Durban branch in 2012 was directed at assisting persons who were rejected at the initial stage of an application for asylum (in South Africa) and required assistance with their refugee appeals. During 2012 the Durban Office assisted 416 clients with refugee appeal-related matters. During the same year, 44 clients requested and obtained assistance from the LHR in Durban with their voluntary repatriation matters.[157] The LHR's Durban division also received 38 of what it terms "protection matters" during the year under consideration. In this context a "protection matter" refers to refugee protection which describes difficulties experienced within the asylum process, on-going persecution, xenophobia and the like.[158]

As to record keeping, the Durban LHR Office was only able to provide statistics for 2012 on the number of files it actually opened and what types of cases these were. They did not record (and hence were not able to indicate) how many requests for legal assistance were received (i.e. over and above cases actually opened as files) or what the nature of those requests were. Furthermore, no records were kept of the number of case referrals to other organisations.[159]

It would be advantageous from the perspectives of fundraising and strategic planning for the organisation to record all requests for legal assistance that are made to the LHR's Durban branch and the nature of those requests - even where only advice is dispensed - as such work (which is in itself a very valuable service) may take up a significant amount of the working hours of staff. Conversely, a failure to maintain such records is in itself counter-

[157] Lawyers for Human Rights Annual Report 2012. On file with the writer.
[158] Ramjathan-Keogh. Personal communication via email from Ms Kaajal Ramjathan-Keogh, LHR National Head: Refugee and Migrants Rights Programme (dated 13 September 2013) (copy on file with the author).
[159] Ramjathan-Keogh. Personal communication via email (dated 13 September 2013) (copy on file with the author).

productive for various reasons. Firstly, such 'advice given clients' might return to the organisation for further assistance at a later date (where a file is actually opened); then the lack of a proper record of earlier advice given to that client is very likely to result in the follow-up consultation taking far longer than it would have had the initial 'advice given' process been properly documented. Secondly, from the perspective of monitoring staff's work performance, in addition to other tasks, having records of time spent on merely advising clients (without opening a file for them) would provide a far fuller picture of such staff's contribution to the organisation's legal service output. This is especially the case for paralegal staff that might very well spend a very significant portion of their time at work giving basic advice to indigent members of the public without the organisation taking such matters beyond that initial stage. Thirdly, being accountable to donor funders means that it is imperative to accurately record the totality of 'legal services' offered, be they actually opening a file and 'running a case' or providing other assistance like community rights awareness training or the furnishing of legal advice even where a file is not opened. Furthermore, in terms of better coordinating free civil legal service delivery for the indigent in eThekwini, it would also be desirable and necessary for comprehensive records to be kept of referrals to other free service providers and the nature of those referrals to be noted. If this were done consistently by all of the 'free civil legal aid' providers in eThekwini, it could go some way towards (hopefully) affirming that a sufficiently comprehensive network of free legal services are on offer to such worthy legal aid clients in civil cases in that metropolitan area, whilst at the same time seeking to avoid unnecessary duplication of functions between the different legal service-providers and highlighting any breaches in the 'web' of available services to meet the main existing needs. For example, were a 'foreign client' of the LHR in Durban to have a civil legal claim not related to their immigrant (or related) status- such as a claim sounding in money, a labour case or a land matter - it would be very useful to record whether such a person is directed to and assisted by another free legal service provider to whom they have been referred by the LHR, the nature of such a person's case as well as its final outcome.

The following conclusions are made from the aforementioned Durban LHR Office's 2012 client statistics. With a very few exceptions, the branch assists people from other African countries as opposed to elsewhere in the world.[160] This office of the LHR deals entirely with

[160] Table of demographic characteristics and location of clients in Durban office from Lawyers for Human Rights Annual Report 2012.

the civil legal needs of refugees, asylum seekers and other vulnerable (*international*) migrants pertaining to their residence status and related concerns. Thus any South African or other resident in eThekwini who does not slot into the refugee / asylum seeker / international migrant category will not be assisted with a civil legal problem by the LHR's Durban division. Also, if an indigent refugee / asylum seeker / international migrant has a legal problem not related to their residence status or an intrinsically related concern (i.e. a 'normal' civil case like a labour, land or family law dispute), then that prospective client would have to seek free legal services for those types of legal problems from another service provider that does deal with those categories of cases. However, the LHR in Durban nonetheless fills a very important niche in so far as there is virtually no indication from the other free civil legal service providers in eThekwini (discussed in this portion of the paper) of these other organisations serving the pressing legal needs of refugees, asylum seekers and other vulnerable (international) migrants pertaining to their residence status and other related issues (such as seeking residence and work permits, identity documents and birth, death or marriage certificates). In a world-wide context of humanitarian and political crises besetting places like Iraq, Syria, Palestine, the Ukraine, Egypt, Nigeria, Somalia, Kenya the Democratic Republic of Congo, (and even on South Africa's doorstep in Zimbabwe), it is inevitable that strife-torn people from such territories will seek (and have sought) legal sanctuary in countries like South Africa. It is important to ensure that the legal status (and other legal protection) of such (vulnerable) persons in South Africa are properly taken care of; and this is an area in which the LHR is undoubtedly making a very valuable contribution in eThekwini as well as other parts of South Africa.

3. 2 The University of KwaZulu-Natal Law Clinic (Howard College campus, Durban)

The University of KwaZulu-Natal Law Clinic- formerly called the Campus Law Clinic- of the University of KwaZulu-Natal (based at its Howard College campus in Durban) was established in 1973. It has undergone several changes and grown considerably during its 40-plus years of existence. The Law Clinic evolved from a rudimentary, voluntary organisation operating out of the office of a single legal academic to its (current) status as a fully operational free civil legal services provider to the indigent people of eThekwini. The University of KwaZulu-Natal Law Clinic (LC) is registered as a 'law clinic' (as defined) with the KwaZulu-Natal Law Society. Although affiliated to the University of KwaZulu-Natal

(UKZN), from an operational and finance perspective it operates along almost identical lines to 'other' legal NGOs, like the Legal Resources Centre and Lawyers for Human Rights.[161]

The LC focuses on two main inter-related functions:

i) rendering a wide range of quality civil legal services to the indigent; and
ii) providing practical legal training to final-year LLB students registered for an elective course called "Clinical Law" at UKZN.[162]

Linked with these two key focus areas is the Law Clinic's continuing role in community legal rights awareness campaigns and courses, including training of community-based paralegal practitioners.[163]

Under its existing cooperation agreement with Legal Aid South Africa (in terms of which the LC provides solely civil legal services on behalf of Legal Aid SA to qualifying clients), the LC utilises the financial means test of Legal Aid SA (which is discussed later in this paper).[164] This means test will be seen to be a good attempt to balance the need for legal aid to be limited to genuinely indigent applicants with a degree of flexibility which allows for very selected other cases (which would otherwise not strictly qualify in terms of the given financial criteria) to nonetheless be taken on where the interests of justice faced shout out for a particular client or clients to receive free representation.

In addition to its staff, the LC taps into the free legal services of final-year LLB students (working under the supervision of LC staff) whose work at the Clinic forms part of their UKZN final-year LLB elective module, "Clinical Law", which runs over the period of the whole academic year.[165] The services of law students working *pro bono* in university law clinics (and at the UKZN Law Clinic in particular) during their LLB studies are considered in more detail later in this article. Since July 2013, thanks to Legal Aid South Africa's financial

[161] UKZN Law Clinic (Durban) "Quarterly reports to the Attorneys Fidelity Fund" (2012), (2013) and (to 30 June 2014) (on file with the author).
[162] UKZN Law Clinic (Durban) "Proposal to Legal Aid South Africa" (7 November 2011) (on file with the author).
[163] *Ibid.* See the later discussion of such training of community-based paralegals.
[164] University of KwaZulu-Natal Law Clinic (Durban) and Legal Aid South Africa "Cooperation Agreement between Legal Aid South Africa and the University of KwaZulu-Natal Law Clinic (Durban) (2012) (copy on file with the author).
[165] UKZN Law Clinic (Durban) "Quarterly reports to the Attorneys Fidelity Fund" (2012) (on file with the author).

support, the LC has been able to expand its workforce by an additional attorney and legal secretary.[166]

3. 2. 1 Civil legal assistance provided by the UKZN Law Clinic in 2012

The LC reported having received 419 requests/ applications for its (free) civil legal aid in 2012, although it was unable to hold initial consultations with all of these potential clients. These requests (as well as files actually opened) covered a veritable smorgasbord of civil legal problems. Listed under 10 specified categories there was a good spread of case requests under virtually all of these divisions, with the highest number of applications relating to family law (especially divorces), delictual matters, land disputes (including many eviction issues), debt-related concerns and labour disputes. [167]

There was a rather large disparity between the number of requests from members of the public for legal assistance from the LC and the lower number of prospective clients actually consulted with at initial consultations.[168] This gap points towards a pressing need for greater staffing capacity and / or increased law student involvement (the latter through compulsory clinical legal education which is outlined below) to deal with the higher number of requests for assistance than initial consultations taking place.[169] In addition, the use of properly trained and supervised community-based paralegals (of which there were none at the LC in 2012 or since) could similarly bolster the LC's capacity to consult with a considerably increased number of new potential clients. Paralegals could also strengthen the LC's operative capacity in various additional ways through their performing other basic legal services (like letter writing on behalf of clients) and providing (invaluable) translation services for clients not fluent in English when the latter are consulting with solely English-speaking law students or professional staff.[170]

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[166] UKZN Law Clinic (Durban) "Quarterly reports to the Attorneys Fidelity Fund" (2013 and to June 2014) (on file with the author).
[167] UKZN Law Clinic (Durban) "Quarterly reports to the Attorneys Fidelity Fund" (2012) (on file with the author).
[168] *Ibid*.
[169] See the section on clinical legal education in below for a discussion on the proposed greater use of senior students in legal aid provision as part of their practical legal studies and community engagement.
[170] See the comprehensive analysis of the current and possible future roles of community-based paralegals in South Africa which follows later in this piece.

In connection with the last point made, it must be noted, however, that there appears to be a significant limitation on the interpretive value of the case statistics furnished by each of the free civil legal service providers in eThekwini (or elsewhere for that matter) in that they consistently fail to indicate (in their annual reports or elsewhere) the number of work hours which went (or go) into each file. For example, one service provider might open a plethora of 'files' which could largely be opened and closed immediately upon the client being seen for the first time; in essence most of those cases could more rightly be termed 'advice given matters'. Whilst another organisation might only open as 'files' those matters which require some legal steps beyond the initial consultation, such as litigation and the various legislatively prescribed stages leading to a matter being decided in court (which are often very time-consuming). It is thus impossible to conclude whether a comparatively lower number of opened files at a particular civil legal aid provider is due to the nature of the cases accepted by the organisation or whether, in actual fact, it could (and should) significantly increase its case numbers.

3. 3 ProBono.Org (Durban branch)

ProBono.Org is first and foremost a 'clearing-house' (NGO) which facilitates the provision of *pro bono* (meaning in essence, free) legal services to the indigent by volunteer attorneys and advocates in private practice. This entails that the organisation sources, on the one hand, worthy clients (in terms of indigence) with a valid and sufficiently strong civil case, and on the other, volunteer legal service providers in private practice with the requisite expertise and availability to accept a particular (*pro bono*) mandate. ProBono.Org does this by first screening potential clients (normally through an initial consultation with either one of its own staff or a *pro bono* legal practitioner at one of its 'clinics' referred to below) and then matching them with appropriate private lawyers to whom a particular case is referred, for the latter to act without charging a professional fee for their work. It is reportedly the only such organisation in the country. As of 2011, ProBono.Org began operating in eThekwini through its opening of a staffed branch in central Durban.[171]

[171] ProBono.Org "About our services" (June 2014) http://www.probono.org.za/services/about-our-services/ (accessed 2014-06-02).

In addition to its core role of acting as a legal clearing-house (thereby acting as a conduit between needy clients and private practitioners acting *pro bono*), ProBono.Org runs regular (what it terms) "legal advice clinics" manned by volunteer private legal practitioners (and sometimes senior law students too). It also provides legal education and training both to members of the public and lawyers as well as offering mediation services. The establishment is moreover involved with strategic impact litigation and enters into focused cooperative agreements with other organisations.[172] These different facets of ProBono.Org's operations (both in Durban and Johannesburg) appear to be well aligned with its stated objectives which pertain to improving access to justice in civil matters for those in greatest need.

As with the almost all of the other (free) 'civil legal aid' service providers operating in eThekwini discussed in this paper, ProBono.Org utilises a financial means test to establish whether clients qualify financially for its assistance. This threshold allows a couple (in a marriage or a marriage-like relationship) to have a joint income not exceeding R 7 000 per month and own assets worth no more than R 350 000. In addition, the organisation's acceptance criteria state that to be accepted a matter must have "good prospects of success" and there needs to be an "element of public interest".[173] A discretion is given to the Provincial Director of ProBono.Org to accept a client who "narrowly misses" out on qualifying in terms of these financial criteria. This discretion is reportedly exercised particularly if children are involved in (or expected to be directly affected by) a case and / or if the public interest element of a particular matter is sufficiently strong. [174]

As was argued above in relation to the so-called 'permissible exceptions' to the financial means test allowed by Lawyers for Human Rights, it is contended that ProBono.Org's allowing for certain exceptions (to those who would otherwise 'fail' its means test) is to be welcomed in providing the flexibility necessary to nonetheless provide free legal assistance in genuinely 'worthy' matters. However, as was submitted in relation to LHR's exceptions, it is argued that ProBono.Org should adopt a less subjective policy which sets out the degree to which an applicant's finances may exceed their normal benchmark and yet still be considered for free legal services. Such an objective exceptions policy should also provide a

[172] *Ibid*.
[173] Posemann "Personal communication via email from Ms Michelle Posemann" Erstwhile Provincial Director (KwaZulu-Natal) of ProBono.Org (dated 18 June 2014) (copy on file with the author).
[174] *Ibid*.

definitive list of the types of legal problems which will be considered as having a strong public interest element and / or particular categories of vulnerable clients (like children, disabled persons or the elderly) for whom exceptions may more readily be made. It is suggested that the introduction by ProBono.Org of a 'financial means test exceptions policy' along such lines would be a more fair and transparent way of ensuring that the *pro bono* briefs assigned to private lawyers are those most genuinely deserving of free legal services.

As a clearing-house which, by definition, outsources virtually all of the actual provision of the free legal services themselves to legal practitioners in private practice acting *pro bono*,[175] its capacity to assist the indigent in civil legal service provision is largely governed by the number and commitment of private lawyers 'on its books'. In June 2014 there were 61 Durban firms of attorneys listed as having provided *pro bono* work referred to them by *ProBono.Org*.[176] Interestingly, it has been reported that there was then (and continues to be) appreciably less *pro bono* assistance provided to ProBono.Org in Durban by advocates (than by attorneys).[177]

3. 3. 1 Clients provided with free civil legal services and other assistance by ProBono.Org's Durban office and lawyers rendering *pro bono* legal services as part of ProBono.Org projects in eThekwini in 2012

In 2012 ProBono.Org in Durban reported opening files for 1141 individuals, community-based organisations or families. The areas of law / types of matters in which assistance was rendered were divorce, family law, pension or provident funds, wills and estates, housing (and evictions), land matters, refugee law, maintenance, and consumer law.[178]

In addition, during the same period, ProBono.Org in Durban telephonically and / or in person consulted with roughly the same number of persons (approximately 1000), the majority of

[175] See the further discussion thereof later in this paper.
[176] This list of participating firms is available on ProBono.Org's website and is updated regularly. ProBono.Org "*Pro bono* panel" (June 2014) http://www.probono.org.za/our-panel/ (accessed 2014-06-14).
[177] Posemann "Personal communication via email from Ms Michelle Posemann" Erstwhile Provincial Director (KwaZulu-Natal) of ProBono.Org (dated 18 June 2014) (copy on file with the author).
[178] ProBono.Org "Annual Report 2012". On file with the writer.

whose matters were found “not to have merit”, or their “problem was essentially not legal in nature”.[179] In other words, these were potential clients consulted with but for whom files were not opened.

In 2012 the weekly-run *Labour Court Help Desk*, a joint project of the South African Society for Labour Law and ProBono.Org, consulted with in excess of 400 persons.[180] The weekly ProBono.Org *Master's Office Help Desk* consulted with another 100 people.[181]

ProBono.Org in Durban regularly runs community seminars on relevant legal topics in eThekwini as well as training sessions for private lawyers. Normally attorneys (and very occasionally advocates) are reported to act as the presenters and facilitators at these gatherings on a *pro bono* basis. In 2012, ten sessions on the subject of wills were held with pensioners or ill persons, and six other community education sessions were provided to the public.[182]

The aforementioned free training of lawyers by other legal practitioners (the trainers having been given this task due to their particular skills and experience) in matters specifically related to *pro bono* legal work should be applauded in so far as it may well encourage a positive cycle in so far as the delivery of *pro bono* services is concerned. In particular, such focused training may expand the capacity (and willingness) of private lawyers to provide free legal services in areas of law that they have not previously worked in - thereby widening the ‘net’ of *pro bono* services potentially on offer to the indigent.

Since 2011, ProBono.Org in partnership with the Constitution Hill Trust, has run a highly informative fortnightly rights awareness radio show called “*Pro Bono* Law” aired on the public broadcaster station *Radio Today* (which is also available on an audio channel of South African digital television heavyweight, DSTV). This radio slot is presented by Mr Patrick

[179] *Ibid*.
[180] The South African Society for Labour Law “*Pro Bono*” http://www.saslaw.org.za/probono_statistics.php (accessed 2014-06-14).
[181] ProBono.Org “Annual Report 2012”. On file with the writer.
[182] *Ibid*.

Bracher, a very experienced attorney from Norton Rose Fulbright South Africa, who also utilises knowledgeable guests appropriate to the legal issue under discussion.[183] A regular, prominent newspaper advertisement (in *The Times* newspaper, which has a national circulation), sponsored by Norton Rose Fulbright South Africa (Attorneys), indicates a few days before each show what the next topic of discussion will be. A useful resource for those with access to the internet are podcasts of all of the "*Pro Bono* Law" shows ever broadcasted, from its inception to the present, which are available (at no charge) via the ProBono.Org website.[184]

The records from ProBono.Org's Durban branch in 2012 show a fairly high number of potential clients consulted with for the first time (given as "approximately 2200") with about half of those said to have been "taken on" as clients[185]. It is somewhat disconcerting that all the figures provided are given as "approximates". One would have thought that precise recording-keeping of exact client numbers - which is surely what donor funders should and would expect - would be non-negotiable. However, this particular flaw notwithstanding, the impressively high (approximated) numbers of both initial potential client consultations held and files actually opened illustrate how far-reaching *pro bono* work by private practitioners (if properly channelled) can be. It also shows how offering telephonic advice (which not many of the other civil free legal service providers in eThekwini offer) can allow an increased number of potential clients to be advised. There are, however, (it is argued) potential drawbacks in offering telephonic advice. Firstly, potential clients who are actually able to afford a lawyer (but might, understandably, rather be helped for free) may make use of the telephonic service, thereby using up valuable staff time which should instead be spent on indigent clients. Secondly, there is likely to be a greater risk of potential clients either misunderstanding what advice is given to them over the phone, or advice is provided to them without the full picture of facts being available to the legal advice giver with a resultant increased risk of the wrong (and often consequently damaging) advice being supplied.

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[183] ProBono.Org "Radio" (June 2014) http://www.probono.org.za/?s=radio (accessed 2014-06-14).
[184] ProBono.Org "Radio Today Podcasts" (2011, 2012, 2013 and 2014) http://www.probono.org.za/our-media/podcasts/radio-today/ (accessed 2014-09-23). By way of example, the topical subject of legal "Class Actions" was broadcast on 14 August 2014. Whilst on 5 June 2014, on the broad topic of "Refugee Rights", Bracher's expert guest was Kaajal Ramjathan-Keogh, the Head of the Refugee and Migrants Programme at Lawyers for Human Rights. Ramjathan-Keogh discussed (significant) recent amendments to regulations in terms of the Immigration Act, focusing on how these changes impact upon refugees. *Ibid*.
[185] ProBono.Org "Annual Report 2012". On file with the writer.

A considerable challenge is the fact that whilst a private attorney or advocate acting *pro bono* will not (and should not) have any expectation of being paid for their *pro bono* work, there remain at least three other types of costs or expenses in such matters which have to be borne by someone. Firstly, in addition to 'professional legal fees' (which are waived when a lawyer agrees to act *pro bono*) there are also *disbursement costs*- for things like sheriff's fees. Whilst a lawyer acting *pro bono* rightly does not receive payment for their free services furnished (due to its altruistic nature), is it fair to expect them to actually incur expenses through having to pay for their *pro bono* clients' disbursement costs? Whilst a large law firm may be able (and willing) to absorb such expenses into a sizeable operating budget, this is much more unrealistic (and perhaps unreasonable) to expect of smaller practices. There is an even a greater challenge in conveyancing matters where significant sums of money may be payable to the state (over and above conveyancer's fees which would be waived when the practitioner acts *pro bono*) in the form of transfer duties and / or bond registration costs before a fixed property may legally be transferred to a new land owner. The same applies to other categories of cases where state-levied 'expenses' are prescribed; such as the costs of registering an antenuptial contract (even where the actual work done by the notary public, like drawing up the antenuptial contract, is done *pro bono*). In other words, even if a conveyancer or notary waives their normal fees (in acting *pro bono*), transfer duties and / or registration fees (amongst other 'expenses' or 'costs') remain payable; this may act as a considerable barrier to effective *pro bono* work in such areas of law. This conceivably explains why, amongst all the reported instances of civil *pro bono* work provided by free legal service providers in eThekwini in 2012, there is *not a single recorded case of a pro bono or 'legal aid' conveyancing or notarial matter*.

There is no evidence that ProBono.Org has yet identified this issue of disbursements and other expenses or costs for indigent clients being assisted *pro bono* as being problematic or implemented mechanism(s) to mitigate it. Such remedial action could take various forms, such as establishing a central fund to cover disbursement and other prescribed costs in *pro bono* cases which could be contributed to by the state (with the funds sourced from taxes), and / or other legal practitioners as part of their *pro bono* contribution[186] and / or by donor funders. Such a central fund for disbursements and other prescribed costs in *pro bono* cases

[186] This possibility of such a 'contribution to *pro bono* costs' could be made (through a rule being created to this effect) a permissible alternative form of mandatory *pro bono* contribution by private lawyers in lieu of performing their own *pro bono* hours. This is relevant to the normative discussion on the merits of voluntary versus mandatory *pro bono* work for lawyers considered later on in this research.

could feasibly be administered by the respective provincial law societies (or the new Legal Practice Council when it becomes operational)[187] or the Attorneys Fidelity Fund.

The second cost-related hurdle in *pro bono* cases arises when a correspondent attorney must be instructed (in accordance with the relevant rules of court) to act as the attorney of record. The instructing attorney may have accepted a *pro bono* mandate, but that does not mean that a correspondent attorney is likewise available to act *pro bono*. A similar, third, challenge exists where an attorney acting *pro bono* wishes to brief an advocate to do an appearance for their *pro bono* client (typically in a superior court), and no advocate is available or willing to accept such a brief *pro bono*.

In an even more challenging scenario, the three above-mentioned (largely) cost-related challenges identified in certain *pro bono* matters (relating to disbursement and other costs as well as potential non-availability of *pro bono* correspondent attorneys and advocates) may well be combined and thereby greatly amplified in a single case. This would occur where both considerable disbursements and other costs are payable (notwithstanding the waiving of legal professional fees in *pro bono* mandates) and a correspondent attorney and advocate are required (or at the very least desirable) but are not available on a *pro bono* basis.

In conclusion, (notwithstanding the challenges highlighted in the previous three paragraphs), ProBono.Org's work (which is entirely civil) in eThekwini - as in Johannesburg - has been largely efficacious in matching worthy, indigent clients with suitable, available private lawyers willing to act *pro bono* on behalf of those particular clients. In addition to facilitating actual (free) legal service provision, ProBono.Org's conducting of community rights awareness workshops can be said to promote access to justice by potentially resolving some issues before they crystallise into legal problems requiring the services of a legal practitioner. Also, its training of lawyers in *pro bono*-related areas of law (ideally and logically on topics most frequently encountered by ProBono.Org's clients) should increase the pool of suitable practitioners available to take on such matters *pro bono*. The use of regular radio shows as a rights awareness tool both increases public exposure to the organisation's existence and

[187] As set out in the Legal Practice Act 28 of 2014 (published on 22 September 2014 in Notice 740, Government Gazette 38022).

operations and provides a mechanism to multiply the number of people who can benefit from the rights awareness provided.

