

SWEDISH SECTION OF THE INTERNATIONAL  
COMMISSION OF JURISTS



# REPORT

## SOUTH AFRICA PROGRAMME

FOR THE YEAR 2001

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## ABBREVIATIONS

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AGM	Annual General Meeting
AULAI	Association of University Legal Aid Institutions
CCMA	Commission for Conciliation Mediation and Arbitration
CLRDC	Community Law and Rural Development Centre
ICJ-S	The Swedish Section of the International Commission of Jurists
LAB	Legal Aid Board
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre
NADEL	National Association of Democratic Lawyers
NCBPA	National Community Based Paralegal Association
NGO	Non Governmental Organisation
NPI	National Paralegal Institute
SA	South Africa
SADC	Southern African Development Community
Sida	Swedish International Development Co-operation Agency
TACA	Transkei Advice Centres Association
ULC	University Law Clinic
ULC-D	Campus Law Clinic, University of Natal in Durban
UOFS	University of Free State Centre for Human Rights Studies
WLC	Women's Legal Centre
ZAR	South African Rand

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## INTRODUCTION

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In accordance with § 10.1 and 10.3 in the signed frame agreement, Sida ref: 1999-04826, the Swedish Section of the International Commission of Jurists (ICJ-S) hereby submit the report for the year 2001 regarding the South Africa Programme.

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## CONCLUSION

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The ICJ-S South Africa Steering Committee decided in its reduced budget for 2001 to give priority to those service providers, paralegal and law clinic organisations, who had given notice of their intention to jointly form Clusters. The bridging funding to the NCBPA was still the most important component in order to support the survival of the paralegal movement until it should as much as possible be incorporated into the national system for legal services to the poor.

Parallel to the support to the NGO partners, ICJ-S has followed the development of the South African Legal Aid Board's activities. Also the activities of other national state actors within the field of paralegal work have been monitored by ICJ-S.

The development of a sustainable system where poor people have access to legal aid took a new turn in 2001. The South African state and many other national stakeholders increased their activities in order to achieve a system that made it easier for poor people to get free legal advice.

Based on the experience gained in 2001, it is obvious for ICJ-S that future work to develop sustainable legal aid has to be organised, co-ordinated and funded by the state in order to be sustainable. This does not mean that the role of lawyers, advocates, attorneys, NGOs and universities will be less important where access is not at hand. Their role in monitoring the system will increase.

A structured plan for how the majority of the poor will get access to free legal aid in South Africa is still needed. This plan must involve all stakeholders in order to be successful. The LAB is the only actor that is able to develop this plan.

The LAB is also the only actor that has enough funding to develop sustainable services for the majority of the poor. ICJ-S therefore believes that the Justice Centres that were established in 2001 and that are now developing fast in all provinces will be the backbone of the legal aid system parallel to the private lawyers, paralegals and the law clinic organisations.

It is also obvious for ICJ-S, from the experience in 2001, that if the paralegal organisations will be able to survive as access to justice providers, the paralegal advice offices must develop an effective and qualified service together with the Justice Centres in the provinces. The Justice Centres need the outreach that the paralegal advice offices can offer. As contact points in all kind of legal matters and guiding people in the legal system, as well as being able to give legal advice in civil matters, paralegals do today and will in the future fulfil a very important role.

The reduction of international funding of the paralegal movement on the local level that is planned during 2002 and in the years to come will not give time for plans and co-operation to be developed by the Justice Centres and the paralegal movement and other stakeholders. Funded paralegal advice offices have already been reduced from 122 to 75 during 2001.

ICJ-S believes that additional funds for about 50 advice offices ought to be available during 2002 and 2003. The funds ought to be allocated to advice offices that have declared interest in and are effective enough for developing local paralegal clusters in conjunction with Justice Centres and ULCs. The funds should be available for a limited period of time and be applied for separately for each local initiative.

ICJ-S believes that in total the needed additional funding amounts to about 2 –3 million SEK a year in 2002 and 2003. One possibility to cover the need for additional funding for 2002 is to allocate the funds gained from fluctuations in the exchange rate. However, in 2003 there is a need to allocate new funds outside the budget.

In addition to the co-operation between the Justice Centres and the paralegal advice offices during 2001, the ULC's legal back up services to and co-operation with the paralegal advice offices play an important role. The ULCs that involve students and candidate attorneys in both education and in giving legal advice complement the Justice Centres where they fail to give services. The ULCs do work on behalf of the LAB and the Justice Centres.

ICJ-S finds that other NGOs also will be able to contribute to access to justice for the poor but in a more limited way than the stakeholders mentioned above. LHR for example had law clinics in each province in 2001 but due to lack of funding they will probably not be able to perform to the same extent in the future. ICJ-S believes that organisations such as the LRC, the WLC and the LHR will be the best suitable organisations for increased human rights monitoring in South Africa. The very skilled lawyers in the organisations will in our view be able to effectively perform activities including litigation and legislation monitoring. The organisations may also pay an important role in other countries in Africa.

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## **ECONOMIC OVERVIEW**

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See Annexure 1 and 2

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## **OBJECTIVES**

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### **DEVELOPMENT OBJECTIVE**

The development objective of the South Africa Programme is that under resourced people, mainly in rural and remote areas, have access to justice in order to enforce their constitutional rights.

### **SHORT TERM OBJECTIVES**

The short-term objectives of the ICJ-S South Africa Programme are:

- a sustainable paralegal structure and system giving legal advice to poor people in the rural and remote areas of South Africa where there are no legal services,
- to maintain and increase free legal advice to poor people through law clinics run by the state or by NGOs,
- a structured co-operation between the paralegal organisations and legal actors such as Justice Centres, NGO law clinics and others within the legal profession,

- an effective and increased Human Rights Monitoring of the South African state through different NGO activities in order to ensure that the South African State fulfils its constitutional and international obligations.

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## THE STRUCTURE OF THE ICJ-S SOUTH AFRICA PROGRAMME

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During 2001, the ICJ-S South Africa Steering Committee including 15 Swedish lawyers, meeting once a month, continued and intensified the work towards increased co-operation between the supported organisations and other stakeholders in South Africa. The board of ICJ-S received regularly reports regarding the development in the programme. The secretariat in Sweden was during 2001 strengthened by financial and administrative capacity. The contacts between Sweden and South Africa have been backed-up by a South African consultant remunerated on an hourly basis. For further information, see under *The South Africa Steering Committee*.

To obtain the development objective of the programme, ICJ-S co-operated during 2001 with a number of Human Rights organisations in South Africa. The organisations were divided into two categories:

### Access to Justice

- **Paralegal organisations:** the National Community Based Paralegal Association (**NCBPA**), the Community Law and Rural Development Centre (**CLRDC**), the University of Free State Centre for Human Rights Studies (**UOFS**).
- **Law Clinic organisations:** the Legal Resources Centre (**LRC**), Lawyers for Human Rights (**LHR**), the Association of University Legal Aid Institutions (**AULAI**).

### Human Rights Monitoring

- **Human Rights Monitoring organisations:** the National Association of Democratic Lawyers (**NADEL**), the Women's Legal Centre (**WLC**), the Campus Law Clinic, University of Natal in Durban (**ULC-D**).

The two different categories in the program have been developed out of the activities executed by the organisations. Under Access to Justice, paralegals are active in giving advice in advice offices and lawyers in the Law Clinic organisations do to a very high extent give legal services such as advice, and representation in court.

Both the Paralegal organisations and the Law Clinic organisations do Human Rights Monitoring work to some degree, but ICJ-S has in its programme supported these organisations primarily under Access to Justice to give advice and represent poor clients that could not afford private council.

The organisations in the category Human Rights Monitoring have not primarily been supported for services including general legal advice to the poor but more for taking principle cases to court or lobbying for change of legislation.

The work and activities carried out by these organisations in 2001, supported, preserved and strengthened the rule of law in the country and ensured that the South African State was aware of its constitutional and international obligations in regard to Access to Justice. The need for better co-ordinated and effective legal services made all stakeholders in the programme work for the development of a new and improved legal aid system in South Africa.

In 2001, ICJ-S continued together with its partners to support the development of Clusters. The development of Clusters aims to create co-ordinated and effective legal services based on varied combinations of NGO legal service providers, private legal practitioners and paralegals - in a formalised co-operation, which will provide legal services on a contract basis to the LAB. The incorporation of paralegals in a Cluster aims to secure an outreach of legal services to the poor and to the remote areas of South Africa where no legal services are rendered.

In addition to the co-operation with the partner organisations, ICJ-S also had regular contact and co-operated with the LAB and with representatives from the Department of Justice. The work was at all time co-ordinated with the activities of ICJ-Geneva.

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## SUMMARY OF ACTIVITIES AND RESULTS

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### ACCESS TO JUSTICE

#### PARALEGAL ORGANISATIONS

ICJ-S supports two paralegal organisations, the **National Community Based Paralegal Association (NCBPA)** and the **Community Law and Rural Development Centre (CLRDC)**. The paralegal offices of **CLRDC** are located in the Kwazulu Natal Province and **NCBPA** is responsible for provincial and local offices in the whole country.

The paralegals working from advice offices all over South Africa give legal advice to poor people in rural and other remote areas where mostly no other options to legal advice exist. The paralegals deal with different issues related to the community that they work in. The issues range from eviction cases, labour disputes, criminal matters and family matters etc.

**CLRDC** is presently responsible for 91 paralegals of which one or two work in the same office. CLRDC has continued to conduct Human Rights Monitoring, visit existing advice offices and establish new ones in rural areas, train paralegals, Amakhosi (traditional leaders) and members of the management committees, which are responsible of the advice offices. Also female traditional leaders receive training. The paralegal training consists of a four months intense course of basic needs within the legal field. The committee training is aimed at improving the skills of the members to do their work effectively and create the ability to better support their community. The traditional leaders are trained in Human Rights and this programme is continuously evaluated in order to be able to focus on their specific training needs. The on-site trips to the advice offices have the objective to audit, monitor, support and evaluate the offices.

The paralegal advice offices, co-ordinated by CLRDC, have addressed problems mostly by receiving and treating complaints and if necessary referring these to lawyers or other institutions. During the second half-year of 2001, 1281 cases were handled. Community workshops have been held to inform citizens about various human right matters. During the second half year of year 2001 over 225 workshops were conducted by paralegals and a total of 6 658 people attended these workshops. An amount of ZAR 3 745 405 was recovered by the paralegals for their clients during the second half year of 2001.

