PREVENTIVE LAW

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P R E V E N T I V E L A W

by

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THE ROLE OF PREVENTIVE LAW IN THE DELIVERY OF LEGAL SERVICES TO SOCIETY

"[The] various relations which may be borne to various parties by the same law must all of them be present to a man's mind before the true nature and influence of it can be understood by him. On the circumstance of there being a party whom it binds, a law depends for its essence: on the circumstances of there being a party whom it is designed at least to favour, it depends for its cause ...

"All these several parties, have need to be acquainted with it: and as the benefit which anybody can derive from it will be in proportion to the acquaintance which they have with it, so on the other hand the need they have to be acquainted with it will be in proportion to the amount of the detriment which they may individually incur by it, or the benefit which they may individually incur by it. Both parties have need to be informed of it in order to determine them with respect to the different lines of conduct they have need to observe according to the different aspects which it bears to them."

J Bentham Of Laws in General, Principles of Legislation ed H L A Hart (1970) 63

"Everyone should have some knowledge of the framework and machinery of the law, of their basic legal rights and obligations and of the ways in which they can seek advice and assistance when those rights are threatened or challenged ... Much more should be done to inform and educate the public about legal matters not only in schools, but in adult education, and by the imaginative use of radio and television."

National Association of Citizens' Advice Bureaux Evidence to the Royal Commission on Legal Services (1977) 111

PREFACE

I wish to record my gratitude to my Supervisor, Prof. McQuoid-Mason, for the guidance and suggestions which have contributed to the completion of this work. I am also particularly grateful to Marise for her subtle encouragement and willing participation in many hours of tedious labour transferring data and compiling tables; and to Kerry Deale for all the time she spent at the word processor without ever displaying any sign of impatience or fatigue under somewhat difficult circumstances.

I record, finally, that the whole thesis, unless specifically indicated to the contrary in the text, is my own original work.

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CHAPTER ONE

INTRODUCTION

As far as this writer is aware, the term "preventive law" has not been used previously to describe formally the central and related ideas set out in this work. However, the phrase "act preventively" probably has been used occassionally in legal literature to describe the activity of taking early action to avoid unpleasant legal consequences.

Preventive law, in its simplest sense, is seen to contain precisely this latter idea. As in the medical sphere, one might avoid ill-health (the dispute) and reliance on the "cure" by utilizing knowledge to act preventively while it is still possible to do so.

The key to preventive activity in the legal sense, as with preventive health, seems to lie with knowledge, whether it be knowledge of specific legal rules or the knowledge required to take advice early. It was public legal knowledge - or lack of it - which first captured the present writer's interest in a "theory" of preventive law. The extent of public legal ignorance and its consequent disadvantages appeared to be of such a degree that there seemed to be a very real need for the creation of legal services to promote public legal education. The making of lay people more aware of their rights and obligations in the legal processes and the advantages flowing from this is essentially what this work sets out to examine.

Preventive law, however, is always to be seen in the context of the provision of legal services to society. This point cannot be overemphasized. The ultimate aim is a thorough and operational scheme whereby members of society are drawn, through the medium of knowledge, closer into the legal structure.

The initial chapter considers the conventional methods of publication and communication of law and what reseach has indicated about the extent of public legal knowledge. This is followed by an attempt to define the limits of preventive law (which includes the ideas of preventive legal education and preventive legal advice) with the emphasis on dispute avoidance.

Two chapters record the findings of a survey on public knowledge of law and legal institutions carried out in Durban in 1979 and consider, particularly, what bearing factors such as general education and occupational standing have upon legal knowledge.

The aims and purposes of preventive law generally are then discussed, followed by an examination of possible justifications for the implementation of preventive law, especially in the context of modern welfare theory.

Other chapters examine ways and means of implementing practical preventive law programmes (including both education and advice branches), the relevance of criminal law and procedure to the workings of preventive law and, penultimately, the expanded function of preventive law. This considers the possibility of a broader public legal consciousness and the possible social implications of having people appreciate, through knowledge, the impact of undesirable laws.

A number of broad conclusions are offered in the final chapter.

CHAPTER TWO

POPULARIZATION AND KNOWLEDGE OF THE LAW

A. PROMULGATION

It is reasonable to expect that any law will be published so that its meaning may become accessible to the citizen.[1] No-one actually believes that the mere act of publication - in one way or another - renders the citizen conscious of the promulgation. The factor which allows this assumption is a convenient fiction, which bridges the murky gap between publication by one actor and comprehension by the other. The fiction is simply that since the law is published the addressee is aware of its meaning. The onus is placed squarely upon the addressee to find out.[2] As Blackstone says :

> "[When laws are published] ... it is then the subject's business to be thoroughly acquainted therewith: for if ignorance of what he might know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity."[3]

Nowadays it seems unlikely that the high handed action of refusing to make public the contents of a law would be encountered. In the absence of Constitutional guarantees of publication (as in the United States) perhaps the acquiscence to this necessity by the legislative or administrative authority rests upon some form of external morality.

As legend would have it, there are instances in Roman history when this morality has been ignored. For example, the compilation of the Twelve Table in about 450 BC was the result of a long and bitter struggle against the Patricians by the Plebians, one of whose grievances was that the law was unknown to them. Accordingly, the Plebians may have been at

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1 There is, strangely, no provision in the United States' Constitution which guarantees the publication of laws. L L Fuller Anatomy of the Law (1971) 89.

2 "[The argument runs that] presupposing universal and accurate legal knowledge generally encourages the public to learn of the laws that pertain to them." D J Gifford "Communication of Legal Standards, Policy Development and Effective Conduct Regulation" (1971) 56 Cornell L R 411. But Blackstone's view has been somewhat refined and modified in South African criminal law; see infra 132 f.

3 W Blackstone Commentaries on the Laws of England Vol 1 (1825) 45-46. See also Gifford op cit 411

a distinct disadvantage in litigation particularly as the formalities of litigation were secretly guarded.[1] Publicity of the law would have two advantages (a) the common man would be on a more equal footing with the patricians; and (b) the removal of secrecy would serve to reduce some pontificial power.[2] The advent of the Twelve Tables was a mark of victory, since the Plebians now had "an indisputable statement of the law."[3]

In spite of this achievement, the struggle was by no means over. The law was still monopolistic, being "one of the great strongholds of the Patricians."[4] Also by legend, the pontificial power was again challenged and weakened in 312 B.C. by the actions of Flavius, secretary to censor Appius Claudius Caecus, who stole and published a collection of the legis actiones. The story runs that the publication became known as the ius Flavianum and Flavius himself consequently earned sufficient popularity to be elected tribune and later curule aedile.[5] (The origins of the story are doubtful since it is likely that Appius Claudius himself was behind the publication, but the fact of popularisation is apparently not in dispute[6]). Possibly more significant as events which herald the popularisation of the law are the lex Ogulnia in 300 B.C.[7] and the lex Hortensia in 287 B.C.[8].

Patrician monopoly is not the only recorded instance of the withholding of legal publication. According to Dio Cassius (cited by Blackstone) the Emperor Caligula "wrote his laws in a very small character, and hung them up on high pillars, the more effectually to ensnare the people."[9]

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1 See A M Prichard Leage's Roman Private Law 3 ed (1961) 19; A S Diamond Primitive Law, Past and Present (1971) 114-116; P van Warmelo An Introduction to the Principles of Roman Civil Law (1976) 9-11.

2 Van Warmelo op cit 9.

3 Prichard op cit 19.

4 H F Jolowicz and B Nicholas Historical Introduction to the Study of Roman Law 3 ed (1972) 90.

5 Jolowicz and Nicholas op cit 91.

6 Ibid.

7 Ibid. In terms of this law the pontificate was opened to the Plebians. Ibid.

8 Prichard op cit 19. Resolutions of the Plebian assembly were now given force of law. Ibid.

9 Blackstone op cit 45.

Perhaps history is rich in instances where attempts were made to popularise the law: to compile, clarify, publish and generally to make it more accessible.[1] In this context one should not omit Justinian's compilations[2] which systematized and unified a diverse map of legal statements.

Most laws, in some or other way, seek to regulate human behaviour. A legal act, which is a message, will not have any behavioural affect unless it is communicated.[3] For Blackstone, the manner in which this notification was made was a "matter of very great indifference".[4] So long as there be some fair external manifestation then the requirement was satisfied; it was then incumbent upon the subject to become acquainted with the contents.[5]

The matter of publication and promulgation of laws has not escaped the attention of other latter-day and contemporary writers. Bentham, for example, was apparently a strong advocate of popular legal education[6] while Austin considered an Act of Parliament effective even without publication.

Bentham's view is reflected in this paragraph :

> "The principle sort of instruction which governments owe to the people, is knowledge of the laws. How can we require laws to be obeyed, when they are not even known. How can they be known, unless they are published under the simplist forms, so that each individual may read for himself the enactments which are to regulate his conduct."[7]

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1 See for example Weeramantry's "Time Chart" in C G Weeramantry The Law in Crisis (1975) 257-290.

2 By this it is not meant to suggest that condification is a prerequisite of popularisation.

3 L M Friedman Law and Society (1977) 111: "... a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law." Blackstone op cit 45.

4 Ibid.

5 Ibid.

6 L L Fuller The Morality of Law (1969) 49.

7 J Bentham Theory of Legislation (1900) 444.

And again, when Bentham speaks of "cases in which punishment must be inefficacious", he says :

> "Where the penal provision, though established, is not conveyed to the notice of the person on whom it seems intended that it should operate. Such is the case where the law has omitted to employ any of the expedients which are necessary, to make sure that every person whatsoever, who is within the reach of the law, be apprized of all the cases whatsoever in which (being in the station of life he is in) he can be subjected to the penalties of the law."[1]

Apparently, Bentham did not confine these sentiments to the criminal law only:

> "[The] various relations which may be borne to various parties by the same law must all of them be present to a man's mind before the true nature and influence of it can be understood by him. On the circumstance of there being a party whom it binds, a law depends for its essence: on the circumstances of there being a party whom it is designed at least to favour, it depends for its cause ...
>
> "All these several parties, have need to be acquainted with it: and as the benefit which anybody can derive from it will be in proportion to the acquaintance which they have with it, so on the other hand the need they have to be acquainted with it will be in proportion to the amount of the detriment which they may individually incur by it, or the benefit which they may individually incur by it. Both parties have need to be informed of it in order to determine them with respect to the different lines of conduct they have need to observe according to the different aspects which it bears to them ..."[2]

Austin appears to have taken a somewhat different view of things. A parliamentary bill, he says, becomes obligatory the moment it receives royal assent:

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1 J Bentham Principles of Morals and Legislation (1823) 173.

2 J Bentham Of Laws in General, Principles of Legislation ed H L A Hart (1970) 63.

"The concurrence of the various members which compose the supreme legislature (as that concurrence is completed by the royal assent) is the only sign given to the subject community. No promulgation is requisite."[1]

Quoting a passage from Blackstone (apparently with approval), Austin explains his proposition:

"It is true, that Acts of Parliament are printed and may be had by those who choose to buy them; but this is not promulgation; for, before an Act is printed, and whether it is printed or not, it is a statute, and legally binding. If the printing were a promulgation, in the proper sense of the term, it would be a necessary consideration precedent to the existence of the law as binding on those whom it concerns. The printing is, in this case, merely intended to refresh the memory of the parties whom it concerns; who, being all of them present at the enactment of the law, were then and there sufficiently informed of its existence and purport. Presence by ourselves and presence by our representatives are manifestly the same thing ..."[2]

Assuming that Austin is to be understood here at face value[3] this sentiment may be said to express in extreme form the legal fiction referred to earlier.[4] One would assume it unlikely that such a view would find favour today; at the very least it is impracticable, presumptious and unrealistic. A less formal objection would be that it is grossly unfair and smacks of high-handed government action.[5]

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1 J Austin Lectures on Jurisprudence 4 ed (1897) 542.

2 Austin op cit 542-543.

3 There is apparently room for the contention that this paragraph is not without irony; see Austin op cit 543 at footnote 32.

4 Supra 3.

5 Long before Austin's time, the same view appears to have been the prevailing one. Thorpe C J said in 1365 that "everyone is bound to know that what is done in Parliament, even though it has not been proclaimed in the country; as soon as Parliament has concluded any matter, the law presumes that every person has cognizance of it, for Parliament represents the body of the realm". Quoted by C K Allen Law in the Making 6 ed (1958) 454-455.

But the person who indignantly asserts the latter criticism may be surprised to learn that the present position in Great Britain is, in theory at least, very much along Austin's lines; and Austin merely supported Blackstone who said "every man in England is in judgement of law, party to the making of an act of parliament, being present thereat by his representatives".[1] Thus the present general rule is that immediately the statute receives royal assent it is at once binding on the Queen's subjects.[2]

The application of this general rules gives rise to the rule ignorantia juris neminem excusat, which although seeming harsh, is likely to be most commonly defended as a matter of utility;[3] and further, it has been argued "it may be doubted whether many substantial hardships result from it."[4]

Returning to the question of promulgation itself, one may ask why it should be necessary to publish laws at all, since the relevant laws - like theft, assault and the like - are second-nature to the average citizen. Furthermore, the obscure and complex laws would never be read and understood by citizens, even if great pains were taken to distribute them.[5] Fuller attempts to answer this question from two points of view: first, if only one person in a hundred takes the trouble to read a law applicable to himself, that is sufficient justification: second, persons have a (behavioural) tendency to follow patterns set by others whom they know to be better informed than themselves - in this way actions of some influence many.[6] Finally, concludes Fuller, "the requirement that laws be published does not rest on any such absurdity as an expectation that the dutiful citizen will sit down and read them all."[7]

In modern times promulgation is a generally accepted practice, even though it is not necessarily the critical juncture at which a law becomes effective. But apart from this general acquiescence, it seems that active communication of law is not a burning concern of legislators.

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1 Quoted by J C Gray The Nature and Sources of Law 2 ed (1972) 167.
2 Allen op cit 456; cf Gray op cit 167.
3 Allen op cit 457. See discussion infra 132.
4 Ibid.
5 Fuller The Morality of Law op cit 51.
6 Ibid.
7 Ibid.

Like Blackstone's, the prevailing view appears to be a "matter of very great indifference",[1] and perhaps foolishly so.[2]

It is still the duty of the citizen to be aware of the law which affects him,[3] and more particularly those aspects of the criminal law. For reasons of policy the general rule in South African criminal law was, until recently, that ignorance or mistake of law would not excuse criminal conduct:[4]

> "for to allow an accused to escape liability on the ground that he was ignorant of, or mistook, the law would be to hamper severely the administration of justice."[5]

Arguably, the effect of this is that eveyone is presumed to know the criminal law. However, a recent South African decision[6] has probably altered the legal position somewhat. This aspect of the law will be considered elsewhere.[7]

The emphasis so far has been on promulgation of criminal law, perhaps because it is in this area of the law that transgressions are seen to be most significant. However, if popularization of the law is important, certain civil law rights and obligations should also fall for consideration.

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1 Blackstone op cit 45.

2 "Traditional legislative procedure is based upon the unquestionable assumption that once a bill has been passed in Parliament and duly published, the necessary knowledge about the new law is automatically disseminated among the public. Empirial evidence ... shows that this assumption is wrong." B Kutchinsky "'The Legal Consciousness': A Survey of Research on Knowledge and Opinion About Law" in ed A Podgorecki Knowledge and Opinion About Law (1973) 103. The author quotes the findings of surveys by Walker and Argyl on the English Suicide Act of 1961. N Walker and M Argyl "Does the Law Affect Moral Judgements?" (1964) 4 British Journal of Criminology 570-581.

3 A legal system may provide by special rules that laws be brought to the attention of those to whom they apply by some extraordinary means, i.e. people are not simply left to find out for themselves. But notwithstanding the absence of some special communication the legality of the enactment is not affected; H L A Hart The Concept of Law (1961) 22; Gifford op cit 416.

4 E M Burchell and P M A Hunt South African Criminal Law and Procedure Vol 1 (1970) 260. This rule has been, however, "very considerably whittled down" by the defence of claim of right. Ibid.

5 Burchell and Hunt op cit 262.

6 S v De Blom 1977 (3) SA 513 (AD).

Understandably the State might not consider this of any great importance from its perspective as prosecutor. But apart from the obvious different consequences of criminal and civil law conflicts, there is, it is submited, no logical reason why a citizen's knowledge of civil law should be considered any the less important than that of criminal law. In other words, if it be considered important that aspects of the criminal law be communicated to citizens, then those arguments ought logically to apply in respect of certain areas of civil or non-criminal law as well. After all, in the law of delict, for example, certain legal standards are imputed to an actor irrespective of the extent of that person's legal knowledge. Thus the standard of "the reasonable man" is applied where conduct is measured objectively against that of the diligens paterfamilias.[1]

Other areas of the law which may be considered relevant here are, for example, certain aspects of family law, consumer law, employment, the making of a will and landlord and tenant.

B. COMMUNICATION

The terms "promulgation" and "publication" have been used interchangeably in this section and it is not intended that they should be interpreted differently. Broadly speaking, they describe the sort of arrangements a government employs to make the substance of the enacted law public. The term "communication", on the other hand, implies something different: it contains the sense of a more positive effort to ensure that the legal message is received. It is possible to have promulgation without communication and - at a stretch of the imagination - to have communication without promulgation. It is useful to make this distinction, especially as this work considers arguments for greater communication. Promulgation is merely a pre-requisite to communication.

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1 J C Macintosh and C Norman-Scoble Negligence in Delict 5 ed (1970) 22; R G McKerron The Law of Delict 7 ed (1971) 25-26.

As a general statement, no special arrangements are officially made (i.e. by government authority) to ensure that laymen become familiar with the law or, more precisely, to bring relevant legal matters to their notice.[1] This is so in spite of the fact that every "legal act (rule, doctrine, practice), whatever function it serves, is a message ... [and] it must be transmitted to an audience or it can have no effect on behaviour."[2] The reasons for this are in part probably practical - for example, the absence of any effective established mechanism by which legal material can be positively filtered to the public. Also there is, probably, a reliance on the notion that since law is not closely guarded or secret, it is adequately accessible.

There are exceptions to the general statement. In the United States of America the Fair Trading Standards Act requires that notices of employees' rights be posted in Factories[3] and, no doubt, similar provisions may be found in other countries. These exceptions, while minute in the larger context, are notable for the simple reason that some authority has deemed such a directive desirable.

If it is accepted that this failure to communicate is a serious omission, one may ask why legal arrangements have nevertheless maintained some degree of social status and respectability? The law, insofar as it affects social arrangements, exerts considerable influence on everyday life. For example, not a day goes by in this country when the courts are not filled to capacity with litigants. Whether any inference of the layman's comprehension of legal messages can be drawn from this is doubtful, but one must assume that some form of legal communication does take place, and this appears in part to be affected by the middlemen, the lawyers.

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1 The mass-media, including the press, may at times seek to perform this function by relying on established wide readership and assume that readers will take the trouble to comprehend an article dealing with the existing law or proposed legislation. But readers may avoid articles which fail to interest their reading appetite, a position, no doubt, of which the commercial press is well aware. Consequently, it is to be expected that a commercial press, acting out of self-interest, will avoid publishing material which does not have popular appeal.

2 Friedman op cit 111.

3 Gifford op cit 416.

By their legal training and experience lawyers are able to digest legal rules - which may be very complex[1] - and to supply their meaning and significance to any person who inquires.[2] This is not to say that lawyers are the only vehicles of communication but their significance may be appreciated if one attempts to imagine a Western Democratic legal order without them.[3] Clearly, they are relied upon to a very large degree - their absence from the present scheme of things would make the situation untenable.[4]

Whether lawyers adequately fulfil their crucial function in society is currently a matter of considerable debate.[5] While it is unnecessary to enter the polemics here it ought to be mentioned that the bulk of lawyer-criticism centres around the allegation that lawyers do not serve all sections of societies equally. The very nature of the profession - in many respects a commercial venture - requires that lawyers pander towards wealthy clientele. Hence the allegations that lawyers are elitist and self-protecting, while the profession itself is generally money-orientated.[6]

Communicating legal knowledge per se (or providing legal education to the laymen) is certainly not the primary lawyer-function, but it may be said to be an unavoidable side-effect. Communication in the sense

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1 Infra 80 f.

2 A Podgorecki Law and Society (1974) 121.

3 A K Pye "The Lawyer's Role in the Twentieth Century - A Reassessment" in University of Natal Legal Aid in South Africa (1973) 232-245.

4 One may argue of course, that the reason why this is so is because lawyers have very largely made themselves indispensable.

5 See eg J S Auerbach Unequal Justice (1976) described by the author as "a social history of the professional elite" at 3; B Abel-Smith and R Stevens In Search of Justice (1968) 95-165; S Wrexler "Practising Law for Poor People" and Comment "The New Public Interest Lawyers" (1970) 79 Yale L J 1049 and 1069; D N Rockwell "The Education of the Capitalist Lawyer: The Law School" in ed R Lefcourt Law Against the People (1971) 90; J Frank Law and Modern Mind (1970) 3-13.

6 In February 1978 Attorneys' fees in South Africa were substantially increased (approx. 33 1/3%) in terms of an amendment to the Rules of Court (Government Gazette 24 February 1978) in spite of the fact that statistics revealed by The Human Sciences Research Council show that in 1977 the Attorney profession was the second most profitable one in the country. (National Register of Natural and Social Scientists Communication Number 13, October 1978).

used previously[1] is essentially a message which is (or ought to be) transmitted as a matter of independent necessity in order to make laymen aware of, for example, a legal duty to be observed in the present and future. Visits to attorneys are usually made in order to gain professional advice on a legal situation - say, the infringement of a duty - which has already occurred. Thus the attorney's communicatory function, although immediately necessary, has in a sense, come too late.[2] It is submitted, therefore, that attorneys as early communicators of legal messages are inadequate.

If those trained in the law are not entirely responsible for legal communication and assuming that laymen do have some knowledge of the law (albeit "popular" as opposed to "official" versions[3]), then how is this knowledge acquired? Putting aside the partial answer than knowledge may be (coincidentally) held where laws are a reflection of what are general views of right and wrong,[4] people may become knowledgeable by following the mass-media or by the influence of press. In a follow-up survey to the "Housemaid Survey"[5] six years later it was discovered that while the original survey showed that those who had acquired some knowledge had learned mostly through the media, the incidence of this had now decreased against the rising factor of peer influence or information from associates.[6] This "follow[ing] the pattern set by others whom they know to be better informed than themselves"[7] has an edge (in terms of efficacy) over the media influence for the possible reason that personal inter-communications are more effective than impersonal ones.[8]

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1 Supra 10.

2 For instance, it is unlikely that a layman will consult an attorney to gain some legal knowledge from mere curiosity in contemplation that the legal "message" may or may not affect him personally. People who seek advice before litigating probably do so in contemplation of a particular dispute which has already arisen.

3 See Gifford op cit 414-418.

4 Fuller The Morality of Law op cit 50.

5 Infra 18.

6 B Kutchinsky "Law and Education: Some Aspects of Scandinavian Studies into 'The General Sense of Justice'" (1966) 10 Acta Sociologica 51.

7 Fuller op cit 51.

8 Kutchinsky "The Legal Consciousness" op cit 106.

A recent Canadian study has considered, in some detail, the question as to how legal information is presently disseminated to the public.[1] The findings are based upon information gathered in Canada itself but may nevertheless hold true for other parts of the world.

The first source of legal information considered - lawyers in private practice - was found to be important but by no means exceptionally so. The trend which emerged indicated that persons only considered consulting lawyers on more serious matters unless they had had some previous dealings through business spheres. A deserted wife or an inadequate car repair would prompt a visit to a lawyer whereas problems with traffic tickets and old age benefits would not.[2] The researchers also discovered that

> "intimidated by the physical appearance of many law offices, by rumours of high fees, and by the lawyers themselves, it seems that most people do not resort to lawyers until a serious or complex legal situation leaves them no choice."[3]

The varied and numerous legal aid programmes in Canada were found to be very important sources of information for the public,[4] perhaps the most significant being legal assistance clinics themselves. By means of a comprehensive filtering process, the more serious matters are separated from others (which may be summarily answered by a telephonist), the more serious being referred to appropriate staff members. Many queries are thus dealt with by telephone. The survey revealed that at least 800,000 queries were dealt with each year in all legal aid offices and that the figure was rapidly increasing.[5]

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1 M L Friedland Access to the Law (1975) 30-59. A British study published in 1973 considered similar matters. See B Abel-Smith, M Zander and R Brooke Legal Problems and the Citizen (1973). See also M D A Freeman The Legal Structure (1974) 161-165.

2 Friedland op cit 30.

3 Ibid.

4 Friedland op cit 31.

5 Friedland op cit 31-36.

Other significant information sources were found to be Government offices and departments, Canadian information centres (of different kinds), the police and libraries.[1]

While the Canadian study isolates the many different offices which provide legal information, it fails to identify - presumably because there are none - offices or agencies which do not merely cater for answering queries but actively initiate the dissemination of legal information. It is this omission which appears to be a near-universal trend[2] and which is, essentially, the central concern of this work.

C. KNOWLEDGE

To assert that since laws are published, whether by means of reporting cases in the law reports, publishing contemporary juristic texts or promulgating legislative enactments, the people for whom the laws are created are consequently sufficiently aware of their meaning and application is merely fictional, albeit convenient and possibly necessary.[3]

On the other hand, it does not logically follow that because there is a lacuna between publication and information intake (acquiring of legal knowledge) that the public are necessarily ignorant or partly ignorant as to the meaning and expectations of the laws which permeate their lives. It is possible that other factors may account for popular legal knowledge: for example, in a society where legal norms correspond very closely with moral norms a competent perception of the moral restraints will necessarily include a degree of knowledge of the laws concerned.[4]

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1 Friedland op cit 41-59.

2 But see infra 78 and Soviet programmes.

3 Cf supra 3.

4 Gifford op cit 410. The relationship between morality and obedience to legal rules cannot be underestimated. "It is ... generally accepted that with regard to ... classical crimes [like murder] morality preceded the law and not vice versa". Kutchinsky "The Legal Consciousness" op cit 102.

The study of peoples' knowledge of law has become relevant in sociological studies of the relationship between legal rules (which define behaviour) and peoples' legal behaviour.[1] This knowledge aspect - or legal consciousness[2] - has been regarded as an "'intervening variable' in the sense that it intervenes causally between the two otherwise unrelated variables, the law and the behaviour."[3]

Professor Hart distinguishes between

> "primary rules of obligation ... which must contain in some form restrictions on the free use of violence, theft and deception which human beings ... must ... repress, if they are to co-exist in close proximity to each other ... together with a variety of ... [other rules] imposing on individuals various positive duties ...[4] [and secondary rules] empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken ... [which] rules will also define the procedure to be followed."[5]

Hart argues that one of the two minimum conditions which must be met in order that a legal system exists is that the primary rules are in fact obeyed :[6] this "condition is the only one which private citizens need satisfy."[7]

One writer sees the success of Hart's approach resting upon the validity of the assumption that these primary rules are obeyed and "which implies a corollary assumption that knowledge of those rules is generally shared by the public."[8] Presumably, this "corollary assumption" imputed to Hart is reached on the basis that it is difficult to imagine

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1 Kutchinsky "The Legal Consciousness" op cit 102-103.

2 The terms "legal knowledge" and "legal consciousness" are used interchangeably.

3 Kutchinsky "The Legal Consciousness" op cit 103. Pertinent to these considerations are assessments of the roles played by moral attitudes and the legal threat of punishment, but insofar as these factors are not considered relevant to this work they will not be dwelt upon here.

4 Hart op cit 89.

5 Hart op cit 94.

6 Hart op cit 113.

7 Ibid.

8 Gifford op cit 412.

that "primary rules" can or will be obeyed unless some knowledge is held. But Hart apparently does not place too much importance on the knowledge aspect;[1] the critical ingredient is simply "obey". The only clue to the degree of knowledge necessary - if any at all - lies in the statement (referring to which rules must be obeyed) "those rules of behaviour which are valid according to the system's ultimate criteria of validity."[2] It has been argued that this statement suggests that the public are deemed to have knowledge of officially formulated rules rather than popular understandings of legal prohibitions."[3]

But, in reality, the public do not have an understanding of the official versions of "primary rules"[4]; at best they may have a popular appreciation. Of some laws, people have little or no knowledge.[5]

The important question, it is submitted, is whether some people have a poor understanding of laws which are relevant to them (with the result that their ignorance may work to their personal detriment). The classic view is a "presumption of universally and accurately held legal knowledge among people and among various classes and groups."[6] The presumption may express itself in various ways: for example, one American writer, while acknowledging that people know "next to nothing" of anti-trust and

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1 Cf Gifford op cit 413.

2 Hart op cit 113.

3 Gifford op cit 413. Whether this is a fair suggestion, it is submitted, is doubtful. It seems likely that Hart is referring - if at all - to popular understandings which, despite their non-official formulation, effectively demand behaviour which is consistent with that of the official formulation.

4 Gifford op cit 413. Those who <u>do</u> have are judges, lawyers and the like. Ibid.

5 Kutchinsky "The Legal Consciousness" op cit 103.

6 Gifford op cit 412.

stock-market laws and the like, claims that people know "enough to get by".[1] Whether this is true of all societies is a question which will be returned to later.[2]

In a study carried out in Norway in 1952 "to establish the extent to which behaviour conformed to the rules laid down in the law"[3] housewives' and housemaids' knowledge of the Norwegian Housemaid Law of 1948 was measured. (The essential purpose of this law is to protect the interests of domestic workers, one of the provisions being that work is limited to ten hours a day.[4]) The overall result of the study shows a very low awareness[5] of both the law's existence and its contents.[6]

The surprising feature of the results is the fact that the persons for whom the law was specifically made were largely ignorant of its promulgation.[7] Similarly, another Scandinavian study measuring the effect of an agricultural workers' act showed that only 33% of the employers and 11% of the employees knew that they were liable to punishment by fine if they failed to comply with requirements regarding working hours.[8]

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1 Friedman op cit 115. As examples, people know that it is a crime to rob a gas station; while "the average woman has never heard of a 'negotiable instrument', she knows enough to endorse and cash her cheques." Ibid. Contra Kutchinsky "The Legal Consciousness" op cit 105.

2 See the results of the Durban survey infra 44 f.

3 V Aubert "Some Social Functions of Legislation" in ed V Aubert Sociology of Law (1969) 116.

4 Ibid.

5 Kutchinsky points out that "awareness" here means "awareness of the very fact that a certain type of behaviour is regulated by law." Kutchinsky "The Legal Consciousness" op cit 134 n 3.

6 Aubert op cit 116 - 126.

7 Kutchinsky "The Legal Consciousness" op cit 103.

8 Cited by Kutchinsky "The Legal Consciousness" op cit 104. Yet another study carried out in Copenhagen found that only 3% of those interviewed gave the correct answer to the question "who passes laws?" Ibid.

Podgorecki, in considering similar surveys points out that a finding of major significance in studies thus far documented is that a person's appreciation of legal facts is largely predetermined by his social standing.[1] Hence, for example, in the Housemaid study it was found that housewives were usually better informed than housemaids: the former were of the upper or middle classes while the latter had little formal education.[2]

In a Polish survey in 1970 in which 2,197 subjects were interviewed,[3] the following findings were recorded: inter alia, those with a relatively better knowledge of the law were males of the 35 - 49 age group, persons of a higher educational level and persons who followed press, radio and television reports dealing with legal matters.[4] One of the conclusions made was that greater knowledge of the law enhances the capabilities of the individual to meet the challenges of society:

> "Knowledge of the law thus has an instrumental character. It is characteristic of those better situated socially.[5] Greater knowledge, it may be assumed, facilitates their adaption to complex and changing functional patterns of personal behaviour. Knowledge of the Law is a means for effective action under the conditions of intricate social relations."[6]

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1 Podgorecki Law and Society op cit 90 - 91.

2 Aubert op cit 120.

3 Podgorecki Law and Society op cit 90.

4 Podgorecki Law and Society op cit 91.

5 A related point is made by Gifford op cit 417 - 418: middle-class persons tend to be more concerned with "ownership rights, landowner liabilities, and business and commercial arrangements" whereas the unemployed poor are concerned with laws regarding loitering, vagrancy, disorderly conduct and welfare.

6 Podgorecki Law and Society op cit 91.

In an article seeking to consolidate some of the findings from various Scandinavian studies relating to public legal knowledge of laws, Kutchinsky[1] isolated two factors which had a bearing upon public legal knowledge: sex and education. It was found (the reasons for which were unclear) that "women have less concrete legal knowledge than men"[2] and that "a rise in the educational level is followed by increasing knowledge of the law."[3]

Fuller has suggested that, to a great extent, men observe the law "not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves."[4] Thus the influence of the press or contemporaries could be seen to be a factor influencing legal knowledge.[5]

To some extent it may seem unnecessary to embark on a time-consuming and expensive survey in order to show, for example, that certain sectors of South Africa's population have a poor knowledge of the law.[6] Common experience sometimes indicates that a certain state of affairs exists, long before the empirical data are available to support the speculation. Thus one English writer who relies heavily on the assumption that the public's knowledge and appreciation of the purpose of law and legal institutions is poor does not appear to find it necessary to substantiate his claims with relaible data. "Lay fallacies[7] concerning the law" he says, "are so numerous "that it would be idle to attempt their enumeration."[8]

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1 Kutchinsky "Law and Education" op cit 21.

2 Kutchinsky "Law and Education" op cit 37. The writer suggests that the reasons may be that women's education may be of a lower standard than that of men's and that "an interest in legal matters is inconsistent with the conventional conception of the female role" and that the majority of women "accept" this attitude. Ibid.

