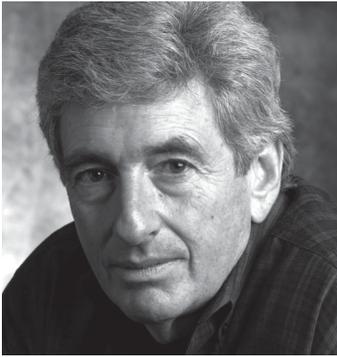


# RESEARCHING LAW

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John Comaroff

## TAKING BACK THE STREETS

*Popular Justice and Counter-Violence in the New South Africa*

**“F**or all the hope stirred by the end of apartheid, the transition to democracy in South Africa, beginning in 1994, opened up a social and moral vacuum—not to mention a huge wealth-gap—in which violence and disorder, real and imagined, became commonplace,” **ABF Senior Research Fellow John Comaroff and his collaborator, Jean Comaroff**, observe. By the late 1990s, the police service, widely perceived as incompetent, was overwhelmed by rising rates of murder, rape, robbery, and car-jacking. In the face of this apparent inability of the government to insure their protection, citizens from all sectors of South African society concluded that alternative methods of law enforcement were the only solution. Community justice and its corollary, counter-violence, were seen as the only way to “take back the streets.” Drawing on extensive fieldwork, John Comaroff and Jean Comaroff are investigating the emergence and consequences of the escalation of popular justice initiatives in South Africa. In one report on this unprecedented research project, they analyze the diverse expressions of alternative policing and the conditions that foster this phenomenon.

“The appeal of ‘cultural’ policing and ‘community’ enforcement gave rise to a bewildering array of security, investigative, and quasi-judicial services offered by private companies, local associations, NGOs, religious fraternities, tribal authorities, and vigilante organizations—each with its own distinctive approach to crime,” the

authors report. The various modes of alternative policing were justified on pragmatic grounds, a rational response to a failure of governance. But on a deeper level, it also “reflected a subtle yet profound re-conception of the public sphere and the nature of the state.” At the heart of the new South Africa is a decentralized, neoliberal democracy that enshrines the private sector and the primacy of the market. In this context, there was a perception that law and order could not be guaranteed by the state and that civil society and a “habitable social world” could only be insured “by a mix of individual initiative, communal action, and economic forces.”

### **Community Policing Stillborn**

North American models of policing, which have been influential throughout the world, have evolved through three progressive phases, the authors point out. “The first stressed order, the second, law enforcement, and the third, service, as exemplified by community policing.” In South Africa the last phase came into play after the end of *apartheid* and was marked by a number of name changes, including redubbing the South Africa Police Force as the South African Police Services, or SAPS. Community policing in South Africa is built upon an uneven but nationwide network of community police forums (CPFs), whose members are expected to meet regularly with the police to discuss ways to combat crime and volunteer information that will lead to the apprehension of felons. At the Lomanyaneng

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## Inside

### A DISTINCTIVE NICHE

The Changing Nature of Public Interest Law Practice

CHANGES IN THE PRACTICE OF THE LEGAL PROFESSION



Laura Beth Nielsen

## A DISTINCTIVE NICHE

### *The Changing Nature of Public Interest Law Practice*

The successful role played by the NAACP Legal Defense Fund in *Brown v. Board of Education* was a pivotal landmark for U.S. public interest law as an instigator of social change. The work of civil rights lawyers inspired many others to use law as a means of achieving social justice. “As the 1960s drew to a close, public interest law organizations (PILOs) had become an established form of social movement organization with a distinctive role in the American legal system,” **ABF Research Fellow Laura Beth Nielsen and her collaborator, Catherine R. Albiston**, observe. Their prominence was highlighted in 1975 when Weisbrod, Handler, and Komesar conducted a comprehensive survey of 72 public interest law (PIL) firms then in existence. The Weisbrod study concluded that PIL firms had provided support for underrepresented interests but that they also faced barriers that could limit their success in the future.

The dearth of information about contemporary PILOs prompted Nielsen and Albiston to mount the first large-scale, empirical study of public interest law practice in nearly 30 years. As part of this inquiry, they charted the evolution of public interest law over the last three decades and found that there has been a fundamental shift in the very nature of PILOs. Originally, PILOs were law reform organizations pursuing litigation-oriented strategies to effect social change for disadvantaged groups. By 2004 a significant segment of the PILO industry was populated by organizations providing direct legal services to individual clients, and some PILOs have constituencies that are quite different from the traditional poverty and civil rights interests that were the mainstay of earlier efforts.

#### **An Institutionalized Mechanism**

Public interest law firms are one of several ways by which the legal profession provides representation

to those without access to legal services. Large law firms increasingly espouse their commitment to *pro bono* legal services, and the American Bar Association recently conducted an empirical study to document the degree to which lawyers in private practice provide legal services for free or at reduced fees. “While these efforts are significant, PILOs remain the primary institutionalized structure for serving the civil legal needs of those who cannot otherwise afford a lawyer,” the authors point out. In addition, PILOs are the major institutionalized mechanism providing support for experienced lawyers with expertise “in the particular legal areas most relevant to representing poor, disadvantaged, or underserved constituencies.”

