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A COMPARISON BETWEEN THE LEGAL AID SYSTEMS OF SOUTH AFRICA AND WEST GERMANY IN THEORY AND PRACTICE

Lovell Derek Fernandez

A Thesis Submitted to the Faculty of Law
University of the Witwatersrand, Johannesburg
for the Degree of Doctor of Philosophy

Hamburg 1984

ABSTRACT

The responsibility of ensuring that all citizens have effective access to the courts rests with the State. Legal aid is one of the institutions created by the State for the purpose of bringing justice within the reach of the poor. This thesis analyses the legal aid systems of both the Federal Republic of Germany and South Africa. How responsive are the legal aid schemes in both these jurisdictions to the needs of those persons for whose benefit they exist?

To avoid making blind comparisons this question is answered in the light of an historical analysis of the major socio-political developments that have shaped the policies on access to justice in each of the two jurisdictions.

In 1923 Germany became the first country to introduce a system of state compensation for legal aid work. This was a major development. It signalled a break with the nineteenth century theory according to which the State was required to do no more than pledge to protect the rights of the individual. The enormous strength of the German legal aid movement was, however, negatively affected by the Weimar crisis and the subsequent Nazi rule.

The nineteenth century equality principle was not fully accepted at the Cape of Good Hope. Although the English revolutionized the court system, access to justice for the poor was, and continues to be, hampered by the rigorous implementation of racially discriminatory laws and the extensive powers which vest in the executive. The present state legal aid scheme is not responsive to the needs of the poor. As before the enactment of the Legal Aid Act in 1969, much

of the legal assistance rendered to the poor today is of a charitable nature. The findings of empirical research show that there is an urgent need to expand the ambit of legal aid, particularly in the domain of criminal justice and administrative law. There is further a need for the State to give material support to the current initiatives that are being undertaken to expand public-sector legal services.

The German legal aid scheme has several shortcomings. These are traceable mainly to the failure of the legal profession to address itself to the socio-psychological aspects related to the use of lawyers. There are, however, features of the German legal aid practice which could serve as a useful guide in the search for a more effective South African legal aid system.

DECLARATION

I declare that this thesis is my own unaided work. It is being submitted for the degree of Doctor of Philosophy in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other University.



(Lovell Derek Fernandez)

Thirtieth day of August, 1984.

To my parents

Cornelius and Claudina Fernandez

PREFACE

The legal aid scheme in South Africa has been in existence for more than a decade. During this period the scheme has been the target of considerable criticism. The general argument is that the scheme is lacklustre. Perhaps too much is expected of legal aid. It is often overlooked that much of the injustice that obtains in South Africa today is caused by Parliament and can only be redressed by it. The fact that South Africa has one of the highest per capita prison population in the world is a problem that derives essentially from the implementation of the Government's racial policies.

But this does not mean that the legal aid scheme can achieve nothing concrete. On the contrary, legal aid can act as a catalyst for promoting real socio-political reform through the legal process. This, in turn, promotes respect for the law, the courts and, above all, for the rights of the individual.

The purpose of this study is (a) to identify the weaknesses in the legal aid scheme which prevent it from becoming a more effective instrument for promoting justice and (b) to recommend solutions. I conducted a survey in the Vaal Triangle to find out what kind of legal problems people usually have, how they go about solving them; and what they know about legal aid. This study also includes the views of the legal profession on matters bearing on legal aid. These views and experiences were elicited by means of questionnaires. Whilst I worked as a Research Officer in the Centre for Applied Legal Studies in the University of the Witwatersrand, Johannesburg, I conducted research in order to establish the correlation between

the incidence of legal representation and other variables in the criminal trial. The findings were published in two law journals in South Africa. Parts of these published findings are included and referred to in chapters 19 and 20 of this thesis.

The main purpose of the comparison with West Germany is to find out (a) how legal aid is administered in the Federal Republic and (b) what South Africa can learn from the German experience. After all, the German legal aid scheme has been in existence for more than a century.

I am greatly debted to my supervisor, Professor John Dugard, for the advice and guidance that he gave me. I am also grateful to the German Academic Exchange Service without whose material support, during the initial phase of my stay in Germany, I would have been at a loss. Thanks are due, too, to all the people in both South Africa and West Germany who sacrificed their time to talk or to write to me about matters bearing on the theme of this study. I appreciate this very much.

I wish to acknowledge the assistance of Dr Sven Tönnies, lecturer in statistics in the Department of Psychology in the University of Hamburg, in preparing the data for the computer. I also wish to acknowledge the assistance I received from the Computer Centre in the University of the Witwatersrand, Johannesburg.

My sincere thanks go to the library staff of the Max-Planck-Institute for Private Law and Private International Law in Hamburg. I greatly appreciate their patience with me and the excellent library service they offer.

Special thanks go to Elsbeth Konertz who sacrificed many a cherished sunny lunch hour to type parts of the preliminary draft of this thesis from my often illegible handwriting; to Irene Gehrken for useful hints in matters relating to style; to Dagmar Flemming for her excellent typing

of this final draft of the thesis. My wife, Michaela, typed the bulk of the preliminary draft of this thesis. Not only do I thank her heartily for this but also for helping me to decipher legal works written in Gothic letters and to translate Old German texts. Above all I thank her for the unflinching moral support she gave me during the writing of this thesis.

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1 INTRODUCTION

A right that cannot be enforced is worthless. To ensure that rights are enforceable the State has created an apparatus for the administration of justice. Within this apparatus are the judicial mechanisms for resolving legal disputes - the courts. But the courts do not go out searching for persons who have legal disputes; the aggrieved person self must find his way to the court. This sets out that the person knows his rights, knows how to go about seeking the protection of the court, and has the means to assert his rights before the court.

Whereas in ancient times legal relationships were simple and transparent, today they are complex. The evolution of the legal system has resulted not only in the streamlining of procedures designed to make the law more accessible, but also in the enactment of more complex laws, in the formalization of the legal process, the professionalisation of legal services and the isolation of the individual from the legal process. The growth in the complexity of the law has also brought about an increase in the demand for professional legal services. But legal services, like other services offered in a competitive economy, are available only to those who can pay. And with the growing degree of specialization within the profession the costs of professional legal services are becoming more and more prohibitive.

The socio-political implications of these problems facing the ordinary person have been a source of growing concern to both governments and legal sociologists. The need to make the law more accessible to the poor is now widely recognized. In response to the growing demands that the State must guarantee the enjoyment of social rights many states have created a right to legal aid. This is a welfare right.

The constitutions of some states, for example, India (Article 24), Spain (Article 119) and Brazil (Article 53), expressly guarantee the social right to legal aid. In some states, this right derives from the constitutional or common law 'equality of treatment principle'. Although the eligibility requirements differ from state to state, it is generally accepted that legal aid comprises the right to gratuitous legal assistance by counsel of one's choice.

The problem of access to justice is particularly poignant in South Africa where the greater part of the population is poor, illiterate and isolated from the political process. The Government's failure to satisfy the socio-political wants of the poor, the Black population, has given rise to a highly explosive political climate. This is evinced by the sporadic outbursts of violence that occur from day to day. It is widely accepted that there is an urgent need for reform. Lawyers are becoming increasingly aware of the need to mobilize the profession in order to press for change through the law. The question of legal representation and access to the law is assuming major importance. One of the basic objects of the recently established lawyers' association, Lawyers for Human Rights, is to provide practical assistance in litigation or matters affecting human rights.

This new concern for the legal plight of the poor has been accompanied by growing dissatisfaction with the implementation of the State legal aid scheme. The criticism, however, has been sporadic and unco-ordinated.

The purpose of this study is to make a comprehensive assessment of legal aid in South Africa. The study examines legal aid and the whole question of access to justice in the light of the socio-political make-up of the country. Thus far, research into legal aid in South Africa has concentrated mainly on the management aspects of legal aid or

its mechanics. This thesis attempts to relate legal aid to the politico-legal culture of South Africa and to the legal needs of the poor. It is hoped that this will help lawyers and law students to develop a healthy scepticism towards rules of law and a sensitivity to social justice.

The decision to compare the legal aid system of South Africa with that of West Germany has not been made arbitrarily. Germany has a long-established tradition of providing legal assistance to the poor. Indeed, the American legal aid system owes its origins to the practice amongst early German settlers of giving legal aid to indigent immigrants from Germany. There is therefore much that could be learned from the German experience, both good and bad.

The second reason for the choice of West Germany is that there is no comprehensive study of the German legal aid scheme in the English language. All publications in English have considered only aspects of the German legal aid scheme. This study appraises the development of legal aid in Germany from the post-Roman area up to the present time. It is hoped that this overview will stimulate English-speaking lawyers to conduct more detailed research into some of the German legal institutions that could not be dealt with fully in this study.

The South African legal system embodies three legal cultures: Roman Law, Roman-Dutch Law and English Law. These three legal systems form the core around which South Africa's substantive and adjective law has evolved. Therefore, when writing about a contemporary South African legal institution it is useful to search first the parent legal systems for a lead. One looks, for example, to the historical forces which gave rise to the legal institution, the events which shaped it, and the factors which led to its acceptance in South Africa. This study will not depart from this approach.