3 Kutchinsky "Law and Education" op cit 38.

4 Fuller The Morality of Law op cit 35.

5 Cf supra 13.

6 Any person who has worked for a number of hours in the University of Natal Legal Aid Clinic in Durban (which caters for indigent persons who require some form of legal assistance) would concede to being appalled by the average applicant's legal ignorance and incapability.

7 Admittedly, "lay fallacies" are by no means the same as legal ignorance since the latter implies no knowledge at all. But in effect, they are both negative in character and consequently unsatisfactory. See infra 75 for a discussion on why people ought to know more about law.

One common fallacy is that the law exists merely to exercise a repressive function, to control wrongdoers. What is not generally recognised is that "law is long past that stage and is today a many-faceted instrument of public welfare."[1] It is also remarkable that many persons, including educated ones, have failed to appreciate the differences between civil and criminal law.[2] Many would have to visit a lawyer to understand that a particular action by a wrongdoer which is a matter to be dealt with by the "police and the courts" may also give rise to a civil claim.[3]

Notwithstanding the findings and opinions discussed above, it seems doubtful that there is presently much substantial agreement on the question of the extent of, and the factors which influence, public legal knowledge. For example, it is probably not true to say that there is any universal and accurately held legal knowledge among the lay public.[4] However, it does seem that where legal enactments deviate substantially from cultural or moral norms, it is likely that knowledge of that enactment will be poor.[5] Furthermore a number of factors affect public legal knowledge including education, social standing, sex and influence of peers. Some of these aspects are considered in the analysis of the findings from a survey of public legal knowledge conducted in Durban in 1979[6].

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1 Weeramantry op cit 6.

2 Weeramantry op cit 20.

3 This writer recalls an incident where a university student of a few year's standing, acting on behalf of an organisation which raised money for charity, witnessed the theft of some of the organisation's money and the subsequent arrest of the offender. The student in question assumed (presumably since the alleged thief was in police custody and was likely to be charged and convicted) that it would be impossible to take legal action to have the money returned.

4 While American society may boast a high degree of public legal awareness (see supra 17) little more than common sense suggests that such a claim would be unrealistic if, say, applied to the rural black population of South Africa.

5 Kutchinsky "The Legal Consciousness" op cit 102, 106 - 107. To phrase this differently: the social force of moral norms cannot be underestimated. It appears that at times this force will overshadow legal demands. See, for example, the Walker and Argyle studies in 1964 (cited by Kutchinsky) which conclusively dispensed with the "declaratory argument" which claims that "whether a legal prohibition operates as a deterrent or not, to repeal it would give the impression that the conduct in question is no longer regarded by society as morally wrong." Walker and Argyle op cit 570.

6 See infra 35 f.

CHAPTER THREE

TOWARDS DEFINING PREVENTIVE LAW

A. INTRODUCTION

The term "Preventive Law" to describe the ideas contained in this work is probably not frequently used in this sense.[1] But it is not to be assumed that there is anything magical in the term; an adequate, but not complete substitute might be "Law for the Layman". As this discussion will indicate, preventive law strictly defined connotes a particular idea, but it will be suggested later that the term can be more broadly perceived to include other ideas.[2]

In its most obvious sense preventive law means very much the same as preventive medicine, although in a legal sense: whereas preventive medicine seeks to avoid ill-health, preventive law seeks to avoid legal misfortune or, more precisely, legal dispute, either actual or potential.

Under the umbrella of preventive law are two separate but related ideas: preventive legal education and preventive legal advice.

B. DISPUTE AVOIDANCE

If in primitive society a person felt aggrieved, the remedy available for rectification of the position was self-help.[3] The later emergence of law was characterised by the adoption of certain set procedures to enforce self-help. Thereafter, by gradual development, an independent party was called to arbitrate, ultimately becoming an official of the law.[4] The law of procedure - civil or criminal - sets out, broadly speaking, to prescribe how a dispute is to be settled.[5] It is within this framework that the substantive law propositions are considered and applied.

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1 The term is apparently used to describe other ideas, for example the preventive aspect of imprisonment, or "preventive justice" : see R v Hlati 1948 (3) SA 346 (T).

2 See eg infra 148.

3 A M Pritchard Leage's Roman Private Law 3 ed (1964) 433.

4 Ibid.

5 W J Hosten A B Edwards C Nathan and F Bosman Introduction to South African Law and Legal Theory (1977) 721 - 722.

In the civil law the substantive dimensions define rights, duties and remedies.[1] Remedies are indispensable if rights and duties are to be meaningful. In Dicey's words

> "There runs through the English Constitution that inseparable connection between the means of enforcing a right and the right to be enforced ... ubi jus ibi remedium ..."[2]

Ultimately, then, the efficacy of the civil law rests upon those remedies. In an imaginery society where persons by nature and without exception avoided disputes, and law or rules were only necessary to regulate conduct, presumably there would be no need for remedies. By comparison, in a society where persons cannot avoid disputes, law is there to settle them: it is curative. Llewellyn perceives law essentially as a dispute-settling mechanism :

> "What, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential; disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of the law."[3]

The question which may now be considered is whether the invoking of remedies or cures (which seek to neutralize[4] disputes) can be averted or prevented.[5] By way of illustration it may assist to consider the theory of preventive medicine, which has been described as :

> "That branch of the science and art of medicine which is concerned with the preventive aspects of the healing art as distinct from its curative function."[6]

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1 Hosten et al op cit 722.

2 A V Dicey Introduction to the Study of the Law of the Constitution 9 ed (1945) 199. See also H R Hahlo and E Kahn The South African Legal System and its Background (1973) 126: "A right has no meaning unless there is a remedy for its invasion."

3 K N Llewellyn The Bramble Bush (1973) 12. The author does, however, admit that there is a ... "widening slice of law in which disputes as such sink out of sight ..." where "...'rules laid down for conduct' are the focus ..." Op cit 13.

4 The use of the word "neutralise" is, admittedly, inadequate and misleading, for dispute settlement in a complex society emphasizes rule-enforcement or "winner-take-all". W J Chambliss and R B Seidman Law, Order and Power (1971) 28-34.

5 This presupposes that there is merit in prevention as opposed to cure. It is accepted [illegible]

This, briefly, involves education of the public to enable them to promote their own health and well-being and to enable them to use the available medical services optimally.[1] The sentiment which runs behind preventive medicine appears to be, in practical terms, a very logical one. By means of taking some early action against possible ill-health of one form or another, one prevents the discomfort of suffering the particular form of ill-health for which there may or may not be a medical cure.

To succumb to the temptation of superimposing this sentiment on to a legal framework may be inadvisable but there are useful parallels. By means of taking some early action against possible legal dispute of one form or another, one prevents the inconvenience of being involved in the particular type of dispute for which there may or may not be a satisfactory settlement or solution. In short, it is far more sensible to prevent an actual dispute arising than having to deal with it once manifested.

As in the field of medicine, the indispensible pre-requisite in preventive legal action is the knowledge which encourages or prompts the taking of the early action. While many apparently assume that laymen know enough about the law to avoid unnecessary entanglement in civil-law difficulties,[2] this is not always the case.[3]

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1 C M Nelson A Handbook of Community Medicine (1975) 276.

2 The assumption is that the law is not inaccessible by virtue of its public nature. For example, Blackstone, in discussing ways by which people are notified of the law states "but when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he might know were admitted as a legitimate excuse, the laws could be of no effect, but might always be eluded with impunity". W Blackstone Commentaries on the Laws of England Vol 1 (1825) 45-46. See the more detailed discussion supra 3 f.

3 See V Aubert "Some Social Functions of Legislation" in ed V Aubert Sociology of Law (1973) 116-126. Cf the results of the Durban survey infra 35 f.

A comparison between law and medicine is respect of medical and legal services has been made by two English writers.[1] The arguments in favour of a National Health Service, they suggest, may be equally applied to legal services:

> "The enjoyment of health is said to be a basic human right. Similarly it is argued that the rule of law is also a basic human right and thus no-one, rich or poor, should have to pay to obtain what the law allows".[2]

The authors examine the benefits of preventive health services where persons are encouraged to consult a doctor at "the early stages of disease when the costs of care may be lower and the prospects of cure greater".[3] Applying this in a legal sense, the authors suggest that :

> "Many disputes - whether about the state of the staircase or who inherits what - could be avoided if good legal advisors were readily and inexpensively available. Early legal advice is one means of preventing accused persons being 'framed' by the police or being persuaded to plead guilty to crimes they have not committed. Similarly, early action can prevent tenants being evicted or losing rights to rent-controlled property. In matrimonial causes it is highly desirable that matrimonial disputes are brought to the attention of third parties as early as possible. Reconciliation is much more likely to be successful at this stage."[4]

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1 B Abel-Smith and R Stevens In Search of Justice (1968) 255.
2 Ibid.
3 Abel-Smith and Stevens op cit 257.
4 Abel-Smith and Stevens op cit 257-258.

The criminal law is also concerned with disputes,[1] but here redress is exacted by the state "from the transgressor in instances where the interest of the community [has] ... been harmed."[2] There are still two disputants and the possibility exists that the accused may have avoided the dispute had he been in possession of some legal knowledge.[3] It does, however, appear unlikely that criminal law ignorance would be as common as civil law ignorance especially when the particular criminal law rule coincides with a moral norm.[4]

This concern with dispute-avoidance or the acquiring of legal knowledge to anticipate and obviate a legal difficulty which manifests itself as a dispute, (either actual or potential), represents preventive law in its narrowest sense.[5]

C. PREVENTIVE LEGAL EDUCATION

The idea of preventive action, which lies at the base of both branches of preventive law is more prevalent in preventive legal education. Here, by means of a general but pertinent legal education, persons will hopefully steer clear of any form of legal difficulty - if it is possible under the circumstances - before the problem seriously manifests itself. The knowledge which makes the preventive action possible is acquired before a potential legal problem becomes a reality and not in contemplation of a problem which has already crystallized. A possible definition of preventive legal education could be:

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1 Llewellyn op cit 15. Whilst disputes per se are to be treated here on an equal footing, it will be demonstrated later that, in terms of practical preventive education, criminal law is far less significant, theoretically, than civil law; infra 132 f.

2 Hosten et al op cit 721.

3 In a survey of the knowledge of the English Suicide Act of 1961 undertaken a year after promulgation of the law, it was found that 16% knew that attempted suicide was not a crime while 75% thought it was still criminal. See B Kutchinsky "'The Legal Consciousness': A Survey of Research on Knowledge and Opinion about Law" in ed A Podgorecki Knowledge and Opinion About Law (1973) 103. In respect of criminal law ignorance see also infra 132 f.

4 For example, murder or theft. See Kutchinsky op cit 102: "It is generally agreed that the reason most people do not commit murder or other serious crimes is not that these acts are forbidden in the penal law, but rather that they are morally condemned." But can the same be said for obscure statutory offences which do not necessarily contain a moral element?

5 Preventive law in its widest sense is discussed infra 148 f.

> "the legal education of some person or persons in order that the knowledge so gained may be employed by that person or those persons in avoiding altogether or lessening the detrimental effects of an adversity of a legal nature."[1]

As a matter of simple reason it does seem better to take steps to avoid a problem, either specifically or generally anticipated, before being embroiled in a predicament from which the only avenue of escape, whether absolute or partial, involves inconvenience or distress. It is for this reason, perhaps, that most motorists tend to drive carefully. They are aware of the multitude of separate problems (of a non-legal nature) which may arise in the event of a collision. Once the mishap is complete, there is no turning back the clock and the consequences, however unpleasant, have to be faced. "Cures" in whatever form they come (e.g. having the vehicle towed away, spending a few days in hospital) have to be invoked. This illustration demonstrates also the unsatisfactory nature of cures, if they may be called "cures" at all. So too, in the medical sense there may at times not be a cure at all or, if there is, only a partial one; and in the legal arena sensible and early measures could avoid sometimes harsh and seemingly inequitable legal solutions.

It may be suggested that human actions are rich in preventive techniques. Many persons every day, as a matter of fundamental health, take certain precautions as a result of their own learning through experience. For example, a person may ensure being warmly dressed on a chilly day after some form of physical exercise to avoid the risk of becoming ill. In everyday life persons take preventive steps freely and voluntarily. But often the matter of choice is not left open to the individual: travellers to areas where a particular disease is prevalent are required by law to be immunised accordingly. The interesting feature about this type of preventive measure is that some authority has deemed the directive a social necessity. The rule requiring vaccination is consequent upon acknowledgement of the existence of wider social interests - not only the individual concerned - since all persons expect

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1 In the medical analogy "adversity of a legal nature" would be ill-health or any ailment which would have been avoided had preventive measures been taken.

to be protected from the illness. Insofar as preventive legal education is concerned, it is doubtful whether there ought ever to be any offer of education which is not for strictly voluntary consumption.[1] Nonetheless there is a strong suggestion that preventive legal education may work through the individual for the general good of society.[2]

The important question as to what is to be prevented has been considered above. However, a fuller meaning of "legal dispute, actual or potential" or "legal misfortune" or "legal adversity" will be attempted here. (It should be borne in mind that this element applies equally to preventive legal advice which will be considered below.)

"Adversity" has been defined merely as "the condition of adverse fortune".[3] It could describe any state of affairs where misfortune is brought to bear in some form upon an individual or individuals. A "legal adversity" would have some legal complexion. That is to say, a resolution of the problem or a return to a state of normality would involve recourse to an authority responsible ultimately to the courts or parliament, rules sanctioned by a legal authority or to the courts themselves. In short, the adversity would involve a legal consideration, one with which lawyers, the courts or persons involved with the law would concern themselves.

The state of affairs need not necessarily be a particularly unpleasant one which precipitates human distress. That it cause inconvenience or require action out of the normal course of events would render it adequate for this particular definition.

The circumstances by which the adversity is brought on may arise from either acts or omissions. Which ever of these is responsible is not regarded with any great significance. Forbearance where an act is required and action where an omission is required are both capable of being avoided if one is in possession of the correct information.

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1 Except, possibly, legal curriculae at school level. See infra .....

2 See generally infra 74 to 77.

3 The Shorter Oxford English Dictionary Vol 1 3 ed (1973).

Although dispute avoidance or prevention lies at the core of preventive law, there remains a category within the preventive legal education classification where the immediacy of disputes becomes less significant. Preventive legal education itself can be seen as containing two branches according to the type[1] of education involved. In the first branch, the legal information centres on specific legal aspects which are pertinent to the layman and are likely to give rise to disputes (e.g. certain aspects of the law of persons, purchase and sale and landlord and tenant). In the second branch the content is far less orientated towards particular legal topics but is concerned with such subjects as "justice", "human rights" and the "rule of law". This instruction may be described as a mild form of jurisprudence. (A further discussion on this subject is attempted below.)[2] It is in this branch of preventive legal education that the prevention of disputes is not necessarily the primary aim, although the "upgrading of law" in the eyes of the public - which is the primary aim - may well have the long-term effect of dispute-avoidance.

Suggestions as to the practical implementation of both species of preventive legal education are discussed later.[3] Insofar as the content of information of the first (and, it is suggested, the most important) branch of preventive legal education is concerned, this would have to be decided upon after adequate research. The most pertinent and pressing legal problems of a particular community or society could be easily ascertained and these statistics used as a basis. For example, one community, by virtue of its economic station in society, may experience numerous problems concerned with the law of hire purchase or the local legal aspects of housing. In a society where a developed legal aid structure is operating valuable information concerning most common types of legal problems could be extracted.

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1 In other words, the specific content of the legal matter chosen to be disseminated.

2 Infra 148 f.

3 Infra 104 f.

D. PREVENTIVE LEGAL ADVICE

To turn now to preventive legal advice, the other major division under preventive law, it has been suggested[1] that, as in preventive legal education, the core is "dispute prevention". The difference between the two divisions lies not in the overall purpose nor so much in the type of information sought or provided, but rather at the stage at which the legal information is disseminated. In preventive legal education the information would be directed (not in contemplation of an actual existing dispute) to all and sundry - in fact, to any person willing to respond - by a particular authority concerned with the information dissemination. In preventive legal advice information is given to a particular person upon the occasion of a legal problem arising for that person and at the instance of that person.

The provision of preventive legal advice - or simply legal advice - mechanisms would seek to meet the requirements of the individual when he has a particular legal query. Accordingly, the value of the service lies in the ability to meet an immediate stress situation. The person from whom the advice is to be sought would necessarily be competent to deal with the problem.

It may be mentioned here that, in the interests of the strictly theoretical aspects of dispute prevention, preventive legal advice may at times not be preventive in the narrow sense for the reason that, by the time the advice is sought, the dispute may well have already arisen (and thus the subsequent advice may not be preventive at all). Whether it is necessary to take this point any further is questionable since in practical terms it is hardly relevant whether the advice given infringes upon the domain of legal aid. (However, it will be suggested that legal aid itself, by virtue of its curative function, is quite different from preventive law.)[2]

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1 Supra 22.

2 Infra 32.

It was mentioned at the outset of this chapter that it is possible to extend the definition of preventive law to other areas. Again, it is submitted, it is not vital to become inextricably involved with definitional restrictions and, for this reason, those "extended versions" of preventive law, whilst departing somewhat from the limits set by the requirements of "prevention" and "dispute", are nevertheless discussed as a relevant part of the topic this thesis sets out to consider.

In essence, preventive legal advice as it is envisaged here is specific legal advice given to an applicant upon the occasion of a particular legal matter which has crystallized for the applicant, after his attention has been directed to the issue. Assuming that the applicant has become an interested and thinking party insofar as the relevance of the given advice to the problem is concerned, it is arguable that that sort of experience provides a form of education in itself. In other words, it is unlikely that the applicant would forget the crucial legal points which applied to his problem and could use them again if the same or a similar problem arose in the future. A fuller discussion on the practical implementation of preventive legal advice is attempted later.[1]

E. RIGHT ENFORCEMENT

One of the integral functions of preventive law is right enforcement. While rights exist in different forms[2] a right may generally be described as "an interest recognised and protected by a rule of law"[3] or "the legally guaranteed power to realise an interest".[4] The point to be made here is that legal education would equip laymen with knowledge of important legal rights; for example, the vital rights a tenant has under a lease,[5] the rights of a hire-purchase buyer[6] or the rights an accused person may expect in court.[7] Arguably, persons

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1 Infra 119.

2 R W M Dias Jurisprudence 4 ed (1976) 34.

3 J Salmond Jurisprudence 12 ed (1966) 218.

4 C K Allen Legal Duties (1931) 183.

5 See W E Cooper The South African Law of Landlord and Tenant (1973) 75-130.

6 See eg M A Diemont R M Marais and P J Aronstam The Law of Hire Purchase in South Africa 4 ed (1978) 97- 107, 121 - 128.

7 This matter is dealt with more fully below at 136.

with a greater appreciation of what may be achieved through the enforcement of legal rights will achieve a greater form of expression within the legal system.[1] Approaching this from a different angle, one might also say that those persons[2] who by virtue of their position in society or profession who are wont to take advantage of and benefit from the passivity of ignorance, may be forced to compromise their powerful positions when faced with individuals or groups who know and wish to enforce their own legitimate demands. In short, knowledge of this sort provides a check against exploitative forces, especially where those public agencies, whose task it is normally to protect vulnerable individuals, are unable to counteract the more subtle forms of abuse. In a sense, this aspect of preventive law provides an individual with his own suit of armour and encourages an element of self-help.

F. COMPARISON WITH LEGAL AID

Following in the same vein, it is necessary also to consider the rights of persons in court and, in particular, the criminal court. The recognition that accused persons require assistance when facing charges is by no means new[3] and is embodied in modern forms of legal aid.[4] It is commonly argued that in order that an accused person be given the opportunity to conduct a proper defence he requires some outside help, this being met on occasion by the provision, at State expense, of legal representation for the accused. But what if the accused has not heard of legal aid or does not know how to apply for it or finds that neither the police nor the magistrate are prepared to assist him in applying? The accused will simply have to conduct his own defence. To suppose for instance that the incidence of undefended criminal cases in the magistrates' courts in South Africa is not alarmingly high is, it is submitted, simply naïve.[5]

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1 "In a great many instances [people] follow the law because it provides a means for them to secure benefits or advantages they could not attain in any other way." M Zander Social Workers, their Clients and the Law 2 ed (1976) 1.

2 For instance a hire purchase seller or a landlord.

3 See eg S K Basson "Legal Aid and the State" in (1977) 2 Natal University L R 32-33.

4 Cf ed F H Zemans Perspectives on Legal Aid (1979).

5 It is not proposed to make suggestions here regarding the failure of legal aid in South Africa to furnish representation in deserving cases. It will be assumed, largely, that legal aid has not met the unfulfilled needs. See Basson op cit 38 f.

It is with the predicament of this type of individual that preventive law ought to concern itself. Perhaps, too, it may be suggested, from a practical point of view this may be the most relevant or fundamental concern for preventive law. It is in this arena that the need is immediate and urgent.[1]

Preventive law and all it involves is perceived as being quite different from legal aid. Since the latter is manifested differently in different systems of law[2] it would be difficult to formulate a trite definition. Certainly, some legal aid systems contain legal advice mechanisms as well[3], in which case they contain elements of preventive law. But if it were accepted that the general and common concern of legal aid is the access of indigent persons to the courts the difference from preventive law becomes clearer. Unlike legal aid, preventive law is concerned with access to the law itself or, more precisely, the meaning and content of the law. The difference may be further illustrated by considering the functions of preventive law and legal aid in relation to disputes. Whereas preventive law in one sense seeks dispute prevention or avoidance, the mechanics of legal aid are often invoked with the aim of conflict resolution. It is not to be supposed that the two cannot co-exist. On the contrary, they complement each other: where the one service fails, the other takes over. If one accepts the merits and importance of each scheme the distinction does not appear too significant, for legal aid, insofar as it necessitates an active individual involvement with the law, itself provides a valuable educative service as a by-product.

G. CONCLUSION

While it is possible to argue convincingly about the feasibility of preventive law, it cannot be over-looked that an important aspect is the ability of the recipient to take advice or absorb knowledge. Where an applicant seeks advice on a particular problem, the factor which provides

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1 Aspects of the accused's rights in court, with some mention of rights to representation and bail will be discussed in a later chapter. See infra 136.

2 See generally M Cappeletti J Gordley and E Johnson Toward Equal Justice : A Comparative Study of Legal Aid in Modern Societies (1975).

3 For instance, in England. See E J T Matthews and A D M Oulton Legal Aid and Advice Second (Cumulative) Supplement (1978).

the motive to absorb advice is the existence of the problem itself. But where preventive legal education is concerned there seems to be little force to motivate the persons to whom the information is directed to absorb the information. It will be assumed, in a large extent, that information properly and adequately disseminated can have a behavioural effect.[1] A consideration of the practical possibilities of implementing preventive law is dealt with in a later chapter.[2]

In conclusion, it may be suggested that the self-help which precipitated the emergence of law in society may now re-emerge in a different form in our legally-organised society. Persons might begin to avail themselves of their own abilities and resources to cope with as many legal problems as possible. In other words, preventive law can be seen to have an historical parallel.

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1 There are other interesting discussions to be considered in the context of whether persons are at all interested in learning more about the law. One of these may be the psychological motivation provided within "self actualization". For a brief consideration of this see M K Robertson "Preventive Legal Education" (1978) 2 Natal University L R 157-158.

2 Infra 104 f.

CHAPTER FOUR

THE DURBAN SURVEY : BACKGROUND AND LEGAL KNOWLEDGE

A. BACKGROUND

1. Introduction

In December 1979, a survey was carried out at three Provincial Hospitals[1] in the Durban area. The survey's object was to measure the public's knowledge of the law and the extent to which they have access to it. It was hoped that the sample, consisting of 399 respondents, would be reasonably representative[2] of the Durban population.[3]

To this latter end a suitable sample was sought and Hospital casualty patients, specifically trauma patients, were chosen. The rationale behind the choice was that these victims of motor-vehicle accidents, assaults, household injuries and others[4] would be the recipients of bodily injury quite as a matter of chance and, as such, the sample would be largely bias-free.[5] Apart from the inherent value for research purposes of this type of sample, a hospital environment is advantageous in that such patients would necessarily be grouped in "Casualty" or "Out-patients" sections making is reasonably simple for the interviewer to engage a respondent.

The interviewer would merely have to satisfy himself that the potential respondent was in a fit physical condition to answer questions properly, that he was prepared to do so and that his injury fell into the

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1 Addington, King Edward and R K Khan hospitals.

2. This word is used cautiously: the writer is aware that research of this nature seldom qualifies for the right to employ descriptions which import sweeping connotations.

3 This was merely the desire: it shall not be assumed that the object was achieved.

4 Sports and "freak" accidents.

5 It could not be contended, however, that such a sample is without bias altogether. For example, it is arguable that assault victims might necessarily emanate from areas in which petty-crime is not uncommon and thus reflect upon the economic standing of the victim.

category deemed to be suitable for the purpose.[1]

The interviewers themselves were all senior law students. Since it was considered necessary that respondents should feel at ease with the interviewer, Indian and African students assisted in the interviews.[2] This was necessary also because of diversity of language.

The interview consisted of two separate sections designed a) to test knowledge of aspects of law and b) to test how people respond to legal problems.

2. Knowledge of the law

Here the respondent was asked to answer "correct", "incorrect" or "don't know" to each of the ten statements set out in Table I.

TABLE I : STATEMENTS ON KNOWLEDGE OF THE LAW

1. A boy of 15 can be convicted of a criminal offence.
2. Only a policeman may arrest a criminal.
3. In a hire purchase agreement, the buyer only owns the goods once the final instalment is paid.
4. A contract made by a minor child is not valid unless his legal guardian assisted him to make it.
5. An advertisement of tinned goods at a certain price in a shop window means the shop is legally forced to sell the goods at that price.
6. Verbal contracts are binding.
7. A landlord has the right to evict a tenant whenever he wishes.
8. A person who buys a carton of milk from a supermarket which turns out to be sour can return the milk and demand the return of the purchase price.
9. It is the responsibility of hospital staff to register the birth of a child.
10. The Unemployment Insurance Fund is only for certain people who have very high salaries.

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1 The interviewers reported that they had little difficulty in finding respondents. The willing co-operation of the hospital authorities is a factor to be mentioned here. Furthermore, owing to the extremely busy nature of the sections at the hospitals concerned, patients were often required to wait an hour or more before receiving medical attention, allowing interviewers easy access. Many patients were on their second or third visits for medication or treatment (for the same injury) and had time at their disposal. Each interview took about 10 minutes.

2 It was feared that Black respondents particularly would be suspicious of Whites who asked them legal questions, especially those concerning the police and State authorities. Despite the precautions, it is doubtful whether the danger of [illegible]

The purpose of the statements in Table I was to measure, as far as possible, knowledge of the content of some laws. It was hoped that the legal areas or the actual problems contemplated by each statement represented a cross-section of socially relevant laws, i.e. the types of legal issues most readily encountered by the man in the street. By measuring groups' and individual's responses (in terms of correctness and incorrectness) to the statements separately and as a whole, it was hoped that some qualified conclusions relating to public legal knowledge could be suggested. Details of this aspect of the survey, together with the findings, are considered later in the chapter.[1]

3. Response to legal problems

In this part of the interview, the respondent was asked to state where or to whom he or she would turn for help if faced with each of the ten different legal problems set out in Table 2.

TABLE 2 : QUESTIONS ON LEGAL PROBLEMS

1. You were in trouble with the police.
2. Your employer would not pay you your wages.
3. You needed somewhere to live but could not find a place.
4. You wanted to get a divorce.
5. You were having trouble with faulty goods you had bought on hire purchase but the seller refused to take them back.
6. Someone was threatening to injure you or your family.
7. Your rooms which you rent have a leak and your bedroom gets flooded.
8. You were badly injured at work but you received no compensation for your injury.
9. You wanted to make a will.
10. You were injured in a motor collision or by a motor car and the person responsible would not compensate you.

As in the statements in Table 1 an effort was made to select problems considered relevant to the average citizen. There were two follow-up questions to each of the initial ten predicaments, namely "have you ever been in a position where..?", and "if your answer is 'yes' to the last question, where did you seek help..?"

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1 Infra 44.

The purpose of the questions in Table 2 was to find out how people react in a given legal predicament and, particularly, how they respond, if at all, in seeking help. Unlike the statements in Table 1, there are no correct or incorrect answers, although some responses are obviously better than others, in that the answers they contain are more likely to be beneficial. For example, seeking advice from an attorney when being charged with an offence is generally preferable to relying on advice from family or friends.

It was also hoped that the answers provided to the questions in Table 2 would allow for an appreciation of the respondents' perception of a particular legal problem and his or her consequent ability or inability to respond adequately. There might also emerge certain indications of the extent to which laymen perceive some legal problems as soluble, and thus the answers might reflect upon the adequacy or otherwise of legal and quasi-legal services themselves.

The findings of the section on response to legal problems are considered in a later chapter.[1]

4. The Sample

The 399 respondents were drawn from Durban's four main race groups: Africans, Indians, Whites and Coloureds[2] being roughly 100 individuals from each group.[3] Each respondent supplied certain personal particulars[4] viz. details of sex, age, education and occupation.

Of the total sample, 246 were male and 151 female[5]. There is no significance in these latter two numbers since interviewers made no conscious effort to interview respondents from either sex.

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1 Infra 61.

2 Although there are obvious objections to the use of these terms, they seem to be unavoidable for this purpose.

3 The exact figures are: African 97, Indian 98, White 101 and Coloured 103.

4 Names of respondents were not recorded.

5 61.7% male and 37.8% female. Two interviews were returned with no information as to sex.

The 12 age categories, together with the number of respondents in each category, were as follows :

TABLE 3 : AGE CATEGORIES

Age Group	Number	Percentage
No information	7	1,8
14 - 19	46	11,5
20 - 24	73	18,3
25 - 29	77	19,3
30 - 34	57	14,3
35 - 39	37	9,3
40 - 44	32	8,0
45 - 49	23	5,8
50 - 54	25	6,3
55 - 59	8	2,0
60 - 64	4	1,0
65 - 69	7	1,8
70 and over	3	0,8

Educational qualifications were recorded as follows :

TABLE 4 : CATEGORIZATION OF EDUCATIONAL QUALIFICATIONS

Qualification	Number	Percentage
No information	20	5,0
Up to Std 3	45	11,3
Up to Std 6	125	31,4
Up to Std 8	106	26,6
Up to Matriculation	55	13,8
Post-Matric. (non-Univ,)	35	8,8
University	12	3,0

Information of respondents' occupations was condensed into nine separate categories :[1]

TABLE 5 : CATEGORIZATION OF OCCUPATIONS

1. (a) Professional.
   Doctor, lawyer, engineer, chemist, biologist, lecturer, teacher, nurse, librarian, social worker.
   (b) Semi-Professional.
   Technician, dental mechanic, religious worker, articled clerk.
2. (a) Administrative, Executive and Managerial.
   Director, manager, stockbroker.
   (b) Representatives, Agents and Salesmen.
   Business salesmen, commercial traveller.
3. Clerical and Students.
   Bookkeeper, cashier, teller, clerk, receptionist.
4. Artisans.
   Mechanic, boilermaker, fireman, locksmith, panelbeater, electrician, woodworker, plumber, welder, carpenter, painter, bricklayer, plasterer.
5. Routine Non-Manual.
   Telephonist, policeman, detective, shop assistant, hawker, chaffeur, taxi-driver, postman, messenger, conductor, watchman, caretaker, waiter, barman, barber, soldier.
6. Semi-Skilled Manual.
   Driver, blacksmith, glazier, machinest, baker, crane operator, dressmaker, upholsterer.
7. Unskilled Manual.
   Gardener, groundsman, farm labourer, labourer, domestic worker, porter.
8. Menial.
   Temporary workers.
9. Unemployed.
   Unemployed, scholar, pensioner.

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1 Adapted from P Stopforth and L Schlemmer Prestige and Socio-Economic Rank Order of Occupations and Occupational Groupings Among Whites in South Africa (1978) 96-106. In the Durban survey, however, this categorization was used for people of all race groups.

The occupational information recorded, according to category, was :

TABLE 6 : PERCENTAGE OF SAMPLE IN EACH OCCUPATION

Category	Number	Percentage
No information	7	1,8
1 (Professional)	24	6,0
2 (Administrative)	9	2,3
3 (Clerical)	44	11,0
4 (Artisan)	41	10,3
5 (Routine non-manual)	50	12,5
6 (Semi-skilled manual)	87	21,8
7 (Unskilled manual)	42	10,5
8 (Menial)	5	1,3
9 (Unemployed)	90	22,6

5. Cross-tabulation of Basic Variables

Further background information to the sample is available from the data provided by a cross-tabulation of the independent variables. Only three of these cross-tabulations will be mentioned here: (a) occupation with race, (b) race with education and (c) education with occupation.[1]

(a) Occupation with race

For the sake of clarity, the nine occupational groupings have been compounded in Table 7 into two groups, the first of which consists of the groups "professional" to "artisan"[2] inclusive (group A); the second "routine non-manual" to "unemployed"[3] inclusive (group B).[4]

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1 The factors age and sex are not considered significant in this context.

2 For a comprehensive list of the occupations concerned, see supra 40, Table 5.

3 See note 2 above.

4 Where the percentages do not add up to 100, this is because 7 respondents did not give any information as to occupation.

TABLE 7 : OCCUPATION AND RACE

	A (%) (Professional to Artisans)	B (%) (Routine non-manual - Unemployed)
African	11,3	88,7
White	70,3	28,7
Coloured	19,4	76,8
Indian	16,3	81,6

It is obvious from Table 7 that the Whites in the sample were far better employed than their Black counterparts, the three groups of which were roughly on a par with each other.

