SECOND CARNEGIE INQUIRY INTO POVERTY
AND DEVELOPMENT IN SOUTHERN AFRICA

Lawyers and Poverty:
Beyond "Access to Justice"

by

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It is perhaps trite to point out that social structures created and sustained by law are a major cause of poverty. The major structural underpinnings of poverty are all buttressed by legal structures.

The use of legal systems and rule by law as a means of maintaining power and class relations immediately raises some difficult questions. Rule by law is not the same in either its ideology or its consequences as rule by sheer force. Law is a means of lending legitimacy to power. This has certain consequences:

"The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just .... The rhetoric and rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions."(1)

The last twenty years have seen a proliferation, around the world, of attempts to use the legal system to promote social justice. This paper is an attempt to evaluate the possibilities and problems inherent in the different sorts of efforts which have been made.
THE TRADITIONAL APPROACH : ACCESS TO JUSTICE

The right to legal representation has increasingly been seen, in many societies, as an important factor enabling the poor to challenge and improve their position. This assumption underlies much of the approach of the Second Main Report of the Australian Government Commission of Inquiry into Poverty, which sets out the classic "access to justice" approach as follows:

"... for the legal system to realise fully the goal of equality before the law it must become more responsive to the needs of poor people and a positive force for the elimination of poverty ... By far the most significant bias of the legal system has been its failure to provide legal advice and representation to many who require that assistance. As stated earlier, equality before the law demands at least that all people have access to legal assistance and to the courts to enforce their legal rights and to protect themselves against injustice and exploitation. Failure to establish and maintain a comprehensive legal aid system makes it inevitable that those who are poor, weak and ignorant will be denied the protection accorded by the law as a matter of course to more affluent or resourceful people. More than this, inadequate legal services prevent the legal system from playing its part in overcoming the powerlessness of poor people to initiate reforms in their own interests." (2)

In South Africa, the principle of the need for access to justice through legal representation has been accepted in theory by government, although not in those terms. In 1962 a National Legal Aid Scheme was started, but never came into full operation
and fairly quickly disintegrated. (3) In 1969 the first scheme of state-funded legal aid was initiated with the enactment of the Legal Aid Act 22 of 1969.

The practice, however, has been far from satisfactory. The Legal Aid Board has been provided with only limited funds, but has on occasion failed to spend even those. It has not shown the vigorous approach which would be necessary to establish it as an effective source of protection for the poor, has remained firmly anchored in the minds of many as another part of the bureaucratic state machinery, and has shown a disturbing timidity in its approach to the problem of providing legal representation to the poor.

A few statistics will illustrate the very limited impact which the Legal Aid Board has had in providing legal services to the poor:

* Approximately 1 million accused persons a year are undefended in the magistrates' courts, and about 180 000 persons are sentenced to imprisonment each year without being legally represented. During the year for which those statistics were calculated (1979-80), the Legal Aid Board referred 1 398 people to attorneys for legal aid in criminal matters. (4)

* During 1979-80, the total number of civil legal aid referrals to attorneys was 5 736. Less than a quarter of these referrals (1 427) were of people classified
as black. (5)

Practitioners can cite numerous instances of cases in which the Board has failed to undertake the funding of litigation for reasons which are difficult to divine. There is a widespread suspicion that the Board is reluctant to fund litigation which has potential political implications. Again, two of the more striking examples will suffice:

* In *Scott and Others v Hanekom and Others*, (6) a number of residents of Mbekweni in Paarl challenged the lawfulness of a community council election. The Board refused legal aid, in part on the grounds that there was no reasonable prospect of success — this despite the opinion of senior counsel, whose view was ultimately vindicated by the Court. A remarkable feature of this case is that the Director of Legal Aid stated that it was not generally the policy of the Board to grant legal aid for matters in which the interests of more than one individual are involved. (7) It is difficult to imagine any basis on which this attitude can be justified, other than narrow political grounds.

