

LEGAL AID AND THE INDIGENT ACCUSED IN SOUTH AFRICA: A PROPOSAL FOR REFORM

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“If legal aid is to give rise to the State having to guarantee to the skolly element who loaf about, snatch handbags, steal purses and remove money from people’s pockets, the additional security of being defended free of charge by legal practitioners provided by the authorities when they appear in court, I can say even at this early stage that the writing is on the wall. I want to put it very clearly that I shall never be a party to subsidizing crime.”¹

Pieter C. Pelsler
South African Minister of Justice
February 26, 1969

INTRODUCTION

An unrepresented accused faces a greater chance of conviction than a represented accused. Such an individual, unfamiliar with the rules of procedure and evidence and courtroom practices in general, may be frightened, inarticulate, and unable to comprehend what is occurring. Compounding the situation in South Africa is the fact that most of the accused are Africans and Coloureds, classes often subjected to discriminatory practices.² The Africans frequently are unable to speak either English or Afrikaans, the languages of the court.

Various South African studies confirm the impact of legal representation on the outcome of an accused’s case. Of 400 cases heard

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¹ Pieter Pelsler, South African Minister of Justice, quoted in *REPUBLIC OF SOUTH AFRICA, HOUSE OF ASSEMBLY DEBATES (HANSARD)*, Feb. 26, 1969, at col. 1496.

² Under the apartheid system, the South African government classifies people as white, African, Coloured (i.e. people of mixed descent), and Asian. This terminology is also employed in this article. The word “black” will be used to denote all South Africans who are not members of the white group. Of South Africa’s 28 million people, 71.9% are African, 2.8% are Asian, 9.2% are Coloured, and 16.1% are white. L. THOMPSON & A. PRIOR, *SOUTH AFRICAN POLITICS* 35 (1982).

at the Retreat Regional Magistrate's Court³ from September 30, 1979 to October 1, 1980, 35.5% of the represented accused, as compared with 10% of the unrepresented accused, received acquittals.⁴ A similar pattern emerges in juvenile cases. A 1974 survey of juvenile offenders revealed a 33% acquittal rate for represented accused and a 15% acquittal rate for unrepresented accused.⁵ Of the 100 juvenile cases heard at the Umlazi Magistrate's Court from June 16, 1980 to October 3, 1980, acquittal rates ran at 50% for represented accused and 20.7% for unrepresented accused.⁶ Of 500 juvenile cases heard in the Durban Magistrate's Court from July 27, 1980 to February 12, 1981, 30%

³ The regional magistrates' courts are lower courts which hear serious criminal cases including rape and robbery. They may impose sentences of up to ten years imprisonment. The other type of lower courts are district courts. Their criminal jurisdiction extends to minor criminal matters only. The regional magistrates' courts and the district courts are known collectively as magistrates' courts. The presiding magistrates are civil servants in the Department of Justice. Appeals from these lower courts lie in the Provincial and Local Divisions of the Supreme Court. The Supreme Court has seven Provincial Divisions and three Local Divisions. In addition to their appellate function, these courts have original jurisdiction in criminal matters punishable by more than ten years imprisonment or by death. The State President-in-Council (the Cabinet) appoints the Divisional judges, and jurisdiction extends to all causes of action affecting all individuals within their respective provinces or local areas. Appeals from Provincial and Local Divisions lie in the Appellate Division of the Supreme Court, South Africa's highest court. The Appellate Division lacks original jurisdiction and is composed of a Chief Justice and ten appeals judges. For further discussion of the South African court structure, see H. HAHLO & E. KAHN, *THE UNION OF SOUTH AFRICA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 249 (1960); W. HOSTEN, A. EDWARDS, C. NATHAN, & F. BOSMAN, *INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY* (1980) [hereinafter *SOUTH AFRICAN LAW*].

The South African legal profession is divided into attorneys and advocates. The two differ in six ways. First, only advocates have the right of audience in the Supreme Court. Second, Supreme Court judges are appointed from the ranks of advocates. Third, only attorneys may do certain work, e.g. initiate litigation in the courts. Fourth, statutes govern various aspects of attorneys' practice (e.g. practical training, admission and removal from the rolls) to a much greater degree than they govern advocates' practice. Fifth, academic qualifications and practical training required for admission as an advocate or attorney differ. Sixth, the ethical rules for attorneys and advocates differ in some respects.

⁴ M. SLABBERT, *SOUTH AFRICA'S LEGAL SYSTEM: JUSTICE FOR ALL?* 30 (1981). These figures represent the average percentage of acquittal for all those appearing regardless of race. Since Africans and Coloureds are represented in fewer instances than whites, the acquittal rate for these groups will likely be lower than 35.5%. See *infra* note 11 and accompanying text.

⁵ Midgley, *Sentencing in the Juvenile Court*, 91 S. AFR. L. J. 451, 457 (1974).

⁶ Hutchinson, *Juvenile Justice: A Study in Durban and Umlazi*, 3 NATAL U. L. REV. 510, 544 (1980-81).

of represented accused, as compared with 12.4% of the unrepresented accused, received acquittals.⁷

Despite the importance of legal representation, each year some one million accused are without assistance in the magistrates' courts.⁸ Of these, approximately 180,000 receive prison terms.⁹ Tragically, the vast majority of the unrepresented accused are poor Africans and Coloureds who together comprise 90% of those charged with criminal offenses¹⁰ in South Africa each year and 90% of the prison population.¹¹

South Africa's recognition of a right to counsel in criminal cases¹² has little value in a country where the vast majority of people cannot afford legal representation;¹³ nevertheless, this right provides a foundation for constructing a system of legal aid designed to ensure some equality of representation between rich and poor alike.¹⁴ Historically, the South African government has shown an anti-legal aid bias.¹⁵ As a result, the national legal aid system is underfinanced, underpublicized and underutilized, resulting in ineffective assistance to the indigent.¹⁶ It is especially ineffective in criminal cases where, because an accused risks losing his liberty or his life, the need for qualified assistance is greatest. Thus, for example, while criminal cases comprise

⁷ *Id.* at 543.

⁸ D. MCQUOID-MASON, AN OUTLINE OF LEGAL AID IN SOUTH AFRICA 100 (1982). In the Supreme Court, however, most accused appear to have representation. A study of 144 robbery cases in the Durban and Coastal Local Division showed that 94% of the accused had representation. *Id.* at 99.

⁹ *Id.* at 100.

¹⁰ *Id.* at 99.

¹¹ *Id.* Statistics reveal that at least 80% of African and Coloured sentenced prisoners had no legal representation at their trials. *Id.* at 99-100. Thus, for example, a survey of 425 cases heard at the Cape Town Magistrate's Court from January 1, 1980 to July 31, 1980, disclosed that 84.5% of the African and 79% of the Coloured accused had no representation while only 42% of the white accused went unrepresented. M. SLABBERT, *supra* note 4, at 28-29. Similarly, of 400 cases heard at the criminal sessions in the Retreat Regional Magistrate's Court from September 30, 1979 to October 1, 1980, 99.9% of the Africans and 92.3% of the Coloureds had no legal representation while 72.3% of whites went without assistance. *Id.* at 29.

¹² See *infra* notes 31-74 and accompanying text.

¹³ See *infra* notes 58-63 and accompanying text.

¹⁴ See *infra* notes 300-31 and accompanying text. Legal aid may be defined as the gratuitous rendering of legal assistance to individuals who cannot afford to pay for legal services.

¹⁵ See *infra* notes 75-119 and accompanying text. See also *supra* note 1 and accompanying text (quotation from former South African Minister of Justice).

¹⁶ See *infra* notes 220-74 and accompanying text.

approximately 10% of all legal aid applications,¹⁷ the system provides aid to under 1% of the accused persons who are sentenced to imprisonment in the Magistrates' Court each year.¹⁸ While various independent organizations also supply legal aid to the indigent accused, this assistance does little to remedy the situation.¹⁹

This article examines the history and present state of legal aid in South Africa. Special reference is given to the plight of the indigent accused, and suggestions are included for reforms aimed at equalizing legal representation among the accused, regardless of wealth or race. Part I discusses the right to counsel, without which there can be no system of legal aid. Part II considers the history of legal aid through 1969. Part III describes and critiques the current national system of legal aid dating from 1969, as well as the operations of the various independent legal aid organizations. Part IV proposes ways in which the entire system (state-funded and independent) can be reformed to accommodate a greater number of persons.

I. THE RIGHT TO COUNSEL

A. *Historical Antecedents: The Roman, Roman-Dutch, and English Positions*

Under Roman law, the praetor or the governor assigned an advocate in proceedings to represent minors, physically or mentally retarded individuals, and those unable to procure assistance because of their adversary's influence.²⁰ Since such an appointment represented a public duty, it was unethical for the appointed counsel to accept remuneration.²¹ In addition, improper action or failure to appear resulted in disbarment of the appointed counsel.²² The assistance of the indigent, however, was only an incidental result of a system designed to maintain patronage networks.

Roman-Dutch law, conversely, exhibited an acceptance of the policy of providing aid to the indigent accused. During the thirteenth century,

¹⁷ D. McQUOID-MASON, *supra* note 8, at 111.

¹⁸ *Id.* at 100.

¹⁹ See *infra* notes 275-99 and accompanying text.

²⁰ DIG. JUST. 1.16.9.5; DIG. JUST. 3.1.1.4. The modern view holds that South African law represents a hybrid legal system of Roman, Roman-Dutch, and English law. Zajtay and Hosten, *The Permanence of Roman Law in the Continental System and South African Law*, COMP. & INT'L L. J. S. AFR. 181, 197 (1969).

²¹ SOUTH AFRICAN LAW, *supra* note 3, at 826.

²² CODE JUST. 2.6.7.

advocates known as *taelmannen* were attached to the courts in the Netherlands.²³ Judges appointed them to act at the defendant's request. Thus, "the origin of the court assigning an advocate to a pauper defendant is probably due to the fact that the *taelman* was appointed by the judge at the request of the client."²⁴ Roman-Dutch law modified the Roman practice of assigning counsel based on the accused's lack of political influence by allocating counsel only in the case of poverty.²⁵ This shift reflected a change in the basis upon which such assistance rested; while Roman laws stressed the need to avoid political imbalance, medieval law based the allocation of counsel to indigents on the idea of charity.²⁶

In England, as in the Netherlands, the idea of charity held sway. For example, the law provided that ecclesiastical lawyers, otherwise legally barred from appearing in secular courts, could do so on behalf of the indigent accused.²⁷ Yet the prevailing belief that the chance of conviction should rise with the seriousness of the offense allowed indigent representation in misdemeanor, but not felony, cases.²⁸ This theory persisted until 1836 when a right to counsel in all cases became standard.²⁹ However, the emergence of a general right to counsel in criminal cases did not imply that there existed a right to counsel for indigents;³⁰ in practice, the right was empty with regard to the indigent accused. This is the situation that exists in South Africa today.

B. *The South African Position*

The granting of legal aid depends upon the accused's having a right to counsel. In South Africa, the right to counsel is a common law right³¹ frequently reaffirmed through legislation.³² The post-Union

²³ J. WESSELS, *HISTORY OF THE ROMAN-DUTCH LAW* 193 (1908) (citing the nineteenth century French jurist Raepsaet).

²⁴ *Id.* at 194.

²⁵ J. VOET, *THE SELECTIVE VOET, BEING THE COMMENTARY ON THE PANDECTS OF JOHANNES VOET*, Book I, Title 1, § 11 (1955).

²⁶ See Cappelletti & Gordley, *Legal Aid: Modern Themes and Variations*, 24 *STAN. L. REV.* 347, 351-54 (1972).

²⁷ Maguire, *Poverty and Civil Litigation*, 36 *HARV. L. REV.* 361, 365 (1923).

²⁸ See Selikowitz, *Defence by Counsel in Criminal Proceedings Under South African Law*, *ACTA JURIDICA* 53, 56, 61-62 (1965-66).

²⁹ *Id.* at 61-62.

³⁰ B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS* 32 (1967).

³¹ *Brink v. Commissioner of Police*, [1960] 3 S.A. 65 (T) 67; *S. v. Wessels*, [1966] 4 S.A. 89 (C) 92; *S. v. Heyman*, [1966] 4 S.A. 598 (a) 604.

³² Legislation in the Cape, the Orange Free State, the Transvaal, and Natal recognizes this right. The Cape codified this right at Cape Proc. of 1819 (crown

South African criminal codes of 1917,³³ 1955,³⁴ and 1977³⁵ recognize this right. In recent years, however, legislation dealing with state security³⁶ and drug abuse³⁷ has limited this right. Persons arrested pursuant to the provisions of such legislation consequently have no access to counsel until they either are charged or are brought to court as witnesses.³⁸

trial) § 65 (providing the right to counsel after preparatory examination) and Cape Ord., No. 40 of 1828 (criminal procedure) § 38 (providing the right to counsel after committal for trial). Section 39 of the 1828 Ordinance denied the right to counsel in preparatory examinations, but Section 13 of Cape Act 17 of 1874 repealed this section. Cape Act No. 20 of 1856 (resident magistrates' courts) § 45 confirmed the right to counsel (except in preparatory examinations) in the resident magistrates' courts. *See generally* Selikowitz, *supra* note 28, at 65.

The Orange Free State's right to counsel is codified at Orange Free State (OFS) *Wetboek Van den Oranjevrijstaat* of 1891, art. 45. Article 46 permitted legal assistance during the preparatory examination. OFS Criminal Procedure Ordinance, No. 12 of 1902, art. 44, however, stipulated that a prisoner could not have legal assistance before commitment for examination except with the magistrate's permission. *See generally* Selikowitz, *supra* note 28, at 69.

In the Transvaal the South African Republic's (SAR) Thirty-Three Articles of 1844, art. 16 appeared to recognize a right to counsel. *See* G. EYBERS, *SELECT CONSTITUTIONAL DOCUMENTS ILLUSTRATING SOUTH AFRICAN HISTORY 1795-1910* 353 (1918). SAR ord., No. 5 § 98 provided for the appointment of pro deo counsel in the case of an indigent accused. This ordinance remained in effect (except from March 1865 to January 1867) until 1903 when Transvaal Criminal Procedure Ordinance, No. 1 of 1903 § 168, replaced it with a general recognition of the right to counsel. *See generally* Selikowitz, *supra* note 28, at 67.

The Natal legislation providing the right to counsel is Natal Ordinance, No. 18 of 1845 (criminal procedure) §§ 43-44 which copied Cape Ordinance, No. 40 of 1828 (criminal procedure) §§ 38-39. Natal Law, No. 16 of 1861 (administration of criminal justice) § 4 provided for access to counsel but empowered the magistrate to exclude all persons, including counsel, from the examination if he deemed it necessary to the administration of justice. *See generally* Selikowitz, *supra* note 28, at 65.

³³ Criminal Procedure and Evidence Act, No. 31 of 1917 §§ 97, 218. The Cape Colony, Natal, the Orange Free State (later the Orange River Colony), and the South African Republic (later the Transvaal) joined to form the Union of South Africa in 1910. The Union later became a Republic in 1961. *See generally* L. THOMPSON, *THE UNIFICATION OF SOUTH AFRICA* (1980).

³⁴ Criminal Procedure Act, No. 56 of 1955 §§ 84, 158.

³⁵ Criminal Procedure Act, No. 51 of 1977 §§ 73, 166.

³⁶ Internal Security Act, No. 44 of 1950 § 12B (repeated in 1982); Gen. L. Amendment Act 37 of 1963 § 17; Gen. L. Amendment Act 62 of 1966 § 22; Terrorism Act 83 § 6; Criminal Procedure Act, No. 51 of 1977 § 185. *See generally* J. DUGARD, *SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE: INTRODUCTION TO CRIMINAL PROCEDURE* (1977).

³⁷ ABUSE OF DEPENDENCE-PRODUCING SUBSTANCES AND REHABILITATION CENTRES ACT, No. 41 of 1971 § 13.