(b) Race with education

In Table 8 the six educational groupings[1] have been compounded into two large groups, those with qualifications less than matriculation (group I) and those with matriculation and over (group II):[2]

TABLE 8 : RACE AND OCCUPATION

	I (%) (Less than Matriculation)	II (%) (Matriculation and over)
African	85,6	8,2
White	25,8	67,3
Coloured	91,1	3,9
Indian	81,6	16,3

Again, it is clear that the Whites' educational standards were far higher than the other groups'. Table 8 also reveals that there is considerable diversity in the educational standards amongst the three Black groups.

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1 See Table 4 supra 39.

2 Where the percentages do not add up to 100, this is because 20 respondents did not give information of education.

(c) Education with occupation

TABLE 9 : EDUCATION AND OCCUPATION

	A(%) (Professional to Artisan)	B(%) (Routine, non-manual to unemployed)
Up to Standard 3	0,0	97,8
Up to Standard 6	8,8	88,0
Up to Standard 8	33,1	65,1
Up to Matriculation	51,0	49,0
Post-Matric. (Non-Univ.)	88,6	11,5
University[1]	75,0	24,9

Table 9[2] shows a reasonably high degree of correlation between education and occupation. By reversing the axes so that occupational groupings are recorded on the vertical axis and educational groupings on the horizontal, the link between the two is again demonstrated:

TABLE 10 : OCCUPATION AND EDUCATION

	I(%) (Up to Matriculation)	II(%) (Matriculation and Over
Professional/Semi-Prof.	0,0	95,8
Admin, Exec., Managerial, etc.	44,4	44,4
Clerical	36,4	59,1
Artisans	65,2	36,6
Routine Non-Manual	73,4	18,3
Semi-skilled manual	88,5	10,2
Unskilled Manual	88,1	2,4
Menial	100	0,0
Unemployed[3]	75,5	16,6

Against this background it is now proposed to examine the detailed findings of the survey[4] in relation to legal knowledge and legal response.

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1 Only 3% of all those interviewed had received any University education.

2 7 respondents did not give information of occupation.

3 The "unemployed" category is misleading in that it includes pensioners and students. This accounts in part for the 16.6% who have matriculation or higher qualifications.

4 The survey results were processed by the Unisa Bureau of Statistical

B. PUBLIC LEGAL KNOWLEDGE

It has been pointed out that each of the ten statements chosen to guage public legal knowledge was selected from an area of law considered to be relevant to the ordinary man in the street.[1] It was also hoped that each statement would involve a relatively simple aspect or point of law so that people generally could be expected to respond with the correct answer. In other words, it was felt that the legal points contemplated by the statements were aspects of the law which people ought to know, if for no other reason than that persons otherwise ignorant of them would be at a serious disadvantage in their ability to negotiate the experiences of everyday life.

It was supposed too, to some extent, that each of the ten statements (with the possible exception of statement 9[2]) would present the same degree of difficulty (or ease) to the respondent.

The percentage of correct, incorrect or "don't know" answers to the ten statements are recorded in Table 11[3].

TABLE 11 : RESPONSES TO LEGAL KNOWLEDGE

		"Correct" %	"Incorrect" %	"Don't Know" %
1.	A boy of 15 can be convicted of a criminal offence.	43,4	48,9	7,0
2.	Only a policeman may arrest a criminal	49,4	44,6	6,0
3.	In a hire purchase agreement, the buyer only owns the goods once the final instalment is paid.	81,7	10,3	7,5
4.	A contract made by a minor child is not valid unless his legal guardian assisted him to make it.	76,4	17,0	6,8
5.	An advertisement of tinned goods at a certain price in a shop window means the shop is legally forced to sell the goods at that price.	22,8	68,9	7,8
6.	Verbal contracts are binding.	18,8	70,2	10,3
7.	A landlord has the right to evict a tenant whenever he wishes.	67,4	27,8	4,3

1 Supra 37. For example, criminal law, hire-purchase, contract, etc.

2 This was regarded as more difficult than the others because it is comparatively obscure.

3 Not all percentages add up to 100 because no information was recorded from some respondents.

8.	A person who buys a carton of milk from a supermarket which turns out to be sour can return the milk and demand the return of the purchase price.	73,7	20,6	5,8
9.	It is the responsibility of hospital staff to register the birth of a child.	55,4	26,3	18,0
10.	The Unemployment Insurance Fund is only for certain people who have very high salaries.	66,2	5,8	28,1

A cursory glance at the figures recorded in the "correct" and "incorrect" columns of Table II reveals that the initial assumptions mentioned above[1] have not been borne out by the findings. Firstly, it is clear that the statements in Table 1[2] by no means contained the same degree of difficulty: the responses ranged from 18.8% to 81.7% correct (where "correct" was the right response).

Secondly, if it was felt that the statements contained law straightforward enough to enable one to expect a high percentage of correct answers, the data do not reveal this either.[3] The generally poor results may be surprising to some. On the other hand, it is conceded that this writer's expectations were, of necessity, subjective[4]; another reader of these data may find them neither surprising nor alarming.

The choice of material from which the above findings are derived is obviously arbitrary, and therefore it is not proposed to contend that public legal knowledge, as represented by the sample, is conclusively good, poor or otherwise. The findings obviously cannot ground any such claims. As will be suggested later in this chapter[5], the real value of

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1 Supra 44.

2 Supra 36.

3 See for example statements 1, 2, 6, 7, 9 and 10 in Table II.

4 This was necessarily so in view of the absence of reliable empirical data to provide the researcher with some foundation or guidelines. In view of this paucity of research it is, arguably, merely a matter of opinion which law is pertinent to the "average man" as are predictions concerning how he will respond to it. Notwithstanding this subjective element, it should be pointed out that the present writer based the selections of legal "areas" on unpublished statistics produced by the Legal Aid Clinic of the University of Natal in Durban. These statistics merely recorded the type of work most commonly handled by the Clinic. To this extent, the selections were not arbitrary.

5 Infra 48.

the above and other data extracted from the survey is to be found in the comparative statistics. This will become clearer in due course.[1]

Nonetheless, these findings cannot be disregarded altogether and it is proposed to make some further observations.

If it is accepted that the statements in Table I and Table II contain aspects of the law which all persons ought to know, then it would probably be agreed that the high degree of wrong responses (in all but two or three statements) reflects poorly upon the public's ability to respond adequately to the immediate legal world. In other words, the sector of the population represented by the sample have a seemingly poor legal knowledge. That only 18.8% of the sample know that verbal contracts are legally enforceable[2] might be regarded as disquieting. Presumably, apart from the 10.3% who do not know what the position is, the other 70.2% believe that all contracts must be reduced to writing. (One wonders, then, how an everyday transaction with a shopkeeper is perceived. Do the 70.2% have any proper perception of the legal rights and obligations which flow from actions such as these, which frequent their daily living?)

In an effort to demonstrate the disparity of answers between respondents (in terms of correctness and incorrectness) a simple system of "scoring" was devised. The results have a secondary function of showing - subject to the doubts expressed above - how well or badly respondents fared. For each statement correctly answered, the respondent was awarded two marks; a "don't know" answer yielded no marks; while a wrong answer resulted in a mark being subtracted. The reason for the latter was partly to penalize guessing.[3] Thus, a respondent who answered six correctly and four "don't know's" would receive a score of twelve (out of a maximum of twenty) while one who answered six correct and four incorrect would receive a total of eight. It was felt that the

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1 Infra 48 f.

2 Statement 6, Table II.

3 Interviewers reported that not infrequently respondents appeared to be guessing, despite being requested not to, and being asked to rather state "don't know" where appropriate. There are many possible reasons for guessing, not least of all the influence of pride. Some respondents obviously did not wish to admit they did not know the answer to what was apparently a simple statement. It was also possible that respondents answered what they thought the law ought to be, not what they knew it was.

discrimination between incorrect and "don't know" answers was justified in that (as in the previous two examples) the respondent who answers "don't know" to some statements, is probably possessed of a better all-round legal knowledge than one who guesses or is simply misinformed: thus he warrants a higher score.

Although the range created by this system of scoring extends from a possible minus ten to positive twenty, scores of minus ten to positive one inclusive (which are very low) were included together (see Table 12). The second column in Table 12 indicates the percentage of respondents who scored the points recorded in the left hand column while the four percentages alongside the second column are percentage averages of the four groups :

TABLE 12 : SCORING BY RESPONDENTS

Score	%	
- 10 to 1	1,8)	
2	3,8)	
3	6,0)	24,7%
4	4,8)	
5	8,3)	
6	9,3)	
7	5,0)	
8	13,8)	37,2%
9	6,8)	
10	2,3)	
11	13,0)	
12	4,8)	
13	1,3)	28,4%
14	7,3)	
15	2,0)	
16	0)	
17	3,0)	
18	0)	3,3%
19	0)	
20	0,3)	

The distribution of scores in Table 12 becomes clearer by separating the range into the four groups (minus 10 to 5, 6 to 10, 11 to 15 and 16 to 20). The largest proportion of respondents scored in the 6 to 10 group (37.2%) followed by the 11 to 15 group (28.4%). The number of respondents who scored in the 16 to 20 group (3.3%) was slight. These figures speak for themselves. They indicate how few respondents answered at least five out of the ten statements correctly (31.7%) while a small minority (3.3%) scored between 16 and 20.

As indicated previously, the real value of this section of the survey lies in the data revealed by the cross-tabulation of the basic variable with the responses to the separate statements. The next section will be devoted to a consideration of some of these data.

C. THE EFFECTS OF RACE, EDUCATION AND OCCUPATION ON KNOWLEDGE

1. The findings

Although there appears to be a tendency away from embarking upon analysis which emphasizes racial differences (by reason of such analysis being racist) it seems that this research would have been incomplete had it ignored the South African population's racial differences. The political and social structure is such that glib disregard for the pervasive institutionalization of race could only be regarded as pretentious. Not surprisingly, the survey indicates (as will be shown) that respondents' race had a large bearing upon their ability to respond correctly to the ten legal statements.[1]

A detailed table of the occupational groupings used in the survey is recorded elsewhere.[2] For the sake of convenience, a summarized version is recorded in Table 13 :

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1. See Table 25 infra 60.
2. See Table 5 supra 40.

TABLE 13 : SIMPLIFIED OCCUPATIONAL GROUPINGS

1. Professional and semi-professional persons.
2. Administrative, executive and managerial personnel. Representatives, Agents and Salesmen.
3. Clerical personnel.
4. Artisans.
5. Routine non-manual.
6. Semi-skilled manual.
7. Unskilled manual.
8. Menial labour.
9. Unemployed.

It will be noticed that these groups have been arranced in decending order of prestige and "merit"[1]

Respondents' educational status was recorded in six categories :

TABLE 14 : EDUCATIONAL CATEGORIES

1. Up to standard 3.
2. Up to standard 6.
3. Up to standard 8.
4. Up to Matriculation.
5. Post-matriculation (non-university).
6. University.

It is proposed to deal with each of the ten statements[2] in turn and to consider some of the more significant results. Summarized tables[3] have been presented where appropriate and all data are in percentage form.

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1. This scheme has been adapted from that devised in P Stopforth and L Schlemmer op cit 96-106.
2. See Table 1 supra 36.
3. The "no information" categories have been omitted. Thus, the appropriate figures do not always total 100.

(a) Statement 1 : "A boy of 15 can be convicted of a criminal offence."

TABLE 15 : STATEMENT 1 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	"Yes"	"No"	"Don't Know"		"Yes"	"No"	"Don't Know"
African	36,1	54,6	9,3	Prof. etc	37,5	58,3	4,2
White	39,6	49,5	7,9	Admin. etc	33,3	55,6	11,1
Coloured	49,5	42,7	7,8	Clerical	40,9	54,5	2,3
Indian	48,0	49,0	3,1	Artisans	61,0	34,1	2,4
				Non-Manual	36,0	52,0	12,0
Standard 3	24,4	62,2	13,3	Semi-skilled	49,4	44,8	4,6
Standard 6	41,6	52,8	5,6	Unskilled	45,2	47,6	7,1
Standard 8	51,9	38,7	8,5	Menial	20,0	60,0	20,0
Matric	49,1	40,0	9,1	Unemployed	36,7	52,2	11,1
Post-Matric	42,9	54,3	0				
University	58,3	41,7	0				

As previously indicated[1], 43.4% of the total sample answered this correctly. The Coloured group fared best, having a 49.5% correct response compared with the poorest response of 36.1% from Africans. Whites (39.6%) were only little better than Africans. That Coloured people presented the best response may be attributed to their comparatively more frequent involvement with the criminal law. The incidence of high crime rates among the Coloured population has been established statistically.[2]

Of the nine occupational groupings, the artisan group responded best with a 61% correct response; the poorest was a 20% correct response from the menial labour group. A sub-division of the nine groups into two groups - one to four (professional to clerical) and five to nine (routine non-manual to unemployed) - reveals that the first group scored an average 43.2% correct and the second 37.5% correct. Overall, the data seems to suggest that working-class people responded better than professional and executive personnel.

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1 Table 11 supra 44.

2 See S P Villiers "Crime In The Coloured Community" in J Midgely J H Steyn and R Graser Crime and Punishment in South Africa (1975) 39.

On an educational level, the best response was from University graduates (58.3% correct) and the poorest (24.4%) from those with Standard 3 or less. Groups four to six (matric and over) responded an average 50.1% correct while groups one to three (less than matric) were 39.3% correct. One notable feature of these results is perhaps that as much as 41.7% of the University graduates (whose correct response was the highest) were incorrect in their response to this statement.

(b) Statement 2 : "Only a policeman may arrest a criminal."

TABLE 16 : STATEMENT 2 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	"Yes"	"No"	"Don't Know"		"Yes"	"No"	"Don't Know"
African	39,2	51,5	9,3	Prof. etc	16,7	79,2	4,2
White	26,7	64,4	8,9	Admin. etc	44,4	44,4	11,1
Coloured	56,3	39,8	3,9	Clerical	15,9	79,5	4,5
Indian	56,1	41,8	2,0	Artisans	41,5	53,7	4,9
				Non-Manual	46,0	52,0	2,0
Standard 3	53,3	31,1	15,6	Semi-skilled	60,9	33,3	5,7
Standard 6	61,6	32,8	5,6	Unskilled	40,5	50,0	9,5
Standard 8	47,2	49,1	3,8	Menial	40,0	60,0	0
Matric	21,8	74,5	3,6	Unemployed	52,2	40,0	7,8
Post-Matric	17,1	71,4	11,4				
University	25,0	75,0	0				

While this statement, like the first one, relates to criminal law, the responses recorded are somewhat different. It may be suggested that this is to be expected. Whereas the first statement might contain law which has a real significance for persons who have personal knowledge of juvenile delinquency it is unlikely that many persons have witnessed a citizen's arrest.[1] Thus, in a sense, the latter involves scholastic knowledge, as opposed to theoretical knowledge for the former.

The highest correct response was recorded by Whites (64.4%) and the lowest by Coloureds (39.8%), a near reversal of the response to the previous statement. The African response (51.5% correct), appreciably higher than that of Coloureds and Indians, may be attributable to the Urban Africans' practical knowledge of the powers of arrest possessed by officials of township administration boards.[2]

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1 As contemplated by S42 of the Criminal Procedure Act 51 of 1977.

2 These officials, who perform similar functions to those of policemen are colloquially referred to by Africans as "black-jacks."

Clerical personnel provided the best correct response (79.5%) followed by professional and semi-professional (79.2%). Again, the occupational data reveal that those better-placed occupationally are less ignorant than the lower working classes: groups one to four (professional to artisan) averaged 64.2% correct while groups five to nine (routine non-manual to unemployed) 47%.

The educational data show a very clear pattern of higher education being linked to better legal knowledge. The recent remarks regarding knowledge of this aspect of criminal law being more theoretical than the criminal law contemplated in the first statement seem to be borne out by the findings.

The best response (75% correct) from the University-educated group is contrasted with the worst response (31.1% correct) from the least educated group while there is a near-constant decline in between these two groups.

(c) Statement 3 : "In a hire purchase agreement, the buyer only owns the goods once the final instalment is paid."

TABLE 17 : STATEMENT 3 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	"Yes"	"No"	"Don't Know"		"Yes"	"No"	"Don't Know"
African	82,5	10,3	6,2	Prof. etc	79,2	16,7	0
White	84,2	7,9	6,9	Admin. etc	100,0	0	0
Coloured	72,8	12,6	14,6	Clerical	84,1	13,6	2,3
Indian	87,8	10,2	2,0	Artisans	85,4	7,3	7,3
				Non-Manual	88,0	10,0	2,0
Standard 3	80,0	6,7	11,1	Semi-skilled	87,4	6,9	5,7
Standard 6	78,4	10,4	11,2	Unskilled	73,8	16,7	9,5
Standard 8	85,8	10,4	3,8	Menial	60,0	40,0	0
Matric	74,5	18,2	5,5	Unemployed	73,3	8,9	6,7
Post-Matric	82,9	8,6	8,6				
University	100,0	0	0				

This statement drew a surprisingly high overall correct response (81.7% correct). Reference to the table will indicate that each race group responded well, there being little difference between them. The Indian group provided the best response (87.8% correct, 10.2% incorrect).

Similarly, the occupational table shows a generally uniform response, with the exception of groups seven to nine (unskilled, menial and unemployed). There appears to be a higher concentration of correct responses in groups three to seven (clerical to unskilled manual) suggesting, perhaps, which class of persons tends to make greater use of hire purchase and is consequently more knowledgeable on the subject.

The educational data do not appear to take the matter much further, although, again, the best response (100% correct) is provided by University graduates.

(d) Statement 4 : "A contract made by a minor child is not valid unless his legal guardian assisted him to make it."

TABLE 18 : STATEMENT 4 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	"Yes"	"No"	"Don't Know"		"Yes"	"No"	"Don't Know"
African	73,2	14,4	12,4	Prof. etc	100,0	0	0
White	91,1	5,9	3,0	Admin. etc	88,9	11,1	0
Coloured	87,4	5,8	6,8	Clerical	81,8	18,2	0
Indian	52,0	42,9	5,1	Artisans	90,2	7,3	2,4
				Non-Manual	68,0	24,0	8,0
Standard 3	73,3	13,3	13,3	Semi-skilled	72,4	21,8	5,7
Standard 6	70,4	20,8	8,8	Unskilled	59,5	23,8	16,7
Standard 8	76,4	19,8	3,8	Menial	80,0	20,0	0
Matric	81,8	14,5	3,6	Unemployed	75,6	14,4	10,0
Post-Matric	91,4	5,7	2,9				
University	83,3	16,7	0				

Whereas it may be supposed that hire purchase is a commercial arrangement about which working-class people are knowledgeable, it may be supposed that law relating to contracts of minors would be less widely known. Thus, the writer considers the White (91.1% correct), Coloured (87.4% correct) and African (73.2% correct) responses surprisingly high.[1] On the other hand, one should presumably distinguish between knowledge of the fairly complex aspects involved in the law relating to contracts of minors and knowledge of the single principle that minors' unassisted contracts are invalid. Clearly, the responses to the statement only record knowledge of the single principle. The writer also has a suspicion that the incidence of guessing may have been relatively high here: the wording of the statement almost prompts a positive

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1 There appears to be no obvious reason why the Indian response

response from a respondent who, unsure of the answer, would nevertheless have enough general knowledge to suppose it unlikely that minors could contract freely.[1]

The professional and semi-professional group gave a 100% correct response while the weakest response came from the unskilled manual group (59.5%). A better overall response was recorded from the upper half of the occupational scale (groups professional to artisan averaged 90.2% correct) than the lower half (routine non-manual to unemployed 71.1%). There is a discernible trend in which correct responses decline as the level of the occupational standing falls.

As far as the effect of education is concerned, group five (post-matric, non-university) had the highest correct response (91.4%) followed by university-educated (83.3%). Thereafter the decline in correct responses corresponds consistently with the decline in educational standing.

(e) Statement 5 : "An advertisement of tinned goods at a certain price in a shop window means the shop is legally forced to sell the goods at that price."

TABLE 19 : STATEMENT 5 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	"Yes"	"No"	"Don't Know"		"Yes"	"No"	"Don't Know"
African	44,3	44,3	11,3	Prof. etc	54,2	37,5	8,3
White	75,2	16,8	7,9	Admin. etc	77,8	22,2	0
Coloured	72,8	16,5	8,7	Clerical	77,3	18,2	4,5
Indian	82,7	14,3	3,1	Artisans	82,9	9,8	7,3
				Non-Manual	82,0	16,0	2,0
Standard 3	57,8	31,1	11,1	Semi-skilled	72,4	19,5	5,7
Standard 6	67,2	21,6	9,6	Unskilled	45,2	47,6	7,1
Standard 8	74,5	20,8	4,7	Menial	80,0	20,0	0
Matric	78,2	16,4	5,5	Unemployed	61,1	23,3	15,6
Post-Matric	65,7	28,6	5,7				
University	58,3	25,0	16,7				

1 One wonders, for example, what answers would have been given by the same respondents, to the question: "What is the difference between the law relating to contracts of minors and majors in respect of capacity to contract?" Generally speaking, it may be observed that the format of the questionnaire was such that respondents were in no way extended in their giving of answers: only a "yes", "no" or "don't know" answer was required. While the format was chosen for obvious reasons (basically, to simplify recording and subsequent analysis) a more exacting test of general public legal knowledge

Overall this statement drew a very poor response (68.9% incorrect). In terms of race, the surprising feature is that Africans responded twice as well (44.3% correct) as any of the other three groups (second-highest was Whites with 16.8% correct).

The data from the occupational table are equally confusing: the professional and semi-professional group yielded a 37.5% correct response and the unskilled manual group a 47.6% correct response. Apart from the latter two, nearly all the other groups had a correct response of less than 20%. The relatively high 47.6% response from the unskilled manual groups is linked to the relatively high 44.3% correct response of Africans, since 42.3% of all African respondents were in the unskilled manual group.[1]

A consideration of the effect of education does not, at face value, seem to explain the apparent anomaly encountered in the responses to this statement. The highest correct response came from the least-educated group.

It is submitted that an explanation for these unusual results may lie in the fact that this statement could be termed a "trick-question". Persons with a better legal education might have been led to believe that the window-display contemplated actually constituted an offer in the contractual sense. Perhaps only students of law would know immediately that an invitation to treat does not constitute an offer[2]. However, this explanation does not account for the feature that 44.3% African respondents were not misled by the "trick", unless there is any possibility that this group of persons, more than other groups, has discovered, from practical experience, the deceptive tactics of advertising.

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1 See Table 8 supra 42.

2 A J Kerr The Principles of the Law of Contract 2 ed (1975) 36.

(f) Statement 6 : "Verbal contracts are binding."

TABLE 20 : STATEMENT 6 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	"Yes"	"No"	"Don't Know"		"Yes"	"No"	"Don't Know"
African	10,3	83,5	6,2	Prof. etc	33,3	58,3	8,3
White	31,7	53,5	13,9	Admin. etc	55,6	33,3	11,1
Coloured	15,5	66,0	16,5	Clerical	31,8	56,8	9,1
Indian	17,3	78,6	4,1	Artisans	31,7	58,5	7,3
				Non-Manual	16,0	74,0	10,0
Standard 3	8,9	77,8	13,3	Semi-skilled	5,7	81,6	11,5
Standard 6	14,4	75,2	10,4	Unskilled	19,0	73,8	7,1
Standard 8	17,9	68,9	11,3	Menial	20,0	80,0	0
Matric	23,6	67,3	7,3	Unemployed	11,1	75,6	13,3
Post-Matric	34,3	57,1	8,6				
University	41,7	41,7	16,7				

This statement was poorly responded to (70.2% incorrect). Whites provided the best response (31.7% correct) while the worst came from Africans (10.3% correct). "Don't know" answers were given by 16.5% of the Coloured respondents.

Where occupation is concerned, group two (administrative, executive, etc.) provided the highest response (55.6% correct) and group six (semi-skilled manual) the lowest (5.7%). There is an overall obvious drop in correct responses from the highest occupational groups to the lowest. The top half of the scale (groups professional to artisan) averaged 35.1% correct and the lower half (routine non-manual to unemployed) 14.4%.

The cross-tabulation of the education data with the responses from this statement reveals that the highest educational group responded highest (41.7%) and the lowest group worst (8.9%). The fall in correct responses is consistent with the drop in educational standings.[1]

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1 In other words, the best-educated scored best, the second-best educated second-best, etc.

(g) Statement 7 : "A landlord has the right to evict a tenant whenever he wishes."

TABLE 21 : STATEMENT 7 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	"Yes"	"No"	"Don't Know"		"Yes"	"No"	"Don't Know"
African	27,8	69,1	1,0	Prof. etc	4,2	87,5	8,3
White	18,8	70,3	10,9	Admin. etc	11,1	88,9	0
Coloured	35,0	61,2	3,9	Clerical	22,7	77,3	0
Indian	29,6	69,4	1,0	Artisans	26,8	63,4	9,8
				Non-Manual	32,0	62,0	6,0
Standard 3	31,1	64,4	4,4	Semi-skilled	32,2	63,2	2,3
Standard 6	33,6	64,0	2,4	Unskilled	26,2	73,8	0
Standard 8	26,4	70,8	0,9	Menial	40,0	60,0	0
Matric	21,8	70,9	7,3	Unemployed	33,3	61,3	5,6
Post-Matric	11,4	74,3	14,3				
University	25,0	66,7	8,3				

On the race scale, the four responses were roughly similar with the highest from Whites (70,3% correct) and the lowest from Coloureds (61.2% correct).

Again, where occupation is concerned, the trend is greater incorrect responses as occupational standings decrease. Thus, for example, group two (administrative, executive, etc.) responded best (88.9% correct) while group eight (menial labour) responded worst (60% correct).

Likewise, a discernible pattern emerges on the educational scale. Group five (post-matric) responded best with 74.3% correct and group two (standard six) worst with 64% correct. Only group six (university educated) seems somewhat out of place, ranking fourth with 66.7% correct.

(h) Statement 8 : "A person who buys a carton of milk from a supermarket which turns out to be sour can return the milk and demand the return of the purchase price."

TABLE 22 : STATEMENT 8 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	"Yes"	"No"	"Don't Know"		"Yes"	"No"	"Don't Know"
African	76,3	20,6	3,1	Prof. etc	87,5	8,3	4,2
White	83,2	4,0	12,9	Admin. etc	88,9	0	11,1
Coloured	76,7	19,4	3,9	Clerical	88,6	9,1	2,3
Indian	58,2	38,8	3,1	Artisans	78,0	17,1	4,9
				Non-Manual	62,0	24,0	14,0
Standard 3	66,7	28,9	4,4	Semi-skilled	73,6	20,7	5,7
Standard 6	64,8	31,2	4,0	Unskilled	71,4	26,2	2,4
Standard 8	80,2	14,2	5,7	Menial	60,0	40,0	0
Matric	74,5	16,4	9,1	Unemployed	68,9	25,6	5,6
Post-Matric	82,9	5,7	11,4				
University	91,7	8,3	0				

The White group again responded best (83.2% correct) and the Indian group worst (58.2% correct). The three top occupational groups all responded with more than 87% correct. The upper half of the scale (professional to artisan) averaged 85.8% correct and the lower half 67.2% correct. The ability to respond correctly is again tied very closely with educational attainment.

(i) Statement 9 : "It is the responsibility of hospital staff to register the birth of a child."

TABLE 23 : STATEMENT 9 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	"Yes"	"No"	"Don't Know"		"Yes"	"No"	"Don't Know"
African	23,7	49,5	26,8	Prof. etc	16,7	75,0	8,3
White	14,9	64,4	19,8	Admin. etc	11,1	77,8	11,1
Coloured	37,9	43,7	18,4	Clerical	11,4	84,1	4,5
Indian	28,6	64,3	7,1	Artisans	31,7	53,7	14,6
				Non-Manual	28,0	64,0	6,0
Standard 3	13,3	53,3	33,3	Semi-skilled	32,2	52,9	14,9
Standard 6	36,8	44,8	18,4	Unskilled	21,4	42,9	35,7
Standard 8	22,6	59,4	17,0	Menial	40,0	20,0	40,0
Matric	25,5	61,8	12,7	Unemployed	28,9	42,2	28,9
Post-Matric	22,9	62,9	14,3				
University	8,3	83,3	8,3				

White and Indian responses (64.4% and 64.3% correct respectively) were significantly higher than African and Coloured (49.5% and 43.7% respectively). "Don't know" answers were given by 26.8% Africans and slightly fewer Whites and Coloureds.

Those respondents with higher occupational standings responded appreciably higher than those in the lower half of the scale. Artisans were 84.1% correct and menial labourers only 20% correct.

Education, again, is very closely tied to the ability to respond correctly. A glance at the relevant table reveals an almost perfectly consistent rise in incorrect responses with a corresponding decrease in educational standards.

(j) Statement 10 : "The Unemployment Insurance Fund is only for certain people who have very high salaries."

TABLE 24 : STATEMENT 10 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	"Yes"	"No"	"Don't Know"		"Yes"	"No"	"Don't Know"
African	12,4	23,7	63,9	Prof. etc	0	95,8	4,2
White	3,0	85,1	11,9	Admin. etc	0	100,0	0
Coloured	4,9	81,6	13,6	Clerical	2,3	86,4	11,4
Indian	3,1	72,4	24,5	Artisans	4,9	87,8	7,3
				Non-Manual	6,0	78,0	16,0
Standard 3	4,4	24,4	71,7	Semi-skilled	4,6	70,1	25,3
Standard 6	7,2	60,9	32,8	Unskilled	19,0	16,7	64,3
Standard 8	6,6	76,4	17,0	Menial	0	20,0	80,0
Matric	5,5	72,7	21,8	Unemployed	5,6	48,9	45,6
Post-Matric	2,9	91,4	5,7				
University	0	91,7	8,3				

While White, Coloured and Indian responses were high (85.1%, 81.6% and 72.4% correct respectively), African responses were, by comparison, very low (23.7% correct) and were accompanied by a relatively high (63.9%) "don't know" response. The disparity between African and other responses does not appear to be immediately explicable but is nevertheless somewhat disquieting.

As far as occupation and education are concerned, the same remarks apply here as about the previous statement: there emerges a very close correlation between legal knowledge and occupation and education.

2. Conclusions

An overall view of the effect of race on knowledge, as considered above, may be demonstrated if one observes that, out of the ten statements, all but three were responded to best by Whites. The responses of the other three groups were similar to one another. The following table demonstrates this :

TABLE 25 : RESPONSES TO STATEMENTS BY RACE

	No. of Statements answered:-	
	Best	Worst
African	1	3
White	7	0
Coloured	1	4
Indian	1	3

The findings further suggest that occupation has an important bearing upon legal knowledge. A simplification of the preceding observations relating to occupation shows that in all but one of the ten statements, the best responses emanated from a group in (what has been referred to as) the top half[1] of the occupational scale. A closer scrunity of all the tables concerned will reveal a trend in which legal knowledge generally decreases with a concurrent lowering of occupational standing. Broadly speaking, this tends to suggest that the poorer classes are less able to respond correctly to everyday laws than their more privileged counterparts.

The clearest pattern of all emerged from the cross-tabulation of education with the responses to the ten statements. It is obvious that this survey has indicated a remarkably close association between education and legal knowledge. Even if the effects of race and occupation on legal knowledge are inconclusive, it would probably be safe to assume that education is the single most influential factor determining an individual's ability to respond correctly to legal problems. In short, general education seems to determine general legal knowledge.

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1 Professional to artisans. See Table 13 supra 49.

CHAPTER FIVE

THE DURBAN SURVEY : RESPONSES TO LEGAL PROBLEMS

A. INTRODUCTION[1]

Not only ought people to have a thorough appreciation of the meaning of laws which most affect their daily lives, but also a knowledge of which agencies or authorities they should turn to when faced with a particular legal problem.[2] To a large extent, this function would be best fulfilled by a preventive legal advice service.[3] However, in the absence of adequate advice centres, people should know where to turn for specialist advice or assistance. It is submitted that this knowledge of how to respond in a given legal predicament falls for consideration within the ambit of preventive legal education.

The aim of this chapter is to present the findings of the second part of the survey carried out in the Durban area. Each respondent was asked to consider ten separate legal problems[4] and to say to whom or where he or she would go for assistance.

The findings are discussed below. Owing to the mass of data which became available from the analysis, it has been necessary to condense the material considerably[5]. For example, no less than 38 different agencies were recorded as responses to the questions (see Table 26). Only the most significant of these will be mentioned in each case. Certain comments by the present writer, on the meaning and significance of the data, are offered at the end of this chapter.

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1 The background to this part of the survey is considered supra 35.

2 For a comprehensive study of this and related aspects of laymen's knowledge of legal institutions, see M L Friedland Access to the Law (1979) esp chapters two and three.

3 See infra 119.

4 Table 2 supra 37.

5 The original material is available at the Law Library at the University of Natal in Durban.

TABLE 26 : ALL THE RESPONSES TO THE TEN QUESTIONS

1 attorney
2 police
3 legal aid
4 welfare
5 church
6 community leader
7 family/friends
8 employer
9 landlord
10 Dept Co-operation & Development
11 Dept Indian Affairs
12 Dept Coloured Affairs
13 Dept Labour
14 workmen's compensation
15 housing authority
16 collection agency
17 not sure
18 don't know
19 nowhere
20 other
21 Industrial Council
22 press
23 insurance company
24 union/worker group
25 bank
26 Salvation Army
27 Consumer Council
28 court/magistrate
29 Automobile Association
30 manufacturer
31 YMCA
32 self-help
33 employment bureau
34 Wage Board
35 Commissioner of Oaths
36 Dept Community Development
37 NICRO[1]
38 marriage councillor

B. THE FINDINGS

Each of the ten questions posed, together with the responses, will be considered separately.[2] (Detailed occupational and educational tables are recorded elsewhere.)[3]

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1 National Institute for Crime Prevention and Rehabilitation of Offenders.