* In *Komani v Bantu Affairs Administration Board, Peninsula Area*, (8) a case affecting the fundamental rights of very many thousands of women and children, the Board financed the (unsuccessful) action in the Cape Provincial Division of the Supreme Court, but refused to finance the (successful) appeal to the Appellate
There is now growing support within the legal profession for the view that the legal aid system should be removed as far as possible from potential control by the State, and that the profession should assume a greater role in running it. In our view there is a good deal to be said for this approach, with the qualification that it is also desirable that those whom the system is intended to serve should be substantially represented in the management of the system. The legal profession does not have a monopoly of wisdom on issues such as the broad policy guidelines for legal aid, the assessment of the effectiveness of the legal aid system, etc. This issue is dealt with more fully below.

Whatever system is adopted, it is desirable that the decision on whether to provide legal aid for a particular case should be made by people who are not part of the State apparatus, and are clearly seen to be independent of that apparatus. The example of the British legal aid system, which places this responsibility on members of the legal profession, is worth considering. The history of legal aid movements around the world reflects an unsurprising fact: where politicians and officials are embarrassed by litigation undertaken at public expense, their first response is often to attempt to use their political muscle to stop the litigation. (9)
It is clear that access to justice, in the conventional sense, is an important element in a strategy to combat poverty in South Africa - but is it adequate? The "access" approach is fraught with difficulties, for a number of reasons.

THE FUNDAMENTAL PROBLEM OF THE "ACCESS" APPROACH

Where the legal structures underpinning poverty are patently oppressive, any number of lawyers representing the poor will not bring an end to poverty. Legal battles may be vigorously and skilfully contested, but at the end of the day one may be faced with a rule of law, whether common law or statute law, which cannot effectively be challenged through the judicial process.

Robertson describes the concern for legal aid as having its focus placed on individual equality and freedom:

"The ambition to make things work within the structure of the existing social order, with minimum disruption to institutions such as the legal one, is distinctive. Put differently, concern is for "social justice" (concentrating mainly on reforming the adjectival law) and not to challenge the legitimacy of the substantive law." (10)

As Wexler has pointed out, poor people are not simply wealthy people without money (11); nor, for that matter, are they wealthy people without lawyers. Bhagwati, a senior judge on the Supreme Court of India, points out that

"the traditional legal service programme suffers from
the vice of passive acceptance of the fact of poverty
and looks upon the poor as simply traditional clients
without money, regards law as a given dictum which the
lawyer has to accept and work upon, treats the poor as
beneficiaries under the programme rather than partici-
cipants in it and is confined in its operation to
problems of corrective justice and is blind to pro-
blems of distributive justice."\(^{(12)}\)

It is plainly simplistic and naïve in the extreme to place
legal representation at the centre point of any strategy for
an attack on poverty. However, in recognising this one
should be careful not to lose sight of the truth in one of
the premises of the "access" approach: in a society governed
by law, the legal system can be a means for people to protect
themselves from the bureaucratic abuse, commercial exploita-
tion, and offical lawlessness which are generally the lot
of the poor and powerless.

Many clearly unlawful and exploitative practices are the
product of cost calculations which change dramatically when
complainants have the means to pursue their grievances. These
routinely unlawful practices may range from unlawful re-
possessions of motor cars bought on hire-purchase, through
bureaucratic obstruction of attempts by people to establish
their residential rights, to unlawful and unsafe industrial
production methods. The examples can be multiplied.

In many of these areas, a single action brought by a single
complainant may produce little or no change. Particularly,
in civil matters, the procedure for the resolution of
disputes is so expensive, time-consuming and uncertain that
a potential litigant is often better off conceding the
point or accepting a poor settlement, than engaging in ex-
tended litigation.

Once a number of such claims are brought, and backed by
an effective threat of legal action, the tables are often
turned. Paradoxically, the very factors that ordinarily
prevent the poor from using the legal system effectively
may make it risky and costly for the offender to resist
a systematic challenge to an unlawful practice. Skilfully
focused law enforcement can produce remarkable results with
wide-ranging consequences.

Linked to this is what one might call "procedural" law en-
forcement. There are significant areas of our procedural
law which have remained substantially unchanged over a
long period of time. They have of course been tampered
with, for example through the "drastic process" of "security"
legislation, but in most cases the underlying principles of
procedural justice have not been substantially changed.

