

MEH91-37-1-20

◆ KEYNOTE ADDRESSES

## 2. Keynote Address

### *The Need to Restructure the South African Legal System: Para-legals and Access to Justice*

**P**lease allow me, first and foremost, to express my own personal gratitude, as well as that of my organisation, the African National Congress, for having been invited to participate in the deliberations of this extremely important meeting. The issue of justice is at the very heart of the struggle the ANC and the masses of our people are waging against the apartheid monster, and being associated with this great meeting is therefore a great honour for us.

#### **Legacy of injustice**

One of the legacies the new post-apartheid society will inherit from the apartheid regime is the inaccessibility of justice to the masses of our people. Like in all capitalist countries, justice in South Africa, even without apartheid, is justice for the chosen few, the rich; the state has never deemed it necessary to invest in making it accessible to the poor and indigent, namely the disenfranchised blacks, who are the ones who fall foul of the laws in the making of which they play no role whatsoever.

Needless to say, the whole legal system and jurisprudence, which developed under centuries of colonialism and decades of apartheid as a special brand of colonialism, and which continues to perpetuate the colonial status of the black majority and gross imbalances in the distribution of wealth and land, has to be totally overhauled. It will have to be replaced with a new legal system that will be reflective of the political, social and economic changes that our people shall have brought about through struggle and great sacrifices.

The whole approach to law and human rights will have to be fundamentally transformed; it will not be enough for us to remove only the vestiges of the apartheid system from the statute book.



*Penuell Maduna*  
**Member of the  
Secretariat of the ANC  
Department of Legal  
and Constitutional  
Affairs**



The so-called Roman-Dutch legal system too, which was imposed by the colonizer to enforce their ideas of peace and order, taxation, and the maintenance of commerce and industry at the expense of the indigenous and other colonized peoples, will have to be looked into with a view to developing a new legal system. The new legal system will have to borrow that which is good from the indigenous traditions, customs and modes of conflict resolution, in order for it to be truly South African. It will also have to benefit from the accumulated experiences of other countries, particularly in the area of human rights.

### **The perspective of the ANC**

The masses of our people have very little faith in the current legal system. This distrust emanates from the fact that the legal system has hitherto been utilised by various racist regimes to deprive them and deny them basic human rights and freedoms and not to defend

them; it has always impacted upon them as the law of the usurper. Under it they are dispossessed of the land by legal title, thrown into jail by forces accountable only to the white minority regime and its nefarious bantustan creations, and fleeced by lawyers who help only those who can afford to pay for their services. The law is almost totally alien to them.

The ANC believes in a perspective of law that will give and promote human rights and basic freedoms and not curtail or deny them. We seek to create, as a culmination of our long and arduous struggle, a law-governed society predicated upon a popular and legitimate constitutional order with a constitutionally entrenched and justiciable Bill of Rights. We want to save law from the ravages of apartheid and use it to promote and uphold the will and the best interests of the democratic non-racial majority of our people.

For us, law should be at the service of social justice; it should be directed towards the elimination of existing conditions of poverty, squalor, homelessness, disease and ignorance which afflict the majority of our people, whilst the few wallow in ill-gotten wealth and opulence. For us, the so-called 'common good' or 'public interest' or 'national interest' would have meaning only when its net effect ceases being the perpetuation of a situation of mass poverty and inequality in our society.

For this purpose, we fully subscribe to the notion of a truly independent, non-racial and non-sexist human rights-orientated judiciary that should be armed with judicial review so that it can

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be a means of defending our hard-won human rights and freedoms. However, we also believe in the capacity of all our people, particularly the down-trodden masses, to participate in the administration of justice. We believe it would be grossly erroneous to allow the current set-up, where the administration of justice is the monopoly and preserve of a few, white, robed gentlemen, who have absolutely no responsibility towards the larger component of our society, comprising the disenfranchised black masses, to continue.

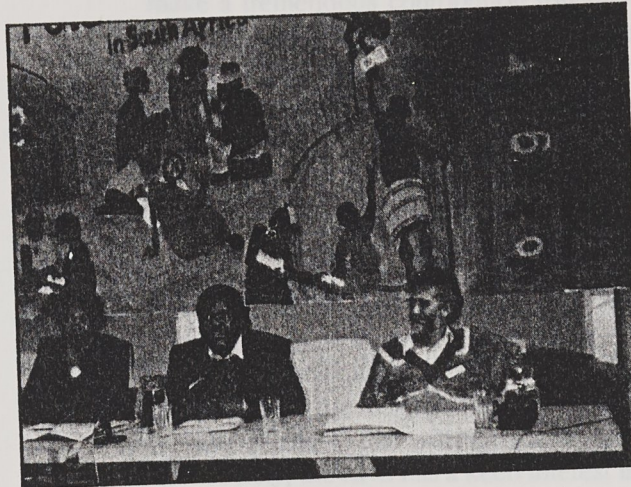
Neither can we allow the fate of our people in the human rights arena of struggle to depend entirely on the services of professional lawyers. In our country, like in any other capitalist country, as we have noted above, the cost of legal services imposes a great restraint on the poor. Furthermore, the demographic distribution, recruitment and training of lawyers generally puts them at a great distance, geographically and socially, from the wretched of our land. The lawyers also deal with problems of individuals and the relationship between them and their clients is usually on an individual basis, so that once a particular case is finished, the relationship is terminated as 'justice' has been done, whatever the outcome.