³⁸ *Id.*

The courts traditionally have viewed the right to counsel as inherent in the system of justice.³⁹ Hence, in the pre-Union case of *Li Kui Yu v. Superintendent of Labourers*,⁴⁰ the Transvaal court, held,

it is quite clear that the only way of preventing a person being illegally done away with and illegally treated is to uphold to the fullest extent the right of every person to have any of his friends come and see him who choose to do so I think it was even more serious still for him (the superintendent) to absolutely decline to allow the man to consult a solicitor or even to say whether he wished to see a solicitor.⁴¹

Post-Union cases echo the *Li Kui Yu* position regarding the right to counsel. In *Brink v. Commissioner of Police*,⁴² the court noted that "[i]t is the fundamental right of every South African citizen upon apprehension or arrest by the authorities to obtain legal advice and consult with his legal advisers."⁴³ Moreover, the court found that "[this right] . . . is so fundamental that it should be taken away only if the regulations specifically say so or if the regulations say so by necessary implication."⁴⁴

Some case support also exists suggesting that the deprivation of the right to counsel may constitute a miscarriage of justice.⁴⁵ In *S. v. Wessels*,⁴⁶ the Cape Court held that the denial of legal representation was an irregularity of a magnitude warranting a finding that the accused had not received a proper trial.⁴⁷ After a detailed analysis of the right to counsel in Roman-Dutch law, the court opined that Roman-Dutch law had perceived the desirability of legal represen-

³⁹ See *Li Kui Yu v. Superintendent of Labourers* [1906] T.S. 181, 188; *R. v. Slabbert*, [1956] 4 S.A. 18 (T) 21; *Brink v. Commissioner of Police* [1960] 3 S.A. 65 (T) 67.

⁴⁰ [1906] T.S. 181.

⁴¹ *Id.* at 188.

⁴² [1960] 3 S.A. 65 (T).

⁴³ *Id.* at 67.

⁴⁴ *Id.* at 69. The regulations referred to were those promulgated in 1960 when the South African government declared a state of emergency following the Sharpeville shootings. For a discussion of the events surrounding the Sharpeville shootings, see L. THOMPSON & A. PRIOR, *supra* note 2, at 196.

⁴⁵ *S. v. Blooms*, [1966] 4 S.A. 417 (C) 421; *S. v. Wessels*, [1966] 4 S.A. 89 (C) 95; *S. v. Seheri En Andere*, [1964] 1 S.A. 29 (A); *R. v. Mtetwe*, [1957] 4 S.A. 298 (O) 99; *R. v. Pandoi*, [1955] 4 S.A. 128 (N) 131; *Cf. S. v. Shabangu*, [1976] 3 S.A. 555 (A).

⁴⁶ [1966] 4 S.A. 89.

⁴⁷ For a fuller discussion, see Dugard, *The Right to Counsel: South African and American Developments*, 84 S. AFR. L. J. 1 (1967).

tation and that legal assistance in both civil and criminal matters was a well-established practice:

From the authorities it would . . . appear that in all civil matters and all procedural matters . . . whether the latter were related to civil or criminal matters the parties before the court had the right to seek audience through a legal representative. This is of course in keeping with the attitude of the Superior Courts in Holland, that a party could only be heard through a legal practitioner.

From the authorities . . . it can be seen that from at least before the start of the seventeenth century . . . parties in civil matters and third parties wishing to resist an order by the court to perform some act in respect of a pending suit—civil or criminal—have had the right to audience through legal practitioners, and that in all serious criminal cases a similar right of audience has existed for nearly 150 years.⁴⁸

On this basis the Court held that:

The failure to allow audience through a legal practitioner to a person who objects to giving evidence in a criminal trial is a gross irregularity. It is so gross a departure from established rules of procedure that it can be said that the accused have not been properly tried. It seems to me that any reasonable person hearing of what took place would say the accused have not had justice.⁴⁹

In addition, the Court maintained that:

Nothing is achieved by speculating whether the acumen and persuasiveness of the legal practitioners could rightly or wrongly have persuaded the court a quo to come to a decision favorable to the accused. The fact remains that the accused have been deprived of the opportunity. It is not for this court to speculate on what would have happened had the accused not been so deprived.⁵⁰

The court subsequently affirmed the right of an accused to counsel in *S. v. Blooms*,⁵¹ where it held that “[e]very accused at any criminal trial has the right to be represented if he so desires, by a legal practitioner.”⁵² In *Blooms*, the trial court advanced the trial date in contravention of established procedures. This, the Court held, “ha[d] deprived the applicant of his right to be legally represented at the

⁴⁸ *Wessels*, 4. S.A. at 95-96.

⁴⁹ *Id.*

⁵⁰ *Id.* at 97.

⁵¹ [1966] 4 S.A. 417 (C).

⁵² *Id.* at 420.

trial. The irregularity is of so gross a nature that it can be said that the applicant was not properly tried and there has in consequence been a failure of justice."⁵³

The courts have further held that it is a fatal irregularity to proceed with a trial after the accused's counsel fails to appear and represent him⁵⁴ or to refuse to postpone a trial in order to allow an accused to obtain legal representation.⁵⁵ Additionally, an individual's right to legal representation implies that he must have an opportunity to obtain a representative,⁵⁶ and that the latter have a right to address the court on his client's behalf.⁵⁷

Despite the foregoing, it appears that the right to counsel is not absolute and a deprivation of the right may not per se constitute a miscarriage of justice.⁵⁸ In this vein, the English case of *R. v. Howes*⁵⁹ suggested that "[t]he real question . . . is whether the court is completely satisfied that notwithstanding the unfortunate course the case took in regard to the defendant not being represented, there has been a miscarriage of justice."⁶⁰ The South African court adopted this view in *S. v. Nongila*.⁶¹ In that case, after examining previous South African decisions including those in the *Wessels* and *Blooms* cases, the court maintained that "[i]n no case . . . has it been held that the fact per se that an accused is denied legal representation affords a ground for relief."⁶² Others suggest, however, that the right is rather one of non-deprivation and that the right to representation by an advocate may depend upon the accused's ability to pay.⁶³

⁵³ *Id.* at 421.

⁵⁴ *S. v. Naula*, [1974] 1 S.A. 801 (E).

⁵⁵ *S. v. Nel*, [1974] 2 S.A. 445 (NC).

⁵⁶ *S. v. Hertzog*, [1970] 2 S.A. 445 (NC).

⁵⁷ *Cf. Ndanozonke v. Nel*, [1971] 3 S.A. 217 (E); *S. v. Sitlu*, [1971] 2 S.A. 238 (N); *S. v. Breakfast*, [1970] 2 S.A. 611 (E).

⁵⁸ *S. v. Nongila*, [1970] 3 S.A. 97, 99 (E); *cf. S. v. Chaane*, [1978] 2 S.A. 891, 895 (A).

⁵⁹ [1964] 1 W.L.R. 576.

⁶⁰ *Id.* at 582.

⁶¹ [1970] 3 S.A. 97 (E).

⁶² *Id.* at 99.

⁶³ Bamford, *Service in the Gown*, 87 S. Afr. L. J. 338, 342 (1970). This suggestion comports with Dugard's view that the accused's right to representation "[i]n most cases . . . is simply the right of an accused person not to be deprived of legal representation if he can afford it." Dugard, *supra* note 54, at 3 (emphasis in original). There has been no South African decision paralleling those of the United States Supreme court in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In *Gideon*, the Court held that all persons accused of

Although the right to counsel is not absolute in the sense that the court must appoint counsel when the accused is unable to afford it, there is, in practice, a long-standing custom of appointing pro deo counsel to represent indigent accused in capital cases.⁶⁴ In *R. v. Mati*,⁶⁵ the Appellate Division asserted that:

[I]t is well-established and most salutary practice that whenever there is a risk that the death sentence may be imposed . . . the State should provide defence by counsel if the accused has not made his own arrangements in that behalf. It is disquieting to think that under our system of procedure, of which we are in general justly proud, it is possible for an accused person to be convicted by a Judge sitting alone and be sentenced to death after a trial in which, by reason of his poverty, he has had to conduct his own defence.⁶⁶

The court insisted, however, that "there is no rule of law that a person who is being tried for an offence that may, if he is convicted, result in a death sentence must, unless he objects, be defended by counsel."⁶⁷ The South African Department of Justice adopts this

a felony are entitled to counsel furnished by the state if the defendant cannot afford a fee. The *Argersinger* decision extended the right to trials for lesser criminal offenses. In *Argersinger*, the court declared that there is a duty upon the state to provide a lawyer in all criminal cases where a jail sentence is possible. It noted that "[a]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37.

In criminal proceedings in England and Wales, the court may make a legal aid order if it appears to be in the interests of justice and if a defendant qualifies for financial assistance. The court must make an order if the defendant is committed for trial on a murder charge or where the prosecutor appeals or applies for leave to appeal from the Court of Appeal (Criminal Division) to the House of Lords. No unrepresented accused may receive a custodial sentence for the first time unless he has had the opportunity to apply for legal aid. CENTRAL OFFICE OF INFORMATION, *JUSTICE AND THE LAW IN BRITAIN* 120 (1985).

⁶⁴ Capital cases include murder, treason, kidnapping, child-stealing, rape, robbery, attempted robbery, and housebreaking or attempted housebreaking where the court finds aggravating circumstances. Criminal Procedure Act, No. 51 of 1977 § 277(19). Political offenses punishable by death include sabotage, Gen. L. Amendment Act, No. 76 of 1962 § 21, the encouragement by a South African resident abroad of violent change in South Africa, the training of a South African resident abroad for "furthering the achievement of any of the objects of Communism" or of any unlawful organization, Internal Security Act, No. 44 of 1950 § 11 (repealed in 1982) and participation in "terrorist activities," Terrorism Act, No. 83 of 1967 § 2 (repealed in 1982).

⁶⁵ [1960] 1 S.A. 304 (AD).

⁶⁶ *Id.* at 306-07.

⁶⁷ *Id.* at 306.

view, maintaining that in political trials, where the offence carries the death penalty, a chief magistrate may, upon request, appoint counsel to defend the accused at the state's expense. This, however, does not amount to a recognition of a right to representation for the indigent accused.⁶⁸ Scant judicial precedent exists to the effect that failure to appoint counsel in capital cases is not a miscarriage of justice. In *S. v. Chaane en Andere*,⁶⁹ the court held that there was no irregularity even though the trial court refused a request by one of the accused for an opportunity to obtain counsel including or alternatively pro deo counsel. The trial judge, however, was not aware that he might impose the death sentence until after the accused's conviction and admission of previous convictions.⁷⁰

Even in cases where the courts appoint pro deo counsel, the accused often receives inferior assistance. Typically, junior counsel handle these cases.⁷¹ In addition, such counsel may not be prepared adequately since courts rarely appoint attorneys pro deo to assist counsel.⁷²

⁶⁸ *Dagbreek en Sondagnuus*, July 31, 1966. The Secretary for Justice confirmed this view in the Department of Justice Annual Report for 1965:

It must be clearly understood that no obligation rests on the State to ensure that *all* indigent accused persons are defended by an advocate or attorney. Not only is such a system not warranted, but it would also undermine the administration of justice and would moreover be completely inconsistent with the general judicial and social pattern in this country.

UNION OF SOUTH AFRICA, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE FOR THE CALENDAR YEAR 1965, at 5 (1966).

⁶⁹ [1978] 2 S.A. 891 (A).

⁷⁰ *Id.* at 895.

⁷¹ H. HAHLO & E. KAHN, *supra* note 3, at 290. The South African advocatés profession is divided into senior and junior counsel. Senior counsel are advocatés possessing letters patent. Before South Africa became a Republic, the Queen of England issued letters patent. Since South Africa became a Republic, the State President issues letters patent. The State President grants senior status to advocatés whose wide experience, extensive practice, and good character justify the grant. *Cf. Wellworths Bazaars Ltd. v. Chandlers Ltd.*, [1947] 4 S.A. 453, 461-62 (T). The State President grants senior status only after the advocate makes an application upon recommendation of the chairman of the bar council and the judge president of the division of the supreme court where the advocate practices. Senior advocatés have the title SC (senior consultus) or QC (Queen's Consultus) if they received their letters patent before South Africa became a Republic. Senior counsel wear silk gowns and are called "silks," "seniors," or "leaders." They rank in seniority according to the date of their letters patent.

All counsel who are not senior counsel are junior counsel. The term does not refer to age. The seniority of junior counsel derives from the time the advocate was first admitted to practice in South Africa or Namibia. *Ex Parte Dold* [1947] 3 S.A. 201 (N).

⁷² H. HAHLO & E. KAHN, *supra* note 3, at 290.

This means that counsel themselves must investigate their clients' cases. Often, they have neither the time nor the resources to perform this task properly.⁷³ If the accused is free on bail, counsel usually is able to consult with him only on the day of the trial. Even if the accused is in custody and accessible, language barriers may make communication difficult or impossible without an interpreter.

Neither the qualified right to counsel nor the pro deo rule in capital cases constitutes an organized system for providing legal services to the indigent accused. The former is a provision of the general law which incidentally aids indigent accused⁷⁴ while the latter is an in-

⁷³ SCHOOL OF LAW, UNIVERSITY OF THE WITWATERSAND, ANN. SURV. S. AFR. 2. 505 (1982).

⁷⁴ There is one other provision of the general law which incidentally aids the indigent accused. The Criminal Procedure Act's review proceedings provide for the automatic review of sentences above a certain minimum imposed by magistrates' courts in criminal cases. Criminal Procedure Act, No. 51 of 1977 §§ 302-06. Under the Act, any sentence imposed upon an unrepresented accused by a magistrate's court is subject to automatic review of a judge of the Provincial Division having jurisdiction. This occurs in situations where the accused is sentenced to: 1) a period of imprisonment exceeding three months or a fine exceeding R500, by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years (§ 302(1)(a)9i-ii); or 2) a period of imprisonment exceeding six months or a fine exceeding R1000, by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer, *id.*; or 3) a whipping other than a whipping imposed upon a juvenile male. Criminal Procedure Act, No. 51 of 1977 (§ 302 (1)(a)(iii)). In cases where automatic review applies, the clerk of the court must forward within one week a record of the proceedings to the registrar together with any remarks by the presiding judicial officer and any written statement or argument by the convicted individual submitted within three days of the sentence (§ 303). If the judge finds that the proceedings did not comport with the standards of justice, he must obtain a statement of the reasons for conviction and sentence from the presiding officer and place the statement and a record of the proceedings before the court of the Provincial Division having jurisdiction sitting as a court of appeal. Criminal Procedure Act, No. 51 of 1977 (§ 304 (2)(a)). A memorandum from the members of the Transvaal Bench to their then Judge President emphasized the importance of this system, the authority for which then derived from the Magistrates' Courts Act rather than from the Criminal Procedure Act. It underscored the problems of a general state of illiteracy of accused persons combined with the fact that a vast majority of accused are undefended. Thus, the memorandum noted that "[w]hen it is borne in mind that at least 90 percent of the accused persons are either wholly or partially illiterate and that the great majority of them are undefended, the vital importance of the system in the administration of justice in this country becomes apparent." 79 S. AFR. L. J. 267 (1962). However, this system has limitations that curtail its usefulness. For example, the high court does not review all cases; the Criminal Procedure Act specifically excludes proceedings in regional magistrates' courts from review. Among cases that are reviewed it appears that under one percent of reviews result in judgments being set aside, and under two percent lead to a variation in the sentences. D. McQUOID-MASON, *supra* note 8, at 66. Moreover,

comprehensive measure designed to treat the gravest inequities in the justice system. Both are, however, the bases upon which an all-encompassing legal aid system can be founded.

II. THE HISTORY OF LEGAL AID TO 1969

Members of the South African bench and bar have long called for a comprehensive system of legal aid in criminal matters. As early as 1930, a note in the *South African Law Journal* on the English Poor Prisoners' Defence Act suggested that it was "at least questionable whether some legislation of this sort should not be introduced in this country."⁷⁵ In 1935, there came the first effort to establish an organized comprehensive legal aid scheme. On November 7 of that year, the South African Institute of Race Relations, acting in consultation with the Department of Justice and with the Incorporated Law Society of the Transvaal, convened a conference on legal aid.⁷⁶ Since the majority of persons needing free legal assistance were Africans and Coloureds, the promotion of race relations provided some of the inspiration behind the conference.⁷⁷ Some felt that particularly in larger cities, organized legal aid bureaus offered the only manner of achieving a modicum of equality between rich and poor before the law.⁷⁸

The Conference resulted in the establishment of the first legal aid bureau in Johannesburg in 1937.⁷⁹ With the need for assistance in criminal matters being greater than that in civil matters, the Bureau originally aided only indigent accused. By 1940, the need for advice and assistance in civil matters became apparent, and the Bureau expanded its activities.⁸⁰ Subsequently, bureaus opened in Cape Town,

review proceedings are not appeal proceedings. The appellate court can consider only the legality of procedure in the trial court and cannot inquire into the merits of the case. *Id.*

⁷⁵ Note, *Poor Prisoners' Defence Act*, 47 S. AFR. L.J. 427 (1930).