Very often, however, these procedures are honoured more in
the breach than in the observance. An example is the right
of the accused in a criminal case to plead not guilty and
require the State to prove its case, thoroughly to cross-
examine prosecution witnesses, to present a proper defence
through calling witnesses, and (if convicted) to adduce all
relevant evidence and put forward an argument in mitigation.
We all know that these rights are exercised in only a very small percentage of the criminal cases that come before the courts. Without the assistance of a lawyer, it is very difficult for an accused person to exercise these rights. But these are rights guaranteed by the legal system - and where a lawyer is available, and does his or her job properly, the picture can often change.

At Crossroads, for example, an entire community faced imminent destruction, the routinised processing of "minor" trespass, squatting and pass law prosecutions being an important part of the machinery of destruction. When lawyers intervened on behalf of individual clients, and did no more than was required of them by their professional ethics - conscientiously and vigorously to defend their clients - the picture changed. By simply bringing the practice of law a little closer to the rhetoric of its stated principles, lawyers played a significant role in helping a community to prevent imminent and certain destruction. (13)

It seems clear that although the traditional "access" approach has severe limitations, there is an important role for lawyers to play in assisting people to assert and protect their rights. Unless legal representation is generally available, the rights set out in the common law and the statute law are merely a sham. Legal rights are meaningless unless those affected have the means to vindicate their rights.
However, legal aid is not enough. We need to look beyond the "access" approach to alternative approaches to the provision of legal services.

ALTERNATIVE APPROACHES

The philosophy behind a possible alternative approach is spelt out by Judge Bhagwati in what he calls "the preventive legal service programme":

"The preventive legal service programme aims at prevention and elimination of various kinds of injustices which the poor as a class suffer because of poverty and endeavours to launch a frontal attack on the problem of poverty itself with the ultimate goal of its eradication from the society. It does not involve merely quantitative extension of traditional legal services to the poor but instead requires a qualitative and radical change in the whole emphasis, aims and functioning of the legal service programme. It involves novel, radical, more dynamic and multi-dimensional use of the skills of a lawyer and expects the lawyer to perform the role of providing representation to groups of social and economic protest. It does not regard litigation as playing an important or even significant role in the life of the poor and hence refuses to consider the Court as the centre of all legal activity and is concerned with the problems of the poor as a class rather than with the individual problems of the poor which may be projected in litigation in court."(14)

PUBLIC INTEREST LAW

The first major development beyond traditional legal aid was
the growth of "public interest" law or "social action litigation", as one writer has called it. (15)

Probably the pioneers in this field were the NAACP Legal Defense Fund and the American Civil Liberties Union. Today one may almost speak of a public interest law movement which is beginning to transcend national boundaries.

Public interest litigation is designed to produce legal decisions affecting the conditions or circumstances of whole classes or groups. The lawyer acts in the traditional lawyer's mode, representing a client and conducting the litigation in the usual manner. The litigation, however, is designed so that it will have the maximum beneficial impact not only on the individual client, but on large number of other people who are similarly placed. The litigation may have consequences which go far beyond the court.

The development of public interest law recognises that many of the fundamental problems of poor people are in fact group problems rather than individual problems. According to Cappelletti, social and economic relations underwent what he calls "massification" as a result of the process of industrialisation:

"Because of the "massification" phenomena, human actions and relationships assume a collective, rather than a merely individual, character: they refer to groups, categories, and classes of people, rather than to one or a few individuals alone." (16)

This immediately highlights one of the problems that has
emerged in the public interest law movement, namely the question of "standing". Our legal system has developed on the basis of the recognition of individual rather than group rights. To gain a hearing by the court, the potential litigant must demonstrate that he or she has some personal interest in the matter that goes beyond his or her interest as a citizen. While in some instances this is easy to demonstrate in public interest litigation - for example, in the American school desegregation cases, or the South African influx control cases - there are many instances in which it is simply not possible.

It can be argued that the characterisation of collective disputes as individual problems serves a political function. The power of poor people lies in their collectivity, whether they are organised in unions, community organisation, or whatever. Morris argues that the effect of individualising collective problems

"is always to attempt to dissolve collective action into individual action, thereby deflecting the implicit political threat contained in all collective action on the part of the popular masses." (17)

Some collective problems cannot be characterised as individual problems justiciable by the courts. To take a simple example from close to home: during the electrification programme in Soweto, vast numbers of trenches were dug. Many were left standing open for long periods. There were numerous instances of people falling or driving into trenches, and there were some deaths as a result of these events.
There seemed to be a strong prospect that the courts could be persuaded to order that the trenches be promptly filled and effectively protected. But who could bring the application? It was doubtful whether a community organisation could do so, and no individual would have any personal interest until he or she had fallen into a trench and been injured.