The thesis first examines the position of the indigent litigant under Roman Law and Canon Law. Thereafter the focus will be on the developments in Germany. After this the discussion will be extended to the other two limbs of the South African legal heritage: English Law and Roman-Dutch Law. More recent developments in both England and the Netherlands will also be briefly reviewed. Thereafter, the discussion will deal with the question of access to the courts in South Africa proper. The historical conspectus will start with the landing of Van Riebeeck at the Cape in 1652 and will end with the period leading up to the enactment of the Legal Aid Act in 1969. The historical part will be rounded off with a comparative review in which the development of the notion of access to justice for the poor in both Germany and South Africa will be assessed critically.

The discussion will then return to consider the question regarding the legal needs of the public today. Next will come an evaluation of the procedural mechanisms for affording access to justice for the poor outside the Legal Aid Act. After that the Act itself will be examined in full. Following this, the focus will be on the extra-judicial legal services as they obtain today.

The concluding chapter will embody a synopsis of the critique with recommendations.

2 ROMAN LAW AND THE INDIGENT LITIGANT

1 The Legis Actio Procedure

The legis actio procedure is the earliest Roman legal procedure known to us. Of the five leges actiones described by Gaius[1], the most commonly used was the legis actio sacramento.[2]

a The Legis Actio Sacramento

Under the sacramentary procedure the litigants were required, after having drawn their claims according to a rigid form, to swear a mutual oath which, in the event that an assertion was proved untrue, rendered the perjurer an outlaw.[3]

This mode of procedure was, however, of little benefit to the indigent plebeians. Although it was not difficult to recognize an actionable right where the matter was covered by statute, problems arose where distant fact patterns had to be interpreted, with reference to precedents, in order to bring them within the scope of the statute. Only the priests, who had studied and cultivated the secular law in their seclusive pontificial enclaves, knew the secrets of the interpretatio.[4] To maintain their influence on the administration of justice the priests did not publish the findings of their archaival work, thus keeping the public in ignorance as to the workings of the law. As the priests themselves came from the privileged patrician class, the secret collegial

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1 G 4. 12.

2 G 4. 13.

3 Ibid.

4 W W Buckland A Text-Book of Roman Law from Augustus to Justinian (1921) 2.

science became an effective weapon with which to frustrate plebian legal claims.[5]

In later times when the sacramentum became a sum of money, the sacramentary procedure became even less beneficial to the poor. Gaius points out that where the matter in dispute was over 1000 asses the sacramentary sum was 500 asses.[6] For disputes involving smaller amounts the sacramentary sum was fixed at 50 asses.[7] The sacramentary sum was deposited with the priests in a temple, and where the deponent's assertions were proved false, the wager sum was forfeited to the State.[8]

Buckland[9] points out that not 'every poor litigant could get a friend to risk 500 asses.' Even the lesser *sacramentum* of 50 *asses* was 'a fairly heavy investment in the case of a poor man (the value of five sheep).[10] Kelly[11] states that this made it extremely difficult for a poor man to litigate by means of the sacramentary procedure, the main form of litigation open to him.

b The Legis Actio per Manus Iniectionem

This action, which took place before the magistrate, was a form of personal execution on the debtor for specific claims. The plaintiff symbolically seized the defendant by touching him.[12] The defendant was not permitted

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5 M Cappelletti J Gordley and E Johnson Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies (1975) 7 (Cited hereafter as Cappelletti et al).

6 G 4. 14.

7 Loc cit.

8 G 4. 13.

9 Op cit 613.

10 J M Kelly Roman Litigation (1966) 82.

11 Ibid 82-83.

12 G 4. 21.

to defend himself personally against the manus iniecto, but had to appoint a representative, a vindex, to contest the action in his own name.[13] A defendant who could not appoint a vindex was taken away and kept in bonds.[14]

In practice, however, a vindex was acceptable to the magistrate only if he was wealthy enough to guarantee actual payment in the event of the defendant's case being unsuccessful.[15] Thus, only the rich were admissible as vindices;[16] and only the rich could furnish vindices who, as Jhering[17] points out, demanded the money in advance to cover the possibility of being condemned. The primary principle underlying the legis actio procedure, 'nulla actio sine lege' thus had its counterpart in the principle, 'nulla actio sine aere'.[18]

The person of humble means had no alternative[19] but to resort to the earlier principle of self-help laid down in the Law of the Twelve Tables. This provision[20] sanctioned the use of persuasion or force by the plaintiff in ensuring the defendant's appearance before the magistrate. That a low-ranking plaintiff could success-

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13 Loc cit.

14 Loc cit.

15 A Berger Encyclopedic Dictionary of Roman Law XXXII (1953) 766. For the wealth of a vindex see D. 2.6.1. and D. 2.8.5.

16 P Garnsey Social Status and Legal Privilege in the Roman Empire (1970) 187.

17 R von Jhering Scherz und Ernst in der Jurisprudenz (1885) 198.

18 Ibid 199.

19 In theory, an indigent defendant could procure a cognitor or procurator to contest his case, but here, too, the payment of security was compulsory. See G 4. 101.

20 'Si in ius vocat, ni it, antestamino: igitur em capito. Si calvitur pedemve struit, manum endo iacito.' Cited by Kelly op cit 6.

fully exert force on a wealthy and powerful defendant, cannot be assumed. As Kelly points out:[21]

> We still want to know what could be done about the powerful man with plenty of slaves who keeps out of the magistrate's way, snaps his fingers at the weaker plaintiff, and succeeds in preventing the plaintiff by physical force from bringing him to law.

No evidence exists that the magistrate ever sent his small police force to intervene against a reculcitrant defendant.[22]

The practical hardships encountered by the poor in the procurement of a vindex necessitated the introduction of the legis actio per manus iniectionem pura, according to which a defendant debtor could act as his own vindex.[23] However, where the defendant lost the case, he was still liable for payment of double the value of the matter in controversy.[24] In practice, this reform did have the effect of widening access to the law, but the poor party had very slender chances of winning a case where the wealthy opponent enlisted the services of a vindex, procurator or cognitor.

2 Vadimonium

Towards the end of the Republic in ius vocatio was replaced by vadimonium, which was a promise in the form of a stipulatio made by a defendant in a trial before

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21 Op cit 8.

22 Ibid 9.

23 R Sohm Institutionen des Römischen Rechts 10 ed (1901) 231.

24 Ibid 231.

the magistrate, or by a debtor summoned by his creditor, binding him to appearance at a future date.[25] In some cases vadimonium was without security; in other cases it was accompanied by an oath or real security.[26] Exempted from the payment of security were men of fides[27] and honestas.[28] Suspectae personae, however, were required to provide security.[29] Garnsey[30] points out that it is unlikely that vadimonium without security was acceptable in the case of an indigent defendant. Indeed, it is doubtful whether this innovation was of any benefit to the poor.

3 Removal of Some of the Obstacles to Justice

Two developments took place in the period of the Republic, which did something to make the law more accessible to the indigent plebeians. One was the election in 254 B.C. of the first plebeian, Tiberius Coruncanius, to the office of pontifex maximus.[31] Coruncanius published the ritual legal secrets that had been used as a weapon against his class, thus destroying the powerful influence the priests previously had on the course of judicial proceedings. Coruncanius also initiated the practice of giving public consultations to persons in need of legal advice[32] - 'a sort of legal hospital service', as Lee interprets it.[33]

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25 G 4. 184.
26 G 4. 185.
27 D 40.5.4.8.
28 D 26.4.5.1.
29 G 4. 184.
30 Op cit 194.
31 Sohm op cit 87.
32 D 1.2.2.35.
33 R W Lee The Elements of Roman Law 4 ed (1956) 9.

The second development was the passage of the lex Papirie after 242 B.C. According to Jhering[34], the general aim of this law was to make the sacramentary procedure accessible to the poor. To this end it provided first, that the oath sum be deposited only after the proceedings and second, that the as be devalued to 1/24 of its former value. Jhering states that this devaluation eliminated the 'oppressive limitations' to the use of the law.[35] There is, however, no evidence which suggests that, in practice, the lex Papiria did in fact have a wide beneficial effect for the underprivileged.

4 The Clientela System

The only meaningful legal protection afforded to the poor during the Republic and early Empire, lay in the Clientela system. In the early period clientes were strangers from vanquished countries who had migrated to Rome where they attached themselves to wealthy patrician households to obtain their protection.[36] The clients offered the household-head political support and a variety of personal services.[37] In reciprocation of these services the patron gave his clients protection in the case of need, especially in legal matters.[38] Indeed, explaining the law to his clients constituted the most important duty of the patron.[39] In addition

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34 Op cit 223.
35 Ibid.
36 Sohm op cit 223.
37 Berger op cit 391.
38 Ibid.
39 Schott op cit note 6 at 5.

the patron represented his clients in court and conducted their law suits for them.[40] The earnestness of this reciprocal relationship is evinced by a provision in the Law of the Twelve Tables providing for religious sanctions against a patron who dishonoured his obligations to his client.[41]

The original clientela system disappeared in the early Empire, but left in its wake similar, though watered down types of half servile relationships which continued to characterize social relationships in subsequent epochs of Roman life.[42] Even today it is said that

> the Italian in trouble will look to his traditional patronus for support whether this be the church, the trade union, an influential individual, the family or a political party. These ... traditions help explain why there is little interest in modern Italy in the state provision of legal services to the poor.[43]

5 Legal Assistance

Prior to 300 B.C. the profession of a lawyer or jurist did not exist.[44] It was only after the plebeian pontifex maximus, Coruncanius, had inaugurated the practice of giving public legal consultations

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40 Cf Cicero de oratore 2 74 302.