3. 4 Legal Aid South Africa – Durban Justice Centre's Civil Unit

Legal Aid South Africa (formerly called the Legal Aid Board) is a state-funded, albeit independent, statutory body established by the Legal Aid Act 22 of 1969. Legal Aid SA (LASA) provides legal aid primarily in criminal cases and in some categories of civil cases to qualifying indigent applicants who cannot afford to pay for their own lawyer.[188] LASA's 'operating units' are called *Justice Centres*- and these Justice Centres are to be found throughout South Africa. An example of such a unit is the Durban Justice Centre. The operations of the *Durban Justice Centre's Civil Unit* is the focus of this sub-section of this research.

In providing (free) legal aid to deserving and qualifying applicants, LASA gives (or should give) substance to the right to legal representation at state expense provided for in the South African Constitution (discussed above) which it is constitutionally mandated to do.[189] For perfectly equitable reasons, whilst a successful applicant for LASA's legal aid does not themselves have to pay anything for those services, in the instances where a civil judgment is granted in such a client's favour, LASA will recoup the applicable legal costs (only) before paying the balance of the monies money owing over to the client.[190]

In addition to (normally) providing free legal assistance to the indigent generally, the organisation places a particular emphasis on the legal needs (for representation) of certain categories of potential clients it has identified as particularly "vulnerable" to legal exploitation-

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[188] See footnotes 13, 14, 16 and 17 above which clearly illustrate LASA's overwhelming focus (in terms of case numbers over a number of years, continuing to the present) on the provision of legal aid representation in criminal cases over civil matters.

[189] In doing this LASA uses the mantra: "*Giving content to the rights of the poor and vulnerable*" Legal Aid South Africa "Legal Aid South Africa Annual Report 2012/2013" (undated) http://www.legal-aid.co.za/wp-content/uploads/2012/12/Legal-Aid-SA-Annual-Report-2013.pdf (accessed 2014-10-10).
LASA " LASA Annual Report 2012/ 2013 22.

[190] Legal Aid South Africa "Who qualifies for legal aid?" (undated) http://www.legal-aid.co.za/?p=956 (accessed 2014-09-23).

such as children, women and the poor in rural areas. Through its work, LASA seeks to "promote access to justice for all" and improve public confidence in the legal system.[191]

Both due to its prominence as by far the largest provider of free legal (aid) services in South Africa and the fact that most of the various means tests of the other South African free civil legal aid service providers discussed in this paper appear to closely follow LASA's financial means test, makes it necessary and prudent to consider the main elements of LASA's means test. The exceedingly detailed 'rules' and policies of LASA governing who qualifies for its legal aid (both in civil and criminal cases) are to be found in chapter 5 of its 2014 Legal Aid Guide.[192] For the benefit (and better comprehension) of the general public, a useful and much simplified summary of these regulations can to be found on LASA's website.[193] In essence, the LASA means test (or any financial legal aid means test for that matter) aims to "make sure the people we help need our assistance the most".[194] Somewhat oddly, the Legal Aid Act 22 of 1969 does not define who 'qualifies' as an *"indigent person"* and consequently (along with some other criteria and considerations) who should then be applicable for free legal assistance. LASA has for that reason laid down and published its financial means test (which is revised from time to time) to provide a yardstick against which to make this key determination.

In terms of LASA's financial means test (to automatically qualify on financial grounds for what it terms "completely subsidised legal aid"), an applicant living on their own may earn up to R5 500 per month (after allowed deductions, which are mainly for income tax) from *all sources*.[195] Similarly, the net monthly income of an applicant's "household" should not exceed R6 000.[196] In addition, the value of an individual or household's place of residence (if owned by them and that is where they reside) and belongings is limited to a maximum of R500 000.[197] If no dwelling is owned, the total worth of all the belongings a single applicant may possess (and/ or those of their household) should not exceed R100 000.[198] It is

[191] Legal Aid South Africa "About us" (April 2014) http://www.legal-aid.co.za/?p=16 (accessed 2014–04 –25).
[192] Chapter 5 thereof is headed "*Qualifying for Legal Aid*". Legal Aid South Africa "Legal Aid Guide 2014" (2014) 75-92.
[193] Legal Aid South Africa "Who qualifies for legal aid?" (undated) http://www.legal-aid.co.za/?p=956 (accessed 2014-09-23).
[194] *Ibid*.
[195] Clause 5.1.4: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 77.
[196] A "household" is defined as a group of people who live together for at least 4 nights a week, sharing meals and other resources. Clause 5.1.5: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 78.
[197] Clause 5.1.6: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 78.
[198] *Ibid*.

incumbent on an applicant for legal aid to provide "documentary proof of income, value of assets and other relevant information" - which must, wherever possible, be verified by LASA.[199] Importantly, an untrue declaration by an applicant as to any aspect of their income or assets may result both in legal aid being denied to them (or withdrawn if it was erroneously granted on the basis of such false pretenses), and such a dishonest applicant being liable for criminal prosecution for providing false information.[200] The prospects of criminal sanction and / or a denial or withdrawal of LASA's legal aid in the event of an untrue declaration by an applicant of their financial affairs being discovered, are certainly necessary deterrents to unscrupulous applicants attempting to obtain benefits to which they are not entitled.

In addition to individual needs for legal aid, LASA tries to "help as many people who cannot afford help as possible" by, from time to time, taking on carefully selected cases which have "the potential to positively change the lives of a far larger number of people than just the person that we provide legal assistance to" under its "*Impact Litigation Programm*e".[201] Where it must be established whether a group or class of persons qualify for legal aid, the LASA Justice Centre in receipt of such an application for legal aid must ensure that an adequate number of means tests are completed to satisfy LASA that a "substantial portion" of the contingent are indigent.[202]

The LASA means test streamlines and simplifies applications for legal aid by certain categories of applicants. Anyone who is both unemployed and without (other) income or assets, or receives a state social assistance grant (which in itself indicates indigence) - like a state old age pension- *automatically qualifies* for legal aid from LASA.[203] Furthermore, criminal accused who are children also automatically eligible for LASA's free legal representation.[204] However, of more relevance to this research's focus on free legal

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[199] Clause 5.2: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 84. All such documentary evidence (like an official 'salary advice slip'), along with a fully completed financial means test, must accompany the prescribed 'application for legal aid' form. *Ibid*.
[200] Clause 5.2.4: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 85.
[201] Clause 5.1.6: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 78.
[202] Clause 5.1.7: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 79.
[203] Clause 5.1.1: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 75. Applicants to LASA claiming to fall into (one of) these categories are required to prove this state of affairs. For example, a recipient of a state old age pension or another type of state grant should be able to furnish documentary proof thereof from the South African Social Security Agency.
[204] Legal Aid South Africa "Who qualifies for legal aid?" (undated) http://www.legal-aid.co.za/?p=956 (accessed 2014-09-23).

representation in civil matters, is that in civil cases, where a child is not assisted by their parents or guardians, then the above-mentioned, 'normal', LASA means test is applied to that child (to establish their ability to pay for their own legal representative). Where such a child is assisted by his or her parents or guardians, then the latter's financial resources are put under a microscope through these family members of the child having to complete and pass the means test.[205]

When it comes to the nationality of applicants for LASA's legal aid, taking finances out of the equation, free legal representation is available to anyone living in South Africa (i.e. not only South African citizens) in criminal matters, where children are involved or where someone is seeking asylum under the Refugees Act.[206] Tellingly for this research, however, all other civil legal aid from LASA (i.e. not related to asylum applications) is "not available to non-citizens".[207]

An applicant who applies for LASA's legal aid might initially be rejected (in being assessed as not qualifying for assistance.) However, such an applicant still has certain avenues relating to their requested free legal representation from LASA open to them. Firstly, provision is made in LASA's Legal Aid Guide for someone not quite meeting the financial 'indigence thresholds' in the means test to nonetheless have their case accepted by LASA through a *discretion* to take on their matter being exercised in different given circumstances (and within prescribed parameters) by either LASA's "Justice Centre Executive"[208] or its "Regional Operations Executive"[209] as the case may be. Secondly, they have the right (following the prescribed procedure to do so) to 'internally appeal' LASA's decision to refuse them legal aid to LASA's "Constitutional Case Management Committee" (CCMC).[210] In

[205] Clause 4.18.3: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 66.
[206] Clause 4.2.1: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 37. The Refugees Act is Act 130 of 1998.
[207] Legal Aid South Africa "Who qualifies for legal aid?" (undated) http://www.legal-aid.co.za/?p=956 (accessed 2014-09-23).
[208] Clause 5.1.14: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 83. The Justice Centre Executive has the discretion to authorise fully subsidised legal aid in all types of cases for an applicant who exceeds the means test's earning threshold by no more than R1 500 a month. *Ibid*.
[209] Clause 5.1.15: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 84. The Regional Operations Executive has the discretion to allow fully subsidised legal aid for an applicant whose earnings are over the means test by up to R3 000 a month or the value of their assets is no more than R100 000 too high. *Ibid*.
[210] Such an appeal is made to LASA's "Constitutional Case Management Committee" in terms of the steps provided therefor in the "Legal Aid Guide". In the internal appeal process, the applicant for legal aid completes the "Annexure G3" form and must furnish a comprehensive motivation as to why he or she will be unable to afford the cost of their own legal representation from their own resources taking cognisance of their "income, expenditure, assets and liabilities". Clause 5.1.1: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 76.

considering such an appeal, the CCMC may authorise "*partly subsidised legal aid"* from LASA in the form of the legal aid applicant being required to make a (determined) contribution towards LASA's anticipated legal expenses.

It is contended that the 'general rules' applicable to qualifying financially under LASA's means test, outlined in the previous paragraph, are mostly quite straight forward and logically sound. Both the provision of discretionary measures that allow for the possibility of granting legal aid in particularly deserving circumstances (even where the initial financial test is 'failed') and the existence of an internal appeal procedure (to challenge an initial decision refusing the provision legal aid) can be said to increase the likelihood of a just allocation of LASA's limited resources. Likewise, the option of LASA authorising partially subsidised legal aid is equitable in the sense of an applicant being required to share part of their legal costs burden in accordance with their financial position to do so.

As to the 'automatically permissible income thresholds', it could be argued that these are set at such low amounts in terms of the existing cost of living in South Africa (especially when an applicant is having to support an extended family) that many potential applicants for LASA's free legal assistance could earn somewhat in excess of these levels yet still be wholly unable to afford to pay for the prohibitively expensive services of a private lawyer. However, for various reasons, it is argued that this approach of LASA is a reasonable and pragmatic one. Firstly, the always finite legal aid resources which are available should (and must) undoubtedly, first and foremost, be channeled towards those in the greatest financial need of such free legal assistance (over people in the 'not as poor' bracket). In reality there are a multitude of competing and compelling demands on South Africa's limited state resources (to cover other absolutely essential services like primary healthcare, basic education, social assistance programmes and housing or at least shelter, to name but a few). Therefore, without gainsaying the earlier submissions on the pivotal role of free legal services (for those in need thereof) as a leverage device - especially in civil matters - to properly enjoy a range of other legal rights, the logic behind the setting of these (ordinarily applicable) maximum income and ownership levels cannot be justifiably criticised. Secondly, both the 'discretionary procedures' and 'partly subsidised legal aid' possibilities referred to a little earlier, result in LASA's financial means determination being designed in such a way that the door is not entirely closed to some form or degree of legal aid in certain instances even where the above-mentioned financial thresholds are exceeded. Thirdly, somewhat related to

the previous point, the existence of LASA's "Impact Litigation Programme" allows for taking on particular cases which have the distinct potential to positively impact on a broader spectrum of 'needy' and vulnerable people - including some who might just miss out on qualifying financially were they to complete the means test on their own. Fourthly, whilst a person who earns a steady income in excess of the levels automatically provided for by LASA might still struggle to pay for their own private legal representation, they may nonetheless have other options at their disposal which an unemployed person (or someone earning either a minimum wage or having irregular and poorly paid work) would not. Such a person's earnings would in some instances be sufficient for them to obtain some form of '*legal insurance cover*'.

Legal insurance policies are readily available from a growing list of prominent South African commercial operations, like *Legalwise* and *Scorpion Legal Protection* (to name but two of the biggest current players in this market).[211] Such legal insurance companies provide a spectrum of legal services (by qualified lawyers) depending on the legal insurance cover option chosen (and applicable monthly premium paid) by its members. In this prudent way, someone with a stable income but without sufficient means to engage their 'own lawyer' if or when the need arises, may make a monthly contribution to a policy which will offer them (and under some policies their family members too) legal representation to the extent provided for in their contract with the company concerned. Such a setup can have a number of advantages, such as allowing a client in such circumstances to budget in advance for their (continuing) anticipated 'legal expenses' Whilst worthy of further discussion, it will suffice to conclude on this subject that legal insurance has the distinct potential to fill a significant gap in the 'access to a lawyer' market in South Africa, particularly in civil matters which do not form a large portion of LASA's legal aid provision. The 'gap' envisaged relates to those

[211] The websites of these two companies provide examples of the wide range of different legal insurance products on offer in South Africa. Different policies have significantly varying monthly premiums payable by policy holders. This is (seemingly) mainly due to large discrepancies both in the scope of legal matters that different policies encompass and in the maximum annual cover (in money terms) which a particular policy will provide legal services for in a particular case and / or in total. In simplified terms, (analogous with any form of insurance cover) the higher the monthly premium of the product chosen, the more likely it is (and should be) that a broader spectrum of legal concerns are covered by the policy purchased and the higher the maximum annual value of legal services for which the policy holder will be covered.
i) *Legalwise* "Home" (undated) http://www.legalwise.co.za/ (accessed 2014-09-25). The cheapest cover available through *Legalwise* currently starts at "R74 per month" which provides annual cover for legal fees of "up to R74 000 per case". *Ibid*.
ii) *Scorpion Legal Protection* "Home" (undated) http://www.scorpion.biz/ (accessed 2014-09-25). *Scorpion's* entry-level cover (which, for example, *excludes* "business-related matters" and "matrimonial matters") comes in at "R41 per month" and provides an annual "R50 000 worth of legal cost cover per claim" with a further cap of R50 000 on the costs of all combined claims in a year. *Ibid*.

earning (or owning) too much to be considered for free legal aid services (by LASA or other free legal service providers) yet not earning or owning enough to be expected to be able to afford to pay for their own legal practitioner (without legal insurance) if or when the need arises.

In commenting on LASA's provision of free legal services to children, it is clear that the fact that a criminally accused child automatically qualifies for LASA's free criminal legal aid accords with such a child's constitutional right to such (criminal) representation - as was discussed earlier. However, just as noticeable is the lack of any special dispensation in a child's application for civil legal aid from LASA; where either the child or (if relevant) the child's parents or guardians must pass the normal LASA means test.[212] It is submitted that this stark discrepancy between LASA's patent prioritising of the criminal legal representation needs of children over children's requirements for civil legal aid is indicative of the organisation's undeniable and considerable overall emphasis on criminal rather than civil legal aid provision. Owing to the special vulnerability of children, it is submitted that LASA's case acceptance policies relating to civil cases of children should be expanded to be more in line with the type of prioritisation which the organisation already gives to the legal representation of children in criminal cases.

When it comes to the nationality of applicants for LASA's free legal services, the fact that 'non-nationals' do qualify for legal aid in criminal matters, where children are involved or where someone is seeking asylum status has been noted already.[213] This provision of LASA's free legal services to 'non-South Africans' in such cases is welcomed on the basis that such applicants have (typically) been uprooted from their home countries, almost invariably leaving them economically and socially isolated and vulnerable. Such socio-economic vulnerability then provides fertile ground for their legal rights to be trampled upon too. However, the absolute bar on LASA's legal aid being provided in all (other) civil matters (not related to asylum applications) to non-citizens,[214] is concerning to say the least. This point is made on the basis that the just-mentioned vulnerability of displaced foreigners does not end with the very short list of types of cases in which LASA will assist such clients. To

[212] Clause 4.18.3: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 66.
[213] Clause 4.2.1: Legal Aid South Africa "Legal Aid Guide 2014" (2014) 37.
[214] Legal Aid South Africa "Who qualifies for legal aid?" (undated) http://www.legal-aid.co.za/?p=956 (accessed 2014-09-23).

the contrary, displaced 'non-nationals' and their families in South Africa, battling to rebuild their lives there, may often face unlawful 'threats' on a whole range of civil issues. It is therefore strongly submitted that LASA's client admission policies need to been urgently revisited (and widened) in so far as free legal representation to (financially needy) 'non-nationals' in South Africa is concerned. At the very least, for the urgent and compelling interests of promoting justice, equity and dignity for all in South Africa, the same bouquet of LASA's free civil legal aid services currently available to South Africans should be extended to these 'non-nationals'.

It now only remains under this sub-heading to briefly consider the available records of civil legal services of the Durban Justice Centre's Civil Unit in 2012. The (reported) total number of civil cases it "accepted" in 2012 was 2606 whilst it "declined" 19 civil cases. The total number of so-called "walk-in" (potential) clients in civil matters consulted with by the Unit's staff during 2012 was 6747.[215] The "accepted" civil cases were categorised under the following headings: "childrens' (civil) legal issues"; "family law matters"; "labour law"; "land matters'"; "applications"; and "other civil matters".[216]

A few comments and conclusions are drawn from the Durban Justice Centre's Civil Unit's statistics for 2012. It is immediately apparent (when compared with the figures of all the other free civil legal service providers in eThekwini analysed in this part of the research) that this Unit deals with a very high volume of requests for civil legal aid / assistance. However, the available statistics do not reflect whether or not all those who applied for or requested legal assistance from the Unit were in fact consulted with, or if not, the proportion of such potential clients who were given an initial consultation. From the perspective of gauging the extent and nature of the requests (and need) for its civil legal aid, it would be useful for the Durban Justice Centre's Civil Unit to record this extra piece of information. This extra 'layer' of records could also help this particular branch of LASA (and LASA at a regional and national level) to engage in more effective strategic planning as to any shifts in its operations or organisation which would be necessary or advisable to achieve any pressing or large-scale unmet civil legal aid needs.

[215] Legal Aid South Africa, Durban Justice Centre "Annual Statistics 2012". On file with the writer.
[216] *Ibid*.

It is reasonable to suggest that with such a high number of requests for legal assistance, especially taking the form of merely providing initial advice, it is likely that paralegals could play a positive role (if this is not already being done) in assisting many of these potential clients particularly at the first consultation stage.[217] This last point is made especially in the context of the Durban Justice Centre's Civil Unit recording having consulted with a staggeringly high "6747 walk-in (prospective) clients" in 2012.[218] This figure totally dwarfs the reported number (often many times and even more than ten-times over) of all the potential clients consulted with by every one of the other civil legal aid providers in eThekwini in the same year. From this one may conclude that either the Unit is operating on such an impressive and large scale that eThekwini's other civil legal aid providers should be strongly urged to attempt to emulate this LASA Civil Unit's *modus operandi* or there exists a tangible need for an independent verification mechanism over all civil legal aid 'initial consultation' and 'files opened' statistics to safeguard their reliability.

The above case statistics for 2012 provided by the Durban Justice Centre's Civil Unit also raise some issues as to an absence of clarity in certain respects. Firstly, there is a major discrepancy between the total number of 2606 civil cases it reported as having "accepted" in 2012, versus the figure of 1634 cases which one arrives at when adding up the six categories of (all) cases cited from LASA's records above for the Unit as having had "files opened".[219] Whilst even the (far lower) total of 1634 files opened at the Durban Justice Centre's Civil Unit's in 2012 would still be an impressive output, the unexplained conflict between these two sets of figures is cause for concern which should be urgently addressed by LASA. It is therefore reiterated that all the case figures supplied (both to date and going forward) should be subject to ideally independent or external verification. Such an 'audit' would add credence to the reliability of the statistics provided by both double-checking their accuracy and safeguarding against the existing record-keeping techniques conceivably being open to misinterpretation. For the sake of better accountability (to donor funders, the

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[217] Consider the later detailed discussion on this and other existing and proposed roles of properly trained and supervised community-based paralegals in promoting better access to civil justice in South Africa. On the effective utilisation of paralegals, it should be noted that a constructive role for paralegals (in increasing LASA's capacity to assist applicants for legal aid) is also to be found in LASA's "Legal Aid Guide" which specifically lists "*paralegals* at Justice Centres" as being among those "persons (who) may receive legal aid applications…". Clause 5.5.1(e): Legal Aid South Africa "Legal Aid Guide 2014" (2014) 88.

[218] Legal Aid South Africa, Durban Justice Centre "Annual Statistics 2012". On file with the writer.

[219] This (seemingly contradictory) total of 1634 files opened in 2012 is arrived at by adding the number of "files (reportedly) opened" under each of the six (broad) categories of cases delineated as follows: 513 (childrens' civil matters), 413 (family law), 157 (labour law), 215 (land matters), 124 ("applications") and 212 ("other civil matters").

indigent public served and other relevant stakeholders) it is contended that such an audit of service delivery output would be equally valuable (and necessary) for all the other civil legal aid service providers discussed in this research paper.

Secondly, the aforementioned work records of the Durban Justice Centre's Civil Unit for 2012 indicate that (only) 19 civil cases were "declined" by this particular Unit in 2012. This would seem to be a remarkably low 'case decline rate figure' in comparison with both the exponentially higher reported number of potential clients who received an initial consultation with the Unit during that year and the number of files recorded as having been opened. This exceedingly low reported case decline rate is also very substantially lower than the 'cases declined rate' reported by virtually all of the other civil legal aid providers in eThekwini in the same year. However, from the Durban Justice Centre's Civil Unit's records themselves (cited above) it becomes clear that it has adopted a very narrow interpretation of 'declined cases' which may, at least partly, explain this ostensible anomaly. This last point is made on the basis that evidently none of a total recorded number of 656 "referrals" to other organisations in 2012 were classified by the Unit as having been 'declined'.[220] It is respectfully argued that to exclude from the list of 'declined matters', *cases not taken on* when referred to another organisation, could results in incomplete or misleading statistics. It would be perfectly logical, acceptable (and even advisable) for the Durban Justice Centre's Civil Unit to differentiate between matters rejected outright and cases referred to other bodies, with appropriate referrals being an important task in their own right. However, its current approach of not classifying matters referred to other organisations as having been declined by LASA results in what could be considered as not particularly clear records.

The last concern relating to the case statistics of Durban Justice Centre's Civil Unit pertains to a perceived lack of clarity or sufficient particularity in some of the classifications of types of cases it utilises. Firstly, whilst some of the categories into which it attempts to slot its cases (like "labour law" and "land matters") are reasonably clear (although even these could and should arguably be broken down further to give an enhanced picture of the main civil legal issues faced), the same cannot be said whatsoever for some of the other classifications it uses. For example, both their "children's matters" and "family law matters" should logically

[220] This figure of 656 referrals to other organisations in 2012 is arrived at by adding the number of reported "referrals" under each of the six (broad) categories of cases delineated as follows: 88 (childrens' civil matters), 18 (family law), 110 (labour law), 50 (land matters), 19 ("applications") and 317 ("other civil matters").

be broken down into further sub-categories. 'Children's matters', for instance, could be more meaningfully sub-categorised under various more specific headings, like "care for children" and "contact with children" (which are actual terms used in the Children's Act pertaining to parental responsibilities and rights)[221], plus additional sufficiently descriptive sub-headings of classes or types of cases directly involving children. Similarly, so-called 'family law matters' would be far more accurately recorded were it to be broken down further into categories like 'divorce', 'adoption', 'maintenance' and so on. Also, the category of cases listed as "applications" is cryptic to say the least; are these court applications (or even all applications for legal aid) - and if they are court applications, what type of applications are they and in what courts or other legal forums have they been brought? Finally, LASA and this particular Unit of LASA's extensive use of the category "other civil matters" (which accounted for over 30 percent of the total number of potential clients with whom a first consultation was held that year) is problematic in the sense of being so vague as to be totally unhelpful.[222] It is therefore not difficult to conclude that rather than utilising such a sweeping, non-descriptive 'catch-all' classification (of "other civil matters") which applies to so many of its prospective clients, LASA's Durban Justice Centre Civil Unit needs to create a number of additional categories of case-types into which most of these 'other cases' can be then be properly and accurately allocated.

Over and above the aforementioned legal service provision output of the Durban Justice Centre's Civil Unit itself needs to be added the fact that nationally LASA offers members of the public free basic telephonic legal advice (which relates to all types of legal concerns).[223] The existence of LASA's telephonic legal advice bureau can certainly be said to aid or at least potentially augment LASA's work throughout South Africa. For instance, a telephonic client from a particular region with a legal problem requiring more than just initial telephonic advice could be easily referred to LASA's closest justice centre to such a person for face-to-face assistance which might lead to such a potential client's matter being opened as a file by LASA.

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[221] Children's Act 38 of 2005.

[222] Legal Aid South Africa, Durban Justice Centre "Annual Statistics 2012". On file with the writer. The average of 910 initial consultations held per other case category is calculated by adding up the recorded totals for each of the other five case categories for the Unit in 2012 (which were respectively 1120, 1151, 745, 1277 and 260) and then dividing that total by five. The recorded figure for the Unit in 2012 of 2194 consultations held with "other civil matter" potential clients is 30.75% of the total number of 6747 new potential client consultations undertaken.