On the other hand, there are some collective problems which can indeed be characterised as individual problems, but no individual is in a position to institute litigation. The circumstances giving rise to the legal right may themselves create such poverty, ignorance and fear that the individuals affected are not able to approach a court for relief.

A practical example of this was recently demonstrated in India, where there was apparently "a thriving market in which women were bought and sold as chattels." The women concerned were obviously in no position to institute legal proceedings. Three journalists filed a writ in the Supreme Court of India demanding prohibition of this practice and immediate relief for the victims through programmes of compensation and rehabilitation. The Court recognised the need to be open to this approach, and accepted that the journalists had standing to institute proceedings, although they had no personal interest in the matter.

The Supreme Court of India has taken a number of adventurous steps in this direction. In a number of instances the
litigation has arisen out of letters written to a judge. The judge has brought these letters before the Court, converting them into legal petitions, and the Court has therefore been able to deal with them. The imaginative use of what is now called "epistolary jurisdiction" has enabled the Court to deal with a series of issues of major public importance, putting an end to abuses which the legal system was previously powerless to check. (18)

The rules concerning "standing" are judge-made, and our Supreme Court has the power to regulate its own procedures. If the courts wished to do so, they could make justice more readily available by changing their present restrictive attitude to questions of locus standi (standing) and procedure. The development of the class action, as has taken place in America, would be an important step in that direction. Our Supreme Court has demonstrated, in the case of Wood v Ondangwa Tribal Authority (19) that there is a sound jurisprudential basis for opening up access to the courts. What is now needed is an imaginative approach by lawyers, and a willingness by the courts to throw off the self-imposed shackles of legal formalism, so that issues of clear legal and social significance may be dealt with in the courts.

In Judge Bhagwati's view

"We have to forge new tools, adopt new strategies and innovate new methods for bringing the problems of the poor before the courts. It is essential that the courts must become a great debating forum where
the claims of the poor can be agitated and rights which are struggling to be born are actualised for the benefit of the weaker sections. But, this requires that the real problems of the poor must come to the forefront and if this is to be achieved, the theatre of the law must radically change and the crucial battle ground must shift and the fighting theme of the drama enacted in the theatre of the law must now increasingly be the claims and prerogatives of the vast numbers of the people and the welfare of the multitudes. The legal and judicial process must become the vehicle for establishing the claims and demands of the have-nots which are struggling to find expression.«(20)

There is of course a danger in this - the problem of legalism, the obsessive hankering after litigation as the answer to any problem which may arise, and the unquestioning acceptance of the "legal" answer as the only answer to a problem. Legalism is a disease to which many lawyers, and also some worker and community organisations, easily fall prey. The consequences of the disease may include the false raising of community expectations, and the substitution of applications to court for grassroots organisation. The disease may be terminal for the community or worker organisation, which ends up existing more on paper (usually court process and press reports) than in reality.

But the answer to the problem of legalism is not to close access to the courts - rather, the answer is a more sensitive and sophisticated understanding of the potential function and value of the legal process in the struggle against poverty,
and also of its limitations.

In considering public interest litigation, one needs also to look beyond the spectacular "test" case to the effect of legal practices on the everyday lives of poor people. Progressive legal rules are of very limited value unless they are enforced. Judgments and statutes are not self-executing. In many countries, and South Africa is not the least of these, the gap between law in practice and law on the books is very substantial. The point is convincingly demonstrated by Bellow:

"California has the best laws governing working conditions for farm labourers in the United States. Under Californian law, workers are guaranteed toilets in the field, clear, cool drinking water, covered with wire mesh to keep the flies away, regular rest periods, and a number of other 'protections'. But when you drive into the San Joaquin Valley, you'll find there are no toilets in field after field, and that the drinking water is neither cool, nor clean, nor covered. If it's provided at all, the containers will be rusty and decrepit. It doesn't matter that there is law on the books."(21)

It is at this point that traditional legal aid and public interest law meet. Issues such as unlawful repossessions, underpayment of wages, and bureaucratic harassment have always been included in the long agenda of legal aid practitioners. The public interest law practitioners often cover some of the same areas, but seek to focus their work, attempting to aggregate claims and develop specialised expertise.
THE PROFESSIONAL AND THE POWERLESS

However, the use of lawyers does raise some fundamental problems in any strategy to combat poverty. I have already referred briefly to the question of legalism, and there are also other problems involved. Poverty is a product of powerlessness, and because of the way in which lawyers work, they tend to exacerbate the powerlessness of the poor.