⁷⁶ Abramowitz, *Legal Aid in South Africa*, 77 S. AFR. L.J. 351, 353 (1960).

⁷⁷ *Id.* at 352-53; see also Rand Daily Mail, Apr. 29, 1947, at 10, col. 6 (remarks of Mr. Justice Ramsbottom at annual meeting of Johannesburg Legal Aid Bureau).

⁷⁸ Rand Daily Mail, Apr. 29, 1947, at 10, col. 6.

⁷⁹ Abramowitz, *supra* note 76, at 353. At the time, the Senior Magistrate of Johannesburg lent much support to the move. Cook, *A History of Legal Aid in South Africa*, in LEGAL AID IN SOUTH AFRICA 28, 30 (Faculty of Law, University of Natal 1974).

⁸⁰ Cook, *supra* note 79, at 30. In its first years, the work of the Bureau focused on representation of accused in Magistrates' Court. In 1941, the South African Institute of Race Relations opened a second legal aid bureau, this time in Cape

Durban, Bloemfontein, Pietermaritzburg, East London, and Port Elizabeth. Due to the independent, voluntary nature of these bureaus, however, the service never approached nation-wide dimensions. Thus, aid remained nonexistent in rural areas.

Financial difficulties and questions about their control plagued the Bureaus almost from their inception. In 1943, the Minister of Social Welfare convened a conference to examine the control of legal aid.⁸¹ Delegates attended from various bodies including the Departments of Social Welfare and Justice, the Provincial Law Societies, the Central Committee for Legal Aid, and the South African Institute of Race Relations.⁸² Many opposed any type of state control of legal aid on the grounds that the success of the Bureaus was derived from public knowledge of their independence.⁸³ They argued that state control would render the Bureaus governmental departments. This would result, because of the social problems of South African society, in fewer individuals approaching the Bureaus for advice. In addition, because many prospective clients' difficulties involved government departments, the potential for intergovernmental conflict could lessen the availability of legal aid. Finally, since the Bureaus were functioning well, a perception existed that more financial support was all that was required. Responding to these concerns, the delegates suggested that any control should be exercised by a body comprised of state representatives, members of the legal profession, and laymen.⁸⁴

Following a second conference in 1944,⁸⁵ the Minister of Justice announced a plan giving the Provincial Law Societies responsibility for establishing legal aid bureaus in their respective provinces.⁸⁶ The plan placed control with local committees comprised of representatives

Town. Abramowitz, *supra* note 76, at 354. Like its Johannesburg counterpart, it too dealt first with criminal cases and later expanded its services to include civil matters in 1942. Cape Argus, July 7, 1948. Next, a legal aid bureau opened in Pretoria in May 1943. Rand Daily Mail, June 21, 1984. By June it had thirty-five clients of whom twenty-five were African.

⁸¹ Abramowitz, *supra* note 76, at 354.

⁸² Rand Daily Mail, Nov. 17, 1943, at 4, col. 2.

⁸³ When the Conference occurred, reports of widespread opposition to state control of legal aid appeared in the press. Cape Times, June 19, 1959.

⁸⁴ Rand Daily Mail, Nov. 17, 1943, at 4, col. 2. There remains some uncertainty as to what occurred at the Conference as some delegates from the Bar Councils, the South African Institute for Race Relations, and the Central Legal Aid Committee disputed the official version of the proceedings. Rand Daily Mail, Nov. 18, 1943, at 4, col. 3.

⁸⁵ Rand Daily Mail, Dec. 29, 1944, at 3, col. 7.

⁸⁶ *Id.*

of the appropriate government departments, the legal profession, and other groups approved by the appropriate Law Society.⁸⁷ These committees were responsible to the Law Societies which, in turn, were responsible to the Department of Social Welfare. Each Law Society could veto committee decisions subject to a right of appeal to the Minister. The Department of Social Welfare provided financing for the Bureau operations. The Bureaus favored this combination of governmental financing and local control.⁸⁸

Upon implementation of the plan, each Bureau divided its work load into criminal and civil matters. The Bureaus further subdivided cases into those requiring litigation and those that did not. A panel of local Side-Bar members, associated with local firms, made themselves available to render free assistance. With respect to criminal matters, the Bureaus usually aided only those indigent accused having a prima facie defense or those facing non-capital charges. This policy precluded representation of indigents seeking mitigation of punishment, and also resulted in delay in the acquisition of counsel.⁸⁹

Potential clients also faced difficulty in reaching the Bureaus. Some Bureaus employed a criminal investigator who, accompanied by an attorney, visited cells each morning and interviewed those awaiting trial. After identifying and interviewing those prisoners meeting the Bureau's eligibility requirements,⁹⁰ a Bureau sometimes sent a representative to discuss the cases with the police investigating officer or the prosecutor. This practice occasionally resulted in the charges being dropped. If the case required an appearance and no panel member was able to attend, the Bureau offered the accused advice on how to conduct a pro se defense.

Despite institution of the Minister's 1944 plan, problems which had previously plagued the Bureaus continued. Financial difficulties persisted, resulting in an inability to acquire qualified help. Non-competitive salaries prevented the employment of at least one qualified lawyer at each Bureau. The government subsequently denied any funding to the Bureaus.⁹¹ This denial followed the representation by

⁸⁷ *Id.*

⁸⁸ Abramowitz, *supra* note 76, at 356.

⁸⁹ *Id.* at 356-57.

⁹⁰ In all cases the Bureaus employed a flexible means test to determine the indigency of the accused. The basic criterion was whether the accused could afford to consult a private lawyer. INTERNATIONAL BAR ASSOCIATION, FIFTH CONFERENCE REPORT OF THE INTERNATIONAL BAR ASSOCIATION 188 (1954).

⁹¹ Abramowitz, *supra* note 76, at 357.

the Johannesburg Bureau of two allegedly non-indigent Africans.⁹² Since the Africans were charged with violations of the Riotous Assemblies Act, the withholding of aid may have in fact been a warning to the Bureaus to refrain from representing political activists. Statistics support this view, since the government objected to only one case out of 3000 handled by the Bureaus in the preceding twelve months, the case handled by the Johannesburg Bureau.⁹³ The Bureaus were on the verge of closing when the government reinstated their grant.⁹⁴ That grant, together with public donations, prevented the system's collapse. Thereafter, the Bureaus formed a fund in an attempt to ensure a sufficient and regular income. In succeeding years, the Bureaus also received grants from private organizations, individuals, and the Law Societies themselves.

The next confrontation over legal aid arose on July 1, 1953, when the government transferred the legal aid scheme from the Department of Social Welfare to the Department of Justice.⁹⁵ The Department of Justice had a longstanding interest in effecting this change as evidenced by its appearance at the 1943⁹⁶ and 1944⁹⁷ Conferences. In 1948, the Secretary of Justice stated that "[a]lthough this organization (the Legal Aid Bureau) actually functions under the aegis of the Department of Social Welfare, this Department is vitally interested in its activities which are an important and integral part of the administration of justice."⁹⁸ Although it is arguable that the responsibility for legal aid rightly belongs to a society's Department of Justice, numerous conflicts arose between the Bureaus and the Department in the 1950s. Clashes revolved especially around the question of legal aid in criminal matters.

The conflict matured in the 1958 Report of the Department of Justice,⁹⁹ in which the Secretary of Justice announced that the-

⁹² Rand Daily Mail, Feb. 7, 1945, at 4, col. 6. The Bureau responded to the Government by noting that the two were joint defendants and that although one of them was just above the means test, the other met its requirements. *Id.*

⁹³ Abramowitz, *supra* note 76, at 357.

⁹⁴ *Id.*; Rand Daily Mail, Aug. 6, 1945, at 5, col. 6.

⁹⁵ UNION OF SOUTH AFRICA, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE FOR THE CALENDAR YEAR 1953 (1954).

⁹⁶ See *supra* notes 81-84 and accompanying text.

⁹⁷ See *supra* notes 85-86.

⁹⁸ UNION OF SOUTH AFRICA, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE FOR THE CALENDAR YEAR 1948, para. 20 (1949).

⁹⁹ UNION OF SOUTH AFRICA, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE FOR THE CALENDAR YEAR 1958 (1959).

Department of Justice would commence negotiations with the Association of Law Societies and the Bar Council for a new legal aid scheme and criticized the activities of the Bureaus. The report questioned the necessity of legal aid in criminal matters:

The investigation has revealed that (legal) assistance is apparently not necessary in criminal cases. This view is based on the fact that our whole legal system is designed to prevent the conviction of an innocent person, whether he is defended or not, and that it is the duty of judicial officers and prosecutors, who are considered quite capable of doing so, to ensure that no miscarriages of justice occur.¹⁰⁰

This argument was not new in South Africa. It had enjoyed some currency as early as the 1935 Conference¹⁰¹ in which participants argued that in petty cases magistrates were able to, and made an effort to, get all the facts from the accused, regardless of representation by counsel, and that qualified counsel was both unnecessary and impractical in the vast majority of cases. Section 210 of the Criminal Procedure Act of 1955 arguably supported this position, providing that the court "may at any stage subpoena . . . any person as a witness . . . and the court shall subpoena . . . and examine . . . any person if his evidence appears to it essential to the just decision of the case."¹⁰² While the expressed intention was laudable, the court at least at that time had an ethical responsibility to remain impartial; it should not have had to assume the role of counsel for the accused.¹⁰³

¹⁰⁰ *Id.* at 4-5.

¹⁰¹ See *supra* notes 77-79 and accompanying text.

¹⁰² Criminal Procedure Act, No. 56 of 1955 § 210 (repealed in 1977).

¹⁰³ Until 1977, the trial method preferred in South Africa was the British accusatorial system which requires that the judicial officer in a court of law adopt a neutral attitude during proceedings while listening to the arguments presented by the prosecution and the defense; such a system holds that the accused is innocent until proven guilty. AMNESTY INTERNATIONAL, POLITICAL IMPRISONMENT IN SOUTH AFRICA 28-29 (1978). However, the introduction of Criminal Procedure Act 51 of 1977 brought an inquisitorial system to South Africa. Under this system, the presiding judicial officer becomes involved in pre-trial investigation. The Act provides that at the beginning of summary trials, presiding judicial officers may ask those accused who plead not guilty if they wish to make a statement of the grounds of their defense. If the accused do not consent to do this and if the extent to which they admit or deny the elements of each charge is unclear, the judicial officers may question the accused in order to ascertain which elements of the charges are in dispute. Under the Act, the judicial officers may "enquire from the accused whether any allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation." Criminal Procedure Act, No. 51 of 1977 § 115(2)(b)(1). Since many African accused speak neither English nor

The Report similarly criticized the need for legal assistance in criminal conviction appeals. It argued that "[w]ith regard to appeals in criminal cases it is also considered that legal assistance should not be rendered for the reason that there is nothing to prevent an accused person from appealing without such assistance."¹⁰⁴ This argument, however, ignores the fact that the prosecution of an appeal with its various procedural intricacies requires professional skills. Moreover, without the assistance of counsel the indigent will not know when or even whether to take an appeal.

With respect to the appointment of pro deo counsel in capital cases, the Report apparently acknowledged the chance of error and the need for qualified counsel to reduce this chance.¹⁰⁵ This argument, however, is unduly narrow. The duty of the state, as representative of the community, is to minimize the chance for a miscarriage of justice. This duty should not be confined to capital crimes; rather, it should be extended to all situations in which the accused is confronted with the possibility of the loss of liberty.¹⁰⁶

The dispute between the Bureaus and the Department of Justice resulted in a chronic shortage of funding leading to the eventual closing of almost all of the Bureaus in the late 1950s. The Johannesburg Bureau, which received a government grant until 1961, was the only exception; it continues to operate through fund-raising campaigns and grants from the Johannesburg City Council and the Transvaal Law Society.¹⁰⁷ Thus, the initial attempt at creating some sort of viable legal aid service failed just over ten years after the opening of the first Legal Aid Bureau in Johannesburg. The state of legal aid in South Africa (with the exception of the Johannesburg Bureau) reverted to its pre-1947 position.

Afrikaans, the languages of the court, this judicial procedure causes many unrepresented defendants to incriminate themselves and jeopardize their defense during pre-trial interrogation. AMNESTY INTERNATIONAL, *supra*, at 29. Under the present system then, it becomes impossible for the judicial officer to assume the role of counsel for the accused.

¹⁰⁴ UNION OF SOUTH AFRICA, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE FOR THE CALENDAR YEAR 1985, at 5 (1959).

¹⁰⁵ The Report conceded that "[i]n so far as capital crimes are concerned, it is generally felt that as the accused's life, his most precious possession, is at stake in such a case, the present procedure whereby pro deo counsel are assigned to persons charged with such crimes should be continued." *Id.*

¹⁰⁶ This is the situation in the United States. See *supra* text accompanying note 63 (discussion of *Argersinger*).

¹⁰⁷ Cook, *supra* note 79, at 31.

The experiment, however, had created a valuable precedent. In the early 1960s, the Department of Justice considered implementing a national legal aid plan. After discussions with the Association of Law Societies, it instituted such a plan in 1962, but the plan never became fully functional.¹⁰⁸

While the national plan enjoyed varying degrees of success throughout the country, by the mid-1960s it became inoperative. The plan's failure resulted from a lack of publicity, especially impacting rural areas where the system enjoyed little success, a lack of remuneration for members of the legal profession leading to a loss of interest in the system, and an overabundance of red tape and unwieldiness.

Concurrently, the early 1960s saw the formation of the Defence and Aid Fund, an organization whose goals included supplying funds to those charged with political crimes. The government disapproved of this practice, and on March 18, 1966, declared Defence and Aid an illegal organization.¹⁰⁹ In the wake of the ensuing public outcry, the government declared that it did not object to the defense of accused persons and welcomed the availability of such defense.¹¹⁰ A Department of Justice circular was distributed outlining the procedure

¹⁰⁸ REPUBLIC OF SOUTH AFRICA, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE FOR THE CALENDAR YEAR 1962 (1963) [hereinafter JUSTICE DEPARTMENT ANNUAL REPORT 1963]. The new system operated in the following manner. The administration and control of the system lay entirely with the Department of Justice. The Department appointed legal aid officers from its staff at all magistrates' and Bantu Affairs Commissioners' Courts. Those seeking legal aid would then contact the legal aid officer in their area. The officer would consider the request and employ a means test to determine if the applicant qualified for legal aid. The legal aid officer functioned under the general control of the local legal aid committee which oversaw the administration of legal aid in its area. Such a committee existed at each center where the Department of Justice had appointed a local legal aid officer. Each committee consisted of the magistrate who was ex officio chairman, a representative of the Department of Social Welfare and Pensions, an advocate, and an attorney. Each committee established a means test for its particular area and varied it as it deemed necessary. Thus, the local committees had flexibility on this critical issue. As further evidence of flexibility, each committee reviewed the applications and, when appropriate, varied decisions of the legal aid officer regarding applications for legal aid. In addition to an ability to deal with local problems when they arose, committees had the opportunity to submit suggestions regarding the improvement of the system to the Administrative Head of the Department of Justice. *Id.*

¹⁰⁹ *Id.* at 32. The government declared Defence and Aid illegal in terms of the Suppression of Commission Act 44 of 1950, and it appointed a liquidator to liquidate the organization's assets and handle the funds then in the organization's possession. *Id.*

¹¹⁰ Cook, *supra* note 79, at 32.

for obtaining counsel under the revised system.¹¹¹ This system, which operated from 1966 to 1969, resulted in the appointment of a qualified legal adviser in only twenty-four cases.¹¹²

By the mid-1960s, many members of the legal profession perceived a need for a comprehensive legal aid system. The 1962 scheme was in a disfunctional state, and Defence and Aid dealt primarily with the accused in political trials. This left the vast majority of the poor without access to legal assistance. A debate ensued within the legal profession and between the profession and the Department of Justice on the formation of a new national legal aid system.