[223] This "Civic Legal Advice Call Centre" of LASA is available toll-free in South Africa at telephone number 0800110110. Legal Aid South Africa "About us" (April 2014) http://www.legal-aid.co.za/?p=16 (accessed 2014–04 –25).

3. 5 Legal Resources Centre, Durban Office

The Legal Resources Centre (LRC) is an independent, non-profit, public interest law firm with offices in four centres in South Africa, one of which is in eThekwini / Durban. It is "South Africa's largest public interest, human rights law clinic"[224] and was established in 1979 (as a major force for positive change in the anti-apartheid movement). It has similar clientele to the aforementioned organisations - that is the poor and otherwise vulnerable members of society who suffer unfair discrimination. However, unlike most of the other organisations which tend to have a focus on individual clients, the LRC focuses more on impact litigation, often on behalf of groups of affected people. The LRC does attempt to assist individual clients with advice mainly through use of its paralegal staff. The LRC seeks to promote democracy and protect the rights of its clientele thereby being an instrument for positive social and economic change. It uses a range of strategies, including the aforementioned impact litigation, law reform, partnerships with other organisations and education and networking both within South Africa and beyond its borders.[225]

Interestingly, despite being registered as a 'law clinic' with the KwaZulu-Natal Law Society, the LRC in Durban was not able to provide a financial means test when requested to do so.[226] Nor do the LRC's three most recent Annual Reports (for the period 2010-2011, 2011-2012 and 2012-2013)[227] or the organisation's website[228] make any mention of the existence or use of a financial means test when it comes to deciding what matters should qualify for free legal assistance with the organisation.

[224] Legal Resources Centre "Welcome to the Legal Resources Centre" (undated) http://www.lrc.org.za/ (accessed 2014-09-20).
[225] Legal Resources Centre "Mission and vision" (June 2014) http://www.lrc.org.za/about-us/mission-vision (accessed 2014-06-02).
[226] Chetty "Personal communication via email from Mr Mahendra Chetty" Erstwhile Provincial Director (KwaZulu-Natal) of the Legal Resources Centre- now Judge of the KwaZulu-Natal Provincial Division of the High Court of South Africa (dated 2014) (copy on file with the author).
[227] Legal Resources Centre "Annual Reports" (2010-2011, 2011-2012 and 2012-2013) http://www.lrc.org.za/publications/annual-reports (accessed 2014-09-20).
[228] Legal Resources Centre "Website" (2014) http://www.lrc.org.za/ (accessed 2014-09-20).

This apparent lack of any financial means test (or at least use thereof) might be ascribed to the LRC's renowned track record for taking on (worthy) cases in the public interest. Therefore it might be assumed that the LRC's choice of cases it accepts invariably fits within this mould, by assisting only those in most need. This focus of the organisation is reflected in part of its mission statement including the stated aim:

> "To function as an independent, client-based, non-profit public interest law clinic which uses law as an instrument of justice and *provide legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities* of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances."[229] (Own emphasis added).

As a registered 'law clinic', the governing legislation (being the Legal Aid Act 22 of 1969) has as its stated object "to render or make available legal aid to indigent clients" (*only*).[230] Whilst the term "indigent" is not defined in the Act, all registered free legal service providers (like Legal Aid SA, university law clinics and the LRC) are *required* to adopt a financial means test to ensure that only suitably qualifying clients are assisted. It is therefore not only logical from the perspective of ensuring that only suitably needy clients are assisted, but also a clear legal requirement for the LRC to utilise an appropriate means test apropos all applications to it for free legal assistance. Failure to do so could even result in its status as a registered 'law clinic' being withdrawn by the respective provincial law societies. Whilst unquestionably laudable in its objectives, the (above quoted) section of the LRC's mission statement needs to be concretised into an actual (definitive) financial means test - which must be consistently applied to all applications to it for 'legal aid' for the reasons just stated.

As to legal services provided, the total number of so-called 'walk-in' clients consulted with at the LRC in Durban in 2012 was 1426.[231] This figure can be seen as a combination of two categories: 'requests for legal assistance' and 'new potential clients consulted with' (as it seems that all those requesting an initial consultation were seen). The LRC offices in Durban

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[229] Legal Resources Centre "Mission and vision" (June 2014) http://www.lrc.org.za/about-us/mission-vision (accessed 2014-06-02).
[230] Act 22 of 1969
[231] Rather than consulting for the first time with the vast majority of its new (potential) clients by way of pre-made appointments, the LRC in Durban instead adopts a 'first come, first served' service whereby walk-in (potential) clients are seen (almost always by a paralegal in the first instance) without a prior appointment having been made.

also reported making 316 “referrals” to other organisations in the year; these ‘referred’ matters were also categorised by them as “declined cases”. That there have been referrals made, however, does not indicate the success or not of such a referral in the sense of whether the person referred was actually successfully assisted by the body to which they were referred.

The total number of new cases “taken on” by the LRC in Durban in 2012 was reported to be 1110.[232] It is not clear whether this figure reflects only ‘files (actually) opened’, or whether it includes all matters where people off the street were assisted in the sense of both files opened and instances where only advice was furnished at an initial consultation (almost always with a paralegal) without the case being taken further by the organisation. The highest volume of cases in the 12-month period for 2012 related to “death benefits” (broadly defined it seems), be they (state) social grants queries or private provident or pension benefits issues or other “benefits” being sought by family members on the death of their breadwinner.[233] The LRC’s report ascribed its high number of “death benefits” case in the year largely to the Durban branch of the Black Sash (which has offices in the same, ‘Diakonia Centre’, building in central Durban as the LRC) no longer taking on new social grants matters in comparison with previous reporting periods.[234] In particular, the Durban LRC branch encountered numerous difficulties with different types of state social assistance grants that had been rejected without applicants having been provided with a full explanation of the decision or evidence supporting the decision reached. Pension benefits sought by dependents of deceased state employees also gave regular problems and there was also a relatively high volume of cases on issues relating to body corporates of sectional title schemes.[235]

It is apparent that the Durban office of the LRC deals with a high volume and variety of civil cases. Significantly, the aforementioned statistics do not illustrate which of these cases or categories of cases the LRC has taken on as strategic litigation, as opposed to out of court largely by way of their paralegals providing legal advice only. Clearly the time spent on the former category of cases way exceeds that expended on the latter type of cases, and there

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[232] Legal Resources Centre, Durban, Annual Statistics 2012. On file with the writer.
[233] Their combined number of “state social grants cases , private provident or pension benefits issues” in 2012 was 187. In the same period the number of (other) “company death benefits” matters was 257. Legal Resources Centre, Durban, Annual Statistics 2012. On file with the writer. From the way that these statistics were recorded, it is difficult to illicit quite what would have differentiated “company death benefits” from private provident or pension benefits issues” in certain instances.
[234] *Ibid.*
[235] *Ibid*.

is inevitably a much greater impact from a strategic litigation intervention than for an individual with a particular legal problem for which only basic advice is provided.[236]

3. 6 The Black Sash - Durban Regional Office

The Black Sash was a prominent anti-apartheid human rights organisation and has been in existence for very nearly 60 years. Significantly for this study, whilst continuing to run as an advice office centre, as of 2012 - as a direct consequence of the Black Sash throughout South Africa having faced severe financial challenges since then - the Durban Black Sash branch ceased to operate as a fully-fledged law clinic with its strategic move instead towards the advocacy, monitoring and training aspects referred to below.[237] The organisation seeks to combat the chronic poverty and inequality affecting a large percentage of the population. Since 2012 the Black Sash has worked in three main arenas, with an emphasis on women and children: rights-based information, education and training provision, monitoring in the community and advocacy partnerships.[238] The following extract from a public statement by the (national) Board of Trustees of the Black Sash indicates its focus on the special needs of the vulnerable poor in South Africa:

> "The Black Sash believes that at this time in the history of South Africa, and of our organisation, the most urgent issues to be addressed are the on-going poverty and inequality afflicting the lives of the most vulnerable members of our society. South Africa cannot be free as long as the majority of its people continue to live under conditions of deprivation and injustice. We are affected and diminished by this....We therefore commit ourselves to foster, support and encourage community initiatives to monitor, record and analyse the socio-economic conditions prevailing in South Africa."[239]

The Black Sash also provides a "free national telephonic legal helpline" manned by trained and experienced paralegals.[240] It is not possible to determine from available records how

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[236] The LRC's 2012-2013 "Annual Report" illustrates some of the key strategic cases undertaken by its Durban offices during this period. In this regard see Legal Resources Centre "Annual Report 2012-2013" http://www.lrc.org.za/publications/annual-reports (accessed 2014-09-20).

[237] The Black Sash "About" (May 2014) http://www.blacksash.org.za/ (accessed 2014-05-12). This paper consequently considers the Black Sash's legal service provision in less detail.

[238] *Ibid*.

[239] The Black Sash "About the Black Sash" (November 2012) http://www.blacksash.org.za/index.php/about-the-black-sash (accessed 2014-10-03)

[240] The contact number for the Black Sash's "free national telephonic legal helpline" is a cellular number (0726633739). This is noted here in that whilst no charge is levied by the organisation for the telephonic assistance rendered by its paralegals, the cost of the telephone call is payable by the clients utilising the service.

many eThekwini clients have been and are assisted by this national telephonic helpline. However, according to the Regional Manager of Black Sash's Durban Office, with the move (from 2012) away from operating as a dedicated 'legal aid provider', the Black Sash has "prioritised (their) National Helpline as a referral source to beneficiaries".[241] Earlier parts of this paper have already pointed out the valuable resource which such a telephonic legal helpline may provide whilst at the same time being mindful of its inherit limitations and possible drawbacks.

The Black Sash has always had a strong advocacy focus, for example seeking to broaden the coverage of social security grants and other aspects of the social security system. Whilst losing some of its identity as a provider of legal services in recent years, the organisation has continued to champion the rights of consumers and in this regard has been involved in class action litigation against those involved in fixing the bread price. An important part of its work has been the establishment of working relationships with over 400 community-based organisations in South Africa.[242]

The very limited staffing resources of the Black Sash in Durban[243] are indicative of the chronic funding crises that the Black Sash nation-wide has endured since 2012. An absence of administrative support staff will almost invariably hinder the lawyers and paralegals in a legal aid office from being able to fully and properly concentrate their efforts on the already considerable task of legal service delivery. It is virtually certain that the decidedly low client number of files opened for clients at the Durban Black Sash Office in 2012 (which will not be focused on here)[244] can largely be attributed to a mixture of inadequate staffing resources, insufficient funding to properly run the operation and the concomitant strategic move away from its operating as a fully-fledged law clinic.

With South Africa's notoriously high cellular telephone costs (by world standards), this could be a factor which constrains its usage. This can be contrasted with the toll-free legal helpline offered by Legal Aid South Africa, discussed in an earlier section of this paper. It is clearly preferable to be able to offer clients (the main target-market of which is the indigent) a toll-free service. However, having a toll-free contact number would have cost implications for the service provider - and it has already been seen that the Black Sash's financial stakes are already precarious. LASA, by comparison, as a state-funded entity benefits from a funding source which is both deeper and more reliable (than the typically transient, 'outside' donor-funding on which virtually all South African NGO's have to turn to).

[241] Naidu. Personal communication via email between the writer and Ms Evashnee Naidu Regional Manager of Black Sash's Durban Office dated 27 June 2014 on file with the writer.

[242] The Black Sash "Board of Trustees Statement (November 2012) http://www.blacksash.org.za/index.php/about-the-black-sash/about-the-black-sash (accessed 2014-06-02).

[243] The Black Sash "Our staff" (2014) http://www.blacksash.org.za/index.php/about-the-black-sash/our-staff (accessed 2014-10-03).

[244] These very few opened files involved "social insurance" or "social assistance", "citizenship and permanent residence" and "employment" issues. Rayner. Personal communication via email between the writer and Ms Shanaaz Rayner, Black Sash (National) Data Administrator dated 13 August 2014 on file with the writer.

It is apparent from the very few files opened by the Durban Black Sash Office during the whole of 2012, that the branch had by then "ceased to operate as a fully-fledged law clinic".[245] However, due to a lack of records kept (or provided) as to members of the public who merely received basic legal advice without a file being opened for them, it is not possible to comment as to the Office's work even as just a legal advice office in 2012. It is imperative for the Durban Regional Office of the Black Sash, even if it continues not to operate as a fully-fledged law clinic, to keep far more detailed records as to all clients it assists, including where 'advice only' is dispensed. Failure to do so could compromise the limited donor funding still being received by the organisation and could even call into question the genuine value of its continued existence. Furthermore, it also makes sense for the organisation to refer potential clients to other free legal service providers in eThekwini and to keep comprehensive records of such referrals. The aforementioned situation shows that it is extremely testing to run such a legal aid operation with insufficient human and financial resources, not to mention various other hurdles which might be being encountered by the Durban Black Sash Office.

3. 7 The Community Law and Rural Development Centre (CLRDC)

The CLRDC is a non-profit organisation, started in 1989, largely to support the work of paralegals in KwaZulu-Natal and the Eastern Cape.[246] Through its support of community-based paralegal work the Centre has sought to promote access to justice, democracy and good governance, improved human rights, gender equality and development. It provides on-site support, checking and evaluation of the work of community-based paralegals. The CLRDC has established and sustained a wide network of 30 community-based advice offices with a presence in 29 of 51 local municipalities in KwaZulu-Natal and parts of the Eastern Cape. Each community-based advice office is run by qualified and suitably experienced paralegal staff who provide basic access to justice to their clients. In addition to training paralegals themselves the organisation also trains local traditional leaders (called 'Amakosi' in the local language of *isi-Zulu*), paralegal advice office management committees and members of the community (using accessible learning material translated into *isi-Zulu*).

[245] The Black Sash "About" (May 2014) http://www.blacksash.org.za/ (accessed 2014-05-12).
[246] The CLRDC is not a registered 'law clinic'.

To meet its goals the organisation partners with various other establishments to promote justice for vulnerable groups. The CLRDC lobbies and advocates for policy and legal reforms. Its work extends beyond the legal realm into civic and voter education and election observation.[247]

3. 7. 1 Legal assistance and training provided in 2012 by the CLRDC

There were 4712 (reported) requests for legal assistance from CLRDC staff in the year - this same number of potential clients were consulted with. The majority of these people were referred onto other legal service providers for assistance. Of this total figure, 579 new files were opened and 283 files were finalised.[248] The CLRDC also conducted 66 community education workshops with 1425 participants.

Points which can be noted from the CRDC's 2012 case and training statistics are the following:

That the organisation was able to consult with all persons who requested it for legal assistance illustrates the value of having a large contingent of paralegals to screen and consult with would-be clients for the first time.[249] The largest number of cases (well over half the total for the year) were to do with social assistance grants, dependent's benefits and pension or provident funds. These aforementioned case categories can be said to typify the most common types of civil legal problems faced by the indigent in eThekwini as they all relate, broadly speaking, to forms of financial assistance sought by the poor to ameliorate their difficult socio-economic circumstances. What this means is that by providing comprehensive training to community-based paralegals in these areas of law will empower them to provide basic legal assistance for most of the legal problems faced by the poor in eThekwini and the surrounding areas served by the CLRDC.

[247] The Community Law and Rural Development Centre "About us" (June 2014) http://clrdc.org.za/?page_id=7About us (accessed 2014-06-02).
[248] CLRDC Annual Statistics 2012. On file with the writer.
[249] In 2012 the CLRDC had 31 community-based paralegals spread amongst its various offices. The CLRDC does not employ any attorneys or advocates. CLRDC Annual Statistics 2012 (on file with the writer).

The 66 education workshops in 2012 run by CLRDC staff for members of the community indicate an important role of this body (and of community-based paralegal organisations generally) in educating people about their rights and how to enjoy them. Rights awareness training is critical to establishing a human rights culture as people cannot properly realise their legal rights without being aware what such rights involve and how to go about protecting such rights.

The fact that the significant majority of the 4712 requests for legal assistance were referred to other service providers indicates the nature of the organisation as largely a referral body; this is not atypical for a paralegal structure like the CLRDC which has been noted is not a registered 'law clinic'. However, what the statistics do not indicate is how many of this large number of 'referrals' could be or were actually assisted by other service providers.

A significant difference between the CLRDC's method of service delivery and the other (above-mentioned) free civil legal service providers in eThekwini relates to the place of service delivery. The CLRDC takes its legal services to the people in outlying areas through its network of community-based advice offices whilst the other organisations all have central offices in eThekwini / Durban to which clients must travel. Such travel takes time, energy and money. When one considers that the clientele are by definition indigent (and often further disadvantaged by factors like old age and disability), this appears to be a major advantage of the CLRDC's service delivery method in comparison with the other free legal service providers in the greater Durban metropolitan area of eThekwini.

3. 8 The KwaZulu-Natal (KZN) Society of Advocates (Durban)

Unlike the aforementioned seven non-profit organisations, the KZN Society of Advocates (Durban)- hereinafter referred to as the Durban Bar- does not exist per se as a free legal service provider. Rather, what is discussed here is the *pro bono* work done by the Durban Bar and its members. In 2012 the Durban Bar had 285 members.[250]

[250] General Council of the Bar. "*Pro Bono Statistics for 2011-2012*" (undated). On file with the writer. Of this 285, 6 were associate members, 1 retired member and 1 honorary member- none of the latter three categories are allocated *pro bono* matters.

The KZN Society of Advocates is a constituent member of the General Council of the Bar of South Africa (the GCB). The GCB adopted its own rule 5.12.4 in July 2002 whereby it became obligatory for members to do *pro bono* work.[251] However, rules of the GCB only become binding on its members when made a rule by their local Bar and enforcement takes place at that level.[252] It is however, relevant to note developments at a GCB level which may impact upon *pro bono* work by the Durban Bar. The Legal Services Charter proposes *pro bono* work being conducted by advocates in private practice and pro bono work by advocates is prescribed in the new Legal Practice Act.[253] The Charter even envisages a score card for such work conducted by advocates.[254]

In terms of the "*Pro Bono* Rules" adopted by the KZN Society of Advocates, "every member of the Bar of more than three years' standing is required as from 1 May 2008 to render a minimum of twenty hours of *pro bono* services each calendar year."[255] Rule 8 thereof provides that each member is required to file with the (KZN) Bar Council a certificate indicating the nature of *pro bono* work performed in the preceding year and the number of hours rendered. Should a member have performed fewer than 20 hours in a year, their certificate is to include an explanation for the shortfall.[256] Where someone has rendered more than 20 hours, then such extra hours may be carried forward to count towards the next year.[257] Where a member fails to timeously file a *pro bono* certificate or renders less than 20 hours in a year without satisfactory explanation, this is considered "unprofessional conduct".[258] A "regular defaulter" in this regard risks "disciplinary action that may take the form of suspension from practice".[259]

3. 8. 1 *Pro bono* legal assistance reported as having been rendered by members of the KZN Society of Advocates (Durban) in 2012

[251] GCB Constitution. Rules of Ethics. Rule 5.12.4 (Adopted July 2002).
[252] This is made clear on the GCB's website. General Council of the Bar of South Africa "About the General Council of the Bar" (undated) http://www.sabar.co.za/about.html (accessed 12-10-2014). This is stressed by the GCB's Rules of Ethics: Rule 5.12.4 indicating that the "*local Bar Council shall require* its members to undertake *pro bono* work…" (own emphasis added).
[253] Legal Practice Act 28 of 2014 (published on 22 September 2014 in Notice 740, Government Gazette 38022).
[254] Article 4.2 of the Legal Services Charter.
[255] KZN Society of Advocates. *Pro Bono* Rules. Rule 1.
[256] KZN Society of Advocates. *Pro Bono* Rules. Rule 9.
[257] KZN Society of Advocates. *Pro Bono* Rules. Rule 10.
[258] KZN Society of Advocates. *Pro Bono* Rules. Rules 11 and 12.
[259] KZN Society of Advocates. *Pro Bono* Rules. Rule 12.

As a referral profession the work done by advocates differs from attorneys in so far as advocates do not take work direct from clients but rather on brief from instructing attorneys. Each advocate has their own private practice and are voluntarily members of the Society of Advocates / 'the Bar'. It is therefore not too surprising that the Durban Bar has not kept records of 'requests for legal assistance', 'potential clients seen' or 'files opened or closed'. Instead records simply indicate the number of *pro bono* cases in which its members have appeared, the number of *pro bono* hours spent on those matters and the type of case. Only 27 members performed (recorded) *pro bono* work in the year. No reasons were provided for other members who did not do *pro bono* work. The total number of hours of *pro bono* work for 2012 amounted to 171.3.[260] This low number of participating advocates and low number of total hours performed mirrored the figures from 2010 and 2011. In 2010, 18 advocates at the Durban Bar took on *pro bono* work and the year after that 28 members performed between them 146 hours of *pro bono* work.[261] According to the Durban Bar Council the aforementioned statistics do not reflect al the *pro bono* work done by its members as "considerably more of such work was undertaken by our members" in so far as not all work was reported to the Council.[262] However, it is submitted that one can and should only consider the recorded / verified *pro bono* work of members. In any event it has been noted that part of the duty to perform *pro bono* work is to certify the work done.[263] Therefore to say after the fact that more *pro bono* work was done than has been recorded is not a justifiable position. A more worthy concern, if it is borne out by the facts, is the argument by some members of the Bar in different parts of the country that a lack of *pro bono* work by advocates may be due to insufficient referrals or requests for assistance.[264] However, the case statistics from the different free legal service providers in eThekwini discussed in this paper seem to show that there is plenty of *pro bono* work for the indigent there which would benefit from advocates' considerable expertise. There is therefore the need to properly harness advocates' *pro bono* work as part of a comprehensive network of free legal services for the indigent.

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[260] 2012 Annual Report KZN Society of Advocates. This includes the *pro bono* hours of 21 of the 27 advocates mentioned; the remaining six did not provide information as to their *pro bono* hours performed to the Durban Bar.
[261] Society of Advocates of KwaZulu-Natal. Bar Council Report (2013). No number of hours of work was recorded for 2010.
[262] KZN Society of Advocates. Bar Council Circular - September 2013.
[263] KZN Society of Advocates. *Pro Bono* Rules. Rule 8.
[264] Advocate TN Aboobaker SC, Chair of the GCB's *Pro Bono* Committee. Email to members of *Pro Bono* Committee 28 February 2014.

There is a distinct disjuncture between what is theoretically expected of advocates in eThekwini/ Durban in terms of *pro bono* work and what is actually being performed or enforced. In theory all advocates (of at least three years' standing) should perform 20 hours of such service annually.[265] However, in 2012 less than ten percent of members performed to this level (27 out of 285). Even amongst those who did do some *pro bono* work, the average time spent was just 6.3 hours in the year.[266] And yet there is not one report of a member of the Durban Bar ever having faced disciplinary action for failing to perform any or sufficient *pro bono* work. This is perhaps not surprising when one considers that in 2012 over 90% of members performed no recorded *pro bono* work and those who did do some averaged a little over 30% of the expected time. Were disciplinary action to be instituted as provided for by the KZN Society of Advocates for breach of (the aforementioned) *Pro Bono* Rule 11 and 12 for failing to perform *pro bono* work or report on *pro bono* work performed, then virtually all members would face disciplinary measures. In so far as the aforementioned statistics show this state of affairs as having existed for some years, most members would or should be considered "regular defaulter(s)" and hence face a possible sanction of "suspension from practice".[267] Quite clearly, therefore, there exists a considerable disparity between, on the one hand, the theoretical requirements of Durban advocates (at the Bar) to perform a set amount of *pro bono* hours annually, and on the other, the lack of adequate (and often any) performance and a concurrent lack of sanction for non- or under-performance. Something has to be done to ensure a vastly improved uptake in *bro bono* work by advocates; if this is not done *mero motu* by the constituent Bars, it will surely be imposed by government legislation or regulations.

The statistics provided above should be seen in the context of advocates already not having to perform as many *pro bono* hours annually as attorneys.[268] In addition, the GCB rules provide under the heading "*pro bono* work" that 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".[269] It is argued that to consider contingency fee work as *pro bono* work is fundamentally wrong. *Pro bono* work is (rightly) work done without any promise or prospect of remuneration for the work done. It is a legal practitioner's philanthropic

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[265] KZN Society of Advocates. *Pro Bono* Rules. Rule 1.
[266] 2012 Annual Report KZN Society of Advocates. This 6.3 hours per person includes the *pro bono* hours of 21 of the 27 advocates mentioned; the remaining six did not provide information as to their *pro bono* hours performed to the Durban Bar.
[267] KZN Society of Advocates. *Pro Bono* Rules. Rule 12.
[268] See the later sub-heading on *pro bono* work for a discussion of the various provincial law societies' current requirements (in theory) of 24 hours *pro bono* work per attorney per year.
[269] GCB Constitution. Rules of Ethics. Rule 5.12.4.3 (own emphasis added).

contribution of a relatively small portion of their work time towards those who cannot afford to appoint their own lawyer. Contingency fees, on the other hand provide the promise of a fee when a client's case is successful. Whilst contingency fees no doubt have a role to play in improving access to justice in certain cases for those unable to pay up front for legal representation, such work should in no way be said to constitute an alternative to each lawyer's *pro bono* obligations. It is argued that should a practitioner wish to take on contingency matters, those should be *in addition* to their fulfilling their mandatory *pro bono* services.