CLRDC facilitates a gender sensitive culture of democracy through production of reading materials, which are also used in workshops. Gender education forms a critical component of the CLRDC programmes besides specific workshops aimed at addressing bias and other stereotypic attitudes towards men and women. This is in particular in relation to the girl child and abuses towards these children in the name of tradition and custom or other misinformation such as the cure for HIV/Aids.

**NCBPA** represents 312 advice offices. 122 of these were financed by ICJ-S until June 2001. Because of decreased funds for NCBPA and management problems in some of the offices, sixty offices were cut

from funding in July. From this month and until the end of year 2001 ICJ-S continued to financially support 75 of the remaining offices including three paralegals in each of these offices. Nine provincial offices also form part of the NCBPA and two people are employed for each provincial office. The funding by Sida through ICJ-S has been directed towards salaries and administration costs for the local, provincial and national levels of the organisation. The funding has also been used for the cluster process. The purpose of the cluster process is to formalise the co-operation between the paralegals and the different legal service providers such as law clinics, Justice Centres and NGOs. The cluster system has engaged cluster co-ordinators since August 2001 in all provinces in order to promote and co-ordinate cluster agreements. Their salaries are funded by ICJ-S. A national workshop was convened early November 2001 to consolidate provincial cluster plans. Only Kwazulu Natal land cluster dealing with land rights in the Kwazulu Natal Province and the Cape Human Rights Cluster dealing with human rights have received funding so far. There are however further clusters under development.

NCBPA has also received funding from ICJ-S to organise meetings with the NEC (National Executive Committee) that is the decisive body of the NCBPA and the Fincom (Financial Committee), the advisory body in financial matters. Co-operation with the civil society and other NGOs has been established. A partnership between the NPI, an institute contributing to the development of a unified training system for paralegals, and the LHR led to the implementation of a paralegal training project with both basic and certificate training.

In 1999, NCBPA together with ICJ-S started to develop a data base programme in order for the provincial offices and the advice offices to report about the cases and results. The data base project is a system for reporting the cases dealt with by paralegals in offices that receive funding by the ICJ-S.

### **Paralegal Training**

ICJ-S continued its support to **UOFS** until the end of 2001. UOFS offers training of paralegals in the province of Free State through courses in law via correspondence and face-to-face lectures. Workshops are also offered. The curriculum consists of 17 fields such as Land Law, Motor Vehicle Accidents, Criminal Law, Family Law, Law of Contract, Labour Law, Governmental Spheres, Constitutional Legislation, Law of Succession, Human Rights, Consumer Law, Social Security, Arbitration, Courts and Court Procedures, Introduction to the Law and Women and the Law. The students submit assignments during the courses and ultimately undergo a written exam at the end of the one-year course. 41 new students were registered at the beginning of 2001. The total number of students at the end of 2001 was 160. They are supposed to undergo their exam in June 2002. UOFS has introduced a charge of R 400 for each student to make the programme more self-sufficient. This might have contributed to the reduced number of applications.

The ICJ-S support to UOFS will not continue after 2001 and therefore this report will not focus much on this co-operation. Nevertheless, UOFS continues offering training for paralegals. During the funding period the programme has been well functioning.

### **LAW CLINIC ORGANISATIONS**

During apartheid, South African NGOs developed legal services mainly to poor people through law clinics. In 2001 ICJ-S has supported, partly or fully, the work of 32 law clinics all over South Africa. Parallel to the legal services delivered by law clinics, the South African state has during 2001 started Justice Centres in all provinces.

According to the report from LRC, 8 265 people walked into their five regional offices during 2001. It can therefore be estimated that during 2001, a total of around 30 – 40 000 people walked into the 32 law clinics supported by ICJ-S to receive free legal advice

The Association of University Legal Aid Institutions established the **AULAI Trust** in 1998 in order to promote the provision of free legal services through university based law clinics, by using qualified practitioners, candidate attorneys and law students.

The system can be described as a network between university based law clinics and paralegal advice offices. The primary output of the AULAI Trust is to allocate funding to ULCs to enable them to develop and implement outreach programmes for back-up legal services to paralegal advice offices and consequently to make legal services more accessible to the poor and marginalized. The Trustees make decisions on whether or not a ULC should receive funding, and the amount to be allocated to it, on the basis of "The Operating Manual". The AULAI Trust has placed substantial emphasis on ensuring a geographical spread of resources.

By the end of 2001, 16 ULCs had applied for funding and were accordingly involved in the system. Out of these 12 were successful and are currently funded by the AULAI Trust. This is roughly in accordance with the timetable originally presented. Approximately 120 paralegal advice offices are reached by the 12 ULCs that are presently funded.

In 2001, the AULAI Trust continued its activities (visits to the clinics for example) to ensure that capacity building and institutional management at ULCs be attended to and thus empowering ULCs to render a better service to their clients. The AULAI Trust has introduced new reporting routines, requiring the ULCs to hand in monthly statements of income and expenditures as well as quarterly full narrative and financial statements.

During the reporting period one of the experienced clinicians in the country, Schalk Meyer, being on sabbatical, was mandated to visit all ULCs in the country to, inter alia, attend to the following: make a survey of all activities of ULCs in South Africa, establish needs at ULCs, draft Implementation Plans for ULCs in which the personnel participated to address the identified needs, assist ULCs in capacity building and management and assist ULCs with proposals as to funding and co-operation agreements to empower ULCs and to ensure bigger sustainability.

As to the development of clusters, the President of the AULAI Trust has participated in consultative meetings and workshops to develop co-operation with the other key national NGOs, namely LHR, LRC and NCBPA. On a regional level, the AULAI has begun the process of establishing the groundwork for clusters in Grahamstown with Rhodes ULC, in the Northern Province with both Venda and University of the North's ULCs and in KwaZulu-Natal, with the four ULCs and paralegal advice offices as well as in the North West with the Potchefstroom University ULC.

The KwaZulu-Natal Land Legal Cluster was the only planned cluster that was actually established during 2001. It is now in full operation.

Some of the activities of the AULAI Trust, related to lobbying and advocacy, that took place in 2001:

- The Gaje Conference on clinical legal education took place in Durban from 5 to 14 December 2001. The President of the AULAI Trust was the Chairperson of The Steering Committee. The conference was successful with approximately 180 delegates from all over the world.
- The AULAI Trust assists the NCBPA and the NPI in the development of a curriculum and in the structuring of a unified training programme for paralegals as well as with their negotiations as to the position of the paralegals within the new legal dispensation as envisaged by the Legal Practice Bill.
- The Secretariat of the AULAI Trust was invited by the National Land Committee to discuss its experiences in the management and administration of an endowment fund. In the process, the AULAI Trust was invited to participate in a national initiative designed to fill the lacuna in legal representation in land cases created by the change in Legal Aid Tariffs. It was further suggested that the NCBPA be invited to participate in the forum. Consequently, AULAI and NCBPA are now

included in the working committee and play a vital role in the design of a system to provide legal services in land cases in rural areas.

**LHR's Law Clinics** are supported by ICJ-S. During 2001, the supported clinics (Karoo, Umtata, Mafikeng, Pietersburg and West Coast) continued to concentrate their activities around legal advice and litigation for the indigent people in the region, legal back up services for the paralegal advice offices in the region, and human rights education and training.

The Karoo law clinic had around 200 open cases and closed about the same amount of cases. The staff in the clinic provided legal advice in approximately 500 to 650 matters. Labour, social welfare and civil matters was the most common. The clinic also holds about 15 workshops, and had many meetings with magistrates and Justice Centres.

The Umtata law clinic handled 200-260 cases per month, of which a large part were criminal cases. Monthly visits to prisons and paralegal advice offices in the region were also carried out. The Mafikeng law clinic met with the Mafikeng Local Aids Council and the South African Human Rights Commission to discuss the possibilities of future co-operation. The clinic received about 140 new cases per month mostly regarding civil matters, labour and pensions.

The Pietersburg law clinic had a high level of labour cases in 2001, and therefore met with a CCMA Commissioner in September. The clinic visited all the 20 community advice centres during the year. Approximately 20-26 consultations per day were handled by the clinic.

The West Coast law clinic made monthly circuit trips to 5 advice offices. The clinic also had 10-20 meetings per month, with different legal stakeholders, with media, press and attorneys. Every month at least two workshops were held. In addition, the clinic gave out 5 issues of the newsletter *Trappertjie*.

The law clinics did not involve in a lot of litigation during 2001.

In 2001, the Karoo and Umtata Law Clinics were identified as the two LHR law clinics to take part in Clusters. Representatives of all the stakeholders formally and jointly manage the Cluster in Karoo. The Cluster in Umtata has however failed in its plans and no formal co-operative body has been formed. The reason is that the TACA does not exist any longer due to funding restraints and the law clinic has not developed cluster activities with other legal stakeholders in the Transkei.

The Mafikeng, Pietersburg and the West Coast Law Clinics have not been identified as taking part in clusters in 2001. However, they are in the process of meeting with other stakeholders to discuss and develop co-operation in clusters.

ICJ-S supports **LRC's Access to Justice Project** (one of several projects in the Constitutional Rights Programme), within which the LRC supply legal services to paralegals and community workers in rural advice offices. All the LRC's regional offices (Johannesburg, Pretoria, Durban, Cape Town and Grahamstown) participate in the project.

Each year, the LRC trains at least 130 paralegals across seven provinces in issues related to constitutional rights and the delivery of legal services. During 2001, the LRC made a total of more than 80 visits to advice offices. During these visits, the LRC provided skilled legal advice in more than 329 matters recorded by the Johannesburg, Pretoria and Durban offices. Over 80 matters were referred to LRC's different regional offices during the visits. No records were available for the Grahamstown office. The Cape Town regional office does not visit advice offices, but provides its services by telephone and by receiving walk-in clients at the front desk.

During the period under review, the LRC kept a record of: people who walked into the regional offices (8265), matters referred outside the LRC (3890), matters referred to lawyers inside the organisation (912). In addition a total number of 1509 telephone queries were recorded.

Since most of the clients listen to radio, the LRC continuously provide information through radio broadcasts on local community stations.

The LRC has during 2001 been part of the KwaZulu-Natal Land Cluster. The role of the LRC is to take referrals and to litigate strategic cases that are brought to the cluster through different contacts with the clients.

During 2001, members of the LRC continued to serve on the LAB and contribute to the deliberations of the Board on the future of the state-funded legal aid system in South Africa.