During this period the Department of Justice remained adamant in its refusal to recognize the need for legal assistance in criminal cases.¹¹³ In support of its position, the Department cited the absence of a state obligation¹¹⁴ as well as the training and experience of

¹¹¹ The circular had five main provisions. *Id.* at 33. First, in cases where the Defence and Aid Fund had incurred liabilities toward advocates and attorneys, the liquidator should recognize their right to compensation if the organization's assets were sufficient to cover these expenses. Second, advocates and attorneys engaged by the Fund before March 18, 1966, but not yet having appeared on behalf of their clients, should continue to represent the clients and submit fee statements to the liquidator. Third, in cases where any advocate or attorney withdrew from the case, the court should inquire as to whether the accused wished to have another legal representative. If the accused indicated that he so desired, then the circular provided for the appointment of counsel. Fourth, in each case the Chief Magistrate was to consult with the Senior Public Prosecutor and examine the circumstances of the case. If the accused wished to have the services of a legal practitioner, the Chief Magistrate was to call upon the Local Side Bar Association or the Local Bar Council to appoint an attorney or advocate. Fifth, the government assumed responsibility for payment of such attorneys and advocates. *Id.*

¹¹² *Id.* The State paid legal fees of just over R9000. The Liquidator of the Defence and Aid Fund eventually controlled a sum of approximately R12000; the Minister of Justice then instructed him to pay the money to the Association of Law Societies for use for an appropriate purpose. Later, the Association of Law Societies paid this sum to the Legal Aid Board, created by the Legal Aid Act of 1969. *Id.* For a discussion of the Board and the Act, see *infra* notes 126-47 and accompanying text.

¹¹³ The Department of Justice Report for 1965 reiterated, the arguments made in the 1958 Report. REPUBLIC OF SOUTH AFRICA, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE FOR THE CALENDAR YEAR 1965 (1966) [hereinafter JUSTICE DEPARTMENT ANNUAL REPORT 1965].

¹¹⁴ JUSTICE DEPARTMENT ANNUAL REPORT 1965, *supra* note 113, at 5. The Report stated that:

At the outset it must be clearly understood that no obligation rests on the State to ensure that all indigent accused persons are defended by an advocate or attorney. Not only is such a system not warranted but it would also undermine the administration of justice and would moreover be completely inconsistent with the general juridical and social pattern in this country.

judicial officers.¹¹⁵ The Department also attempted to explain its justification for the appointment of pro deo counsel in capital cases on the basis of the finality of the death penalty and the impossibility of post-execution rectification.¹¹⁶

It is not clear how legal representation in criminal matters can possibly undermine the administration of justice as the Report suggests. This view apparently rests on the presupposition that defendants in criminal cases are guilty until proven innocent.¹¹⁷ In fact, the Department's Report asserts that "we must constantly guard against the possibility of our attempts to assist the *criminal* being carried out at the expense of law-abiding citizens or having the effect of materially impairing the efficiency of our legal machinery."¹¹⁸

The Report qualified its negative attitude toward legal aid in criminal cases by asserting that it was not "unsympathetic" as long as suggestions for improvement of the 1962 scheme did "not entail the direct involvement of the State in, or its acceptance of responsibility for, the defence of accused persons, and provided further that there [was] no departure from the general principles indicated [in the Report]."¹¹⁹

In early 1966, the General Bar Council¹²⁰ addressed the matter and proposed the establishment of a Judicial Commission to consider the

¹¹⁵ *Id.* The Report asserted that:

the training and experience of presiding judicial officers and prosecutors and the prescribed rules of court procedure are such that an innocent person will normally not be convicted, whether he be defended or not; and should this happen in isolated cases, there are, in the Department's opinion, adequate safeguards designed to bring to light and to rectify the miscarriage of justice by way of review by a superior court or otherwise.

¹¹⁶ *Id.* The Report stated that:

this is the only reason why the State sees to it, as far as possible, that accused persons in capital cases are defended, and in fact also takes other measures to ensure that no innocent person is executed. These considerations obviously do not apply in cases not punishable by death.

¹¹⁷ See *supra* text accompanying note 103.

¹¹⁸ JUSTICE DEPARTMENT ANNUAL REPORT 1965, *supra* note 113, at 5 (emphasis added).

¹¹⁹ *Id.*

¹²⁰ The advocates profession in South Africa is composed of societies of practicing advocates called bars. There are seven bars in the Republic. These seven are federated in the General Bar Council. The objectives of the General Bar Council are: 1) to consider, promote, and deal with all matters concerning the teaching and practice of law and the administration of justice; 2) to deal with all matters affecting the profession and to take action thereon; and 3) to represent the interests of advocates. The Council also examines and takes whatever action it deems appropriate in regard

most efficacious method of supplying legal aid.¹²¹ The problem of legal aid became the subject of a debate at the meeting of the Association of Law Societies held in Pretoria on August 30 and 31, 1966.¹²² The Association appointed a National Committee on Legal Aid to examine the problems and take what steps it deemed necessary on behalf of the Association. The Committee met for the first time in Pretoria on September 16, 1966.¹²³ Representatives from the Bar and the Secretary for Justice attended. Those present at the meeting decided that the Committee members in attendance would each write a memorandum offering suggestions concerning the creation of a national legal aid system. The Committee reconvened in Cape Town on November 17 and 18, 1966, to examine the memoranda.¹²⁴ During the months that followed, the Committee held meetings, prepared and debated various proposed legislative enactments, and met with the Secretary of Justice. Eventually, the Committee drafted the legislation that was to become Legal Aid Act No. 22 of 1969. The Act, promulgated on March 26 of that year, established the legal aid system which currently exists in South Africa.¹²⁵

III. LEGAL AID SINCE 1969

A. *The National System Described*

i. *The Act*

The Legal Aid Act established a Legal Aid Board, a corporate body whose goal is "to render or make available legal aid to indigent persons."¹²⁶ To this end, the Act empowers the Board, inter alia, to

to legislation and the administration of justice. It gathers evidence for submission to government or provincial commissions or committees and makes or joins in making representations to ministers or other persons or bodies on matters concerning the profession. See generally, H. HAHLO & E. KAHN, *supra* note 3, at 281-85.

¹²¹ Cook, *supra* note 79, at 35.

¹²² The Association adopted the view that the creation of a Judicial Commission would be an unnecessary waste of time. *Id.*

¹²³ *Id.* at 34.

¹²⁴ *Id.* at 35.

¹²⁵ Legal Aid Act No. 22 of 1969. The national legal aid system took effect in South Africa on March 29, 1971, and in South West Africa/Namibia including the Caprivi Zipfel on June 16, 1971. CONSOLIDATED LEGAL AID GUIDE para. 4.3.

¹²⁶ Legal Aid Act No. 22 of 1969 § 3; cf. Strauss v. Strauss, [1973] 3 S.A. 788 (A) 799; Opperman v. Opperman, [1975] 3 S.A. 337 (O) 338.

obtain the services of legal practitioners¹²⁷ and to "fix conditions subject to which legal aid is to be rendered."¹²⁸ The Act determines the constitution of the Board; providing for representation by the bench, the organized legal profession, and several government departments.¹²⁹ Specifically, the Board consists of a judge of the Supreme Court appointed by the Minister of Justice;¹³⁰ one practicing advocate and four practicing attorneys nominated by the General Council of the Bar of South Africa and the Association of Law Societies respectively and appointed by the Minister;¹³¹ and an additional member appointed by the Minister.¹³² The other members of the Board are the Secretary of Justice,¹³³ the Secretary for Black Administration and Development,¹³⁴ the Secretary for Social Welfare and Prisons,¹³⁵ and the State Attorney.¹³⁶ Under the Act, the Minister may, in his discretion, terminate the period of office of any appointed member or his alternate if "there are good reasons for doing so."¹³⁷

¹²⁷ Legal Aid Act No. 22 of 1969 § 3a. In addition, § 3 of the Act gives the Board power:

(b) to purchase or otherwise acquire or to hold or alienate any movable property or, with approval of the Minister acting in consultation with the Minister of Finance, any immovable property;

(c) to hire or let any movable or immovable property;

* * * *

(e) to do all such things and perform all such functions as may be necessary for or incidental to the attainment of the objects of the board.

¹²⁸ *Id.* at § 3d. According to § 3d, these conditions include those:

in accordance with which any rights in respect of costs recovered or recoverable in any legal proceedings in respect of which the aid is rendered, shall be ceded to the board, and conditions relating to the payment of contributions to the board by persons to whom legal aid is rendered.

¹²⁹ *Id.* at § 4(1).

¹³⁰ *Id.* at § 4(1)(a).

¹³¹ *Id.* at § 4(1)(b).

¹³² *Id.* at § 4(1)(g). According to § 4(2)(a):

The Minister may appoint a person to serve as an alternate in the stead of any member referred to in paragraph (b) or (g) of subsection (1), during such member's absence from any meeting of the board, if such person is qualified to be appointed as such member and has been nominated in the same manner as such member.

¹³³ *Id.* at § 4(1)(c).

¹³⁴ *Id.* at § 4(1)(d).

¹³⁵ *Id.* at § 4(1)(e).

¹³⁶ *Id.* at § 4(3)(f). According to § 4(2)(b): "If any member of the board referred to in paragraph (c), (d), (e), or (f) of subsection (1) is unable for any reason to attend any meeting of the board, he may designate any officer in his department or office to represent him at such meeting."

¹³⁷ *Id.* at § 4(3)(c). According to § 4(3)(b): "Any member of the board or his alternate whose term of office has expired, shall be eligible for reappointment."

The Board, itself, however, determines the frequency of its meetings¹³⁸ although the Act requires a quorum of six members.¹³⁹

The Act also deals with the problem of funding, providing that in addition to the money the South African Parliament appropriates to it,¹⁴⁰ the Board may receive money from any other source.¹⁴¹ The Board, upon request, must provide the Minister of Justice with information concerning its activities and financial position.¹⁴² The Legal Aid Board must submit an annual report to the Minister including an audited balance sheet and statement of income and expenditure¹⁴³ which the Minister must table in both houses of parliament.¹⁴⁴

The Board has wide discretion in operational matters since the Legal Aid Act provides only a broad framework.¹⁴⁵ Thus, it appears that the Board could have chosen to employ its own legal practitioners to assist indigent persons, rather than to set up a network of referral agencies. The Board has incorporated its directives in the *Consolidated Legal Aid Guide*.¹⁴⁶ Revised periodically, the Guide contains the Board's directives, a set of rules made in terms of the Act with the force of delegated legislation.¹⁴⁷ Thus, an understanding of the South African legal aid system may be achieved by an examination of the Guide.

¹³⁸ *Id.* at § 5(1). According to § 5(2): "The Chairman of the board may at any time, and shall at the request in writing of not less than six members of the board, convene a special meeting of the board, to be held at such time and place as he may determine."

¹³⁹ *Id.* at § 6(1). According to § 6(2): "Any decision at any meeting of the board shall be by majority of votes of the members present, and in the event of an equality of votes in regard to any matter, the person presiding at the meeting shall have a casting vote in addition to a deliberative vote."

¹⁴⁰ *Id.* at § 9(1)(a).

¹⁴¹ *Id.* at § 9(3). Thus, for example, the Board received the remaining funds confiscated from the banned Defence and Aid Fund. *See supra* notes 109-12 and accompanying text.

¹⁴² Legal Aid Act No. 22 of 1969 § 9(10).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at § 9(11). Section 9(11) provides that:

The Minister shall lay the said report upon the Table of the Senate and of the House of Assembly within fourteen days after receipt thereof, if Parliament is then in ordinary session, or, if Parliament is not in ordinary session, within fourteen days after the commencement of the next ensuing ordinary session.

¹⁴⁵ CONSOLIDATED LEGAL AID GUIDE, para. 4.4.

¹⁴⁶ Attorneys may obtain copies from the secretaries of the Provincial Law Societies. CONSOLIDATED LEGAL AID GUIDE, para. 26.1.

¹⁴⁷ Legal Aid Act No. 22 of 1969 §§ 2-3.

ii. The Guide

The Legal Aid Guide provides for the Legal Aid Board's resolutions to be carried out under the supervision of the Director of Legal Aid who is an officer of the Board.¹⁴⁸ The legal aid system comprises a combination of legal aid officers in the main centres, i.e. Pretoria, Johannesburg, Cape Town, Athlone (Cape), Port Elizabeth, and Durban, and a network of designated legal aid officers in the Magistrates' and Commissioners' Courts in the different provinces and in the homelands.¹⁴⁹ These officers are typically employees of the Department of Justice or the Department of Bantu Administration, although occasionally they are Legal Aid Board employees.¹⁵⁰ The legal aid offices operate as referral agencies. The officer considers whether an applicant qualifies for aid in compliance with the Legal Aid Guide. Once eligibility is established, the officer refers the indigent to a qualified attorney.¹⁵¹ The Guide recognizes that legal practitioners should be remunerated for their work and establishes a schedule of fees for attorneys and advocates.¹⁵² These fee arrangements rest upon the principle that legal aid work is not charitable work. Furthermore, where practicable, the legal aid officer must honor the applicant's choice of attorney.¹⁵³

While the Act does not define "indigent", the Guide provides that an indigent person is "a natural person who qualifies for legal aid in terms of this guide."¹⁵⁴ The Guide further notes that "legal aid includes advice."¹⁵⁵

The Guide prescribes an overall means test which is modified periodically to determine indigence.¹⁵⁶ The means test establishes an income ceiling figure, i.e. the maximum monthly income a person may earn and remain eligible for legal aid.¹⁵⁷ The same ceiling figure

¹⁴⁸ CONSOLIDATED LEGAL AID GUIDE para. 4.2.

¹⁴⁹ *Id.* at para. 4.7.

¹⁵⁰ *Id.* at para. 14.1.

¹⁵¹ *Id.* at para. 14.4.

¹⁵² *Id.* at para. 43.1. According to para. 43.1: "An advocate shall be remunerated in accordance with the rules and tariffs of fees on which the Board and the General Council of the Bar of South Africa have agreed and no additional fees may be received." *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at para. 1.1(f).

¹⁵⁵ *Id.* at para. 1.1(g).

¹⁵⁶ *Id.* at para. 5.1. One test applies to single persons and estranged spouses while another applies to married persons.

¹⁵⁷ For example, in 1980 the figure for married couples was R340 per month while

applies to all population groups in South Africa, since legal costs are the same for all racial groups.¹⁵⁸ The monthly figures for married couples are double those for single persons and estranged spouses.¹⁵⁹

The test is based upon calculated income which takes both income and assets into account.¹⁶⁰ Calculated income means income from all sources after deductions for compulsory pension contributions, tax duty and maintenance payments or contributions in respect of natural or adopted children not under the applicant's care, plus one percent of the unencumbered value in excess of R1000 of the assets of the applicant, or in the case of a married applicant, the couple's joint assets.¹⁶¹ Calculated income does not include the value of furniture, clothing, groceries, and tools of trade.¹⁶²

The Guide provides that those who have sufficient "disposable capital" to pay for the required legal aid may not receive assistance.¹⁶³ The applicant must satisfy the legal aid officer that he is indigent and, at the officer's request, must offer documentary proof of income, value of assets, number of dependent children and other relevant matters.¹⁶⁴ Depending on the applicant's calculated income, the officer may require payment in advance to the indigent's appointed attorney.¹⁶⁵ Nevertheless, the Director of Legal Aid may fully or partially exempt from contributing an individual who, because of circumstances beyond his control, cannot make the prescribed contribution.¹⁶⁶ The

that for single persons was R170. 1980 LEGAL AID BOARD REPORT (1981). Such figures are just over twice the subsistence level for Africans and Coloureds. D. McQUOID-MASON, *supra* note 8, at 76.

¹⁵⁸ From 1971 to 1978, the means test was different for each racial group. In 1978, the Board recognized that legal costs are the same for all groups. 1978 LEGAL AID BOARD REPORT 2 (1979).

¹⁵⁹ CONSOLIDATED LEGAL AID GUIDE para. 5.2.