Throughout much of its history, public interest practice has focused on serving poor clients, litigating civil rights issues, and representing interests largely ignored by the adversarial legal system, such as consumers or environmental groups. More recently, however, public interest lawyering has embraced “ideological causes divorced from issues of poverty, but not necessarily from issues of wealth distribution.” Some PILOs, such as the Pacific Legal Foundation and the Washington Legal Foundation, address market-based policies and support free enterprise. Others pursue conservative agendas that focus on individual rights, seeking to promote prayer and other forms of religious expression in schools. Although their study does not specifically examine the political ideology of PILOs, Nielsen and Albiston do explore topical diversity to see if public interest lawyering still focuses on the types of causes that were championed earlier or if new areas of practice are supplanting old ones.

The pioneering 1975 study of public interest law by Burton Weisbrod and his coauthors

identified and collected data on organizations that met its definition of a PIL firm. Since the Weisbrod study was not designed to identify all the PIL firms then in existence, it cannot serve as a baseline to measure growth in the field of public interest law. But it still provides an accurate representation of PIL firm characteristics in 1975 and provides a framework to illustrate how the field has changed over time. The authors' definition of a PILO is similar to that used by Weisbrod: "Organizations in the voluntary sector that employ at least one lawyer at least part time, and whose activities (1) seek to produce significant benefits for those who are external to the organization's participants, and (2) involve at least one adjudicatory strategy." As the definition makes clear, this is not a study of "cause lawyering" in general, the authors note, because a broader investigation of public interest practice would include pro bono work by lawyers in private practice as well as the activities of other entities. "Accordingly, we examine a more circumscribed subject: people who come together to form an organization dedicated to pursuits benefiting others and who utilize adjudicatory strategies to do so."

### Identifying and Surveying PILOs

To generate the random sample of PILOs, the authors compiled an exhaustive list of public interest organizations engaged in legal activity. They drew on several sources, including records of amicus briefs filed by public interest organizations before the Supreme Court, lists of providers of free legal services obtained from state bar associations and Internet web sites, and lists of organizations receiving funding from Interest on Lawyer Trust Accounts (IOLTAs), among others. By employing multiple strategies, the researchers were able to capture a diverse group of PILOs that includes both organizations seeking to influence policy by participating in high-profile litigation as well as other

entities that provide direct legal services. From a sampling frame of 4,588 organizations, a random sample of 1,200 organizations was drawn. This group was narrowed to include only those organizations that met the study's criteria, yielding a sample of 327 organizations. Each organization was contacted to identify the person who would be most appropriate to answer questions about structure and activities. "All respondents were lawyers, typically the managing partner, director, or head of legal services."

In 2004 a telephone survey was undertaken, and the questions addressed the organization's history and mission, budget and structure, goals and activities, and strategies for pursuing those goals. Prior to analysis of the responses, 57 organizations were excluded because the interviews revealed that they did not meet the study's criteria. Of the remaining 270 organizations, 221 completed the survey, yielding a very high response rate of 82 percent.

### Growth and Transformation

The 1975 study produced the following portrait of PILOs: (1) Most PIL firms use non-legal tools and engage in public interest non-law activity as well as PIL activity; (2) The average firm employs about seven lawyers and five other professionals; (3) About 43 percent of total income comes from foundation grants; (4) Sixty percent of the average firm's effort is devoted to legal work; (5) A typical firm concentrates over 70 percent of its effort in a single area and expects that its efforts will benefit either the general population or some specific subgroup. Since the Weisbrod study did not capture the universe of PILOs then existing, it is not possible to know precisely how much this sector of legal practice has grown, the authors point out. By projecting from their data, Nielsen and Albiston estimate that there were just over 1,000 PILOs in 2004. Although this is a significant

number, there were, by 2000, more than 47,000 law firms in the United States. So PIL firms constitute "only a tiny fraction of the legal profession as a whole."

As did that of other law practice organizations, the organizational structure of PILOs changed significantly over time. "PILOs are much larger now according to almost any

**More recently public interest lawyering has embraced ideological causes divorced from issues of poverty, but not necessarily from issues of wealth distribution**

measure: the number of attorneys employed, total staff, and operating budgets." This growth mirrors that of private firms. In 1980 there were 2,682 firms with more than ten lawyers; by 2000 there were 4,962. The proportion of PILOs that employ very few attorneys declined from 1975 to 2004. PILOs employed an average of seven attorneys in 1975 but that number almost doubled by 2004, rising to thirteen attorneys. In 1975 almost one-third of PILOs employed just one or two lawyers; in 2004 that number was under 20 percent.

The number of large PILOs grew over the time period. In 1975 only 5 percent of PILOs employed more than 20 lawyers; 23 percent of PILOs employed more than 20 lawyers in 2004. Some 9 percent of PILOs employed more than 40 lawyers in 2004, and the largest PILO in the study employed 110 attorneys. There was also dramatic growth in the number of non-lawyers employed by PILOs. In 1975 PILOs averaged five non-

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## A Distinctive Niche

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lawyer employees. By 2004 that number had increased to 40. While 22 percent of PILOs were staffed entirely by attorneys in 1975, not one PILO in the current study was staffed only by attorneys. Large PILOs also experienced significant change. In 1975 just 2 percent of PILOs employed more than 20 non-lawyers, but in 2004 36 percent employed more than 20 non-lawyers and 4 percent employed more than 150 non-lawyers.