41 Twelve Tables Tab VII 21 'Patronus si clienti fraudem fecerit, sacer esto' in C G Bruns Fontes Iuris Romani Antiqui 6 ed (1893).

42 W Kunkel Römische Rechtsgeschichte 4 ed (1964) 16.

43 E Blankenburg and J Cooper 'A Survey of Literature on Legal Aid in Europe' (1982) 2 Windsor Yearbook of Access to Justice 263 at 289.

44 C P Sherman Roman Law in the Modern World II 2 ed (1924) 451.

that a group of jurisconsults emerged.[45] These were public men who professed to be skilled in the law and to whom one could go for legal advice.[46] Under the formulary procedure, which superseded the obsolete legis actio, the jurisconsults frequently assisted magistrates in analysing complicated facts and in deciding on the applicability of new formulae.[47] Although the jurisconsults did not represent the parties in actual litigation, they assisted them in the first instance in drawing the formula to be produced to the judge.[48] But as they were men of high social rank, who drew their clientele from their peers through informal social contacts, and were conversant chiefly with the legal problems normally faced by the high orders[49], it is unlikely that they were of benefit to persons of low status.

Under the formulary system the parties in litigation normally appeared before the magistrate and the judge, accompanied by patroni or oratores who presented the motions before the magistrate or judge, examined witnesses and argued the case in the actual trial.[50] They offered their services gratuitously, their only reward being fame and high esteem in the eyes of their fellow citizens.[51] Their services were originally accessible to the underprivileged through the clientela system.

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45 Ibid.

46 Ibid. See notes 32 and 33 supra.

47 H F Jolowicz Historical Introduction to the Study of Roman Law (1932) 381.

48 Ibid.

49 Garnsey op cit 218.

50 J W Wessels History of the Roman-Dutch Law (1908) 312.

51 Ibid 192.

a Assistance in Criminal Proceedings

The criminal trial was based on the idea that the accused must defend himself in person.[52] As a general rule legal representatives were not allowed.[53] The reason for this is to be sought in the praetorian infamia, according to which certain persons were not allowed to act for anyone or to be represented by anyone in litigation.[54] In practice, however - during the Republican times at least - the accused was represented by his patron[55] - if he was fortunate enough to have one. At the trial the patron usually enjoyed what Mommsen[56] calls 'the mute assistance' of an advocate. Towards the end of the Republic it was not unusual for an accused to have as many as four persons representing him.[57]

An accused of low standing and of little means was at a considerable disadvantage as opposed to his wealthy counterpart. Whether or not an accused was kept in pretrial custody depended not alone on the nature of the crime allegedly committed, but also on the accused's social standing, wealth, dignity as well as his ability to furnish guarantors.[58] At the trials magistrate and juries showed preference for defendants and accusers of high standing.[59] During the period of the Republic it was not customary for the Court to assign defence counsel

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52 T Mommsen Römisches Strafrecht (1899: reprint 1955) 376.

53 D 48.1.13.1.

54 D 3.1.1.5 and G 4.82. See Mommsen op cit note 7 at 376; Buckland op cit 82-93; Garnsey op cit note 2 at 185-86.

55 Mommsen op cit 377.

56 Op cit 377 especially at note 7.

57 Ibid.

58 D 48.3.1.

59 Garnsey op cit 277.

to assist the accused.[60] The indigent accused without a patron was therefore at a considerable disadvantage. There was also gross inequality of treatment as regards the convicted person. Honestiores escaped the severe forms of punishment which were applicable only to the humiliores.[61]

6 Fees

After the disintegration of the original clientela system, a practice sprung up among clients in need of legal advice, of giving a fee or presents to persons who acted for them in court.[62] The exactions on clients became so outrageous that in the year 204 B.C. the lex Cincia was passed which enjoined advocates from accepting gifts from their clients as payment for their professional services.[63] But because this statute provided no penalty for its contravention, it became 'more honored in the breach than in the observance'.[64] This led Augustus (63 B.C.-14 A.D.) to reinforce the lex Cincia with a senatus consultum (17 B.C.) which imposed a fourfold penalty on advocates who accepted fees.[65] Adherence to this injunction was of short duration. Under the reign of succeeding Caesars, advocates grew less attentive to it. At the time of Claudius (A.D.41-54) the principle of a fee (honorarium) had become part of the Roman legal

60 Mommsen op cit 376.

61 For a detailed discussion of the dual-penalty system see Garnsey op cit 103 ff.

62 Sherman op cit 455.

63 Ibid.

64 Ibid.

65 Ibid.

practice.[66] The maximum fee payable to an advocate was fixed at 100 aurei.[67] During Trajan's reign the praetor Nepos forbade advocates from taking a contingent fee (pactum de palmario). This injunction was necessitated by the practice that had sprung up amongst advocates of taking fees in advance and not going on with the case.[68]

a Court fees

During the reign of Constantine the Great already (306-337 A.D.) subordinate court officials had been in the habit of accepting bribes from litigants. Constantine enjoined this malpractice which he visited with a severe penalty.[69] The injunction was heeded only for a short while. The habit of accepting gifts and charging fees for official duties was resumed again; it grew into a fixed custom which officially crystallized into a right in the second half of the fifth century A.D.[70] The fees, which were calculated according to the amount in controversy, went directly to the subordinate officials as remuneration for their duties.[71] A fee was charged

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66 Ibid.

67 D 5.13.1.13.

68 R Pound Jurisprudence (1959) 698. See also Schott op cit 6-7.

69 H Sprickmann-Kerkerinck 'Ueber den Ursprung des Armenrechts im Civilprocesse' (1893) 25 Archiv für katholisches Kirchenrecht 145 at 146. See generally Kelly op cit 33 ff. on the problem of bribery.

70 M Kaser Das Römische Zivilprozeßrecht (1966) 448.

71 Schott op cit 7.

for each stage of the litigation in which an official act was required.[72] Where the party lost the case, he was liable for all the costs including those of the victorious opponent.[73] Judges were prohibited from accepting fees from litigants as payment for their professional duties.[74] However, the iudices pedani who were low-ranking judges (originally honorary judges) with jurisdiction over unimportant matters had the right to require fees for their services.[75]

7 Exemption from the Payment of the Costs of Litigation

The costs of litigation were high.[76] Garnsey[77] points out that

> the poorer section of the population must have suffered considerable hardship when on the losing side in litigation. They were forced through debt to sell their meagre possessions, take out credit at unfavourable rates, and ultimately fall victim to the savage debt laws and forfeit their freedom.

Certain groups of persons, however, enjoyed either total exemption from the payment of court fees, or were required to defray only part of the costs. This was a privilege accorded by law irrespective of the

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72 A Blomeyer Zivilprozeßrecht (1963) 730.

73 Kaser op cit 448.

74 Schott op cit 7.

75 Ibid 8.

76 Sprickmann-Kerkerinck op cit 147; Schott op cit 13.

77 Op cit 138-139.

beneficiary's financial circumstances.[78] Fully exempted were the advocati, episcopi, ecclesiae and the fiscus.[79] Partly exempted were the comites consistoriani, in sacris scriniis militantes, agentes in rebus and their principes, the castrensiani and ministeriani, scholares, milites and the clerici except the bishops.[80] The Emperor could, in his discretion - per specialis largitatis - discharge other Roman citizens from the obligation to pay court fees. But again, poverty was not a criterion.[81]

Two passages of Ulpian have been construed[82] to support the theory that Roman law contained an organized solution for the legal problems of the poor. These passages are:

> D 1.16.9.3 It will be his (the proconsul's) duty in most cases to allow the assistance of counsel to persons who are under age or otherwise helpless, or to such as are out of their mind, if anyone asks for it on their behalf; or, if no one asks, he ought to allow it of his own accord. Again if anyone should declare that he is unable to get counsel, owing to the power of his opponent, in this case too the proconsul ought to find him one. It is not allowable that any should be borne down by the power of his opponent....[83] and

78 J T B von Linde 'Bemerkungen über die Zweckmäßigkeit *der in Deutschland geltenden Grundsätze über das* Armenrecht im Prozesse' (1833) 16 Archiv für civilistische Praxis 51 at 65-66.

79 Sprickmann-Kerkerinck op cit 150.

80 Ibid.

81 Von Linde op cit 66.

82 S P Gans 'Über Armenrecht im Prozesse' (1826) 1 Zeitschrift für die Zivil- und Kriminal-Rechtspflege im Königreich Hannover 26 at 28-32; Schott op cit 10-11.

83 Monro's translation.

D 3.1.1.4 The words of the praetor are: -"If they have no advocate I will give them one. It is not the practice to show this indulgence to the above mentioned class only (children and people with physical or mental defects); he extends it for all alike who for specific reasons, such as machination or intimidation on the part of their opponents, fail to find counsel."[84]

Nowhere in these two passages is there any express reference to the poor. It is possible that the poor also benefited from this legislation, but more by way of coincidence than by right.[85] Given the widespread incidence of poverty during Roman times, if the poor - as a class - were the intended beneficiaries, this would have been expressly mentioned. It is submitted that these benefits were intended primarily as a partial safeguard against converting litigation into a blatant political struggle the outcome of which was determined by influence and force alone. The Emperor, too, had reason enough to fear the political clout of the then emerging aristocracy.