2 Tables 27 to 36, apart from being restricted to presenting the more significant responses, do not include "no information" categories.

3 Tables 4 and 5 supra 39-40.

(a) Question 1 : "Who would you approach for help if you were in trouble with the police?"

TABLE 27 : RESPONSES TO QUESTION 1 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	attorney 43,4%	police 16,5%	family/friends 17,3%	don't know/no help 11,6%
African	12,4	51,5	0,0	26,7
White	51,5	6,9	25,7	3,0
Coloured	37,9	6,8	27,2	14,5
Indian	71,4	2,0	15,3	2,0
Standard 3	15,6	35,6	6,7	26,7
Standard 6	39,2	15,2	9,2	12,0
Standard 8	52,8	11,3	17,0	6,6
Matric	56,4	10,9	20,0	7,2
Post-Matric	42,9	22,9	25,0	0,0
University	41,7	0,0	16,7	8,3
Prof. etc	37,5	20,8	29,2	0,0
Admin. etc	88,9	0,0	0,0	0,0
Clerical	65,9	9,1	11,4	0,0
Artisans	63,4	4,9	19,5	0,0
Non-Manual	56,0	4,0	18,0	8,0
Semi-skilled	46,0	9,2	23,0	7,9
Unskilled	7,1	50,0	2,4	30,9
Menial	20,0	40,0	20,0	20,0
Unemployed	31,1	21,1	18,9	18,9

The greatest proportion (43,4%) said they would visit an attorney. Other answers given were "family or friends" (17,3%), police (16,5%, a somewhat puzzling response) and 11,6% said they either did not know or that they would not seek help at all. Of the 43,4% who said they would see an attorney, the majority were from higher-income occupational groups (professional to artisan). Of those who said they did not know, all were from lower-income groups. The remaining respondents (12,2%) gave other answers.[1]

The highest "attorney" response came from the Indians (71.4%) and the lowest from the Africans (12.4%). The high (51.5%) "police" response from Africans seems to suggest that this question was not properly understood by Africans. Where education is concerned, better-educated people tend to rely on the services of an attorney.

(b) Question 2 : "Who would you approach for help if your employer would not pay you your wages?"

TABLE 28 : RESPONSES TO QUESTION 2 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	attorney	police	dept. labour	union	don't know/ no help
	12,0%	17,0%	13,3%	15,3%	16,4%
African	5,2	47,4	15,5	0,0	8,3
White	27,7	3,0	7,9	12,9	25,8
Coloured	7,8	9,7	15,5	26,2	22,3
Indian	7,1	9,2	14,3	21,4	8,2
Standard 3	2,2	46,7	11,1	8,9	11,1
Standard 6	8,8	20,0	9,2	9,6	16,0
Standard 8	11,3	12,3	14,2	24,5	14,2
Matric	20,0	9,1	7,3	5,5	21,8
Post-Matric	17,1	5,7	8,6	20,0	22,9
University	33,3	0,0	8,3	33,3	16,7
Prof. etc	33,3	8,3	4,2	12,5	20,9
Admin. etc	44,4	11,1	11,1	0,0	0,0
Clerical	29,5	9,1	13,6	9,1	11,3
Artisans	2,4	0,0	12,2	29,3	19,5
Non-Manual	6,0	4,0	18,0	18,0	20,0
Semi-skilled	12,6	10,3	10,0	21,8	18,3
Unskilled	0,0	47,6	14,3	0,0	9,6
Menial	0,0	40,0	40,0	0,0	0,0
Unemployed	7,8	31,1	13,3	15,6	17,7

The most common answer was "police" (17%) followed by "union" (15,3%), Department of Labour, a Government Office (13,3%) and "attorney" (12%). 18 other answers were given. 16,4% said they either did not know or would not seek help.

The highest White response was "attorney" (27,7%)) whereas most Africans answered "police" (47,4%). The highest education and occupation categories both yielded more frequent "attorney" responses. The "union" reponses also increased with higher education while no Africans gave the answer as "union".[1]

1 The present writer was puzzled by this until it was discovered that there are very few unions catering for African workers in Durban. Of those that do exist, their membership represents a very small proportion of the Durban African population.

(c) Question 3 : "Who would you approach for help if you needed somewhere to live but could not find a place?"

TABLE 29 : RESPONSES TO QUESTION 3 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	welfare 13,5%	family/friends 32,1%	housing auth 24,8%	don't know/not sure 9,8%
African	6,2	24,7	46,4	6,2
White	26,7	27,7	1,0	17,8
Coloured	11,7	36,9	15,5	11,6
Indian	9,2	38,8	37,8	3,0
Standard 3	4,4	42,2	33,3	4,4
Standard 6	8,0	34,4	31,2	8,6
Standard 8	13,2	28,3	24,5	10,4
Matric	4,5	32,7	12,7	14,6
Post-Matric	34,3	34,3	11,4	5,8
University	25,0	16,7	16,7	16,6
Prof. etc	41,7	29,2	12,5	8,4
Admin. etc	0,0	11,1	0,0	22,2
Clerical	29,5	27,3	15,9	6,8
Artisans	17,4	31,7	9,8	12,2
Non-Manual	10,0	40,0	20,0	16,0
Semi-skilled	9,2	34,5	33,3	3,4
Unskilled	7,1	23,8	45,2	9,5
Menial	0,0	0,0	60,0	40,0
Unemployed	7,8	34,4	26,7	11,1

32,1% said they would approach family or friends while 24,8% responded "local housing authority". Of the latter, the majority were people from lower-income groups. The reverse trend applied in the "welfare" response (13,5%). "Don't know" and "not sure" answers were 9,8%.

Most Africans responded "local housing authority" (46,4%) compared with Whites (1,0%). The answer "family or friends" - the greatest response - given by all population groups is not really a legal response and for this reason, it is submitted, these particular results do not provide much useful information.

(d) Question 4 : "Who would you approach for help if you wanted a divorce?"

TABLE 30 : RESPONSES TO QUESTION 4 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	attorney 45,1%	legal aid clinic 7,0%	welfare 10,8%	don't know 9,0%	court/ magistrate 4,8%
African	18,6	19,6	0,0	13,4	0,0
White	84,2	4,0	0,0	1,0	2,0
Coloured	46,6	3,9	4,9	16,5	9,7
Indian	29,6	1,0	38,8	5,1	7,1
Standard 3	11,1	8,9	11,1	17,8	2,2
Standard 6	33,6	7,2	18,4	7,2	8,0
Standard 8	51,9	5,7	7,5	9,4	7,5
Matric	61,8	3,6	10,9	1,8	0,0
Post-Matric	71,4	14,3	2,9	2,9	0,0
University	83,3	0,0	0,0	8,3	0,0
Prof. etc	83,3	12,5	0,0	0,0	0,0
Admin. etc	77,8	0,0	0,0	0,0	11,1
Clerical	68,2	4,5	9,1	2,3	2,3
Artisans	65,9	0,0	7,3	7,3	2,4
Non-Manual	44,0	2,0	6,0	2,0	12,0
Semi-skilled	40,2	8,0	28,7	3,4	4,6
Unskilled	16,7	21,4	0,0	7,1	0,0
Menial	0,0	0,0	20,0	0,0	0,0
Unemployed	34,4	6,7	5,6	1,1	5,6

The response "attorney" accounted for 45,1%. The percentage of persons who gave this answer increased steadily in relation to an increase in occupational standings. Other answers given were "welfare" (10,8%), "don't know" (9%), "legal aid clinic" (7%) and "magistrate" (4,8%).

The White "attorney" response (84,2%) was considerably higher than the other group (next highest coloured 46,6%, lowest African 18,6%). There is a marked and fairly consistent increase in the "attorney" response in relation to occupational and educational standings.

(e) Question 5 : "Who would you approach for help if you were having trouble with faulty goods you had bought on hire purchase but the seller refused to take them back?"

TABLE 31 : RESPONSES TO QUESTION 5 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	attorney 25,6%	police 16,0%	don't know/no help 33,3%
African	14,4	36,1	34,0
White	39,6	2,0	22,1
Coloured	25,2	12,6	21,9
Indian	22,4	14,3	20,5
Standard 3	8,9	33,3	35,5
Standard 6	20,0	17,6	42,4
Standard 8	30,2	14,2	33,0
Matric	30,9	12,7	23,7
Post-Matric	48,6	5,7	20,1
University	16,7	0,0	8,3
Prof. etc	41,7	0,0	16,9
Admin. etc	55,6	11,1	22,1
Clerical	31,8	6,8	18,2
Artisans	36,6	9,8	36,5
Non-Manual	20,0	8,0	40,0
Semi-skilled	23,0	11,5	41,4
Unskilled	9,5	40,5	40,5
Menial	0,0	20,0	60,0
Unemployed	24,4	24,4	29,0

Again, the most frequent response was "attorney" (25,6%). As many as 33,3% said they didn't know or would not seek help. The number of "don't know" answers increased steadily in relation to a decrease in the occupational standings. 16 other answers were given including the answer "police" (16%).

There is a marked decrease in the "don't know" response on the higher end of the scales in relation to both education and occupation.[1]

1 On the occupational scale in Table 31 the "unemployed" category (29,0%) runs somewhat against the pattern. However, this category is misleading because it contains pensioners and scholars.

(f) Question 6 : "Who would you approach for help if someone was threatening to injure you or your family?"

TABLE 32 : RESPONSES TO QUESTION 6 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	police	family/ friends
	82,5%	4,0%
African	70,1	1,0
White	87,1	0,0
Coloured	89,3	2,9
Indian	82,7	12,2
Standard 3	64,4	11,1
Standard 6	77,6	4,0
Standard 8	88,7	4,7
Matric	87,3	1,8
Post-Matric	88,6	0,0
University	100,0	0,0
Prof. etc	91,7	0,0
Admin. etc	77,8	0,0
Clerical	93,2	2,3
Artisans	90,2	4,9
Non-Manual	88,0	6,0
Semi-skilled	82,8	4,6
Unskilled	76,2	0,0
Menial	80,0	20,0
Unemployed	71,1	4,4

A great majority of the respondents answered "police" (82,5%). 14 other answers were given including "family or friends" (4%). The data do not appear to reveal any particular trends, except a higher "police" response from better educated groups.

(g) Question 7 : "Who would you approach for help if your rooms which you rent have a leak and your bedroom gets flooded?"

TABLE 33 : RESPONSES TO QUESTION 7 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	landlord	housing auth
	65,4%	15,3%
African	50,5	36,1
White	26,2	0,0
Coloured	62,1	8,7
Indian	72,4	17,3
Standard 3	46,7	24,4
Standard 6	68,0	19,2
Standard 8	68,9	9,4
Matric	58,2	12,7
Post-Matric	74,3	20,0
University	75,0	8,3
Prof. etc	66,7	16,7
Admin. etc	77,8	0,0
Clerical	72,7	15,9
Artisans	70,7	4,9
Non-Manual	70,0	4,0
Semi-skilled	70,1	14,9
Unskilled	64,3	31,0
Menial	40,0	40,0
Unemployed	53,3	18,9

The answers were "landlord" (65,4%) and "local housing authority" (15,3%). The remaining 19.3% gave a variety of answers (11 in all). The "landlord" response increased somewhat in relation to an increase in the educational level. No Whites answered "housing authority", compared with an African response of 36,1%.

(h) Question 8 : "Who would you approach for help if you were badly injured at work but you received no compensation for your injury?"

TABLE 34 : RESPONSES TO QUESTION 8 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	attorney	dept labour	workmen's comp	don't know	union
	10,0%	8,0%	22,3%	19,0%	8,3%
African	7,2	11,3	27,8	22,7	0,0
White	18,8	3,0	27,7	11,9	12,9
Coloured	13,6	10,7	13,6	27,2	10,7
Indian	0,0	7,1	20,4	14,3	9,2
Standard 3	2,2	4,4	11,1	28,9	8,9
Standard 6	4,8	13,6	17,6	25,6	2,4
Standard 8	9,4	6,6	27,4	16,0	13,2
Matric	10,9	3,6	16,4	12,7	9,1
Post-Matric	20,0	2,9	42,9	5,7	17,1
University	25,0	8,3	33,3	8,3	8,3
Prof. etc	25,0	4,2	29,2	4,2	12,5
Admin. etc	11,1	0,0	66,7	11,1	0,0
Clerical	13,6	2,3	38,6	13,6	6,8
Artisans	12,2	4,9	39,0	7,3	22,0
Non-Manual	8,0	4,0	20,0	18,0	8,0
Semi-skilled	4,6	12,6	11,5	17,2	8,0
Unskilled	7,1	11,9	23,8	26,2	0,0
Menial	0,0	20,0	40,0	0,0	20,0
Unemployed	11,1	8,9	11,1	32,2	6,7

The answer "workmen's compensation authority" accounted for 22,3%, "don't know" answers 19%, "attorney" 10%, "union" 8,3% and "Department of Labour" 8%. The majority of "don't know" answers emanated from the lower-income groups while the percentage of those who responded "attorney" rose slightly in relation to a rise in income group. There is a slight increase in "workmen's compensation" in relation to a higher level of education. No Africans gave the answer as "union"[1].

1 See supra 64 note 1.

(i) Question 9 : "Who would you approach for help if you wanted to make a will?"

TABLE 35 : RESPONSES TO QUESTION 9 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	attorney 56,1%	church 4,0%	don't know 11,8%	bank 9,3%
African	33,0	16,5	19,6	0,0
White	59,4	0,0	3,0	23,8
Coloured	69,9	0,0	15,5	3,9
Indian	61,2	0,0	9,2	9,2
Standard 3	26,7	8,9	28,9	0,0
Standard 6	59,2	6,4	12,8	4,8
Standard 8	64,2	0,9	10,4	9,4
Matric	54,5	3,6	5,5	18,2
Post-Matric	60,0	0,0	5,7	17,1
University	75,0	0,0	8,3	0,0
Prof. etc	75,0	0,0	4,2	12,5
Admin. etc	55,6	0,0	0,0	44,4
Clerical	52,3	0,0	2,3	22,7
Artisans	65,9	0,0	4,9	17,1
Non-Manual	64,0	0,0	8,0	8,0
Semi-skilled	70,1	0,0	9,2	9,2
Unskilled	33,3	16,7	16,7	0,0
Menial	40,0	0,0	20,0	0,0
Unemployed	44,4	10,0	23,3	1,1

56,1% responded "attorney", 11,8% "don't know", 9,3% "bank" and 4% "church or church leader". 14 other answers were given. Again, there tended to be a higher "attorney" response from the higher income groups while the "don't know" responses indicated a reverse trend.

The highest "attorney" response was from Coloureds (69,9%), the lowest from Africans (33,0%). An increase in educational level again yeilded an increased "attorney" response. The White "don't know" response (3,0%) was relatively low compared with African (19,6%) and Coloured (15,5%). 23,8% Whites gave the answer as "bank" compared with a nil response from Africans.

(j) Question 10 : "Who would you approach for help if you were injured in a motor collision or by a motor car and the person responsible would not compensate you?"

TABLE 35 : RESPONSES TO QUESTION 10 IN RELATION TO RACE, EDUCATION AND OCCUPATION

	attorney	police	don't know	insurance company
	40,1%	19,5%	10,3%	19,0%
African	25,8	25,8	22,7	0,0
White	56,4	4,0	5,9	24,8
Coloured	42,7	11,7	12,6	29,1
Indian	34,7	37,8	0,0	21,4
Standard 3	24,4	24,4	26,7	4,4
Standard 6	34,4	28,8	9,6	12,8
Standard 8	44,3	17,9	10,4	25,5
Matric	43,6	16,4	1,8	27,3
Post-Matric	48,6	2,9	2,9	20,0
University	75,0	0,0	0,0	25,0
Prof. etc	58,3	0,0	4,2	16,7
Admin. etc	55,6	11,1	11,1	22,2
Clerical	54,5	6,8	6,8	18,2
Artisans	51,2	14,6	2,4	29,3
Non-Manual	46,0	16,0	4,0	30,0
Semi-skilled	39,1	27,6	3,4	21,8
Unskilled	28,6	19,0	33,3	0,0
Menial	40,0	0,0	0,0	20,0
Unemployed	27,8	30,0	15,6	12,2

In all, 14 different responses were given, the most significant of which were "attorney" (40,1%), "police" (19,5%), "insurance company" (19%) and "don't know" (10,3%). Again, more Whites responded "attorney" (56,4%) than Africans (25,8%) and the "attorney" response increased with education and occupational levels. Lesser educated people also tended to rely more on the "police" answer.

C. COMMENTS

One of the striking features of the findings is the diversity of responses. This seems to indicate that people do not really know where to turn with their legal problems or that there are not proper or adequate agencies to deal with people's problems. The reason is probably a combination of these two f[illegible]

It seems that there are relatively few people who know of and utilize the legal aid structure. The highest "legal aid"[1] response of only 7% was given to the question on divorce (see Table 30). As a centralized and dependable authority to which persons turn with confidence and frequency, legal aid appears to fail dismally.

One of the most frequent responses was "attorney". However, there are also indications that this response decreased in relation to a lowering of respondents' occupational grouping. This finding is hardly surprising, but it does confirm the common assumption that poorer people are not in a position to afford lawyers' fees.

It is also evident that a general level of education influenced the responses, particularly the "attorney" response. Lesser educated people did not answer "attorney" as frequently as those better educated, but gave more "don't know" answers (see, for example, Table 36).

As far as race is concerned, it is obvious that Whites make far greater use of attorneys than the other groups, particularly Africans. Africans also seem to rely more heavily upon the police (whose services are not subject to a fee) than others (see, for example, Tables 27, 28 and 36).

At the lower end of the occupational scale there is an increase in the "don't know" or "not sure" response, a finding which seems to complement the attorney-response for higher occupational groups.

Overall, the findings indicate to the present writer that there is a pressing need for easily-accessible and centralized advice and assistance centres along the lines of those presently being established and run in the United Kingdom.[2] All people (particularly those who cannot afford the fees demanded by attorneys) ought to have ready access to competent legal advice and assistance. The conventional haphazard and inaccessible structures are simply not adequate to provide legal services which are, it is submitted, a primary social commodity.

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1 Although the questionnaire made provision for the answer "legal aid clinic", "legal aid" responses were recorded in this category.

2 Infra 119 f.

CHAPTER SIX

AIMS OF PREVENTIVE LAW

A. BRINGING INDIVIDUALS CLOSER TO THE LEGAL STRUCTURE

In this section possible benefits flowing from a scheme of preventive law will be discussed. Since this writer is unable to quote empirical data measuring the effects of an existing project - apparently no such comprehensive scheme exists in the Western World[1] - the discussion is necessarily a theoretical one. This is not to say that these ideas are advanced with any lack of confidence. It is merely noted that speculative arguments are frequently later proved inadequate or inaccurate.

Preventive law is primarily sympathetic towards the needs of an individual in a legally-organised society. It aims at a particular form of betterment of the individual. It is proposed to begin the discussion at this point, considering, in a secondary fashion, the broader social benefits and implications.

Unavoidably (and perhaps controversially) when one discusses individual needs and betterment within society the propositions advanced tend to be largely superficial unless some statement is made indicating the basis of the propositions. Such a statement, even if it turns out to be susceptible to criticism, serves at least to provide a foundation from which to advance an argument.

It is submitted that each individual has certain inalienable rights as an individual, and that these rights extend to all individuals.[2] Consequently, rights would have to be carefully demarcated to avoid the clash of legitimate competing claims. In other words, in view of the

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1 It appears that considerable efforts are presently being made in Canada in this and related fields. How closely they are related to the ideas expressed in this work is not entirely known. There are, of course, many schemes which fall into the preventive legal advice category; see infra 119.

2 This is merely intended as an expression of the belief in human rights. See generally J D van der Vyver "The Concept of Human Rights: Its History, Content and Meaning" in eds C F Forsyth and J E Schiller Human Rights : the Cape Town

multitude of persons with the same claims there would have to be a ceiling to any one individual's expectations. Although this "ceiling" would turn out to be a controversial matter, it is important that within the area in which claims may be legitimately made, they be given their fullest expression. Thus, the right to life, health, reasonable living standards, political participation, education and others ought not to exist merely theoretically or as "paper-rights" but as rights which are within the reach of each individual.

If this important and special position of the individual is acknowledged and it extends to within any legal arrangements effected by a particular society, then the individual ought to be given the fullest opportunity for legal expression in the legal processes. After all, it may be suggested that, like health, law is a fundamental human commodity; and, as in health, the individual ought to be able to expect to achieve the best condition possible in the legal forum.

For this reason, it is suggested that within a given legal order it would be advantageous for the individual to have a greater appreciation of the law as it is,[1] (where it is obviously pertinent to him), as well as society generally. This proposition may also be examined from a somewhat different perspective.

If it is conceded that law is in one sense a social institution,[2] that is a set of arrangements whereby the interest of individuals as human beings are regulated - "a system of ordering human conduct and adjusting human relations"[3] - then there are good reasons why those human beings should be part of it, not only in a theoretical sense, but also in a real one. People ought to feel that they have a personal nexus with the law. The argument is therefore that the unhappy chasm between individuals as members of society and "the law", (the means of their own control) popularly perceived as something remote and unresponsive to personal or social needs, ought to be reduced.

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1 And possibly, as it ought to be. The suggestion that persons become more appreciative of concepts like the rule of law and human rights is taken up more fully at 148 infra.

2 See generally, L M Friedman Law and Society (1977) 53-60; A Podgorecki Law and Society (1974) 1-47; P Morris "A Sociological Approach to Research in Legal Services" in eds P Morris, R White and P Lewis Social Needs and Legal Action (1973) 47-69; R Pound Social Control Through Law (1968) 63-102.

3 R Pound An Introduction

If a person felt closer to the law in the sense of construing it as a reflection of his own sense of right and wrong, or, less optimistically, saw it as a means whereby his own difficulties or interests could be responded to with a certain hope of success, it seems logical to argue that not only would the person concerned benefit from a greater measure of confidence in his own ability, duly aided, but so would the law itself. But the individual would have to be possessed of a far greater practical knowledge of the effects of the law in order to achieve these immediate practical goals[1] and reach the position whence it is possible, consciously of subconsciously, to reflect upon the question of whether the law is indeed friend or foe.

In other words, to become part of the legal system the individual must be able to use the law but to do this he must understand it, albeit in a limited sense. And to be able to feel part of the legal system he must have confidence in it. But, arguably, it is possible to utilize the law in this practical sense without necessarily believing it reflects the right standards. (Having a good knowledge of the effect of a system or set or rules with which one doesn't agree is in itself an advantage[2]).

This individual pursuit in a greater measure of everyday participation in the legal system and the sense of belonging may be differently expressed as a form of self-interest[3] or maybe "self-actualization"[4].

Much has been written about current attitudes held by lay persons towards the legal systems of the West.[5] In general, it is not alarmist to say that many persons hold negative feelings towards the entire legal process, whether they be disapproval, disrespect, lack of confidence,

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1 For example, the ability to enforce a right arising out of a contract.

2 It is, almost invariably, the only position from which to launch a challenge to the existing order with a view to change. See infra 158 f.

3 Cf C G Weeramantry The Law in Crisis (1975) 25.

4 "A fundamental motive of man is to express his potentialities in their most effective and complete form, a need for self-actualisation." A H Marlow Motivation and Personality (1954) cited by D Krech R S Crutchfield and N Livson Elements of Psychology 3 ed (1974) 462. "Self-actualisation" is defined as "A basic human tendency towards making actual what is potential in the self, that is, toward maximal realisation of one's potentialities." Ibid.

5 See infra 86 f.

confusion, scepticism, disillusionment, suspicion or other related attitudes. It is submitted that much of this may be overcome by preventive law and that individual participation in and understanding of the law and legal processes is a forerunner to a healthier legal system. A discussion of those aspects of law and the legal system which are said to be most obviously to the disadvantage of lay persons is considered separately[1] but should be seen in the context of these discussions.

Weeramantry argues strongly that the current disillusionment with, and lay indifference to, the law is posing the danger that individual freedom under the law may soon be lost. The protections offered by the rule of law - a system which is the result of centuries of hard labour - are threatened by the marked lack of vigilance on the part of persons for whom the rule of law really matters, the laymen. That they are not being vigilant is not entirely their own fault: rather, their position is a consequence of the inability of the law or, more specifically, the legal profession to communicate the law to the layman and is the result of "many generations of neglect".[2] Consequently, there is a threat that freedom under the law will diminish.

There is also the need to demystify the judicial process which, to lay eyes, is mysterious and the domain of lawyers and judges alone.[3] Some aspects of lay ignorance are indicated by considering these questions :

> "What are the considerations which weigh with judges and to what extent do previous decisions, logic, history, morals and other matters influence them? Do judges make law or merely declare it? What difficulties do they encounter in the plain task of judging between man and man? To what extent are they truly a bulwark against the ursurpation of personal liberty?"[4]

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1 See infra 86 f.
2 Weeramantry op cit 5.
3 Weeramantry op cit 25-26.
4 Ibid.

Another reason advanced in favour of a greater popular law-consciousness is that some knowledge of the more important by-laws, rules, regulations and statutes (a feature of modern society) is necessary in order to fight this "new despotism" in an effort to check the abuse of authority and power which these arrangements may allow.[1]

Public legal education may also have the effect of combating, in certain areas, abuse of legally ignorant persons by unscrupulous commercial dealers. For example, in South Africa where many less-privileged people buy goods on hire purchase, there is ample suspicion that some sellers act in contravention of the relevant legislation and to the detriment of buyers.[2] Many buyers, it is suspected, are unaware of the few protective devices in their favour and consequent failure to invoke them will allow the exploitation to continue.[3]

B. SOVIET PROGRAMMES

At this juncture it is apposite to make some reference to the efforts of the Soviet legal system in respect of the "educative role" of Soviet law.

Within the Soviet state the educative function of the law is a very important one.[4] The idea embraces three separate forms: (a) the propagandizing of law (provovaia propaganda) which is the spreading of legal knowledge amongst the people; (b) legal upbringing (provovoe vospitanie) which is the nurturing of legal values and inculcation of respect for the law; and (c) the actual educational role of law, (vospitatel 'naia rol' prava) which involves the nurturing of moral, political and other values which are deemed to be important to the Soviet State:[5]

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1 Weeramantry op cit 29.

2 Cf E Roelofse Sorry I Upset You (1975) 20 f.

3 Roelofse op cit 28.

4 Eds D B Barry, W E Butler and G Ginsburgs Contemporary Soviet Law (1974) 1.

5 Barry Butler and Ginsburgs op cit 1 f.

"Soviet legal norms, procedures and institutions are intended to shape attitudes and beliefs generally and to help create 'a new type of man'. This is not supposed to be merely a by-product of law but its ultimate raison de'etre."[1]

Positive attempts are made by the Soviets to fulfil the tasks set out in this educative aim: for example, by adult education programmes called "people's universities of legal knowledge," lectures by legally trained persons at places of work and residence and by use of the mass media, including radio programmes and a monthly magazine.[2]

The efforts are even more exhaustive. Apparently, all interested Soviets have, if they so wish, an opportunity to participate in the legislative process. They are even encouraged to do so by suggesting amendments to draft bills dealing with certain areas of legislative activity.[3] The idea behind this is that "citizens must feel that the law voted by their representatives is truly their own - a law desired by them, the strict observation of which they must support and watch over".[4] The Soviet court has a very special place in these educative arrangements :

"The court shall educate citizens of the U.S.S.R. in the spirit of devotion to the Motherland and the cause of communism, in the spirit of strict and undeviating execution of Soviet laws, care for socialist property, observance of labour discipline, and honourable attitude toward public and social duty [and] respect for the rights, honor and dignity of citizens [and] for the rules of socialist community life."[5]

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1 Ibid.

2 Ibid.

3 R David and J E C Brierly Major Legal Systems in the World Today 2 ed (1978) 179.

4 Ibid.

5 Article 3 of the Fundamental Principles of Court Organisation of the U.S.S.R., quoted by Barry Butler and Ginsburgs op cit 4.

The court is expected not only to play an active role in protecting the rights and interests of all groups but also to act as "teacher" in all criminal and civil proceedings. It does this by inculcating all participants in a trial - even spectators - with the values which are involved and which reflect upon the legal system generally.

One writer suggests that Western democracies should take careful note of these and other Soviet arrangements because there is much that may be learned.[1] It is perhaps ironical that in systems in which so much emphasis is placed upon the rule of law little or no effort is made to have citizens of those systems actual participants in the law-making and law-understanding process. In fact, many will argue that the complete opposite applies: the law generally is so far removed from the ambit of consciousness of the average man in the street that any "feeling" for the law is lacking.[2]

C. OVERCOMING LEGAL COMPLEXITY AND QUANTITY

It is axiomatic that human law[3] owes its existence to the existence of human beings. An enlargement of this statement would be : human laws are created or recognised to cater for human needs. Furthermore if laws are instruments of social control, then human laws are to be comprehensible to human beings, otherwise they will not serve their intended purpose in a coherent fashion.[4]

To what extent, though, are laws comprehensible to the average person? One view may be that every law ought to be perfectly clear to any person of moderate intelligence who wishes to understand it. A contrary view may be that the latter view is naïve and over-optimistic and that it is inevitable that many laws will necessarily be fit for professional consumption only.[5]

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1 Weeramantry op cit 25.

2 Cf Weeramantry op cit 25.

3 Law made by human beings and imposed by a political sovereign.

4 A similar statement would be: "It is axiomatic that no person can guide his conduct by a law unless he knows what that law is." D J Gifford "Communication of Legal Standards, Policy Development and Effective Conduct Regulation" (1971) 56 Cornell L R 410. Cf discussion supra 3 f.

5 Cf Friedman op cit 114.

A survey conducted in Poland in 1963 which set out to measure familiarity with the law resulted in interesting findings connected with the language of the law.[1] For the purposes of the survey a distinction was made between "legal principles" and "legal precepts". Legal principles are "norms ... consistent with the basic legal notions ... [and] refer to the shape of basic rights and obligations and the basic categories of the allowed and the forbidden".[2] It was found that lay familiarity with legal principles was good (because they usually "reach the people by a long practical training"[3]). Legal precepts, on the other hand, which are "mainly technical and procedural in character ... describ[ing] the available methods of realization of the objectives determined by legal principles"[4] were generally poorly understood or known.

Podgorecki, interpreting these findings, suggests that to a large extent, ignorance of the precepts can be understood by considering that they

> "are most often worded in esoteric juristic terminology and are addressed chiefly to the guardians of the law, i.e. to those who execute the claims of the legal system, and who are professionally trained to comprehend such information."[5]

Juristic terminology is well known to many who have even the slightest contact with the law. Income tax laws, encountered by most members of the population at one time or another, have the ability, through the language they employ, to have the reader respond with exasperation. Of the United States tax law, the Internal Revenue Code,

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1 See Podgorecki op cit 120-121.
2 Podgorecki op cit 120.
3 Podgorecki op cit 121.
4 Podgorecki op cit 120.
5 Podgorecki op cit 121.

one writer says "it is ... utterly unreadable ... no layman can cope with this legal hippopotamus".[1]

In a comprehensive study of the type of language encountered in modern law[2] one author analyses the characteristics of legal language which give it an "uncommon touch"[3] and finds that there is frequent use of common words with uncommon meanings, frequent use of formal words, Latin words and phrases, old French and Anglo-Norman words, use of terms of art and argot.[4] As far as the law language's mannerisms are concerned, they are often wordy, unclear, pompous and dull.[5] The author suggests that "although English is the official [legal] language, the language of the law is not officially English".[6]

Where criminal law is concerned, to hold a person criminally responsible for something which could not be understood, owing to the complex or ambiguous nature of the language employed in prescribing the offence, would be unfair :

> "although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."[7]

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1 Friedman op cit 121. See also L L Fuller The Morality of Law (1969) 36, and the problems encountered by Rex. After realising that he was obliged to provide a code to publicize the law so that his subjects would know in advance the substance of the law, a sincere effort was made to produce such a document. An announcement of these intentions was well met by the populous but when the code did appear "it was discovered that it was truly a masterpiece of obscurity ... here was not a sentence in it that could be understood."

2 D Mellinkoff The Language of the Law 2 ed (1970).

3 Mellinkoff op cit 11.

4 Mellinkoff op cit 11-23.

5 Mellinkoff op cit 24-29.

6 Mellinkoff op cit 10.

7 Holmes J in McBoyle v United States (1931) 283 US 25-27.

Looking briefly at the civil law, the South African Hire-Purchase Act[1] may be considered as an example of "esoteric juristic terminology". Stripped of its garments, a hire-purchase contract is a credit sale with special arrangements regarding instalments and passing of ownership.[2] The purpose of the act is to protect buyers[3] ("An instrument ... for the protection of hire-purchasers as a class"[4]) and yet it is fairly widely acknowledged that these agreements are very often exploitatively employed against purchasers.[5] Part of the problem is that many buyers have little or no idea as to what they are exposing themselves when contracting this way, and quite understandably so. The Act, in spite of its intended purpose, is not a model of simplicity and clarity. Buyers, for whom the Act exists, would encounter many difficult passages were they to attempt a reading of its provisions. For example, they would be met by clauses such as in section 1 :

> "any agreement whereby goods are sold subject to the condition that the ownership in such goods shall not pass merely by the transfer of the possession of such goods, and the purchase price is to be paid in instalments, two or more of which are payable after such transfer; and includes any other agreement which has or agreements which together have the same import, whatever form such agreement or agreements may take.
>
> Provided that any agreement which or agreements which together provide for the letting and hiring of goods -
>
> (a) with the right to purchase such goods only after two or after more than two instalments and subsequent to such transfer have been paid in respect thereof; or

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1 Act 36 of 1942.