The adoption of modern management techniques in the PILO sector was also evident. "Perhaps the most salient indication of this process is captured by the ratio of lawyers to non-lawyers," the authors note. In 1975 for each one

**PILOs are much larger now according to almost any measure: the number of attorneys employed, total staff, and operating budgets**

and a quarter lawyers employed at a PILO, there was one non-lawyer staff person employed. By 2004 there was a striking reversal in the ratio of lawyers to non-lawyers. In 2004, for each lawyer employed by a PILO, there was an average of more than six non-lawyers employed. "This ratio suggests that like their private sector counterparts, PILOs are more efficiently leveraging their lawyer professionals by allowing support staff to perform an increasing proportion of the functions of the firm."

Another measure of the growth of PILOs is the sharp increase in

their budgets. In 2004, nearly half (42 percent) of PILOs had annual operating budgets greater than \$1.4 million while in 1975 only 26 percent had budgets in this range (in constant dollars). The percentage of PILOs operating with budgets of \$3.5 million increased markedly, from 11 percent of all PILOs in 1975 to 29 percent in 2004. Yet there are still many PILOs operating on relatively small budgets, the authors report. In 1975 40 percent of PILOs had annual budgets of slightly more than half a million dollars; in 2004, 28 percent of PILOs had operating budgets of \$523,000 or less. Even in 2004, "many PILOs are still relatively small organizations and relatively resource-poor when compared to other practice settings."

### Shifting Focus

As in the earlier study, respondents were asked to indicate the percentage of the organization's effort that is spent on each of the following activities: legal (including litigation, negotiation, adjudication, and/or monitoring); legislative (including lobbying, testifying, drafting model legislation, and/or other advocacy work directed toward government organizations or officials); research, education, and outreach (including disseminating information, community education, publications, and/or community organizing); internal administration (including fundraising and other in-house activities). The analysis revealed that the mean amount of effort expended on these activities has not changed much over time. In 1975 the mean amount of effort that PILOs spent doing legal work was 60 percent, and in 2004 that number rose to 63 percent.

The means, however, mask some interesting variations, the authors point out. A much higher proportion of organizations report doing little or no legal work than was the case in 1975. Ten percent of PILOs in 2004 devoted less than one-fifth of their effort to legal activities, a

sharp contrast to 1975 when all the organizations in the study devoted at least one-fifth of their work to legal endeavors. At the other end of the spectrum, fewer organizations report devoting 100 percent of their effort to legal activities, decreasing from 3 percent in 1975 to 1 percent in 2004.

Another notable change is the amount of effort PILOs expend on research, education, and outreach, which received greater attention in 2004 than previously. The interesting variations are at the extremes. In 1975 a sizeable proportion, 22 percent, expended no effort on research, education, and outreach; by 2004 the percentage had dropped to 5 percent.

**The percentage of PILOs operating with budgets of \$3.5 million increased markedly, from 11 percent of all PILOs in 1975 to 29 percent in 2004**

Although PILOs continue to emphasize legal activities, almost all also now engage in research and education. The shift may reflect the need to engage in more fundraising. Yet PILOs now receive a larger share of their funding from government sources than they did in 1975, so the change more likely stems from a redefinition of their mission. "Our research suggests that PILOs have moved beyond litigation as the sole focus of social change."

### Tackling Multiple Issues

As in the 1975 study, the 2004 survey asked PILOs about the extent to which their efforts were devoted to specific topical areas: civil liberties, environment, con-

sumer protection, employment, education, media reform, health, welfare, housing, voting, occupational safety and health, and other. In 1975 more than one quarter (29 percent) of the PILOs devoted their efforts to a single cause. By 2004 just 7 percent were single-issue organizations, a clear indication that contemporary PILOs are addressing multiple issues.

The analysis also revealed important shifts in the effort devoted to various causes. About 8 percent of PILOs devoted 100 percent of their efforts to civil liberties in 1975, and that number dropped to 2 percent by 2004. Environmental protection was the sole focus of 7 percent of the PILOs in 1975; that number fell to 1 percent by 2004. In 1975 a number of PILOs were devoted entirely to the issues of consumer rights, employment, media reform, and welfare rights, but by 2004 no PILOs focused exclusively on these causes. "This represents perhaps one of the most significant changes in the organizational character of PILOs—there is much more topical diversity within organizations than we saw in 1975," Nielsen and Albiston observe.

The current study also included four new categories to better capture conservative PILO agendas directed at promoting traditional values, free market/free enterprise, law and order, and property rights. These four categories combined constituted 13 percent of all PILO effort in 2004. Yet it is important to note that these data may not reflect total conservative PILO effort, the authors note, because "some politically conservative organizations may be captured in the civil liberties category."

### **A Rise in Government Funding**

During the three decades between the two studies, the sources from which PILOs secured their funding changed notably. In 1974 foundation grants accounted for 42 percent of the income that PILOs

## **Growth in government funding is not an unmitigated benefit for public interest law entities because of the strings attached to this support**

received, with the federal government providing 8 percent and state and local government just 1 percent. By 2004 government funding was a much more significant source of income. State and local funds accounted for 28 percent of PILO funding and federal funds 21 percent. Foundation grants comprised just 21 percent of PILOs' income.