¹⁶⁰ *Id.* In the case of a married person, the income and assets of both spouses are relevant. The Guide defines a married person as one joined in a union recognized as a marriage in accordance with any law or custom. CONSOLIDATED LEGAL AID GUIDE para. 1.1(i). This seems to include those married according to Muslim, Hindu, or traditional African rites. The Guide gives spouse a corresponding meaning.

¹⁶¹ *Id.* at para. 5.3.

¹⁶² *Id.*

¹⁶³ CONSOLIDATED LEGAL AID GUIDE para. 5.5. The Guide states that disposable capital is cash in hand and deposits as credit in a bank or savings account, not required for the usual daily necessities of life. *Id.* at para. 1.1(e).

¹⁶⁴ *Id.* at para. 6. According to para. 6.2: "If assistance is rendered to a person with no income, the reason why such person has no income, shall be briefly stated by the legal aid officer at the foot of the triplicate instruction form."

¹⁶⁵ *Id.* at paras. 7.1-.2.

¹⁶⁶ *Id.* at para. 8.1.

Director may also grant legal aid to any individual who does not qualify under the means test but who is indigent under a subjective test and deserves sympathetic consideration because of exceptional circumstances.¹⁶⁷

Subject to certain exceptions and compliance with the means test, the Guide permits legal aid in all cases that require the assistance of a legal practitioner.¹⁶⁸ However:

If a legal aid officer is satisfied that an applicant is unemployed without sound reasons, or that he leads a dissolute or dishonest life, or that he is as a result of his misconduct or neglect unable to bear the legal costs himself, no legal aid shall be rendered to him.¹⁶⁹

As regards legal aid in criminal cases, the Guide provides that the legal aid officer decides "whether it shall be just and reasonable that an accused be assisted by the Board" after considering "a) court procedure, especially in so far as it is aimed at ensuring that justice is done to accused persons whether they are legally represented or not; and b) all the circumstances of the relevant case."¹⁷⁰ The Guide then sets forth rules governing the officer's application of these principles. These rules stipulate that legal aid is available in all criminal matters except:

- a) if pro deo defense is available;
- b) in respect of offences for which an admission of guilt has been determined or which can be compounded;
- c) in respect of cases where the commission of the offense is admitted and the accused's defense or excuse is so simple that it can be advanced by the accused himself without aid;
- d) in respect of a traffic offence or any other offence connected with the use of a motor vehicle;
- e) in a preparatory examination; and
- f) for the institution of a private prosecution.¹⁷¹

¹⁶⁷ *Id.* at para. 8.1. The Guide contains a paragraph warning legal aid officers to be wary of applicants who can afford to pay for legal services but who, nevertheless, try to abuse the system by applying for aid. *Id.* at para. 36.

¹⁶⁸ *Id.* at para. 11.1. According to para. 11.2: "In deserving cases where an accused pleads guilty, legal aid may also be rendered with a view to submitting grounds of extenuation, unless these are of such a nature that they can be raised by the accused himself."

¹⁶⁹ *Id.* at para. 10.1.

¹⁷⁰ *Id.* at para. 12.

¹⁷¹ *Id.* at para. 12.1.

If an applicant does not qualify for legal aid in terms of the above provisions or in terms of the means test, the legal aid officer must inform him accordingly.¹⁷² The officer must further inform the applicant of the right to an appeal with the Director of Legal Aid.¹⁷³ The applicant must submit the grounds of appeal in writing to the legal aid officer who, in turn, must forward them to the Director together with his comments.¹⁷⁴ An applicant also has the right of appeal to the Chairman of the Legal Aid Board if the Director refuses to render him assistance.¹⁷⁵ In such cases, the applicant must submit the grounds of appeal in writing to the Director, who must forward them to the Chairman together with his comments.¹⁷⁶

In cases in which the accused qualifies for legal aid, the legal aid officer refers him to any local attorney who is willing to accept the instruction, provided that: "a) if no local attorney is available the nearest available attorney may be instructed;¹⁷⁷ b) where practicable, in criminal trials an attorney at the center where the case is to be heard must be instructed;¹⁷⁸ and c) where practicable effect must be given to the applicant's choice of attorney."¹⁷⁹ If an attorney accepts a legal aid case, he must satisfy himself that his instructions are clear.¹⁸⁰ Where applicable, he must collect the client's contribution before incurring any costs.¹⁸¹ If for any reason an attorney decides not to accept the matter after he has been instructed, he must inform the legal aid officer and send the applicant back to him.¹⁸²

An attorney who is instructed in a legal aid matter and decides to accept the case must render the assistance himself, although where

¹⁷² *Id.* at para. 14.2. The legal aid officer, however, does not have to furnish reasons for his refusal.

¹⁷³ *Id.* at para. 19.1.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at para. 19.2.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at para. 20.1(a).

¹⁷⁸ *Id.* at para. 20.1(b).

¹⁷⁹ *Id.* at para. 20.1(c). The Guide requires the legal aid officer to ensure as far as possible that the work is divided evenly among attorneys who undertake legal aid work and in proportion to the size of their firms. *Id.* at para. 20.1(d).

¹⁸⁰ *Id.* at para. 27.2(a). In addition, according to para. 27.2(b): "If an attorney accepts a case on a legal aid basis, he shall satisfy himself that it has been indicated whether a contribution must be made by the applicant." *Id.* Paragraph 27.3 provides that "[i]f there are any mistakes or anything is not clear, the matter shall be taken up with the legal aid officer concerned or referred to the Director."

¹⁸¹ *Id.* at para. 27.4. Failure to collect the contribution in advance may result in the attorney having to bear that portion of the expenses himself. *Id.* at para. 7.1.

¹⁸² *Id.* at para. 27.1.

necessary he may generally brief a correspondent and/or an advocate.¹⁸³ The Guide, however, places several restraints on the attorney's freedom of action in this regard. Without the written permission of the Director of Legal Aid, the attorney may not: "a) brief an advocate in a case in which he is by law entitled to appear himself;¹⁸⁴ b) brief a senior advocate;¹⁸⁵ and c) prosecute an appeal."¹⁸⁶ The attorney may use his discretion in selecting a correspondent, but must brief the advocate in accordance with the rules of the local bar.¹⁸⁷

An attorney who has been instructed in a legal aid case must neither render assistance outside his instructions nor make applications or institute suits in addition to the main suit, without the written consent of the Director of Legal Aid.¹⁸⁸ If necessary, however, a legal aid attorney may proceed by way of substituted service without the prior consent of the Legal Aid Board.¹⁸⁹ A legal aid attorney need not submit regular progress reports but should advise the Director of Legal Aid if he has completed rendering his service, if the case has petered out, or if there is likely to be a long delay in the finalization of the case.¹⁹⁰ Finally, the Guide expects that attorneys and advocates

¹⁸³ *Id.* at para. 27.6. South Africa's bifurcated legal profession is comprised of attorneys and advocates. Briefing a correspondent or advocate is the practice of informing the advocate, who will appear in court, of the facts of the case. According to para. 27.9 of the Legal Aid Guide:

Before engaging in litigation, an attorney or advocate shall satisfy himself that a client in a civil case has reasonable prospects of success and in the case of a criminal case that he has an acceptable defence against the charge, or if the commission of the offence is admitted, that there are extenuating circumstances which cannot be advanced by the accused himself.

¹⁸⁴ *Id.* at para. 27.6(a).

¹⁸⁵ *Id.* at para. 27.6(b).

¹⁸⁶ *Id.* at para. 27.6(c).

¹⁸⁷ *Id.* at para. 27.7. The correspondent or advocate must be prepared to perform his services according to the legal aid tariff. He is also bound by the provisions in the LEGAL AID GUIDE. *Id.*

¹⁸⁸ *Id.* at para. 27.10.

¹⁸⁹ *Id.* at para. 31.1.

¹⁹⁰ *Id.* at para. 38.1. Paragraph 38.1 provides that "[a] file shall however, be opened in respect of each legal aid case at the head office of the Board and these files shall from time to time be closed and destroyed in order to make room for storage." In addition, under para. 38.2:

If an attorney who has been instructed on the Board's behalf does not submit a final account in respect of the matter or report on the delay, within one year from the date of the instruction, he shall be requested in writing to do so within twenty-one days. If an attorney remains in default to comply with such a request, the Board's file shall be closed and it shall be deemed, without waiver of any rights of the Board, that no moneys are owed to the attorney.

briefed in legal aid matters will guard against the possible abuse of the Legal Aid Board's services; consequently, it requires them to report any changes in the applicant's circumstances which may affect the applicant's continuing ability to receive legal aid.¹⁹¹ It requires attorneys, during interviews, to establish from their clients whether the clients still qualify according to the means test. If they do not, the case cannot proceed without written consent of the Director of Legal Aid.¹⁹² Thus, a person receiving legal aid who subsequently acquires sufficient funds typically may not continue to receive assistance from the Legal Aid Board.¹⁹³

While the Legal Aid Act and the Legal Aid Guide appear to establish a national scheme of legal assistance capable of meeting the demand for legal aid in South Africa, analysis reveals that major problems beset the system. In short, the system is underfinanced, underpublicized, and underutilized, and, therefore, ineffective in supplying legal aid to indigents.

B. The National System Evaluated

While the failure of the National Legal Aid scheme in South Africa lies in its practical operation, the practice is derived from the directives contained in the Act and the Guide which themselves require revision.

i. The Act

The Act's broad outline is favorable in that it offers flexibility in designing and adapting South Africa's legal aid system to meet present and future needs,¹⁹⁴ and eliminates the need for perpetual legislative amendments.¹⁹⁵

On the negative side, the composition of the Board under the Act, and the broad powers the Act gives the Minister of Justice in the appointment and possible termination of members to the Board,¹⁹⁶ convey the impression that the Board is not an independent entity but rather has a pro-state bias. The public perception that the Board is associated with the state may deter the black poor from seeking assistance. The Board's unwillingness to fund litigation with potential political implications supports the suspicion that the Board is part

¹⁹¹ *Id.* at para. 41.1.

¹⁹² *Id.* at para. 41.2.

¹⁹³ *Id.*

¹⁹⁴ *Cf.* *Opperman v. Opperman*, [1975] 3 S.A. 337 (O) 338.

¹⁹⁵ *See supra* notes 126-45 and accompanying text.

¹⁹⁶ *See supra* notes 145-47 and accompanying text.

of the state machinery.¹⁹⁷ For example,¹⁹⁸ in *Scott and Others v. Hanekom and Others*, a group of residents of the black township of Moekweni in Paarl tried to challenge the legality of a community council election in their area on the grounds that "the election process had been clothed in secrecy, had been done in a dark corner."¹⁹⁹ "As a result of this secrecy, argued the residents, 'stooges' had been 'elected' to the council."²⁰⁰ The residents sought to have the courts invalidate the election results so that a new election might be held, and approached a law firm in this regard. The residents contacted the firm only as a last resort after meetings with public officials, complaints to the press, public demonstrations, and a petition to Parliament produced no results. The lawyers then went to the Board on behalf of their clients, all of whom were sufficiently indigent to satisfy the means test. The Board, however, refused them legal aid on various grounds, including lack of probable cause in bringing the suit (despite a contrary opinion by senior counsel whose views the Supreme Court eventually adopted) and the assertion that it was not Board policy to grant legal aid for matters which involved the interests of more than one person. The Legal Aid Guide, however, contains no resolutions prohibiting the rendition of legal aid in class or group actions,²⁰¹ and states that, subject to a few exceptions (of which setting aside an election is not one), "legal aid shall be rendered in all cases where the assistance of a legal practitioner is normally required."²⁰²

The lawyers for the group eventually brought the case without Legal Aid funding and vindicated their clients' claims in the Supreme

¹⁹⁷ See *supra* notes 134-37 and accompanying text. Since the Board has a chairman who is a judge, five representatives from the state, and five representatives from the profession, this composition ostensibly divides power equally among the state and the profession with the judge as a neutral party. The South African judiciary, however, is not independent of the Executive and the Legislature. For critiques of the judiciary's lack of independence, see COMMISSION OF INQUIRY INTO THE STRUCTURE AND FUNCTIONING FOR THE COURTS PART A, Vol. I at 55-93 (1983); J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (1978); INTERNATIONAL COMMISSION OF JURISTS, EROSION OF THE RULE OF LAW IN SOUTH AFRICA (1968).

¹⁹⁸ See Budlender, *Lawyers and Poverty: Beyond "Access to Justice"*, CARNEGIE CONFERENCE PAPER NO. 91, SECOND CARNEGIE INQUIRY INTO POVERTY AND DEVELOPMENT IN SOUTHERN AFRICA 4, (1984).

¹⁹⁹ [1930] (3) S.A. 1182 (c). For a detailed discussion of *Scott*, see Ladley, *A Guide to Legal Aid? Some Issues Arising From the Refusal of Legal Aid in the Moekweni Community Council Case*, 99 S. AFR. L.J. 237 (1982).

²⁰⁰ Ladley, *supra* note 199, at 237.

²⁰¹ *Id.*

²⁰² CONSOLIDATED LEGAL AID GUIDE para. 11.1.

Court which set aside the elections. The Board's refusal to provide aid not only gave the public reason to question its willingness to aid the poor but also evidenced a conservative stance analogous to that of the South African government in 1945 when it threatened to cut off the Legal Aid Bureaus' funding because they had represented clients in cases with political implications.²⁰³ The Board's decision also sets an even more alarming precedent for criminal cases with political overtones. The Board, in choosing to behave as it did in the *Scott* case, may deprive the accused of an adequate defense and thus may contribute to his eventual conviction.

ii. The Guide

The Guide's compensation provision reflects the position that legal aid work is not charity. Thus, members of the profession providing such services are encouraged to give the same amount of effort to legal aid cases as to other cases.²⁰⁴ Similarly, the provision that a successful applicant for legal aid should be able to choose his own attorney elevates the status of the legal aid recipient to that of the fee-paying client.²⁰⁵

On the negative side is the Guide's provision on abuses of the system by successful applicants.²⁰⁶ Even assuming that in any society there may be those who can afford to pay for assistance but seek to use the system dishonestly, such abuse should be viewed as exceptional. It may be argued that the inclusion of a specific provision warning legal aid officers to guard against possible abuses injects a high level of suspicion into the system. This in turn renders the identification of abusers a primary goal of legal aid officers, taking precedence over the fundamental aims of legal aid work, i.e. attempting to ensure equality before the law for the poor as well as the rich. Unfortunately, this provision appears to reflect a larger problem with the Guide, namely an over-all negative attitude toward legal aid. Thus, for example, the Guide nowhere contains a provision on the theoretical principles of equality and justice which underlie the rendering of legal aid.

Another unacceptable provision reflecting the Guide's negative attitude is that which stipulates that an individual may not receive legal aid if he is unemployed without sound reasons, leads a dissolute life,

²⁰³ See *supra* notes 91-93 and accompanying text.

²⁰⁴ See *supra* note 152 and accompanying text.

²⁰⁵ See *supra* note 153 and accompanying text.

²⁰⁶ See *supra* text accompanying note 169.

or as a result of his own misconduct or neglect cannot afford a lawyer.²⁰⁷ This provision is so vague that it gives the legal officer the power to refuse aid because of his own personal prejudices while justifying the refusal on one of these amorphous criteria. While the legal aid officer's ability to deny aid in any society is discretionary, this provision renders the decision arbitrary and exposes the system to abuse from the very individuals, the legal aid officers, who should have an interest in its development.²⁰⁸ In practice, legal aid officers use this provision to exclude from eligibility for assistance rural workers, work-seekers who have not yet found employment, and persons who have been unemployed for long periods even though they report regularly to the labor employment bureaus.²⁰⁹ This provision is further used to exclude applicants with prior convictions although the Guide requires that the officer consider the nature of the previous offences and the personality of the offender.²¹⁰

Various provisions on the rendering of legal aid in criminal cases also manifest a negative attitude toward legal aid. Paragraph 12(1)(a) provides that legal aid is not rendered in criminal matters "[i]f pro deo defence is available, except where an attorney is instructed to assist a pro deo advocate, provided the attorney's services cannot be dispensed with and the director of legal aid consents thereto."²¹¹ This provision implies that legal representation is unnecessary because the judge and the prosecutor will safeguard the rights of the accused. This view, however, should be rejected for the reasons discussed above.²¹² Moreover, the Guide's exclusion from the legal aid system of cases in which pro deo defence is available (i.e. capital cases) is

²⁰⁷ See *supra* note 169 and accompanying text.