2 J T R Gibson South African Mercantile and Company Law 3 ed (1975) 159.

3 Smit and Venter v Fourie 1946 WLD 13.

4 Lodge v Modern Motors Ltd 1957 (4) SA 103 (SR) 113.

5 Cf D J McQuoid-Mason "Putting the 'Con' in Consumer Protection : the Credits Agreement Bill and the Consumer" (1978) 2 Natal University L R 196 f.

(b) with the right, after two or after more than two instalments subsequent to such transfer have been paid in respect thereof, to continue or renew from time to time such letting and hiring at nominal rental, or to continue to renew from time to time, the right to be in possession of the goods, without any further payment or against payment of a nominal periodical or other amount,

shall, whether or not the agreement or agreements may at any time be terminated by either party or one of the parties, for the purposes of this Act, be deemed to be of the same import."[1]

In defence of the Act, the obvious rejoinder is that such information in this particular form is not for average lay consumption. But if this is the position, and assuming that laymen are entitled - even expected - to know what the agreement has in store for them, then one must ask the simple question: "Just whose task is it to make the laymen aware of everything they ought to know about the hire-purchase agreement?" It seems that there is no suitable agency for this purpose. At best, a buyer can rely upon the information provided by a salesman, and in view of the latter's interest and motivation in the sale, his interpretation must necessarily be regarded with extreme caution (which the unwary and vulnerable buyer will probably lack).

The above example is not intended to focus upon the layman's gullibility in legal matters, but his inability to comprehend legal language. Quite apart from this prohibitive aspect it seems highly unlikely that lay persons ever see the text of a statute.[2] (What is probable is that they see the document which embodies legal-type language, the agreement itself. It seems unlikely that this would be of any assistance to the buyer.)

Not only might the quality of the law appear complex to the layman; there is also the matter of quantity to consider. In view of the mass of

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1 The Hire-Purchase Act 36 of 1942, s 1. This Act is to be replaced by the Credit Agreements Act 75 of 1980.

2 It is interesting that despite assumptions made about the applicability of statutory exactments based upon any citizen's right of access to any law in force, (see supra 3 f) it is doubtful whether anyone actually believes that laymen are equipped to read statutes. The fiction referred to above (supra 3 f) becomes even more metaphorical.

legislation and other forms of law prevalent in modern society, there seems little room for the supposition that all persons who are the recipients of legal "broadcasts" are capable of receiving the information. It is probably closer to the truth to say that the average layman finds the sheer quantity of law confronting him overwhelming and perhaps even intimidating.[1] "[I]n his opinion [it] could be simple, clear and easily accessible to everyone."[2] Furthermore, the problem of quantity is hardly a static one. As society becomes more complex and new pressures are brought to bear upon the social arrangements, old laws are no longer adequate and new forms of regulation and control are necessary to meet the extra demands. Laws are constantly changing and expanding.[3]

In summary, the notion that because law is published in some manner it is thus potentially comprehensible[4] becomes more improbable when one considers these factors of complexity and quantity. The position of lawyers in the legal system as conduits for access to legal information is considered elsewhere in this work[5] but their function in this particular context may be mentioned. The notion that law is available and accessible to all appears to rest heavily upon the existence of lawyers and the function they serve: they "collect, digest, store and pass on rules, orders and decisions in usable form".[6] In so doing they tend to bridge the gap between promulgation and comprehension. But lawyers who are not readily accessible to all, cannot be relied upon to fulfil this task for everyone.

It is submitted in conclusion that in these areas of legal complexity and quantity preventive law has an important role to play. An on-going, external and unbiased agency is required to sift and present the law in a digestible form to the public. Only when thorough and competent efforts are made in this direction will the problems considered here appear less insoluble.

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1 It is not infrequent that one encounters the sentiment - even amongst educated people - that if "the law" can be avoided, then so much the better, for virtually any minor confrontation with it will almost invariably result in a degree of dissatisfaction.

2 H R Hahlo and E Kahn The South African Legal System and its Background (1973) 64. See also, generally, J Frank, Law and the Modern Mind (1963) 5-9.

3 See generally J W Hurst Law and Social Order in the United States (1977) 16-20; Weeramantry op cit 131.

4 Cf discussion supra 3 f.

5 Supra 12.

D. CHALLENGING THE LAW

It has been assumed to a large degree by the present writer that law and legal structures in the Western world have certain characteristics which justify the claim that law works largely against and not for the man in the street.[1]

While it is not regarded necessary to justify this assumption comprehensively[2] it is intended to show briefly that there is considerable sentiment which runs along these lines. Furthermore, these aspects are not intended to be exhaustive.

Accordingly, this section poses an additional claim in favour of preventive law.[3] Law as we know it is of such a nature that it can be regarded as "against the people".[4] Preventive law (considering all its entails) could be used to combat the negative aspects of the law and thus fulfill unmet or neglected needs.

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1 See Justice (British Section of the International Commission of Jurists) Lawyers and the Legal System (1977) 1-2: "We have no dogmas to pronounce or crusades to follow. But we see ordinary people nowadays enmeshed in a system of law or procedure which they seldom understand and often cannot utilize; a system so arcane that proceedings for enforcing and defending their rights seem to them more and more to be an esoteric mystery outside the reality of everyday life." Cf A E Tay "Law, The citizen and the State" in ed E Kamenka Law and Society (1977) 1: "There is, in many quarters today, a remarkable hostility to law, as a social institution, as an intellectual discipline and as a repository of values."

2 See for example: J S Auerbach Unequal Justice (1976): Weeramantry op cit; D N Pritt Law, Class and Society, Book 4: The Substance of the Law (1972); A Strick Injustice For All (1977); J R Feagin Subordinating the Poor (1975); B Abel-Smith, M Zander and R Brooke Legal Problems and the Citizen (1973); H James Crisis in the Courts (1974); Ed M Zander Cases and Materials in the English Legal System 2 ed (1976); S S Nagle Improving the Legal Process (1968); Faculty of Law University of Natal Legal Aid in South Africa (1974); Eds B Wasserstein and M J Green With Justice for Some (1970); A Lester and G Bindman Race and Law (1972); Ed R Lefcourt Law Against the People (1971).

3 Some other arguments have already been advanced. See supra 74 f.

4 Title of work edited by R Lefcourt: see note 2 above.

It appears to be less scandalous now to argue that the law favours the rich at the expense of, or in preference to, the poor. Whether this proposition is accepted by those within whose power it lies to reshape the course of the law is not always clear. What can be said is that there is an increasing awareness of the lack of legal neutrality by reformists and legislators. The growing importance attached to the establishment of legal services of one sort and another, where so-called "indigents" are afforded the opportunity of equal access to legal advice and the courts, seems to indicate that the allegation of legal exclusivity is no longer being recognised as a merely theoretical argument.

Despite the provision of legal services to those who would not normally be able to afford them and the claim that the law is now freely available to all,[1] there appears to be no escape from the assertion that the law is by no means neutral.[2] The point is that law most ardently protects those persons, natural and legal, who have wealth in property by virtue of the fact that the law is integrally property-orientated. One writer describes this characteristic as follows :

> "When society gives rise to social classes as a result of the creation of an economic surplus, which becomes privately appropriated and therefore distributed unequally, one class protects its rights of appropriation by subjecting others to its will. This class then creates, out of a need to fix and legitimate its relationships with all other classes, a state, and with it, law. State and law thus reflect the accumulation of property as private property in the hands of the few and the demise of property as social property in the hands of the many.[3]"

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1 Whether Legal Aid in its various forms has achieved what it set out to achieve is doubtful (see supra 32) but the real point here is that, theoretically, no-one is precluded from meeting the largest corporation on an "equal" footing in court.

2 On this discussion see generally: R Lefcourt "Law Against the People" 21 f, K Cloke "The Economic Basis of Law and State" 65 f and D N Rockwell "The Education of the Capitalist Lawyer : The Law School" 90 f in Lefcourt op cit; Pritt op cit 48 f; R Nader in Wasserstein and Green op cit ix-xi.

3 K Cloke op cit 67. For a discussion, from a Marxist Socialist point-of-view, of the significance of property see Pritt op cit 48-52; Cf "The Key Position of Property in Modern Industrial Society" in Friedmann op cit 65-89.

It has also been suggested that if the law is elite then so are the lawyers:[1] "The role of the legal profession in relation to social movements reflects the class and racist orientation of the legal system itself."[2] And, it is argued, if anyone is responsible for the intrinsic components of lawyers, it is the law school:

> "The Law School is one of the primary institutions for the defence and preservation of those economic and political interests which control American Society.[3]"

The principle of equality before the law demands, amongst many other things, the complete eradication of any aspects of racism. While many countries have achieved, in their legal orders, the removal of legal disabilities based upon race, "The principle of equality before the law ... had to be fought for, and in many parts of the world it still has to be won."[4] But in spite of the fact that the "fight" has been "won" in England,[5] "... it is important to understand the narrow limits of the principle."[6] The courts tend to view it as a formal concept only. Although "the legal system may treat individuals and institutions as equals, it cannot by itself alter the profound inequalities within their actual relationships."[7] Other militating features are the "passive nature of the Common Law"[8] and the absence of constitutional guarantees.[9]

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1 See eg Auerbach op cit 3 : This work is a "social history of the professional elite".

2 Lefcourt op cit 5. But see a group of researchers' work "The New Public Interest Lawyers" (1969) 78 Yale L J 1009-1151.

3 Rockwell op cit 90.

4 Lester and Bindman op cit 24.

5 For a discussion of the prevalence of racism in American law see H Burns "Racism and American Law" in Lefcourt op cit 48-54.

6 Lester and Bindman op cit 24.

7 Ibid.

8 Lester and Bindman op cit 25.

9 Lester and Bindman op cit 26. Whether constitutional guarantees profoundly alter the situation is doubtful; see Burns op cit 48 f and R Brown "White Debt and Black Control : Of Missionaries and Panthers" in Wasserstein and Green op cit 133-159.

Much has been written about exhorbitant costs of the law and, to some extent, for this lawyers may be held responsible.[1] The effect is to make lawyers inaccessible to many people (unless the financial hurdle is overcome with the help of legal aid). One writer comments that one ought not to be too critical of lawyers because they only strive to make as much money as other professional men, but adds that the legitimacy of the lawyer's role will be viewed according to one's vision of the socio-economic structure.[2] But even accepting a liberal economic structure one could charge that lawyers are not "saintly men accepting a pittance for performing a public service".[3]

However, one cannot overlook the fact that law itself, quite apart from lawyers, is an expensive commodity. It has been suggested that this difficulty will only be overcome by reducing the costs of legal proceedings.[4] Another argument is that the adversary system and the insistance upon oral evidence account for high legal costs.[5] It is these and other factors which have precipitated the rise of legal aid..

In South Africa where legal status is determined by race[6] it seems impossible to claim that the equality principle applies. Perhaps one of the many justifications put forward in support of legally entrenched racism is the "treat equals alike and unequals unequally" notion. A standard South African text-book states: "To treat alike, ignoring their differences ... the raw savage and the civilized man, would be the height of injustice."[7] But, as Hart points out, what this notion ought to mean is that

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1 See eg G Drewry Law Justice and Politics (1975) 138-15; B Abel-Smith and R Stevens In Search of Justice (1968) 234; R M Jackson The Machinery of Justice in England 6 ed (1972) 413-418; Zander Cases and Materials op cit 318-339.

2 Drewry op cit 139.

3 Ibid.

4 Ibid. Cf Abel-Smith and Stevens op cit 234 f.

5 Zander Cases and Materials op cit 319.

6 To gain some idea of the legal significance of Race in South Africa see W J Hosten A B Edwards C Nathan and F Bosman Introduction to South African Law and Legal Theory (1977) 295-6 and 647-688. For an account of racism in Australia, see E Eggleston Fear, Favour or Affection (1976). See also M Horrell Laws Affecting Race Relations in South Africa (1978).

7 Hahlo and Kahn op cit 35.

> "when ... we protest against a law forbidding coloured people the use of public parks, the point of such criticism is that such a law is bad, because ... it discriminates between persons who are, in all relevant respects, alike.[1]"

Other problems which are pertinent may be mentioned as follows : the obscurity[2] and rigidity[3] of the law; legal discrimination against women[4] and many defects in the procedural processes[5]. It also has been argued that the core of all "injustice" is the adversary system of law.

> "The heart of our judicial crisis is the adversary ethic: the values and conceptual system it represents, together with those antisocial behaviours it confirms and inexorably proliferates."[6]

Moving away from the law per se, there appears to be major speculation as to the degree of competence involved in the administration of the law.[7] In this respect, questions of costs of litigation[8] are considered as well as the lengthy delays in having matters brought before the courts.[9] Further, despite the legal aid provisions (in this case, England) facilities for obtaining legal advice[10] are inadequate.[11]

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1 H L A Hart The Concept of Law (1961) 155; Cf Eggleston op cit 317-318.

2 Ed M Zander What's Wrong with the Law? (1970) 8-14.

3 Zander What's Wrong with the Law? op cit 8-14.

4 See generally B A Brown A E Freedman H N Katz and A M Price Women's Rights and the Law (1977); P Murray "The Rights of Women" in ed N Dorsen The Rights of Americans (1971) 521 f.

5 See eg Zander Cases and Materials op cit and Nagel op cit dealing with English and American legal systems respectively.

6 Strick op cit 14.

7 Abel-Smith and Stevens op cit 9.

8 Abel-Smith and Stevens op cit 64-94. Cf Zander Cases and Materials op cit 318 f.

9 Ibid. Cf James op cit 20-35.

10 "[T]he citizen needs skilled advice before he can use the legal system, and he should have it as soon as he becomes involved with that system." Abel-Smith and Stevens op cit 353.

11 Abel-Smith and Stevens op cit 234-272.

Weeramantry argues that the most pervasive problem facing the law today is its absence of respectability[1] or "the crisis of disillusionment."[2] This, he argues, has been precipitated by "the failure of the Law to communicate with the layman."[3] The freedom we now enjoy, as a result of centuries of struggling which has brought us to the rule of law, will all too easily be lost without vigilance which itself is only possible through "education of the community towards an enlightened interest in the legal system.[4]"

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1 Weeramantry op cit vii.
2 Weeramantry op cit 3.
3 Ibid.
4 Weeramantry op cit 5.

CHAPTER SEVEN

JUSTIFYING PREVENTIVE LAW

A. INTRODUCTION

The purpose of this chapter is to examine possible ways in which the provision or existence of preventive law schemes may be justified. Already some effort has been made to explain why they are necessary.[1] For one school of thought this necessity may be justification enough: if something is apparently good for society, and feasible, then reasons for its adoption are compelling.

But, for those who are not so easily persuaded, further justifications may be required: for example, arguments finding the preventive law idea consistent with prevailing political philosophy. The difficulty in advancing such arguments here would be enormous except for someone well-versed in political or social theories. This will not be attempted by the present writer.

However, in spite of possible inadequacies, some effort will be made to consider the theory of preventive law in the context of the theories of human rights, the rule of law and welfare rights.

Reference has already been made to the importance of different forms of popular legal education in the Soviet Union.[2] It ought to be stated here that within that society these schemes form an integral part of the prevailing political ideology.[3]

It has been suggested that legal services (like health services) are "essential rights of citizenship and thus should be available without charge."[4] This broad proposition has been taken up with different points of emphasis by different governments and translated into varying

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1 Supra 74.

2 Supra 78.

3 Eds D B Barry W E Butler and G Ginsburgs Contemporary Soviet Law (1974) 4.

4 B Abel-Smith and R Stevens In Search of Justice (1968) 255.

practical schemes (most commonly termed "legal aid"). Perhaps the primary justification for legal services of this kind lies in the recognition that poorer persons do not have, in reality, the financial means to involve themselves in litigation, the process of which is fundamental to any person wishing to be an equal participant in the legal process.[1]

But the distinguishing feature of preventive law, which separates it from the above "legal services" is that of education or advice. (As already suggested, not only the educative but also the advice aspect has educational characteristics.[2] Thus, any propositions regarding education as a basic human right[3] apply to both preventive legal education and advice, although more strictly to the former.)

B. HUMAN RIGHTS

Article 26 of the Universal Declaration of Human Rights[4] reads

> "1. Everyone has the right to education ... Elementary education shall be compulsory ...
> 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedom..."[5]

If one is prepared to regard the sentiments contained in the Declaration as guiding principles, there appears to be some basis for the advancement of the idea of preventive legal education. But while the right to education is not itself in dispute, there is nevertheless a problem in deciding how broadly education is to be defined in this context. It is submitted that persons living in a politically and legally organised society will not be fully orientated members of that society unless they have some appreciation of the place and function of

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1 Cf Abel-Smith and Stevens op cit 235.

2 Supra 30.

3 It is not considered to be within the ambit of this work to attempt to justify the substantive nature of human rights. On this, see generally, J D Van Der Vyver Seven Lectures on Human Rights (1976) 57-77.

4 Reprinted in I Brownlie Basic Documents on Human Rights (1971) 106-112

the law in their society.[1] Thus, it could be argued that the "full development of the human personality and ... the strengthening of respect for human rights and fundamental freedom" will not be complete without this educational ingredient.

The question of education as a human right is taken up by Imre Szabo.[2] The author examines the historical development of rights to education up to the Universal Declaration of Human Rights in 1948 which is a landmark in that it is the first International document to formalize the right to education.[3] Within the wording of article 26 (2) - "Education shall be directed to the full development of the human personality ..." - is detected the predomination of the socio-economic function of education[4] while the right to education itself "is in functional relationship with other groups of human rights: it comprises ... the education required to further enforcement and materialization of these rights".[5] It is argued further that while the educational right is fundamental to economic, social and cultural rights, these latter rights are themselves fundamental to other groups of human rights. This leads to the conclusion that the right to education "... can be seen to acquire a separate standing ... and to assume a general functional role, thus becoming a basic right among the basic rights".[6] Furthermore:

> "by interpreting the right to education as a human right, the fundamental functions of which comprise education for preserving and enforcing human rights, we reach a correlation where human rights ... revert to themselves through the medium of the right to education."[7]

A noteworthy development in the educational rights field is the Covenant on Economic, Social and Cultural Rights adopted at the United Nations General Assembly in 1966. The significance of education vis-a-vis man in society is enlarged by the statement that the purpose of education "shall [be to] enable all persons to participate effectively in a free society."[8] There is now, within this expression "a basic social

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1 Cf infra 110 f.
2 I Szabo Cultural Rights (1974).
3 Szabo op cit 35.
4 Szabo op cit 36.
5 Ibid.
6 Ibid.
7 Ibid.
8 Quoted by Szabo op cit 37

purpose".[1] Likewise, it is submitted that there is a "basic social purpose" to preventive law.

C. THE RULE OF LAW

Whereas human rights theories necessarily contain an acknowledgement of considerable substantive content, there is disagreement as to whether the rule of law encompasses substantive individual rights and liberties. One may consider the famous, if unpopular, rule of law formulation submitted by the International Commission of Jurists in 1952:

> "The Rule of Law is a dynamic concept ... which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised."[2]

If one accepts these sentiments, then, it is submitted, the same propositions regarding preventive law vis-a-vis human rights apply.[3]

The International Commission of Jurists' view contrasts with that of Van der Vyver who concludes that :

> "The Rule of Law simply means legality, that is both the government and the subordinates of a state are subject to the law ... Attempts to increase the ambit of the rule of law so as to proclaim it to be the corner stone of individual rights and civil liberties have only led to confusion and should be abandoned."[4]

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1 Ibid.

2 International Commission of Jurists The Rule of Law in a Free Society (1959) 3 quoted by J Dugard Human Rights and the South African Legal Order (1978) 47.

3 Supra 93.

4 Van der Vyver op cit 121.

Dugard rejects the use of the rule of law "as a standard by which to judge South African legislation".[1] His major objection stems from a belief in the procedural nature of the rule of law. This is largely negative in character and does nothing

> "[to affirm] ... the substantive rights of the individual ... Procedural safeguards are certainly an important part of the make-up of individual liberty, but they are not everything."[2]

Notwithstanding the acceptance of this narrow definition of the rule of law, the concept nevertheless contains (what Dugard calls) "procedural safeguards" which, it is submitted, are indispensable for the maintenance of a just and free society. Again, in order to allow individuals to participate completely in legally organised society, it follows that they must be aware of these rights. In this sense, the rule of law contains the need for preventive legal education, thus enhancing the need for its implementation.

The rule of law is sometimes explained simply as a notion which involves rule by law.[3] Thus, any political system may lay claim to the rule of law (even the most morally unacceptable) as long as its laws are duly enacted and enforced. Despite any difficulty accepting this as a total expression of the rule of law, it nevertheless probably expresses an idea which is a central one in the wider interpretation of the concept.[4] This idea emphasizes the supremacy of rules (or laws) in relation to men and conversely man's subordination to and dependancy upon laws. What flows from this is the inherent expectation of man that not only will the laws be comprehensible[5] and pertinent to himself but also that some independent official action be taken to ensure that he is informed of their existence and content. This would fall within the ambit of the function of preventive legal education.

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1 Dugard op cit 41.

2 Dugard op cit 45. Unavoidably, argues, Dugard, the only answer is to follow modern trends and to adopt a Bill of Rights in order that these substantive freedoms may be guaranteed. Op cit 46-49.

3 Dugard op cit 44.

4 See A V Dicey Introduction to the Study of the Law of the Constitution 10 ed (1959) 202-203: "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power" and "The equal subjection of all classes to the ordinary law of the land administered by the ordinary courts." Cf H W Jones "The Rule of Law and the Welfare State"

D. WELFARE RIGHTS

To some, the rule of law has inherent limitations in providing justification for the (moral[1]) demands of modern society. For this reason and also because of the growing use of what is loosely termed welfare legislation and programmes employed by many modern democratic states, it is apposite to consider welfare rights as a possible foundational justification for preventive law. It may be noted firstly that some energetic debate has revolved around the assertion that the Welfare State is incompatible with the rule of law,[2] but perhaps the balance is now tipped in favour of those who say the two can be compatible.[3] (It is not easy to accept that freedom and security cannot go hand-in-hand.)

There is apparently a tradition which regards the word "right" to connote something truly juridical in character.[4] Juridical rights, as distinct from welfare rights, are presumably most purely conceived as stemming from a system which embraces the rule of law (where the emphasis is on formal or procedural rights) or as a result of a lengthy legalistic tradition wherein rights and responsibilities are properly (equally) distributed amongst all members of society. These rights, to person and property, are rigorously enforced by the courts.[5] Welfare rights, on the other hand, are concerned with the protection of a more recent species of claims made within a society which has embarked upon programmes of social and economic reform. These are more in the nature of social rights and do not carry with them the "unique emotive power"[6] such as those rights in tangible property. It is possible to investigate

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1 In essence, it is submitted that the search for an acceptable system of juridical norms is preceded by an individual moral judgement. In other words, once an individual or group decides upon what is right under the circumstances, an effort is then made to provide a means whereby the idea or demand may be more formally or acceptably advanced.

2 The most vociferous protagonist of this view is A Hayek The Road to Serfdom (1944). The arguments are broadly that freedom under the rule of law is in contrast with the necessary curtailments of freedom under a socialist regime. Furthermore the necessary arbitrary power conferred upon administrative government in welfare planning contravenes the rule of law. See Jones op cit 403-410.

3 Jones op cit 406-413, W Friedmann Legal Theory 4 ed (1960) 425-429.

4 Cf Jones op cit 411.

5 Cf M Cappelletti J Gordley and E Johnson Toward Equal Justice (1975) 86-87.

6 [illegible]

the differences between juridical and welfare rights by considering recent attempts by governments to institute legal aid programmes. There have been two distinct approaches: legal aid as a juridical right and legal aid as a welfare right.[1]

In the juridical right approach legal aid is viewed as a means by which any persons gain equal access to the courts.[2] What is emphasized is uniform standards uniformally applied. Moreover, these standards are stringent and inflexible. The focus is placed on the individual who may, of his own volition, avail himself of the opportunity to utilize the courts.

Where legal aid is approached from the welfare right perspective, the traditional utilization of rights and responsibilities is supplemented by a government programme in which the primary function is to make advances against unfavourable social conditions: for example, poverty and other social afflictions. The aim is to promote economic and social equality.[3] Unlike the juridical approach, this is far more flexible and considers the needy allocation of resources. In fact, those aspects of a juridical approach perceived to be disadvantageous are the strong points in the welfare scheme. Uniformity and inflexibility are replaced by a more realistic recognition of an immediate and demanding social condition. There is a transcendence of relatively insignificant individual rights to group interests in an unhealthy social environment which cannot be effectively tackled by dispersed individual claims and which is more effectively challenged by a wide coherent social plan.[4] Thus there is an emphasis on long-term class interests rather than individual grievances. The welfare approach to legal aid

> "protects the right to aid through statutory law, frees its protection from dependence on private impulse if not from the exigencies of public policy and thus is 'law' within the meaning of the phrase. It is of course, a very different kind of law. It is dynamic rather than stabilizing and social rather than personal. It

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1 Cappelletti Gordley and Johnson op cit 86. Cf K Schuyt "Dilemmas in the Delivery of Legal Services" in ed E Blankenberg Innovations in the Legal Services (1980) 53 f.

2 "Legal aid is seen as a kind of armoury in which the poor are outfitted before trial with the weapons naturally possessed by the rich." Cappelletti, Gordley and Johnson op cit 88.

3 Cappelletti, Gordley and Johnson

is orientated towards common tasks rather than individual responsibilities and provides a relative rather than a categorical kind of protection. It is not the law of the Advocate, the Litigant and the Court; it is the law of the Expert, the Community and the Plan.[1]"

These aims have been embodied in the Legal Services Programme of the Office of Economic Opportunity in the United States of America. From its inception the programme was intended to attack poverty. The concept of the neighbourhood law clinic developed wherein the staff members - trained lawyers - would identify as closely as possible with members of the community, understand the local problems and initiate both legal and extra-legal attempts to ameliorate unfavourable conditions.[2] Further, the staff would fulfil an educative role. By virtue of their proximity to, and identification with, the members of the community, they would be in a position to "communicate a sense of how law functions."[3]

Recently, much has been written about welfare planning and legislation. The latter remarks regarding welfare have been in a legal aid context. An attempt will now be made to present a brief overview of current views of the welfare idea.

Broadly defined, welfare denotes a number of separate but interrelated ideas. Firstly, it contains the idea of individual well-being in the sense of health and economic adequacy with an emphasis on basics.[4] Secondly, there is inherent an idea of a standard of living and particularly a minimum level in the standards of living.[5] Thirdly, happiness (of the individual) although not a component of welfare is nevertheless its goal.[6] Fourthly, welfare - considering its physical, material and psychological dimensions - has its strength measured at its weakest point:

> "deficiencies in one place are generally not to be compensated for by superiority in another ... just as cardiovascular superiority does not make up for a deficient liver so added strength in one sector of welfare cannot cancel our weaknesses in another."[7]

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1 Cappelletti, Gordley and Johnson op cit 111-112.

2 Cappelletti, Gordley and Johnson op cit 119-122

3 Cappelletti, Gordley and Johnson op cit 123.

4 N Rescher Welfare (1972) 3-4.

5 Rescher op cit 4. "The problem of specifying the setting of such a level ... is obviously a major issue in the Theory of Welfare." Ibid.

Fifthly, a man's welfare cannot be considered in isolation but rather in terms of a social inter-reaction with others.[1]

Welfare, it is said, is many-sided and ought not to be treated simplistically by seizing upon only one part of it (eg. its economic or medical aspect).[2] Education also forms part of the total welfare idea:

> "those minima of schooling and training required to make it possible for a man to function effectively among his fellows under the conditions of their common social environment."[3]

Neither can one ignore the relationship between educational and economic welfare. The former is a prerequisite for successful participation in the latter.[4]

The "basic" character of welfare, mentioned above, may be expressed as a guaranteed national minimum,[5] or "surrogate forms of property for all citizens and not [a restriction of] the benefit of autonomy and independence to those whom the economic order favours".[6] This plan aims at providing every citizen with certain basic needs irrespective of the cyclical effects of labour and unemployment and thus marks a thorough departure from a system of social insurance which favours only those in steady employment. Moreover, it signifies the failure of a system of private enterprise exclusively to meet the social needs[7] of all members of society.[8]

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1 Rescher op cit 6. "Man is so constituted that he cannot achieve ... [the basic requisites of well-being] without reference to the condition of those about him." Ibid.

2 Rescher op cit 8.

3 Rescher op cit 7.

4 Ibid.

5 The introduction of this idea, it is claimed, marks the crucial distinction between what is termed the "positive state" and the "Social Security State". In the former the character is primarily laissez-faire, individualism and protection of corporate interest wherein the beneficiaries are those whom the economic order favours; in the latter there is a greater collective responsibility for the individual. N Furniss and T Tilton The Case for the Welfare State(1977) 16-17.

6 Furniss and Tilton op cit 16.

7 The meaning of "social need" is by no means simple. For an analysis of the concept see J Bradshaw "The Concept of Social Need" in eds M Fitzgerald, P Halmos, J Muncie and D Zeldon Welfare in Action (1977) 33

In spite of this failure there is a curious interdependency between welfare measures and capitalist economics which has been described as

> "a compromise between the values of economic individualism and free enterprise on the one hand and security, equality and humanitarianism on the other."[1]

Despite the current widespread use of welfare tactics throughout the world (in differing degrees[2]) there is perhaps a marked lack of philosophical justification for the ideal behind the welfare concept.[3] For this reason, it may be difficult to propose a fundamental consistency between welfare rights and preventive law. Nonetheless, in practical terms, the aims of preventive law [4] appear to correlate substantially with those of the welfare concept.

British social welfare policy may have had its roots as early as the beginning of the seventeenth century with the Elizabethan Poor Law in 1601. The lengthy historical process which preceeded the emergence of post-war British welfare[5] bears testimony to the seriousness with which legislatures have set about considering the feasibility of welfare programmes.

The most "famous" single piece of British legislation in this regard is undoubtedly the controversial National Health Service Act which effectively provides free medical services to over 95% of the population. Similar attention has been given to educational services. The rationale by which education is conceived part of the welfare system may seem obvious but is well expressed as follows :

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1 H L Wilensky and C N Lebeaux "Conceptions of Social Welfare" in ed P E Weinberger Perspectives on Social Welfare (1969) 16.

2 A distinction has been drawn between what has been called a "Social Security State" and a "Social Welfare State" which is essentially one of magnitude of welfare-type legislation. Furniss and Tilton op cit 16-20.

3 Furniss and Tilton op cit 22-49.

4 Supra 74.

5 See generally J Saville "The Welfare State: an historical approach" in Fitzgerald, Halmos, Muncie and Zeldin op cit 4-9; Furniss and Tilton op cit 94-106.

> "... education is not only something to which every citizen has a right, it is a process by which citizens are made. As such it is something that every society must promote in its own interest ... education is of such vital importance for the health and prosperity of a nation, that it is regarded as something of which the individual has a duty to avail himself ..."[1]

Thus education is not only justified by the ideal of the national minimum in the sense of equal opportunity,[2] but contains a secondary character in that there is an obligation placed upon the individual to avail himself of the services.

It is submitted that preventive education is thoroughly consistent with the prevailing social aims within a social welfare system. A greater popular appreciation of the place and function of law in society can help individuals or groups to participate in the amelioration of social conditions by which they are disadvantaged. Furthermore, education, as has been suggested, is an integral component of the idea of a national minimum. This education need not only include schooling in the traditional sense but also important social education - like that relating to the impact[3] of relevant law and legal issues.

The entire welfare thrust - if it is seen as an attack on poverty and inequality - may be greatly assisted if the persons for whom the programme exists are not perceived as mere by-standers in whatever action and development takes place. Where legal and related issues are concerned (and presumably nearly all welfare considerations are touched by the law), the work of, say, the neighbourhood lawyer would be greatly enhanced by a semi-informed clientelle. Further, there is no obvious reason why a particular person could not use some knowledge gained in redressing, insofar as is possible, an individual grievance or avoiding a particular individual legal problem. In other words, juridical, as distinct from welfare rights, would not be ignored.

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1 T H Marshall "The Right to Welfare" in eds N Timms and D Watson Talking about Welfare (1976) 59-60.

2 An extension of the liberal ideal. Furniss and Tilton op cit 18.

3 Infra 158.

But even if preventive law is congruous with welfare theory there are nevertheless instances when the ideal of legal education would not appear to be feasible. For example, there would have, of necessity, to be a certain level of education upon which to build understanding of legal issues. In other words, it could be argued that education to overcome illiteracy is more fundamental than some form of socio-legal education. This brings one to a consideration of the prevailing conditions in South Africa. Certainly any government efforts (whether welfare-orientated or not) ought firstly to concentrate on malnutrition, unemployment, inadequate health facilities and a generally poor standard of living and education before considering the relatively advanced step of legal education. But this does not mean that isolated efforts should not at present be made within South African society to bring home to poor or disadvantaged persons certain legal facts which may be used to their own immediate advantage. It is conceded that such efforts, in the absence of a coherent social plan, would be ad hoc but nonetheless valuable.

In summary, welfare theory is perceived as providing a convincing theoretical basis for preventive law. Preventive law's aim seems to coincide with the purpose of the welfare ideal. Welfare also provides an answer to the funding of preventive law. But, a prerequisite for the practical and thorough implementation of preventive law programmes is a firmly established and operative social welfare system.