At the time of Justinian, however, we find express reference to the poor. In Novel 17 chapter 3 the Emperor's directive to the judges reads in part: '(S)i tamen sufficientes in datione consistant, alioqui etiam gratis lites audire'. This Novel guaranteed the poor total exemption from the payment of court fees. In a much later Novel[86] Justinian prohibited the payment of fees to the judices pedani in all matters in which the

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84 Ibid.

85 Cf P Gross Legal Aid and its Management (1976) 13.

86 Nov 82.

amount in dispute was less than 100 aurei. However, it is not clear whether the poor, too, were exempted from payment where the disputed sum exceeded 100 aurei; nor is it clear whether the exemption applied only to the poor.[87]

None of the texts above mentions anything about counsel's fees. It is not clear whether assigned counsel[88] was paid by the client or by the State, or whether he was paid at all. This is an important consideration as the question of fees certainly influenced the quality of legal services rendered. Also, assuming that counsel was not paid, one cannot exclude the possibility of him being bribed by a wealthy and influential adversary of his client.[89]

8 Concluding Remarks on Roman Law

The idea of equality in and before the law could find no echo in a society in which rank, wealth and power were the prime movers of the legal process. The functionaries within the machinery of justice, as well as the legal experts who were independent, the jurists and the priests, were drawn mainly from the upper classes whose interests they sought to further. Quite apart from class prejudices, the legal procedures available to the

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87 Sprickmann-Kerkerinck op cit 149.

88 D 1.16.9.5; D 3.1.1.4.

89 Cf Kelly op cit 33. To prevent the wealthy from using the costs risk as a weapon with which to suppress the legal claims of the poor, and also to protect ignorant citizens against the excesses of civil servants, Emperor Valentinian created the office of defensor civitatis. The defensor had the task of dealing with the grievances of victimized plebeians. The defensor, however, stopped fulfilling his duty towards the poor when his office fell pray to corruption. Kaser op cit 437-438.
See also Cappelletti et al op cit not 22 at 10-11.

aggrieved harboured structural defects which made it very difficult for the poor to assert the claims against the rich. The creation of the institution vadimonium is a striking illustration of how the growth and refinement of Roman law - itself a formidable feat - could take place in callous disregard of the legal needs of the poor. Such evidence as exists on the solicitude that Roman law showed for the legal welfare of the poor is too thin to justify a conclusion that Roman law knew the concept legal aid.

9 Canon Law and the Indigent Litigant

Charity, the most sublime of the triad of Christian virtues was the principle driving force behind the religious altruism of the Middle Ages.[90] The social and scholastic philosophy of the times, epitomized in the Summa Theologica of Saint Thomas Aquinas, caused ecclesiastical concern for the welfare of the poor. The Church saw its role in perfecting the system of law, in enlarging and transforming Roman law in the spirit of Christian ethics so as to produce greater justice and benefit to mankind.

Canon law strictly forbade ecclesiastical judges to accept fees from litigants.[91] The Roman law glossators, fired by Christian ideals, gave total recognition to the elimination of court fees for the poor.[92] So also was Digest 3.1.1.4., originally applicable only to children and people with physical or mental defects, interpreted to include also the poor.[93]

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90 Cappelletti et al op cit 11-12

91 Sprickmann-Kerkerinck op cit 154.

92 Ibid.

93 Ibid 107-108.

In line with its philanthropic ideals the Church organized a variety of poverty-relief programs for the miserabiles personae. One such was the advocatus pauperum deputatus et stipendiatus, an official created by canonical statute, who was renumerated by the Church for representing the poor in ecclesiastical courts.[94] Also created were the offices of the defensores ecclesiastici whose duty it was to render free legal assistance to the poor in the ordinary courts, thereby protecting them from the fraudulent suits of the rich and powerful. In later times the lay persons, too, were allowed to act as defensores. This, however, resulted in malpractices which, in turn, forced the cancellation of the service in the twelfth century in France.[95] In Italy the institution of poverty lawyers continued to operate until 1865, when it was replaced by a system of appointed lawyers.[96]

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94 Cappelletti et al op cit 12.

95 Sprickmann-Kerkerinck op cit 159.

96 Cappelletti et al 12.

3 THE HISTORY OF LEGAL AID IN GERMANY

1 Mediaeval Times

Under the old Germanic laws, justice was, in theory, administered gratuitously. The Volksrechte and the imperial Frankish capitularies prohibited judges from accepting money or gifts for their services.[1] But after the death of Charlemagne (766-814 A.D.) the ideas of state, law and administration of justice began to be eroded. The judges saw their work no longer as an exercise of stately office, but as a personal service which entitled them to receive payments from litigants.[2] The cities, the Church and the landed aristocracy had a direct interest in the welfare of their underprivileged subjects and tried to stop this corrupt judicial practice. Their demands, which were reinforced by statute[3] in certain areas, had only partial success; they were obeyed by some judges and conveniently forgotten by others.

In the course of time the old Germanic legal procedure was slowly supplanted by Roman law and Canon law institutions. The Bologna revival of Roman law spread to Germany and other parts of Europe. German students

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1 Schott op cit 21. Although the Germanic judges were prohibited from accepting fees, they profited hugely from the intake of money imposed as penalties upon wrongdoers. Such payments, however, should not be confused with court fees. See J W Planck Das deutsche Gerichtsverfahren im Mittelalter (1879) I 137.

2 See Schott op cit 14-21.

3 Ibid 22-23.

educated in Italian law schools returned to Germany to work as judges. Under their influence the old, simple Germanic court procedure made way for the written, more complicated and more expensive Roman procedure.[4] To assist the indigent litigants who were unable to bear the costs of the reformed legal procedure, a Fürsprecher (mediator) was appointed. His duty was to offer gratiutous legal assistance to indigent litigants.[5] In some towns, such as Leipzig and Wittemberg, there were poverty lawyers who were paid out of public funds for assisting the poor pro Deo.[6]

a Poverty Oath

In 1471 an ordinance was enacted which provided that legal assistance could be obtained only on condition that the applicant swore an oath of poverty (iuramentum paupertatis)[7] in which

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4 Sprickmann-Kerkerinck op cit 159-160.

5 As to the function of the Fürsprecher, the author of the Schwabenspiegel (Mirror of the Swabians) wrote: 'Er sol armen luiten ir wort durch got sprechen, und tuot er das nuit gerne, daz ist wider gotte, und der rihter mag ez im gebieten mit rehte, daz er armer luite wort spreche.' Cited by F L A von Lassberg Der Schwabenspiegel oder Schwabisches Land- und Lehen - Rechtbuch (1840) 44.

6 C Fuchs 'Über die geschichtliche Entwicklung des Armenrechts im Zivilprozeß (1866) 5 Zeitschrift für Rechtsvergleichung 104 at 115.

7 Para 6 of the Kammergerichtsordnung of 1471 provided: 'Item auf dass armuts halben nymand rechtloss gelassen werd, so sol der Cammerrichter, so ye zu zeiten sein wird, die sachen der armen, die ir armut mit iren eyden, ob der gesonnen wirt, erweisten, den Advocaten und Procuratoras empfehlen, darin zu raten und zum bosten in Recht fürzubringen.'

he proclaimed:

> Ich N. schwere, daß ich so arm sey an fahrenden und liegenden Gütern, oder Schulden nicht vermag die Canzleygebühr zu erlegen noch einen Advocaten zu besolden, daß ich auch umb Leistungen willen dieses Eydes mein Gut Haabe nicht vereuserт noch andern vergeben habe traulich und ohne Gefehrde als mir Gott helffe.[8]

Once the applicants poverty was established an advocate or procurator was assigned to assist the poor party gratiutously.[9]

To prevent the courts from being swamped by a spate of poverty cases, an ordinance was enacted in 1495 which made it compulsory for the legal assistance applicant to swear a promissary oath whereby he promised to repay his lawyer's fees and court fees at a later stage when his financial situation improved.[10] As no respite was given for the reimbursement of expenses incurred by witnesses, indigent parties who could not afford reimbursing such witnesses had difficulty in establishing their claims before the court.[11] In later times the legal aid applicant was required to adduce collateral evidence to establish his poverty. In addition, the applicant had to swear an oath that he was not instituting action against his better judgement.[12]

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8 Cited by W Bemm 'Ins Armen Recht legen' (1957) 12 Deutsche Richterzeitung 304.

9 G W Wetzell System des ordentlichen Civilprocesses 2 ed (1865) 298.

10 See para 27 of the Kammergerichtsordnung op cit.

11 F Meents Das Armenrecht im sozialen Rechtsstaat des Grundgesetzes (1975) 43.

12 See paras 1 and 2 of the Kammergerichtsordnung of 1955.

Until the middle of the eighteenth century one still could not label the above-mentioned enactments as evidence of an express recognition of the right to legal aid.[13] No appeal could be lodged against a judicial decision rejecting a legal aid application.[14] Much of the legal protection received by the poor came from the Church. The legal aid provisions in the Kammergerichtsordnung were merely a response to the piety of the Church and the strong influence of chivalrous aristocrats.[15] Charity still constituted the mainspring in the efforts towards solving the legal needs of the poor.