Once a legal issue is presented to lawyers, as "experts" they tend to take it over. They may succeed in solving the client's immediate legal problem, but the client's position of powerlessness is reinforced when the lawyer simply "takes over". From the moment the issue is presented to the lawyer, it often passes out of the client's hands until the matter has been finalised, when a pre-packaged solution is handed over to the client. This may well be an appropriate mode of action when the lawyer is dealing with the problem of an individual, but when group problems are involved it is often very unsatisfactory.

Associated with this is the overwhelming power which the lawyer has in his or her relationship with the poor client. The lawyer invariably has more formal education than the client, and it is very easy for the lawyer to define and present alternative forms of action so that the client is compelled to the course of action preferred by the lawyer. The lawyer has overwhelming power in that situation - for much of his or her professional training and experience has been directed towards
formulating and defining problems in such a way that the formulation and definition point to the solution which he or she desires. Argument and persuasion are the lawyer's stock in trade. And when the lawyer's organisational client takes a decision which he or she feels is wrong-headed, what does the lawyer do? The lawyer may wish to respect the client's right to make the decision; there may also be a more or less subconscious desire to be more directly involved in the client's problems, and to make sure that the client does the "right" thing. Of course, what is "right" will depend in part on what one seeks to achieve from the litigation or other legal process, and the lawyer and the client may place different emphases and values on the various possible results.

What this means is that the lawyer involved in this form of practice has to be unusually sensitive to the client's perceptions of the problem. Another part of the answer is to go some way towards equalising the relationship by ensuring that the client has more power, which in this instance means knowledge of the processes involved.

There has been a lot of writing in recent years about the role of professionals, including lawyers, in "disabling" their clients. One of the solutions often suggested has been to "empower" the client by promoting self-help.

**SELF-HELP IN LAW**

One does not have to be a protagonist of the lawyer equivalent
of the "barefoot doctor" to recognise that there are many legal problems which people can resolve without the direct intervention of the lawyer - if they have the necessary skills and knowledge.

This recognition has prompted the steady production, by many organisations, of publications aimed at "preventive legal education" - to inform the public of their rights in particular situations, and of how to enforce their rights. While efforts such as this must surely be welcomed, it is difficult not to feel rather pessimistic about whether they will have wide-ranging and lasting results. If the publications are short - as they must be to be read and absorbed - they plainly cannot even begin to deal with all the contingencies that can be expected to arise. In addition, one cannot anticipate that the contents will be remembered for any length of time. If one reads today a pamphlet about hire-purchase sales, it is highly unlikely that one will remember any significant part of it if one wishes to purchase goods in a year's time. The publications will be valuable if a problem arises at about the time that the reader has received it, but the value will rapidly diminish with the passage of time.

For these reasons, I do not believe that occasional publications in a perishable form and directed to the public at large, are likely to have a major impact in empowering poor people to help themselves. Other methods must be sought.

A more pervasive and lasting method of community legal
education is to work through the burgeoning community and worker organisations. A possible model for this is to be found in the advice office project conducted by the Legal Resources Centre in Johannesburg.

During 1981 the LRC was approached by a number of community leaders who expressed the need for training in management of advice offices and aspects of law catered for by them, as para-legals. The establishment of the advice office project was a response to this need. The project provides the following forms of assistance:

(a) Assistance when requested in establishing advice offices, eg drafting of constitutions, administrative advice.
(b) Training of advice office personnel through a series of seminars.
(c) Providing a forum for liaison between advice offices.
(d) Providing written materials and resources to advice offices - an extensive manual for advice office workers will shortly be published.
(e) Providing legal back-up in the form of advice and litigation in selected matters.