It is submitted that another shortcoming of the existing Durban Bar policy relates to the exemption from performing *pro bono* work by members in their first three years of practice.[270] Whilst the rationale for the exemption, which is almost certainly to allow someone to build their practice before having to give a portion of their time for free, is apparent, it is argued that all members of the advocates profession should be making some contribution to the underprivileged segments of society through *pro bono* work. Recently admitted attorneys and candidate attorneys, for example, are not exempt by law society rules from having to perform their requisite 24 *pro bono* hours a year. It could well be said that performing *pro bono* work right from the beginning of one's professional career and even in vocational training (be it in the period of 'articles' as a candidate attorney or pupillage for trainee advocates) rightly inculcates a culture of undertaking such service as a part of one's overall work. From the perspective of pupil advocates and junior members of less than three year's standing it is argued that performing *pro bono* work provides opportunities such a practitioner would otherwise not have had to hone their skills, improve their reputation and develop new areas of expertise and passion. That experience can then also be fruitfully used in paying briefs as that advocate builds their own legal practice. Whilst it would be far from perfect (or what it is submitted should be required), a compromise position would be for junior practitioners to be required to perform fewer hours of *pro bono* work until they reach a certain number of years of experience. It would not be ideal in so far as even 24 hours (let alone 20 for advocates) is often insufficient to finalise one client's matter.

A last criticism about the existent *pro bono* policy at the Durban Bar relates to the rule that where a member has performed more than 20 *pro bono* hours in a particular year, then those extra hours may be carried forward to count towards the requisite number for the

[270] KZN Society of Advocates. *Pro Bono* Rules. Rule 1. Although not directly stated in Rule 1, it is clearly implied that pupil advocates (serving a little under one year's pupillage) are also exempt from any *pro bono* service.

following year.[271] This rule implies that the 20 hour threshold is to all intents and purposes a 'ceiling' rather than a 'benchmark'. Performance of *pro bono* hours in excess of the 20 hour *minimum* should be encouraged and not be considered out of the ordinary except in so far as drawing public attention to that practitioner's exemplary contribution. If an advocate does perform in excess of the minimum prescribed hours in a year, that should not reduce the minimum expectation for the following year.[272]

There have been some developments at a national level and in different parts of the country which seem to offer some hope for an improvement in the uptake of *pro bono* work by South African advocates (who are members of the Bar) in due course. As has already been alluded to, the GCB has at a national level adopted its own rule 5.12.4 whereby it became obligatory for members to do *pro bono* work.[273] Although the rule has to be incorporated by individual Bars, this shows a clear commitment by the advocates' profession to impose a *pro bono* commitment on its members as envisaged by the last version of the Legal Practice Bill, the recently passed Legal Practice Act and the Legal Services Charter.[274] In terms of the same rule, all Bars are supposed to have a *pro bono* committee. Also a positive development has been the recent establishment of a 'National *Pro Bono* Forum' - comprising members of the GCB, retired Constitutional Court Judge Zak Yacoob, ProBono.Org, the Law Society of South Africa, the Law Society of the Northern Provinces and Legal Aid South Africa.[275]

The *pro bono* programme for practicing advocates which has been in existence for significantly the longest period is that run by the Cape Bar which states that the provision of *pro bono* services is an important part of its commitment to promoting justice for all.[276] Whilst not verified by statistics, the Cape Bar claims that its "current system is operating very efficiently and members are generally providing well in excess of their twenty *pro bono* hours

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[271] KZN Society of Advocates*. Pro Bono* Rules. Rule 10.
[272] Again a comparison can be made with the attorneys' profession where *pro bono* hours in excess of the annual threshold are not carried forward to the next year.
[273] GCB Constitution. Rules of Ethics. Rule 5.12.4 (Adopted July 2002).
[274] A more detailed discussion on the Bill, the Act and the Charter's *pro bono* contents follow later in this research.
[275] This forum met for the first time on 9 November 2013 and then again on 5 April 2014. It is chaired by Advocate TN Aboobaker SC. The Forum has yet to release into the public domain conclusions from its deliberations. However, the fruits of its work are keenly anticipated. Notes from the 9 November 2013 meeting were circulated by the GCB to the Chairmen of all constituent bars. GCB Circular No. 05/2014 (of 21 January 2014) entitled "*Pro Bono* Initiative".
[276] Cape Bar "Mission Statement" (22 August 2006) http://www.capebar.co.za/attachments/057_Mission%20Statement%20of%20the%20Cape%20Bar%20Council.pdf (accessed 23-06-2014).

per year."[277] Whilst it is hoped that such widespread compliance with *pro bono* obligations does exist at the Cape Bar, as argued already, it is imperative that accurate and comprehensive records of *pro bono* work are indeed kept in order for such general claims to be justified and assessed. As is the case with the Durban Bar, the Cape Bar's *Pro Bono* Rules require each member of more than three years' standing to perform at least twenty *pro bono* hours per year.[278] The argument made earlier that junior advocates (and pupil advocates) in Durban should not be exempt from *pro bono* work applies *mutatis mutandis* here. It is interesting to note that the Cape Bar *Pro Bono* Rules provide for advocates to act both on a referral for an indigent client and "where there is a public interest in the outcome of the litigation".[279] The additional avenue of acting *pro bono* in public interest matters is a welcome development in so far as whilst a particular client might not qualify in terms of a prescribed financial means test, it still might be apposite (in very exceptional circumstances) for a legal practitioner to act *pro bono* in their case where to assist such a person would at the same time be in the public interest.

Perhaps the biggest *pro bono* development in South Africa involving advocates has been the Joint Venture Agreement (JVA) between Legal Aid South Africa and the Johannesburg Society of Advocates (the Johannesburg Bar), signed in June 2014.[280] A few key aspects of the JVA and its perceived suitability as a referral arrangement will be considered below. The Johannesburg Bar adopted its Local Rule 5.2 which stipulates that all its members must perform at least 20 hours of *pro bono* work annually.[281] The JVA is an agreement whereby most *pro bono* work conducted by members of the Johannesburg Bar is channelled through Legal Aid South Africa.[282] Section 6.2.3 of the JVA provides that in terms of the agreement

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[277] Advocate Michelle Norton. Chairperson: *Pro Bono*, *In Forma Pauperis* and Legal Aid Committee of the Cape Bar. "Report of the *Pro Bono*, *In Forma Pauperis* and Legal Aid Committee of the Cape Bar on the proposed initiative of the GCB *Pro Bono* Committee." 17 February 2014 (On file with the writer).

[278] Cape Bar. "Cape Bar's *Pro Bono* Rules" (Adopted by the Cape Bar Council on 22 September 2011, amended on 29 August 2013).
http://www.capebar.co.za/attachments/article/57/PRO%20BONO%20GUIDELINES%20IN%20RELATION%20TO%20THE%20APPOINTMENT%20OF%20COUNSEL%2029.08.2013.pdf (accessed 2014-06-22).

[279] Cape Bar "Cape Bar's *Pro Bono* Rules. Rule 3.5" (Adopted by the Cape Bar Council on 22 September 2011, amended on 29 August 2013).
http://www.capebar.co.za/attachments/article/57/PRO%20BONO%20GUIDELINES%20IN%20RELATION%20TO%20THE%20APPOINTMENT%20OF%20COUNSEL%2029.08.2013.pdf (accessed 2014-06-22).

[280] Joint Venture Agreement (JVA) between Legal Aid South Africa and the Johannesburg Society of Advocates (the Johannesburg Bar). This JVA was signed on 10 June 2014. In terms of section 3 of the JVA, subject to neither party withdrawing, the agreement is to operate indefinitely. Copy on file with the writer.

[281] Johannesburg Bar "Local Rules" (undated) http://www.johannesburgbar.co.za/ethical-rules/local-rules.html (accessed 2014-06-22).

[282] In terms of Johannesburg Bar Local Rule 5.2.6, in addition to Legal Aid South Africa, *pro bono* briefs may be accepted from university law clinics, legal NGO's, a judge or magistrate, ProBono.Org or another entity designated by the Johannesburg Bar Council. It is submitted that it is correct that *pro bono* briefs to the

either LASA or a *pro bono* attorney accredited with LASA shall instruct the advocate and be the attorney of record. The JVA seeks to create a working relationship between the Johannesburg Bar and LASA to promote access to justice. Legal Aid SA will assist the Bar in identifying clients who cannot pay a lawyer, provide infrastructure like translators sometimes required when performing *pro bono* work and refer work appropriate to a particular advocate's expertise. The Johannesburg Bar will assist LASA in delivering services to the poor where the latter lacks capacity to do so itself.[283] It is argued that this is precisely when *pro bono* work by private attorneys or advocates should come into play; that is when the state supported 'legal aid' net is unable to meet the legal need of the indigent. The agreement also takes cognisance of the need to transform the legal profession by empowering black, female and disabled junior advocates through apposite briefs.[284] This inclusion dove-tails with the argument made earlier that *pro bono* work has the capacity to provide invaluable experience to junior practitioners thus resulting in a win-win scenario for all concerned. The JVA can be said to create a clearing house-type system whereby most administration of *pro bono* work under the agreement is handled by LASA.[285] When one considers that the Johannesburg Bar, like other constituent bars of the GCB, is made up of individual practitioners practicing for their own account with limited administrative assistance, then such an arrangement makes most sense when it comes to most effectively harnessing the *pro bono* work of advocates. In terms of referrals under the JVA, an advocate may recoup from LASA "necessary disbursements" where a *pro bono* client would have qualified for legal aid with LASA.[286] This is entirely equitable for advocates to be recompensed for their (permissible) expenses (as opposed to fees) in *pro bono* matters.[287] The JVA makes provision for progress and efficiency meetings between the Johannesburg Bar and Legal Aid SA.[288] In terms of these meetings LASA undertakes to maintain statistics regarding referrals

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Johannesburg Bar are not limited to those from Legal Aid SA as that would close off whole other avenues of *pro bono* work - which may be just as worthy of support - from other free legal service providers.

[283] "Introduction" section of Joint Venture Agreement (JVA) between Legal Aid South Africa and the Johannesburg Society of Advocates (the Johannesburg Bar).

[284] *Ibid*.

[285] In terms of s. 6.2 of the JVA, such administration will include screening clients (including conducting a financial means test), instructing the advocate as the client's attorney of record and consulting with the client or other relevant persons. The fact that a *pro bono* brief to counsel in terms of the JVA can be provided by Legal Aid SA *or* a *pro bono* attorney accredited with it implies the clearing-house nature of the arrangement. Section 6.2.3 of the JVA.

[286] Joint Venture Agreement (JVA) between Legal Aid South Africa and the Johannesburg Society of Advocates (the Johannesburg Bar). Section 5.5.

[287] However, section 6.1.1 of the JVA provides in terms of rules 5.12.4.3 and 7.10.10 of the GCB Constitution, Rules of Ethics, that a *contingency fee* may be charged by an advocate in a "*pro bono*" matter when such an agreement is in place and approved by the Bar Council and Legal Aid SA. It has been argued earlier in this section that contingency work and *pro bono* work should not be conflated - to do so is to misunderstand the essence of *pro bono* service. It is therefore submitted that s. 6.1.1 of the JVA should be amended in this regard and likewise such a conflation avoided in future similar *pro bono* agreements by bars in other parts of the country.

[288] JVA s. 7

to advocates and provide annual certificates to practitioners reflecting the nature of the *pro bono* matter and the hours rendered. This maintenance of detailed annual records of the *pro bono* work of particular advocates will remove a large administrative burden from individual advocates and the bar to which they are affiliated. As noted above, there have been arguments made that existing *pro bono* statistics for South African advocates are not a true reflection of *pro bono* work done due to poor record keeping; if this is indeed the case the type of arrangement contained in the JVA should solve this shortcoming. It is submitted that the JVA, although still in its infancy and not a perfect document, provides a blueprint for the type of *pro bono* arrangement which could and should be adapted to the particular needs and circumstances of the various societies of advocates / bars around the country.[289]

3. 9 Final comments about free civil legal service delivery in eThekwini

The aforementioned statistics as to free civil legal service provision provided in eThekwini in 2012 provide some useful insights. A number of comments have already been made as they apply to specific civil legal aid service providers. As a whole the records clearly show that there is a considerable need for free legal services in civil matters in eThekwini – a state of affairs which is very likely to be found throughout much, if not all, regions of South Africa. What neither the number of requests for legal aid (where this was indeed recorded) nor the number of files opened are able to illustrate is whether there is a greater need from additional potential (indigent) clients for further free civil legal services. Such additional potential clients might not have requested legal assistance because of being unaware of their legal rights, being unaware of the existence of the free legal service providers for the indigent in the area or being unable to access the services due to considerations like old age or disability or the transport or opportunity cost of accessing existing legal services. Further empirical research is called for to establish this extent of the need for civil legal aid (both in eThekwini and in South Africa as a whole).

[289] A report by the *Pro Bono*, *In Forma Pauperis* and Legal Aid Committee of the Cape Bar mirrors this submission in calling for organisations like Legal Aid South Africa to enter into specific agreements with constituent Bars (as opposed to the GCB). "Report of the *Pro Bono, In Forma Pauperis* and Legal Aid Committee of the Cape Bar on the proposed initiative of the GCB *Pro Bono* Committee." Point 12. 17 February 2014 (On file with the writer).

The case records of some of the free civil legal service providers showed that less prospective clients were consulted with than was the number of those who requested free legal assistance. This is a potentially worrying discrepancy as it is argued that any indigent person who raises a legal concern should be consulted with in terms of a comprehensive network of free legal service provision. However, what the statistics do not indicate is what number of those not consulted with were turned away for failing to pass an organisation's financial means test or because the type of case was not one falling within the ambit of the service provider's work. Where someone's finances do not warrant free legal services then clearly such a person need not be consulted with as they are not entitled to free legal assistance in terms of section 34 or 35 of the Constitution (in civil and criminal matters respectively). Likewise, where the type of case is not that handled by the free legal service provider to which the request for assistance was made, then provided such a person is properly referred onto another appropriate service provider there is no problem.[290] However, this presupposes the existence of a free civil legal service provider which does deal with the type of case in question. In addition, for such a network of facilities to operate optimally requires the referring body to ensure that the body to which someone is referred has the capacity to assist that person and the applicant is told how to access those services. In other words there should be some value added by the referring organisation.[291] Where potential clients have not been consulted with due to capacity limitations, then ways should be sought to improve such capacity through acquisition of better funding for legal NGO's and parastatals, enhanced training of staff and expanding the use of paralegals and senior law students in this initial phase of the legal assistance process.[292] As was and will be further argued in relation to *pro bono*, some of the time of lawyers in private practice can also be harnessed in the form of *pro bono* work to assist legal NGO's in consulting with prospective clients for the first time.[293]

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[290] The question of proper referrals is dealt with in this paper's conclusion.

[291] The UKZN Law Clinic for example, when it cannot assist a client and refers them elsewhere will often provide them with a step-by-step written guide to dealing with the matter. For instance, potential clients who are not consulted with are provided guides with how to use the Small Claims Court, the Commission for Conciliation, Mediation and Arbitration or to apply for a social assistance grant from the state. UKZN Law Clinic (Durban) quarterly reports to the Attorneys Fidelity Fund (2012). On file with the writer.

[292] In this regard see the sections of this paper on the topics of community-based paralegals and continuing legal education.

[293] This is how ProBono.Org runs its so-called outreach 'clinics' to members of the public - these potential clients are consulted with by attorneys or candidate attorneys acting *pro bono* or supervised, volunteer senior law students.

The types and number of civil cases opened illustrate the extent and nature of the free civil legal services 'net' on offer to the indigent in eThekwini. These figures need to be analysed as a whole in order to determine on the one hand what types of legal problems are being satisfactorily covered. On the other hand it should be established where there is inefficient duplication of services between organisations, or even more concerning, gaps in the legal service provision net mean that certain types of legal problems are not being assisted.

What is absolutely crucial from the perspective of this research initiative is that civil legal aid services introduced and implemented throughout South Africa can genuinely be said to tangibly increase access to justice in civil matters for indigent people in that country. This will only be possible where the civil legal aid model adopted is a sustainable and coordinated one which includes quality-control measures to improve the standard of legal services provided. The four sections of this paper which follow suggest different elements of such a proposed model for better coordinated and more sustainable civil legal aid services in South Africa of an enhanced quality.[294]

4. Access to justice through compulsory clinical legal education

Maisel notes that "Spurred by desires to make the law school experience more educational and relevant for students and to promote equal justice and the rule of law, scholars have devoted considerable attention and resources to creating or expanding clinical legal education".[295] Yet community service through work at one's university law clinic is not compulsory for many LLB students in South Africa. There is no doubt that as a vocational qualification, an LLB degree should adequately prepare graduates for the world of legal practice. Any failure by the South African LLB curriculum to provide adequate exposure to practical legal skills would be a major shortcoming indeed. The late former South African Chief Justice Arthur Chaskalson made the point some time back that:

> "Law students can leave a university with an LLB degree without ever having seen a client, without ever having been in court, without knowing how to interview a witness or draft a contract, or prepare an argument or address a court. The result is that law graduates emerge from the

[294] These elements are: i) Access to justice through compulsory clinical legal education; ii) Improving access to justice via compulsory post-study community service; iii) *Pro bono* work by private lawyers in South Africa; and iv) Recognising and regulating community-based paralegals (CBPs) in South Africa.
[295] Maisel "Expanding and Sustaining Clinical Legal Education: What we can learn from South Africa." 2006 30 2 *Fordham International Law Journal* 374 374.

> university with a theoretical training, but without any basic knowledge of, or practical training directed specifically to, the practice of law. I do not believe that there is any profession other than the law in which students leave university as ill-equipped as this to pursue their chosen career."[296]

Clinical Legal Education (CLE), properly implemented, can go some way towards avoiding such a sorry state of affairs. The need for CLE also needs to be seen within the context of universities having an ethical obligation to meaningfully contribute to the social upliftment of the areas in which they exist.[297]

> "What distinguishes clinical education from any other method of practical skills training is a methodology that uses actual experiences of the legal process as the educational core."[298]

CLE uses experiential learning which prepares law students for the challenges of practice. It aims to promote in students a spirit of public service and good professional ethics. In the South African context especially, clinical education has a transformative function whereby law is now taught, unlike years passed, in the context in which it operates.[299] de Klerk concludes that: "(1) clinical education is an effective teaching methodology; (2) it could go a long way towards addressing the concerns expressed about legal education in South Africa; and (3) the clinical movement in South Africa has reached a state of development where it is sustainable."[300] From these conclusions he asks the question: "To what extent is this resource being exploited to its full capacity?"[301] In response to this question, this paper proposes the need for compulsory student work at university law clinics as part of the LLB degree.[302]

When discussing university law clinics, this research's focus is on the legal service provision of university law clinics more than the teaching and learning aspect thereof. However, as has been noted in numerous studies,[303] it is virtually impossible to separate the intrinsically

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[296] Chaskalson "Responsibility for practical legal training" 1985 March *De Rebus* 116 116.
[297] See, for example, the Transformation Charter of UKZN in this regard . University of KwaZulu-Natal "Transformation Charter of UKZN" (undated) http:/www.ukzn.ac.za (date accessed 2012-05-21).
[298] Steenhuisen 'The goals of clinical legal education' in Stilwell (ed) (op cit note 22) 1 at 2. 2004 Clinical Law in SA.
[299] de Klerk "University Law Clinics In South Africa*"* 2005 122 4 *South African Law Journal* 929 937.
[300] *Ibid*.
[301] *Ibid*.
[302] According to the statistics of the South African University Law Clinics Association, in 2010, of 15 responding university law clinics in South Africa, 10 had compulsory CLE and at the remaining five it was elective. The South African University Law Clinics Association "Statistics" http://www.saulca.co.za/home (accessed 2013-01-17).
[303] See, for example: Iya "From Lecture Room to Practice: Addressing the Challenges of Reconstructing and Regulating Legal Education and Legal Practice in the New South Africa" 2003 16 Third World Legal Studies 141-

intertwined dual mandates of university law clinics of legal service provision and practical teaching aspects. This investigation therefore considers the legal service provision of university law clinics through the lens, as it were, of CLE.

There is an increasing demand for law degrees to be made more practical, yet CLE remains on the fringes of South African legal education. While clinical education over the past thirty years has certainly expanded and improved, these programmes essentially remain within a certain mould - they are isolated from other law courses, usually condensed into a single course, and mostly presented only at final-year LLB level.[304] A separate but related issue is therefore the form which CLE should take. That is should it be a stand-alone course in the final year of the LLB or should there be assimilation throughout the degree between the academic and skills training? There is a lack of an integrated approach to CLE at almost all South African law schools and faculties.[305] Logic would dictate that an integrated method would be preferable, but in the context in which a stand-alone CLE module is not compulsory at many universities, it would seem that the establishment of such a compulsory module would be a first necessary step. However, in favour of the assimilated approach it has been argued that CLE is not a topic which can or should be compartmentalised in the law degree. CLE is rather a teaching methodology whereby knowledge, skills and values are combined in a live interaction with real clients, as opposed to academic legal education which uses the traditional classroom method of instruction.[306] There is therefore considerable scope for changing the *status quo* by incorporating clinical teaching into mainstream instruction. Integration could be achieved by linking specialised clinics to substantive areas of law; there could therefore be a 'family law clinic', 'socio-economic rights clinic' and so forth. This already exists at the Law Clinic of the University of the Witwatersrand (Wits).[307]

Integration could also be met by spreading clinical work over the course of the LLB degree. This would be possible, for example, by having a referral-type advice office staffed by junior law students, where the focus would be on advising clients and referring them on to other 'clinics'. This could be combined with separate, specialised clinics staffed by more senior

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160; and Bloch and Prasad "Institutionalizing a social justice mission for clinical legal education: cross-national currents from India and the United States" 2006 13 Clinical Law Review 165 165.

[304] de Klerk 2005 *South African Law Journal* 947.

[305] de Klerk "2005 *South African Law Journal* 938.

[306] du Plessis and Dass "Defining The Role Of The University Law Clinician" 2013 130 *The South African Law Journal* 394 394.

[307] de Klerk 2005 *South African Law Journal* 946. This suggestion has also been made by Woolman et al. Woolman, Watson and Smith ' ''Toto, I've a feeling we're not in Kansas anymore'': A reply to Professor Motala and others on the transformation of legal education in South Africa' 1997 114 *SALJ* 30 63.

students, who would receive clients from the referral clinic- under close supervision of admitted practitioners.[308]

As a methodology, CLE uses the practice of law as a context to teach doctrine, ethics, professional skills, effective interpersonal relations and the ability to integrate law, facts and procedure.[309] Put similarly, CLE transcends the artificial boundaries imposed by academic training. It is invaluable in showing students the difficulties in applying theory to practice.[310] Haupt points out that "clinical" in this context refers to the attempt to study and teach law through the use of legal skills directed to solve client problems and the attempt to draw useful generalisations from such experience.[311]

The embodiment of what a university law clinic is essentially about, is well described by Wizner:

> "the law school clinic is a teaching office where students can engage in faculty-supervised law practice in a setting where they are called upon to achieve excellence in practice and to reflect upon the nature of that practice and its relationship to the law as taught in the classroom and studied in the library. It is a method of teaching law students to represent clients effectively in the legal system, and at the same time to develop a critical view of that system. Law students in the clinic learn that legal doctrine, rules and procedure; legal theory; the planning and the execution of legal representation of client; ethical considerations; and social, economic and political implications of legal advocacy, are all fundamentally interrelated."[312]

In the context of the above comments on CLE as a teaching methodology it is important to ask what its role is in this research into free civil legal service provision. In South Africa, where university law clinic students cannot represent clients in court, they can nevertheless fulfill crucial legal functions in numerous areas where court representation is not required – most notably providing legal research and advice.[313] Similarly, community service graduates/

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[308] de Klerk 2005 *South African Law Journal* 947.
[309] du Plessis and Dass 2013 *SALJ* 395.
[310] de Klerk "Unity in adversity: Reflections on the clinical movement in South Africa" 2007 *International Journal of Clinical Legal Education* 100 100.
[311] Haupt "Some aspects regarding the origin, development and present position of the University of Pretoria Law Clinic" 2006 39 *De Jure* 231 234-238.
[312] Wizner "The law school clinic: Legal education in the interests of justice" 2001–2002 69 *Fordham LR* 70 70 (own emphasis added).
[313] First All-Africa Colloquium on Clinical Legal Education. "Combining Learning and Legal Aid : Clinics in Africa. Report on the First All-Africa Colloquium on Clinical Legal Education, (23-28 June 2003)".