2 The Influence of the French Revolution

The wave of social and political reform that swept the face of Europe in the nineteenth century was a product of four dominant influences: the Renaissance, Humanism, Natural Law and the Enlightenment. But more proximate and direct in its influence upon the course of events in Germany was the French Revolution of 1789.

The seventeenth and eighteenth century schools of Natural Law provided the revolutionaries with broad concepts with which to implement the idea of justice. Man was seen as the fundamental reality. The French Declaration of the Rights of Man was, like the American Bill of Rights, to serve as the basic definition of the goals of the Revolution. At the heart of these aspirations lies the idea that men are born and remain free and equal in rights[16] and that the principle of all sovereignty resides essentially in the nation and that no body nor

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13 Meents op cit 44.

14 Ibid 43.

15 See Cappelletti et al op cit 13-14.

16 Art 1 of the French Declaration of the Rights of Man.

individual may exercise any authority which does not proceed from the people.[17]

The notion of Justice is anchored in the principle that the Government must preserve the natural rights of the people,[18] and that the exercise of the natural rights of each man is unlimited, insofar as it does not infringe the enjoyment of the same rights of other members of the society.[19] Underscoring these values is the principle that courts of law be accessible to all citizens, irrespective of wealth, rank or privilege.

To give concrete meaning to these principles, the French enacted statutes the purpose of which was to make the courts accessible to the poor.[20]

The clarions that crumbled the ancien régime in France resounded in the French armies occupying Germany, thus paving the way for major reforms. The peasants were liberated from their feudal shackles. The privileges of the landed aristocracy were scrapped. Municipal administration was reorganized on simple and efficient lines. Restrictions on enterprise were lifted. The Jews were emancipated. The idea of Liberty was given depth and prominence by Lessing, Kant, Fries, Schiller and Pestalozzi. The civil liberties which the Revolution had given to France, Napoleon gave to Germany.[21] The judicial system was reformed and Westphalia, together with most of the states which constituted the Confederation of the Rhine, under the protection of Napoleon, adopted the French Code civil (or Code Napoléon) of 1804.[22]

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17 Ibid art 3.

18 Ibid art 12.

19 Ibid art 4.

20 Cappelletti et al 17-18.

21 A J P Taylor The Course of German History (1976) 28.

22 H Grundmann (ed) Gebhardt's Handbuch der deutschen Geschichte III 9ed (1970) 50-53.

The new political consciousness in Germany was typified by the Hambach Festival in 1832 when a huge gathering of revolutionaries demanded a Republic and German unity.[23] The demands for political reform dominated the 1840s. The 1848-49 revolutions resulted in prominent liberals being appointed to influential State positions. Civic reforms which safeguarded the rights of the citizen were introduced. These reforms, however, did not go far enough. In 1847, already, Julius von Kirchmann criticized the State for its failure to remove the steep economic barriers to justice.[24] In 1869 the Congress of all German-speaking Socialists demanded free access to justice,[25] a demand repeated in their Gotha programme of 1875.[26]

3 The Birth of Legal Aid

It was not until the 1870s , with Bismarck as Chancellor, that the legislature addressed itself to the question of access to the courts for the poor. The period being referred to is that between 1871 and 1879. This was a period of reform. The liberals dominated the Reichstag. Their leaders, the lawyers Lasker and Bamberger, had a strong influence on Bismarck and 'were virtually his parliamentary managers'.[27] The laws restricting freedom of movement were abolished. The freedom of the press was secured. The usury laws were repealed, and Germany was given a uniform currency. Significant in the realm of the

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23 Ibid.

24 J von Kirchmann Die Werthlosigkeit der Jurisprudenz als Wissenschaft (edited by G Nesse) (1938).

25 Eisenach Programme (1869) III 7 in Programme der deutschen Sozialdemokratie (edited by the Bundessekretariat der Jungsozialisten)(1963) 71 at 73.

26 Gothaer Programme (1875) II 5 in Programme der deutschen Sozialdemokratie op cit 73 at 75.

27 P G J Pulzer 'From Bismarck to the Present' in Germany: A companion to German Studies (edited by M Pasley) (1972) 249 at 256.

administration of justice was the enactment of the uniform Criminal Code in 1871, the enactment of the Criminal Procedure Code in 1877 and of the Civil Procedure Code in 1877. Work was started on the Civil Code which came into effect in 1900.

It was in the light of these developments that the right to legal aid was created. Paragraph 114 of the Code of Civil Procedure[28] which came into effect on 1 October 1879, provided that legal aid should be granted to any person who was unable to defray the costs of litigation without endagering his or his family's means of existence. The proviso was that the intended action should not be hopeless or capricious. The State undertook to pay the court fees and to reimburse the expenses incurred by the indigent litigant's witnesses.

4 The Legal Aid Attorney

Although the State had now recognized a right to legal aid it is significant that the lawyer representing the indigent party was still required to work free of charge. He had to recover his fees and disbursements either from the losing opponent or from the indigent client as soon as the client's economic circumstances were substantially better. Legal aid, therefore, still harboured elements of charity.

It could be assumed that the legislature's reluctance to remunerate the legal aid attorney affected the quality of legal services rendered to the poor; especially in the then developing industrial economy with its emphasis on remunerative work. In addition, the legal

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28 Zivilprozeßordnung of 30 January 1877 RGBl 6 83.

profession was at the time strongly dominated by the upper classes, who, in practice, were ill-acquainted with the problems of the poor. When he wrote at the time, Anton Menger, the noted legal philosopher in Vienna, criticized the profession's inattentiveness to the legal problems of the poor. He remarked:

> Hitherto lawyers have devoted scant attention to the enormous difference between the propertied and the unpropertied classes in their pursuit of justice. This is, undoubtedly, traceable to the universal tendency amongst lawyers who, because of their education and interests, regard themselves solely as servants and representatives of the rich....The social contrast which forces the citizenry of civilized states more and more into two separate camps, marked by a reciprocal dislike for each other, is largely traceable to this partiality of the legal profession.[29]

The legal aid system had, at least, enabled the poorer classes to air their grievances in court - a right which previously existed mainly in theory. The workers started developing a rights consciousness. The bourgeois politicians, on the other hand, saw this development as a threat to their vested interests.[30] Criticism was levelled at the liberal legal aid provisions and the way they were implemented.[31] The argument was that legal aid was being misused by the poor. There was, however, no statistical evidence to prove this.[32]

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29 Das Bürgerliche Recht und die besitzlosen Volksklassen 3 ed (1904) 17-18 (own translation).

30 See Brunner 'Die deutschen Arbeitersekretariate im Jahre 1905' Correspondenzblatt der Generalkommission der Gewerkschaften Deutschlands (1906) 197.

31 See Brettner (1897) 9 Deutsche Juristenzeitung 182; Weil (1902) 8 Deutsche Juristenzeitung 197.

32 Nöldeke (1901) 7 Deutsche Juristenzeitung 150 at 151.

5 Legal Aid at the Time of the Weimar Republic

The inflation that struck Germany from 1918 onwards made it increasingly difficult for lawyers to handle the steady rise of legal aid cases which, in practice, brought them little or no income. Generally, lawyers were struggling hard to earn a living. Statistical yearbooks of the time show that between 1919 and 1933 the number of legal practitioners increased by 60 per cent. According to statistics, 62 per cent of the profession earned less than 3000 Reichsmarks.[33] This led to the enactment of a law which obliged the State to reimburse all disbursements of the legal aid attorney which he could not recover from the losing opponent.[34] An amendment to this law in 1923 entitled the legal aid attorney to recover all his fees from the State.[35]

Two years later a law was passed which provided that the maximum fee which could be charged in a legal aid matter involving a disputed amount over 1000 Reichsmarks, was 35 Reichsmarks.[36] Three years later, the maximum fee chargeable in a legal aid matter in which the amount in dispute exceeded 2000 Reichsmarks was fixed at 60 Reichsmarks.[37]

The rapid rise in unemployment, coupled with the melting of the middle-class savings, increased the number

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33 See E Noack Kommentar zur Reichsrechtsanwaltsordnung in der Fassung vom 21.2.1936 2 ed (1937) 4.

34 Art 2 of the Gesetz über Teuerungszuschläge zu den Gebühren der Rechtsanwälte und Gerichtsvollzieher of 18 December 1919 RGBl I 2113 at 2114.

35 § 1 of the Gesetz über die Erstattung von Rechtsanwaltsgebühren in Armensachen of 6 February 1923 RGBl I 103.

36 Art 1 of the Gesetz zur Änderung des Gesetzes über die Erstattung von Rechtsanwaltsgebühren in Armensachen of 14 July 1925 RGBl I 136.