In 2001, the LRC succeeded in a landmark case in which the court ordered the government to provide legal aid at state expense to people threatened with evictions. This is an important victory for landless people facing eviction. The LRC represented the Nkuzi Development Association in an application to the Land Claims Court. The government initially opposed the application, then withdrew from the case. The potential impact of this case on the lives of thousands of labour tenants and land occupiers may be very far-reaching if this judgement is effectively implemented across the country. It means that landless people threatened with eviction are entitled to legal aid at state expense - a significant advance in the provision of access to justice for some of the country's poorest people.

#### JOINT CLUSTER ACTIVITIES

The plan for 2001 was to support the start-up of four Clusters with participation from local paralegal organisations and local law clinics in different provinces to form pilot Clusters. The purpose of a Cluster is to try different ways to develop more co-ordinated and effective Access to Justice in different areas and within various legal subjects. The support from ICJ-S is only for 6 months start-up costs and during this period it is presumed that the partners in the Cluster will apply together for national funding both for the joint Cluster costs but also for the basic costs for legal advice in each organisation.

However, it is obvious for ICJ-S that different organisations, regions, legal questions and personalities will have an impact on how each Cluster will be constituted and to what degree the co-operation will develop. ICJ-S has tried to promote a system that is as flexible as possible in order for the partners to achieve as much experience as possible.

#### **A. According to the plan for 2001, the following Cluster initiatives were taken:**

##### **a) Kwa-Zulu Natal Land Cluster**

The ULC-D, the NCBPA and the CLRDC and other local organisations active in land legal questions participate. The LRC take referrals in principle cases. The KwaZulu-Natal Land Cluster is up running and very successful. It will probably receive funding from the LAB during 2002.

##### **b) Umtata Cluster**

The intention with this Cluster initiative was to start a co-operation between LHR and the local paralegal organisation TACA as well as with NCBPA. No specific legal question has been defined. The LHR law clinic in Umtata received support from the LAB during 2001. But the funds from the LAB were only for LHR's criminal work and for parts of the Clinic's administration costs, not for Cluster or paralegal work. The development of the Cluster has not been formalised yet probably because TACA, the local paralegal organisation, has stopped its operations. The Transkei region needs this Cluster co-operation and further initiatives will be taken during 2002 to restart the activities.

c) **Karoo Cluster**

Within this Cluster LHR co-operates with the local paralegal advice offices and the NCBPA. No specific legal question has been defined. The LHR law clinic in Karoo received support from the LAB during 2001 for criminal work and for some of the general law clinic work. But no funds were released for joint Cluster costs. Meetings have been held between partners in the Cluster but so far no joint application has been submitted to the LAB.

d) **Grahamstown Cluster**

The intention with this Cluster initiative was to start co-operation between the LRC, the University Law Clinic of Rhodes University in Grahamstown, local paralegal advice offices and the NCBPA in land legal questions. Due to lack of co-ordination there have been problems to find a common plan for the development of the Cluster and it is still not clear if the pilot project will develop. The co-operation has not yet been funded.

**B. Because of late starts of some of the Cluster initiatives accounted for above and as the LHR Law Clinic in Umtata received funds from the LAB, there were resources available for other Cluster initiatives as follows:**

e) **Cape Town Metropolitan Cluster**

The stakeholders within this Cluster (the University of Western Cape Law Clinic and the NCBPA) have signed formal agreements to co-operate. The Cluster is up running and gives advice primarily in housing and HIV/Aids matters.

f) **West Coast Cluster**

This is an initiative from LHR and local advice offices of the NCBPA. There is no reported formalised structure yet but the local partners seem to be enthusiastic to the idea and it will probably develop during 2002. An application has been sent to the LAB.

g) **Pietersburg Cluster**

This is a initiative from LHR, the University of the North Law Clinic, and local advice offices of the NCBPA. There is no reported formalised structure yet but the local partners seem to be enthusiastic to the idea.

h) **North West and Mpumalanga Clusters**

During 2001 ICJ-S also received an application from the University Law Clinic in Potchefstroom and local advice offices of the NCBPA to develop co-ordinated services in the North West and Mpumalanga Provinces. The initiative will be further developed during 2002. It has not yet received start-up funding from the ICJ-S or the LAB.

## **HUMAN RIGHTS MONITORING**

Human Rights monitoring helps setting the standards that make large number of people realise their rights. Hence, these are activities that can make a great difference in the lives of vast parts of the South African population.

Important to remember is also that the human rights monitoring activities and the provision of legal services by paralegals and law clinics are closely interrelated and mutually interdependent. The cases and examples within the legal services help not only the specific individual turning to the ICJ-S partner for advice, but are also necessary and renders possibilities for the human rights activities to evolve. Likewise, the Human Rights monitoring activities contribute to setting the human rights standards that are applied when providing legal services. Hence, these are all activities necessary for the true realisation of access to justice.

In addition, the development and execution of the human rights monitoring conducted by the ICJ-S South Africa Programme contributes to the transformation of the legal system. The transformation will give South Africa better possibilities to fulfil its international and constitutional obligations regarding peoples right to Access to Justice.

During 2001, ICJ-S and its partners developed plans for a future focus of human rights monitoring in South Africa despite a general decrease of funding in total.

## CHILDREN'S RIGHTS

ICJ-S supports the **ULC-D's Juvenile Justice Project**. The project did not start until the second half of 2001. The reason for the late start of the project was that the financial manager of the law clinic did not allow the project to start until it was fully financed. Since the first instalment was not made until May 2001, due to the late negotiations between ICJ-S and Sida regarding the frame agreement, she recommended the clinic to wait and start the project in the second half of the year.

The objective of the Project is to monitor the protection, maintenance and the enforcement of the rights of children. To obtain this, the organisation has been active within four different areas during 2001:

### 1. Selecting criteria for an upcoming test case litigation:

Five final year students worked to establish the criteria to be used in the selection of a test case. A number exceeding 250 children held under the Childcare act or the Correctional services act has been interviewed about their opinion as to what would help improve their situation. About 20% of these were girls. A range of people within non-governmental and governmental organisations has also been interviewed with the same objective. The students found that the children's own opinions differed as from the other interviewees, and even from the opinion of the children's own parents. Participatory research will be continued before the final decision will be made as to which test case will be pursued.

The following were identified as the broad categories of root causes of problems for children: poverty, inadequate access to schools, learning materials and a safe learning environment, abuse (sexual, physical and psychological), overcrowding in detention centres, delay in the justice system for awaiting trial children.

However, the research was not able to identify the most relevant area to pursue. Consequently, the project decided to continue consultations with other impact litigation organisations in the efforts to narrow the focus and design the case.

### 2. Working to reform the relevant current legislation:

Members from the clinic participated in activities arranged by the South African Law Commission in Durban on the Child Justice Bill which is due to be tabled in Parliament early 2002. The Project manager also had meetings with the departments of justice and correctional services. These meetings addressed the issues of overcrowding in the detention centres and representation of children. A working group has been set up to ensure access to justice for the children and a justice system that is efficient and understands them as children.

### 3. Trying to make the government allocate sufficient financial and human resources to protect and enforce the rights of children at risk with the law:

A group of final year students carried out research into Government budgets and submitted the research to the project in November 2001. The goal was for the students to understand the budgeting policy and how it impacts on children at risk with the law. Relevant state departments were also identified and their budgets were analysed. Certain policies and legislation were reviewed.

4. Trying to make employees of the relevant State departments sensitive to the needs and rights of children within the criminal justice system.

The project is a member in the management committee of the Street Children's Forum in Durban. The needs of children at large are discussed at these forums with local council, local government and state bodies such as police, health etc. The project is also a member of a coalition that is carrying out a campaign against torture in South Africa. The project is carrying out outreach programmes into the Westville Youth Correctional Centre where children awaiting trial are consulted regarding their pending charges but also regarding their social being in the hands of the police, wardens etc.

Even though not directly funded by ICJ-S, several of the **other NGOs** supported by ICJ-S also have programmes in the field of Children's Rights or carry out activities related to this field.

#### WOMEN'S RIGHTS

The **WLC** conducts public gender litigation and has been specially focused on Violence against women, Women's access to housing (especially on behalf of farm workers), Women's access to land (especially on behalf of farm workers), Women's access to health care services (including reproductive health care services and other women's health issues), Domestic workers access to social security, Maintenance, Customary and religious Laws and practices, Decriminalising adult commercial sex work and Equality. All the staff and the Trustees of the WLC are women.

WLC has during the year been involved in 29 cases. The centre has finalised three cases, which achieved successful results, two of which proceeded to court. A significant development is that one of these cases pertained to the recently enacted Recognition of Customary Marriages Act, and is to our knowledge the first court case under the Act. Both cases will hopefully set new precedent, resulting in aspects of the Sexual Offences Act being struck down and the common law duty of care being developed and extended. The WLC has also been granted permission to intervene as amicus curiae in cases in the Constitutional Court and Supreme Court of Appeals to be heard in 2002, which reflects an indication of the good standing of the WLC in the courts. During this period the WLC was engaged in two lengthy, high profile trials in respect of violence against women, both of which have been postponed until 2002 for further hearing.

Due to delays in key law reform areas by the South African Law Commission and Parliament the WLC has presented less written submissions than previously years during 2001. Instead there was greater focus on litigation, workshops, training and presentations.

In 2001, the WLC held two workshops to inform about WLC's submission on domestic partnership to the law commission. WLC also held courses on public interest gender litigation, both in South Africa and in Uganda. The course in South Africa further developed WLC's own skills and assisted in the development of a network of women lawyers in South Africa. It was also an opportunity to share the expertise that the WLC has built up in this area. In Uganda, the WLC was able to extend its work by co-operation with women lawyers from Kenya, Uganda and Tanzania. Two members from the ICJ-S South Africa Steering Committee (Berenike Alfvén and Åsa Malmros) attended the course.

During 2001 the WLC conducted training with paralegals for the first time on key gender legislation. The participants have requested follow up workshops.

Papers on customary law, maintenance, domestic violence, reproductive health and law reform on sex work were delivered at various conferences.

The gender desk of **LHR**, at its national office, works together with the law clinics and provides material on women's rights, where the law clinics inform the Gender desk on trends in the regions regarding women's rights issues. However, the Gender desk had no funding for 2001 and could therefore not perform accordingly.