'*interns*' could effectively provide both these and other legal services.[314] The work of students at university law clinics and post-study community service interns can play a key role in focusing legal assistance on the rights of marginalised and vulnerable groups, such as ethnic minorities, refugees, children, prisoners and women.

One view focuses considerably on the educative side of a university law clinic further by stating:

> "Students pay good money to complete clinical courses and have legitimate expectations of the benefits they should receive in return. The teaching that takes place in a clinic should therefore never be incidental or secondary to the practice of law. Teaching students remains the core business of (university) law clinics."[315]

The United Kingdom's (UK) Clinical Legal Education Organisation (CLEO) likewise took a policy decision confirming the primary educational focus of university law clinics. It came to this decision regarding the tension between educational needs of students and clients' legal service needs, which now forms part of their so-called "model standards for live-client clinics".[316]

The present author takes a somewhat different stance that it is intrinsically through legal service provision (to the indigent) that CLE can be said to operate. In other words the training aspect of CLE and legal service provision are two sides of the same coin - without the one the other will not function properly. Teaching thus takes place through supervised legal service provision. Therefore by properly harnessing the work of law students in a CLE context, improved access to justice is sure to follow. Where a South African university law clinic serves as virtually the only indigent civil legal services operation in its region, such a clinic will strongly feel the tensions between provision of adequate legal services and provision of appropriate clinical education for students.[317]

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[314] The term '*intern*' is used by the author in this research as an appropriate description for someone who has completed their academic studies and is then undergoing community service.
[315] de Klerk 2007 *International Journal of Clinical Legal Education* 98.
[316] Clinical Legal Education Organisation (CLEO) "Model standards for live-client clinics." (undated) *http://www.ukcle.ac.uk/resources/teachingand-learning-practices/clinical-legal-education/* (accessed 2014-03-11) 4.
[317] Gilbert "Report on the status of university law clinics in South Africa" (*unpublished report to the Ford Foundation, South Africa-Namibia Office, November 1993*; copy on file with author) 5 6.

The Unites States of America provides a good example of where the objectives of CLE (identified by Maisel[318] and others) have translated into extensive legal assistance for the indigent. The American Bar Association and judges in the United States have long supported CLE because clinical programmes play an important role in ensuring that access to the courts - a precondition for access to justice - will not be limited to only those who can afford to hire lawyers.[319] Because of the quite extensive functions performed by American students in CLE, it is submitted that reference thereto is also relevant in so far as South African CLE is concerned. The impact of CLE in providing access to justice for those unable to afford lawyers has been significant in the United States. Thousands of law students taking in-house and externship clinical courses yearly join the mere 5 000 to 6 000 lawyers working for organisations that represent 45 million impoverished Americans who qualify for civil legal aid.[320] In addition to providing access to the courts for clients and learning lawyering skills, law students also learn legal ethics rules and the norms of the legal profession first-hand in their clinical courses.[321]

Despite its potential to help meet the above and other vital objectives, the clinical law movement still frequently lacks sufficient support, including in South Africa.[322] Among other factors, South African law school clinics continue to have to battle to obtain financial resources, often from unreliable donor funding, and clinical staff tend not to enjoy the same compensation, status, or job security as their 'normal' law school academic colleagues.[323] It is argued that the point made by van As (cited earlier) that legal aid requires funding and political will applies on a more micro-level to the promotion of law clinics within a university.[324]

4.1 A few examples of clinical legal education in South Africa

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[318] Maisel states that those who support the expansion of clinical legal education in South Africa and elsewhere have sought to achieve up to five different objectives, three related to improving legal education for students and two related to providing assistance to disadvantaged groups. Maisel P "Expanding and Sustaining Clinical Legal Education: What we can learn from South Africa." 2006 30 2 *Fordham International Law Journal* 375.
[319] *Ibid.*
[320] US Department of State Issues of Democracy 2004 *IIP Electronic Journals* 2.
[321] *Ibid.*
[322] Maisel 2006 *Fordham International Law Journal* 377.
[323] *Ibid.* See also McDiarmid "What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead" 1990 35 *N.Y.L. SCH. L. REV.* 239. See generally Gilbert "Report on the Status of University Law Clinics in South Africa" 1993 (Unpublished report to the Ford Foundation, South Africa-Namibia office. On file with the writer).
[324] See fn 101 above in this regard.

The CLE model of the University of KwaZulu-Natal (UKZN) in eThekwini / Durban will be considered and comparisons drawn between its CLE model and the institutionalised models of the University of the Free State (UFS) and to a lesser extent, Rhodes University. The reason for such a comparison is because the latter two universities already have a compulsory CLE element whilst at UKZN it is merely an elective component of a student's LLB curriculum. As was noted in this section's introduction, when discussing university law clinics, this work's focus is on the legal service provision of university law clinics more than the teaching and learning aspect thereof (albeit that the two aspects have been shown to be closely related). In other words, an intrinsic part of CLE is the provision of legal services to the indigent.

UKZN's Howard College Campus in Durban, has a fully functioning law clinic staffed by three attorneys, two administrators and four candidate attorneys.[325] Final year LLB students may work at the clinic for a year as part of a public interest elective called 'Clinical Law'. Students choose whether to register for Clinical Law (and hence work at the Law Clinic) or one of two other alternatives; 'Teaching Legal Skills' or 'Street Law'.[326] In 2012, of the total number of final year LLB students (252), 72 were enrolled for Clinical Law.[327] It is apparent from these figures that a relatively low percentage of final year law students choose to work in the Law Clinic at UKZN. It is submitted that the legal service delivery potential of the UKZN Law Clinic would unquestionably be improved were CLE (through the Clinical Law course) to be compulsory for all final year law students at the institution. However, one cannot appropriately make work at a university law clinic a compulsory element of the LLB without ensuring that there remains a reasonable supervisor to student ratio.[328] Provided sufficient supervision is made available, an increased number of students would improve the capacity of university law clinics to meet their civil legal aid mandate.[329]

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[325] This was the case from 1 January 2014 to the date for submission of this paper of 13 October 2014.
[326] It would be amiss to not note the community outreach work conducted as part of the Street Law course. For example, Street Law provides basic rights awareness training at schools, hospitals and prisons. See Street Law "About us" (undated) http://www.streetlaw.org.za/(accessed on 2013-01-04). However, this work is contrasted with what are essentially lawyering skills taught and learnt in Clinical Law and at the Law Clinic through practical legal work related to the real-life legal problems of indigent clients.
[327] Figures obtained from UKZN Law School Office Manager, Ms Razia Amod, on 28 November 2012. In 2013 this figure was somewhat higher at 99 students (records on file with the author).
[328] Brickhill 2005 *SAJHR* 316.
[329] *Ibid.*

The voluntary nature of CLE at UKZN can be contrasted with the institutionalised community service required of all final year law students at UFS,[330] in a course named 'Legal Practice 4'. A similar model to that of UFS exists at Rhodes University, where compulsory work at the law clinic exists in the final year of the LLB in a course called 'Legal Practice'.[331] Many possible advantages and disadvantages of making CLE compulsory in the South African LLB degree could be considered, but for this paper it will suffice to note the existence of both sides to the argument and to list just one or two of the arguments on both sides.

A factor favouring CLE being a voluntary as opposed to compulsory part of the South African LLB relates to high student numbers. Of all the various factors that impact on methods of assessment, the greatest recurring challenge remains large student numbers. High student numbers are a major challenge to credible clinical legal education courses, especially when the course is compulsory. At the Wits Law Clinic, where the clinical course is compulsory, there are between 280 and 300 students per year.[332] du Plessis points out how an unsatisfactory ratio between clinician and students poses a major challenge in assessing the various components of a CLE course.[333] The only viable solution is to be found in the appointment of more (suitably experienced) clinicians, which will address the problematic ratio between clinician and students, allowing for the implementation and maintenance of continuous assessment methods.[334]

Notwithstanding challenges to having mandatory CLE at South African law schools and faculties, there would be a number of advantages of having work at these law clinics made compulsory. As to funding, increased student numbers would add weight to any argument for increased funding contribution from one's university to its university law clinic's operations. Such a suggestion would appear to be equitable when consideration is had that the funding formula for South African higher education institutions which, among various other factors, provides a subsidy from the government's Department of Education according to student numbers.[335] Increased student numbers have the potential to increase university

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[330] See the policy document on the institutionalisation of community service at the University of the Free State at http://ufs.ac.za (Accessed on 2012-12-12).
[331] http://www.ru.ac.za (Accessed on 2012-12-31).
[332] du Plessis "Closing the gap between the needs of students and the community they serve *200833 2 Journal for Juridical Science* 11 11.
[333] du Plessis 2009 *Journal for Juridical Science* 92.
[334] du Plessis 2009 *Journal for Juridical Science* 115.
[335] Republic of South Africa Ministry of Education "A new funding framework: how government grants are allocated to public higher education institutions" (February 2004) http://www.education.gov.za/LinkClick.aspx?fileticket=fcXw4P4qxAk= (accessed 2014-07-02).

law clinics' legal service delivery output. From the perspective of a holistic legal education it is strongly argued that exposure to real-life legal problems has great potential to improve the readiness for legal practice of any law graduate from university.[336] This point is made on the premise that the 'live client' model of teaching in CLE is adopted. The live client model involves students working, under attorney supervision,[337] directly with the legal problems of clients by consulting with them and drafting documents such as letters of demand and pleadings.[338] This model can be contrasted with various types of simulation and the like. It is undoubtedly the case that increased student numbers and the limited duration of the academic year make an intensive hands-on clinical law course challenging to teach. However, there are ways around such challenges. For example, the course may be split over two semesters with half the final year LLB students working in the law clinic in their penultimate semester and others in their final semester.[339]

South African university law clinics, like that of UKZN's Law Clinic in Durban, have substantial experience as legal aid service providers for the indigent. But they are very dependent on donor funding for this work to be continued and expanded.[340] Solutions to the problem of lack of funding are numerous and interrelated. The ideal solution would be for university law clinics' budgets to be mainstreamed into their law school or faculty's budgets so as to no longer be dependent on donor funding. The alternative is to continue to seek alternative donor funding for particular projects.

A university law clinic - like at UKZN in Durban- can play a pivotal role as a conduit between needy members of society and the (private) legal profession providing *pro bono* work to such clients. As de Klerk notes, law clinics are able to screen clients and formulate "*pro bono* briefs" for private lawyers.[341] *Pro bono* could become a new focus for many law clinics in

[336] For an explanation of different forms of clinical legal education teaching see Barnhizer "The clinical method of instruction: its theory and implementation" 1979 *Journal of Legal Education* 67.
[337] The supervising attorney is always available to assist the student with any aspect of the client's case with which they are having difficulty. The attorney also checks (and ultimately takes responsibility for) any work done initially by the law student before such work leaves the law clinic.
[338] de Klerk *et al Clinical Law in South Africa* (2ed) (2006).
[339] This is the case at Rhodes University. See http://www.ru.ac.za (accessed 2012-11-29).
[340] The UKZN Law Clinic was established in 1973 as one of the first university law clinics in South Africa. Maisel 2006 *Fordham International Law Journal* 377.
[341] de Klerk 2005 *SALJ* 945.

relation to access to justice, whilst at the same time facilitating expanded clinical education programs.[342]

It has been argued that a certain amount of *pro bono* work by law students in South Africa should be a prerequisite for graduation.[343] It is most obvious for such *pro bono* work to be channeled through CLE. An illustration of this concept is reflected in the graduation requirements of Tulane Law School in the United States of America. In September 1987, Tulane became the first US law school to require its students to perform community service to graduate. Each student has to complete at least 30 hours of legal service on behalf of indigent clients. The required hours are ungraded, but appear on the students' academic transcript as a "*pro bono credit*". The Tulane *pro bono* programme grew out of concern for the unmet legal needs of the poor, as well as for the educational enrichment of law students. The essential premise of the programme is the "trickle-up" theory of moral obligation, an ideal way to shape legal practitioners' attitudes from the ground up. This instills a sense of responsibility within law students before becoming members of the legal profession. Drawing upon this, Tulane graduates should be more willing to seek *pro bono* opportunities in their law practices and make them more confident in their ability to provide assistance to those who desperately need it.[344] This programme's resolve to counter social injustices through law student work is on par with this paper's proposal of compulsory law student work at South African university law clinics as part of the LLB.

The concept of "*pro bono"* work during the LLB[345] forming a requirement for registration as a legal practitioner was reflected in section 13 of a previous draft of the South African Legal Practice Bill. A lack of any mention of unremunerated practical legal training for law students was and is a notable omission from the latest draft of the Legal Practice Bill and the recently enacted Legal Practice Act. The above-mentioned section 13 stipulated one of the requirements being that a person eligible for registration completed, during the study for the LLB degree, 200 hours of unremunerated practical legal training. This was to involve the

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[342] de Klerk 2005 *SALJ* 949. As to this link, see the *pro bono* sub-section of this research.
[343] Brickhill 2005 *SAJHR* 315.
[344] Tulane University "Website" (undated) http://www.law.tulane.edu (accessed 2013-02-09).
[345] From a terminology perspective it must be noted that this research refers to "*pro bono*" work by admitted practitioners. By this is meant private lawyers providing a given portion of their time / legal services to the indigent for free. This is to be *contrasted* with this section's discussion of a) compulsory work by senior LLB students at their university's law clinic (for which they will not be paid); and b) compulsory post-study community service (discussed in the latter part of this section of the paper).

delivery of, or assistance with the delivery of, legal services with at least 100 hours thereof being what it termed "community service". A likely positive spin-off of the completion of such community service (were it to be required) would be an increased awareness in students of the need to assist the disadvantaged, allied with improved public awareness of their legal rights.[346] This may lead to a sense of duty within students who have been exposed to the needs within the community and feel compelled to do something about it, especially if it is necessary for their qualification.

4. 2 Some further recommendations relating to student work in law clinics (in CLE)

Such recommendations might relate to how a compulsory clinical programme should be introduced whilst others could be alternatives or variations to such a development.

Many South African university law schools or faculties have legal aid clinics or street law programmes, however students are not always awarded academic recognition for such programmes. Such academic credit is called for.[347]

The duration of post-LLB community service (which is to be introduced in the forseeable future in terms of the Legal Practice Act) could be reduced according to the number of hours' community service already performed during the LLB degree. However, it is submitted that it would be preferable from both a more comprehensive practical training perspective and from the angle of improving the availability of free legal services for those in need thereof, for legal community service to be mandatory both at university and post-study levels without the latter being reduced by community service done during the LLB.

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[346] Perold and Omar *Community Service in Higher Education: A Concept Paper (*1997).
[347] This type of recognition is recommended by McQuoid-Mason. He states that at present only a few of the 17 law schools involved in the Street Law program give academic credit for Street Law work, and he suggests that students deserve to be rewarded academically for their efforts in respect of these programmes. McQuoid-Mason 1999 *Windsor Y.B. Access Just.* 6.

4. 3 Improving access to justice via compulsory post-study community service

Early parts of this paper showed that in the South African civil justice system many ordinary people cannot afford to use the courts because of the expense involved, or because they are ignorant of their rights. There is hence a need for better access to justice in civil matters as a tool to assist vulnerable residents' access to social justice.[348] This segment briefly explores implementing a year's community service for law graduates as envisaged in the last draft Legal Practice Bill (LPB) and the recently passed Legal Practice Act as a means of promoting access to justice in civil matters through some form of legal advice and representation to the indigent. Some factors in favour of implementing post-study compulsory community service were already considered above. This section canvasses a few further arguments why such a programme could or should be implemented and some possible consequential challenges. The analysis seeks to propose how to implement community service for South African law graduates as a prerequisite for admission into the legal profession. Both positive and negative aspects faced in the implementation of community service must always be considered as well as potential hurdles to be addressed in a model for the legal profession.

The South African Deputy Minister of the Department of Justice and Constitutional Development, Mr John Jeffery, stated that a "candidate legal practitioner" [in section 29(a) of the last draft of the Legal Practice Bill which has an equivalent section in the new Legal Practice Act] is defined as a candidate attorney or pupil (advocate) and thus community service requirements do not include law students at this stage. However, he added that the list is open to later include law students.[349] The National Director of Lawyers for Human Rights has indicated that this requirement might take the form of law students having to undertake the requisite number of hours of community service as part of the qualification.[350] Jeffery opined that there is little opposition to community service for candidate legal practitioners; rather the opposition is mainly aimed at recurring community service for

[348] According to de Klerk, "Social justice has been defined as referring to the fair distribution of health, housing, welfare, education and legal resources in society." Quoted in McQuoid-Mason 1999 *Windsor Y.B. Access Just.* Footnote 109.
[349] Manyathi-Jele 2013 August *De Rebus* 10.
[350] Advocate Jacob van Garderen in Manyathi-Jele 2013 August. *De Rebus* 8.

existing practitioners (i.e. *pro bono* work by admitted lawyers).[351] He added that a challenge with rolling out community service work (the definitions of which must be finalised) is how the planned "National Legal Council" will monitor it in a cost-effective fashion.[352]

It is necessary to properly define what is meant by community service for graduates. In the context of community service clinical psychologists it has been said that:

> "community service entails graduate professionals working in a state facility for a mandatory period on completion of their internships and academic requirements… as a prerequisite for professional registration".[353]

This definition will suffice for legal community service, perhaps with the exception that a community service year for lawyers in South Africa might come in lieu or more likely before the 'internship period' referred to here (which in law would be what is currently called 'articles' for candidate attorneys and 'pupillage' for pupil advocates).

The logic behind requiring community service relate to economic and social justice ideas, in that the state's contribution towards training professionals is viewed against the expectation that graduates will repay this debt through a contribution to the upliftment of society.[354] In the context of the South African healthcare professions, over and above the idea of some recompense to society by the recruits, community service was prompted by a considerable shortage of healthcare workers in the country's state facilities due to a brain drain and poor salaries – particularly in rural and other needy areas.[355]

Erstwhile Minister of Justice and Constitutional Development, Jeff Radebe, has echoed the contents of the last draft of the Legal Practice Bill and the now promulgated Legal Practice

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[351] Manyathi-Jele 2013 August *De Rebus* 10. In this regard see the sub-heading on *pro bono* work by private lawyers.
[352] *Ibid.*
[353] Pillay and Harvey "The experiences of the first South African community service clinical psychologists" 2006 June 36 2. *South African Journal of Psychology* 260.
[354] Pillay and Harvey 2006 June *South African Journal of Psychology* 260.
[355] *Ibid*.

Act in terms of which all newly qualified legal practitioners should soon have to perform compulsory community service.[356] The former minister (appropriately) expressed the opinion that the move would improve people's access to affordable justice. Radebe said that this aspect of these legislative developments aim to:

> "ensure that legal practitioners contribute to free legal services, especially to the indigent, just (as) is happening with doctors' (community service). They will be asked to provide a certain amount of hours."[357]

It would appear as if the above sentiment conflates the concepts of post-study community service by graduates (in terms of section 29(1)(a) of the Legal Practice Bill and its equivalent section in the Legal Practice Act) with a requisite number of community service hours per year by admitted legal practitioners in the form of *pro bono* work (in terms of section 29(1)(b) of the Bill- and its equivalent provision in the Act).

Justice Department official JB Skosana says the community service will be compulsory and be part of advocates' and attorneys' training.[358] It will apply to "all new entrants into the profession as a part of their internships or articles. … for a prescribed minimum of time".[359]

It is interesting to note that the late former South African Chief Justice, Chaskalson, was a fervent advocate for compulsory post-study community service.[360] The establishment of compulsory community service harks back to the days of a very active NGO sector in South Africa. As McQuoid-Mason notes, one of the very few benefits of the oppressive apartheid regime was the development in South Africa of a vibrant NGO community, which included several organisations - including university law clinics - engaged in public interest lawyering and voluntary work.[361]

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[356] IOL News "Editorial" (2010-05-06) *IOL News* . According to the latest draft of the Legal Practice Bill such community service would be for a period of one year. http://www.gov.za (accessed 2010-07-11).
[357] *Ibid.*
[358] These proposed requirements are to apply equally to advocates and attorneys. Currently, these two arms of the legal profession have separate admission requirements , norms and standards, and ways of charging fees.
[359] IOL News (2010-05-06) *IOL News*.
[360] Chaskalson "Legal interns could solve legal aid problems" 1997 December *De Rebus*.
[361] McQuoid-Mason 1999 *Windsor Y.B. Access Just*. 8.

The need for community service is heightened when one takes cognisance of the fact that with the establishment of democracy in South Africa, many NGOs and public interest law firms are finding their funding under serious threat. Donors often prefer to deal directly with governments rather than with large numbers of NGOs.[362] In the case of public interest lawyering, many donors believe that with a democratic government the onus of providing legal services falls on the state and should come out of the Legal Aid (South Africa's) budget.[363] Accordingly, it is probable such legal NGOs will find that funding for their projects will be increasingly hard to come by. Consequently, such organisations would benefit from being staffed in part by law graduates as part of the latter's community service year.

One of the chief goals of introducing a post-study legal community service programme would be the enhancement of access to justice for those most in need.[364] It is argued, on the basis of the earlier submission that criminal legal aid is relatively well provided for in South Africa, that this need shifts to civil legal services. South Africa is a developing country where there are vast economic and social differences between the rich and the poor, and where the majority of the population do not have adequate access to civil legal services. By making community service obligatory for law graduates, the government will be enhancing the standing of social justice within the nation not to mention the realisation and protection of human rights which permeate the Constitution.

Community service undoubtedly has the potential to improve access to professionals in underserviced areas. For example, the World Health Organisation has shown that in Puerto Rico, before there was compulsory medical community service, 16 of 78 municipalities had no physician. Once compulsory service programmes were running it was shown that all 78 municipalities had at least one doctor.[365] After the introduction of community service for doctors in South Africa there have been improved staffing levels in rural hospitals, shorter

[362] McQuoid-Mason 1999 *Windsor Y.B. Access Just*. 11.
[363] *Ibid.*
[364] Kaufman "Community service component of an alternative bar exam." 2004 20 *Georgia State University Law Review* 1057 1058.
[365] World Health Organisation "Website" (undated) http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2865657/ (accessed 2014-06-25).

patient waiting times and more frequent visits to outlying clinics by health workers.[366] Community service doctors have "become an essential backbone of many rural health services".[367] It is contended that properly supervised community service law graduates could well play an equally important role in the provision of free legal services to the underprivileged, particularly in civil matters which are not comprehensively covered by Legal Aid South Africa.[368]

A community service system would extend graduates' time in which to search for articles or pupillage. However, the editorial of the South African attorneys' magazine, *De Rebus*, warns that: "the legal aid system should not be used as an avenue to allow disadvantaged students to have access to the profession: that is not its purpose."[369] Contrary to the view, it is submitted that if compulsory community service for lawyers will improve access to the profession for graduates from previously disadvantaged groups, then this should be wholeheartedly welcomed. Concomitant with a community service scheme would be the added advantages of a higher post-university study employment rate for graduates and (all being well) improved marketability thereafter.

Another possible benefit is that a law graduate community service intern working in a predominantly social justice context will build up a collection of useful contacts operating within this sphere. This should effectively broaden the social justice network and increase awareness of the legal services on offer to those in need.

Due to the relative lack of research on the issue of (proposed) compulsory community service in law in South Africa, it would be useful to be able to explore both the positives and negatives of existing compulsory service within the medical and other fields in South Africa as well as consider foreign experiences. One could then hopefully draw a correlation between the compulsory services in other South African occupations and abroad (as to community service for law graduates) to that which may be implemented in the South African

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[366] Conco and Reid "Chapter 17" (undated) http://www.hst.org.za/uploads/files/chapter17_99pdf3 (accessed 2014-07-11).
[367] Editorial "Community Service – Nurses Play Catch-Up With Legislation" 2007 September/October 11 five *Professional Nursing Today* 7.
[368] Legal Aid SA's split between criminal and civil work was discussed under the introductory section of this paper. See footnotes 14, 17 and 18 above.
[369] Cited by McQuoid-Mason 2005 *Obiter* 208.

legal sphere. However, in order to avoid this paper being too long, the study will *not* attempt to make such comparisons.