"The dramatically increased reliance of PILOs on government funding is initially surprising given increasing government hostility toward the social change efforts of these organizations," the authors observe. But the growth in government funding is not an "unmitigated benefit" for public interest law entities because of the strings attached to this support. In 1996 new restrictions were placed on organizations that accept funds from the Legal Services Corporation. "The new rules prohibited LSC organizations from taking class action lawsuits, challenging welfare reform, collecting attorney's fees, rulemaking, lobbying, litigating on behalf of prisoners, representing clients in drug-related public housing evictions, and representing certain categories of aliens." Consequently, "the government simultaneously provides resources to PILOs and negatively impacts their efforts to effect social change."

### **An Emphasis on Direct Legal Services**

A comparison of PILOs that received funding from the Legal Services Corporation in 2004 (almost 25 percent of the sample) and those that did not receive federal funds identified major differences.

- LSC-funded organizations have significantly larger budgets. The mean budget of LSC-funded PILOs is \$3,706,372, compared to \$2,934,190 for organizations that do not received LSC funds.
- LSC organizations employ many more attorneys than their

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counterparts who do not receive federal funds. The mean number of attorneys employed by LSC-funded entities in 2004 was 31.75, while the mean number of attorneys in non-LSC organizations was 7.75.

- LSC-funded PILOs are far more likely to provide direct services. The mean percent effort devoted to direct legal services in organizations that receive federal funds is 83 percent; in organizations that do not receive these funds the effort devoted to legal services is 55 percent.

**Privately funded organizations, although smaller in budget and size, are free to pursue law reform agendas and may be a much more potent force for systemic change**

“One interpretation of these data is that LSC-funded organizations are prospering and providing much needed legal assistance to the poor,” the authors note. But the emphasis on direct service should not be viewed as evidence that LSC is effectively meeting the civil legal needs of the low-income population. Rather, they are only scratching the surface of legal need. “Many studies suggest that as much as 80 percent of the civil legal needs of the poor go unmet.” In addition, the public interest law sector is a small segment of the legal profession as a whole. Nielsen and Albiston estimate there were just slightly

more than 16,000 lawyers working in PILOs in 2004, constituting just 1.5 percent of all practicing lawyers.

The following description of the PIL industry emerges from the comparative analysis across time: (1) As in 1975, most PILOs use non-legal tools as well as legal ones and so engage in public interest non-law activity as well as PIL activity; (2) The average firm employs about 13 lawyers (up from 7) and 40 other professionals (up from 5); (3) The largest single source of income is state and local funds (28 percent) as opposed to foundation grants, which constituted 43 percent of funding in 1975; (4) A typical firm does not concentrate on one topical area, in contrast to 1975 when more than 70 percent of the PILOs’ effort was focused on a single area.

### Falling Short

Despite the sharp increase in the size of some organizations that rely on federal and state funding, they “fall far short of delivering anything approaching an adequate level of civil representation to the poor.” Recent research has used census data to estimate the number of people eligible to receive legal services from LSC-funded organizations and found that the client to legal aid attorney ratio for those living in poverty is 1:6,861. For Americans overall, the ratio of private lawyers to individuals is 1:525. As a result, “lawyers who work in LSC-funded organizations attempt to meet an enormous potential legal need with resources far inferior to those available to private clients.” Moreover, government constraints on LSC entities “restrict their ability to leverage limited resources into sweeping legal reform through class action or social change litigation.”

By contrast, privately funded organizations, although smaller in budget and size, are free to pursue law reform agendas and may be a

much more potent force for systemic change. “Unlike the early period of PIL activity, this sector is now populated by conservative as well as liberal groups, by groups concerned with the interests of the middle class, the wealthy, and the socially powerful, as well as the poor and socially disadvantaged.” The privately funded sector of public interest law continues to be a forum where lawyers “can seek to have maximum impact on social policy through law.” But liberal groups no longer hold a monopoly in this arena. “Private power has realized that it too can lay claim to the mantle of ‘public interest.’”

Nielsen and Albiston report on this research in “The Organization of Public Interest Practice: 1975–2004,” *University of North Carolina Law Review* (forthcoming, 2006).

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## Taking Back the Streets

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Police Station in the North West, the authors met Inspector Irene Lefeny, “who revels in her crime prevention work.” This bright and energetic woman visits villages and urges residents to establish CPFs. But she acknowledged that people are not interested and that scheduled meetings of the community policing committee go unattended. Captain Patrick Asaneng, a SAPS community liaison officer pointed out that there is an obvious reason why people are not interested in CPFs. “In South Africa,” he said, “nobody cooperates easily with the police. The memories and nightmares of *apartheid* have not been laid to rest.”

### The Many Faces of Private Justice

Between 1995 and 2000 black South Africans notably escalated their efforts to “take care of themselves.” Reports of criminals being dealt with by their communities, that is “killed,” became an almost daily occurrence. “This land may lack a death penalty, but here the penalty of death is meted out more and more by ‘ordinary people’ under the signs of civility, morality, decency, and, above all, order.” Modes of informal justice, however, vary widely, and the authors have identified six tendencies.