In the first six months of 2001, the **LRC** received increasing requests for assistance, advice, and workshops on the new Domestic Violence Act. The Grahamstown LRC office, for instance, was invited to make a presentation on this new piece of legislation by the Independent Complaints Directorate. A lot of booklets on both the domestic violence legislation and the maintenance act were distributed to advice offices nation-wide. The Pretoria LRC office assisted a Mabopane-based advice office in organising a community march on the issue of maintenance grants. The march was a great success.

#### HIV/AIDS

**CLRDC** and **NCBPA** conduct awareness campaigns related to HIV/Aids matters of rural leadership by training paralegals to intervene in this issue. This is a vital component of the work of the paralegals.

The **LHR** runs an HIV/Aids Project (not funded by ICJ-S), based in Pietermaritzburg. The project focus on children affected and infected by HIV/Aids. To protect the rights of affected children the project involves in for example capacity building for NGOs and Community organisations in order for them to be able to advice on legal issues. The psychological impacts of these children are also dealt with. Some examples are the increased school drop out rate, an early entry on the streets, the fear of stigma and rejection by their families and friends at school, and young children caring for younger siblings or sick parents.

The **LRC** has played an important role in the struggle to make the government finance the anti-retroviral drug (Nevirapine) to HIV-positive pregnant women at state hospitals and clinics. According to a decision from the Pretoria High Court in March 2002 the government must provide this drug at every state institution. The government has appealed the decision and the appeal to the Constitutional Court is not expected to be concluded before the end of May 2002.

#### A SINGLE LEGAL PROFESSION

ICJ-S supports **NADEL's** national capacity building and the organisation's work towards legislation that provides a framework for a single legal profession, inclusive of all practitioners. NADEL, a voluntary organisation of lawyers, is the only South African affiliate of the International Commission of Jurists and has as its primary goal a legal and judicial system that realises access to justice for the disadvantage. During 2001, there has been a significant growth in membership within the organisation and currently NADEL has thirteen branches nation-wide.

On the 18-20 May 2001 in Bloemfontein , NADEL held the AGM postponed from 2000. The AGM was successful and was organised in conjunction with the organisation's Free State branch. The AGM's three-day agenda focused on the advancement of democracy and carving out new roles for lawyers. The resolutions adopted highlighted the following: the continuing need to transform the judiciary; the government's obligation to accelerate it's response to the HIV/Aids crisis; the concerns expressed about recent events in Zimbabwe that pose a threat to the rule of law and sustainable democracy in Zimbabwe and the SADC sub-region; support for the Commission For Gender Equality and other civil society organisations with their campaign advocating justice for women; NADEL's participation in the preparations and deliberations at the World Conference Against Racism held at Durban.

However, the AGM for 2001 did not take place during the year. The meeting is planned to take place in Durban on 31st May -1 June 2002.

During 2001, NADEL has also been working for the Transformation of the Legal Profession and Legal Practice Bill through being a member of the Legal Practice Bill Drafting Team, a Task Team that has been commissioned by the Minister of Justice.

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## ANALYSIS OF THE ACCOMPLISHMENT

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### RESULT ANALYSIS

#### ACCESS TO JUSTICE

##### *Paralegal organisations*

There are still great needs for training of paralegals and committee members in the rural areas. It is also obvious that the training of Amakhosi is a success. Many of the traditional leaders have explicitly asked **CLRDC** for the opportunity of training. Since the traditional leaders play an important role in the decision making, their interest in human rights will lead to progress in for example gender questions, HIV/Aids and children rights in the rural areas. The traditional leaders will learn to understand issues of equality and objectivity and interact better with their citizens. Female traditional leaders have also been included in the training programmes. During 2001 the training groups for women were separate from those for men. This has been explained with the fact that before the female leaders has reached a training level equal to those of the men, they preferably should stay in separate groups. The groups will however later be merged. The paralegal training programme at CLRDC is a well-elaborated legal basic education. There are many examples of paralegals that continue their legal carrier by studying at the university and a combination of a paralegal background and a law degree is a good base for an important contribution to the communities.

CLRDC's performance has corresponded with the agreement and with the objectives of the South Africa Programme. CLRDC is a structured organisation that plays a very important role for poor and marginalized people in the rural areas of the KwaZulu-Natal Province.

**NCBPA** is an umbrella organisation that is in a current phase of transition. The organisation involves in many different activities whereof the support to paralegals in its provincial and advice offices is one. The importance of the work of the paralegals in the local communities is obvious. They support people in communities where there are no other service providers, by giving legal and social advice in different areas. Without the advice offices, people in the rural, suburban and remote areas would probably not have any other opportunity to defend their rights. However, the paralegals need to co-operate with legal providers in order to refer cases where the paralegals do not have the competence.

The cluster process that the CLRDC and NCBPA actively take part of is developing rather well. In two provinces there are already cluster agreements in place such as the in the KwaZulu-Natal Province and the Western Cape Province. The further cluster process has come quite far and is as follows; Potchefstroom Law Clinic together with the NCBPA provincial offices of North West and Mpumalanga Provinces have come up with a memorandum of understanding in order to co-operate in a cluster. There is also a memorandum of understanding, although not finalised, between NCBPA, LHR and some further law providers in the Northern Province. In the province of Gauteng there are ideas to work within the field of labour matters. In the Northern Cape Province, the provincial office of NCBPA have had initial discussions with the Justice Centre in Kimberley to co-operate as a cluster and the provincial office is also engaged in discussions with different provincial departments and with one stop courts. These courts deal with small claims and will integrate family-, children-, criminal-, civil-, divorce- and maintenance matters. They consist of attorneys and candidate attorneys.

### *Law clinic organisations*

As the system of the **AULAI Trust** (the network between university based law clinics and paralegal advice offices) is in place, the AULAI Trust now focuses more on the activities related to the objective of an increase in the efficiency and effectiveness of the system. The survey carried out by Schalk Meyer and his on-site visits to all ULCs during 2001, are deemed to be crucial for the successful work related to this objective. The activities of the AULAI Trust in 2001 related to capacity building and institutional management seem to have improved the quality of many ULCs.

The **LHR** does not have a uniform and standardised system to register output. It is therefore difficult to comment on the exact degree to which the realised work during the period correspond with the quantitative objectives that have been set up. But overall, the accomplishment is in accordance with the objectives and goals of the organisation.

The objective of **LRC's Access to Justice Project** is to enable access to justice for poor and vulnerable people all across South Africa. This is done through the frequent visits to advice offices, the training of paralegals, the cases taken by the LRC regional offices, the participation in the LAB, the strategic litigation to expand the definitions of who is eligible for state-funded legal aid etc. The project has during several years developed into an effective, well functioning and integrated area within the LRC and it is important that the activities are carried out continuously to maintain knowledge and improve skills.

The overall result during 2001 is in accordance with the objectives of the project. However, the objective of visiting 500 advice offices has met some problems during the period. This will be further discussed below in the *Problem Analysis and in the Risk Analysis*.

The objective of the strategic litigation carried out by the LRC is to achieve the greatest impact for as many people as possible. Within the project, the LRC has during the year under review helped hundreds of people with unjust contracts, to secure pensions and death benefits, assisting in cases of fraud, taking on micro-lenders etc. Some of these activities have been carried out within the KwaZulu-Natal Land Cluster, of which the regional office in Durban is part.

### HUMAN RIGHTS MONITORING ORGANISATIONS

**NADEL** has achieved the goals set up for the year 2001 except that the AGM for 2001 has not yet been held. It is planned to take place in Durban on 31<sup>st</sup> May – 1 June 2002.

It is positive that the **ULC-D's Juvenile Justice Project** has been involved in activities to promote reform of legislation – primarily the Child Justice Bill - and that a working group has been set up to ensure access to justice for children and that the clinic is participating in discussions about these issues. The research into governmental allocation of resources seems to be thorough. The awareness amongst these final year law students, who obviously soon will be practising law, should hopefully have an impact on their and their colleges future work.

Overall, the **WLC** had a successful year 2001 in meeting its objectives and aims. It is the strong belief of ICJ-S that the work of the WLC has an important impact on the human rights situation of the women of South Africa. It is also a belief that one reason for the great impact of the WLC's work is due to the fact that the organisation has focused on only one legal area (women's rights) and has been able to build up its skills within the area as well as an important network of women's rights organisations in South Africa and elsewhere.

In January 2001 the director of the WLC went on maternity leave. This has not had any visible negative effect on the work of the organisation since the WLC is not based on one person. Amongst the Trustees of the WLC, there are many women who themselves are gender issue professionals at the Universities and

in the civil society. The Trustees play an active role in the WLC's work and during the director's absence one of the Trustees went in as Acting Director.

## **PROBLEM ANALYSIS**

During the last years the ICJ-S identified that the problems in SA having an effect on the programme mostly was related to the paralegals. The problems contained organisational structures and the lack of recognition of the paralegals. Today the problems are more related to law, responsibility and work relations as described below.

### **LEGAL PROBLEMS**

A very important factor in the beginning of the bridging funding of the paralegals was the legal position of the paralegals in the law. Did they have the right to represent and give legal advice to clients? The Bill that should regulate this question was the Legal Practice Bill.

The work to develop a new Legal Practice Bill is on its way to be finalised. The foreseen problem to incorporate the paralegals in the administration of justice as accepted actors within the field of the law was in the beginning of the discussions intense but quite soon the interest conflict between the attorneys and the advocates dominated. Whatever final detailed position the paralegals will have within a new Legal Practice Bill it is most probable that they will have an important role.

The problems are today that these legal provisions were supposed to be adopted two to three years ago when the ICJ-S/Sida bridging funding was not yet reduced. In the present situation when there is a funding problem for the paralegals and if the Bill gives the paralegal a role within the legal field, there is a need for each paralegal to be recognised. Therefore, records must be developed for the information regarding what practise, education and what needs there is for further education for each paralegal in order to adhere to the condition set by the law.

If there will be any possibility for existing funds during 2002 and 2003 to be allocated to support the application of the Bill within the paralegal area ICJ-S will propose such allocations. Because of currency changes there seems to be room for activities to support the application of the Bill within the paralegal field.

What this support will contain will be discussed during the second half of the 2002 with the partners in SA.

### **LIABILITY PROBLEM**

In the beginning of the bridging funding of the paralegals the organisational, structural, administrative and financial problems were the first to be solved. In the meantime the paralegals supported by ICJ-S up to a number of 400 to 450 gave legal services at the local level to the poor. Paralegals mostly help individual clients to contact local government representatives in order to secure social and economical rights in relation to the state. Also labour rights and minor civil rights mostly related to consumer rights question occur. The services have not contained representation in court.