Whilst space constraints will not allow this paper to do so, it is possible and useful to consider the post-study community service experiences in the legal field abroad,[370] as well as the lessons to be learnt from South African post-study community service programmes in other professions. In post-apartheid South Africa, programmes and strategies for addressing inequalities, like post-study community service, were introduced in the public sector, particularly in healthcare.[371] Perold and Omar consider post-study community service to have certain general, key benefits.[372] For healthcare professionals it has afforded a valuable learning opportunity in gaining practical experience.[373] In a study of various professions' community service in South Africa, most of the young professionals involved opined that they had gained skills and confidence as well is making a meaningful contribution through their work.[374]

A year's community service should help prompt graduates to better understand their obligations as citizens.[375] Importantly, in this way a *cycle of free legal service* is created; first at university as part of one's law studies,[376] then in a post-study community service year and ultimately throughout one's career in the form of *pro bono* work.[377] Such community service (broadly construed) is "motivated not by extrinsic rewards but by intrinsic rewards, such as personal satisfaction."[378]

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[370] For example, currently in Nigeria, compulsory national service in all professions, including law, has to a degree met the scarcity of qualified human resources in rural and remote areas. Omole, Marincowitz and Ogunbanjo "Perceptions of hospital managers regarding the impact of Dr's community service" 2005 September 47 8 *South African Family Practice* 56. Consider also that Chile requires up to 18 months compulsory community service after university study as a pre-condition for law graduates to be admitted into the legal profession. De Klerk W "Justice for all?" *De Rebus* (January/ February 2003) 26.
[371] Padfield "Reframing the frame : reflections of a community service psychologist" 2013 21 1 *Psychoanalytic psychotherapy in South Africa* 61 62.
[372] Perold and Omar. Joint Education Trust, 1997.
[373] *Ibid.*
[374] Mostert-Wentzel, Van Rooijen and Frantz 2013 *African Journal of Health Professions Education* 19.
[375] Smith "Volunteering and community service." 1999 62 *Law and Contemp. Probs* 171.
[376] See the earlier section of this paper pertaining to work at university law clinics by students as part of compulsory clinical legal education on exactly this point.
[377] Consider this research's analysis of *pro bono* work in the legal profession.
[378] Smith 1999 *Law and Contemp. Probs* 175.

Notwithstanding the above points, it must be acknowledged that certain considerations can be said to not favour compulsory community service. Reid, for example, argues that "the coercive nature" of community service "actually defeats its own ends". He found those doing medical community service were not positively influenced into developing a career path that would contribute to the public health care system. Reid's research showed a high proportion of professionals intended to emigrate after completing community service.[379] Nemutandani *et al* found that skills development of community service doctors was hampered by inadequate supervision and support.[380] In a study of community service doctors in Northern KwaZulu-Natal, it was found that decisions regarding where doctors were sent was made on the basis of availability of posts, not on senior practitioners to support them.[381] The dangers of inadequate supervision would thus appear to be a consistent theme pertaining to community service in the South African healthcare sector and something which needs to be carefully guarded against when it comes to community service for law graduates. Due to similarly perceived 'dangers', the probability of graduate community service has been received with hostility in certain South African legal circles. The official journal of the attorneys profession, *De Rebus*, warned that representation by community service 'interns' and paralegals could be of such an inferior quality that in worst cases it would not satisfy the constitutional right to representation.[382] To safe guard against such a danger, correct and adequate supervision of those serving community service is urgently called for. In addition, inadequate training and a lack of resources like telephone, fax and computer facilities would seriously hamper community service lawyers in their work.

This paper will not be able to do so in any detail, but in considering the issue of post-study community service for South African law graduates, a pertinent question requiring careful consideration is: Where can law graduates fulfilling their community service be placed and how will they be supervised? It has been cautioned that the introduction of about 3000 law graduates annually into a community service programme would be no easy task due to the requirements of their training, placement and supervision.[383] McQuoid-Mason states that special arrangements would have to be made to deploy community service interns at the different magistrates' courts (there are 432 in South Africa), community paralegal advice

[379] Reid in Ijumba (ed) *South African Health Review 2002* 157.
[380] Nemutandani, Maluleke and Rudolph "Community service doctors in Limpopo Province." 2006 96 3. *South African Medical Journal* 180 182.
[381] Couper "Developing mentors for community service doctors: an experience from northern KwaZulu-Natal." 2004 May 46 4 *South African Family Practice* 34.
[382] Manyathi-Jele 2013 August *De Rebus* 8.
[383] *Ibid.*

offices and (Legal Aid SA) justice centres.[384] He further suggests that state-funded law clinics have proved a useful skeleton on which to base and develop a community service model.[385] The Law Society of South Africa is adamant that the community service candidate practitioners be supervised by qualified legal practitioners.[386] There would thus appear to be a concrete basis upon which legal community service can be built. However, in addition to the so-called 'qualified legal practitioners' as mentors requirement, it is argued that such persons need to be fully committed to the role. Obvious possible 'placement points' for law graduate community service interns would be Legal Aid SA's Justice Centres. It is arguably most logical for South African community service lawyers to be placed with government-run and funded centres (as with medical community service). This is because the year's community service is a government objective and therefore the easiest and most practicable means for government to improve legal services for the indigent are through its own institutions. However, it is doubtful that these centres are capable of housing all of the approximately 3000-plus graduating law students annually.[387] It is also submitted that when it comes to the placement and supervision of law graduates fulfilling their community service, there is a potential role for legal NGOs and private lawyers acting *pro bono.*

It would be feasible to use legal NGOs willing to house graduates wanting to perform their community service there.[388] The problem, again, is that the number and location of existing South African legal NGOs is limited and hence constrained in the number of community service interns they could accommodate. A proposal is for private law firms, as part of their *pro bono* obligations, to take on a supervisory role over community service graduates rather than, or in addition to, running *pro bono* matters themselves. This is much like how South African *pro bono* 'clearing house', ProBono.Org operates its weekly so-called refugee clinics (in Durban and Johannesburg). UKZN (society) *Students for Law and Social Justice* students attend the consultations supervised by attorneys. This system functions well both in terms of the organisation seeing more clients, and in terms of the students gaining

[384] McQuoid-Mason 2005 *Obiter* 209.
[385] *Ibid.*
[386] Manyathi-Jele 2013 August *De Rebus* 8.
[387] McQuoid-Mason 2005 *Obiter* 224.
[388] In this regard institutions in mind are the Legal Resources Centre, Lawyers for Human Rights, Section 27 and the various university law clinics; all places which already employ candidate attorneys.

invaluable practical experience.[389] A similar structure for supervised community service lawyers could operate optimally.

4. 4 Concluding comments on community service in South Africa for students and graduates

The above sections have highlighted the positive role, despite the challenges which exist, which properly supervised and implemented community service by both law students and graduates could play in improving access to justice for the indigent in South Africa. These are important cogs in the wheel of free legal service delivery in civil matters proposed in this paper. The two distinct options of mandatory CLE and compulsory post-study community service may well be complementary - for example where post-study community service is provided at a university law clinic through supervision of student work.[390] Enhanced access to justice through quality free legal service delivery to the indigent should be considered the main indicator of whether the community service is indeed a triumph.

McQuoid-Mason proposes various advantages of community service. Firstly, there is the opportunity to help the indigent and other disadvantaged community members obtain what is due to them. Secondly, both students and graduates receive theoretical and practical exposure to the social justice issues of the day, something which is vitally important and which is not possible to obtain in 'regular' university black letter law courses.[391] Therefore, through their community service the student or graduate will develop the skills necessary to be an efficient practitioner and in this way supplement certain apparent shortcomings of the LLB degree.[392] A further possible plus is that those performing community service will

[389] See this paper's discussion of *pro bono* work by admitted lawyers and specifically the section on ProBono.Org.
[390] These two options have been put forward as distinct from one another by other authors. See, for example, Brickhill "The right to a fair civil trial: the duties of lawyers and law students to act *pro bono*" 2005 21 *SAJHR* 293 315.
[391] McQuoid-Mason 1999 *Windsor Y.B. Access Just.* 8. This plus is mirrored in the Department of Health's website calling for medical interns to apply for community service, where an element of community service is given as follows: "(it) provides our young professionals with an opportunity to develop skills, acquire knowledge, behaviour patterns and critical thinking that will help them in their professional development". Reid, Conco and Fonn "Implementation of Legislation: Community service for doctors and termination of pregnancy" (1999) http://www.hst.org.za/publications/implementation-legislation-community-service-doctors-and-termination-pregnancy (accessed 2014-03-10).
[392] UKZN Law School has responded to the possible numeracy inadequacies of certain graduates (complained of by law firms who have employed candidate attorneys) by implementing the requirement (through a supplementary course) that all students have a certain level of mathematical skill.

network with those employed in the free legal services sphere. It is submitted that gaps in the South African 'legal aid net' provide a space which compulsory student work at law clinics as part of CLE and post-study community service might appropriately fill.

In addition to the two aforementioned forms of (legal) community service, the paper now goes on to briefly outline the remaining two parts of a model for improved and coordinated free civil legal services for the indigent. This involves (firstly) attorneys and advocates in private practice acting *pro bono*, and (secondly) by community-based paralegals (hereafter referred to as CBPs). The potential of such services to narrow the civil legal assistance gap is explored. As Grant notes, there are economic limitations to the exercise of the right to legal assistance; the parts of the paper which follow attempt to show how these two forms of free legal services may play a positive role in this regard.[393]

5. *Pro bono* work by private lawyers in South Africa

5. 1 Defining *pro bono* work and the need for *pro bono*

"*Pro bono public*" (hereinafter referred to simply as *pro bono*) translates as "for the good of the public"[394] and means providing or assisting to provide quality legal services to enhance access to justice for persons of limited financial means.[395] Whilst this working definition will suffice for the purposes of this research endeavour, clearly what exactly constitutes *pro bono* can be the subject of considerable debate. The Cape Law Society, for example, has defined *pro bono* work as including advice, assistance or the giving of an opinion in matters falling within an attorney's competence, to facilitate access to justice for those unable to afford the costs thereof, through recognised structures.[396]

A critical problem facing South Africa's legal system is the prohibitive costs of legal services for the indigent.[397] In the light of the relatively wide net of legal aid provided in criminal cases

[393] Grant "The right to counsel: recent developments in South Africa" 1989 2 *SAJCJ* 48 55.
[394] Strossen ""*Pro Bono* Legal Work: For the Good of Not Only the Public, But Also the Lawyer and the Legal Profession" 1993 *Mich L Rev* 2122 2132.
[395] Jaichand ""LHR calls on lawyers to embark on *Pro Bono* Work" Jan 2002 *De Rebus* 21 21.
[396] Whittle ""Cape Attorneys Opt for Mandatory *Pro Bono* Work" Jan 2003 *De Rebus* 2 2
[397] Jaichand Jan 2002 *De Rebus* 21.

by Legal Aid South Africa,[398] it is submitted that this sentiment is most applicable to unaffordable civil legal representation. This effectively constitutes a barrier to access to justice in such matters. Attorney and own client costs invariably far exceed the tariffs in place. However, even on the basis of the South African High Court tariffs it is immediately clear that the assistance of a paid lawyer in civil matters in this forum is for the well-off only. For instance, in terms of the High Court Tariffs, fifteen minutes in court or in a consultation costs a sizeable R177.50, whilst for each page drafted R50 is allowed.[399] Yet the indigent, like other members of society, have serious legal concerns and problems requiring legal redress.

5. 2 Mandatory versus voluntary *pro bono* work for lawyers

There has been much domestic and international debate as to the establishment of mandatory *pro bono.* It is fundamental to consider whether the 'responsibility' for doing *pro bono* work is or should be an individual, moral decision to be undertaken voluntarily or whether it is or should be a professional obligation to be imposed upon all lawyers. Essentially, is there a professional duty to ensure that the legal needs of everyone are met without regard to the ability to pay? This is particularly relevant in South Africa in the light of the earlier drafts of the Legal Services Sector Charter (of December 2007), the last draft of the Legal Practice Bill and the recently passed Legal Practice Act which all sought or seek to introduce mandatory *pro bono*. It will be submitted that the South African legal community needs to commit itself, or failing that, be it through legislation or otherwise, be compelled to provide a reasonable, set portion of their time as *pro bono* work. It is the most marginalised, vulnerable and indigent in society who typically lack legal representation within the civil justice regime. A system of free legal services which does not rely solely on legal aid service providers (like Legal Aid SA) but harnesses a small proportion of the work time of private lawyers must have a greater positive impact in providing access to legal representation to the indigent than (dedicated) legal aid providers alone. As Constitutional Development Minister, Mr Jeff Radebe, echoed the rationale for this need in aptly stating:

[398] See the detailed discussion thereof earlier in this paper.
[399] High Court Tariffs, Amendment of Rule 70 (Tariff of fees of attorneys). See GN R516 in GG 32208 of 2009-05-08.

> "Resolution of civil disputes cannot continue to be an exclusive terrain for the rich and powerful only … All South Africans must enjoy equal access and protection of the law and where necessary through adjudication by the courts."[400]

There are plenty of arguments both for mandatory *pro bono* and against it. Due to considerations of length only one or two examples of each will be briefly mentioned in this research.[401]

A common argument against mandatory *pro bono* is the fear that it will result in poor quality representation.[402] There are essentially two aspects to this argument: firstly, that compulsory *pro bono* work will add a reluctant or resentful lawyer to an already difficult scenario.[403] Where legal practitioners are required to represent a client without compensation, there is said to be little incentive to provide high-quality representation to the assigned client, and as long as the lawyer performs in a way that is minimally competent, there can also be no recourse through disciplinary action.[404] This would technically provide 'access to justice' for the client in form only, not substance.[405] This would effectively defeat the purpose of introducing mandatory *pro bono.* Furthermore, individuals who receive *pro bono* services expect a willing and zealous representative and may believe that they would benefit most when lawyers act voluntarily.[406] However, Jacobs argues that this fear is in fact unfounded because assigned lawyers would still have to meet their ethical obligation of providing competent and zealous representation to *pro bono* clients. Failure to do so would subject them to disciplinary steps just as a failure to provide competent assistance to a paying client would trigger disciplinary action.[407] Besides, it is submitted that were a lawyer or firm to provide *pro bono* work of an inferior quality (especially consistently), this would damage their reputation with paying clients. Thus self-preservation could serve to motivate lawyers into providing quality, free legal services to needy clients.

Another perspective is that voluntary service is preferable to compulsory service in any endeavour as clients will be better served by lawyers who stand at their side willingly.[408] It

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[400] South African Government News Agency "Poor to get free legal services" (5 May 2010) http://www.sanews.gov.za/south-africa/poor-get-free-legal-services (accessed 2014-05-09).
[401] However, for a comprehensive analysis thereof see: Holness "Recent Developments in the Provision of *Pro Bono* Legal Services by Attorneys in South Africa" [2013] *PER (16)* 1.
[402] Strossen 1993 *Mich L Rev* 2140; Scully "Mandatory *Pro Bono*: An Attack on the Constitution" 1990 *Hofstra L Rev* 1229 1263; Burke, Mechling and Pearce 1996 *Stetson L Rev* 985.
[403] Jacobs "Mandatory *Pro Bono*: Real Change or Imagined" 1998 *Fla L Rev* 509 509.
[404] Russel "The Lawyer as Public Citizen: Meeting the *Pro Bono* Challenge" 2003-2004 *UMKC L Rev* 439 443.
[405] Jacobs 1998 *Fla L Rev* 520-521.
[406] Russel 2003-2004 *UMKC L Rev* 444.
[407] Jacobs 1998 *Fla L Rev* 511.
[408] Wachtler 1991 *Hofstra L Rev* 743; Tudzin 1987 *J Leg Profession* 104.

could be said that one cannot and should not force someone to be charitable.[409] Rather, incentives and recognition should be offered[410] to those who voluntarily perform *pro bono* work, as rewards are often more efficacious in changing behaviour than commands or threats of punishment.[411] However, such arguments are perhaps well answered by Kruuse's view that:

> "In principle, *pro bono* work should be voluntary, but given the situation of access to justice in South Africa, I think it has to be mandatory. …we have such a constitutional crisis here. I believe that the legal profession can't have a monopoly on the legal system without giving back to the community."[412]

A number of alternatives to mandatory *pro bono* for facilitating access to justice can be considered. One option is to permit community-based paralegals to perform more non-courtroom services, such as the drafting of wills and uncontested divorce agreements. An expansion of access to the Small Claims Court (through, for example, increasing its jurisdiction as we as establishing Small Claims Courts in districts where no such courts currently exist) is another alternative that should benefit all residents, but particularly the poor.[413] Such legal developments would make justice more accessible to all in so far as there is no need for the services of an admitted legal practitioner. Already, for this reason, lawyers are barred from appearing in certain labour matters in South Africa, for example conciliations and most misconduct and incapacity arbitrations. The legislature could respond to the needs of indigent people by encouraging rather than mandating the *pro bono* services of legal practitioners[414] - by implementing a 'carrot' rather than a 'stick' approach to such work. One suggestion is to allow lawyers a tax incentive by deducting time spent on *pro bono* work from taxable income at the normal charge-out rate.[415]

The Law Society of South Africa (the Law Society) and the General Council of the Bar (GCB) could also provide exposure to attorneys or advocates who voluntarily do *pro bono* work over and above the 'norm'. Features highlighting the meritorious *pro bono* legal service of particular firms or individuals could, for example, be shown on organisational websites and elsewhere in the popular press. This is along the same lines as the below-mentioned Young

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[409] Tudzin 1987 *J Leg Profession* 114.
[410] This option is discussed below under the next heading of "alternatives to mandatory *pro bono*".
[411] Cramton 1991 *Hofstra L Rev* 1138.
[412] Quote from Ms Helen Kruuse, admitted attorney and legal academic at Rhodes University. Kruuse http://bit.ly/15QYIYd.
[413] Scully 1990 *Hofstra L Rev* 1269.
[414] Burke, Mechling and Pearce 1996 *Stetson L Rev* 991.
[415] Whittle June 2002 *De Rebus* 14.

Solicitors Group in England and Wales which awards outstanding *pro bono* efforts by young solicitors.[416] This approach encourages lawyers to undertake *pro bono* work rather than forcing them to do so.

But there are also numerous arguments in favour of introducing mandatory *pro bono* for South African lawyers. For example, it is suggested that the very nature of their profession requires lawyers to perform *pro bono* work, as shown by the embodiment of justice aspirations in codes of lawyers' professional ethics.[417] It is similarly argued that lawyers have a special responsibility to provide legal assistance to the poor because of the profession's espoused public commitment to justice.[418] Their role as officers of the court could be said to require legal practitioners to assist in the administration of justice through providing compulsory *pro bono* services.[419] The Constitutional Court has also made reference to the "public responsibility of the organised legal profession".[420] A second argument raised is that as lawyers enjoy a profitable monopoly in providing legal services, it is not unduly onerous to impose such an obligation in order to afford everyone (proper) access to justice.[421] Thus, due to the opportunities and benefits that lawyers enjoy as a result of their privileged position, they have a moral duty to contribute to society and share those benefits with others.[422] On the other hand, Wachtler raises the point that other professionals such as doctors are also licenced and yet we do not expect them, let alone require them, to provide free services.[423] Why should this duty be selectively enforced against lawyers only and not against members of other restricted professions? To counter this argument, however, it should be remembered that whilst the South African medical professions have a requirement for entry into their professions that they perform a year's mandatory community service, this differs from lawyers' *pro bono* work in that the community service in the medical professions is remunerated. An additional difference is that whilst medical practitioners are required to perform post-study community service, they are not compelled to perform a *continuing* amount of free services thereafter.[424] A third viewpoint is that *pro bono* work may help to

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[416] van der Merwe Aug 1999 *De Rebus* 5.
[417] Burke, Mechling and Pearce 1996 *Stetson L Rev* 992; Cramton 1991 *Hofstra L Rev* 1123.
[418] Cramton 1991 *Hofstra L Rev* 1126.
[419] Burke, Mechling and Pearce 1996 *Stetson L Rev* 987.
[420] *De Kock v Minister of Water Affairs and Forestry* 2005 12 BCLR 1183 (CC) 11851-1186B as quoted in van der Merwe Nov 2001 *De Rebus* 18**.**
[421] Tudzin 1987 *J Leg Profession* 110-111; Wachtler 1991 *Hofstra L Rev* 739 740; Burke, Mechling and Pearce 1996 *Stetson L Rev* 987.
[422] Tudzin 1987 *J Leg Profession* 111.
[423] Wachtler 1991 *Hofstra L Rev 740.*
[424] Erasmus N "Slaves of the state – medical internship and community service in South Africa" 2012 August 102 8 *South African Medical Journal* 655.

counter negative attitudes toward the legal profession[425] and help restore its often tarnished reputation both in South Africa and abroad.[426] If lawyers show the public that they are contributing to the broader interests of society,[427] this should enhance the profession's integrity.[428] Thus, so the argument goes, it is in the interest of the legal community to uphold and maintain its integrity by introducing mandatory *pro bono.*[429]

A recent article in *De Rebus* arguably paints a very misleading picture as to the extent of *pro bono* work by South African attorneys. This report, citing the international *Thomas Reuters Foundation's Trust-Law Index of Pro Bono*, states that "South African law firms are reporting some of the highest average hours of *pro bono* work per fee earner globally".[430] But, very significantly, this conclusion was reached purely on the basis of a response to the *Trust-Law Index's* survey from only *five* prominent South African law firms.[431] The respondents are all organisations with well-established *pro bono* practices[432] whilst (not surprisingly) firms not performing *pro bono* work clearly did not even submit responses. It is therefore argued that this *De Rebus* article and the *Trust-Law Index's* survey provide a grossly incomplete reflection of the current actual roll-out of *pro bono* services by South African attorneys. If one juxtaposes the lack of clear evidence of *pro bono* work by numerous if not most South African lawyers with the sheer volume of the need for such services,[433] it is evident that a frequent lack of volunteerism amongst practitioners necessitates the imposition of a mandatory requirement.