CHAPTER EIGHT

PREVENTIVE LAW IN PRACTICE

A. PREVENTIVE LEGAL EDUCATION

1. Introduction

The idea of having citizens aware of their rights and obligations in law is not a new one.[1] But apart from somewhat scattered efforts around the world there has not been, until fairly recently,[2] a concerted effort on a large scale to provide these educational facilities to citizens of a state. On the other hand, enthusiastic suggestions regarding such educational schemes have not been infrequent.

In the United Kingdom two groups who presented evidence to the Royal Commission on Legal Services in 1977 strongly recommended the implementation of such schemes.

The British Section of the International Commission of Jurists in its report[3] considered the problem of making law and lawyers more accessible to people. The provision of more legal offices in socially underprivileged areas would be only a partial solution :

> "but that by itself cannot have the desired effect until a far greater proportion of our population knows enough about the law to be able to make at least a reasonable attempt at classifying their own problems, so that they are able to identify those where it may be worth the effort to find and consult a lawyer."[4]

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1 See supra 4.

2 The Soviet Union appears to have been engaged in efforts of this nature for some years. See eg H J Berman "The Education Role of Soviet Criminal and Civil Procedure" in eds D D Barry W E Butler and G Ginsburgs Contemporary Soviet Law (1974) 1-16. It appears, too, that some Canadian groups are becoming involved in educational schemes: at York University in Ontario the "Community and Legal Aid Services Programme" (C L A S P) run by students seeks to provide fundamental legal knowledge to members of the community. (Source: unpublished letter from CLASP.)

3 A Report by Justice Lawyers and the Legal System : A Critique of Legal Services in England and Wales (1977).

4 A Report by Justice op cit 4.

The Commission later continued :

"In the long run ... we know of only one [solution to the problem] and that is education - not only through the usual media of publicity for adults, but above all at school ... If it were possible to transmit a basic understanding of our legal system to even just one generation by these means, the diffusion of that knowledge to their parents - and eventually to their children - could do more to meet the unmet needs for legal services than any other means we can imagine."[1]

The National Association of Citizens' Advice Bureaux in their report[2] to the same commission similarly conclude that

"Everyone should have some knowledge of the framework and machinery of the law, of their basic legal rights and obligations and of the ways in which they can seek advice and assistance when those rights are threatened or challenged ... Much more should be done to inform and educate the public about legal matters not only in schools, but in adult education, and by the imaginative use of radio and television."[3]

Seton Pollock, the secretary of Legal Aid of the Law Society in Britain, in his work on the first twenty five years of Legal Aid in that country says that :

"There can be no question but that there is a great need for members of the community to be made aware of their rights and their duties under the law, and be shown how to obtain advice about both and effective legal support in maintaining those rights."[4]

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1 Ibid.

2 National Association of Citizens' Advice Bureaux Evidence to the Royal Commission on Legal Services (1977).

3 N A C A B op cit 111.

4 S Pollock Legal Aid (1975) 156.

Weeramantry, in somewhat emotive fashion, declares that "a greater popular law-consciousness is one of the demanding and urgent needs of our times."[1] The author maintains that the current lack of respect for the law by the community - "the crisis of disillusionment"[2] - threatens the "preservation of freedom under the law"[3] and suggests that "if our liberties are to endure, communication must begin."[4]

> "The conditions of modern living render imperative to the citizen some basic familiarity with his rights. This more so today than in any previous age, for the complexities of commerce and the numerous regulations effecting every detail of his life, make ignorance more expensive than ever before. And, more importantly, the law, which is his protector, itself needs protection, for there has scarcely been a time in history when its future was so much in peril."[5]

Brief mention has been made of teaching law in schools and similar sentiments have been expressed in England :

> "There are two reasons why I am convinced that law should be a subject on the general curriculum in schools. First, the children both as chiildren and when they grow up, have to live under the laws of the land. If they emerge from the education process with a total ignorance of the working of the law how can it be said that they have been prepared for life? Second, we like to think that we have a democratic form of government. Surely the more that the public is able to participate in the legislative process, the greater will be the degree of democracy ... Education strengthens democracy: a fortiori education in legal matters does so."[6]

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1 C G Weeramantry The Law in Crisis (1975) 22.
2 Weeramantry op cit 3.
3 Ibid.
4 Weeramantry op cit 5.
5 Weeramantry of cit 17.
6 A P Dobson "Law Should be Taught in School" (1977) 127 New L J 875.

Turning now to the United States of America, many persons have spoken out in favour of legal education of the public. It may be useful to make mention of some of these. The question of law in schools has also received attention to the extent that some schools in the United States have begun including legal education as an integral part of their curricula.[1] In an article which discusses "what law-related studies can accomplish",[2] it is suggested that "law-related citizenship education" is the aim.[3]

> "Rather than trying to teach a body of legal rules ... or attempting to foster simple values, law related education attempts to treat law as one of the great liberal disciplines, a valuable (and much under-utilized) means of approaching history and examining issues of timeless concern to human beings ... Though [certain] ideas [liberty, justice, equality, property and power] have been explored in our schools through history, economics, political science and other disciplines, they have not, until recently, been approached through law."[4]

The authors continue:

> "law-related education seeks primarily to raise instructive questions rather than to supply "right" answers ... By bringing school children into contact with open-ended issues such as justice, equality and freedom we will be doing much to give them an appreciation of the true nature of law, as well as providing them with a new way of looking at the society in which they live."[5]

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1 R C Maxwell, J F Henning and C J White "Law Studies in the Schools: (1975) 27 Journal of Legal Education 157. Cf P J Fitzgerald "Law at School - A Canadian Viewpoint" (1978) 128 New L J 300.

2 Fitzgerald op cit 300.

3 Ibid.

4 Maxwell, Henning and White op cit 158.

5 Ibid. For other useful discussion on this point see W M Gibson "Law Students: a Valued Resource for Law Related Education Programs" (1973) 25 Journal of Legal Education 215.

It has also been suggested by the Cahns that :

"expanding the legal manpower supply must involve increasing the capacity of each individual to cope independently and preventatively with situations posing the possibility of legal injury. Thus, we would propose teaching legal concepts in grade school as a means of protecting that fragile sense of morality and fair play with which children enter the world."[1]

They go on to submit that a trained teacher can communicate basic and complex legal concepts in a form which children would be able to understand[2] and conclude that :

"Decreasing the dependancy of the layman on the legal profession increases the justice-producing capability of the society at large ... education in the law has major investment potential if it affects basic perceptions at an early age, increases one's ability to resist injustice and to compel fair dealing ... To accomplish these ends, law ought to be taught, long before children begin to accept it cynically merely as a set of technical rules for deaing with the police and avoiding responsibility for illegal actions."[3]

Adult education has not escaped the notice of American researchers and particularly where preventive education has been seen to be a social necessity. For example, a few volumes of the Columbia Human Rights Law Review were devoted exclusively to prisoners' criminal rights both in pretrial and sentence stages.[4] The pretrial manual has an introduction which reads thus :

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1 E S Cahn and J C Cahn "Power to the People or the Profession? - the Public Interest in Public Interest Law" (1970) 79 Yale L J 1021.

2 Cahn and Cahn op cit 1022.

3 Ibid.

4 A Victory et al "Getting off the Railroad : Trying to Vindicate Your Rights in the Criminal Justice System" (1976) 8 and (1977) 9 Columbia Human Rights L R; various authors "A Jailhouse Lawyer's Manual" (1978) 10 Columbia Human Rights L R.

"This manual was prepared to give you [the pretrial prisoner] as much information as possible about the criminal justice system in which you are a prisoner ... Our experiences have taught us that people are stranded in jail for lack of enough money to post bail and buy a decent lawyer. Because of this our main purpose in bringing this manual to you is to try to give you the practical information you need to be prepared to deal with your legal hurdles and confrontations with the system and, ultimately, to get you home."[1]

A subsequent issue of the journal, entitled "A Jailhouse Lawyer's Manual"[2]

"is committed to the enhancement of the human rights of all persons ... [R]ights and liberties are tenuous at best without the protection of a functioning system of laws ... [and] most prisoners do not have access to such a system, largely because they lack the financial ability to retain or consult with an attorney. This Manual has been designed to give prison inmates that access."[3]

The authors suggest that "if prisoners do not know of their rights ... [or] how to protect their rights by seeking help from a court ... then their rights mean very little."[4]

In Canada a fairly recent and comprehensive study[5] set out to examine all aspects of "the problem" which was described as follows :

"Every citizen continually encounters situations and problems that involve law. To deal with these problems effectively the citizen must find out what the relevant law is and how it affects him. In serious and complex situations many citizens will rely on legal experts to advise them and recommend courses of action. But most of the situations and problems involving law which the citizen encounters involve reasonably simple questions that have reasonably simple answers."[6]

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1 Preface to (1976) 8 Columbia Human Rights L R 4.

2 Various authors (1977) 9 Columbia Human Rights L R and (1978) 10 Columbia Human Rights L R.

3 Preface to (1977) 9 Columbia Human Rights L R 3.

4 Preface to (1977) 9 Columbia Human Rights L R 4.

The research revealed that citizens do have difficulty finding answers to these problems[1] and that in general they knew very little about the law and legal system.[2] Apart from improving the then present legal services, the author recommends that

> "Fundamentals of law should be taught both in school and to those who have finished their formal education. In particular, courses about law and the legal system should be available in high schools and perhaps even in senior elementary schools ... Education about law is equally important for those outside the school system, and should be undertaken with the same objectives in mind: recognition of everyday situations involving law, and knowledge of resources available to supply specific legal information."[3]

In suggesting ideas and a structural framework for preventive legal education, it seems suitable to divide the overall scheme into two parts: law teaching at school and adult legal education programmes.

2. School education

It is submitted that law teaching at school ought to receive the greatest attention. There are a number of reasons for this. Firstly, persons at school represent the immediate future adult generation. It is they who will shape and influence historical events when they reach adulthood and thus they ought to have a grounding in the discipline which is the core of society. Moreover it is they who, as adults, will be required to respond to the legal arrangements of the time and be required to cope with them. In other words, like any educational process, there is an element of preparation (for the future) about it. While it may still be necessary to provide similar eduction later for those who have reached that stage where that education is a necessary prerequisite, there is no logic in providing fundamental educational processes unnecessarily late.

Secondly, persons at school are the most likely candidates in society's learning process. It is at this stage that introductory instruction traditionally occurs (assuming for a moment that this type of legal education is a subject for fundamental instruction).

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1 Friedland op cit 10-29

The third reason closely follows the latter: the schooling structure is an established one and thus the channels for instructional methods are already a reality. Unlike prospective adult educational programmes, few new costs would be involved. (The disadvantage would be, however, an immediate lack of teachers and suitable texts.)

Since primary and secondary education at school level in South Africa is the responsibility of the State, it follows that the inclusion of such legal curriculae would be likewise. Since the possibility exists that those authorities which bear the responsibility for education may be inclined to prescribe ideological content into syllabi there would have to be, of absolute necessity, some degree of teaching freedom from the school's point of view.

This is not to infer that what is taught need necessarily be contentious. As suggested above "law-related education seeks primarily to raise instructive questions rather than to supply 'right answers'".[1]

What is envisaged is content which falls into two distinct categories (as described above)[2]: firstly, aspects of law as it exists, including rights and obligations within the legal structure and basic concepts such as those to be found in criminal law and procedure, delict contract and the like and, secondly, aspects which raise questions about the philosophy of law and its place and function in society, including such concepts as liberty, justice, human rights and the rule of law. Perhaps the latter aspects would be open to greater abuse than the former, but there is no reason, it is submitted, why these topics cannot be broached in a critical and inquiring fashion without making any attempt to prescribe set attitudes to gullible and impressionable young people.

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1 Maxwell, Henning and White op cit 158.

2 Supra 29.

The recipients in this educational process, as potential participants in the real social structure, deserve to be equipped to deal with the demands that modern living will make upon themselves. In a sense it is surprising that society has so long overlooked this arguably fundamental necessity. Children are taught such subjects as mathematics, science and history (which no doubt are easily justified in the total learning process and which will in some cases equip them for later life), and yet no effort is made to equip them with some of the basic requirements of human existence and, especially, co-existence. School children ought to be engendered with a greater feeling for and appreciation of the possibilities and limitations of law in a legally organised society.[1] However, none of this diminishes the need for instruction about the law as it is and especially those aspects which are ordinarily relevant to the man in the street.

Studies have shown that law is communicated to a considerable degree by peers.[2] It may be suggested that a single generation of school children which has benefitted from legal education at school level could begin a significant process in which they influence (or communicate to) other members of their generation and to their children.[3]

It is notable that a legal syllabus, as envisaged here, is presently included in Australian schools. It has three separate aspects: to engender an awareness of law in society as it relates to the individual, an appreciation of the law-making processes and authorities in Australia and instruction on specific selected areas of the law (such as remedies for breach of contract and negligent use of motor vehicles.)[4]

One American writer points out that it would have to be emphasized that the purpose of legal teaching at school would not be to "make lawyers of youth".[5]

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1 Cf Gibson op cit 216-217, Weeramantry op cit 61.

2 See supra 13.

3 Cf Cahn and Cahn op cit 1021; A Report by Justice op cit 5.

4 Weeramantry op cit 60. Cf K E Lindgren "Legal Studies in Australian Secondary Schools - An Account and Some Issues" (1980) 54 Australian L J 399. Cf the Canadian experience: Fitzgerald op cit 301.

5 Gibson op cit 219.

He argues that

> "a key to the successful acceptance of the program by young people lies in the fact that the subject matter must be taught not as rules and regulations per se but in terms of acts and reactions ... how individuals initiate particular acts, the implications of the act and what our society and other societies have to say and do about the situation. ..... The whole experience would be fraught with an opportunity to enhance such individual's social functioning."[1]

The same writer sees the objectives of such teaching to include an appreciation for the necessity of law and government by law, the extent and scope of American law and a working knowledge of law which is relevant to them as adolescents.[2]

As already suggested, legal educational programmes at school would be preferable to those designed for adult society. However, since the former are necessarily a long-term aim there is presently a pressing need to direct efforts towards adult society.

3. Adult education

Hopes to achieve legal awareness amongst adult members of society should perhaps present a more exacting challenge. Firstly, unlike school education, there are few, if any, educational structures which exist for the purpose of general adult education. Scattered efforts through the media cannot be regarded as thorough as the facilities which exist in an ordered schooling system. Secondly, it would be impossible, and inadvisable, to have any compulsory programmes. (At school level, one is at least assured of an audience.) This introduces an additional difficulty of having to make adult programmes attractive to the man in the street or to create an appreciation in lay circles for the need for some form of instruction. There is apparently no guarantee that the most sophisticated and coherent media programme will attract an audience significantly large to warrant its existence.

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1 Ibid.

2 Gibson op cit 218.

It is for these reasons submitted that the initial task in an adult media programme would be to make the respondent aware of his own personal need to gain more knowledge of the law. If this interest could be aroused the reader or listener probably would be more responsive because he would anticipate some personal benefit. One way of approaching the task would be by citing, in realistic terms, the predicament of a certain ordinary man, X, who finds himself unable to cope with a particular problem. For example, X spends some hard-earned money on merchandise which turns out to be faulty. The seller refuses to consider taking the goods back saying that X himself must bear the responsibility for the defect. X considers consulting an attorney but discovers he does not have the financial means to do so. X is at a loss. The reader and listener might then be asked to consider the possibility of himself being in the situation and asked "What would you do? Accept defeat? Do you know what the law says in this situation? Would you like to be able to know the law to be able to deal with the problem yourself?" The answer might then be provided on a different page of the publication, or in a broadcast at a later stage.

The possibilities are limitless, but some of the crucial elements are clarity in creating the factual predicament (in other words, "painting" a clear picture of the problem), simplicity of language and employing predicaments which are common, everyday experiences, so that each member of the audience would be able to see himself in the situation. An equally important feature would be to create a sense that merely because "the law" is involved does not make the problem unduly complex, and that the law can be a very "earthy" substance.

Like school education, it is submitted that both aspects of preventive legal education, that is the aspects of positive law and a general sense of the functioning of law in society, ought to be considered as suitable for adult education programmes. The reasons do not change.[1] If anything, the personal need of an individual in adult society is heightened by the proximity of the legally orientated environment.

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1 That is, from those reasons advanced in favour of the education of youth. See also the ideas which emerge from the quotations in the introduction to this section.

A consideration of the question as to who or what authority should be responsible for adult legal education programmes raises a number of fundamental questions which will not be dealt with here.[1] (These questions relate to the extent to which the State ought to provide social services.) It is merely suggested that since the State is traditionally responsible for the provision of education and because the State ought to play the dominent role in the provision of welfare services, it would be, ideally, the State's responsibility to provide these educational services. At the same time, it is believed, the authority created to pursue the programmes ought to have a certain degree of independence. Without this, the scheme could be open to abuse in that a government may make use of the educational possibilities to its own ends.[2] What is suggested, then, is a statutory body which, like a university, is partially independent and free to choose what to teach but which, owing to the considerable financial burdens involved, is government-funded.[3]

It is conceivable that such a body could co-operate with legal advisory groups[4] and consumer organisations where their respective aims coincide and overlap. Such groups as the latter could provide the preventive legal education authority with valuable information concerning people's current legal problems[5] and provide a useful outlet for distributing publications. As far as consumer organisations are concerned, the relevance of some of their work should not be overlooked. To a large extent, some of it consists of attempts, through publications and other communicatory forms, to keep consumers aware of their legal rights in the consumer field :[6]

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1 See the discussion on rights to education, welfare and juridicial rights supra 93 f and 97 f.

2 Cf Barry, Butler and Ginsburgs op cit 1-16 and the Soviet attempts to inculcate citizens with a legal sense.

3 Cf Weeramantry op cit 56-57.

4 See infra 119.

5 The idea of an "information centre" at the core of the preventive legal advice structure is discussed infra 122.

6 See generally, A Borrie and A L Diamond The Consumer, Society and the Law 3 ed (1974); D P Rothschild and D W Carroll Consumer Protection (1973).

> "It is the widely held opinion of consumer advocates that the most important element of consumer protection is "preventive" activity, i.e., consumer education ... Certainly, if consumer problems are to be attacked on a permanent basis, the present level of consumer awareness must be greatly enhanced many times."[1]

The chief function of the preventive legal educational authority would be to prepare legal material, in digestible form (upon topics previously decided) and to investigate all possible channels for dissemination. It seems that the greatest challenge would be in this communicatory function. It has already been suggested that the audiences' interest may be stimulated by having individuals appreciate that, firstly, they are potentially victims of an adverse legal predicament and, secondly, that they would be furnished with sufficient legal information to act preventively under the circumstances (i.e. to avoid being entangled irretrievably within a legal problem). But even if interest could be stimulated by this sort of device, there still has to be an initial form of communication.

The most obvious forms of communication for this are possibly the established media:[2] press, radio and television. Additionally, more localised and lesser-known publications may be utilized if they cater for a specific audience. The distribution of pamphlets on a massive scale could be effectively achieved with the co-operation of government departments who have actual or postal contact with citizens. Employers in both the private and public sectors could provide great assistance in distributing leaflets in pay envelopes.[3]

The success of any such scheme might depend largely upon the respectability, reputation and impact of the central body. Diligent and efficient co-ordination and planning would be critical. It goes without saying that each prepared text would have to be accurate to the last detail. One mistake would damage the organisation's reputation irreparably. For this reason preparation, or at least final scrutiny, would have to be the work of someone legally competent to perform such a task.

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1 Rothschild and Carroll op cit 580.

2 Cf Weeramantry op cit 64; Friedland op cit 81.

3 Cf a recent project undertaken jointly by the Legal Aid Clinic at the University of Natal and the South African Co-ordinating Consumer

More sophisticated education techniques would involve greater financial outlay. As stated, television might be successfully utilized. (A cartoon or similar attracting device may be a very effective form of communication.) Because of the relatively high costs involved with television, particularly to the consumer, radio may prove a more efficient medium. Other direct techniques include lecturing schemes where employees of large factory groups would provide a definite and concentrated audience.

Publicity of the aims and availability of the scheme would be essential, particularly in the early stages. To this end, an appropriate means of establishing the scheme would be to declare a "law year" during which a full-scale effort in all areas of preventive legal education could provide adequate momentum for subsequent efforts until the scheme was fully fledged.

Whilst the emphasis would be on a State-instigated scheme, there is no reason why private organisations should not embark upon similar schemes. If, in South Africa, a statutory authority seems an unlikely development, private efforts are vital. Presumably, there can be no objection to private initiative in this field, but the major practical drawback would be the problem of sponsorship. However, extensive private sponsorship cannot be discounted as a possibility.[1]

The role of universities at these embryonic stages should be stressed. A university has, potentially, the necessary resources: legal and educational disciplines, intelligent manpower and commitment. Shortage of financial means is not a fatal deficiency: there is no reason why an organised legal student group should not supply relevant material to a sympathetic press on a regular (e.g. weekly) basis. The university group could also supply material to private organisations (of a welfare nature) which have regular contact with the public.[2] Again it is in the best interests of groups such as these to maintain close contact with each other.

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1 Cf the Urban Foundation in South Africa.

2 Cf the work of the Preventive Legal Education Association at the University of Natal in Durban.

One final legal educational source should be considered. It has been suggested by one writer that serious consideration be given to an encyclopaedia of law for non-lawyers.

> "What is needed is a new printed source of law. What we propose is a multivolume legal encyclopaedia, regularly updated, which would be directly available to those providing legal information and to citizens in public libraries and in such locations as government offices and school libraries."[1]

The author has examined various aspects of the feasibility of such a publication such as classification ("the materials would be classified according to heading most useful to the non-lawyer")[2], format, updating, indexing (this would be done according to topics which the layman would understand)[3] and even production and costs.[4] The author concludes that like the delivery of other legal services, the provision, at State expense, of an encyclopaedia would contribute towards the expectation that "the law [is] to be available to those it is meant to govern."[5]

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1 Friedland op cit 91.
2 Friedland op cit 93.
3 Friedland op cit 97.
4 Ibid.
5 Friedland op cit 98.

B. PREVENTIVE LEGAL ADVICE

1. Introduction

It has already been suggested that preventive legal advice is part of the preventive law structure.[1] The purpose of this section is to expand upon the meaning of preventive legal advice and to suggest a rough model for its practical implementation.[2]

In essence, preventive legal advice is the rendering of legal advice by a competent person to an applicant who feels he has a problem of a legal nature. It is submitted that this activity falls under the "preventive" umbrella because the knowledge gained by the applicant may assist in circumventing potential legal difficulty.[3] At the same time, however, it is acknowledged that not all such enquiries to an advisory authority are strictly preventive. For example, the applicant's problem may be of such a nature that dispute avoidance is no longer possible and the matter warrants referral to an attorney or an authority which deals with the granting of legal aid.

Accordingly, strictly speaking, an advice agency would concern itself with the provision of advice only - even if that advice is in the form of a recommendation to visit an attorney, legal aid office or welfare group. A slightly expanded function of such an agency would be to deal with minor forms of assistance in the form of letter-writing, telephoning, and the like, on behalf of the applicant.

In order to approach this advice function more thoroughly, it may be well to consider the British experiences in advice work. The types of schemes which have been and are operative in Great Britain provide a useful insight into the issues and problems involved in this type of activity.[4] There are two types of schemes to be considered here: statutory and voluntary services.

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1 Supra 30.

2 A separate section considers the practical implementation of preventive legal education; supra 104.

3 See the discussion on this point supra 30-31.

4 The Lord Chancellor's Office and The Law Society Legal Aid Handbook 1976 4 ed (1976) 65-73.

2. Statutory schemes

The statutory Legal Advice and Assistance scheme[1] had its origins in 1968 with a memorandum published by the Law Society.[2] The memorandum set out proposals for a scheme which has now been incorporated in the Legal Aid Act of 1974. The scheme, known as "The £25 Scheme" or "Green Form Scheme" removes the need to pay a solicitor for advice (subject to a means test) or assistance (e.g. writing letters, completing forms, negotiation), provided that the advice or assistance does not exceed £25.[3] There is no merits test applied; the solicitor merely decides whether the problem deserves his attention. The means test is applied to income and capital whilst contributions are assessed on income alone.[4]

In practice, a prospective applicant merely approaches a solicitor participating in the scheme. The solicitor, whether or not he does participate, should always advise a client as to what facilities are available under the 1974 Act and what would be to his best advantage. Failure to do so may make the solicitor liable in negligence for a breach of duty to his client.[5]

A person who is uncertain or confused as to what procedure to follow in applying for advice or assistance could initially visit a Citizens' Advice Bureau[6] (see below) which would then refer him to an appropriate agency.[7] Additionally, a useful document has been prepared recently by the Law Society, called the Legal Aid Solicitors' List. Copies are available free of charge from Citizens' Advice Bureaux, town halls, public libraries, social work offices, police stations, courts and many advice centres. The list includes names of solicitors practising under the scheme, arranged according to the type of work they are prepared to undertake.[8]

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1 Pollock op cit 93.

2 C Smith and D C Hoath Law and the Underprivileged (1975) 223.

3 For an analysis of the types of schemes available in Canada see Friedland op cit 31-47.

4 M Zander Cases and Materials on the English Legal System (1976) 394-395.

5 E J T Matthews and A D M Oulton Legal Aid and Advice Second (Cumulative) Supplement (1978) B14.

6 Matthews and Oulton op cit B13.

7 Ibid.

3. Voluntary schemes

Turning now to voluntary schemes, it would seem that the most significant advice scheme of this nature in the United Kingdom at present, is the Citizens' Advice Bureaux service. Established in 1939, initially to provide emergency service in time of war, they developed during the post-war era by aiding persons, amongst other things, to adapt to new welfare state measures.[1] By 1977 there were about 750 local bureaux in the U.K., falling loosely under the umbrella of the National Association of Citizens' Advice Bureaux.[2] Over 90 per cent of Bureaux workers are volunteers. Each bureau has an organiser and a deputy who are responsible for general management of the bureau.[3] Nearly all financial support is provided by local authorities which may also provide furnished premises and bear the running costs and overheads.[4] The National Association, however, receives funds from central government.[5]

The functions of the bureaux are described as

> "advice, information, referral, action, advocacy and feedback. Any member of the public can walk into a local C.A.B. and ask for help, information or advice. The service is free, confidential, independent and provided by trained workers[6] ... [and furthermore] ... the bureaux service sees itself as the well-informed general practitioner of the social services, combining the roles of prevention, diagnosis and referral to the specialist consultant. It provides an independent, non-statutory service of advice and help."[7]

The bureaux, however, confine themselves to giving lay advice. They do not involve themselves in litigation, nor employ lawyers although a bureau may have an honorary legal adviser to whom legal queries may be directed by staff members.[8]

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1 N A C A B op cit 1.
2 N A C A B op cit 6-10.
3 N A C A B op cit 7.
4 N A C A B op cit 9.
5 Ibid.
6 N A C A B op cit 3.
7 Ibid.
8 M Cappelletti J Gordley and E Johnson Toward Equal Justice (1975) 113.

A unique feature of the C.A.B. scheme is its "information department" which is run by the central office of the movement. A team of information officers is responsible for maintaining and up-dating its more than 8,000 files containing information on new legislation, regulations, organisations and administrative procedures "the selection and detail of which is carefully related to the bureaux' practical needs".[1] Every month this new information is sent out to the bureaux.[2] The Information Department has the machinery at its disposal "to gather comment from the growing number of bureaux to build up a country-wide picture of trends and stress points."[3]

4. General discussion

In either form of service - statutory or voluntary - referral to an appropriate agency is an important feature. The advice sought may require some form of help (other than mundane advice or assistance) by a specialist welfare agency if the problem is not strictly a legal one or referral to a solicitor for legal aid if the problem necessitates some activity beyond the scope of the agency's usual enterprise.[4]

It is also of some significance that the function of these advice services is not limited to advice only :

> "frequently, the client's problem cannot be resolved without taking some active step such as obtaining information, corresponding with some third party or telephoning another solicitor. An advice service in isolation from any assistance subsequently needed ... must fall short of its purpose."[5]

The agency must therefore be prepared to undertake minimal tasks on behalf of the applicant, otherwise it will limit considerably its possible efficacy.

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1 N A C A B op cit 11.

2 Ibid.

3 Ibid. The sort of topics upon which information is collected and circulated include contracts of employment, rent allowances and rebates, pyramid selling, battered wives, consumer complaint procedures, the failure of private landlords to do repairs, etc. Ibid.

4 See eg N A C A B op cit 3.

5 Law Society Legal Advice and Assistance (1968)

One of the problems faced by advisory services of this nature is the ignorance of lay persons of the existence of the service. A survey conducted in England, the results of which were published in 1973, show a surprisingly low awareness of the existence of Citizens' Advice Bureaux.[1] A more recent survey on the Neighbourhood Advice Centre in Camden showed that in the immediate neighbourhood of the Advice Centre less than half the population had ever heard of the Centre.[2]

Some of these problems can be overcome by thorough advertising of legal services through the press, television, mail and by publishing information prominently in courts, police stations and prisons.[3] It has been suggested that:

> "any person who receives a summons, judgement or appealable administrative decision should, as a matter of routine, be given full information about how to get legal help [and furthermore] hospital casualty staff, general practitioners, medical social workers and the police should display posters and distribute leaflets specifically addressed to accident victims and the law."[4]

Very often the failure by an individual to take advice is owing to his inability to recognise his problem as a legal one or that a legal solution does exist.[5] It seems that the only way in which this problem can be effectively tackled is by preventive legal education (or public legal education). The practical aspects of this are discussed above.[6] Having better legally-informed citizens is perhaps a long-term aim, but some form of solution for the short-term is necessary. It has been suggested that partial relief may be gained by an extension and greater utilization of the Citizen's Advice Bureaux themselves.[7]

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1 B Abel-Smith M Zander and R Brooke Legal Problems and the Citizen (1973) 188-191.

2 J Baker The Neighbourhood Advice Centre (1978) 180. See also M D A Freeman The Legal Structure (1974) 164-5.

3 N A C A B op cit 112.

4 Ibid.

5 Freeman op cit 164.

6 Supra 104 f. On this particular point see also A Report by Justice op cit 4-5.

7 Ibid.

These advisory and referral centres have the ability to help the applicant "with the indentification and preliminary analysis of his problem".[1] Moreover, they presently occupy a significant position in the British social structure because of the facilities they have already established. These centres, as general recipients of all social and legal queries in the first instance, have the added advantage of having the right image. A centre which, for example, bears the name "Law Centre" is inappropriate since such a title "presuppose[s] that the client has already correctly classified his problems".[2]

The question as to who should have management responsibility for the provision of advisory services is a critical one. Perhaps the issue can be simplified into a consideration of the choice between judicial and welfare systems. (This choice has already been considered in another chapter)[3]. In a judicial system the claim to legal aid is considered a traditional legal right whereas in a welfare system the right is government-created in the form of welfare legislation. In the United States of America the legal aid programmes known as "legal service programs" are welfare-orientated, being part of the scheme devised by the Federal Government's Office of Economic Opportunity.[4] In the United Kingdom, on the other hand, the trend has been to maintain the juridicial approach, despite representations from such groups as the Society of Labour Lawyers who were anxious to restructure legal aid efforts on the lines of the American Neighbourhood Law Firm.[5] In a response to suggestions such as these the British Section of the International Commission of Jurists issued a report in 1977 (containing evidence presented to the Royal Commission on Legal Services) in which it set out its objections to the concept of a "National Legal Service"[6] (i.e. "a national service of state-employed lawyers dispensing full legal services to the community at public expense"[7]).

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1 Ibid.

2 Ibid.

3 Supra 97 f.

4 T Finman "OEO Legal Service Programs and the Pursuit of Social Change" (1972) 4 Wisconsin L R 1001-1084.

5 Pollock op cit 91; Zander op cit 385-388.

6 A Report by Justice op cit 6-8.

7 A Report by Justice op cit 7. Cf M Zander Legal Services for the Community (1978) 59 f.

A major objection is that the independence of the legal profession would be threatened, this independence being the cornerstone of the rule of law. A National Law Service, the Report suggests, "could at best only be an adjunct to the private practice of the law"[1] which plays such a vital role in the preservation of human rights.

> "It is the poor who most need protection from the State in all its protean aspects, and in such a system they would be least likely to get it ... [and] ... ultimately ... neither rich nor poor would be able to trust lawyers to defend them against the State."[2]

Returning to advisory services, it will be recalled that in the United Kingdom the "green form" scheme employs the services of solicitors in private practice whilst Citizens' Advice Bureaux are staffed largely by volunteers. Neither scheme can thus be said to be under the direct influence of the State and in all probability the situation is unlikely to change in the immediate future. The recommendations of the Royal Commission on Legal Services, released towards the end of 1979, do not appear to suggest alterations to present schemes.[3] A wider function of the Citizens' Advice Bureaux is envisaged but they should nevertheless remain as an "independent national network".[4] Insofar as the statutory provision of Legal Advice and Assistance is concerned (the "green form" scheme) the Commission recommends that the Law Society retain responsibility for its administration.[5]

The National Association of Citizens' Advice Bureaux in 1977 submitted many recommendations to the Royal Commission on Legal Services in which, inter alia, it suggests that salaried lawyers should be placed in Citizens' Advice Bureaux to augment the services already provided.[6] This suggestion appears to have met with the partial approval of the Commission which recommends that, firstly, "local law societies should ensure that every C.A.B. is properly serviced by solicitors to whom C.A.Bx can refer their clients"[7] and, secondly, "salaried lawyers should

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1 Ibid.