37 Art 1 § 1 of the Gesetz betreffend die Erstattung von Rechtsanwaltsgebühren in Armensachen und Änderung des Gerichtskostengesetzes of 20 December 1928 RGBl I 411.

of persons eligible for legal aid. An emergency decree was issued in 1930 which cut legal aid fees by another 10 per cent[38] and which abolished the right to appeal against the rejections of an application for legal aid by a court of second instance.[39] As a further anti-inflationary measure legal aid fees were cut by another 10 per cent in 1931, and the legal aid applicant was now required to show that the intended action had a prospect of success.[40]

These illiberal enactments in the sphere of legal aid for civil proceedings should not be seen purely against the background of a need to rationalize at a time of acute economic crisis, but also against the background of a sinister ideology which was then beginning to rear its head amongst bourgeois politicians and legal positivists - an ideology which was subsequently exploited by the National Socialists to bring the legal profession into line. This ideology was propagated under the concept 'peace of law' (Rechtsfrieden) or 'legal welfare' (Rechtsfürsorge).[41]

The 'peace of law' ideology developed largely as a response to the legal advice activities of the trade unions' worker secretariats. At the turn of the century

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38 § 7 of the Verordnung des Reichspräsidenten zur Sicherung von Wirtschaft und Finanzen of 1 December 1930 RGBl I 517 at 604.

39 Ibid § 5.

40 § 17 of the Dritte Verordnung des Reichspräsidenten zur Sicherung von Wirtschaft und Finanzen und zur Bekämpfung politischer Ausschreitungen of 6 October 1931 RGBl I at 565.

41 See U Reifner 'NS-Rechtsbetreuungsstellen und die Rechtsberatung der Deutschen Arbeiterfront - Theorie und Praxis sozial befriedender Rechtsberatung' in U Reifner (ed) Das Recht des Unrechtsstaates (1981) 178 at 187 (Cited hereafter as Reifner 'NS-Rechtsbetreuungsstellen').

already, worker secretariats were active in providing indigent workers with legal advice on matters related mainly to labour law and social security law. In 1904 a total of 226,260 persons had already consulted some 48 worker secretariats for legal advice.[42] This caused the former Prussian Minister of Trade, Möller, to declare before the Prussian Landtag:

> The propaganda activities of the Social Democratic Party in the sphere of legal advice are extraordinarily extensive, extraordinarily intensive, and extraordinarily effective, and we would be grossly negligent not to meet this need in other ways.[43]

With the financial support of the Government, municipalities and suitable organizations were encouraged to set up their own legal advice bureaux which were manned by laymen and by civil servants who had some legal background.[44] They offered free legal advice to everybody. The advice given was to be impartial and was to be directed towards the maintenance of the social peace. The main idea, as professor Udo Reifner puts it, was 'to water down the political content of social conflicts, to reconcile the worker with his State, and to isolate social democracy'.[45]

This ideology was given currency during Weimar times. The neutrality, originally required of legal advice bureaux, was now required of the legal profession at large. Lawyers were told to abandon their partiality towards their clients. They were required to remain neutral and to

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42 Ibid 187.

43 Brunner op cit 401 (own translation).

44 Reifner 'NS-Rechtsbetreuungsstellen' op cit 187.

45 Ibid 188.

prevent 'unnecessary litigation'. Not the interests of the individual were important but those of the 'State, the economy and the public well-being'.[46]

6 Legal Aid under the National Socialists

When the National Socialists came to power they amended the Civil Procedure Code.[47] The right to legal aid was extended to juristic persons with their seat in Germany and to persons acting in their official capacities, such as executors of deceased estates and trustees.[48] It was no longer necessary for the legal aid applicant to show a bare 'prospect of success'. It sufficed if the applicant could show that the intended action had a 'sufficient prospect of success'.[49]

These surprisingly liberal innovations pale into insignificance when seen against the rigorous measures adopted by the Hitler regime to obstruct access to the courts.

As early as April 1933 a law was passed which authorized the exclusion of Jews, social democrats and communists from the judiciary and the civil service.[50] Lawyers who were communists were barred from the legal profession.[51]

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46 P Jessen 'Rechtsfürsorge und Anwaltschaft' (1932) Die Rechtsauskunft 6 at 39.

47 See Gesetz zur Änderung des Verfahrens in bürgerlichen Rechtsstreitigkeiten of 27 October 1933 RGBl I 780-789.

48 § 114 ibid.

49 Ibid.

50 §§ 1 and 3 of the Gesetz zur Wiederherstellung des Berufsbeamtentums of 7 April 1933 RGBl I 175. See also I Staff (ed) Justiz im Dritten Reich: Eine Dokumentation (1978) 48-49.

51 § 3 of the Gesetz über die Zulassung zur Rechtsanwaltschaft of 7 April 1933 RGBl I 188.

Five years later, Jewish lawyers, too, were excluded from the legal profession.[52]

Jewish lawyers used to make up 25 per cent of the legal profession and they also represented the profession's liberal and radical phalanx.[53] Those who were known for their anti-Fascistic activities and for their close co-operation with the trade unions were forced to flee the country to save their lives. Among them were prominent jurists such as Otto Kirchheimer, Ernst Fraenkel, Franz Neumann, Hugo Sinzheimer and Otto Kahn-Freund. Indeed, after the expulsion of the Jews the profession moved, ideologically, to the right. Although they were not compelled to do so, by 1934 two-thirds (13000) of the practising profession had joined the Confederation of National Socialist German Jurists.[54]

From the ranks of the disbarred Jewish lawyers were chosen so-called 'counsels' (Konsulenten) to represent Jewish clients. However, Jewish 'counsels' were admitted only at the discretion of the court, and even then preference had to be given to those Jewish lawyers who had done military service at the front.[55] No 'Aryan' German lawyer was allowed to represent a Jewish client. Those who did so were disbarred.[56] Exceptions with regard to

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52 § 1 of the Fünfte Verordnung zum Reichsbürgergesetz of 27 September 1938 RGBl I 1403 at 1439.

53 U Reifner 'Institutionen des faschistischen Rechtssystems' in U Reifner op cit 11 at 36 (Cited hereafter as Reifner 'Institutionen').

54 Reifner 'NS-Rechtsbetreuungsstellen' op cit 192.

55 §§ 8 and 9 of the Fünfte Verordnung zum Reichsbürgergesetz of 27 September 1938 RGBl I 1403 at 1405.

56 I Staff Justiz im Dritten Reich 1978 131-134.

the legal representation of Jews by 'Aryans' were made in the case of persons held under preventive detention. But only those lawyers could be appointed 'whose attitude left no shadow of doubt as to their total agreement with the aspirations of the State'.[57] In practice, however, persons held under preventive detention, more particularly those held in the notorious concentration camps, were never afforded access to legal representatives.[58]

Although Jewish persons were not legally disentitled to legal aid, they rarely, if ever, were granted legal aid.[59]

In the sphere of criminal procedure, a number of measures were enacted which seriously curtailed the procedural rights of the accused and which, on the other hand, armed the police and the prosecution with extensive discretionary powers.[60] These enactments had the effect of rendering the accused person a mere object of the proceedings.

In theory, mandatory legal representation was prescribed for all criminal proceedings before the People's Court.[61] In practice, however, the right to counsel of one's choice was subject to a number of steep qualifications. Whether or not defence counsel could appear

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57 Directive of the Imperial Ministry of Justice to the judges of the Provincial Courts of Appeal (31 January 1938) cited by Staff op cit 125 (own translation).

58 Staff op cit 125.

59 A Wagner Die Deutsche Justiz und der Nationalsozialismus (1968) II 136. See also Staff op cit 101-102.

60 For a detailed discussion of the National Socialist criminal procedure see I Müller Rechtsstaat und Strafverfahren (1980) 74 ff.

61 § 140(1) of the Gesetz zur Änderung von Vorschriften des Strafverfahrens und des Gerichtsverfassungsgesetzes of 28 June 1935 RGBl I 844.

before the Court depended not only on his race, but also on whether or not he had the 'correct' political frame of mind. A defence counsel whose interpretation of the law was seen as 'patently un-German' or as contrary to the 'healthy popular feeling', was not only excluded from the proceedings, but was prevented from acting as defence counsel in future as well.[62] In addition, the 'undesirable' defence counsel had to subject himself to the disciplinary measures of the Bar; and if he was a registered member, he was disciplined by the Party as well.[63]

The plight of the 'non-Aryan' accused was particularly accute. Only in exceptional circumstances were Jewish 'counsels' permitted to act as defence counsel before the People's Court.[64] In practice, however, Jews, Poles, as well as accused persons in political trials were assigned Court-appointed counsel, who were selected from a list bearing the names of all lawyers 'agreeable' to the Court.[65] Such defence counsel were, however, useless.[66] Their presence at the trial was merely for the purposes maintaining a 'hollow formality'.[67] One legal commentator[68] at the time even questioned the need for defence counsel at criminal trials. Another writer wrote: 'We do not need him anymore - National Socialist judges

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62 A Wagner Die Deutsche Justiz und der Nationalsozialismus (1968) III 33.

63 Ibid.

64 See § 1 of the Verordnung zur Durchführung der Fünften Verordnung zum Reichsbürgergesetz of 12 June 1940 RGBl I 872.

65 Wagner op cit 34.

66 Ibid 33.

67 Ibid.

68 H Henkel Das deutsche Strafverfahren (1943) 227.

and prosecutors are all able to find the truth and the law.'[69]

The 'legal peace' ideology which was propagated during the Weimar period was exploited to the hilt by the National Socialists. Lawyers were told to abandon their 'legal representative' role for a 'legal caretaker' one.[70] In fact, lawyers were referred to as 'legal caretakers' (Rechtswahrer)[71] or 'servants of the law' (Diener des Rechts)[72] who were required to show the same unfaltering loyality to the State as the civil servants.[73] As Henkel put it: 'The Court, the prosecutor and the defence counsel constitute a triad of procedural institutions that are united in the task of realizing the law.'[74]

Such was the criminal justice ethic of the times. Between the period 1942 and 1945 the People's Court alone sentenced 11000 persons to death[75] - let alone the millions of innocent people who were murdered in the concentration camps at the orders of the Nazi regime.