The experience thus far is that this method provides for greater penetration into the community. The members of the community are themselves involved in obtaining legal redress, para-legal and legal services are made more widely available, and problem areas and priorities for litigation are more effectively identified.
Various non-lawyer organisations are opening up a wide range of advice offices around the country. Lawyers can play a valuable role by providing professional back-up, in that way supplementing the work of these offices without in any way supplanting them. A similar role is obviously open in relation to trade union offices which deal with worker complaints.

THE LAWYER AND THE COMMUNITY ORGANISATION

This raises immediately the role of lawyers in relation to community organisations. I have already identified some of the problems inherent in this relationship, but it is clear that if it is handled with sensitivity on both sides the lawyer can fulfil a most important function in empowering community and worker groups.

A relationship with non-lawyer organisations is the key to all of the lawyer roles which we have identified. The community organisation can assist the lawyers in identifying the public interest litigation which is most important; in monitoring compliance with judgments in these cases; and in identifying patterns of routine abuse. The community organisations are obviously central to any form of para-legal programme.

One of the most valuable things that lawyers can do is to make their skills and services available to assist groups and organisations which are themselves working for social justice.
Traditionally, the role of the lawyer is secondary and not primary - he or she is not a principal actor on the stage, but a surrogate for a client. In the traditional and time-hallowed words of the attorney's letter, he or she "acts for" someone else.

Much of the work that the organisational client will require does not involve litigation. It may involve drafting constitutions and incorporating non-profit companies, drafting and checking contracts, etc. The corporate lawyer spends a good deal of his or her time on work of this sort, and the "poverty" lawyer should be willing and prepared to do the same. It is not as dramatic as major public interest litigation, but it is of major importance in enabling others to act. As Tiruchelvan rightly points out, one of the major criticisms of official legal aid services is that they are normally limited to litigation. (23)

Any discussion of the role of lawyers in relation to community organisations would be incomplete without mention of the function which lawyers can serve in protecting these individuals who are themselves fighting poverty or subjected to oppressive legislation. This is a role which is well-established, and does not need to be argued or expanded on here.
PROFESSIONAL RULES

In examining the potential role of lawyers, one must also reconsider professional rules which may limit access to justice.

One is the question of charging fees by results: that is, the lawyer stipulates that he or she will not charge any fee unless the litigation is successful, in which case the costs (in civil cases) are generally recoverable from the other side. While it has been widely believed that this constitutes unprofessional conduct by the lawyer, a closer examination has revealed that at least as far as advocates are concerned, in proper circumstances this is neither contrary to public policy nor contrary to the ethics of the profession. (24)

This is a matter of some importance, both for lawyers in private practice and for lawyers in law centres. It is desirable that the Law Societies should make it clear that, like the General Council of the Bar, they regard it as proper for a practitioner to assist in this way a litigant who cannot afford to pay legal fees. The benefits inherent in making justice available to the poor far outweigh any potential abuses, which can in any event be prevented by appropriate rules of the professional associations.

In India, it has been suggested that 'Professional norms relating to ... acceptance of briefs under contingent fee
may have to be changed to suit the requirements of the new modes of delivery of justice to whole classes of people." (25)
The same reasoning applies in South Africa.

It is also necessary to examine the professional rules relating to advertising and touting. Again, it is undoubtedly true that these practices create the opportunity for abuse. However, it is also well-known to lawyers that despite the prohibition of touting it continues - and arguably is carried on primarily by less scrupulous attorneys. There is a need to examine whether these prohibitions in fact eliminate or substantially reduce abuse. It is likely that whatever their other effects, rules such as these play a role in limiting access to legal services.

CONCLUSION

Despite the limitations inherent in the lawyer's role in the struggle against poverty, there is important work to be done. Law students and young lawyers are showing increasing interest in this form of work. Both in private practice and in law centres, there is now a need for a systematic approach to the sorts of problems raised in this paper.
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These papers constitute the preliminary findings of the Second Carnegie Inquiry into Poverty and Development in Southern Africa, and were prepared for presentation at a Conference at the University of Cape Town from 13-19 April, 1984.

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Quoting (in context) from these preliminary papers with due acknowledgement is of course allowed, but for permission to reprint any material, or for further information about the Inquiry, please write to:

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