2 Ibid. Other views on this topic are considered in Zander Legal Services op cit 64 f.

3 See ed J Hodgson "Royal Commission on Legal Services : Principal Recommendations" (1979) 129 New L J 964 et seq.

4 Hodgson op cit 964.

5 Ibid.

6 N A C A B op cit 25 [illegible]

be seconded where necessary to C.A.Bx to act as internal advisers".[1] Apparently, the Commission does not consider that these "salaried lawyers" should deal with individual clients themselves but that this task should be undertaken by solicitors in private practice or by the newly recommended "citizens' law centres".[2]

5. Suggestions

From an observation of the preceding discussion as a whole, it may be possible to make specific suggestions for the practical structure of preventive legal advice in South Africa. Rightly or wrongly, it will be assumed, for this purpose, that whatever advice services presently operate in this country they are largely inadequate, especially when compared with the efforts currently operative in other parts of the Western world, notably the United Kingdom. Taken point by point, it is submitted that in principle an effective preventive legal advice structure for this country should include both statutory and non-statutory services and incorporate the following :

1. A statutory scheme run along the lines of the British "green form" scheme because this service makes use of available legal resources, i.e. lawyers in practice. Such a scheme would provide specialized legal advice and assistance.

2. A non-statutory service, on the other hand, run along the lines of the British Citizen's Advice Bureaux, but which would not be as specialised, dealing with both legal and non-legal queries. An important aspect of this work would be referral to more specialist agencies such as the statutory body. The impetus for such bureaux might come from the private sector which could help to establish and finance such operations in urban and rural areas. These agencies ought to be established in all needy areas and might have to rely on voluntary helpers. Insofar as staffing is concerned, race ought only to be relevant where language is concerned.

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1 Ibid. Cf Zander Legal Services op cit 81-83.

2 Ibid.

3. Both services would depend upon the existence of other specialist agencies (in the field of social welfare) to whom applicants may be referred and an adequate and receptive legal aid scheme.

4. It seems preferable that both schemes retain independence from government control and in this sense the British approach would be most suitable. Thus the statutory scheme could be managed by the various law societies, operating on a grant from the government. The establishment of a government department with government-salaried staff supplying advice is seen as unsuitable in the present context owing to the detrimental effects the permeation of government race policies would have upon the scheme. It would be imperative that all prospective applicants do not identify the service with the government in any way.[1]

   The non-statutory scheme also ought to operate independently of government spheres of influence. Any member of the public must be free to enter such an advisory centre irrespective of race or financial means.

5. The statutory scheme should employ a realistic means-test.

6. The inequitable distribution of attorneys' offices presents a real problem to the feasibility of a "green form" scheme. It is suggested that this will only be overcome if and when "neighbourhood law centres"[2] operate within areas which have no attorneys' offices. (Again, these centres should be government-funded, but independent of government influence.)

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1 Cf legal aid services in South Africa.

2 Of the type currently being established in the United States of America. See supra 124. Cf the recent establishment in Johannesburg of the Legal Resources Centre. See A Chaskalson "The Legal Resources Centre : Why It Was Established and What It Hopes to Achieve" (1980) De Rebus 19 f.

7. A mature non-statutory advisory service of the type contemplated here should set out to establish an information centre which would keep up to date with problems and developments in legal and other fields. This centre would then be in a position to supply all the advisory agencies with this well-researched and tested information.[1]

8. Advertising of both types of services would be essential. Special considerations would have to be given to reaching illiterate and destitute people.

Upon consideration of the suggestions in (3), (4) and (6) above, it seems that the present outlook for such preventive legal advice services in South Africa is bleak. There are many factors which make the task seem improbable. The absence of sufficient funds, commitment and legal offices (upon which a statutory scheme would depend) together with the inadequate nature of legal aid facilities without which there is no back-up to advisory services, make the problems of establishing a respectable advisory structure appear insurmountable.

Nonetheless, lest pessimism lead to complete inactivity, it is useful to consider the early beginnings of the Citizens' Advice Bureaux unfavourable political and economic climate of the United Kingdom in 1939. Despite the current lack of adequate service resources in a country like South Africa, there seems to be no reason why efforts should not be made towards the establishment of agencies akin to Citizens' Advice Bureaux in South Africa's urban areas.[2] Already there are privately inspired organisations operating along these lines.[3] These efforts ought to be consolidated and expanded. Advisory services of this nature, can be the first steps towards the implementation of a sophisticated legal advisory service. Certainly their absence would be severely felt.

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1 Cf the activities of the Centre for Applied Legal Studies in Johannesburg: J Dugard "Centre for Applied Legal Studies" (1979) 96 South African L J 126.

2 Such agencies have existed in Zimbabwe for several years and the University of Zimbabwe Legal Aid Clinic operates in conjunction with the Salisbury Citizens' Advice Bureau. See A M Donagher "The University of Rhodesia Legal Aid Clinic : An Example for South African Universities in the Field of Legal Training?" (1978) 3 Responsa Meridiana 326.

3 For instance the Black Sash ...

C. PROBLEMS FACING PREVENTIVE LAW

Apart from the hurdles in the path of establishing preventive legal education and advice schemes, such as lack of resources - financial and personnel - and reluctance or hostility on the part of State and legal authorities, there are perhaps other problems to be considered.

It may be suggested that the ability to comprehend information of a legal nature will, in part at least, depend upon the recipient's primary educational level (i.e. the extent to which the recipient has successfully achieved a basic level of schooling). A person who has never been to school or left school after only one or two years and never received any corresponding education, may experience difficulty in understanding legal information. For example, an illiterate person will be unable to benefit from any written information. Thus, in a country or community in which the general educational level is low, preventive legal education may be too optimistic a goal. In such circumstances, a more pressing social need would be to improve schooling facilities and perhaps the socio-economic conditions to enable a greater portion of the population to attend school. In such circumstances, too, in terms of preventive law, a greater emphasis could be placed on preventive legal advice services. Legal educational facilities might expand and improve with developments in schooling services. Advice services, it is submitted, depending on resources, are capable of operating independently of any other deficiencies.

Mention ought to be made of the possible dangers of abuse inherent in preventive law and preventive legal education in particular. The aim of an educational service of this kind should not be to supply people with what one school of thought regards as the "right" answers. On the contrary the aim in raising such issues as the rule of law and human rights is to stimulate interest and thought and not to create a citizenry of like-thinking individuals. Hence there is a need for the educational authorities to be independent of government

influence. It should not be the aim of preventive law to inculcate persons with ideological values.[1] A great deal of success in preventive law schemes generally would depend, it is submitted, upon their credibility in the eyes of the public. Efforts which are not objective in approach and which are government-controlled and influenced might lose credibility.

A question of some significance, which tests the feasibility of preventive law, is the extent to which it is possible to keep people abreast of the vast mass of law in modern society[2] and its rapidly changing character.[3] Perhaps an answer to this lies in the hope that preventive law itself seeks to overcome these formidable features of law[4] by drawing on its own and other resources to separate those legal areas which are relevant to the man in the street. In this way preventive law could be a most efficient filter-process. It ought to be emphasised, too, that it would not be the function of preventive law to make lawyers out of all citizens, but essentially to furnish them with enough knowledge to act preventively should the need arise.

South Africa is the only country in the world which makes the so-called policy of apartheid or separate development the basis of its statutory law,[5] a policy which inevitably translates itself into the wider legal framework. Consequently, preventive law efforts are faced with the difficulty of providing greater access to a legal system to many people whose status in the system is an inferior one. Perhaps the black majority in this country are too critical of the "white man's law" to begin to consider playing a more active role within it. In view of this, it is submitted that the current emphasis ought to be upon preventive legal advice services. Moreover, it goes without saying that all preventive law efforts ought to avoid any conduct which is seen to be supporting racially-orientated laws. Credibility and the trust which persons need to place in the preventive law efforts (so much a pre-requisite for success) would otherwise be at stake.

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1 Contra aspects of Soviet Law. See Berman op cit 14 f. Cf I Szabo Cultural Rights (1974) 41.

2 L M Friedman Law and Society (1977) 56-57.

3 Ibid.

4 See supra 74 f.

5 M Moskowitz The Politics and Dynamics of Human Rights (1968) 177.

Aside from the racial issues, there is inevitably the issue of preventive law efforts seeking to place their stamp of approval upon economically discriminating laws. Whilst this charge may be valid, if it were allowed to present a serious threat to the viability of preventive legal services, all such efforts would be placed in jeopardy. It seems that this objection is unduly destructive and has no regard for immediate needs, particularly advice services, within the present legal structure. Furthermore, it has been suggested that preventive legal education itself would raise, without supplying answers, issues relating to the function of law in society.[1]

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1 Supra 107.

CHAPTER NINE

PREVENTIVE LAW AND THE CRIMINAL LAW

A. IGNORANCE OR MISTAKE OF LAW

The question of whether an accused person's ignorance of the law in respect of the offence alleged to have been committed is a defence in criminal proceedings has recently been reconsidered in the Appelate Division in South Africa.[1]

This question is considered relevant to this work because if the idea "ignorance of the law is no excuse" is a principle of the criminal law it is arguable that it is consequently fair and advisable that persons are told in advance what activities and omissions bear criminal sanctions.

Before considering the effect of De Blom's case, the overall position prior to the judgement will be considered. According to Burchell and Hunt, (who were writing before De Blom), the general rule that ignorance of the law does not exclude criminal conduct is recognised in our law.[2] Accordingly, it is not surprising to encounter a passage of this nature in the law reports :

> "I know of no principle whereby a person, who is aware of all the material facts constituting the offence can escape criminal responsibility - on the ground of lack of mens rea - merely because he was unaware that his conduct constituted a contravention of the law. On the contrary the rule is that every person is presumed to know the law and that ignorance of the law is no excuse.[3]"

Despite its apparent inflexibility, there are exceptions to the rule[4] the most notable of which is the "claim of right" where the accused escapes conviction by arguing that although he appreciated that

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1 S v De Blom 1977 (3) S A 513 (AD).

2 E M Burchell and P M A Hunt South African Criminal Law and Procedure (1970) Vol 1 260.

3 S v Tshwape 1964 (4) SA 327(C) at 330.

4 Burchell and Hunt op cit 263-265.

his act was criminal, under the particular circumstances he believed it ligitimate.[1] It has been suggested that this defence is no more than mistake of fact or law in a different form.[2] In any event, it has enjoyed success as a defence.

A far more serious challenge to the ignorantia juris doctrine is posed by the issue of knowledge of wrongfulness. It is arguable that, in our law where mens rea is required for liability in respect of a particular offence, the mental element must extend to every element of the crime[3] including obviously, the wrongfulness aspect. In other words, the wrongdoer must appreciate the wrongfulness of his act (where, for example, dolus is required). If the state does not prove this, then the prosecution will fail.

This appears to be quite irreconcilable with the view expressed by Corbett J in S v Tshwape[4]. An attempt to avoid the dilemma is made by drawing a distinction

> "between absence of knowledge of unlawfulness which results from ignorance or mistake of fact and absence of such knowledge which is due to ignorance or mistake of law. The former should excuse since, on account of its factual origin, it is merely an indirect departure from the ignorantia juris rule; whereas the latter, being a direct transgression of the rule, should not excuse."[5]

Notwithstanding the implausibility of such an approach, it appears to have been in vain in the light of De Blom. The effect of the decision insofar as it relates to ignorantia juris can be summarised as follows. Rumpff C.J., delivering the court's judgement, dismissed as a "cliche" the view that "ignorance of the law is no excuse" in view of the present-day concept of mens rea.[6] The learned Chief Justice appears to have approved of the views of De Wet and Swanepoel[7] to the effect that

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1 Ibid.

2 Ibid.

3 Burchell and Hunt op cit 133-135 discuss the vascillation of our courts between an acceptance and rejection of this view.

4 S v Tshwape at 330. See also R v Kumalo 1958 (1) SA 381 (AD).

5 Burchell and Hunt op cit 136.

6 S v De Blom at 529.

7 J C de Wet and H L Swanepoel Die Suid-Afrikaanse Strafreg 3 ed (1975) 140.

ignorance or mistake of law would always exclude intention,[1] and further,

> "Die punt is egter dat mens die dader die verwyt dat hy opsetlik gehandel het, nie kan maak nie, tensy by ook bewus was van die ongeoorloofdheid van sy optrede ... Dit is billiker en suiwerder houding om in te neem as die groteske dat iedereen geag word die reg te ken. Hierdie laasgenoemde fiksie was nog nooit 'n waarheid nie, en dit is dit vandag ook nie. Om te gaan beweer dat regshandhawing onmoontlik is sonder die reeds gewraakte fiksie, is ook verkeerd.[2]"

Approval is also apparently given to the view that where dolus is concerned there is no justification for drawing a distinction between errors of fact and law. In either case the error concerns legal ability (bevoegheid) - and is consequently one of law - which negatives dolus.[3]

In conclusion the court expressly approved of the view that where mens rea in the form of dolus is required, the wrongdoer must have acted with knowledge of wrongfulness while for culpa it is necessary that the accused could and ought to have been aware of his wrongful conduct.[4] Thus, the effect of De Blom's case seems to be that knowledge of wrongfulness is firmly embedded as an element of an offence requiring mens rea in the form of dolus. Failure by the State to prove such knowledge will result in the accused escaping conviction.

The effect of the judgement may be alarming to some because it seemingly unnecessarily favours the accused and will "open the door to an unacceptably large number of spurious claims of mistake of law which the prosecution will be unable to refute."[5] On the other hand those in favour of the new approach are likely to argue that it is more in accordance with principle in that it is improper and unwise to punish for an innocent illegal act. And if there are policy interests to be considered then it is arguable that since the hitherto accepted defence of ignorance or mistake of fact was not abused there is no reason why

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1 S v De Blom at 530.

2 De Wet and Swanepoel op cit 140, as quoted by Rumpff C J.

3 S v de Blom at 530-531.

4 S v de Blom at 531.

5 R C Whiting "Changing the Face of Mens Rea" (1978) 95 South African L J 7 .

ignorance or mistake of law should.[1] Thus there is little justification for the view that the "floodgates"[2] will be opened. While this view has been dismissed as unsound since it is based on a "false analogy",[3] it is probable that the real effect of the judgement will be obvious only once it has been tested adequately in practice.

By comparison with major western legal systems the Appellate Division decision of De Blom may well be considered far-reaching.[4] Where statutory offences are concerned, the decision will probably be most effectual. It is now settled that where legislation is silent upon the question of mens rea, there is a rebuttable presumption that the State President did not intend strict liability.[5]

The only consolation for the prosecution is that, following De Blom, when the State leads evidence that the offence has been committed an inference can be drawn that the accused committed the act with the necessary intention and the evidential burden shifts to the defence.[6]

Another notable point is that where mens rea in the form of culpa is required the task of the prosecution is considerably lessened. It may be reasonably expected of a person engaged in a particular line of business that he will keep himself informed of existing law and developments in that field.[7] In other words conduct is measured objectively against a reasonable standard.

It is submitted that insofar as the ignorantia juris position is relevant to preventive law, the following may be suggested: (a) Where strict liability applies, preventive education is necessary. (b) Where mens rea in the form of culpa applies, preventive education is also necessary. (c) Where mens rea in the form of dolus applies, the necessity for education diminishes considerably.[8] To all this may be added that

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1 S v de Blom at 531. The learned Chief Justice quoted with apparent approval the views of Professor Van Rooyen.

2 M Loubser "Ignorance of the Law can be an Excuse" (1977) 1 South African Journal of Criminal Law and Criminology 296. Another counter-argument is "ignorance of the letter of the law will not necessarily exclude mens rea but only ignorance of law in general." Ibid.

3 Whiting op cit 7.

4 Whiting op cit 8.

5 S v De Blom at 532.

6 S v De Blom at 532.

7 S v Tsochlas 1974 (1) SA 565 (AD) 577

where knowledge is unimportant from the point of view of the potential accused, it may still be important from the State's point of view. Prosecution under obscure and less known offences may fail where the unlawfulness of the act remains unknown.

B. PREVENTIVE LAW AND THE CRIMINAL COURTS

1. Introduction

Some reference has already been made to preventive law and criminal law.[1] In this section it is proposed to examine preventive law possibilities in the context of criminal procedure. It is submitted that as a general trend preventive law is not particularly relevant to criminal law: people do not have to be told that it is an offence to steal or murder.[2] Once a person has been arrested or summonsed to appear on a criminal charge, no amount of preventive advice or education will alter the fact of standing trial. But irrespective of the accused's actual guilt or innocence, there are certain actions which may be taken by the accused which may contribute to a more thorough trial. The services of an attorney might be obtained at the request of the accused himself or through legal aid. If the accused is in custody there is also the matter of bail to be considered.

In both these aspects - representation and bail - it is advisable that the accused be aware of his rights. For example, Section 73(1) of the Criminal Procedure Act[3] provides that an accused "be entitled to the assistance of his legal advisor as from the time of his arrest." The same act provides, in respect of bail, that

> "An accused who is in custody in respect of any offence may at his first appearance in a lower court ... apply to such court ... to be released on bail in respect of such offence."[4]

It is arguable that in most cases accused persons will soon become aware of these two fundamental rights by virtue of contact with fellow-prisoners. While this is probably so, it obviously does not

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1 Supra 26.
2 Supra 26.
3 Criminal Procedure Act 51 of 1977
4 S 60 (1) Act 51 of 1977

constitute an adequate method of communication upon which the authorities should rely. Moreover, there are numerous other procedural rights of which unrepresented accused persons ought to be aware at both pretrial and trial stages in order that the enquiry into their guilt be a thorough one. It is intended to consider the extent to which accused persons have their procedural rights explained to them at trial stage.

It may be stated initially that the present writer regards the criminal courts in South Africa (especially the lower ones) as of particular social relevance. It is probably not over-emotive to suggest that in these courts the lives of thousands of individuals are daily affected. Consequently, a researcher might well find that a great majority of poor persons in South Africa see the law in terms of the criminal law. By way of comparison, the number of occasions in which these underprivileged people are civil-law litigants is probably insignificant.[1] It is also believed here, perhaps wrongly, that no amount of preventive education on specific offences will reduce the number of those persons appearing on charges such as theft and assault; rather, the incidence of this type of crime would best be reduced by altering the socio-economic conditions which precipitate the illegal activity. In other words, people who are not hungry, for example, are probably less inclined to steal food, in full knowledge of the possible legal consequences of their action.

In spite of any socio-political failings the courts, including the criminal ones, are ostensibly places in which one can expect to receive a fair trial. It is in pursuit of this aim that rules of procedure are devised, and particularly in an adversary system where both sides in dispute (the State and the accused) are given an opportunity to present their respective cases to the court. It is this area of the law - criminal procedure - which becomes important from the preventive law perspective. Advice to unrepresented accused persons on how to conduct a defence, from whatever source, could greatly facilitate the accused's own ability to defend the case properly. It is not to be assumed that any amount of right-explanation in or out of court will ever be preferable to

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1 The number of criminal cases heard in magistrates' courts for the period 1977/78 was 1,515,410 compared with 820,680 civil cases. Department of Justice Annual Report for Calendar Year 1978 93.

the services of a person legally qualified to perform the task, but in the absence of compulsory legal representation for all accused persons who may receive a prison sentence[1], this type of assistance would be better than none. There is no question either, that the great majority of accused persons are unrepresented at the trial stage.[2]

2. Explanation of rights at close of the State case

Section 151 (1)(a) of the Criminal Procedure Act[3] provides that

"If an accused is not under section 174 discharged at the close of the case for the prosecution, the court shall ask him whether he intends adducing any evidence on behalf of the defence, and if he answers in the affirmative, he may address the court for the purpose of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence."

A similar section in an old piece of legislation dealing with same aspect read

"At the close of the evidence for the prosecution the proper officer of the court is required to ask the accused ... whether he intends to adduce evidence in his defence. If he answers in the affirmative he may address the jury or court ... for the purpose of opening the evidence intended to be adduced for the defence but without comment thereon."[4]

Schreiner J.A. in R v Sibia[5] held that the section

"does not in terms provide that the accused must have his mind directed separately to the questions whether he wishes to give

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1 The United States' decision of Gideon v Wainwright 372 US 335 83 SCt 792 (1963) made it mandatory that persons who faced the prospect of a prison sentence be afforded counsel. See also Argensinger v Hamlin 407 US 25 92 SCt 2006 (1972).

2 This was the present writer's experience from observations at the Durban Magistrate's Court. Also see D Platt A Study of Bail in the Durban Magistrate's Remand Court (1977) 10 (Unpublished Research Project, University of Natal Law Library, Durban).

3 Criminal Procedure Act 51 of 1977.

4 S 221 (4) Act 31 of 1917, quoted in R v Sibia 1947 (2) SA 50 (AD) 54.

5 R v Sibia at 54

> evidence himself and whether he wishes to lead the evidence of other persons ... [but] ... the portion ... should be interpreted so as to require that the accused be asked both whether he wishes to give evidence himself and, separately, whether he wishes to call any other witnesses."[1]

Accordingly, it was held that, since the accused had not apparently been asked whether he wished to call any witnesses, there had been an irregularity which had prejudiced the accused and the appeal should be allowed.[2]

It was similarly held in a later Natal case that "the failure to give the accused the opportunity of giving evidence and of calling witnesses was an irregularity"[3] as a result of which the conviction and sentence were set aside.[4]

Since the introduction of the new Criminal Procedure Act in 1977 the matter has again come before the Supreme Court in S v Mdadana.[5] Here it was held that the record of the trial proceedings must show clearly whether an accused's rights were properly explained to him at the close of the State case. Further, an unrepresented accused must be made to understand that he does not have to give evidence if he chooses not to. It is not sufficient that the magistrate merely enquire from the accused whether or not he wishes to place his story before the court. A proper explanation by the magistrate is necessary.[6]

It seems settled then, that the presiding officer has of necessity to explain the accused's position to him at the close of the State's case. The question which now falls for consideration is how far he should go in giving the accused a clear explanation of how the proceedings stand. It is obvious that one magistrate (or Judge) may put the position very briefly, while another might amplify his explanation in order to assist the accused in his understanding of it. For example:

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1 R v Sibia at 54.
2 R v Sibia at 50.
3 S v Vezi 1963 (1) SA 9 (N) 12.
4 S v Vezi at 13.
5 S v Mdadana 1978 (4) SA 46 (E).
6 S v Mdadana at 46 - 48.

"Accused, that is all the evidence that the State Prosecutor will place before the court to support the charge which he has preferred against you. It is now your opportunity to present your case to the court if you wish to do so. You may do that by giving evidence upon oath, in which case you will be subjected to cross-examination by the State Prosecutor and questions by the court. You are not obliged to speak, you have a right to remain silent. But if you say nothing in your defence the court should have to decide the case upon the evidence it has heard and the court has only heard the State's version. That story which you told the court on the first day you appeared is not evidence. It was merely an explanation of your reason for pleading not guilty. It has no evidential value whatsoever. If you want the court to take any notice of the story that you told you shall have to repeat it on oath. You may call witnesses too. So what you can do at this stage is: you can decide to call witnesses and you can given evidence; you can decide to call witnesses and not to give evidence and simply to remain silent. Do you understand?"[1]

There are a few notable features about the above. The first is that the explanation may be regarded as a full one.[2] Secondly, it is made slightly more complex by the introduction of a new element: the relevance or irrelevance, evidentially, of the initial statement made in terms of S 115.[3] And, thirdly, the length and possible complexity of the explanation to an accused person who is required to make an immediate decision on his proposed course of action on hearing the explanation for the very first time. It is submitted that while the explanation may seem perfectly clear to one who has had experience of criminal trials, for a person standing trial for the first time, it may indeed seem baffling.[4]

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1 This explanation was recorded verbatim from a magistrate in Durban magistrates' courts, October 1979.

2 In fact, the magistrate did fail to point out that the accused may elect to call neither witnesses nor to give evidence himself.

3 Act 51 of 1977. See infra 141.

4 On a separate occasion the magistrate whose explanation is recorded above became annoyed when the accused stated that he did not understand his rights, having just had these explained to him. The magistrate switched off the recording machine and told the accused in an aggressive manner that he was using his "very best English" and enquired whether there was something wrong with the accused. He repeated the explanation and asked the accused if he understood, by which stage the accused appeared too terrified to say no.

In a different trial from the one referred to above (before a different magistrate) the accused, having had his rights explained to him at the close of the State case, indicated that he did not understand them. The magistrate then gave the following explanation:

> "If you go to a grocer and you want to buy sugar, then he will weigh the sugar on a pair of scales. The sugar is placed on one side of the scales. The prosecutor has placed weight on one side of the scales indicating that you are guilty. He did that by calling the complainant and the second State witness. Here I have to weigh whether you are guilty or not. If you want me to find you not guilty you have the opportunity to place weight on your side of the scales. You do this by calling witnesses to testify on your behalf and by giving evidence yourself on your behalf. Do you understand that?"[1]

In this instance the magistrate seemed to make a special effort to have the accused appreciate, in terms which he could more likely understand, the importance of giving evidence where the State has established a prima facie case against him.[2]

3. Statements made in terms of section 115

Section 115 of the Act states

> "(1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding [officer] ... may ask whether he wishes to make a statement indicating the basis of his defence."

Already this section has provoked considerable attention in the law reports[3] and, it is submitted, this is likely to continue. There appears to be some argument as to the extent to which a presiding officer

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1 Recorded verbatim in the Durban Magistrates' Courts, October 1979.

2 Where no prima facie case is established, the court need not put the accused on his defence. See S 174 of the Act and S v Mdadana at 46-48.

3 See eg S v Mkhize 1978 (2) SA 249 (N); S v Muzikayifani 1979 (2) SA 516 (N); S v Mathogo 1978 (1) SA 425 (O).

may put questions to the accused under sub-section (2) of the same section, and what the permissable content of the question is.[1] In practice, once the accused has pleaded not guilty the magistrate may, for example, say

> "Accused, in terms of Section 115 of the Act, you may now, if you wish, make a statement indicating the basis of your defence. In other words, you may tell me why you plead not guilty."[2]

To the unrepresented accused person this almost invariably presents an opportunity to relate his version of the story (if he has one).

Another magistrate put it in this way:

> "This is the stage where you can, if you want to, make a statement setting forth the basis of your defence. You are not giving evidence now. The state must give evidence first and then you can give evidence later on; but now you can tell me what your defence is. Do you want to tell me what your defence is?"[3]

Unfortunately, to the ignorant accused, there is probably little difference in meaning between "giving evidence" and saying what his defence is. It has been said that the purpose of S 115 is to narrow the areas of the dispute between the State and the accused,[4] especially in view of the content of S 115 (2)(b) or to establish to what extent the accused "denies or admits the issues raised by the plea."[5]

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1 S v Muzikayifani at 516-520.

2 Recorded verbatim at Durban Magistrates' Courts, October 1979.

3 Recorded verbatim at Durban Magistrates' Courts, October 1979.

4 See eg J H van Rooyen "Some Doubts Regarding Aspects of the 1973 Criminal Procedure Bill" (1976) 101 De Rebus Procuratoriis 207.

5 S 115 (2)(a) Act 51 of 1977.

That a statement made in terms of S 115 does not carry the same weight as evidence upon oath appears to be settled :

> "... an accused person who makes a statement in terms of S 115 or who answers questions put to him by a judicial officer in terms of S 115 (2) should be left in no doubt at the conclusion of the State case that the statements which he made when he pleaded have no evidential value whatsoever ... [If the accused] wishes to lay his story before the Court, he must do so on oath."[1]

It also appears that the presiding officer is not obliged to explain this fact to the accused before he makes the S 115 statement.[2] It has also been held that while "it is desirable that an accused person should be advised of his right to remain silent"[3] on being invited to make a statement in terms of S 115 "an omission to give such advice does not amount to an irregularity or impropriety".[4]

It is submitted that in practice it very often happens that an unrepresented accused person, on being invited to make a statement setting forth the basis of his defence, proceeds exactly as if he were giving evidence, not realising that his statement has no evidential value whatever. It is further submitted that very few accused persons merely admit or deny the elements of the charge as "raised by the plea".[5] There is, consequently, a suspicion that the section is being abused to the prejudice of the accused. For example, in a theft charge, the represented accused would have satisfied the requirements of the section if his counsel on his behalf (1) admitted possession of the property mentioned in the charge sheet, (2) admitted the property belonged to the complainant, but (3) denied that the accused took the property unlawfully.

Not only does the accused not have to know at this stage that his S 115 statement is not evidence and that he may keep silent at this stage,[6] but it is not incumbent upon the presiding officer to restrict the accused in any way in the making of his statement:

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1 S v Mkhize 1978 (2) SA 249 (N) 251.
2 Ibid.
3 S v Muzikayifani at 520.
4 Ibid.
5 S 115 (2)(a).
6 In which case the presiding officer will

> "... I am of the view that the statements spontaneously made by ... the accused in response to the magistrate's invitation in terms of S 115 (1) are unobjectionable."[1]

It may seem that since the invitation to the accused in terms of S 115 merely gives the accused an opportunity spontaneously to put his side of the story (and although this is not strictly what the Act contemplates), there is nothing undesirable in it. If the accused is telling the truth, there is no possibility that the section could work to his detriment. It is only the dishonest accused who, if he elects at a later stage to testify and deviates from his S 115 statement, will have to answer for the discrepancy.[2] This argument, it is submitted, is true up to a point. However, unfortunately, the unrepresented accused having made the S 115 statement may have his case adjourned for six weeks or more for trial. Upon giving evidence at the trial stage, he may through lapse of time and its effect upon memory, forget to re-mention a minor point or effectively give a slightly altered version. Unlike the presiding officer, the prosecutor and the represented accused, the unrepresented accused has not had the benefit of notes, taken at the time of pleading with which to refresh his memory before giving evidence. Furthermore, it has been this writer's experience that on occasions an accused person has been asked to explain, under cross-examination, why he omitted to say something in terms of S 115 which he now mentions for the first time in evidence in chief. Clearly, such a question may be grossly unfair where the accused cannot be expected to mention every factual detail in terms of S 115, especially when the section is not designed for that purpose. In short, possible human failings which account for slight deviations from the accused's version given when asked to plead ought not to be mercilessly used against the accused, thereby contributing to the possibility of conviction. In all fairness, the unrepresented accused deserves to be made more appreciative of the dangers which await him if he makes a lengthy and detailed statement in terms of S 115.

One writer has suggested that "a magistrate ought to ensure that a non-informed or otherwise ignorant accused does not speak[3] when asked

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1 S v Muzikayifani at 520.

2 A statement made in terms of S 115 (1) can provide very useful "ammunition" for the prosecution in cross-examination.

3 Van Rooyen op cit 209. See the principle behind S v Lwane 1966 (2) SA 433 (A).

to reply in terms of S 115, and that the accused ought to be informed that silence may not be held against him.[1] And further, the arrangement whereby the ignorant accused is asked to make concessions (admissions in terms of S 115 (2)(b)) is questionable in view of the accused's incompetence to do so as for example, where the accused's defence is an alibi and he admits all the elements of a charge of housebreaking and theft except those relating to his own involvement in the crime. The admitted elements become proof of those facts[2] and if the accused does not cross-examine the complainant on the ownership or possession of the goods the defence of alibi will fail. In fact it may have emerged under cross-examination that the complainant was in doubt as to whether the goods were the same as those allegedly stolen.[3]

The same writer concludes that

> "If a system has to rely upon accused persons not exercising their rights or not putting up available defences through ignorance, there is something very wrong with that system."[4]

It has also been this writer's experience that despite some effort being made by magistrates to explain accuseds' rights at the close of the State case, some accused persons clearly do not really appreciate the position regarding S 115 statements and the failure to give evidence. For example, an accused person gives a lengthy statement in terms of S 115 and puts his defence to the State witnesses. Upon being told his rights, he elects not to testify, saying, "I have said all I want to." The magistrate asks, "Do you close your case?" and the reply is in the affirmative. Assuming a prima facie case was established by the State, the accused has now failed to "gainsay"[5] it. A conviction possibly follows. Despite any warnings given to him, the accused, through ignorance and possibly intimidation, has not made the intelligent choice. He is incapable of understanding, then and there, that what is said from the accused's dock is not the same as identical statements made, upon oath, from the witness stand.

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1 Van Rooyen op cit 210.
2 S 220.
3 Van Rooyen op cit 208.
4 Van Rooyen op cit 210.
5 S v Mthetwa 1972 (3) SA 766 (AD) 769.

4. Conclusions

In summary, the following factors ought to be considered :

(1) the complicated nature of the relationship between S 115 statements and the giving of evidence, and the multiple inherent dangers for the accused.

(2) the Supreme Court's apparent attitude to what the accused may be legally entitled to know at the outset of the preceedings and

(3) the improbability that in all cases the unrepresented accused will have the necessary foresight and knowledge to compensate for possible pitfalls attached to these aspects of the trial.

Because of this it is respectfully submitted that

(1) the courts are not disclosing to the accused enough information regarding his own predicament during the course of the trial and

(2) even if substantially greater efforts were made by the courts in this respect, there is nevertheless a strong argument for providing some sort of instruction[1] for the accused even before his case is called. In other words, having had his legal rights in respect of the trial explained to him before being asked to plead, he deserves the opportunity to contemplate his own predicament before finding himself in the court atmosphere.

Accordingly, it is suggested that, at the very least, accused persons, before being asked to plead to the charge, ought to have access to some suitably qualified person who can explain the accused's rights to him and advise him as to how to conduct his own defence. Such a person,

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1 In other words, preventive legal education or advice.

it is submitted, ought not to be a government appointee[1] but a representative of the Law Society[2] or some other independent body. It seems that only when services like these are provided will the vulnerable unrepresented accused person begin to enjoy some of the justified safeguards which seem to have become the "privilege" of represented persons.

Finally, it is submitted that it is not only in the field of S 115 statements and the giving of evidence that the unrepresented accused requires pre-trial advice. The right to and importance of cross-examination could receive attention, as could the address on sentence which very often determines whether or not a gaol sentence is deemed appropriate.