²⁰⁸ The provision also presents a potential conflict with the South African rules of evidence regarding the relevance of an accused's character and prior conduct. For a further discussion of this proposition, see ANN. SURV. S. AFR. L. 473 (1969); Steyn, *Public Participation in the Prevention of Crime*, 88 S. AFR. L. J. 210, 218 (1971).

²⁰⁹ McQuoid-Mason, *Legal Aid Clinics or Clearinghouses*, DE REBUS PROCURATORIS 132, 134 (1977).

²¹⁰ To deny an individual legal assistance because of previous convictions is antithetical to the concept of a right to counsel. Moreover, it is arguable that these individuals may have a greater need for assistance than those without prior convictions. For example, a person with a personality disorder and previous convictions for similar offenses is likely to require the aid of a qualified practitioner to place his condition before the court. See *id.*

²¹¹ CONSOLIDATED LEGAL AID GUIDE para. 12.2(a). See *supra* notes 170-71 and accompanying text.

²¹² See *supra* notes 100-03 and accompanying text.

unacceptable because it perpetuates inequality between the rich and the poor in capital cases; the indigent accused receiving pro deo assistance has only the assistance of an advocate who is not aided by an attorney, while an accused who can afford to pay for legal services has the superior assistance of both an attorney and an advocate.²¹³ Arguably, it is in capital cases, where one stands the risk of losing one's life, that the most adequate assistance is necessary. Errors cannot be rectified post-mortem. Furthermore, by excluding pro deo assistance from its ambit, the Guide also creates the anomalous situation that indigent accused charged with lesser offenses have the benefit of assistance by attorneys and advocates.

The provision denying legal aid in traffic offenses or any other offenses connected with the use of a motor vehicle in the absence of written permission from the Director in exceptional circumstances²¹⁴ potentially precludes aid in serious cases such as reckless driving or culpable homicide. The clause permitting an exception by the Director does little to ameliorate the situation; there are no guidelines as to what constitutes exceptional circumstances. Furthermore, the burden of proving exceptional circumstances to the Director lies with the applicant who may be illiterate or who may have a limited command of English or Afrikaans. This problem is similarly applicable with respect to the Guide's general provision for an indigent's right to appeal in all cases in which legal aid is refused.²¹⁵ The Guide's failure to require an officer to furnish reasons for a denial of aid further compounds the difficulties of the indigent accused.

The Guide's negative bent also appears in the undue restraint it places on attorneys' actions. It circumscribes their discretion in deciding whether to prosecute an appeal and instead requires written permission from the Director of Legal Aid.²¹⁶ In so providing, the Guide gives the Director the ability to prevent appeals in cases which have developed potentially important political implications. In *Komani v. Bantu Affairs Administration Board*²¹⁷ the Appellate Division of the Supreme Court struck down regulations requiring the wives of African men entitled to residence in an urban area to obtain lodgers' permits in order to live permanently with their husbands. Although

²¹³ See *supra* notes 71-74, 105-06 and accompanying text.

²¹⁴ See *supra* note 171 and accompanying text.

²¹⁵ See *supra* note 173 and accompanying text.

²¹⁶ See *supra* note 186 and accompanying text.

²¹⁷ [1980] (4) S.A. 448 (A).

the Board financed the unsuccessful action in the Cape Provincial Division of the Supreme Court, it refused to finance the eventually successful appeal to the Appellate Division.²¹⁸ No reasons for the refusal appeared. By the time of the decision in the Provincial Division, the press, in recognition of its political implications, had given the case much attention. Arguably, the Board with its apparently close ties to the state²¹⁹ realized the political implications and no longer wished to be involved. This circumscription of the province of the attorney has even more profound implications in criminal cases where the accused may be faced with the loss of liberty; by denying an attorney the right to appeal in such cases, the Director, in effect, becomes the final judge of the accused's case.

iii. The System in Practice

Beyond the difficulties caused by the wording of the Act and the Guide, the system has proved ineffective in practice. The Board is underfinanced, and what financing it does receive is spent inefficiently.²²⁰ The Board receives its funding in the form of an annual grant from Parliament the amount of which has risen nearly every year since 1969.²²¹ Thus, while the 1967 budget was R50,000²²² by 1984-85, the figure had increased to R4,105,000.²²³ Nevertheless, the 1984-85 figure amounts to a per capita expenditure of only 0.15 cents for South Africa's twenty-eight million people.²²⁴ This figure compares unfavorably with a 1982-83 per capita expenditure of \$6.57 in Canada and a 1984-85 per capita expenditure of £0.70 in the United Kingdom.²²⁵

The Board spends these funds inefficiently. By choosing to create a referral system of legal aid rather than hire salaried lawyers, the Board must set aside large sums calculated on the basis of the number

²¹⁸ The Legal Resources Center sponsored the appeal. For a discussion of the work of the Center, see *infra* notes 297-99 and accompanying text.

²¹⁹ See *supra* notes 196-203 and accompanying text.

²²⁰ See D. McQUOID-MASON, *supra* note 8, at 70.

²²¹ 1969 LEGAL AID BOARD REPORT 3 (1970).

²²² 1967 LEGAL AID BOARD REPORT (1968).

²²³ 1985 LEGAL AID BOARD REPORT 4 (1986).

²²⁴ Per capita expenditure calculated from 1984-85 annual grant from Parliament statistic contained in 1985 LEGAL AID BOARD REPORT 4 (1986) and population figures contained in L. THOMPSON & A. PRIOR, *supra* note 2, at 35.

²²⁵ CANADIAN CENTRE FOR JUSTICE STATISTICS, BRIEFING NOTES 2, (1984); LAW SOCIETY OF GREAT BRITAIN, THIRTY-SIXTH LEGAL AID ANNUAL REPORT (1986).

of pending cases to cover lawyers' fees.²²⁶ Until 1976-77 the Board set lawyers' tariffs at R250 per case.²²⁷ In 1977-78 the figure increased to R300. By 1984-85, the Legal Aid Board calculated an average cost of R330 per case taken from a test sample of 1000 finalized cases.²²⁸ Using this figure, it can be demonstrated that the referral system is not cost effective.²²⁹ During 1984-85, the Board paid private practitioners the sum of R3,902,245;²³⁰ it is not known how many cases this amount covered. The number of cases referred to lawyers in that year is not a satisfactory index because lawyers receive compensation only after the judgment is rendered and because cases commenced in one year often are completed the following year. In addition, cases pending from prior years only may have been finalized in 1984-85. Hence, the average cost per case for 1984-85 cannot be calculated. Nevertheless, using the R330 figure per case, the R3,902,245 spent that year would have paid for 11,825 cases. Assuming that twenty-five percent of the R3,902,245 or R975,961 would be spent on operating costs if the system used salaried lawyers, R2,926,284 would be left for 117 lawyers' salaries. If each lawyer received R25,000 per year and handled an estimated work load of 200 cases a year, the 117 lawyers would handle 23,400 cases per year, 11,575 more than under the present system. Moreover, if private practitioners dealt with these same 23,400 cases at the R330 rate of the present system, the cost would have been R7,722,000, almost R3,819,755 more than the total budget for 1984-85. Based on the foregoing calculations, it appears that the current referral system is neither cost-efficient nor manpower-efficient.

An additional difficulty is that what state-funded legal aid there is does not reach the poor because the system is under-publicized. The lack of publicity stems from what appears to be the Board's negative attitude toward such publicity. Thus, the Board has maintained that the costs of advertising the system in newspapers is "disproportionate to what can be achieved."²³¹ Consequently, by 1984

²²⁶ See LEGAL AID BOARD REPORTS (1970-86). The referral system exists even though the wording of the Guide appears to allow for the establishment of an in-house system. See *supra* notes 145-46 and accompanying text.

²²⁷ See 1977 LEGAL AID BOARD REPORT 4 (1978).

²²⁸ 1985 LEGAL AID BOARD REPORT 9 (1986).

²²⁹ This hypothetical follows D. MCQUOID-MASON *supra* note 8, at 71.

²³⁰ 1985 LEGAL AID BOARD REPORT 7 (1986).

²³¹ 1976 LEGAL AID BOARD REPORT 6 (1977).

the Board had spent only R450,251 on advertising.²³² This figure compares unfavorably with similar figures from western countries. For example, in 1971-72 alone, the Legal Aid committee in the United Kingdom spent £295,000 on advertising.²³³ This anti-advertising bias has led the South African Legal Aid Committee to rely on gratuitous publicity from the press, radio, the legal profession, the university law clinics, various state departments, and welfare organizations. The policy thus consists of piecemeal attempts at publicization rather than any comprehensive strategy of disseminating information about the system. For example, in 1975, the Board sent an article explaining the system to 100 newspapers and periodicals.²³⁴ Four years later it sent a letter describing the procedure for obtaining legal aid to a newspaper with a large black readership.²³⁵

The Board also manifested an anti-publicity bias by adopting the position that the posting and maintaining of notices and posters in public buildings was "impracticable."²³⁶ In recent years the Board modified its stance somewhat by permitting posters in courthouses and post offices.²³⁷ In any event, widespread illiteracy²³⁸ among poor blacks and an inability to read English or Afrikaans among those literate in an African language further reduces the effectiveness of the Board's attempts at publicity.

Those poor Africans whom the publicity does reach may still be unable to use the legal aid system because of the location of legal aid offices in urban centers. Although South Africa's repressive system of "pass" laws which restrict the movement of Africans throughout the country has been abolished,²³⁹ new laws aimed at fostering "or-

²³² 1969-85 LEGAL AID BOARD REPORTS (1970-86). The 1977 Report gives the figure of R469 for publicity in addition to advertising. 1977 LEGAL AID BOARD REPORT, Annexure B (178). The 1985 Report does not give a figure for advertising or publicity.

²³³ J. CORRY, CRIME, PUNISHMENT AND CORRECTION 7, 21 (1976).

²³⁴ 1975 LEGAL AID BOARD REPORT 3 (1976).

²³⁵ 1979 LEGAL AID BOARD REPORT 4 (1980).

²³⁶ 1974 LEGAL AID BOARD REPORT 2 (1975).

²³⁷ 1977 LEGAL AID BOARD REPORT 2 (1978).

²³⁸ For detailed examinations of the problem of illiteracy, see Mawasha, *Language, Education and Poverty*, CARNEGIE CONFERENCE PAPER NO. 105, SECOND CARNEGIE INQUIRY INTO POVERTY AND DEVELOPMENT IN SOUTHERN AFRICA (1984); Pillay, *The Development and Underdevelopment of Education in South Africa*, CARNEGIE CONFERENCE PAPER NO. 95, SECOND CARNEGIE INQUIRY INTO POVERTY AND DEVELOPMENT IN SOUTHERN AFRICA (1984); Wedepohl, *Illiteracy and Adult Basic Education in South Africa*, CARNEGIE CONFERENCE PAPER NO. 263, SECOND CARNEGIE INQUIRY INTO POVERTY AND DEVELOPMENT IN SOUTHERN AFRICA (1984).

²³⁹ For further discussions of the pass laws, see Chaskalson & Duncan, *Influx*

derly urbanization" now operate to prohibit rural Africans from entering urban areas to seek legal aid.²⁴⁰ Even those blacks who work in urban areas may not have time to visit the offices because the offices are open only during working hours. Similarly, those who work in urban areas but have lengthy commutes to their homes outside the cities may not have time to visit the urban offices.

Those who overcome all of these problems and make their way to legal aid offices may still be unsuccessful in procuring aid because of the rigid application of the means test and its low income ceilings.²⁴¹ The system only protects the poorest of the poor. As presently constituted, the test is not tied to the cost of living index, and thus, income qualifications do not keep pace with inflation. Moreover, the system does nothing to assist those poor individuals with income just above the ceiling level who, because of rising inflation and the prohibitive costs of private legal services, are unable to engage a lawyer. Since the ceiling figures, unlike flexible guidelines, are absolute levels of income which must be reevaluated constantly because of changing economic conditions, there is the danger that disputes over the proper figure will become ends in themselves and obscure what is arguably the fundamental principle behind the ceiling figures, namely, that they are but a means toward the end of providing legal services to those unable to pay for them. The inflexible means test also does not consider variations in the economic situation in different areas of the country. Thus, it compares unfavorably with the 1962 plan under which each local legal aid committee established a means test for its particular area and varied its test as it deemed necessary.²⁴²

It is a combination of all the legal system's difficulties described above that has resulted in the system's gross underutilization. The underutilization is worse in criminal cases, the area in which an

Control: The Pass Laws, CARNEGIE CONFERENCE PAPER NO. 81, SECOND CARNEGIE INQUIRY INTO POVERTY AND DEVELOPMENT IN SOUTHERN AFRICA (1984); Zille, *Political Power and Poverty: An Examination of the Role and Effect of Influx Control in South Africa*, CARNEGIE CONFERENCE PAPER NO. 83, SECOND CARNEGIE INQUIRY INTO POVERTY AND DEVELOPMENT IN SOUTHERN AFRICA (1984).

²⁴⁰ On orderly urbanization, see Schoombee & Davis, *Abolishing Influx Control—Fundamental or Cosmetic Change?*, 2 S. AFR. J. HUM. RTS. 208 (1986).

²⁴¹ By 1976, the income ceiling figures for all population groups were above the poverty datum line for all racial groups. The Legal Aid Board published figures indicating that the income ceiling figures averaged three times the minimum income requirements and twice the standard of living index for blacks. 1976 LEGAL AID BOARD REPORT 5 (1977). See *supra* notes 156-65 and accompanying text.

²⁴² See *supra* note 108 and accompanying text.

indigent who may be threatened with loss of liberty needs assistance most. Since the implementation of the legal aid system in 1971, the number of applicants for legal aid has increased annually;²⁴³ while there were 5,401 applicants of all races in 1971-72,²⁴⁴ by 1983-84 the figure had risen to 51,305.²⁴⁵ While only ten percent of all applications are in criminal matters,²⁴⁶ the number of such applications has increased from ninety-six in 1971-72²⁴⁷ to 5,898 in 1983-84.²⁴⁸ Other than in Supreme Court cases, where virtually all applicants have representation,²⁴⁹ it appears that less than ten percent of the accused have representation.²⁵⁰

A comparison of the annual number of criminal legal aid applicants with the number of criminal cases in the magistrates' courts and with the annual number of sentenced prisoners reveals that the system is having little success in assisting the indigent accused. In 1971-72, the figure of ninety-six criminal legal aid applicants²⁵¹ compared unfavorably with the 1,481,972 criminal cases in magistrates' courts²⁵² and the 440,922 sentenced prisoners that year.²⁵³ By 1984-85, the number of criminal legal aid applicants was 5,454²⁵⁴ but that figure was nowhere near the 2,224,382 criminal cases in magistrates' courts²⁵⁵ and the 91,225 sentenced prisoners that year.²⁵⁶ Moreover, the figures for criminal legal aid applicants include applications by members of all racial groups. The situation appears especially dismal for Africans who constitute the vast majority of the South African poor and 71.9% of the South African population.²⁵⁷

Until 1976-77, the number of applications from white, Coloured, and Asian applicants in criminal matters exceeded the number from

²⁴³ 1971-84 LEGAL AID BOARD REPORTS, STATISTICS Section (1972-85).

²⁴⁴ 1971 LEGAL AID BOARD REPORT (1972).

²⁴⁵ 1984 LEGAL AID BOARD REPORT 9 (1985).

²⁴⁶ 1969-85 LEGAL AID BOARD REPORTS, STATISTICS Section (1972-85).

²⁴⁷ 1972 LEGAL AID BOARD REPORT 4 (1973).

²⁴⁸ 1984 LEGAL AID BOARD REPORT 9 (1985).

²⁴⁹ D. McQUOID-MASON, *supra* note 8, at 59.

²⁵⁰ *Id.* at 83.

²⁵¹ 1972 LEGAL AID BOARD REPORT 4 (1973).

²⁵² REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF JUSTICE 1972 ANNUAL REPORT 23 (1973).