*Lone Rangers.* At one end of the spectrum are lone rangers, who patrol tough urban streets “as guardian angels of the vulnerable.” One such person, Tutu Mgulwa, provided an escort service for vulnerable young women and specialized in hunting down rapists. At one point he paraded a youth accused of rape—naked—through the streets of a large township outside Pretoria. “Such carnivalesque marketing of his services led women to seek his help, and Mgulwa often landed in court with his clients as prosecution witnesses—or on charges of having assaulted the suspects.” To the

community, Mgulwa was a saint; to the police, he was regarded as a violent, habitual felon. His career was cut short in 2000 when he was jailed for rape. Mgulwa contended that the charge was engineered by a police conspiracy, but “the judge decided otherwise.”

*Community Organizations.* There are numerous instances of groups coming together to deal with criminals, often inflicting death in particularly brutal attacks. These

**The appeal of ‘cultural’ policing and ‘community’ enforcement gave rise to a bewildering array of security, investigative, and quasi-judicial services offered by private companies, local associations, and vigilante organizations—each with its own distinctive approach to crime**

actions at times led to more formal organizations, as was the case in “two remarkable women’s groups.” One, called Women of Vision, was formed by two women after a series of sexual attacks on elderly women in a township in Johannesburg. Its first act was to march on the home of a suspected rapist, apprehend him, and turn him over to the police.

The other group, more prone to violence, was formed by traumatized older women in Soweto. In a newspaper interview the women

claimed to know well the criminals in their midst and spoke as if killing suspected robbers was a common occurrence. “The group lacked a formal name, but its actions followed a pattern: the victim is dragged into the open and laid into by everyone present with whatever came to hand.”

*People’s Courts and Tribal Police.* In the late *apartheid* era people’s tribunals, or kangaroo courts as the media called them, acquired an ignominious history, and many were later disbanded and some were renamed “anticrime committees.” Respect for due process varied in these forums. “In the nightmare version, self-appointed court functionaries arraign a suspect on a complaint of some member of the community, a summary ‘trial’ is held—with scant attention to the quality of evidence or the rights of the accused—ending in a guilty verdict followed by the swift execution of an inevitably harsh sentence, varying from a brutal lashing to death.”

These tribunals evoke a populist African form of justice, the tribal courts, which long laid claim to the authority to discipline troublemakers. In the postcolonial era, they reappeared in some rural areas. “The ‘tribal police,’ recognized by the government under the rubric of traditional law, began to mimic the ‘community’ justice of the townships.” So people in certain regions can “appeal to the tribal police, for a fee, to punish those causing them trouble if compelling reasons can be given.” Interestingly, the authors note, this approach combines elements of conventional policing, in that those involved have some recognized authority, customary law because it involves tribal punishment, if not a full trial, community justice in the sense that the response to crime is informal but not done by a mob, and private protection because “it is a fee-for-service response against attacks on persons or property.”

*Religion as Law Enforcer.* Religion has also been invoked to further

informal justice. "In its Christian manifestation, this has included efforts to bolster the moral infrastructure and thus to combat crime by means of conscience." In various parts of the country, prayer days against crime have been held. But a more proactive and violent approach was taken by a Muslim organization, People Against Gangsterism and Drugs (PAGAD). The organization came to national attention when it became involved in a gruesome murder in which a local gang leader was doused with

**This land may lack a death penalty, but here the penalty of death is meted out more and more by 'ordinary people' under the signs of civility, morality, decency, and, above all, order**

fuel, set alight, and shot, all broadcast live on prime-time television. Although initially welcomed by ordinary citizens, PAGAD lost its popular support when its violent tactics were publicized. A study found that in its first 42 months PAGAD "was linked to almost 700 acts of violence, including assassinations of gangsters, drive-by shootings, bombings, and gun battles." Yet groups like this "that use a metaphysic of disorder to justify informal policing and community justice address a local need, a populist desire for strong, self-motivated collective action, and a fervent belief in the rectitude of counter-violence to, well, counter violence."

*NGOs: The Respectable Face of Alternative Justice.* A number of NGOs have entered the arena of alternative policing and community justice. Conquest for Life, funded by the Open Society Foundation and the British High Commission, established the Victim Offender Conference Pilot Project, "the lofty goal of which is to lead the way to 'alternative justice' in South Africa." The organization set up forums "at which crime victims and perpetrators meet voluntarily for purposes of mediation, admission of guilt and restitution in the form of money, service or an apology." The goals are to produce successful outcomes so that trials will be unnecessary and, in a broader view, to introduce a more restorative approach to justice.

Another project concentrates on alternative policing rather than mediation. Called by different names in its two locations, the organizations are funded by a variety of U.S. and European groups and run by a German NGO. It recruits Community Peace Workers who must be 18, have no prison record, be politically independent, and have 10 years of schooling. After being trained for four weeks, they patrol the streets, unarmed, in fairly large groups, "gaining information about criminal activities in 'the community,' intervening in unarmed conflicts and family disputes, ... helping lost people, and so on." Like Conquest for Life, these groups claim to be quite successful, yet they are well aware, as they acknowledged to the authors, "that their impact on the troubled cityscapes of Cape Town remained small indeed."

*Private Security: Home Protection and Business Watch.* The objective of the growing private security industry is focused more on crime prevention and protection than the apprehension of offenders. One initiative, Business Watch, has entire commercial centers in some towns and cities under video surveillance and deploys special

enforcement officers paid for by the corporate sector. Another species of organizations, familiar in the USA, are private companies—one in Cape Town is called Baywatch—that provide speedy armed response for propertied citizens "at prices few can afford." These private security forces have been active primarily in middle-class white areas. "But their analogues are to be found across the invisible borders of class and race that still cut deeply across the social terrain of the post-colony."