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69 A Sack Der Strafverteidiger und der neue Staat (1935) 21.

70 Noack op cit 3-4.

71 See Staff op cit 129 and 132-33.

72 Henkel op cit 227.

73 See I Müller op cit 210-11.

74 Henkel op cit note 222 at 227 (own translation).

75 U Reifner 'Juristen im Nationalsozialismus' (1983) 1 Zeitschrift für Rechtspolitik 13.

4 DEVELOPMENTS AFTER 1945

After the Second World War the new democratic Government under Conrad Adenauer immediately set about reconstructing the social, economic and the legal order. A special law[1] was enacted for the purposes of re-establishing the unity of the West German legal system. The old legal aid provisions, however, together with all the amendments introduced during both the Weimar economic crisis and the Hitler tyranny, were left untouched.

Throughout the 1950s and for the greater part of the 1960s legal aid was not an issue. In fact, the whole question of the economic costs of obtaining justice was of no interest. Discussion on this topic was regarded as taboo.[2] Even the Commissions that were appointed at the time to look into matters of civil jurisdiction paid scant attention to the problem of the costs of civil litigation.[3] The fact that West Germany had a more developed system of social security than other countries helped to smother discussion on the problems faced by underprivileged persons in their quest for justice.[4]

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1 Gesetz zur Wiederherstellung der Rechtseinheit auf dem Gebiete der Gerichtsverfassung, der bürgerlichen Rechtspflege, des Strafverfahrens und des Kostenrechts of 12 September 1950 BGBl I 246.

2 R Wassermann Der soziale Zivilprozeß (1978) 187.

3 Ibid.

4 Ibid 188.

Party which, together with the Liberal Party, formed the Government then. 'Equality before the Courts' became the favourite legal topic for statements, discussions, interviews, features and reports on television and radio.[7] In 1976 the politically influential Deutscher Juristentag, the annual gathering of thousands of German jurists, made legal aid a central focus of its deliberations.

In sum, it had become clear that the antiquated legal aid scheme, which was almost 100 years old, was no longer responsive to the legal needs of modern Germany. The fact that Germany once had the best legal aid system in the world, coupled with the fact that England, the Netherlands and Sweden had now overtaken it in this regard, signalled the need to implement reforms as soon as possible.

Before going on to discuss the current legal scheme, it is necessary to review, in broad strokes, the main proposals that were put forward in the 1970s as alternatives to the Armenrecht. But since the proposals dealt mainly with the question of costs, it is, however, necessary to explain how the German system of fees and court costs works.

1 How the System of Costs and Fees Works

The fees chargeable by attorneys are laid down in minute detail by the Federal Act on Attorneys' Fees.[7a] The amount of the fee is related to the amount in controversy, that is, the monetary value of the issue. The attorney is usually entitled to three basic fees for

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7 Wassermann op cit note 11 at 194.

7a Bundesgebührenordnung für Rechtsanwälte of 26 July 1957 BGBl I 907 as amended by the Gesetz of 18 August 1980 BGBl I 1503.

conducting a lawsuit: one fee for preparing the case[7b]; another fee for the preliminary hearing[7c], and a third fee for representation in court where evidence is taken.[7d] Each of these fees may be charged only once, regardless of the number of hours the attorney spends in preparing the case, or the number of oral hearings. The attorney is entitled to the same fee irrespective of whether he wins or loses the case and irrespective of whether he is well-known and experienced or not.

For appellate actions the attorney's fees increases by 3/10 and for review proceedings before the Federal Supreme Court by 10/10.[7e]

The court costs are also related to the amount in controversy in the lawsuit. These costs can be quite substantial especially when expert evidence is led as is usually the case in matters involving foreign law or complicated medical or technical questions.

The advantage of fixing the fees in relation to the amount in controversy is that the costs of the proceedings can be estimated with reasonable accuracy even before the suit is filed. The risk of investing an unpredictable amount of money in vain is thus limited. This system also prevents attorneys from demanding unreasonable fees and from underbidding each other.

The disadvantage of this system is that, from the lawyer's point of view, a case involving a small amount in controversy but lots of work does not yield an adequate compensation. An attorney who handles mainly cases involving small amounts in controversy,

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7b Ibid § 31(1)(i).
7c Ibid § 31(1)(ii).
7d Ibid § 31(1)(iii).
7e Ibid § 61.

such as landlord/tenant matters, does, indeed, have difficulty in covering his overhead expenses. One could, of course, argue that in such cases the attorneys should invest only as much work as the statutory fee justifies. Obviously, this would not be in the interests of the client. Indeed, this matter constitutes a sore point amongst those lawyers whose clients come mainly from the lower-income groups. Some lawyers told the author that although the legislature has revised the fee table several times, this problem still remains.

On the other hand, a case involving little work but in which the amount in controversy is high results in an excessive windfall of a fee. Professor Kötz points out, however, that 'cases involving a lot of money and little work are fairly rare, but if one should arise, the attorney may agree to "split the cause of action" and limit the claim to part of the sum at stake in the hope that the opponent, having lost the case, will pay the balance without more ado'.[7f]

To work for a contingency fee is regarded unethical.[7g] An attorney may also not enter into an agreement with the client in terms of which the attorney will be entitled to retain a certain part of the amount in dispute if he wins the case or part of it. An agreement to pay a higher fee than the statute prescribes has to be in writing; to charge a lower fee is considered unethical.[7h]

7f H Kötz 'The Role and Functions of the Legal Professions in the Federal Republic of Germany' in U Drobnig and H-J Puttfarken (eds) Deutsche Landesreferate zum Privatrecht und Handelsrecht (1982) 69 at 78.

7g § 52(1) of the Richtlinien. See also decision of the Federal Supreme Court of 15 December 1980 - AnwSt 13/80 in (1981) 5/6 Juristenzeitung 203-204.

7h § 51(1) of the Richtlinien.

similar to the health insurance.[9] The insurance contract would be entered into either privately or publicly, or it would be incorporated into an existing social security insurance contract. The insured sum would be the same for everybody and it would be based on the costs involved in litigating through three instances a civil action involving a disputed amount of DM 20 000. The premiums would be the same for everybody irrespective of income. A small bonus system would be introduced to forestall misuse of the legal insurance coverage. The insurance would also cover the costs for legal advice.

Another insurance model was put forward by the Bremen Christian Democratic Union.[10] According to this model, group insurance contracts would be entered into between the social welfare authorities and private insurance companies, for the benefit of all indigent persons who qualify for social welfare. The insurers would pay all the costs of litigation if the insured party lost the case. Excluded from the insurance coverage would be all actions arising from strikes, lockouts, criminal acts and disputes involving the insured in his capacity as owner or driver of a motor vehicle.

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9 Insurers estimate that 40 per cent of all West German households carry some form of legal protection insurance. About 93 per cent have motor vehicle or traffic coverage, 50 per cent have coverage for contractual disputes, and 29 per cent have real estate or rental coverage. See W Pfennigstorf and S L Kimball Legal Service Plans (1977) note 48 at 504.

10 See E Röper 'Rechtsschutzversicherung für sozial Schwache' (1975) 11 Zeitschrift für Rechtspolitik 252 ff. See also E Röper Rechtsschutz für sozial Schwache (1976) 85 ff.

The insured would be entitled to seek out an attorney of his choice who would have discretionary powers as to the institution of court proceedings. This, however, would be subject to the insurer's right to examine the claim first. An arbitration body consisting of an impartial chairman would ensure proper observance for the terms of the group policy.

The annual premium to be paid would be calculated on the basis of the size of the population.

Professor Gottfried Baumgaertel of the University of Cologne Law School integrated the Bremen model into his Verfahrenshilfe (assistance towards costs) model.[11] According to this model assistance towards litigation costs would be granted to uninsured members of the middle class. However, the aided party would be required to pay the difference between the attorney's fee chargeable for legal aid and the normal fee. Members of the middle class would thus owe it to themselves to have an appropriate insurance policy.

(i) Objections to the Compulsory Legal Expense Insurance

The idea of a compulsory legal expense insurance received more negative than positive comments. At the Deutscher Juristentag (meeting of German jurists) held in Stuttgart 1976, the insurance proposal was put to the vote but was overwhelmingly rejected.[12] The principal

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11 G Baumgaertel Gleicher Zugang zum Recht für alle (1976) 159 ff.

12 Resolution 4(a) 'eine globale Rechtsschutzpflichtversicherung wird abgelehnt' (1976) 44 Neue Juristische Wochenschrift 2007.

objection against the scheme was that the costs of maintaining it would have to be borne by its intended beneficiaries, thus subjecting them to an unreasonable burden. It was argued that the insurance coverage would benefit only the middle class, which would be inclined to institute more court actions often involving high amounts in dispute. The insurers would thus have to pay out more than what they received in premium intake from this section of the population. This would be at the cost of the low income groups who would be contributing the same amount in premiums.