²⁵³ REPUBLIC OF SOUTH AFRICA, COMMISSIONER OF PRISONS 1972 ANNUAL REPORT (1973).

²⁵⁴ 1984 LEGAL AID BOARD REPORT 9 (1985).

²⁵⁵ REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF JUSTICE 1984-85 ANNUAL REPORT 100 (1986).

²⁵⁶ *Id.* at Table 7.

²⁵⁷ See *supra* text accompanying note 2.

Africans.²⁵⁸ In that year, the number of African applicants exceeded the number of applicants from other racial groups,²⁵⁹ although this trend has not continued. From 1976 to 1984, the number of African applicants nearly quadrupled from 541 to 1,961 while the number of white applicants almost tripled from 483 to 1,443.²⁶⁰ This represented a decline for whites from 32.5% of the total to 24.4%.²⁶¹ Despite the increase in the number of African applicants, however, the percentage of Africans using the system did not increase correspondingly to the white decrease. Rather, the proportion of African applicants actually decreased slightly from 36.9% to 33.2%.²⁶² Instead, the 1976-84 period saw an increase in the number of Coloured and Asian applicants from 31% during 1976-77 to 42% during 1983-84²⁶³ as the number of applicants more than quintupled from 462 to 2,494.²⁶⁴ This increase among Coloured applicants resulted from the opening of a legal aid office in Athlone, a Coloured area, making legal aid more accessible to the Coloured population in the area.

In relation to the average daily numbers of sentenced and unsentenced prisoners, the percentage of African legal aid applicants is far below their proportional representation in the prison population. Conversely, in relation to this daily average, the percentage of white, Coloured, and Asian applicants is far above their proportional representations in the prison population. For example, in 1983-84, Africans comprised 72.8% of the daily average of sentenced and unsentenced prisoners²⁶⁵ but only 33.2% of criminal legal aid applicants.²⁶⁶ Whites, however, comprised 24.4% of criminal legal aid applicants²⁶⁷ but only 4.3% of the daily average of sentenced and unsentenced prisoners.²⁶⁸ Similarly, Coloureds and Asians formed 42%

²⁵⁸ 1969-77 LEGAL AID BOARD REPORTS, STATISTICS Section (1970-78).

²⁵⁹ 1977 LEGAL AID BOARD REPORT 9 (1978).

²⁶⁰ 1977-84 LEGAL AID BOARD REPORTS, STATISTICS Section (1978-85).

²⁶¹ Percentages calculated from *id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ 1977-84 LEGAL AID BOARD REPORTS, STATISTICS Section (1978-85). Percentages calculated from *id.*

²⁶⁵ Figure computed from statistics in REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF JUSTICE 1983-84 ANNUAL REPORT, Table 8 (1985).

²⁶⁶ Percentages calculated from 1983-84 LEGAL AID BOARD REPORT, STATISTICS Section (1985).

²⁶⁷ *Id.*

²⁶⁸ Figure computed from statistics in REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF JUSTICE 1983-84 ANNUAL REPORT, Table 8 (1985).

of criminal legal aid applicants²⁶⁹ but only 22.9% of the prison population.²⁷⁰

The Legal Aid Board, in keeping with its negative bias toward legal aid, does not appear disturbed by this situation. It maintains that because there are large numbers of applicants for aid in civil cases, it is apparent that "the scheme is not unknown to the general public."²⁷¹ The Board argues that the system is "publicized as widely as possible," and that the Board is "not empowered to force its services upon accused persons."²⁷² While acknowledging that there are few applicants for aid in criminal cases, the Board claims that the low number of such applicants does not result from the system's rules or practical problems.²⁷³ In the case of Africans, the Board suggests that their failure to use the system in large numbers derives from the fact that they generally collect monies from family members and "are apparently reluctant to accept services free of charge."²⁷⁴ Thus, the Board shows no sign of acting to improve the system's effectiveness in the near future. The state-funded system, unfortunately, is the major source of legal aid in South Africa, and while various independent organizations also supply legal aid to the indigent accused, none has the resources to do much to alleviate the situation.

C. Independent Legal Aid Organizations Described and Evaluated

The efforts of the legal aid organizations existing outside of the 1969 scheme which offer aid to the indigent accused are, at best, piecemeal attempts to achieve a measure of equality between rich and poor in criminal cases. The organizations involved are the university-sponsored legal aid clinics, the Black Sash, the South African Council of Churches, and the Legal Resources Center.

²⁶⁹ Percentages calculated from 1983-84 LEGAL AID BOARD REPORT, STATISTICS Section (1985).

²⁷⁰ Figure computed from statistics in REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF JUSTICE 1983-84 ANNUAL REPORT, Table 8 (1985).

²⁷¹ Figure computed from statistics in REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF JUSTICE 1983-84 ANNUAL REPORT, Table 8 (1985). The Board denies the allegation of the Theron Commission of Inquiry into Matters Relating to the Coloured Group that its services "benefit only a small number of accused persons." REPORT OF THE THERON COMMISSION OF INQUIRY INTO MATTERS RELATING TO THE COLOURED GROUP, para. 45 (1976). The commission of inquiry is a device used by the South African government to explore matters of national concern. Members of such commissions are appointed by the Executive. Judges frequently head commissions.

²⁷² 1976-77 LEGAL AID BOARD REPORT 6 (1976).

²⁷³ *Id.*

²⁷⁴ 1975-76 LEGAL AID BOARD REPORT 6 (1976).

i. University-Sponsored Legal Aid Clinics

By 1981, several South African universities had established legal aid clinics.²⁷⁵ Each clinic has its own mode of operating; however, all appear to suffer from common problems that have reduced their effectiveness, namely, a lack of student interest (partly caused by a lack of academic credit for clinic work), minimal financing from the student governments, the Universities, and the local law societies, and a lack of faculty members or other qualified practitioners to supervise the clinics' activities on a full-time basis. The number of cases handled by the clinics is small with the majority involving civil matters. For example, in 1979 Rhodes University handled seventy-six cases of which only five involved criminal matters.²⁷⁶ That same year the University of Zululand legal aid clinic dealt with fifty-six cases none of which concerned criminal matters.²⁷⁷

ii. The Black Sash

The Black Sash²⁷⁸ operates offices in Johannesburg, Pretoria, Port Elizabeth, Durban, Grahamstown, and Athlone (operated jointly with the South African Institute of Race Relations).²⁷⁹ The offices, which function essentially for Africans, offer legal advice and, unfortunately for the accused, deal primarily with civil matters such as housing, labor and pension problems. However, the offices often refer applicants in need of a lawyer to the national legal aid scheme.

iii. The Johannesburg Legal Aid Bureau

The Bureau, founded in 1937, continued to operate after the government withdrew its funding in 1961.²⁸⁰ It functions on donations

²⁷⁵ These were the universities of Cape Town (1972), the Witwatersrand (1973), Natal (Durban (1973) and Pietermaritzburg (1974)), Port Elizabeth (1974), Stellenbosch (1975), the Western Cape (1975), Durban-Westville (1976), Zululand (1978), Rhodes (1979), Pretoria (1980), the North (1980), and Rand Afrikaans University (1981). D. MCQUOID-MASON, *supra* note 8, at 139. The clinic at the University of Durban-Westville closed in 1981. *Id.* at 159. For a fuller discussion of the work of the university clinics, *see id.* at 139-64; M. SLABBERT, *supra* note 4, at 15-21.

²⁷⁶ D. MCQUOID-MASON, *supra* note 8, at 147.

²⁷⁷ *Id.* at 160.

²⁷⁸ The Black Sash is an organization of women established in the 1950s to protest the Senate Act which led to the removal of the Coloured voters in the Cape from the common roll. After Parliament passed the Senate Act, the Sash protested other repressive legislation. L. THOMPSON & A. PRIOR, *supra* note 2, at 165. *See generally* C. MICHELMAN, *THE BLACK SASH OF SOUTH AFRICA: A CASE STUDY IN LIBERACISM* (1975).

²⁷⁹ *See* D. MCQUOID-MASON *supra* note 8, at 133-36; M. SLABBERT, *supra* note 4, at 21-22.

²⁸⁰ *See supra* note 107 and accompanying text. *See generally* D. MCQUOID-MASON, *supra* note 8, at 128-33; M. SLABBERT, *supra* note 4, at 23-24.

and is chronically short of money. Staff members must engage in fund-raising activities to prevent the Bureau from closing. Lawyers who offer their services to the Bureau do so on a *pro amico* basis. Some sixty percent of the Bureau's work involves giving advice.²⁸¹ The remaining forty percent involves mostly civil matters.²⁸² In 1980, the Bureau handled 773 civil cases as opposed to 130 criminal cases.²⁸³

iv. The South African Council of Churches

The South African Council of Churches (SACC) offers legal advice to political prisoners through offices in Cape Town, Johannesburg, Durban, East London, Pertermartizburg, Port Elizabeth, Pretoria, and Queenstown.²⁸⁴ It has established the Asingeni Relief Fund which provides financial assistance for the defense of individuals charged with contravening security legislation.²⁸⁵ The Fund also has provided for the defense of people charged with violating the Group Areas Act,²⁸⁶ as well as for those accused of violating influx control laws.²⁸⁷

As a result of these activities, the SACC incurred the wrath of the South African government, which historically has disapproved of aid in politically sensitive cases.²⁸⁸

Consequently, the SACC became the subject of an investigation by the Eloff Commission of Inquiry which examined its organization and finances for the years 1975-81, a period during which more than ninety-seven percent of the SACC's funds came from foreign donors.²⁸⁹ Chaired by Mr. Justice C.F. Eloff, the Commission was an

²⁸¹ D. McQUOID-MASON, *supra* note 8, at 129, 131.

²⁸² *Id.* at 131.

²⁸³ Compare *id.* at 130, Table 50 (773 civil cases in 1980) with *id.* at 312, Table 52 (130 criminal cases in 1980).

²⁸⁴ M. SLABBERT, *supra* note 4, at 24.

²⁸⁵ SURV. RACE REL. S. AFR. 103 (1979).

²⁸⁶ The Group Areas Act of 1950 as amended divides all urban areas into racial zones. Only the members of a particular racial group may live or conduct business in its designated area. The effect of this legislation has been the forcible uprooting of thousands of African, Coloured, and Asian families. L. THOMPSON & A. PRIOR, *supra* note 2, at 67-68.

²⁸⁷ SURV. RACE REL. S. AFR. 103 (1979).

²⁸⁸ See *supra* notes 92-93, 109, 203 and accompanying text.

²⁸⁹ From 1975 to 1981, the SACC's income was R17,958,048. Most of the money came from foreign church organizations. Some 52.6% of the funds came from West German donors, 10.3% from the World Council of Churches, 6% from the Netherlands donors, 5.2% from donors in Switzerland, 4.4% from donors in Denmark, 3.5% from donors in the United Kingdom, and 1.2% from donors in Canada. Other foreign donations came from Norway, Finland, "multinational sources, other small foreign sources, and sundry sources (local and foreign)." Local sources accounted for only 1.2% (R209,853) of the income from donations over the seven years. Rand Daily Mail, Feb. 16, 1984, at 9, col. 2.

all-white body²⁹⁰ appointed by the Prime Minister in 1981; no theologians were members.²⁹¹ The Commission could have declared the SACC an "affected organization" under South African security laws. Such a finding would have barred any foreign financial contributions, thereby adversely affecting or perhaps closing down most of the SACC's programs, including its legal aid services.

After hearing evidence that filled eighty-two volumes and deliberating for five months, the Commission published a 450-page report in February 1984.²⁹² The Report accused the SACC of "strategies of resistance to the government"²⁹³ and castigated the SACC's legal aid work. It argued that although a large portion of the Council's funds from 1975-81 were spent on legal defense, "a relatively small number of persons, save the lawyers concerned, benefitted by the activities of the SACC in this regard."²⁹⁴ While the Report stopped short of calling for a complete ban on foreign contributions to the SACC, it did call for government controls on the SACC's financing by making it subject to a law controlling donations to welfare organizations.²⁹⁵ How this will affect the SACC's current activities is not clear. It is not unrealistic, however, to suggest that in the future the government may pass legislation restricting the SACC's legal aid operations. As Anglican Archbishop Desmond Tutu has noted, "they [the government] have not been known to be bashful about passing new legislation to deal with awkward customers."²⁹⁶

v. *The Legal Resources Center*

Founded in 1979, the Legal Resources Center is a public interest law firm modeled on both the American public interest law firm and the English neighborhood law office.²⁹⁷ With offices in Durban and Cape Town, which advise Africans, Asians, and Coloureds on civil and criminal matters, it also operates a law clinic and oversees the operation of three law clinics at the University of the Witwatersrand.

²⁹⁰ The membership of the SACC is approximately eighty percent black. Sowetan, Feb. 16, 1984, at 7, col. 1.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *World of Religion*, Feb. 25, 1984.

²⁹⁴ Sowetan, Feb. 16, 1984, at 6, col. 1.

²⁹⁵ *World of Religion*, Feb. 25, 1984.

²⁹⁶ Rand Daily Mail, Feb. 16, 1984, at 8, col. 1.

²⁹⁷ For a further discussion, see D. McQUOID-MASON, *supra* note 8, at 126-28; M. SLABBERT, *supra* note 4, at 13-14.

The Center was responsible for the important *Komani*²⁹⁸ and *Rikhotto*²⁹⁹ test cases which made it easier for Africans to acquire residence rights in cities. Although the Center deals with some criminal problems, most of its work involves civil matters such as consumer problems, workmen's compensation claims, housing, and wrongful dismissals from employment.

While the above-described efforts provide some assistance to the indigent criminally accused, they do little to improve the overall situation.

IV. A PROPOSAL FOR REFORM

The inadequacy of the services offered by the independent organizations and the failure of the National Legal Aid scheme present a difficult situation for those interested in achieving adequate representation for the indigent accused. Three possible paths for legal aid present themselves: 1) all efforts (state-supported and otherwise) could be abandoned entirely; 2) the system could be retained in its present form; 3) the system could be reformed to ensure that a more equitable distribution of legal services to indigents (especially in criminal cases) is achieved. The first possibility appeals to those extreme conservatives who believe that legal aid is unnecessary, as well as to those radicals who oppose legal aid on the grounds that its absence will heighten the contradictions within the society and hasten the revolution. The views of the former group should be rejected on the grounds that access to representation, at least to some degree, equals access to justice. The views of the latter group are more problematic. Admittedly, where, as in South Africa, the legal structures underpinning poverty (and other forms of inequality) are oppressive, a legion of lawyers representing the poor will not bring an end to poverty. Indeed, it is naive to place legal representation at the center of any strategy for an attack on poverty. Yet, farsighted concerns about hastening the revolution can be of little comfort to an indigent African faced with a criminal prosecution. The second possibility must be rejected, for as has been demonstrated, the current system does little to meet present needs. Thus, for those interested in achieving adequate rep-

²⁹⁸ See *supra* note 31 and accompanying text.

²⁹⁹ *Rikhotto v. East Rand Administration Board* held that a contract worker who returns to his rural home for a brief time each year, as required by law, is able to acquire an urban residence right after ten years of continuous employment. Dugard, *Using the Law to Pervert Justice*, 11:2 HUMAN RIGHTS 12 (1983).

resentation, the third possibility is the only viable alternative.

In keeping with this premise, it is proposed that the current nationally-financed system be revised to serve a larger number of individuals and that its operations be harmonized with those of the non-state-funded organizations. Such a revision entails changing the Act, the Guide, and the system's mode of operation in order to create a decentralized scheme responsive to local needs, funded by the state, controlled by the legal profession, and administered by legal aid officers who are employed by the Board itself, rather than by the Department of Justice or the Department of Bantu Administration. The utility of this proposed revision is applicable not only under present circumstances but also in a majority-ruled South Africa in which, despite a more equitable political dispensation, poverty will not disappear overnight.