### **Mapogo: Brown-Spotted Leopard, "African Justice," and Vigilantes**

The most notable of these, indeed in a class of its own, is *Mapogo a Mathamaga*, or Business Shield, "South Africa's biggest, most colorful, and most controversial self-policing operation." It deploys all of the elements of alternative policing, informal justice, and private security now in play in the country, offering "a living summation of our arguments about all these phenomena." It was founded by Monhle John Magolego, "a charismatic postal worker-turned-entrepreneur who founded it in 1996 at about age 50." He is an accomplished self-promoter who acknowledges that his movement extends well beyond mere protection. As he told the Afrikaans press, "We are sick to death of the soft-handed techniques of democracy... Crime knows no color. If they won't listen, their backsides must burn."

Magolego first set out to serve black men who owned small businesses in the Northern Province, but his movement spread rapidly, soon drawing "shopkeepers of all races and even isolated white farmers, who posted the *Mapogo* logo—a snarling, double-headed beast, part tiger, part leopard—on their gates." In 2000 Magolego claimed to have 90 branches with some 60,000 members. The police believe this is overstated but agree that the membership runs to the many

thousands.

New branches of *Mapogo* are opened with elaborate ritual and stirring fanfare. The authors were invited to witness the founding of a predominantly white chapter in Nelspruit, a desolate village near the Mozambique border. The event was held at the civic center and conducted almost entirely in Afrikaans. Magolego himself leads these processions, traveling in a large BMW, and flanked by his supporters. At the opening in Nelspruit a cross-section of the village gathered in the civic center. Magolego's assistants set up a stall to sell bumper-stickers, placards, and shirts while local workers prepared meat donated by villagers. "After some time, Magolego himself, attired in a stylish suit, swept into the room accompanied by armed bodyguards and a video technician." All the proceedings, including the authors' interview, were videotaped.

"*Mapogo* comes to town, then, like a tent revival." And Magolego, "who cultivates an image of piety," is its preacher who often uses passages from the bible to describe his mission. "Like the great 'fisher of men' in Luke, Magolego has been enjoined, presumably by God, he has said, to 'fish people' through his movement."

Magolego was moved to found his movement, which he describes as a conversion experience, by the crime and particularly the wanton killing of businessmen that erupted with the birth of the "new" South Africa. Magolego addressed a meeting of some 100 black businessmen that was held in 1996 and the organization was born. He emerged as the movement's "leader and founding visionary." There was also a personal element that reinforced his determination. Four days after the inaugural meeting that launched his new organization, and likely as a consequence, he was confronted by armed youth who took his bible, his bag, and his

keys and then withdrew. The trauma of the experience was for Magolego a kind of "baptism" that fueled his continuing dedication.

### Unorthodox Methods

*Mapogo* goes about its business of apprehending those who commit crimes (primarily property crimes but on occasion murders and assaults) by drawing on members who volunteer for specific "operations." When incidents occur, units visit the victim, gather information, and "then find the 'right people,'" as Magolego says." The police are skeptical, claiming instead that the group does not really investigate but simply goes to known criminals and beats them up. Magolego counters that the police are unable to get assistance from the community because people are afraid of testifying. By contrast, his organization draws on deep-seated local knowledge and protects those who stand in the witness box. Those who join *Mapogo*, he says, "could punish the boy next door without fear" because the organization stands behind them. Deterrence is also a focal point of *Mapogo's* strategy. Women, who can join the group but not participate in the action, "appear to regard merely displaying the *Mapogo* logo as having a prophylactic effect on the chance of rape and physical abuse."

Effective marketing is one tool that *Mapogo* has employed to establish its formidable reputation. From the beginning the movement widely publicized its intentions so when it attacked known criminals, "television, radio, and newspaper reporters rushed to the hospital to take pictures, showing the entire country the backsides of [our] victims." Local operatives appear to have "considerable license in inventing their methods of doing business." Reports have circulated of members plunging a man into a dam filled with crocodiles, of administering electric shocks to the genitals of suspects, and of drag-

ging alleged perpetrators behind vehicles.

But these unorthodox methods are at the center of the critique of *Mapogo* by the media and the police. Critics have called the group no better than a gang of common criminals "whose 'jungle justice' substitutes rumor for evidence and produces terror by inflicting public violence on scapegoats." Accounts of mutilation and death resulting from *Mapogo's* disciplinary procedures fill the media. But Magolego insists that his organization does not intend to kill anyone, and he has apologized to bereaved families and offered to pay for funerals. "But *he* notes that, even in a hospital, patients sometimes die."

### Backlash and Official Ambivalence

The South African police have expressed concern that *Mapogo* encourages a racist backlash among white extremists, providing them with a rationale for calling all blacks criminals and giving them license to assault people. And it is true, the authors observe, that "*Mapogo's* rough justice appeals to pistol-packing farmers in the strongholds of the white right." Yet there is even a more "profound concern." *Mapogo's* exploits have "evolved into an ideology that has a momentum of its own." As a result, when an incident occurs in *Mapogo's* name, it is not always clear that *Mapogo* was even aware of it.