Academic and the legal profession's opinion on mandatory *pro bono* work is divided, but the majority appear to oppose mandatory service. Jacobs states that if the profession wants to provide a measure of social justice to the poor, mandatory *pro bono* work will not accomplish this goal.[434] Similarly, Russell thinks that it is appropriate that the duty of *pro bono* service is couched in terms of voluntary compliance.[435] van der Merwe argues that a voluntary scheme

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[425] Strossen 1993 *Mich L Rev* 2132.
[426] van der Merwe Nov 2001 *De Rebus* 18; Strossen 1993 *Mich L Rev* 2132.
[427] Geral Sep 2006 *De Rebus* 16.
[428] van der Merwe Mar 2006 *De Rebus* 21; Tabak 1995 *Geo J Legal Ethics;* Strossen 1993 *Mich L Rev* 2135.
[429] Tudzin 1987 *J Leg Profession* 112.
[430] Manyathi-Jele "*Pro bono* index launched" July 2014 *De Rebus* 9 9.
[431] *Ibid*. There was also no report of any verification procedure for statistics provided and, significantly, no studies were made on lawyers and firms who did not respond to the survey (ie those most likely to be falling short of the mark).
[432] For example, Norton Rose Fulbright (South Africa), Weber Wentzel and Bowman Gilfillan (the last of which is discussed below).
[433] This is illustrated by the very limited extent of civil legal aid provision referred to under the introductory heading.
[434] Jacobs 1998 *Fla L Rev* 521.
[435] Russel 2003-2004 *UMKC L Rev* 444.

with contributions encouraged and appropriately recognised by the organised profession(s) is the preferred route.[436] A compulsory system may well serve only to replace a spirit of volunteerism with one of resentment and resistance.[437] It has been said that without sufficient empirical research to analyse the effect of a specific mandatory *pro bono* proposal on the delivery of legal services, it is difficult to see how the perceived problem and apparent solution will be joined to form a reasonably complete and worthwhile remedy.[438] However, Tudzin submits that instituting a mandatory programme would begin to address the problems of unmet legal needs.[439]

Whilst worthy of separate analysis, this paper will be unable to consider international law and developments relating to *pro bono* legal services beyond one example from the International Bar Association (IBA). The Resolution on Legal Aid (adopted in 1996) of the IBA resolved that countries provide adequate funding and other mechanisms for properly resourced legal aid schemes (broadly construed) to ensure access to justice for all. Whilst such IBA resolutions are not binding upon South Africa or elsewhere, they do give a persuasive indication to the legal profession as to what *pro bono* expectations there are on it from the organised international legal community. This includes access to courts regardless of financial position and a prohibition against prejudice caused by being unable to afford a lawyer. This Resolution applies to both civil and criminal proceedings. Law societies and bar associations are urged to encourage the setting up of free legal services where none exists and their lawyers should participate in or otherwise support such schemes (through *pro bono* work).[440]

Similarly, *pro bono* in selected foreign jurisdictions could and should be considered in separate studies - but is not done in this paper bar for one example given in this paragraph. Australia has a public interest law clearing-house, a referral body that matches disadvantaged and under-represented individuals and groups with a voluntary legal

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[436] van der Merwe Apr 2002 *De Rebus 2*.
[437] van der Merwe Aug 1999 *De Rebus* 5.
[438] Burke, Mechling and Pearce 1996 *Stetson L Rev* 984. These authors provide an interesting empirical analysis of the effect of introducing mandatory *pro bono* work.
[439] Tudzin 1987 *J Leg Profession* 128.
[440] International Bar Association "IBA Resolution on Legal Aid" (1996) http://www.google.co.za/url?url=http://www.ibanet.org/Document/Default.aspx%3FDocumentUid%3D3725ccaa-6858-490f-8192-6e0c302b7e91&rct=j&frm=1&q=&esrc=s&sa=U&ei=bKqUU-nlM6bC7AaCioC4BA&ved=0CB8QFjAB&usg=AFQjCNHfTacqKZnjDJa9wazxEP4sl0EiKQ (accessed 2014-06-08).

practitioner member of the clearing-house.[441] These Australian *pro bono* clearing-houses (such as that in Sydney) act as referral bodies which attempt to marry unrepresented indigent clients with private law firms associated with that clearing-house.[442] The Australian clearing-house model is reported to be extremely rigorous in its appraisal and acceptance of mandates. A client must show that she has no profit motive, is unable to access the formal legal aid system and qualifies in terms of a financial means test, meaning that such persons could not engage and pay for their own lawyers.[443] Members pay an annual membership fee to the clearing-house and, in turn and according to a roster system, they receive two to three cases a year which they conduct on a *pro bono* or reduced-fee basis.[444]

The range of foreign approaches to *pro bono* work for lawyers extends from entirely voluntary to strictly compulsory systems. Whilst this paper has been unable to go into them, the practices of foreign jurisdictions show that it is viable to use either a 'carrot' or 'stick' approach to *pro bono* legal services. Wherever possible the incentive-based American and United Kingdom-style of volunteer *pro bono* work is preferable, as interference in the running of the legal profession is thereby kept to a minimum. For example, the 'carrot' approach is reflected in the American Bar Association's Model Rules of Professional Conduct which identifies the lawyer as a public citizen and thereby encourages voluntary *pro bono* work.[445] However, where lawyers fail to (voluntarily) embrace *pro bono*, there are examples of successful implementation of mandatory schemes which should then be considered.[446]

5. 4 Current *pro bono* position in South Africa

Mandatory *pro bono* work is *theoretically* part of the rules of each of the constituent provincial law societies and various bar councils. A failure by any attorney or advocate to perform their *pro bono* service hours without good cause *should* be regarded as unprofessional conduct.[447] The caveats *theoretically* and *should* are added due to a

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[441] Whittle "*Pro Bono Publico*" 2001 *De Rebus* 2 2.
[442] Whittle "*Pro Bono* – Appealing to the Profession's Social Conscience" Jun 2002 *De Rebus* 13 15.
[443] Whittle 2001 *De Rebus* 2.
[444] van der Merwe "*Pro Bono* Waits in the Wings" Nov 2001 *De Rebus* 18 18.
[445] Russel 2003-2004 *UMKC L Rev* 439.
[446] Conversely, a classic example of a (strict) 'stick' approach can be found in Malawian law which requires lawyers to provide proof of performing 50 hours of *pro bono* work in a year before their practice certificates, which are issued annually by court, are renewed. Whittle "Malawi Lawyers Prepare for Mandatory *Pro Bono*" May 2006 *De Rebus* 16 16.
[447] This duty for all lawyers is in the Legal Services Sector Charter (December 2007): Clause 2.2.2. More particularly, the GCB adopted its own Rule 5.12.4 whereby it became obligatory for its (advocate) members to do *pro bono* work. GCB Constitution. Rules of Ethics. Rule 5.12.4 (Adopted July 2002). However, rules of the GCB

conspicuous absence of enforcement of these duties; to date there has been no report whatsoever of an attorney or advocate being disciplined for not meeting their *pro bono* requirements.[448] In 2003 the Cape Law Society introduced a minimum requirement of 24 hours a year of mandatory *pro bono* work.[449] *Pro bono* work was initially obligatory only for attorneys in the three so-called 'Cape Provinces'.[450] In later years almost identical rules have been adopted countrywide. For example, Rule 27 of the KwaZulu-Natal (KZN) Law Society provides for mandatory *pro bono* work by its members.[451] Sub-rules 27.3 and 27.4 stipulate the approved structures through which *pro bono* work may be offered. Notwithstanding the detail of Rule 27, no punitive consequences are provided for failing to meet *pro bono* obligations.

The hesitancy of the legal community in much of South Africa to embrace mandatory *pro bono* work is well illustrated by the aforementioned situation in KZN. The KZN Law Society debated the issue of compulsory *pro bono* service since 2002,[452] but its members repeatedly voted against the requirement being obligatory.[453] It followed the Cape model only in the second half of 2010.[454] Similarly, the Law Society of the Northern Provinces for a number of years decided that *pro bono* services would (best) be rendered by its members (only) on a voluntary basis.[455]

However, it should also be noted that certain South African law firms (most notably the large, national firms) have *mero motu* undertaken to perform a great deal of voluntary *pro bono* work. One example is given below.[456]

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only become binding on its members when made a rule by their local Bar and enforcement takes place at that level. This is stressed by the GCB Rules of Ethics. Rule 5.12.4 indicating that the "*local Bar Council shall require* its members to undertake *pro bono* work…" (own emphasis added). http://www.sabar.co.za/ (July 2002) (accessed 2014-06-24).

[448] van der Merwe "*Pro Bono* – Attorneys Rolling up Their Sleeves" Jan 2006 *De Rebus* 22 23.

[449] Whittle "*LSSA seeks views on pro bono at CCMA* " Jul 2003 *De Rebus* 14. Adopted in 2003, this minimum requirement is found in Cape Law Society Rule 21. See in this regard Singh *Access to Justice: Developing a Pro Bono Practice for South Africa*. Conference on Consolidating Transformation (7-8 February 2005) http://bit.ly/11Ivb2t (accessed 2012-01-24).

[450] van der Merwe Jan 2006 *De Rebus* 23.

[451] The rules of the KZN Law Society are accessible at http://bit.ly/179tRtj (accessed 2012-01-27).

[452] van der Merwe Jan 2006 *De Rebus* 22.

[453] Whittle Jul 2003 *De Rebus* 14; van der Merwe Jan 2006 *De Rebus* 23.

[454] KwaZulu-Natal Law Society "Mandatory *Pro Bono* Services" (undated) https://www.lawsoc.co.za/default.asp?id=2065 (accessed 2014-08-18).

[455] van der Merwe Jan 2006 *De Rebus* 22.

[456] For numerous other examples of the *pro bono* initiatives of mainly prominent South African commercial law firms, with footprints typically in most of the large urban centres, see: Holness "Recent Developments in the Provision of *Pro Bono* Legal Services by Attorneys in South Africa" [2013] *PER (16)* 1.

Bowman Gilfillan Attorneys Inc. (Bowman) commits all its lawyers to act *pro bono*. It has declared that it is both a desire and an obligation of all its legal practitioners to "give something back to the community and to assist all South Africans in accessing justice".[457] The firm commits to provide its lawyers "with the opportunities and facilities to enable them to fulfil their individual ethical and community service obligations." To this end they have a committee identifying worthy *pro bono* work and played a role in the formation of legal NGO clearing-house, ProBono.Org (discussed further elsewhere in this paper).[458] Bowman encourages and facilitates *each* candidate attorney and attorney to do 50 *pro bono* hours annually- although this ambitious target has yet to be reached.[459] Whilst not yet at the 50 hour level, there are impressive *pro bono* statistics from Bowman over about a decade. From June 2003 to February 2010 they reported contributing about 51 000 hours of *pro bono* work. This amounts to an average of about 30 hours per attorney or candidate attorney per year.[460] The aforementioned 50 *pro bono* working hours per year for every professional staff member would amount to about 1 000 hours a month across its national offices - worth about R1 million.[461] The organisation has stated that this model of *pro bono* allows it to make far more of an impact than (alternatively) appointing one or two dedicated *pro bono* lawyers. To illustrate this it contends that two practitioners doing *pro bono* full-time could achieve about 3 500 hours in total per annum. Yet in the financial year which ended in February 2014, Bowman managed 8 000 *pro bono* hours.[462]

It is worthwhile reiterating that Bowman's model involves each lawyer doing *pro bono* work, rather than creating a dedicated unit or department, which has been the route chosen by some other big South African firms. The Bowman-type system would arguably be more easily replicated by most other firms than the costly task of establishing a dedicated *pro bono* department (especially for smaller operations). However, whilst the appropriateness to other firms of the Bowman model of *pro bono* work could be debated at length, its commitment to unpaid work for the indigent generally is something to be emulated by other practices.[463]

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[457] Bowman Gilfillan "The Bowman Gilfillan Model" (2013) http://bit.ly/YrdRzU (accessed 2014-08-18).
[458] *Ibid*.
[459] This significantly exceeds the benchmark set by the various law societies in South Africa which is 24 hours per attorney each year.
[460] Bowman Gilfillan "*Pro Bono"* 2011 http://bit.ly/YziiuA (accessed 2012-07-10).
[461] *Ibid*.
[462] Bowman Gilfillan "The Bowman Gilfillan Model" (2014) http://www.bowman.co.za/Pro-Bono/probono-model.asp (accessed 2014-06-09).
[463] But from the perspective of *pro bono* in eThekwini, it should be noted that Bowman has no branch in Durban.

A significant development in the provision of *pro bono* work by private lawyers in South Africa was the establishment in 2005 of the *pro bono* clearing-house, ProBono.Org,[464] discussed earlier in this paper.

Within the realm of labour law, a fairly new development has been the provision of *pro bono* help by the South African Society for Labour Law (SASLAW) at the Labour Court one morning per week in Cape Town, Port Elizabeth and Durban, and three mornings a week in Johannesburg.[465] SASLAW has also taken the initiative of giving media exposure on their website to those attorneys who have spent the most hours on its *pro bono* work. In this way the Society thanks and acknowledges those lawyers for their exemplary work in the project.[466] Such public exposure of extraordinary *pro bono* work is not dissimilar to the awarding of prizes for outstanding *pro bono* contributions in the United Kingdom and Illinois, USA.[467]

The extent of *pro bono* work by advocates was covered earlier in this paper in the section which considered legal service provision in eThekwini / Durban in particular. That segment showed the glaring paradox between sound *pro bono* policy in terms of (supposed) duties on members versus the very limited provision of recorded *pro bono* work by advocates at the Durban Bar both in terms of the number of advocates involved and amount of hours done. However, that section did identify instances at the Cape and Johannesburg Bars where *pro bono* work by advocates is more widespread or at least promising.

From this section on the status of *pro bono* work amongst South African lawyers, it is clear that there has been some hesitancy on the part of the organised professions to fully embrace *pro bono* work by its members. Notwithstanding the shortcomings at a law society (and GCB) level, a number of the large, national firms of attorneys have taken it upon themselves to set up quite extensive forms of *pro bono* work by their professional staff - although many of these developments have been restricted to Johannesburg and Cape Town. Also, on the whole, smaller firms as well as advocates appear to be playing a much

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[464] ProBono.Org has over 40 law firms that it refers its requests for *pro bono* requests to. A list of the Durban and Johannesburg firms on ProBono.Org's books is provided on its website. ProBono.Org "About" (2012) www.probono.org.za (accessed 2014-06-05).
[465] South African Society for Labour Law "*Pro Bono*" (2012) http://bit.ly/14mldYB (accessed 2012-09-12). The project's inception was in February 2011.
[466] *Ibid*.
[467] Holness "Recent Developments in the Provision of *Pro Bono* Legal Services by Attorneys in South Africa" [2013] *PER (16)* 15.

smaller role in *pro bono* service provision. The two main forms which *pro bono* work in the large firms has taken are creating exclusive *pro bono* departments within a firm, or prescribing annual hour benchmarks for each lawyer in every department.

5. 5 Some concluding comments on *pro bono* work by South African lawyers

The words of the former American Bar Association President, Michael Grego, aptly describe the principles around *pro bono* work as:

> "... a recommitment to the noblest principles that define the profession: providing legal representation to assist the poor, disadvantaged and underprivileged; and performing public service that enhances the common good."[468]

Pro bono work is undeniably something to fervently support. But the question remains, what are the best forms for it to take? This section of this paper has asked as many questions as it has attempted to provide answers- and hence this issue requires considerable further considered input from all relevant stakeholders, including South African legal professionals themselves.

6. Recognising and regulating community-based paralegals (CBPs) in South Africa

There are compelling arguments for the statutory recognition and regulation of CBPs as part of a solution to bring about more equal access to civil legal services and promoting justice in South Africa. This is in light of their capacity to provide certain free legal services to clients, in contrast to (most) admitted lawyers in private practice. However, one must also consider views against their full recognition, including that they currently lack effective regulation and often have limited legal training, both of which might result in inferior advice and services for clients. The possibility of future statutory recognition and regulation of CBPs - including, but not limited to, aspects such as the rationale for the initial inclusion and subsequent exclusion of paralegals in general from the last version of the Legal Practice Bill (LPB) and the recently passed Legal Practice Act - will be considered.

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[468] In Ginsburg "Renaissance of Idealism in the Legal Profession" (22 Sep 2006) http://bit.ly/16gcnZd (accessed 2013-04-01).

6. 1 Defining a community-based paralegal

There are two main types of paralegals. The first group work and operate in commercial law firms. The second, CBPs, work with and serve poor, mainly rural communities. CBPs are sometimes employed by public interest law firms and NGOs. This study deals with CBPs only.

Paralegals may be law graduates who have no license to practice as advocates or attorneys, or ordinary lay-people with no formal legal qualifications but who have been trained in giving basic legal advice, performing administrative tasks relating to legal problems and providing legal education.[469] CBPs are thus local people trained or experienced in various practical aspects of the law, able to give legal advice and counselling, and possess administrative and legal education skills.[470] They may have specialised training to offer legal help to disadvantaged groups, and are often members of such groups. They may also be ordinary community members who use the law to help themselves and others.[471] A CBP is therefore not a fully qualified lawyer in the traditional sense but still does legal-type work. CBPs may be paid by NGOs or public interest law firms or may be community-based volunteers.[472] An example of the sort of work done by CBPs is the interviewing of clients about their legal problems. CBPs are paralegals who offer free legal information and advice to those in under-serviced, mainly rural and so-called township areas.[473] They deal with legal problems that include housing and debt matters, family and maintenance issues, basic contracts, employment, social services, labour, and other government service delivery matters such as pensions, claims against the Unemployment Insurance Fund (UIF), claims under the Compensation for Occupational Injuries and Diseases Act (COIDA), Road Accident Fund claims and dependents' benefits. In eThekwini, if CBPs need more information or knowledge with regard to a specific matter or legal question posed by a client, they typically contact the Community Law and Rural Development Centre (CLRDC) for guidance and advice to assist

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[469] McQuoid-Mason "Lessons from South Africa for the delivery of legal aid in small and developing commonwealth countries*" 2005 Obiter* 207.
[470] The South African School of Paralegal Studies "Safety and security sector education and training authority." (2011) http://www.paralegalstudies.co.za/source/2011_brochure.pdf (accessed 2011-10-05).
[471] Golub *Nonlawyers as legal resources for their communities* in Golub and McClymont *Many Roads to Justice. The Law Related Work of Ford Foundation Grantees around the World (*2000) 297.
[472] Due to a shortage of existing written research on South African paralegals, some use is made of a personal interview by the author with a leading and very experienced CBP with a wealth of first-hand practical experience and knowledge of CBPs in South Africa and particularly KZN, Mr Langalihle 'Langa' Mtshali. Mtshali was formerly Executive Director of the Community Law and Rural Development Centre (CLRDC) and Founding board member of the National Alliance for the Development of Community Advice Offices (NADCAO). Mtshali *Personal Interview* with the author. Durban (February 2012).
[473] Mtshali Interview 2012.

a client.[474] A similar network of CBPs has been created by the Centre for Criminal Justice across KwaZulu-Natal based at police-stations.[475] CBPs, therefore, despite the lack of a law degree, provide generally straightforward legal assistance to the indigent. They have a basic working knowledge of the legal principles relevant to the field in which they are advising and as a result are able to work independently to perform basic but nonetheless necessary legal tasks.

6. 2 Current position of CBPs in South Africa

CBP 'advice offices' (AOs) play a complementary role to the (formal) legal profession in the delivery of free / 'legal aid' services (broadly construed).[476] They operate at a grass-roots level where communities first come into contact with the law.[477] CBP AOs play an invaluable role in screening initial legal complaints and resolving legal disputes before referring potential litigants onto admitted lawyers and by performing various other basic legal tasks on clients' behalf.[478] CBPs represent a "paradigmatic shift" in the delivery of legal services, similar to the proliferation of rural public health workers in response to the formal medical profession's inability to meet community health needs.[479] In other words, they fill in the gaps where the legal system falls short of providing these legal services. The importance of CBP's work was recognised by the National Legal Aid Forum in 1998, when it called for a new legal aid structure that should build on existing advice offices infrastructure, increase AO's educative role via CBPs and others, provide support for CBPs from lawyers, encourage the use of out of court resolution mechanisms, and use CBPs as a first port of call, with referral to lawyers only when no solution is found.[480]

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[474] *Ibid*.
[475] Centre for Criminal Justice "Website" (2013) http://ccj.ukzn.ac.za/Homepage.aspx (accessed 2013-05-26). Approximately twenty CBP coordinators provide free legal services to the public at fifteen support centres in the interior of KZN. The centres are run by women from the community, all of whom have paralegal qualifications from the University of KwaZulu-Natal. Offices are based at police stations and magistrates' courts in order to be better able to work with the criminal justice system. Coordinators provide legal advice as well as mediation, educational and counselling services to clients, especially women and children, helping them to learn about and gain access to their rights and solve their problems. Staff also work in partnership with government departments and private organisations on behalf of clients, facilitating monetary claims and enabling them to use the law to improve their lives. *Ibid*.
[476] *Ibid.*
[477] *Ibid.*
[478] McQuoid-Mason "National Legal Aid Forum, Kempton Park, 15 – 17 January 1998: working commission recommendations" 1999 12 *South African Journal of Criminal Justice* 48 53.
[479] Abdulai *Socio-Economic Rights: The Forgotten Rights?* (2005) 1.
[480] McQuoid-Mason 1999 *South African Journal of Criminal Justice* 53.

Unfortunately, these factors appear not to have been adequately applied. Instead, the infrastructure of existing AOs has often deteriorated; their educative potential has not been reached; lawyers still do not offer CBPs adequate support; and procedures such as mediation have not been well advocated. Paralegals are sometimes utilised as a first port of call in areas where legal practitioners are geographically unavailable. But the full potential of CBPs being used generally for the initial contact with an indigent client (as a cost saving measure, for example) and where lawyers are geographically inaccessible, is said not to have been met to any great extent.[481]

CBPs have a range of backgrounds, experience, education, duties and tasks across a broad range of practice areas.[482] They may perform many of the same roles as attorneys except those that only a licensed and qualified attorney may perform under the Attorneys Act 63 of 1979, such as charging legal fees for work or representing clients in court. The daily work of CBPs is hence often quite difficult to distinguish from that of an attorney, with similar ethical implications. An understanding of ethics and professional responsibility is thus critical to their work.[483] They must be able to identify a potential conflict of interest arising from their professional work or personal interests and know how to address it in a way that protects the interests of their office and the client(s) involved.[484] They must fully understand the intricacies of legal representative-client privilege and the broader duty of confidentiality, and act carefully to preserve each client's privacy just as a practicing lawyer is obliged to do.[485] They must uphold the highest levels of competency, professionalism, and integrity in all of their work and in their communications with others.[486] In other words, they must act in line with the standards set for legal practitioners.[487]

The services of CBPs vary from merely giving (legal and other) advice to providing full legal aid services such as those provided by the Legal Aid Bureau in Johannesburg.[488] CBPs thereby play a substantial role in providing basic legal services to the poor. Due to the law being complex and often ambiguous, paralegals must be intelligent with analytical and

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[481] Mtshali Interview 2012.
[482] The delivery of legal services by non-lawyers in many executive administrative agencies is a well-established practice. National Federation of Paralegal Associations "Continuing legal education" (2011). http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=116 (accessed 2011-10-05).
[483] *Ibid.*
[484] National Federation of Paralegal Associations http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=116.
[485] *Ibid.*
[486] *Ibid.*
[487] *Ibid.*
[488] McQuoid-Mason "The delivery of civil legal aid services in South Africa" 2000 24 *Fordham International Law Journal* 111 142.

logical minds.[489] They must be able to recognise and evaluate relevant facts and legal concepts and be able to organise, analyse, communicate, and administer. Other interpersonal skills that paralegals should possess are the ability to resolve conflicts, negotiate, and relate well with various types of individuals in distress.[490] The roles of CBPs are therefore multi-varied with strong links to accessing basic services and social services from government bodies or NGOs.

Unlike the rigid criminal justice system, the civil legal system inspires innovative methods of problem-solving, including alternative dispute resolution. Muralidhar therefore argues that paralegals are well-placed to be co-opted into the civil justice system to provide help to litigants.[491] He sees paralegals playing a key role in promoting access to justice.[492]

Although CBPs perform some of the same tasks as attorneys, they even offer many distinct advantages over attorneys in certain contexts. For example, CBPs can focus on the justice needs of an entire community, not just their client. For example, if an environmental danger is brought to a CBP's attention by a member of the community, their assistance can be for the benefit of the whole group affected by that environmental concern. Paralegals can also often resolve issues faster and more amicably through alternative dispute resolution than attorneys can.[493] They are particularly effective because they are in touch with the communities in which they serve, more so than a lawyer is ever likely to be.[494] Due to low entry barriers, it is much easier and less expensive to train and utilise CBPs and to deploy them to legally under-resourced areas than to do so with lawyers.[495] CBPs also usually know the community they serve and can therefore meet their needs better than lawyers would be able to do.[496] They can be paid by an NGO to represent the broad needs of the community, while attorneys (with limited exceptions in the case of legal aid) take cases largely based on the client's ability to pay.[497]

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[489] The South African School of Paralegal Studies http://www.paralegalstudies.co.za/source/2011_brochure.pdf
[490] National Federation of Paralegal Associations http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=116.
[491] Muralidhar 2005 *Obiter* 261 264.
[492] Muralidhar 2005 *Obiter* 280.
[493] *Ibid.*
[494] Golub in Golub and McClymont *Many Roads to Justice. The Law Related Work of Ford Foundation Grantees around the World* 298.
[495] *Ibid.*
[496] *Ibid.*
[497] *Ibid.*

Because the scope of free civil legal services in South Africa is arguably quite narrow, CBPs have a key role to play in terms of access to justice. Because LASA's work has been shown to be significantly focused on criminal legal aid, CBPs have the capacity to fill this big gap apropos civil legal problems of the indigent. CBPs thus perform a number of functions to assist impoverished people who cannot afford other legal assistance. They are better equipped than most lawyers in relation to specific types of cases because of the closeness they share with the communities they help. It is therefore submitted that due to the broad spectrum of their work and their potential effectiveness, CBPs can perform a commanding role in allowing and increasing access to justice for the indigent.

6. 3. Qualifying as a CBP in South Africa

Certain NGOs in the justice sector and some tertiary institutions provide training and accreditation of CBPs. The CLRDC, for example, until recently provided training in collaboration with the University of KwaZulu-Natal's (UKZN) Institute for Professional Legal Training, and support for a network of 30 CBP advice offices in mainly rural areas in KZN.[498] At the end of the training, CBPs received a Paralegal Diploma from UKZN. In addition, a consortium of NGOs across five countries in the sub-region, including Lawyers for Human Rights have formed the "Southern Africa Legal Cluster Assistance Project" to lobby and advocate for the legal recognition of paralegals (especially CBPs) in Southern Africa.[499] South Africa has thus used paralegal networks as a means through which NGOs seek to provide legal services.[500]

The training of CBPs varies from the formal training offered by organisations like the CLRDC and UKZN, leading to a diploma, to predominantly experiential learning obtained whilst working.[501] Paralegals currently have two national qualifications registered with the South African Qualifications Authority (SAQA), namely a 1-year National Paralegal Certificate and a 2-year National Diploma in Paralegal Practice, which ensure that CBPs' qualifications are nationally recognised.[502]

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[498] The Community Law and Rural Development Centre "About us" (June 2014) http://clrdc.org.za/?page_id=7About us (accessed 2014-06-02).
[499] Penal Reform International and Bluhm Legal Clinic of the Northwest University Law School http://www.penalreform.org/files/rep-2007-access-africa-and-beyond-en.pdf.
[500] Muralidhar 2005 *Obiter* 282.
[501] McQuoid-Mason 2000 *Fordham International Law Journal* 131.
[502] South African Qualifications Authority "National Diploma: Paralegal Practice" (1 July 2012) http://regqs.saqa.org.za/showQualification.php?id=49598 (accessed 2014-07-11).