Most of the time each paralegal has the possibility to refer the case to a lawyer employed by a University, LHR, LRC or to a private practitioner if the paralegal believes that the problem will be too difficult for him/her to solve or give advice about or if the paralegal would exceed the powers by solving the case.

One question that has been discussed but has not yet been solved is the responsibility for the individual paralegal in relation to individual clients for wrong advice or negligence.

If the Legal Practice Bill will regulate the right for paralegals to represent and give legal advice to clients it is necessary to develop a system equal to the system for other legal professions that gives their clients rights to compensation when service has included wrong advice or negligence.

ICJ-S has so far supported the general discussions to find solutions to these problems within NCBPA. NCBPA has developed an advisory group containing persons with high qualifications within this field and proposals from this group will if possible be supported by ICJ-S in its realisations.

#### PROBLEMS RELATED TO CO-OPERATION

The development of clusters has been reported in the last two years and is also in other parts mentioned in this report. In this type of structures and in other work relations that the paralegals have with lawyers, private practitioners, Justice centres and NGOs, ICJ-S has experienced a lot of problems.

One way to foresee and solve problems in the cluster developed so far has been to outline different agreements between paralegals and the law clinics. Also legal backup work from university law clinics within AULAI has been regulated contractually.

So far, no such agreements have however been developed between Justice centres and the paralegal movements or individual advice offices.

ICJ-S has come to the conclusions that there ought to be a need for the development of standard contractual rights and obligations between paralegals and supportive or partner lawyers. A proposed standard contract regulating relations between paralegals and lawyers and lawyer organisations ought to be developed by the SA partners involved and distributed to all local actors.

ICJ-S believes that the experiences regarding individual relations and formal problems between paralegals and lawyers at the local level ought to be documented.

#### PROBLEMS RELATED TO SLOW COURT PROCEEDINGS

ICJ-S has during the last years supported Human Rights litigation in SA. Because of slow court proceedings one case supported within the programme will normally take more than one year. This means problems in relation to individuals to have their rights protected. It will also mean problems in relation to funding when it will be difficult to know how much funds to allocate in advance from one year to another.

ICJ-S believes that efforts ought to be taken in relation to the right to have court decisions in reasonable time. This can be done within litigation but also programmatically in giving support to NGOs developing advice to the government or courts. SA government has already taken one huge initiative related to court administration and management. This initiative and others could be looked at as part of one initiative related to the right to a court decisions in reasonable time that is a human right.

## RISK ANALYSIS

### ACCESS TO JUSTICE

#### *Cluster co-operation*

The Land Cluster Programme in the KwaZulu-Natal Province includes among other organisations LRC (the Durban office), ULC-D, CLRDC and NCBPA. The cluster programme is a useful way of co-operation where other organisations and legal actors provide legal back up service to the paralegals, but a lesson to learn and a risk with implementing such a programme, is that it takes time to establish co-operation between different organisations, especially when the government is involved.

This means that there is a risk that not enough clusters will start in order for the majority of the paralegal advice offices to be incorporated in the administration of justice in SA before the Swedish bridging funding will be taken away or reduced to the degree where there is no room for a general survival support to paralegal advice offices. On the other hand it is perhaps necessary for the partners in SA after four years of bridging funding and the development of the first ICJ supported very interesting and successful clusters, to develop national plans for maintaining the paralegal services of access to justice for the poor. If these plans will include clusters as one option as well as how they will be financed in the future must be decided by the national partners and state representatives.

#### *Paralegal organisations*

There is a funding problem for South African organisations in general and that is therefore also the fact for **CLRDC** and **NCBPA**. CLRDC has support from various funders and is not as dependent on ICJ-S funds as NCBPA that receives the main part of its funding from ICJ-S. There is a general tendency among donors to scale down and this produces a gap of which there is no simple solution. If the lack of funding continues there is a substantial risk that this could cause a major setback for the paralegal movement in South Africa. CLRDC and NCBPA are well aware of the problem and have made considerable efforts to raise funds from different stakeholders during the reporting period. NCBPA is negotiating with two funders and ICJ-S considers it important that these potential donors learn from the experiences that ICJ-S has had during the co-operation programme with NCBPA.

**NCBPA** has also faced some internal problems during the reporting period. There seems to be a major gap in the communication between the national office and the provincial and advice offices. NCBPA has not, according to ICJ-S, a real plan for the internal structure of its organisation. According to ICJ-S the overall communication between the national office and the provincial offices has not worked well because of NCBPA being a top-down organisation. ICJ-S has tried to influence NCBPA to hire an administrative expert/coordinator to plan its internal activities. Otherwise there is a risk of mismanagement of its activities and resources. The NCBPA needs to structure its internal work and decentralise, especially to the provincial offices of the organisation. NCBPA national office would need to alter and probably scale down its activities and focus on for example lobbying for the paralegal movement and continue its work with the cluster system.

In the yearly audit for **NCBPA** 2001, comments by the auditors were made about the management of the ICJ-S funds. There are remarks about staff loans, inter-project loans and use of the money market fund. These facts are partly due to the insufficient capacity to plan for the economy and to structure the management of funds. Measures have to be taken to redress these inadequate actions.

The responsibility of the National Office for the local and provincial levels of the organisation is not sufficient according to ICJ-S. These levels of the organisation do not benefit enough from the activities that are carried out at the National Office for the overall structure of the organisation such as raising

funds, lobbying and discussions with various stakeholders. Further, the closing of the sixty advice offices has contributed to creating dissatisfaction and many paralegals feel let down by the NCBPA.

The database is functioning well but has not yet been developed to include the essential information for the organisation to really analyse the activities at the local and provincial levels. As it is today the information in the data base sheets is just statistics of the cases handled by the paralegals. There is no assessment of the background, reasons to cases or how paralegals deal with specific cases. One example why this would be useful is to be able to analyse why there are so many eviction cases in the southern part of the Western Cape and what is done to solve these problems.

### *Law Clinic Organisations*

The work of the **AULAI Trust** seem to be too dependent on and carried out by too few persons, making the management weak. This has already caused damages such as late reporting. The AULAI Trust has for a long time tried to establish a full time secretariat. This has not been done, since applicants have not been considered competent or “right”. More staff is however required, and the AULAI Trust seems to be in need of more administrative leadership. The employment of a part time financial assistant during 2001 is far from enough. The supervisors should have a position enabling them to focus on limited questions and projects. Since the AULAI Trust is physically located at the law clinic of the University of Natal in Durban, there is a risk that it becomes difficult to distinguish between issues related to the law clinic itself, and those related to the AULAI Trust. In the contacts with the AULAI Trust, ICJ-S has at several occasions pointed out the need for a stronger administration.

During 2001 the **LHR** has experienced internal problems related to a high staff turnover, effecting both the financial department at the National office and the Mafikeng law clinic. The main problem for the law clinics though is the decreasing funding. Several attempts have been made to find alternative funding, both from international and national funders. Parallel to this, the one important alternative to continue the provision of legal advice and litigation to the indigent is through co-operating with the LAB and the Justice Centres that are formed in the area where the law clinics are present. As a consequence of the funding problem for LHR, and if the LAB will not provide funding, there is a high potential risk that the LHR law clinics will be forced to close down. During 2001, ICJ-S has supported the LHR in the plan to host a Pro Bono conference in 2002.

The greatest risk for the **LRC's Access to Justice Project** is the reduced funds. The overall budget of the project (only partly funded by ICJ-S) does not allow the employment of more staff, which makes it harder to maintain the high quality of the project (based on the frequent visits to advice offices, which of course are consuming both time and resources). One of the LRC's stated objectives (from 1999) is to visit 500 advice offices per year. The number of visits during 2001 only amounted to a bit more than 80. This can result in the LRC shifting from the frequent contact with and training of paralegals to a more focused search for cases to litigate. The fundraising manager of the LRC has recently left the organisation and there is a risk that this will affect the project when the funding from ICJ-S is reduced. However, the recruiting of a new funding officer is in progress.

### HUMAN RIGHTS MONITORING ORGANISATIONS

**NADEL** faces problems related to funding. Due to a substantial reduction in funding it is impossible for the organisation to undertake all the planned activities, for example to employ a National Co-ordinator. Hence, as of March 2002 the position of a National Co-ordinator will become redundant. Due to unforeseen circumstances it was necessary to postpone the AGM scheduled for the year 2000 on two different occasions, with it finally being held in May 2001. The AGM scheduled for 2001 was also postponed and is planned for the end of May 2002. It is evident that in the light of the serious budget cuts, the important activities that have been facilitated by NADEL's National co-ordinator would have had to be curtailed.

Regarding the test case litigation in the **ULC-D's Juvenile Justice Project**, progress has been slow. Despite a large number of interviews, the project has not been able to identify relevant criteria for the case that will be pursued. The organisation has decided that consultations with other impact litigation organisations, such as LRC, might be a way to remedy this problem. The fact that the project is dependent on a few persons and on students is maybe a contributing factor to the difficulties in making concrete decisions regarding the issue of test case criteria. Another risk related to the project's dependency on students is that the educational aspect gets more focus and attention than the objectives of the project. It is therefore of great importance to recruit enough interested and active students. The positive side is that the increased awareness and competence in these areas among law students will improve the standards of tomorrow's lawyers in South Africa.

The **WLC** is networking with many NGO's in South Africa (and also in other African countries). Through these very important contacts the WLC gains information about women's situation in different societies and many of the WLC's cases are referred from these NGOs. Therefore, even if the WLC itself does not presently face any threat of decreasing funds, the overall situation for NGOs in South Africa regarding decreased funding, creates a risk for the future work of the WLC.

The fact that cases take long to finalise in the South African legal system, did not have a major negative effect on the WLC's work in 2001 since the organisation has been working for some years now and started to see the results from year 1999 and 2000 during 2001. At all time WLC will allocate resources to new cases that have a potential impact in the interests of women. It is obvious that this work will take time.

What now has been said about the risks facing the different organisations co-operating with and funded through ICJ-S leads to the general conclusion that if these organisations does not find alternative funding from international and/or national funders, there is a great risk that what has been achieved through the years - more and better access to justice for poor people - will be lost or reduced. Even in a situation where the organisations are able to continue their work in a smaller scale with less resource there is a risk that the most skilled and competent of the members of the staff will leave the organisation causing the work of the organisation to be of inferior quality and more time consuming. These dreary visions will apply for all of the organisations funded through ICJ-S but in particular for NCBPA as the organisation is facing thorough structural changes.