For its part, the state has exhibited considerable ambivalence toward the organization. The police are aware that *Mapogo* has "curbed crime in areas where law enforcement is lacking or ineffectual." The official opposition alliance in South Africa, the United Democratic Movement, even asked Magolego to run for office, and he came close to winning a seat in the provincial legislature. To build on this bid for respectability, Magolego announced in 2000 that the organiza-

*Continued on page 10*

## Taking Back the Streets

*continued from page 9*

tion was “going mainstream.” It started a “professional security firm” that used marked patrol vehicles, was registered with the national Security Officers’ Board, and refrained from flogging suspects. The African National Congress, however, was not impressed. It directed any of its members who had joined *Mapogo* to resign. Magolego responded by pointing out how ineffective the government had been in dealing with disorder and said the organization “would cease to exist if the government was tough on crime.” He vowed that corrupt police would be arrested. *Mapogo* “promptly ‘disciplined’ a constable...suspected of theft.”

### Grand Ambitions and Intergenerational Conflict

“Informal justice of the kinds meted out by *Mapogo* boldly usurps the powers of the state and raises the prospect of lawlessness, of an irresponsible public sphere, of ‘the dark side of freedom.’” But despite efforts to prosecute members of *Mapogo* for serious crimes, the organization remains legal. The police do not appear to interfere significantly with its operations. Nonetheless Magolego talks repeatedly of police harassment. “In spite of seeing himself as under siege, or perhaps because of it, Magolego has grand ambitions.” Two controversial and unsuccessful attempts by the state to prosecute him for murder have not thwarted his aspirations. He is making contact with anticrime groups throughout the world with the goal of convening a summit and leveraging funds. Magolego correctly views his movement as part of a global phenomenon. “Like alternative policing elsewhere, it seems to be an ideologically motivated response to the effect that neoliberal conditions have on the ability of states—especially post-totalitarian states—to maintain law and order.”

One explanation for the success of the *Mapogo* phenomenon is basically economic, the authors suggest. “[F]or the rural, white and black petty bourgeoisie, [it is] an affordable and populist version of more expensive security services” that protect affluent white areas. But this explanation “does not account for *Mapogo*’s complex form, nor the principles that unite its members or the common views they appear to hold on a range of social issues that give shape to perceptions of disorder.” One potent issue “involves the uncivil war between generations in South Africa.” Magolego often stresses the youthfulness of the criminals he apprehends, his organization’s ability to punish “the boy next door,” and his concern for protecting businessmen, “a term connoting not merely affluence but social seniority as well.” Significantly, the authors point out, the only meaningful opposition to *Mapogo* in rural communities has come from young men, who have boycotted shops owned by members of *Mapogo*.

This intergenerational conflict has its roots in an earlier era. Magolego was a veteran of sustained conflicts that pitted youth against senior black men of means, “battles that had their analogue across the country during the 1980s.” At that time violent clashes were common, with young men waving ANC and SA Communist Party flags engaged in mass action against the older generation “for having acquiesced to, or even profited from, the forces of domination.” Although times have changed and the revolution has come and gone, “the youth are still on the margins.” Some rural areas in the Northwest now have unemployment rates of more than 60 percent. These young people, who had earlier been courted to take up violence to destabilize the Afrikaner regime, now became a challenge for the state. They suffered massive unemployment with the collapse of the old system of labor-intensive industrial produc-

tion while becoming increasingly frustrated by those who were visibly obtaining wealth in the ever more privatized economy and who seemed “to accumulate wealth at local expense.” The young men, who claim to act in the common interest, vent their anger on those who have benefitted from the new prosperity. In turn, it is from their victims, and other citizens of property who are prey to crime, that *Mapogo* garners its support. “In the process, youth are criminalized, and the young become the nightmare anti-citizens who must be disciplined if order is to be restored.” At the same time, the state does not have a monopoly over the means of force and is unable to secure the peace. “It is these conditions, as much as the exigencies of crime and violence per se, that call forth the host of complexly wrought enforcement enterprises we have discussed.” Despite their obvious imperfections, they are part of a larger effort that seeks not simply to confront disorder “but to establish new visions of moral being and responsibility, to conjure community from the ashes.”

John and Jean Comaroff report on this facet of their research in “Popular Justice in the New South Africa: Policing the Boundaries of Freedom,” in C. Winship, T. Meares, & R. Sampson, eds., *Legitimacy and the Criminal Justice System*, Vol. II, *The International Context* (Russell Sage Foundation, forthcoming).

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## CHANGES IN THE PRACTICE OF THE LEGAL PROFESSION

Ramón Mullerat, OBE, Barcelona, Spain, is a senior partner of Mullerat. He was a scheduled panelist at the The Fellows of the American Bar Foundation Seminar, *International Perspectives on Lawyer Professionalism and Ethics*, held on February 11, 2006 but was unable to attend because of weather problems in Europe. The presentation he prepared for that event follows.

The legal profession is a diversified profession. It varies according to the jurisdiction and organisation of each bar as well as the location and the structure of firm, the type of law, the type of clients, etc. of each lawyer. It is difficult to generalise on the trends in the legal profession as a whole as it is difficult to generalise on the trends of trade covering the mega mall and the street peddler.