In the final analysis, the best defence for human rights and basic freedoms will be the masses of our people, who shall have won them through struggle and huge sacrifices. The masses can do this, however, only when they are organised and properly equipped with the necessary knowledge and information, in other words, when law shall have ceased being a mystery which only lawyers and judges can unravel.

This brings me to the concept of para-legals.

### **Para-legals**

In the process of our struggle for the transformation of our society, a new phenomenon, para-legals, has emerged and mushroomed. These para-legals are community workers armed with basic skills in law, who are accountable to the masses of our people. Functioning under the auspices of numerous human rights and legal resource groups, these para-legals have played a crucial role in defence of our people against severe



*Penuell Maduna (centre) addresses conference delegates. With Penuell are Nomatyala Hangana, para-legal worker, and Wilfried Schärf, Director of the Institute of Criminology.*

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repression and the tyranny of apartheid.

Within the political space that we have won through struggle, they will play an even more important role as we embark upon mass political education programmes that will, among other things, help generate the necessary human rights culture which is generally lacking in our society. By virtue of their work within, and their proximity to, their communities, they, more than the lawyers in private practice, who mostly find it convenient to maintain and in effect increase the social distance between themselves and their impoverished clientele, will play this important role. They will make a tremendous contribution towards the upholding of the envisaged Bill of Rights; they will help the people understand and protect their rights, freedoms and interests and make justice accessible to the ordinary, indigent people who will be emerging from the morass and decay of the system of apartheid. In short, para-legals will be part and parcel of the building material that we will use to construct the new society and develop a new legal system.

We need to consider what is to be done to develop self-confident para-legals, especially as the dire consequences of crisis-ridden apartheid education will be living with us in the foreseeable future. In the light of the mammoth tasks that we all will have to tackle and the problems that will surely confront the new state and the new society, the ANC has a keen interest in this and believes that we have to invest hugely in programmes geared towards this. We can report that, shortly before the ANC was unbanned, we had numerous discussions and exchanged correspondence with foreign funding organisations to assist us in this regard.

We believe that the training of para-legals should involve the affected communities, the liberation movement, non-governmental organisations, practising lawyers, the universities and all other interested persons and institutions. Training programmes should be based on information and research on the problems and needs of affected communities. Many different levels of general legal

training suited to the needs of different trainee para-legals and which take full account of the needs and peculiar problems facing particular communities, should be developed. In-house and on-the-job training programmes could also be embarked upon.

**The existence of para-legals, human rights and legal advice groups and centres should not exonerate the new state from its responsibility to provide legal aid to those who need it.**

#### **The state and legal aid**

The existence of para-legals, human rights and legal advice groups and centres should not, however, exonerate the new state from its responsibil-



ity to provide legal aid to those who need it. The state will have the responsibility to ensure the promotion and upholding of human rights and basic freedoms on the basis of true equality before the law. It will have to develop suitable legal aid schemes to ensure that opportunities for securing justice are not denied any citizen by reason of poverty or any other social disability.

We have to consider whether or not it would be appropriate for the future state to make legal aid a constitutional right. India did this in 1976 by means of a Constitutional Amendment. This may entail the setting up of legal aid centres all over the country and the creation of a legal aid fund with allocations drawn from the national budget.

Again in this regard, para-legals and our communities should play an important role to ensure, among other things, the proper administration of the system of legal aid, and the equitable distribution and appropriate use of resources. We cannot leave such matters in the hands of bureaucracy and lawyers. Our approach is that legal activities are not the exclusive domain of lawyers and judges, but are of even keener interest to the masses of our people who are directly affected by policies and legislation.

Our concept of legal aid should also differ from the traditional approach which focuses exclusively on court-related solutions to problems and places more reliance on the lawyer who is supposed to know best and have all the answers. Those of us who pursue the modern approach to legal aid are not content with strictly applying the law as it is; we believe the people have all the right as well as a duty to question it especially when it violates or threatens some basic human right or freedom. In other words, we are not content with only finding a remedy but also a solution that will guarantee that the people are not going to be continually subjected to the same violations.

### People's courts

Our struggle has also produced popular mass-based organs of the administration of justice, known as people's courts. Unfortunately, however, when these organs emerged, they were shrouded with



*The first day of the conference was attended by 250 delegates from all over the country.*



the dust of the turmoil arising out of the conflict between our people and the apartheid state in the mid-eighties. In the minds of many people who could not fathom the depth of popular feeling against apartheid justice and the administration thereof, they tended to be associated with crime and were regarded disdainfully.