## GENDER POLICIES

Most of the participants in the workshops organised by **CLRDC**, the management committees and the paralegals are women, 60% of the paralegals are female and an increasing number of the chairpersons of the committees are women.

**NCBPA** obliges the organisation to employ according to gender equality in all its work and levels of the organisation. The long-term intentions of the organisation are to establish a gender desk to ensure maximum dedication and implementation of this policy. In the interim, the organisation ensures compliance with this policy through provision of equal opportunity to employment wherever vacancies occur. At the moment, at the NCBPA advice offices, management committees (local, provincial and national) and the training programmes there is a policy of equal gender representation. In the view of gender dynamics in rural areas arising from the male migration patterns to urban areas, it is important to recognise the need for female paralegals to enable the high female client base to have confidence to present sensitive and confidential cases to advice offices.

The **LHR** has a staff component of 71 of which 38 is female (54%). The ICJ-S funded law clinics have a staff component of 24 of which 12 is female (50%).

The **LRC's Access to Justice Project** is run by a woman, who is an experienced paralegal based in the Johannesburg office. Most of the paralegals and lawyers assisting her in the regional offices are women.

**NADEL** has continued to empower its members with a policy aimed at addressing gender issues and in particular facilitating an increase in the number of women both within NADEL and its leadership and within the profession and the judiciary. An example of this is the resolution adopted at NADEL's AGM, setting minimum thresholds for prioritising the representation of women at all levels within the organisation.

## **PLANNED FUTURE CHANGES**

### ACCESS TO JUSTICE

#### *Paralegal organisations*

The paralegal organisations are expecting changes in relation to the outcome of the cluster co-operation agreements, the recognition of paralegals and as a result of the recognition, getting increased support from LAB. There will be changes in the training programmes. This will be occasioned by a need to ensure that paralegal training is re-aligned with national norms and standards of the South African Qualifications Authority on qualification. The anticipated qualifications will result in some of the paralegals being registered as practitioners unlike now while others will continue functioning as office functionaries. Within the CLRDC there is already a well-elaborated training programme that is a good platform for the paralegal work.

The process of the capacity improvement of the paralegal movement is presently under development. Clusters for better co-operation between paralegals, NGOs, Justice Centres and legal practitioners are being constructed and training programmes have been developed. The training programmes are on their way to be unified. Progress has been made and a positive development is expected to happen. ICJ-S believes that it would be a mistake to interrupt the important process in these mentioned areas at this stage.

#### *Law Clinic Organisations*

The **AULAI Trust** has had discussions and negotiations with the Attorneys Fidelity Fund (AFF) on the possibilities for them to fund the activities of ULCs as from 2002. The AULAI Trust's efforts strive at enabling all ULCs to have a uniform submission to the AFF. Contacts and discussions with the LAB concerning ULCs entering into co-operation agreements with the LAB Justice Centres and the overall future co-operation with the LAB are also ongoing. The AULAI Trust anticipates that substantial strategic planning and discussions will continue to identify and develop cluster pilot projects and that this work primarily will be carried out on a regional level. Each law clinic supported will be encouraged to investigate possibilities and to develop a cluster system in each region. Grahamstown and Western Cape have been identified so far, Northern Province, North West and Mpumalanga will follow.

If the attempts of **LHR** to attract new funders are not materialised in the nearest future, co-operation with the LAB will be one direction to overcome the challenge. The Umtata law clinic is now funded for LAB specific activities as well as a large part of its current activities. The Karoo clinic is only funded for LAB specific activities, but seeks to expand this in year 2002. West Coast has submitted a co-operation proposal to the LAB for 2002 and beyond. The Mafikeng and Pietersburg clinics are exploring the possibility of some kind of co-operation with the LAB since they have established their own Justice Centres in these two regions.

Since the frequency of the **LRC's** trips to the advice offices has been markedly less than planned during 2001, it is imperative to increase the project staff. Compared to the original objective of 500 advice office visits, the revised and more realistic target is now to make 100 advice office visits every year.

Since the funding is cut down the LRC has looked into some other ways of finding the most important cases to litigate, e.g. through co-operation with other organisations that do not focus on litigation. The organisation has also submitted funding applications to other organisations in order to raise the balance of funds needed to sustain the Access to Justice Project

#### HUMAN RIGHTS MONITORING ORGANISATIONS

**NADEL** has not reported any planned future changes.

For the **ULC-D's Juvenile Justice Project**, as seen above in the *Problem Analysis*, there could be a need to involve more professional staff in the project.

The **WLC** has not reported any planned future changes.

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### THE SOUTH AFRICA STEERING COMMITTEE

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During 2001, the South Africa Steering Committee has continued and intensified the work towards increased co-operation between the supported organisations and other stakeholders in South Africa, in order to create a sustainable system for Access to Justice in South Africa before the withdrawal of the ICJ-S and Sida support.

During the year, the composition of the **South Africa Steering Committee** was the following:

Programme Manager:	Stellan Gärde
Deputy Programme Manager:	Urban T:son Nyström

Responsible for the co-operation with:	
WLC	Berenike Alfvén
LHR	Louise Bjurwill
Resource person	Thérèse Björk
LRC	Åsa Hill
CLRDC	Birgitta Lind
NCBPA	Åsa Malmros
ULC-D	Ann-Charlotte Nilsen
LRC	Tor Nitzelius
AULAI	Katarina Pahlsson
AULAI	Sara Stendahl
NADEL	Kenneth Ström
NCBPA	Henrik Sundgren
UOFS	Eric Östberg.

#### **Staff at the Secretariat working with the South Africa Programme:**

Emma Algotsson	Legal Officer (to February 17)
Helena Bergh de Medeiros	Programme Officer (from January 22)
Samarie Wijekoon	Programme Officer (from January 22 to March 19)
Ylwa Renström	Programme Officer (from March 19)
Gudrun Lennartsson	Financial Manager (to April 30)
Ewa Nyberg	Financial Manager (from August 15)

## Consultants in South Africa remunerated on an hourly basis:

Kate Savage (with assistant Jotee Daya)  
Håkan Friman

### Activities in 2001

The South Africa Steering Committee had seven recorded meetings during the year. At the June meeting, both Mikael Boström, Sida, and Salinda Biyana, First Secretary at the South African Embassy in Stockholm, participated. The focus of that particular meeting was to discuss how to develop a strategy for the future ICJ-S Human Rights Monitoring support. At the December meeting, Louise Doswald-Beck, Secretary General ICJ-Geneva and Adrian Arena, Executive Secretary ICJ-Geneva was present. The purpose was for them to learn more about the South Africa Programme since it can serve as a model for other national sections of the ICJ interested in running similar projects.

During 2001, members of the South Africa Committee travelled to South Africa on four different occasions:

- In **February**, Stellan Gärde and Urban T:son Nyström were in South Africa for one week together with Emma Algotsson, Ylwa Renström and Helena Bergh de Medeiros. The main purpose of the first week was to discuss and **sign the 2001 agreements** with all partner organisations. The second week Emma, who left her position as Legal Officer shortly after this trip, introduced Ylwa and Helena to their new jobs. Meetings and visits were set up with among others LHR, TACA, and a paralegal office outside Umtata, LRC, the Law Clinic at Rhodes University in Grahamstown, and the Legal Aid Clinic at the University of Pretoria.
- In **April**, Stellan Gärde, Urban T:son Nyström, Ylwa Renström and Helena Bergh de Medeiros went to Johannesburg to attend a **pre-meeting for the Advisory Conference** that is organised by ICJ-S every year in November. Representatives from the partner organisations were present as well as Judge Mohammed Navsa from the LAB and Lucretia Seeveld from the EU Foundation for Human Rights. The discussions focused around priorities in funding Human Rights Monitoring work in South Africa, in order to agree upon a few areas that could then be further elaborated during the November conference. Geoff Budlender, representing LRC's Constitutional Litigation unit, held a speech on the very same theme of how to prioritise in funding Human Rights Monitoring work. Urban and Helena also attended the Law Clinicians Meeting of the LHR in Pretoria for two days. Ylwa and Helena met with the Cape Metropole Cluster in Cape Town to sign an agreement for six months start-up funding from ICJ-S to the Cluster.
- In **August**, Henrik Sundgren, Åsa Malmros and Ylwa Renström went to South Africa to discuss the developments in the cluster process. Meetings were held with the National Office of the NCBPA and with the Provincial Office of the NCBPA in the Northern Province, where a meeting with the LHR also took place.
- In **October/November**, Stellan Gärde, Urban T:son Nyström, Ylwa Renström, Helena Bergh de Medeiros, Ewa Nyberg, Berenike Alfvén, Louise Bjurwill, Thérèse Björk, Åsa Hill, Birgitta Lind, Åsa Malmros, Ann-Charlotte Nilsen, Kenneth Ström, and Eric Östberg went to South Africa to attend the yearly **Advisory Conference** and to make organisational visits in order to discuss activities and results, managerial issues, reporting routines etc. The main purpose of the Conference was to decide, with input from the different stakeholders of the programme, which Human Rights Monitoring areas ICJ-S should fund during 2002. Present at the Conference were all partner organisations (except NADEL and WLC), Judge Mohammed Navsa and Ashley Alley from the LAB, Jody Kollapen from the South African Human Rights Commission, and Tony Pillay from the Legal Society of South Africa. The Minister of Justice, Peunel Maduna, came during the second day

of the conference to speak about access to justice in South Africa. The outcome of the Conference was that ICJ-S should concentrate its Human Rights Monitoring support during 2002 on the following groups and areas: Women, Refugees, Criminal Justice, and Social and Economic Rights.

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## THE CO-OPERATION BETWEEN ICJ-S AND THE SA PARTNER ORGANISATIONS

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One of the objectives of the ICJ-S South Africa Programme is to monitor the Human Rights in South Africa in co-operation with its partner organisations, not only to deliver financial support for the activities executed by the organisations.

### MONITORING OF ACCESS TO JUSTICE

Together with the South African partner organisations, ICJ-S has during the last years been involved in the development of a new South African legal aid system. From 1998 ICJ-S co-ordinated three different task teams with the aim to develop the legal aid system in SA. In the task teams all SA partners were represented – Universities, Law clinic organisations and paralegal organisations. ICJ-S South Africa consultant supported the administration of the task teams and all cost for travels and anything else was covered by ICJ-S. This operation was not applied for any of the SA organisations but developed during meeting organised by ICJ-S. The aim of the task teams was to solve future

- a) In-corporation of paralegals within the Legal Aid System,
- b) the incorporation of paralegals in Legal Practice Bill and
- c) to develop legal backup system for paralegal service.