The University of South Africa (UNISA) also offers a SAQA-accredited paralegal qualification. It is a 1-year undergraduate Diploma in Law and seeks to meet the considerable need nationally for paralegal training. The student market for the Diploma are CBPs (including those working for non-profit organisations) as well as paralegals in the private, commercial and public sectors.[503]

Despite the existence of the these accredited courses, under existing law there is technically no qualification required to act as a paralegal, let alone a CBP. This is a lacuna in the current legal framework. However, one must perhaps be wary of implementing a blanket rule requiring certain qualifications failing which one cannot act as a CBP. For example, a CBP who for 35 years has diligently worked in the field should be afforded proper recognition of their prior experience in the event of formal paralegal qualifications being mandated. From a slightly different angle, although paralegals currently do not legally need qualifications, it is submitted that it remains imperative for them to be given adequate training to ensure they are able to provide sound legal advice and other aid to clients. Furthermore, NGOs such as the Legal Resources Centre employ CBPs based on their qualifications and experience. This makes it an unwritten prerequisite to have such qualifications for job-seekers to such employers.[504]

6. 4 The impact of CBPs and cooperation with other agencies

CBPs may impact beyond their own community via policy reform and the replication of activities from a local level. For example, the Philippines NGO *Saligan* successfully advocated for land reform with a resultant decrease in land prices and improved share of crops for leaseholders.[505]

South Africa's Black Sash is a useful model of how CBPs may work hand-in-hand with lawyers. Their CBPs have worked with the Legal Resources Centre, for example, in identifying worthy public interest litigation cases and locating clients to form the basis of such legal challenges.[506]

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[503] UNISA College of Law "Undergraduate diploma in law" (28 August 2012) http://www.unisa.ac.za/contents/faculties/law/docs/diploma_undergraduate_2012.pdfhe law (accessed 2014-07-06) 1. This is a 30 module, 360-credit qualification.
[504] Legal Resources Centre "Website" (2013) http://www.lrc.org.za (accessed on 2013-05-20).
[505] Golub in Golub and McClymont *Many Roads to Justice. The Law Related Work of Ford Foundation Grantees around the World* 311.
[506] Black Sash "Website" (2013) http://www.blacksash.org.za (accessed on 2013-02-20).

Vawda stresses the role of CBPs within public interest law firms. He notes that whilst public interest law firms are relatively few and small they have played and will continue to play a vital role disproportionate to their size and number. He stresses the role of CBP advice offices in the work of such NGOs through screening legal problems and providing support to members of the community. However, he is of the view that CBPs' role in this regard would be improved through their recognition and formalisation of paralegal structures.[507]

In 2007 there was a cooperation agreement between Legal Aid SA and the National Community-Based Paralegal Association. This entailed the (LASA) justice centres and university law clinics giving backup legal services to about 750 CBPs in 250 AOs mainly in so-called township and rural areas not widely covered by the formal legal aid system.[508] This has only been maintained by some law clinics, for example at Rhodes and North-West Universities.[509]

Legal Aid South Africa uses paralegals at all its justice centres and satellite offices. At its head office, paralegals - supervised by lawyers - staff the "Legal Aid Advice Phone-in Service".[510]

It is evident that impact of CBPs is affected by support from other agencies, public interest law firms, law clinics, CBP networks and governmental legal aid. Despite this, functioning relatively independently, CBPs can make a significant impact in the provision of legal services to the poor.

6. 5 Remuneration of CBPs

South African CBPs are usually paid, but often their pay is very low and in some cases they work as unpaid volunteers.[511] A definitive aspect of a CBP is that they are not working for

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[507] Vawda "Access to justice: from legal representation to promotion of equality and social justice – addressing the legal isolation of the poor" 2005 *Obiter* 234 246.

[508] Ramgobin *Justice for all? Law clinics in South Africa and in Sweden* Unpublished LLM thesis: Lund University (2004). The lack of clear data pertaining to paralegals and advice offices is shown by the 1998 National Legal Aid Forum estimating there to be 350 community advice offices in South Africa. McQuoid- Mason 2000 *Fordham International Law Journal* footnote 92.

[509] See Rhodes University Law Clinic "Advice Office Programme" (undated) http://www.ru.ac.za/lawclinic/adviceoffices/ (accessed 2014-07-09); and University of the North-West Law Clinic "Advisory Services" (undated) http://www.nwu.ac.za/p-fl-law-clinic (accessed 2014-07-09).

[510] Legal Aid South Africa "About us" (April 2014) http://www.legal-aid.co.za/?p=16 (accessed on 25 April 2014).

[511] McQuoid Mason 2000 *Fordham International Law Journal* 111-142.

profit. Provided a CBP's remuneration comes from its employer or an outside funder as opposed to from a client themselves, there is no problem from the perspective of the former being a CBP.

CBPs are reportedly paid a minimum of about R1000.00 per month.[512] More experienced CBPs have the potential to earn in the region of R4000.00 and more.[513] The amount that CBPs are paid, however, is often not based on the levels of experience of qualification they hold. Their remuneration is usually dependent on available funding from donors.[514] This is because, as discussed already, most CBPs operate from or for non-profit organisations. These bodies rely on funding which mainly comes from overseas and other NGOs, and to a much lesser extent the government.[515] The likely rationale for CBP acceptance of low or no income is that they wish "to achieve a broader goal of social and economic upliftment in their own local communities."[516]

The fact that South African CBPs receive little or no pay and that any pay is uncertain beyond the short-term are worrying issues which could result in a decreased number of CBPs going forward. This is because security of tenure and remuneration will always be important factors in respect of job choice. For CBPs neither one can be guaranteed and as a result it is probable that people might not look to be CBPs or may leave the field to procure a more substantial and secure income. Due to the rapid depletion of donor funding to South Africa from abroad,[517] it is postulated that if CBPs do not receive sufficient and reliable payment for their services, CBP AOs will really struggle to be able to provide any legal services in the future. If this were to happen it would have a detrimental effect for the indigent majority who rely heavily on the legal assistance they receive from CBPs.

Whilst the work of volunteer CBPs is generally less structured than that of employed paralegals, volunteers often have the benefit of also belonging to a community-based association. CBP work may then have mutually beneficial results for both the CBP AO and

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[512] Mtshali Interview 2012.
[513] *Ibid*.
[514] *Ibid.*
[515] Southern African NGO Network Pulse "An Emerging Funding Crisis for South African Civil Society" (12 January 2011) http://www.ngopulse.org/article/emerging-funding-crisis-south-african-civil-society (accessed 2014-07-10).
[516] Mtshali Interview 2012.
[517] Southern African NGO Network Pulse http://www.ngopulse.org/article/emerging-funding-crisis-south-african-civil-society.

the community-based association.[518] Undoubtedly, the training discussed above for employed CBPs is as important for volunteer CBPs, if not more so, in so far as there is no employment contract to fall back on.

6. 6 Laws or other regulation of CBPs

As mentioned above, a previous draft of the Legal Practice Bill (in the year 2000) included paralegals as "legal practitioners". The LPB was seen as an opportunity to give some formal and legislative recognition to paralegals. Indeed, prior to its closure, the National Community-based Paralegal Association (NCBPA) and its subsidiary, the National Paralegal Institute (NPI), were successful in having CBPs included in the provisions of the draft 2002 LPB and the Legal Services Charter of 2007. However, a later draft of the LPB was tabled on 21 April 2010. In terms of this Bill, the Department of Justice and Constitutional Development (DOJ and CD) opted to exclude all paralegals- encompassing commercial, state, academic and community-based paralegals- from the legislation. Instead, the DOJ and CD committed itself to the creation of a separate regulatory framework for paralegals and, in particular, the work of CBPs in community advice offices.[519]

The intial inclusion of paralegals as "legal practitioners" in the Legal Practice Bill of 2000 seemed to raise alarm bells amongst many attorneys and advocates in South Africa. Their anxiety was largely (seemingly) due to the lack of a necessary, formal qualification as well as insufficient regulation of the paralegal sector. On the other side of the coin, Osman-Hyder points out that CBPs consider themselves a key component in expanding legal services to indigent and rural communities. There have even been calls for paralegals to be able to appear in particular legal fora, such as in the Commission for Conciliation, Mediation and Arbitration (CCMA) applications.[520] It is acknowledged that poor quality representation - as may sometimes be said to be the case with trade union representation of employees at the CCMA - may be worse than no representation whatsoever. However, it is argued that proper training and accreditation of CBPs would greatly reduce the likelihood of an unacceptable standard of representation by them. It is in this light that it is submitted that every and any step which *improves* a person's right to legal assistance (through properly qualified and regulated lawyers or CBPs) goes some way towards achieving what Goldstone J in *S v*

[518] Golub in Golub and McClymont *Many Roads to Justice. The Law Related Work of Ford Foundation Grantees around the World* 303.
[519] The Department of Justice and Constitutional Development, Republic of South Africa "Website" (2013) http://www.justice.gov.za/ (accessed 2014-01-19).
[520] Osman-Hyder *The Legal Profession in South Africa* in De Klerk *et al. Clinical Law in South Africa* (2006) 26.

Radebe; S v Mbonani describes as "the evolutionary process of broadening and extending the right to legal representation".[521] This judicial pronouncement aligns with the view that access to justice is more than simple physical access to courts - it encapsulates the being "effectively heard".[522]

No legislation or regulatory bodies govern CBPs, and as such there are no prescribed minimum standards or regulatory authority that enforces compliance. In theory anyone can become and practice as a CBP even without having successfully completed a paralegal training programme of some sort (as discussed above). There is unquestionably a greater danger of a low standard of legal assistance from a CBP who has neither formal paralegal training nor regulatory control over their work. From a normative perspective this writer therefore calls for some form of minimum qualification for CBPs, allied with admission into and regulation of the profession by a statutory controlling body.

Currently community AOs operate as non-profit organisations with an elected management committee overseeing their governance and financial accountability and ensuring compliance with the requirements of the Non-Profit Organisations Act of 1997. The AO management committees consist of elected community members in that particular geographical area, and are a form of 'internal supervision'.[523] No formal qualification is necessary to be an advice office management committee member although informal, in-house basic training is sometimes provided.

The National Alliance for the Development of Community Advice Offices (NADCAO) was requested to engage with the DOJ and CD and other stakeholders to develop an appropriate regulatory framework for paralegals, particularly CBPs. NADCAO, together with National Task Team on Community-Based Paralegals (NTTCBP), made a joint submission to the South African Parliamentary Portfolio Committee on Justice and Constitutional Development on the LPB. This related to the revised Bill which excludes all categories of paralegals.[524] This submission took the form of written representations and an oral submission on 28 May 2013. In their submission NADCAO and the NTTCBP stated that any debates on paralegal recognition within the justice system must include the issue of the long-term sustainability of

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[521] *S v Radebe; S v Mbonani* 1988 (1) SA 191 (T).
[522] Dugard "Courts and the poor in South Africa: a critique of systematic judicial failures to advance transformative justice." 2008 *South African Journal of Human Rights* Special Edition on the South African Judiciary 1 2.
[523] *Ibid.*
[524] The last draft of the Legal Practice Bill was open for comments in February 2013.

CBP AOs.[525] They called for the LPB to "ensure that CBPs are equitably and justifiably included in the Bill or that sufficient minimum thresholds are contained … for their regulation and sustainability."[526]

Despite the lack of government progress towards paralegal regulation, NADCAO have organised community AOs into 9 provincial associations. This is as a precursor to forming the 'National Community Advice Office Association' (NCAOA). NCAOA will in future hopefully sit as a body regulating the affairs of South African community AOs, like the Law Society of South Africa that currently regulates attorneys' affairs and the National Bar Council for advocates.[527]

To conclude the section, there is currently no legislation or regulations governing any paralegals (including CBPs). With the Legal Practice Bill now having been passed as the Legal Practice Act, it seems clear that this legislation is not going to recognise paralegals. Instead it is likely to that separate legislation will govern all types of paralegals. This must occur through a combined effort of all parties involved, including paralegals themselves.

6. 7 Lessons from other jurisdictions and internationally

Many lessons can be learnt from the CBP experiences from other countries and internationally. But beyond the one Chinese example given below and the *Kampala Declaration on Community Paralegals* mentioned after that, these lessons fall beyond the scope of this particular study.[528]

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[525] The National Alliance for the Development of Community Advice Offices and the National Task Team on Community-Based Paralegals "Joint submission to the South African Parliamentary Portfolio Committee on Justice and Constitutional Development on the Legal Practice Bill [B20 – 2012]" (2013) http://nadcao.org.za/wp-content/uploads/2013/08/Joint-Submission-to-Parly-on-Legal-Practice-Bill.pdf (accessed 2014-05-11) 2.
For a similar sentiment see the website of the National Alliance for the Development of Community Advice Offices *"Community-based paralegals current status"* http://www.nadcao.org.za/regulations.html (accessed 2013-02-05.)

[526] The National Alliance for the Development of Community Advice Offices and the National Task Team on Community-Based Paralegals http://nadcao.org.za/wp-content/uploads/2013/08/Joint-Submission-to-Parly-on-Legal-Practice-Bill.pdf 12.

[527] The National Alliance for the Development of Community Advice Offices http://www.nadcao.org.za/regulations.html.

[528] However, to see many foreign experiences of the use of CBPs as part of the (mainly civil) justice system of those countries, see: Holness "The need for recognition and regulation of paralegals: an analysis of the roles, training, remuneration and impact of community based paralegals in South Africa" Accepted for publication in *JJS* Dec. 2013 edition.

China's *Qianxi County Rural Womens' Legal Services Centre* uses CBPs to give legal advice, mediate disputes, provide rights education at rural markets and refer complex cases to lawyers. Its experience is that such legal education genuinely and realistically improves legal awareness of disadvantaged groups and those people need help from CBPs to affirm their rights.[529]

On a regional level, in July 2012 over fifty organisations from twenty three African countries working to advance justice and government accountability in Africa adopted the *Kampala Declaration on Community Paralegals* calling on governments to recognise CBPs' roles.[530] The Kampala Declaration resolved, amongst other things, to strengthening the standard of CBP work through improved methods for their training, supervision, evaluation, and community oversight and to participate in networks of paralegal organisations. It calls upon governments and development agencies to invest in the promotion of CBP work nationwide. Finally, it warns that governments, whilst recognising CBPs, must respect their independence so as not to hinder CBPs' important function of holding the state accountable.[531]

6. 8 Arguments for formal recognition and statutory regulation of CBPs

Arguments in favour of formal recognition and statutory regulation of CBPs in South Africa include: that it is a low or no cost alternative to other legal services; it is more accessible than other legal services; CBPs provide unique services; the importance of raising community-wide legal awareness; and the potential for community upliftment. For the sake of the length of this paper, these will not be discussed here.[532]

6. 9 Arguments against formal recognition and statutory regulation of CBPs and rebuttal of such views

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[529] Golub in Golub and McClymont *Many Roads to Justice. The Law Related Work of Ford Foundation Grantees around the World* 302.
[530] Kampala Declaration "Kampala Declaration on Community Paralegals 2012" (2012). http://www.namati.org/news/newsfeed/kampala-declaration/ (accessed 2013-05-27). Those countries are: Burundi, Cameroon, Chad, the Democratic Republic of Congo, Egypt, Ghana, Kenya, Liberia, Malawi, Mali, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Somaliland, South Africa, South Sudan, Tanzania, Uganda and Zambia. *Ibid*.
[531] Kampala Declaration http://www.namati.org/news/newsfeed/kampala-declaration/ Resolutions 1 to 4.
[532] However, for a detailed discussion of these listed arguments for formal recognition and statutory regulation again see: Holness "The need for recognition and regulation of paralegals: an analysis of the roles, training, remuneration and impact of community based paralegals in South Africa" Accepted for publication in *JJS* Dec. 2013 edition.

One could argue that because CBPs are only trained in relatively basic theoretical legal knowledge (albeit that skills and expertise are gained over time) that the poor they serve may at times get service inferior to that provided by an admitted lawyer.[533] Perhaps a greater concern is the current absence of a regulatory framework to control all aspects of CBPs' work. Because of a lack of a controlling body there is no mechanism to police a satisfactory standard of paralegal work or behaviour, nor is there anyone to whom the public may lodge a complaint in the event of alleged CBP negligence or other wrong-doing. Also, unlike clients of attorneys who are protected against loss resulting from the theft of trust monies by their lawyer through the insurance cover of the Attorneys Fidelity Fund[534] (AFF), no such safety net exists where a CBP's dishonest conduct is concerned. Similarly, attorneys have the Attorneys Insurance Indemnity Fund (AIIF) which insures them against negligence[535]; again CBPs have no such fund which places their indigent clients in an even more vulnerable position.

It is incontrovertible that CBP training offers more elementary legal knowledge than a lawyer's studies in an LLB degree. Importantly, however, the argument was advanced above that some legal representation (by *qualified* and *regulated* paralegals, when that is the case) is surely preferable to none whatsoever - which is often the case in the absence of assistance from a CBP. Provided that a CBP's training is satisfactory and the standard of their work and behaviour is controlled by a properly functioning statutory regulatory body (to protect clientele), there is no reason why a client should not benefit from the legal help of a CBP. This research has shown that there are gaps in the 'net' of free legal services for the indigent via available legal aid and *pro bono* services - gaps which CBPs are well placed to satisfactorily fill. As to CBPs lacking facilities like the AFF and AIIF to protect their clients against loss caused by a CBP's dishonesty or negligence, such insurance funds could be put into place *vis-à-vis* CBPs' legal work.

6. 10 Recommendations concerning CBPs

There should be legislative recognition and regulation of CBPs. But in this process there must be more engagement with all the relevant stakeholders, in particular paralegals themselves, to ensure that the final outcome is workable, particularly in the differing contexts

[533] Golub in Golub and McClymont *Many Roads to Justice. The Law Related Work of Ford Foundation Grantees around the World* 297.
[534] Attorneys Fidelity Fund "Website" (undated) http://www.fidfund.co.za/ (accessed 2014-07-12).
[535] Attorneys Insurance Indemnity Fund "About us" (undated) http://www.aiif.co.za/ (accessed 2014-07-12).

in which paralegals work, their diverse roles and the need for their services to remain accessible. CBPs are most effective when working cooperatively with lawyers.[536] CBP AOs may be used to complement traditional legal aid schemes.[537] Thus everything possible should be done to promote a good working relationship between CBPs and lawyers. A good example of this is the Rhodes University Law Clinic and its 'Advice Office Project'. In terms of this project the work of CBP is supervised by attorneys and when a legal issue is beyond the skills of the paralegal there is a referral to attorneys at the Law Clinic (for example to appear in court).[538] The CBP's role should not end with the so-called 'referral' - typically the paralegal remains the go-between between the client and the attorney. CBP AOs are a useful addition to traditional lawyer-based legal aid services as has been outlined above. But there is an urgent need for proper payment of and training for CBPs for this system to function properly.[539]

McQuoid-Mason makes a number of proposals applicable to the operations of CBP AOs which include the following. Firstly, he argues for existing infrastructure of AOs advice offices to be improved. Secondly, he supports empowering CBP AOs by incorporating paralegals and law-related education trainers to provide legal education. Thirdly, AOs should be empowered through the inclusion of lawyers in these offices. Finally, alternative dispute resolution should be promoted as an alternative to litigation. Once a client has exhausted all of a CBP's avenues, they may be referred on to a law clinic, justice centre or private attorneys acting *pro bono* as the case may be. He cites the CLRDC as a good example of an organisation centred upon establishing and overseeing community-based paralegal advice offices, mainly in rural areas.[540]

As to legal education both of and by CBPs, the dissemination of legal knowledge involves not just the content but the method in which that content is delivered.[541] As to the medium of training, CBPs are well-placed to use interactive training methods appropriate to the group being trained.

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[536] Golub in Golub and McClymont *Many Roads to Justice. The Law Related Work of Ford Foundation Grantees around the World* 299. Notwithstanding this point McQuoid-Mason notes that some paralegals act independently of lawyers. McQuoid-Mason 2005 *Obiter* 231.
[537] McQuoid-Mason 2005 *Obiter* 232.
[538] Rhodes University Law Clinic "Advice Office Project" (2012) http://www.ru.ac.za/law/lawclinic/ (accessed 2013-05-21).
[539] McQuoid- Mason 2000 *Fordham International Law Journal* Para 135.
[540] McQuoid- Mason 2000 *Fordham International Law Journal* Para 134.
[541] *Ibid.*

The Black Sash indicates some of the challenges that clients of its advice offices face when coming up against agents of the state. It notes:

> "many … clients are illiterate and intimidated by officialdom. They have little access to telephones. In spite of this they have usually tried many avenues to resolve their problems before coming to a … Sash office".[542]

In response thereto the Black Sash and similar NGOs have engaged the services of CBPs. Amongst other functions,[543] these paralegals act as conduits between clients and government agencies - such as in applications for social grants.

As to legislative and policy proposals, from the above it is submitted that it is chiefly a shortage of funding and a lack of genuine interest in CBPs by government, that remain the biggest obstacles to opening, running and maintaining CAOs in South Africa.

The world-wide funding crisis has affected not only NGOs providing vital basic services, but also CBP service provision. The Black Sash, for instance, had to close three of its advice offices (in Knysna, Pietermaritzburg and Grahamstown) in February 2012, in a process of consolidation after funding cuts from long-standing donors moving their strategic focus away from South Africa.[544] CBP's role in lessening the burden on courts and their impact on making legal services accessible to the poorest in society cannot be refuted. In order to realise access to justice for all in South Africa, in particular the indigent in civil matters, the recognition and regulation of CBPs is non-negotiable. Hopefully, such recognition and regulation will also provide much needed financial and other resources to ensure that CBPs continue to provide quality free legal assistance.

Over-regulation can stifle any profession, but considering the current lack of recognition, legislative acknowledgment and regulation is likely to give impetus to further expansion and development of existing CBP projects. In this way, CBPs will continue to play a vital role in their societies and strengthen other free civil legal services provided by government and NGOs.

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[542] Quoted in Golub in Golub and McClymont *Many Roads to Justice. The Law Related Work of Ford Foundation Grantees around the World* 301.
[543] Such roles include helping clients get domestic violence protection orders or claiming outstanding maintenance.
[544] Black Sash "Sash to consolidate its provincial operations" (25 January 2012) http://www.blacksash.org.za/index.php/media-and-publications/media-statements/1078-sash-to-consolidate-its-provincial-operations-black-sash-25-january-2012 (accessed 2013-05-26).

7. Conclusion

One of the true fathers of democratic South Africa, Nelson Mandela, once said:

> "Let there be justice for all. Let there be peace for all. Let there be work, bread, water and salt for all. Let each know that for each the body, the mind and the soul have been freed to fulfil themselves."[545]

This paper has attempted to propose elements of a 'civil legal aid model' (broadly speaking) for more sustainable, improved and better coordinated access to justice for indigent people in civil matters in South Africa which would in so doing play a part in achieving the ideals referred to by Mandela in this quote. There have been calls for a "national legal aid forum" of the entire spectrum of legal aid service providers (including community-based paralegals) so as to promote cohesion and cooperation between such service providers towards a coordinated strategy to legal aid.[546] There are decidedly likely advantages of having such a consultative legal aid forum of all existing free civil legal aid service providers as well as representatives of the needy clients that serve.

Also on the issue of better coordinated civil legal aid, it is submitted that it is crucial that any organisation referring a potential client (who they are unable to assist) to another free legal service provider does so in an appropriate fashion which actually places such a person in a better position than they were in before their contact with the referring body. To elaborate on this, it is important that someone is only referred to another organisation which both deals with the type of legal matter faced by that potential client and has the staffing and other capacity to actually accept that client's mandate. The establishment and fostering of good communication channels and having regular meetings between the various South African civil legal aid providers should facilitate more suitable and efficient referrals of appropriate types of matters to the best placed free legal service provider to assist an indigent client facing a particular legal challenge. The worth of a referral is enhanced when the initial service rendered is taken to an elevated level through the referring party assisting by doing

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[545] Mandela "Nelson Mandela Quotes" (undated) http://www.nelsonmandelas.com/mandela-quotes.php (accessed 2014-09-01)

[546] Bodenstein 2005 *Obiter* 320. Such a 'legal aid forum' is discussed later in this research vis-à-vis the proposal for a comprehensive and coordinated approach to free legal service delivery in eThekwini.

things like phoning ahead to the referral body to confirm such prerequisites (like staffing capacity) and potentially even setting up an appointment with that organisation for the client being referred. ‘Value-added’ and appropriate referrals are especially necessary to avoid a situation where indigent clients are pointlessly and aimlessly sent from pillar to post by one organisation to the next in search of legal assistance. Such persons should not have their time, energy and preciously limited funds (if they in fact have any money whatsoever) needlessly wasted on public transport travel costs or long travels on foot to reach a subsequent civil legal aid provider (to which they have been referred by another organisation) only then to be told that they have been sent there in vain.

This research has recommended a multi-faceted approach to the provision of free legal service provision for the indigent in civil matters. This proposed model includes the use of compulsory work (for the indigent) by both law students during their studies and law graduates upon graduation in response to these challenges, an expanded role for properly trained and supervised community-based paralegals and suitably enforced mandatory *pro bono* requirements on practicing lawyers.