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1 According to one interpreter at the magistrates' courts, Durban, many prisoners are suspicious of any form of government assistance provided for an accused. Allegedly, there is a tendency to indentify the entire court structure, including, on occasions, defence counsel, with the government. For this reason it has become necessary to explain to an accused person on a murder charge (who is entitled pro deo counsel) that "the advocate's services will be paid for by the State" and not "the State will provide you with an advocate". Nonetheless, many accused persons refuse the services of pro deo counsel.

2 Cf the duty solicitor scheme in Scotland. See M Zander "Legal Aid in a Democratic Society" in University of Natal Legal Aid in South Africa (1974) 17.

CHAPTER TEN

THE WIDER FUNCTION OF PREVENTIVE LAW

A. TOWARDS A BROADER LEGAL CONSCIOUSNESS

1. Introduction

Reference has already been made to school and adult legal education.[1] It was suggested that such programmes should include not only subjects such as contract, delict and family law but also certain jurisprudential issues which raise questions about the function of law in society. For example,

> "By bringing school children into contact with open-ended issues such as justice, equality and freedom we will be doing much more to give them an appreciation of the true nature of law, as well as providing them with a new way of looking at the society in which they live."[2]

In this chapter certain appropriate topics are considered together with their relevance to laymen. In each instance it is hoped to show that issues like justice are very important to all members of society. It is surprising that these areas of public legal education have been neglected for so long.

The topics considered are by no means exhaustive.

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1 Supra 110 and 113.

2 R C Maxwell J F Henning and C J White "Law Studies in the Schools" (1975) 27 Journal of Legal Education 157.

2. Justice

Despite the frequent use of the word "justice" in lay terminology, it is doubtful if many laymen appreciate just how complex a term it is. Conceptions of justice vary considerably according to time and place.[1] The meaning of justice has never been "settled".[2]

Notwithstanding the absence of certainty of meaning within the theory today, justice does play a guiding role. Its appeal lies in the fact that it carries immutable connotations of fairness.[3] It is "the prevailing sense of men of goodwill as to what is fair and right."[4]

The need for justice arises in the fact of legitimate competing interests :

> "Men are to decide in advance how they are to regulate their claims against one another ... Just as each person must decide by rational reflection what constitutes his good ... so a group of persons must decide, once and for all, what is to count among them as just and unjust. The choice which rational men would make in this hypothetical situation of equal liberty ... determines the principle of justice."[5]

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1 N E Bowie and R L Simon The Individual and the Political Order (1977) 92-122.

2 R W M Dias Jurisprudence (1976) 66. Some theories of justice appear immensely complicated to the average reader. Consider J Rawls A Theory of Justice (1973). Rawls himself says "this is a long book, not only in pages." Rawls op cit viii.

3 "Justice as fairness" is one of the ideas central to Rawls's theory. Rawls op cit 116.

4 H R Hahlo and E Kahn The South African Legal System and its Background (1973) 31. Cf R Stammler The Theory of Justice (1969) 22: "Our purpose is to hold firmly to the interesting observation that in all social deeds and human institutions is concealed a feeling and longing for justice; even though this tendency is sometimes described differently and in a roundabout manner." And cf H L A Hart The Concept of Law (1961) 154: "The distinctive features of justice and their special connection with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words 'fair' and 'unfair'." Hart points out that what is just is not necessarily right and what is unjust, wrong: "just and unjust are more specific forms of moral criticism than good and bad or right and wrong". Ibid.

5 Rawls op cit 11-12. Cf Bowie and Simon op cit 92 : "When conflicting claims are pressed under conditions of relative

It has been suggested that the postulates of formal justice are reasonableness, generality, equality, certainty and fair-process.[1] The requirement of formal justice is satisfied when postulates (such as the above) are consistently applied whereas material theories of justice contain certain absolute standards.[2] Friedman surveys attempts to establish absolute standards of justice and concludes that only those with a religious basis have succeeded.[3] Those philosophies, he claims, "which make knowledge of justice a matter of intuition are merely escapist."[4] On the other hand, Del Vecchio maintains that

> "that same fundamental motive of consciousness ... which renders possible the formal conception of justice, constitutes also the fulcrum and the basis of an absolute requirement which may never be completely realized, but which ... bears, par excellance, the name of justice."[5]

To the man in the street, who perceives justice essentially as fairness, the sentiments expressed in the above quotation might appear confusing. The simpler natural sense of justice (what is fair and right in the circumstances[6]) may nevertheless be of great value if it serves as a fixed-point from which a brake may be exerted upon those over-zealous in the persuit of scientific logic.[7]

In spite of the value of instinctive justice, however, a warning must nevertheless be sounded lest popular notions of what is "just" lead to over-simplicity and precipitate absurd expectations.[8]

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1 Hahlo and Kahn op cit 31-41.

2 Bowie and Simon op cit 93.

3 W Friedmann Legal Theory 5 ed (1967) 346.

4 Friedmann op cit 347.

5 G Del Vecchio Justice (1952) 114-115.

6 Cf C K Allen Law in the Making 7 ed (1964) 386-387.

7 Ibid.

8 Allen explains that a common lay failing is to neglect "to look beyond the particular to the general" and that in so doing expect that a general rule be abrogated in favour of the demands of the present situation: "abandoning uniformity in favour of mere caprice." Allen op cit 386.

It is submitted that the individual's inherent sense of justice should be developed and encouraged. To this extent, preventive law ought to concern itself with the justice issue. At the same time, people should become aware of some of the improbable tasks too often thrust expectantly in the path of justice.

An educational concern with justice may begin to overcome some of the neglect society has shown towards the orientation of individuals into cohesive co-existence in that particular society. Some people may find it strange that at school level in South Africa, while children are invited to study mathematics and science, nowhere is there a suggestion that young people ought to be stimulated, by teaching methods, to consider how best to share life with their fellow-men.

3. Natural law and liberty

The supreme expression of justice, it is said,

> "demands the equal and perfect recognition, according to pure reason, of the quality of personality in oneself as in all others, for the possible interactions among several subjects."[1]

It is these principles which provide the central notions of natural law theories,

> "that liberty is essentially inborn in every man and that each one has therefore in relation to others a 'natural right' to liberty; that amongst men there is not, as regards this right, any difference, but rather a perfect equality."[2]

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1 Del Vecchio op cit 116.

2 Del Vecchio op cit 117. Cf Hart op cit 155: "the general idea latent in applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality. There is something to be respected in the viccissitudes of social life when burdens or benefits fall to be distributed."

Natural law theories have a creditably long but controversial tradition. Original ideas may be traced to the Sophistis of ancient Greece, through Plato, Aristotle, the Stoic philosophers, the Corpus Iuris Civilis and Cicero.[1] During the Middle Ages the ideas took a new turn under the influence of St. Thoman Aquinas who argued that this higher law, up till then proclaimed accessible on the basis of man's rational ability, was actually God-ordained.[2] However, the secular theories continued and culminated, in slightly altered form, in the French and American Declarations at the end of the eighteenth century. At this stage, the rights of human beings as human beings were asserted as against the State.[3]

d'Entreves claims that one of the essential features of the theory of natural rights is rationalism.[4] It is this which provides justification for the theory which, secular or otherwise, has always been based upon natural reason: "the dignity and power of man."[5]

Serious challenges, past and contemporary, have placed the respectability of natural law and rights theories in jeopardy. These were utilitarianism in the nineteenth century,[6] positivism over a long period and the Nominalist theory of ethics.[7] But most challenging is Hegel and the ethical state out of which developed Marxism.[8] In Hegel the state provides the supreme ethical standard; it is "the ethical whole, the incarnation of God in history."[9] Effectively, this removes the possibility of any ideal in law and natural law is substantially an ideal.[10]

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1 Bowie and Simon op cit 59.
2 Ibid.
3 Bowie and Simon op cit 60.
4 A P d'Entreves Natural Law (1967) 49. The other features are individualism and radicalism. Ibid.
5 Ibid.
6 Bowie and Simon op cit 60.
7 d'Entreves op cit 65-74.
8 Ibid.
9 d'Entreves op cit 73.
10 Ibid.

In spite of all this, natural rights continue to be extremely important. It is claimed that

> "the doctrine of natural rights has resurfaced, shorn of much of its excess metaphysical and theological baggage, in the form of a plea for human dignity and for the kind of treatment that makes at least a nominally decent human life possible."[1]

4. Human rights[2]

The sentiment expressed in the above quotation appears very close in substance to the expressions which have manifested themselves more recently in the wealth of documents which aim to promote human rights.[3] Perhaps the most famous and important are the Charter of the United Nations and the subsequent Declaration of Human Rights.[4] The preamble of the Charter begins

> "We the peoples of the United Nations determined ... to re-affirm faith in fundamental human rights, in the dignity and worth of the human person ..."[5]

The Declaration, adopted on 10 December 1948 (with the U.S.S.R. and the Union of South Africa, amongst others, abstaining) does not impose any legal obligations on States as such[6] but proclaims human rights "as a common standard of achievement."[7]

The European Comvention on Human Rights, as a further example, has eighteen "High Contracting Parties"[8] - the member states of the Council

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1 Bowie and Simon op cit 61.

2 Human Rights are considered again, in a different context, supra 93.

3 See generally I Brownlie Basic Documents on Human Rights (1971); A H Robertson Human Rights in the World (1972); M Moskowitz The Politics and Dynamics of Human Rights (1968); A H Robertson Human Rights in Europe 2 ed (1977); F G Jacobs The European Convention on Human Rights (1975); V Chaldize To Defend These Rights (1975).

4 Printed in Brownlie op cit 93 and 106.

5 Brownlie op cit 93.

6 Robertson Human Rights in the World op cit 27.

7 Brownlie op cit 107.

8 Article 1, European Convention on Human Rights. See Brownlie op cit 340.

of Europe - and is modelled largely on the Universal Declaration of Human Rights. It imposes upon the ratifying parties the obligation to heed these rights in their domestic law.[1]

It may be imprudent to be too optimistic about the effects of requirements like the latter. At least one writer appears to doubt that there is much contemporary recognition of individual rights. Dworkin, in defending a liberal theory of law[2] reaffirms a belief in the "old idea of individual human rights."[3] He distinguishes this theory from what he calls the "ruling theory" which consists in a belief of the formalism of legal positivism and economic utilitarianism, both parts derivative of Benthamite philosophy. Current objections to the theory, emanating from both the political left and right, fail to argue that the ruling theory is defective in that it does not recognise that individuals have rights against the state prior to any created by statute.[4] In other words, not one of the three prevailing theories concerns itself with fundamental individual human rights.

Despite any controversy surrounding the credibility of natural law and human rights theories, it seems that to ignore them would be pretentious.[5] Their relevance to individuals is obvious: it is the individuals themselves who are the subjects of the rights. Thus laymen ought to appreciate, for their own benefit, the indispensability of these fundamental safeguards and participate in attempts to achieve their greater recognition.[6] In this respect, human rights seem to be an essential concern of the broader preventive legal education envisaged here.

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1 Jacobs op cit 10. Some salient articles of the Convention : "Everyone's right to life shall be protected by law" (article 2); "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal establishewd by law" (article 6, section 1). See Robertson Human Rights in Europe op cit 294-296.

2 R Dworkin Taking Rights Seriously (1977) vi.

3 Ibid.

4 Dworkin op cit x - xi.

5 One may consider the contemporary human rights policies of President Carter of the United States of America. The former British Secretary of State for Foreign and Commonswealth Affairs, Dr David Owen was an advocate of human rights. See D Owen Human Rights (1978).

6 Against other individuals or groups and abusive government power.

5. The rule of law[1]

The rule of law has been described as "rather an unruly horse".[2] The doctrine, it has been said, is not of much assistance since if it is only "a synonym for law and order, it is characteristic of all civilized states".[3] Otherwise "It is apt to express the political views of the theorist and not the analysis of the practice of government".[4] Other writers are more flattering of Dicey's propositions[5] but few critics have failed to indulge in substantial pruning and reshaping.[6] The result is that while part of Dicey's analysis has been discredited[7] the rest has survived with respectful recognition.[8]

Dicey's three oft-quoted propositions relate to the absence of arbitrary power on the part of the government;[9] the assertion that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals";[10] and to certain basic freedoms of person.[11]

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1 The rule of law is considered again, in a different context, supra 95.

2 W I Jennings The Law and the Constitution 5 ed (1964) 60. Cf J D van der Vyver Seven Lectures on Human Rights (1976) 105: "The truth is ... that the rule of law resembles a chameleon ... the idea takes on different shades of meaning to satisfy the subjective prejudices of its interpreters."

3 Jennings op cit 60.

4 Ibid.

5 Eg R F V Heuston Essays in Constitutional Law 2 ed (1964) 32 f.

6 Eg A S Mathews Law Order and Liberty in South Africa (1971) 3-32.

7 Eg "Dicey's assertion that the Rule of Law precludes anything corresponding to the administrative law ... of France." Heuston op cit 47. Cf F H Lawson and D J Bentley Constitutional and Administrative Law (1961) 75: "administrative authorities now have very wide powers to take property compulsorily ..."

8 Much of the criticism of Dicey's work has been brought on by his personal association with a particular view-point which apparently tainted, but not irretrievably, his juridical propositions. Mathews argues that under these political colourings there lies a "true juridical concept". Mathews op cit 18.

9 A V Dicey Introduction to the Study of the Law of the Constitution 9 ed (1945) 188.

10 Dicey op cit 193.

11 Dicey op cit 195.

The idea of equality is at the basis of the second proposition. It means that "nobody may on account of official position, status and the like, escape responsibility for violation of the basic freedoms of the individual."[1] But a "treat equals equally" principle appears to express no more than a formal theory of justice[2] and difficulties arise when attempts are made to provide content to the formula.[3]

By the third proposition, Dicey apparently meant that

> "individual rights are more secure if they are woven into the fabric of the common law and protected by effective common-law remedies".[4]

The weakness of this allegation lies in the impossibility of reconciling the idea with parliamentary sovereignty[5] and the absence of fundamental guarantees in many systems of common law.[6] For these reasons, the proposition ought not to be regarded as a unversal principle of the rule of law.[7]

Mathews, however, argues that despite the dangers of indentifying fundamental personal liberties with the rule of law (it would add a political bias to a juridical concept) there is nevertheless a sound reason for doing so.[8] This lies in "the necessary relation between law and reason".[9] The consequence of this is to indicate that

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1 Mathews op cit 23.

2 Bowie and Simon op cit 98.

3 Ibid. It is not clear whether Dicey meant to include a universal substantive formula, in which case his proposition would run into difficulty. See Heuston op cit 46 and Hart op cit 155 : "[The idea] 'treat like cases alike and different cases differently' ... until supplemented, cannot afford any determinate guide to conduct ... To fill it we must know when ... cases are to be regarded as alike and what differences are relevant."

4 Mathews op cit 24.

5 Ibid.

6 Mathews op cit 25.

7 Ibid. Contra Heuston op cit 49 : "This particular aspect of the Rule of Law has been accepted by everyone without question."

8 Mathews op cit 19-22.

9 Mathews op cit 20.

> "the interest in preserving the fundamental freedoms is a legal as well as a political interest. The liberties of person, speech and association make up that climate of intellectual freedom in which the rational enactment and administration of the decrees of a governing authority are alone possible."[1]

Some modern viewpoints are to the effect that the rule of law ought to and can be associated directly with fundamental liberties.[2] Whether or not it is advisable to do this, it is clear that (like human rights theories) the rule of law is an important and relevant modern-day concept. As such, and because it is concerned with some individual rights and the respectability of government action it is also an issue with which the lay public ought to be more directly concerned. There can be little doubt about the importance of public vigilance towards the protection of individual rights and due process procedures whether threatened by government, its subsidiaries or any other force with legal power.[3] If nothing else, people ought to understand fully the importance of "the right to a 'meaningful day in court'".[4]

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1 Mathews op cit 22.

2 See eg the work of the International Commission of Jurists who have expanded the concept enormously. An appraisal of their contribution appears in Mathews op cit 27-30. But they may have over-zealously stated the possibilities of a juridical concept, thus weaving into it a distinct political bias. Ibid. But the indentification of the rule of law with human rights, although possibly not sound, is nevertheless real. For example, the term "Rule of Law" is enshrined in the preamble of the Universal Declaration of Human Rights. See van der Vyver op cit 112.

3 See eg H W Jones "The Rule of Law and the Welfare State" in ed J W O Douglas Essays on Jurisprudence from the Columbia Law Review (1964) 402.

4 Ibid.

B. IMPLICATIONS OF PREVENTIVE LAW

Mention has already been made of the broader function of preventive law, as distinct from its narrow sense.[1] In its restricted definition, preventive law is concerned with the legal education of laymen to enable them to respond more successfully to the legal possibilities and demands placed upon them by the legal system. In this chapter it is proposed to examine briefly the implications of the effect of this narrow function.

It seems that a greater popular understanding of the contents of relevant laws will invariably lead to an appreciation of the impact of those laws.[2] This would be an unavoidable consequence of the process of legal education. By means of achieving a greater understanding of specific legal rules, the public would begin to appreciate the effect those rules have on society.

Accepting that laymen ought to be more critical of the legal system which orders their lives and more demonstrative about the type of legal order they would like to create, it seems that preventive law might provide the impetus for this. Education would provide an appreciation of legal impact and (if the laws are unacceptable[3] or reprehensible) greater popular disapproval. Society, or sections of it, would be stimulated to respond with favour or disfavour to the legal arrangements as a whole. This could realistically lead to pressure for changes of those unacceptable legal arrangements. Thus, preventive law provides a "grass-roots" possibility for legal reform.

This process by which people become more aware of the law by which society is ordered would, it is submitted, necessarily follow from a thorough programme of preventive law. A more critical programme could precipitate the process of having people appreciate legal impact by encouraging an examination of not only actual legal content, but credibility and social desirability of various laws.

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1 Supra 29.

2 This is not to be confused with the idea of a broader legal consciousness. See supra 148.

3 A separate chapter considers some aspects of laws and legal institutions which might elicit popular disapproval. See supra 86.

There are at least three separate "categories" of laws which are the focus of reformists and which could receive greater popular attention and disapproval. These are laws which discriminate against people on the basis of economic standing, race and sex.[1]

By way of illustration, the position of women in the legal structure will be briefly considered. Law, by being discriminatory, may also be counter-reformist : "an instrument of oppression or reform".[2] At the beginning of the century, the legal processes were "ruthlessly employed" against the Suffragette Movement which was concerned with the fundamental issue of women's franchise.[3] But having eventually won their struggle the way was clear for woman to pursue other legal reforms.[4] To the present day, the international concern with the rights of women[5] and the women's liberation movement is part of a continuum which had its origins between the world wars with the franchise issue.[6] It seems arguable that a prevalent characteristic of the entire thrust of women's emancipation is women's consciousness of the impact (through knowledge) of discriminatory laws.

If being conscious of the impact or effect of certain laws on society provides a key to legal reform, one should not be unaware of the difficulty, under certain circumstances, with this approach. As mentioned above, law might actively oppose forces in pursuit of legal change. For example, one may consider the present plight of Black people in South Africa who - like the Suffragettes without the vote - face enormous obstacles in the path of greater legal expression.[7] Despite impetus for change being provided by popular understanding and condemnation of the laws and their impact, such impetus does not necessarily provide sufficient pressure for constitutional change.

Nevertheless, if more people became more conscious of the effects of discriminatory and oppressive laws (racist or otherwise) through understanding the impact of those laws, it seems that wide popular disapproval and ultimately, militancy, could not be ignored indefinitely.

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1 See supra 90.

2 M Rendel "Law as an Instrument of Oppression or Reform" in ed P Carlen The Sociology of Law (1976) 143-169.

3 Rendel op cit 143.

4 Ibid.

5 Cf van der Vyver op cit 21-27.

6 Van der Vyver op cit 26.

CHAPTER ELEVEN

CONCLUSIONS

Possible conclusions to the aforegoing chapters may be detailed as follows:

1. The conventional methods of promulgation and communication of laws are inadequate in making people aware of the meaning and impact of laws.

2. Research has shown that public knowledge of law and legal services is generally poor.

3. The Durban survey shows that the extent of public knowledge of law in South Africa is linked to race, occupation and general level of education and that public legal knowledge is generally poor.

4. Preventive law seeks to overcome public legal ignorance by
   (a) preventive legal advice;
   (b) preventive legal education.

5. In its narrow sense, preventive law contains the idea that unnecessary disputes can be avoided with sufficient legal knowledge.

6. Preventive law is also concerned with the improvement of the position of the individual in society by making him a more active participant in the legal processes.

7. Preventive law could fulfil the function of making the law less complex and more comprehensible for laymen.

8. Preventive law would present a challenge to some aspects of the existing legal order which are seen to be contrary to the good of society.

9. Theories such as human rights and the rule of law contain the need for public legal education.

10. Preventive law would fit best into a welfare system since preventive law fulfils needs similar to those contained in the aims of a Welfare State.

11. In its practical implementation, preventive legal education could be divided into schemes catering for
(a) school education; and
(b) adult education
and would best be free of government influence.

12. The provision of preventive legal advisory services (such as those in the United Kingdom) is an immediate necessity in South Africa since these would fulfil an important preventive legal role; it would be feasible to establish a statutory "green form" type scheme and to stimulate the establishment of citizens' advice bureaux.

13. Notwithstanding the unsuitability of the present South African socio-economic order for the implementation of thorough preventive law programmes, there is much scope for private initiative of preventive law programmes.

14. Preventive law is relevant to the criminal law
(1) where certain procedural rights such as bail, representation and trial procedures are concerned,
(2) where certain offences are concerned.

15. The need for a broader public legal consciousness to encourage appreciation for such issues as justice and the rule of law could be fulfilled by a preventive legal structure.

16. Preventive law would contain a social function by providing the impetus for legal reform as a result of lay persons becoming more appreciative of the social impact of certain laws.

BIBLIOGRAPHY

Abel-Smith B Zander M and Brooke R Legal Problems and the Citizen (1973)

Abel-Smith B and Stevens R In Search of Justice (1968)

Allen C K Law in the Making 7 ed (1964)

Allen C K Legal Duties (1931)

Aubert V "Some Social Functions of Legislation" in ed V Aubert Sociology of Law (1969)

Auerbach J S Unequal Justice (1976)

Austin J Lectures on Jurisprudence 4 ed (1897)

Baker J The Neighbourhood Advice Centre (1978)

Borrie A and Diamond A L The Consumer Society and the Law 3 ed (1974)

Barry D B Butler W E and Ginsburgs G Contemporary Soviet Law (1974)

Basson S K "Legal Aid and the State" in (1977) 2 Natal University L R

Bentham J Of Laws in General, Principles of Legislation ed H L A Hart (1970)

Bentham J Principles of Morals and Legislation (1823)

Bentham J Theory of Legislation (1900)

Berman H J "The Education Role of Soviet Criminal and Civil Procedure" in eds D D Barry W E Butler and G Ginsburgs Contemporary Soviet Law (1974)

Blackstone W Commentaries on the Laws of England Vol 1 (1825)

Bowie N E and Simon R L The Individual and the Political Order (1977)

Bradshaw J "The Concept of Social Need" in eds M Fitzgerald P Halmos J Muncie and D Zeldon Welfare in Action (1977)

Brown B A Freedman A E Katz H N and Price A M Women's Rights and the Law (1977)

Brownlie I Basic Documents on Human Rights (1971)

Burchell E M and Hunt P M A South African Criminal Law and Procedure Vol 1 (1970)

Cahn E S and Cahn J C "Power to the People or the Profession? - the Public Interest in Public Interest Law" (1970) 79 Yale L J

Cappeletti M Gordley J and Johnson E Toward Equal Justice : A Comparative Study of Legal Aid in Modern Societies (1975)

Chaldize V To Defend These Rights (1975)

Chambliss W J and Seidman R B Law Order and Power (1971)

Chaskalson A "The Legal Resources Centre : Why It Was Established and What It Hopes to Achieve" (1980) De Rebus

Cloke K "The Economic Basis of Law and State" in ed R Lefcourt Law Against the People (1971)

Cooper W E The South African Law of Landlord and Tenant (1973)

Corder H "The Right of Africans to Remain in Urban Areas" (1977) Responsa Meridiana

David R and Brierly J E C Major Legal Systems in the World Today 2 ed (1978)

d'Entreves A P Natural Law (1967)

De Wet J C and Swanepoel H L Die Suid-Afrikaanse Strafreg 3 ed (1975)

Del Vecchio G Justice (1952)

Diamond A S Primitive Law Past and Present (1971)

Dias R W M Jurisprudence 4 ed (1976)

Dicey A V Introduction to the Study of the Law of the Constitution 10 ed (1959)

Diemont M A Marais R M and Aronstam P J The Law of Hire and Purchase in South Africa 4 ed (1978)

Dobson A P "Law Should be Taught in School" (1977) 127 New L J

Donagher A M "The University of Rhodesia Legal Aid Clinic : An Example for South Africa Universities in the Field of Legal Training?" (1978) 3 Responsa Meridiana

Drewry G Law Justice and Politics (1975)

Dugard J "Centre for Applied Legal Studies" (1979) 96 South African Law Journal

Dugard J Human Rights and the South African Legal Order (1978)

Dworkin R Taking Rights Seriously (1977)

Eggleston E Fear Favour or Affection (1976)

Ellum P Legal Aid Developments in South Africa (1975)

Feagin J R Subordinating the Poor (1975)

Finman T "OEO Legal Service Programs and the Pursuit of Social Change" (1972) 4 Wisconsin L R

Fitzgerald P J "Law at School - A Canadian Viewpoint" (1978) 128 New Law Journal

Frank J Law and Modern Mind (1970)

Freeman M D A The Legal Structure (1974)

Friedland M L Access to the Law (1975)

Friedman L M Law and Society (1977)

Friedmann W Law in a Changing Society 2 ed (1972)

Friedmann W Legal Theory 5 ed (1967)

Fuller L L Anatomy of the Law (1971)

Fuller L L The Morality of Law (1969)

Furniss N and Tilton T The Case for the Welfare State (1977)

Gibson J T R South African Mercantile and Company Law 3 ed (1975)

Gibson W M "Law Students : A Valued Resource for Law Related Education Programs" (1973) 25 Journal of Legal Education

Gifford D J "Communication of Legal Standards Policy Development and Effective Conduct Regulation" (1971) 56 Cornell L R

Gray J C The Nature and Sources of Law 2 ed (1972)

Hahlo H R and Kahn E The South African Legal System and its Background (1973

Hart H L A The Concept of Law (1961)

Heuston R J V Essays in Constitutional Law 2 ed (1964)

Hodgson J ed "Royal Commission on Legal Services : Principal Recommendations" (1979) 129 New L J

Horrell M Laws Affecting Race Relations in South Africa (1978)

Hosten W J Edwards A B Nathan C and Bosman F Introduction to South African Law and Legal Theory (1977)

Hurst J W Law and Social Order in the United States (1977)

International Commission of Jurists The Rule of Law in a Free Society (1959)

Jackson R M The Machinery of Justice in England 6 ed (1972)

Jacobs F G The European Convention on Human Rights (1975)

James H Crisis in the Courts (1974)

Jennings W I The Law and the Constitution 5 ed (1964)

Jolowicz H T and Nicholas B Historical Introduction to the Study of Roman Law 3 ed (1972)

Jones H W "The Rule of Law and the Welfare State" in ed J W O Douglas Essays on Jurisprudence from the Columbia L R (1964)

Justice (British Section of the International Commission of Jurists) Lawyers and the Legal System (1977)

Justice, Department of Annual Report for Calendar Year 1978

Kerr A J The Principles of the Law of Contract 2 ed (1975)

Krech D Crutchfield R S and Livson N Elements of Psychology 3 ed (1974)

Kutchinsky B "'The Legal Consciousness' : A Survey of Research on Knowledge and Opinion About Law" in ed A Podgorecki Knowledge and Opinion About Law (1973)

Kutchinsky B "Law and Education : Some Aspects of Scandinavian Studies into 'The General Sense of Justice'" (1966) 10 Acta Sociologica

Law Society Legal Advice and Assistance (1968)

Lawson F H and Bentley D J Constitutional and Administrative Law (1961)

Lefcourt R "Law Against the People" in ed R Lefcourt Law Against the People (1971)

Lester A and Bindman G Race and Law (1972)

Lindgren K E "Legal Studies in Australian Secondary Schools - An Account and Some Issues" (1980) 54 Australian L J

Llewellyn K N Bramble Bush (1973)

Lord Chancellor's Office and The Law Society Legal Aid Hardbook 1976 4 ed (1976)

Loubser M "Ignorance of the Law can be an Excuse" (1977) 1 South African Journal of Criminal Law and Criminology

Macintosh J C and Norman-Scoble C Negligence in Delict 5 ed (1970)

Marlow A H Motivation and Personality (1954)

Marshall T H "The Right to Welfare" in eds N Timms and D Watson Talking About Welfare (1976)

Mathews A S Law Order and Liberty in South Africa (1971)

Matthews E J T and Oulton A D M Legal Aid and Advice Second (Cumulative) Supplement (1978)

Maxwell R C Henning J F and White C J "Law Studies in the Schools" (1975) 27 Journal of Legal Education

McKerron R G The Law of Delict 7 ed (1971)

McQuoid-Mason D J "Putting the 'Con' in Consumer Protection : the Credits Agreement Bill and the Consumer" (1978) 2 Natal University L R

Mellinkoff D The Language of the Law 2 ed (1970)

Morris P "A Sociological Approach to Research in Legal Services" in eds P Morris R White and P Lewis Social Needs and Legal Action (1973)

Moskowitz M The Politics and Dynamics of Human Rights (1968)

Murray P "The Rights of Women" in ed N Dorsen The Rights of Americans (1971)

Nagle S S Improving the Legal Process (1968)

National Association of Citizens' Advice Bureaux Evidence to the Royal Commission on Legal Services (1977)

National Register of Natural and Social Scientists Communication Number 13 October 1978

Nelson C M A Handbook of Community Medicine (1975)

Newman G The Rise of Preventive Medicine (1932)

Owen D Human Rights (1978)

Platt D A Study of Bail in the Durban Magistrate's Remand Court (1977)

Podgorecki A Law and Society (1974)

Pollack S Legal Aid (1975)

Pound R An Introduction to the Philosophy of Law (1975)

Pound R Social Control Through Law (1968)

Prichard A M Leage's Roman Private Law 3 ed (1961)

Pritt D N Law Class and Society, Book 4 : The Substance of the Law (1972)

Pye A K "The Lawyer's Role in the Twentieth Century - A Reassessment" in University of Natal Legal Aid in South Africa (1973)

Rawls J A Theory of Justice (1973)

Rendel M "Law as an Instrument of Oppression or Reform" in ed P Carlen The Sociology of Law (1976)

Rescher N Welfare (1972)

Robertson A H Human Rights in the World (1972)

Robertson A H Human Rights in Europe 2 ed (1977)

Robertson M K "Preventive Legal Education" (1978) 2 Natal University Law Review

Rockwell D N "The Education of the Capitalist Lawyer : The Law School" in ed R Lefcourt Law Against the People (1971)

Roelofse E Sorry I Upset You (1975)

Rothschild D P and Carroll D W Consumer Protection (1973)

Salmond J Jurisprudence 12 ed (1966)

Saville J "The Welfare State : an Historical Approach" in eds M Fitzgerald P Halmos J Muncie and D Zeldon Welfare in Action (1977)

Schuyt K "Dilemmas in the Delivery of Legal Services" in ed E Blankenberg Innovations in the Legal Services (1980)

Smith C and Hoath D C Law and the Underprivileged (1975)

Stammler R The Theory of Justice (1969)

Strick A Injustice For All (1977)

Szabo I Cultural Rights (1974)

Tay A E "Law, The Citizen and the State" in ed E Kamenka Law and Society (1977)

The Shorter Oxford English Dictionary Vol 1 3 ed (1973)

University of Natal, Faculty of Law Legal Aid in South Africa (1974)

Van Rooyen J H "Some Doubts Regarding Aspects of the 1973 Criminal Procedure Bill" (1976) 101 De Rebus Procuratoriis

Van Warmelo P An Introduction to the Principles of Roman Civil Law (1976)

Van der Vyver J D "The Concept of Human Rights : Its History Content and Meaning" in eds C J Forsyth and J E Schiller Human Rights : the Cape Town Conference (1979)

Van der Vyver J D Seven Lectures on Human Rights (1976)

Victory A et al "Getting off the Railroad : Trying to Vindicate your Rights in the Criminal Justice System" (1976) and (1977) 9 Columbia Human Rights L R

Villiers S P "Crime in the Coloured Community" in J Midgely J H Steyn and R Graser Crime and Punishment in South Africa (1975)

Walker N and Argyl M "Does the Law Affect Moral Judgements?" (1964) 4 British Journal of Criminology

Wasserstein B and Green M J With Justice for Some (1970)

Weeramentry C G The Law in Crisis (1975)

Whiting R C "Changing the Face of Mens Rea" (1978) 95 South African Law Journal

Wilensky H L and Lebeaux C N "Conceptions of Social Welfare" in ed P E Weinberger Perspectives on Social Welfare (1969)

Wrexler S "Practising Law for Poor People" (1970) 79 Yale L J

Zander M "Legal Aid in a Democratic Society" in University of Natal Legal Aid in South Africa (1974)

Zander M Cases and Materials on the English Legal System 2 ed (1976)

Zander M Legal Services for the Community (1978)

Zander M Social Workers, their Clients and the Law 2 ed (1976)

Zander M What's Wrong with the Law? (1970)

Zemans F H Perspectives on Legal Aid (1979)