A. *The Act*

In order to remove the perception of the Board as a mere arm of the state, the legal profession should be given more control over the legal aid scheme. This increased control might also have the effect of stimulating the profession's interest in the system. Greater control can be achieved in two ways. First, the Act's provision concerning the make-up of the Board³⁰⁰ should be revised to give the legal profession more representation. Second, the provisions of the Act giving the Minister of Justice broad powers in appointment and possible termination of members³⁰¹ should be abandoned. Instead, the local bar councils and Provincial Law Societies should have the freedom to appoint their representatives without the Minister's approval. The Act also should curtail the Minister's powers of removal over representatives from the Bar by establishing a list of objective criteria for removal, and by requiring the consent or, at least, the consultation of the relevant professional organization before the Minister takes dismissal action. Such a provision would be in marked contrast to the present subjective criterion of "good reasons."³⁰² The independence created by a greater degree of control and a reduced potential for removal would free the Board to abandon its present conservative stance and to take on cases of a more politically sensitive nature.

³⁰⁰ Legal Aid Act No. 22 of 1969, *supra* notes 130-37 and accompanying text.

³⁰¹ Legal Aid Act No. 22 of 1969, *supra* notes 130-38 and accompanying text.

³⁰² Legal Aid Act No. 22 of 1969, *supra* note 137 and accompanying text.

To help promote the impression that the Board functions independently, the Act should include a provision establishing a separate monitoring organization responsible for reviewing the Board's action and submitting reports to Parliament at regular intervals. Members of the monitoring organization would include prominent members of the bar as well as laypersons; such an organization might be modeled after the Lord Chancellor's Advisory Committee in the United Kingdom,³⁰³ criteria for membership in which are knowledge of the court's work and an understanding of social conditions. This Committee's reports provide constructive criticism, stimulate reflection on the legal aid system's operations and put such operations in a social context. This last contribution is particularly valuable as it helps to prevent practitioners intimately involved with the system from forgetting the social functions of legal aid, and adopting too legalistic an approach.

B. The Guide

As has been noted, the Guide evidences a negative attitude toward legal aid. Provisions reflecting this attitude must be removed. These include the provision warning legal aid officers to be on their guard against abuses of the system, which introduces a high level of suspicion into the application process,³⁰⁴ and the vague criteria which allow the legal aid officer to refuse aid because of his own personal prejudices.³⁰⁵ The latter should be replaced by objective criteria which would work to eliminate potential abuses by legal aid officers. A statement of the theoretical principles of equality and justice which inform the rendering of legal aid should replace all such negative provisions.

The provisions dealing specifically with legal aid in criminal cases also must be revised to ensure equality of representation between rich and poor. Thus, the Guide should eliminate current *pro deo* practice³⁰⁶ and instead make legal aid available to all indigents accused of crimes. Such a provision would result in the appointment of attorney-assisted defense counsel in all cases; therefore, the standard of legal services would improve in those cases where the best assistance is needed, i.e. those in which the accused risks losing his life. Indeed, statistics indicate that the impact of such a change would be con-

³⁰³ Zander, *Legal Aid in a Democratic Society*, in LEGAL AID IN SOUTH AFRICA, *supra* note 79, at 20.

³⁰⁴ See *supra* text accompanying note 68.

³⁰⁵ See *supra* notes 169, 207-10 and accompanying text.

³⁰⁶ See *supra* notes 212-14 and accompanying text.

siderable. For example, for the period May 1, 1981 to April 30, 1982, the General Council of the Bar of South Africa reported that 2,394 pro deo counsel received appointments in the various divisions of the Supreme Court.³⁰⁷ Compared with figures supplied by the Legal Aid Board for the same period, pro deo advocates constitute approximately 56% of all counsel funded by the state.³⁰⁸

The Guide's provision limiting legal aid in cases involving motor vehicle offenses to exceptional circumstances³⁰⁹ should be modified. While the intent of the provision is to limit the availability of legal aid to incidents of a serious nature,³¹⁰ the practical effect is the denial of aid in serious cases such as reckless driving or culpable homicide. A more equitable position would be to provide aid in cases where the accused faces incarceration or, at the very least, in cases where the accused is subject to imprisonment beyond a certain period of time, e.g. one year.³¹¹

C. *The System In Practice*

Turning from revision of the tone and language of the Guide to the working of the system in practice, it appears that decentralization would result in an efficient system that is more responsive to the needs of the poor. As has been demonstrated, the Board is under-financed, and what financing it does receive is spent inefficiently.³¹² With regard to financing, the Government should increase the amount spent per capita to at least reach parity with western nations such as Canada and the United Kingdom.³¹³ Even though the state has historically taken a negative attitude toward legal aid—the Department of Justice has never repudiated its statements denigrating the value of legal aid³¹⁴—two arguments likely to appeal to the state can be made. First, placing the level of financing on a par with that in the West will serve to deflect foreign criticism away from the present inequality of representation. Since in general the South African government seems particularly interested in cultivating a positive image

³⁰⁷ ANN. SURV. S. AFR. L. 505 (1982).

³⁰⁸ *Id.*

³⁰⁹ See *supra* note 214 and accompanying text.

³¹⁰ See *supra* note 214 and accompanying text.

³¹¹ Providing aid in cases where the accused faces imprisonment is the position in the United States. See *supra* text accompanying note 106.

³¹² See *supra* notes 220-30 and accompanying text.

³¹³ See *supra* notes 224-25 and accompanying text.

³¹⁴ See *supra* notes 108, 110-18 and accompanying text.

abroad,³¹⁵ it may find this argument attractive. Second, increasing the amount spent on legal aid would result in a savings of money spent on imprisonment.³¹⁶ For example, the acquittal rate for represented accused is thirty-five percent.³¹⁷ The cost of keeping one person incarcerated was R8 per diem by 1984-85.³¹⁸ Assuming an acquittal rate of thirty-five percent as a result of legal aid for the 87,966 prisoners given sentences of up to one month in 1984-85 (i.e. 27,288)³¹⁹ and assuming further that the average length of sentence imposed on these persons was fifteen days, at a rate of R8 per person per day, acquittal because of legal aid would save R3.275 million (27,288 x R8 x 15). Using the same rate for acquittals, it appears that the savings increase with the length of the avoided prison term.

Thus, if 35% of the 76,348 persons sentenced to imprisonment for over one month and up to four months in 1978-79³²⁰ were acquitted because of legal aid (i.e. 26,722) and assuming that they would have served an average sentence of sixty days, the amount of money saved would equal R12.827 million (26,722 x R8 x 60). In practice the amount saved by legal aid would be higher still, because these figures represent only the amount saved in cases where non-custodial sentences are imposed. Presumably, with legal aid, the number of non-custodial sentences also would increase and would thereby contribute to further savings.

The system must also use the resources it receives more efficiently so that the maximum number of people can be benefitted. The Board should, therefore, abandon the referral system in favor of an in-house system of salaried lawyers. As mentioned previously,³²¹ the referral system is approximately three times as costly as an in-house system. Thus, for the same amount of money, in-house lawyers could handle approximately three times as many cases as referral lawyers under the present system. Beyond the purely monetary benefits of an in-house system there is the additional advantage that such lawyers would acquire expertise in the areas of law most frequently involving

³¹⁵ See L. THOMPSON & A. PRIOR, *supra* note 2, at 147-48.

³¹⁶ This hypothetical follows D. MCQUOID-MASON, *supra* note 8, at 110-11.

³¹⁷ See M. SLABBERT, *supra* note 4, at 30.

³¹⁸ This figure is derived from REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF JUSTICE 1984-85 ANNUAL REPORT, TABLES 1, 8 (1986).

³¹⁹ *Id.* at Table 9.

³²⁰ *Id.*

³²¹ See *supra* notes 226-30 and accompanying text.

the indigent; this expertise also would render such lawyers more competent in their work than general practitioners.

As under the present system where indigents closely identify the Board with the state,³²² however, it is also likely that indigents would view in-house lawyers in the same manner. To prevent such an impression from arising, once the profession has greater control of the Board as suggested above, it should move to decentralize the system by allowing the Provincial Law Societies to take control of the day-to-day operations of the system. Arguably, such a change would give greater flexibility in administration and would create a more ambient understanding of the nature of local problems. The new system would operate as follows: in each province, the Provincial Law Society would be responsible for the operation of legal aid in its area and would appoint a provincial legal aid committee which would oversee the day-to-day operations of the system and submit an annual report to both the Provincial Law Society and the National Legal Aid Board. Provincial legal aid committees could model themselves on the Area Committees used in the United Kingdom.³²³ Thus, they would include practicing attorneys and advocates nominated by local bar councils. Some provision should be made to ensure representation by both black and white practitioners.³²⁴ Conceivably, this would raise the committees' esteem in the public's eye. The provincial legal aid committees also should include members of the local University law faculty to foster greater cooperation and communication between the National Legal Aid Scheme and the University law clinics. The provincial legal aid committees would then hire local attorneys and advocates to handle cases. While it is normally not the practice for law offices in South Africa to include both attorneys and advocates, special permission could be obtained from the organized legal profession. Indeed, such permission already has been granted to the Legal Resources Center.³²⁵

The committees should actively seek to employ black, especially African, practitioners as this also would contribute to the legal aid

³²² See *supra* notes 196-203 and accompanying text.

³²³ E. MATTHEWS & A. OULTON, *supra* note 303, at ch. 1.

³²⁴ There are 4,600 attorneys in South Africa of whom 250 are blacks. Additionally, there are 600 advocates of whom 20 are black. Of the 20 black advocates, only nine are African. Correspondence from the Black Lawyers Association of South Africa, *Legal Services and Law Reform in the United States: Are There Lessons Applicable to Rural South Africa?*, New York, N.Y., (June 10, 1985) (Carnegie Corporation Conference).

³²⁵ Dugard, *supra* note 299, at 22.

system's positive public image and attract more black (especially African) clients who because of cultural and linguistic reasons currently hesitate or are unable to use the system. Presumably, individuals might communicate not only more easily but also more willingly, with members of the same ethnic group. To further facilitate communication with poor Africans, the committees might also employ African interpreters to assist clients. Since local committees would control the scheme, they would have an appreciation of which interpreters to hire, based on their knowledge of local needs. The committees might also offer fellowships to recent black law graduates to work in their offices and might establish agreements with local law faculties offering academic credit to students who interned with the committees. These moves would give young black lawyers experience in areas of the law they will encounter in practice and would foster greater interest in legal aid work among law students. This last move also would have positive effects later, as these law students, many of whom presumably would become sympathetic to legal aid and have a greater appreciation of the legal needs of the poor, enter practice and eventually become prominent members of the bar.

In order to further dispel the impression that the legal aid system is an arm of the state, the provincial legal aid committees should be responsible for hiring their own legal aid officers rather than having legal aid officers who are employees of the Department of Justice or the Department of Bantu Administration, as is presently the case. The same consideration of ethnic, cultural, and linguistic background applied in the selection of legal practitioners also should apply to these officers. Ideally, such officers should be drawn from the areas in which they will serve, as this will ensure that they have the greatest possible understanding of local problems. Again, as was suggested for clients, interpreters employed by the committees would be available to facilitate communication with poor Africans.

The decentralization proposed here would improve the quality and quantity of legal aid in ways other than those just articulated. For example, since each provincial legal aid committee would be intimately aware of the problems peculiar to those indigent in its geographic area, it might open offices in areas which the present system with its offices in downtown metropolitan locations ignores. Thus, in an effort to better serve the people in its area, it might open offices in African townships and in rural areas. As noted above, the opening of a legal aid office in Athlone, a Coloured area, made legal aid more accessible to the population there and resulted in an increase

in the number of Coloured applicants.³²⁶ It is fair to speculate, based on this development, that the opening of legal aid offices in the major African townships such as Soweto would result in a similar rise in the number of African applicants. Offices also might adopt working hours compatible with the schedules of those in the areas they serve. Hence, unlike under the present system, offices might be open early in the morning, late in the evening, and on weekends.

Decentralization also would lead to a greater number of applicants being accepted for legal aid. Flexible local means tests should replace the rigid national standard. Rather than an absolute figure above which an applicant may not receive aid,³²⁷ local tests should take the form of mere guidelines based upon considerations of local economic conditions; the tests should be tied to the cost of living index so that income qualifications keep pace with inflation.³²⁸ Legal aid officers familiar with local conditions would then be at liberty to consider each case on its merits and decide accordingly. Moreover, in cases where officers deny legal aid, the local committees should require them to give written reasons. These reasons should be objective; "good cause"³²⁹ should be considered an unsatisfactory reason. This would facilitate the appeal process which itself would become more sympathetic to indigents' requests under a decentralized system. For example, appeals no longer would be to the National Director in Pretoria,³³⁰ but rather to the director of the provincial committee who presumably would be drawn from the ranks of the provincial legal aid society and elected by its members. This director could be assumed to have a greater understanding of local circumstances that might make the rendering of aid in a particular case appropriate; the National Director under the present system could not be expected to be acquainted with local problems in all of South Africa. Thus, with a local appeals process, the number of those eventually granted aid conceivably would increase.

Decentralization also would lead to more effective publicization of the scheme; this would result in an increased number of people seeking

³²⁶ See *supra* note 70 and accompanying text.

³²⁷ See *supra* notes 156-65 and accompanying text.

³²⁸ See *supra* notes 241-42 and accompanying text. For a discussion of the effects of inflation on the poor in South Africa, see Kahn, *The Effects of Inflation on the Poor in South Africa*, CARNEGIE CONFERENCE PAPER NO. 134, SECOND CARNEGIE INQUIRY INTO POVERTY AND DEVELOPMENT IN SOUTH AFRICA (1984).

³²⁹ See *supra* notes 207-10 and accompanying text.

³³⁰ See *supra* notes 175-76 and accompanying text.

aid. As has been noted, the current system has an anti-publicity bias and does not spend money on advertising but rather relies on free services of the media and other organizations.³³¹ Ideally, the funds should be allocated specifically for advertising. Indeed, funding for the entire system might be arranged through an annual process whereby each local committee would submit a proposed budget to the National Legal Aid Committee which in turn would forward the requests to the government. Such budgets might contain specific requests for advertising in addition to requests for salaries and other operating expenses. Under a decentralized system, each local committee might spend its advertising funds in a manner which, after considering local conditions, it deemed would have the greatest impact in attracting indigent applicants. Thus, for example, it might advertise in newspapers with a large African readership.

Even in the absence of funds for advertising, local committees could disseminate information about the legal aid scheme, thereby attracting clients more effectively than the National Legal Aid Board does under the present system. They could establish close ties with other non-state sponsored legal aid organizations such as the Black Sash and the university law clinics. The Sash, which already sends those needing representation to the Legal Aid Board offices, might also post information and distribute pamphlets in its own offices. Students at university law clinics could be required to man legal aid information offices in magistrates' and other courts; they also could run information and advice bureaus located in areas where the local legal aid committees determine the need is greatest. Such links with information and advice offices would establish a regular means of directing needy clients toward the legal aid offices.

Legal aid ties with the churches figure prominently, as well, in improving the dissemination of information about legal aid. They could make their parishioners aware of both the manner in which the system operates and of any revisions in procedures as they occur. They could notify parishioners of the existence and operations of non-state funded legal aid organizations such as the Black Sash, the university law clinics, and the proposed information and advice offices, all of which would have the added function of funneling indigent clients toward the local legal aid committee offices.

³³¹ See *supra* notes 231-36 and accompanying text.

The changes suggested here would contribute to the system's greater utilization and thereby would ensure a more equitable distribution of legal aid to the indigent accused.

CONCLUSION

Although South Africa recognizes the right to counsel in criminal cases, that right has little value in a country where the vast majority of people cannot afford legal representation. The existence of the right, nevertheless, is a prerequisite for creating a system of legal aid that ensures a measure of equality of representation between rich and poor alike. Unfortunately, the South African government historically has taken a negative attitude toward legal aid. This has produced a national legal aid system that is ineffective in supplying legal assistance to indigents, underfinanced, underpublicized, and underutilized. The various independent organizations that supply legal aid to the indigent accused have neither the finances nor the manpower to ameliorate the situation.

In order to achieve adequate representation for the indigent accused, the current nationally-financed system must be revised to serve a greater number of individuals and its operations must be harmonized with those of the independent organizations. Such a revision entails changing the Legal Aid Act, the Legal Aid Guide, and the system's mode of operation in order to create a decentralized scheme responsive to local needs, funded by the state, controlled by the legal profession, and administered by legal aid officers who are employed by the Legal Aid Board itself. While such changes would not end the problems of the indigent accused—these must be resolved through social and economic changes in South African society as well as through legislation—they would, at least, improve their lot.