Because of the high legal competence within the ICJ-S programme management and SA Group it was possible for ICJ-S actively to go into a consultative role in the development of the new legal aid system in SA. The Judicare system has changed to be complemented by a salaried system where lawyers are employed in state run or independent Justice Centres. These centres have combined forces with community-based paralegals. It is envisaged that the new legal aid system will have a direct positive effect for poor people in rural areas, in informal settlements, and in squatter camps - individuals who was not benefiting from the former legal aid system in the country.

The year of 2001 has been characterised by initiatives from different legal stakeholders and the LAB for the future development of legal aid in South Africa. The LAB has now developed Justice Centres in most provinces and has also signed contracts with NGOs to develop independent Justice Centres. The start-up of the LAB Justice Centre was initially supported by ICJ-S and therefore the process gained one year. The development of Justice Centres was and is of vital interest for Access to Justice for the poor. This support was not applied for but developed directly by ICJ-S in co-operation with the SA partners and LAB.

ICJ-S, in co-operation with its partners, has taken initiatives to develop new thinking and pilots for testing different solutions. The Universities, the LRC and the LHR are active in the rural areas, in townships and in squatter camps and are very important because of their possibility to develop and embark on new orientations.

The unsolved issues concerning the responsibility of individual paralegals that ought to be regulated by the Legal Practitioners Act, and the involvement of the paralegal movement in the distribution of access to justice, have been discussed thoroughly with the partners in South Africa and in the group of Swedish lawyers involved in the programme.

The co-operation with the partners in South Africa has during 2001 made it possible for a larger group of Swedish lawyers to visit law clinics, paralegal advice offices and courts in South Africa.

These activities have developed knowledge of the living conditions and the importance of legal work in the poor and rural areas in South Africa as well as how to, in the best way, co-operate for the development of Access to Justice. This part of the programme, the involvement of Swedish lawyers, is important for ICJ-S as an international Human Rights organisation. ICJ-S has been able to take advantage of the developed knowledge among the Swedish lawyers both in its Swedish work and in other countries as well.

The lawyers involved have also been able to increase their understanding in relation to Human Rights not only in Africa but also in other parts of the world.

ICJ-S concludes that the ICJ-S programme management and the Swedish lawyers within the SA group containing advocates, university lawyers, public employed lawyers and trade union lawyers represent knowledge and competence that have been used in a consultative role within the ICJ SA programme. Without that knowledge and competence base within the programme the financial recourses had been more difficult to allocate effectively and the Access to Justice in SA would have had a slower development..

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**ANNEXURE 1: ECONOMIC OVERVIEW**

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	<b>INCOME</b>	<b>OUTCOME</b>
Allocation from Sida	22 000 000	
Unspent funds brought forward from 2000 <sup>1</sup>	1 629 466	
Project related costs in South Africa		20 012 061
Project related costs, ICJ-Sweden		1 162 822
Administration surcharge <sup>2</sup>		1 747 365
<b>Total</b>	<b>23 629 466</b>	<b>22 922 248</b>
<b>Balance unspent funds brought forward to 2002<sup>3</sup></b>		<b>1 140 551</b>

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<sup>1</sup> DESO 0040/01

<sup>2</sup> See report from the Swedish Section of ICJ, May 2001

<sup>3</sup> Specification of unspent funds 2001 (Sida decision Gd 28/01)

New legal Aid from 2000	36 574
Information from 2000	150 000
ULC-D	160 466
Local cluster co-ordinator	88 000
New legal Aid Consultancy	76 389
Seminars New Legal Aid	16 596
Swedish Input New Legal Aid	43 569
Capacity Building	114 446
Contingency co-operation costs in Sweden	21 178
IMSSA (booked as current liabilities (1999) to the organisation awaiting clarification of IMSSAs financial situation. The organisation is now clarified as bankrupt and ICJ-S has no obligation to disburse the funding from 1999)	433 333
<b>Total</b>	<b>1 140 551</b>

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**ANNEXURE 2: SPECIFICATION OF THE CONTRIBUTION TO CO-OPERATING ORGANISATIONS**

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<i>Project-related costs in South Africa</i>	<i>2001</i>		
	<i>Budget</i>	<i>Outcome</i>	<i>Liabilities to organisations</i>
<b><i>Organisations</i></b>			
Association of University Legal Aid Institutions (AULAI) <sup>4</sup>	1 633 000	816 500	816 500
Community Law and Rural Development Centre (CLRDC)	797 000	797 000	0
Lawyers for Human Rights (LHR)	3 003 000	3 003 000	0
Legal Resources Center (LRC)	1 600 000	1 600 000	0
National Association of Democratic Lawyers (NADEL) <sup>5</sup>	188 000	94 000	94 000
National Community Based Paralegal Association (NCBPA)	10 880 892	10 880 892	0
Campus Law Clinic, University of Natal (ULC-D) <sup>6</sup>	328 000	167 534	160 466
University of Orange Free State (UOFS)	78 000	78 000	0
Women's Legal Center (WLC)	751 000	751 000	0
<b><i>Organisations, summary</i></b>	<b><i>19 258 892</i></b>	<b><i>18 187 926</i></b>	<b><i>1 070 966</i></b>

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<sup>4</sup> The second instalment was not paid due to a missing audit report for 2000. It was settled in May 2002

<sup>5</sup> The second instalment was not paid due to a missing audit report for 2000. It was settled in May 2002

<sup>6</sup> Brought forward to unspent funds due to a late start of the project

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## ANNEXURE 3: SOME INTERESTING LEGAL DEVELOPMENTS IN SOUTH AFRICA DURING 2001

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Compiled by Kate Savage, in May 2001

### A. COURT DECISIONS

#### 1. CRIMINAL LAW

##### i. Mandatory life sentences

***S v Dodo*** 2001 (3) SA 382 (CC) 5 April 2001

This judgement concerned the constitutional rights to freedom and security of the person and to be free from cruel, inhuman and degrading treatment and punishment. The Constitutional Court considered the constitutionality of section 51 of Act 105 of 1997, which obliges High Courts to sentence people convicted of certain serious offences to life imprisonment unless "substantial and compelling circumstances" justify the imposition of a lesser sentence.

The Eastern Cape High Court declared the section to be constitutionally invalid on the basis that it was inconsistent with both section 35(3)(c) of the Constitution (which guarantees the right to be tried before an ordinary court) and the constitutionally required separation of powers. In a unanimous decision, the Constitutional Court declined to confirm the order, finding the section to be constitutionally valid. The Court held that the legislature may prescribe sentences, which must be imposed by the courts but that this power is not unlimited, and punishments must be consistent with the Constitution. The Court held further that a sentence would be "cruel, inhuman or degrading" if its length were grossly disproportionate.

##### ii. Contempt of court

***S v Mamabolo*** 2001 (3) SA 409 (CC) 11 April 2001

Mr Mamabolo, a spokesperson for the Department of Correctional Services was convicted and sentenced for scandalising the court after a high court judge granted Eugene Terre Blanche bail. Mamabolo issued a statement to the effect that bail had been wrongly granted and that the prisoner would not be released. The judge ordered Mamabolo and the Director-General of the Department to appear before him to explain. Mamabolo was convicted of contempt of court for bringing the dignity, honour and authority of the court into discredit and sentenced to a fine and suspended imprisonment. This Court granted Mamabolo leave to appeal to it. On appeal Mamabolo was supported by the Freedom of Expression Institute, e.tv and Business Day as amicus curiae. It was argued that the constitutional rights to freedom of expression and to a fair trial had been infringed. Mamabolo's counsel argued that the offence of scandalising, i.e. contempt of court by way of statements not made in court or relating to pending proceedings, could no longer be recognised in the light of the Bill of Rights. The argument for the amicus was that recognition of the right to freedom of expression limits scandalising to cases of clear and imminent danger to the administration of justice.

The Constitutional Court found that although the crime of scandalising the court did limit freedom of expression, provided the crime was appropriately narrowly defined; the limitation was reasonable and justifiable in an open and democratic society in order to preserve confidence in the administration of justice. The Court held that freedom of expression must be weighed against public confidence in the courts. All the justices found that the summary procedure adopted in the high court, had limited a number of constitutionally protected fair trial rights in a manner not justifiable in cases of scandalising. The Court

held that such cases should be prosecuted in the normal way. In this case there had been no defiance of a court order, as the judge seems to have thought, nor did the appellant's public utterances constitute scandalising. The appellant's conviction and sentence were accordingly set aside.

### **iii. Extradition to states with death penalty**

***Mohamed v President of the Republic of South Africa*** 2001 (3) SA 893 (CC)  
28 May 2001

Mr Mohamed, a Tanzanian, is on trial in New York on numerous capital charges arising out of the bombing of the United States embassy in Dar Es Salaam in 1998. The FBI traced him to Cape Town where he was living under an assumed name and with a false passport. He was arrested and interrogated by South African immigration authorities as an illegal immigrant and handed over to the FBI for removal to the United States where the court told him he was facing the death penalty.

The applicant was supported in the Constitutional Court by the Society for the Abolition of the Death Penalty and the Human Rights Committee Trust. It was argued that the handing over and subsequent removal of Mohamed amounted to a disguised extradition without a safeguard against the death sentence. The South African officials were said also to have breached the law relating to deportation (under the Aliens Control Act 96 of 1991 and its regulations). This infringed Mohamed's constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment. The government argued that Mohamed had been liable to deportation for illegally entering the country, had lawfully been arrested and at his request had properly been deported to the United States and not Tanzania.

The Constitutional Court found that whether the removal was a deportation or an extradition, the ruling in *S v Makwanyane and Another* that capital punishment was inconsistent with the values and provisions of the interim Constitution applied with even greater force to the final Constitution. South Africa cannot expose a person to the risk of execution, whether by deportation or extradition, regardless of consent. The Court held that the handing over of Mohamed was unlawful in that (a) the absence of an undertaking that Mohamed would not be executed infringed his constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment; (b) it breached the Aliens Control Act. The Director of the Court was authorised and directed to draw the judgement to the attention of the trial court in New York as a matter of urgency.