In the future constitutional order, we will have to find an appropriate place and role for these structures. With the participation of para-legals, these organs could develop into a means to ensure quick, inexpensive and impartial dispensation of justice in an atmosphere of mutual trust and goodwill. They could help the state and society in finding ways and means of evolving new alternate popular dispute resolution methods and forums, and restore our people's confidence in their ability to resolve and settle problems through negotiation and not only through litigation. We need to consider whether it would not be socially beneficial if the new state accords judicial sanction to settlements and agreements reached through people's courts to ensure legal enforceability.

### **Public interest litigation**

South Africa has hitherto not evolved a system of public interest litigation which would easily allow public-spirited persons and institutions to take up protecting the rights and freedoms of the poor and ignorant. Our archaic approach to the doctrine of *locus standi* is, in my opinion, one of the factors that militate against the development of such a system. (Your *locus standi* is your right to bring a case to court.)

We should make it possible for all our people to approach the court and file petitions on behalf of the poor, indigent and weak members of our society, without the need to demonstrate a direct, personal material interest in the cases that are taken up. The only requirements should be that the legal rights of an individual are violated or are in jeopardy and that, by reason of poverty or some other disability, the individual adversely affected cannot personally approach the court for redress. This approach will enable our communities and para-legals to participate in the promotion and defence of human rights in our new society.

**The whole process of producing lawyers should be looked into so that we ensure that the end-product is a socially responsible and human rights-orientated lawyer.**

### **The legal profession**

The legal profession, as it stands today, may not be very helpful in the protection and promotion of human rights. Like in most countries, lawyers are organised into professional bodies on the pretext of self-regulation. Becoming a lawyer in our society is deliberately made very difficult, so much so that it is only very few people that qualify. This partly



accounts for the fact that out of over 7000 attorneys, only about 10% are black. The profession is dominated by a few white elites who mystify the law, monopolize information and knowledge thereof and arrogate to themselves representational and intermediary roles.

The poor, bereft of power and influence in the making, interpretation and administration of law, are completely shut out of this domain. They have nothing to do with the process of training new lawyers either. The profession is generally skewed in favour of the interests of the rich and affluent groups on whom the lawyer is dependent for survival.

The profession cannot be left intact if it is to play its rightful role in the future constitutional order. The whole process of producing lawyers should be looked into so that we ensure that the end-product is a socially responsible and human rights-orientated lawyer.

### **Conclusion**

While the changes that this short paper has alluded to can take place effectively in a post-apartheid society that we are struggling to create, the process of transformation should be ongoing; we cannot afford the luxury of waiting for the revolution. Whatever we can do within our known constraints to facilitate the process, ought to be done.

The ANC takes full account of the fact that, over the years numerous non-governmental advice centres and human rights groups have sprung up, and that tremendous work has been done by way of defending whatever might have been left of human rights and freedoms in this country. A good crop of public-spirited and human rights-oriented lawyers, jurists and academics already exists and has to be nurtured and encouraged to reproduce itself. The foundation has been laid and we all have to build on it.

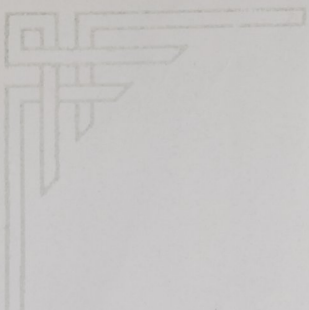
However, in order to ensure that this good work grows and that this crop of lawyers we are talking about develops and reproduces itself and becomes familiar with the hard facts of the daily lives and human rights struggles of the people and grassroots organisations, it will be necessary for us to foster linkages at community level. Grassroots organisations could help this process by, among other things, adopting a multi-disciplinary approach to the problems of the disadvantaged and inviting these lawyers to participate in their programmes. Together with such lawyers, we should develop strong people's organisations with a high degree of awareness of law and human rights, with the force of human rights as an internationally accepted yardstick always being our starting-point.



The future has a lot of good in store for our country, but we need to work even harder to reach the world beyond apartheid. We need to go all out to educate and agitate over the issue of human rights and freedoms among our people. We need to mobilise all available human and material resources to produce the requisite human rights culture and orientation amongst all our people, black and white, so that the outcome of our struggle should be a truly democratic, united and non-racial society where humanity, and not super-profits, will be at the centre of our national endeavours.

Thank you.





PROGRAMME

CHOIR

OPENING ADDRESS

PENUEL MADUNA

*ANC Department of Legal &  
Constitutional Affairs*

ADDRESS DIRECTOR PLTP

ROB WATSON

*Director PLTP*

SPEECH

Participant

CHOIR

KEY NOTE SPEAKER

Prof. ALBIE SACHS

ADDRESS &  
PRESENTATION OF CERTIFICATES

Adv. JULES BROWDE

*Chairperson LIIR*

CLOSURE

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THANK YOU FOR ATTENDING