Globalisation has affected the world we live in today. The world is more closely connected by modern communications as well as being interdependent economically, socially and politically (the "global village"). Globalisation also intensively affects the law. The law has become globalised in two senses: a) laws are more and more harmonised or even unified across the world; b) lawyers can establish themselves and practice cross-border internally (e.g. in the EU) or globally (GATS-WTO). The cause and also the effect of this is that lawyers are increasingly coping with the growing diversity, complexity and ubiquity of their clients' business.

Globalisation provides increased access to information (aided by the advances in information technology), and facilitates easier and less costly access to justice. Improvements in the economy, the increase in rights awareness and the emergence of preventative risk management create a greater demand for legal services and an increase in the number of lawyers. Lawyers become less reactive and more proactive to clients' needs. Clients require competent and quick responses to their needs at reasonable prices, which can only be delivered not just by specialised but hyper-specialised lawyers. Hyper-specialisation requires large structures (built through mergers, alliances, associations, etc.) or

"boutique" firms managed according to enterprise criteria.

However, the changes are also affecting lawyer's habits and ethics. There is an increasing tendency among lawyers to submit to the commercialisation of today. Unfortunately for some lawyers the accumulation of wealth has become the dominant factor with little energy devoted to public service or "pro bono" work. This is due to several factors including pressure and competition at work, the decline of the "lawyer statesman" role, for example, and commercialisation.

The crisis of commercialism is a broader crisis affecting the profession. It is the product of a general crisis of moral and spiritual values that our society is experiencing. It is not easy to find a virtuous medium (*in medio stat virtus*) between the public service orientation and today's economic demands. However, lawyers must endeavour to provide quality and efficient service while maintaining the standards of professionalism, which is the essence of our profession.

Some ethical problems facing lawyers today include:

*Independence:* Independence, the quintessence of the lawyer, is the subject of some challenges today. The best example is probably the reform planned to be introduced in the UK (the Clementi Report). Legal services will be able to be provided by businesses, and companies and supermarkets will shortly start selling legal services as they do insurance (so-called "Tesco law"). Companies will be able to own law firms' equity capital. A Legal Services Board will provide independent external regulation of lawyers and firms. All this may challenge the traditional self-regula-

tion which has always been a guarantee of the lawyer's independence.

*Loyalty:* As firms become larger, there is a greater chance of conflicts of interest arising. Avoiding conflicts is a main ethical issue derived from the principle that nobody can serve two masters. A lawyer must ensure that he has the interests of his client in mind at all times and that his judgement is not being clouded by a conflicting issue. "Chinese Walls" are an option in large firms where different departments are providing services to different sides of a case, but the true effectiveness of these is debatable. It is neither acceptable to propose special rules for sophisticated clients.

*Attorney Client Privilege:* A lawyer is obliged to keep secret information he has received from his client in confidence. However, various legal provisions are disregarding this obligation, for example, the U.S. Patriot Act, which deprives privilege to suspects of terrorism, the U.S. Gatekeeper Initiative, the EU Money Laundering Initiatives, the Sarbanes-Oxley Act, and SEC Regulations ("up the ladder" and "noisy withdrawal"), etc. The ABA has set up a Task Force on Attorney-Client Privilege to discuss the changing demands facing this issue in the legal profession today.

As lawyers we have a special duty to defend the essential principles of the profession, not just to protect the interests of the profession but also the administration of justice, the rule of law and democracy. As Jules Jusserand, a French poet put it; "the future is not in the hands of fate but in ours."

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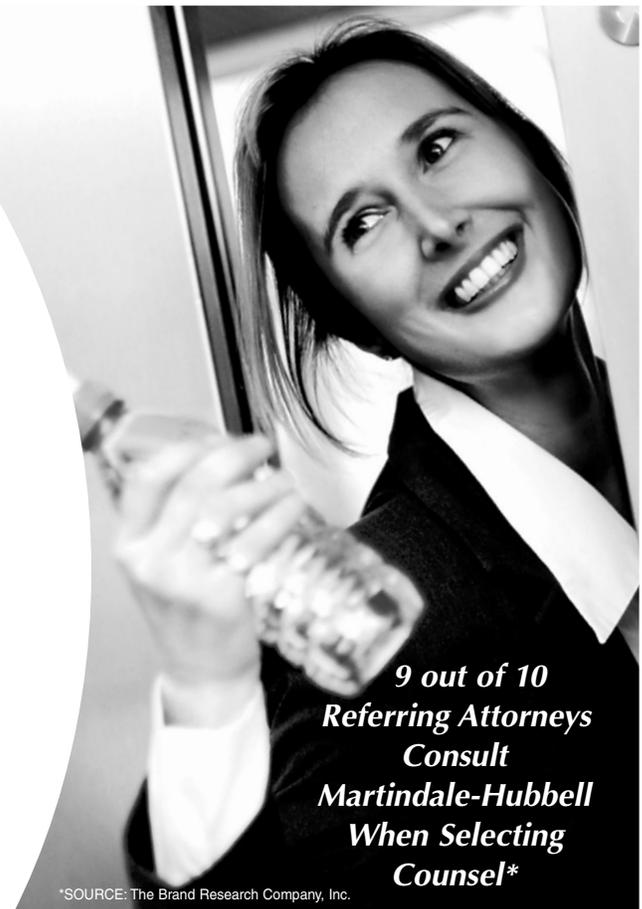
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