### **iv. Indeterminate prison sentences**

***S v Niemand*** 2001 (11) BCLR 1181 (CC)  
8 October 2001

The Constitutional Court considered an appeal as to the constitutional validity of the indeterminate sentence imposed on habitual criminals. This Court addressed the issue whether the provisions of section 286 of the Criminal Procedure Act 51 of 1977 (the CPA) read with section 65(4)(b)(iv) of the Correctional Services Act 8 of 1959 (the CSA) are consistent with the Constitution.

It was argued that such punishment or treatment is cruel, inhuman and degrading and violates the provisions of section 12(1)(e) of the Constitution and it unfairly discriminates between habitual criminals and dangerous criminals. The Court concluded that even when read together the relevant provisions of the CPA and the CSA do not prescribe any maximum period of incarceration. A new Correctional Services Act 111 of 1998 was assented to on 19 November 1998, and that a section thereof now explicitly defines a period of 15 years as the maximum period of detention. It is almost four years since that legislation was passed and it has not yet come into operation. Although the appellant has therefore succeeded in his appeal to the extent of persuading this Court of the constitutional invalidity of section 65(4)(b)(iv) of the CSA as read with section 286 of the CPA, he cannot succeed in the consequential relief

sought by him, namely to have the sentence declaring him an habitual criminal set aside. The Court held that section 65(4)(b)(iv) of the Correctional Services Act 8 of 1959, read with section 286 of the Criminal Procedure Act 51 of 1977, is declared to be inconsistent with the Constitution. The Court ordered that such sentences be limited to a period of 15 years and that no such prisoner shall be detained for a period exceeding 15 years.

## **2. ADMINISTRATIVE LAW**

### **ii. Work permits for foreign spouses**

***Booyesen v Minister of Home Affairs 2001 (4) SA 485 (CC)***

*4 June 2001*

Four couples approached the Constitutional Court, all of whom consisted of a South African married to a non-South African. They applied for confirmation of the declaration of invalidity by the Cape High Court of two sections of the Aliens Control Act 96 of 1991 which deal with applications for work permits by foreign spouses of South African citizens or permanent residents. The first section concerns the obligation of such spouses seeking to work in South Africa to apply for a work permit while outside the country and then not to enter the country until the permit has been issued. The second section relates to the provision that work permits would only be issued to spouses of South African citizens if they do not pursue an occupation for which a sufficient number of persons are available in South Africa. The Minister of Home Affairs did not oppose the confirmation. The Constitutional Court held that the right to dignity and to family life were infringed by virtue of the provisions of Aliens Control Act 1991 which require applicants for work permits to be outside South Africa at time of application. The effect of this law on spouses of South African citizens residing in South Africa fails to give proper recognition to the importance of family life. The provisions were therefore declared unconstitutional by the Court.

## **3. CIVIL PROCEDURE**

### **i. Limitation of legal proceedings**

***Moise v Greater Germiston Transitional Local Council 2001 (4) SA 491 (CC)***

*4 July 2001*

The Constitutional Court upheld the right of access to court by a schoolgirl raped by her teacher after it found that the statutory 90-day limitation period in which to launch legal proceedings against a provincial or local authority or any of its officers (set out in section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970) is unconstitutional.

The Women's Legal Centre, an amicus curiae, asked that the order be retrospective to 27 April 1994 when the Interim Constitution came into force. In a judgment delivered 21 September 2001, the Court said that as a matter of law, if nothing more is said, such an order of invalidation is automatically retrospective to 4 February 1997, when the Constitution came into force. Since that date the provision has been a nullity. The effect of such nullity will have to be determined in each individual case.

## 4. RIGHTS OF VICTIMS OF CRIME

### i. Releasing rape suspects on bail

*Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)*  
16 August 2001

The applicant sued the state for damages resulting from a brutal attack on her by a man who was awaiting trial for having attempted to rape another woman. Despite his history of sexual violence, the police and prosecutor had recommended his release without bail. In the High Court the applicant alleged that this had been an omission by the police and the prosecutor. She also relied on the duties imposed on the police by the interim Constitution and on the State under the rights to life, equality, dignity, freedom and security of the person and privacy. The High Court dismissed the claim at the close of the applicant's case, finding that she had not established that the police or the prosecutor had wrongfully failed to fulfil a legal duty owed specifically to her. The applicant appealed to the Supreme Court of Appeal (SCA), which held that the police and prosecution had no legal duty of care towards the applicant and could not as a matter of law be liable for damages to her.

In a unanimous decision the Constitutional Court granted the application for leave to appeal and upheld the appeal. The Constitutional Court held that the state is obliged by the Constitution and international law to prevent gender-based discrimination and to protect the dignity, freedom and security of women. It is important that women be free from the threat of sexual violence. In the particular circumstances of the present case the police recommendation for the assailant's release could therefore amount to wrongful conduct giving rise to liability for the consequences. Similarly, the Court held that prosecutors, who are under a general duty to place before a court any information relevant to the refusal or grant of bail, might reasonably be held liable for negligently failing to fulfil that duty. The Court also referred to the complex issue of causation in this case.

The appeal was upheld and the matter referred back to the High Court. The effect of the order is that the case will be re-opened in the trial court on the basis that the appellant has made out a case in law for the state to meet. The state will now have the opportunity to lead evidence as to whether or not on the facts they should be held liable for damages.

## 5. RIGHT TO EDUCATION

### i. School going age

*Minister of Education v Harris 2001 (4) SA 1297 (CC)*  
5 October 2001

In January 2000 the Minister of Education published a notice, which stated that a learner might only be admitted to grade one at an independent school if he or she turns seven in the course of that calendar year. The purpose for the notice was to bring independent schools in line with public schools, in respect of which the Minister had already imposed the turning-seven requirement.

Talya Harris' parents approached the High Court challenging the validity of the notice on a variety of grounds, among others, that it unfairly discriminated against children on the grounds of age and was against the best interests of children such as Talya. The judge in the High Court found in favour of the Harris parents, declared the notice unconstitutional and invalid on a number of constitutional grounds and declared that there was no barrier to Talya being enrolled in Grade 1. The Minister of Education appealed to the Constitutional Court. In a unanimous judgement handed down on 5 October 2001 held that the matter was best decided not on the broad constitutional questions raised, but on whether the Minister had the power under the National Education Policy Act to issue the notice he did. He held that that Act only

gave the Minister powers to determine policy and not to impose binding law. Whether or not the Minister had in fact had the power to impose a binding age requirement under the South African Schools Act did not have to be decided, since the Minister had clearly chosen to exercise his powers under the National Education Policy Act. The appeal was therefore dismissed.

## **6. RIGHT TO EQUALITY**

### **i. Military discipline system**

*Minister of Defence v Potsane ; Legal Soldier (Pty) Limited v Minister of Defence 2001 (11) BCLR 1137 (CC) 5 October 2001*

On 5 October 2001 the Constitutional Court ruled on the constitutionality of an aspect of a new system of military prosecutions introduced by the Military Discipline Supplementary Measures Act 16 of 1999. The Free State High Court had stayed a military prosecution against Rifleman Potsane on disciplinary charges. It found provisions of the Act putting military prosecutors under the control of the director of military prosecutions unconstitutional because section 179(1) of the Constitution says that "[t] here is a single national prosecuting authority in the Republic . . . and consisting of . . . a National Director of Public Prosecutions . . . and . . . Directors of Public Prosecution and prosecutors . . .". The High Court also found that the challenged provisions of the Act unjustifiably infringed the equality rights guaranteed by section 9 of the Constitution.

In the Legal Soldier matter the constitutionality of military prosecutions on any charges was challenged on behalf of four soldiers who had been convicted or were charged in military courts with civil offences, i.e. common law and statutory crimes. These applicants also contrasted the sections of the Act, which create the military prosecution structure within the SANDF with section 179(1) of the Constitution.

The Minister, supported by the NDPP argued that the challenged provisions of the Act did not infringe the Constitution, which expressly called for a disciplined military force; section 179(1) was not concerned with a separate and independent military prosecution system and did not prohibit it but served to consolidate into one national prosecuting authority the various offices of attorneys-general that existed before. Nor was the equality guarantee infringed.

The unanimous decision of the Constitutional Court was that the interpretation contended for by the Minister and the NDPP was correct and that the constitutional challenge based on section 179 had to fail. The equality challenge, aimed at the prosecution only, was also dismissed as constitutionally unfounded.

## **B. LEGISLATION PASSED**

### **1. Amendment of the Constitution (by Act No. 34, 2001) - 21 November 2001**

A Constitutional amendment effected in November 2001 changed the title of the President of the Constitutional Court to that of Chief Justice and vested the highest judicial office in the head of the Constitutional Court. The amendment also provided for the extension of the term of office of a Constitutional Court judge.

### **2. Amendment to the Medical Schemes Act (by Act No. 55, 2001) -14 December 2001**

The Medical Schemes Act of 1998 was amended to prohibit discrimination on the basis of age, to widen the beneficiaries permissible under a scheme and restrict the limitations on coverage to and waiting periods for such beneficiaries. This was important in extending private medical coverage to people previously excluded from it.

## **C. LAW REFORM PROCESSES**

### **1.Children and the law**

The South African Law Commission during 2001 finalised its discussion papers with draft bills in its Child Justice Committee, its Committee on the Review of the Child Care Act and of the Sexual Offences legislation. This has resulted in three key pieces of legislation having been drafted, which will provide the legislative framework to ensure the appropriate legal protection is available to children in South Africa. All three bills will be debated in parliament during the course of 2002. They are the Child Justice Bill, the “Children’s’ Statute” and the Sexual Offences Act.

### **2. Social security**

- i. The Unemployment Insurance legislation currently excludes domestic workers, seasonal workers and government employees from unemployment, maternity, illness and adoption benefits. A new bill is accordingly in the process of being drafted, with consideration being given to including such workers.
- ii. The Alliance for Children's Entitlement to Social Security was established in early 2001 and is lobbying for the government to move the age limit for child support grants from age seven to 18 years and to take cognisance of the needs of children affected by HIV/Aids.

### **3. Recognition of Islamic marriages**

The South African Law Commission proposed that Islamic marriages be recognised by law which would result in Muslim marriages having legal status, which is important in divorce, child custody and property division.

## **D. OTHER**

### **1. World Conference against Racism**

The World Conference Against Racism was held in Durban during 2001.

### **2. HIV/Aids**

The Department of Health started trials at a number of sites across the country in an attempt to assess the efficacy of the drug Nevirapine in curbing the rate of mother-to-child HIV infection. This followed pressure from the Treatment Action Campaign to do so.