Often cited in support of this argument were the results of a survey conducted in the American state, Louisiana, where a similar compulsory legal expense insurance was being tried out. The survey showed that the number of court actions increased by 70 per cent and that it was the enlightened middle class that benefit thereby, not the underprivileged groups.[13] That a similar phenomenon could occur in Germany was supported by the results of an empirical study which revealed that only 16 per cent of the population in the Federal Republic have, in their life time, had contact with a civil court.[14]

Another argument was that an obligatory insurance scheme would estrange the citizen from the legal process as the right to institute actions would reside

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13 See F Bokelmann '"Rechtswegsperre durch Prozeßkosten' (1973) 6 Zeitschrift für Rechtspolitik 164 at 167.

14 W Kaupen 'Bevölkerung und Rechtspflege in der Bundesrepublik' (1971) Anwaltsblatt 63 ff.

primarily with the insurance companies.[15] Also, attorneys would become financially dependent on the power-wielding insurance companies. This would undermine the independence of the legal profession.[16]

b Costless Justice

Implicit in this proposal is that justice would be administered gratuitously.

The implemenation of a system of costless justice was held to be too utopic.[17] It would place an enormous burden on the State. Critics pointed out that a system of costless justice would have the effect of proliferating litigation, clogging the courts and lengthening the duration of proceedings.[18] It was also argued that such a system would have the effect of converting the Bar into a branch of civil service.[19] This, in turn, would undermine the public's confidence in the legal profession.

There is some historical evidence to support this latter point. In Prussia, during the reign of Frederick the Great (1740-1786), advocates were done away with

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15 N Trocker 'Empfehlen sich im Interesse einer effektiven Rechtsverwirklichung für alle Bürger Änderungen des Systems des Kosten- und Gebührenrechts? Gutachten B zum 51. Juristentag' in Verhandlungen des 51. Deutschen Juristentages (1976) I B3. (Cited hereafter as Trocker Gutachten B).

16 Baumgaertel op cit 140.

17 M Rehbinder 'Die Kosten der Rechtsverfolgung als Zugangsbarriere der Rechtspflege' in Jahrbuch für Rechtssoziologie und Rechtstheorie IV (1976) 395 at 399.

18 W Demuth 'Zum Thema: "Nulltarif bei der Justiz"' (1972) 1 Deutsche Richterzeitung 27 ff.

19 H-M Pawlowski 'Zur [illegible] n der Prozeßkosten' in (1975) 7 Jurist[illegible] 97 at 201.

and substituted by state-employed 'judicial commissaries' from whose ranks litigants chose their legal representatives. This institution, however, was subsequently abolished because the public had no faith in these 'commissaries'.[20]

c Adjustment of Amount in Controversy

As the costs of civil proceedings are determined mainly by the amount in dispute, it was suggested that the indigent party be afforded the right to request the court to lower the figure taken to be the amount in controversy.[21] This would have the effect of preventing the wealthy party from blackmailing the indigent party into an out-of-court settlement. Such protection for the indigent party is available under the laws governing patents[22], trade-marks[23], securities[24], unfair competition[25], and designs.[26]

The application for a reduction of the amount in dispute would be lodged with the trial court and would be accompanied by evidence of the material harm the indigent party would suffer if the matter was litigated normally. Approval of the application would have the effect of fixing the attorney's fees and the court fees

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20 A Weissler Geschichte der Rechtsanwaltschaft (1905) 351 ff.

21 W Däubler 'Bürger ohne Rechtsschutz? Kostenrisiko und Grundgesetz' (1969) 13 Betriebsberater 545 at 551.

22 § 144 of the Patentgesetz of 16 Dec. 1980 BGBl I 1981 1.

23 § 31(a) of the Warenzeichengesetz of 2 January 1968 as amended by the Änderungsgesetz of 9 December 1974 BGBl I 1089.

24 § 247 of the Aktiengesetz of 6 September 1965 BGBl I 1089.

25 § 23(a) of the Gesetz gegen den unlauteren Wettbewerb of 7 June 1909 RGBl I 499 as amended by the Änderungsgesetz of 26 June 1969 BGBl I 633.

26 § 17(a) of the Gebrauchsmustergesetz of 2 January 1965 BGBl I 24.

in accordance with the reduced disputed amount.

This proposal was rejected, presumably because of the heated opposition such an arrangement would attract from lawyers, whose income depends heavily on the monetary value of legal claims.

d Abolition of Mandatory Legal Representation

At present, a party appearing before a district court and before all other courts of higher instance must be represented by an attorney admitted to practise before the court where the action is pending.[27]

For the purposes of making the courts more accessible to the ordinary person, it was suggested that the institution of mandatory legal representation be abolished.[28] One critic regards the institution as redundant and attributable to an authoritarian [illegible]on.[29]

The argument against this proposal was that, without legal representation, the litigant would be made into a mere object of the proceedings. In addition, it was argued that the growth of the law would be stunted. As Professor

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27 78(1) of the Zivilprozeßordnung.

28 G Sauer 'Postulationsfähigkeit und Grundgesetz' (1970) 9 Deutsche Richterzeitung 293.

29 J H Husmann 'Zum Dienstleistungszwang des Rechtsanwalts ohne sozialadäquate Vergütung' (1970) 49 Der Betrieb 2305 at 2309.
This institution dates back to the Nineteenth Century. In 1844 the Prussian Ministry of State turned down a request by F K von Savigny (then Minister of Legislation) for the introduction of a general system of mandatory legal representation. However, on the repeated insistence of [illegible]s the principle was adopted and drafted into the Zivilprozeßordnung which came into effect on 1 October [illegible]. See J Magnus Die Rechtsanwaltschaft (1929) 36 [illegible] and at 468.

Pawlowski put it:[30]

> One should not forget that ancient Greece which forbade the participation of professional legal counsel in judicial proceedings, developed a venerable legal philosophy, but not a methodically cultivated legal science. In Rome, on the other hand, there were - very early at that - men who took unto themselves the task of counselling and representing other people in legal matters. This was of decisive importance for the development of the law.

e Absolvation from the Payment of Costs where the Law is Vague

It was proposed that litigants be entirely exempted from paying the costs of litigation in cases where there is no legal clarity on the issue at hand.[31] The main argument here was that the State itself, not the litigant, must provide legal certainty, and this should not be done at the expense of the litigants.[32]

The main objection to this proposal was that the costs the State would incur thereby would be too huge to justify politically.[33]

A concurrent proposal was that a party who loses in an appellate action, after winning in the court below, should be held liable for the costs in the court of first instance only.[34] Professor Wolfgang Grunsky pro-

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30 Op cit 201 (own translation).

31 U Seetzen 'Prozeßkosten und sozialer Rechtsstaat' (1971) 2 Zeitschrift für Recht und Politik 35 at 37.

32 Ibid.

33 Rehbinder op cit 404.

34 Seetzen op cit note 1 at 36.

posed that where an appeal is successful the State should be held liable for the payment of the costs in the court a quo and for the bulk of the costs of the appellate action.[35]

The argument against these proposals was that there would be a real danger that the judgement of the superior courts would be influenced by the question of costs.[36]

2 Conclusion

All the proposals sketched above offer interesting and wide-ranging clues on how to eliminate the economic obstacles that block the individual's access to the law. It is striking, however, that none of the proposals met with general approval. Given the wide-ranging differences between these proposals, it is doubtful whether a compromise proposal, one which contains a little bit of all others, would be acceptable either. This necessarily raises the question whether access to the courts is influenced solely by the costs factor.

It is submitted that the proposals surveyed above overemphasized the question of costs. This is highlighted by the wording of the topic under which the Juristentag, in 1976, considered the inadaquacies of the Armenrecht. The topic read: 'Is it advisable to change the system of costs and fees in the interests of an

35 W Grunsky 'Empfehlen sich im Interesse einer effektiven Rechtsverwirklichung für alle Bürger Änderungen des Systems des Kosten- und Gebührenrechts? Gutachten A zum 51. Juristentag' in Verhandlungen des 51. Deutschen Juristentages (1976) I at 55 (Cited hereafter as Grunsky Gutachten A).

36 Rehbinder op cit 404-405.

effective realization of the law for all citizens?'[37]

Admittedly, costs constitute a major obstacle for indigent p.rsons who want to assert their rights before the courts. But to regard the access problem purely from a financial point of view, is to overlook the fact that poverty embraces more than mere lack of money. Ignorance of the law, illiteracy, inarticulateness, mistrust of the law, fear of formal procedure, proneness to exploitation and resignation are some of the concomitant features of poverty. None of the proposals analysed the extent to which these other features of poverty influence the indigent person's utilization of the law; neither was account taken of the difficulties that many foreign workers and their families have in asserting their interests before the courts.

It is submitted that a wider socio-legal approach to the problem, one accompanied by empirical sociological studies, would have revealed some of the practical weaknesses or strengths of the legal aid scheme. This, in turn, would have provided the legislature with more informed guidelines on how to model the legal aid laws. Indeed, the legislature did consider to proposals surveyed above, but it rejected them, primarily because of the criticism levelled against them.[39] What the legislature has done about the problem of access to the courts, is discussed in the next chapter.

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37 'Empfehlen sich im Interesse einer effektiven Rechtsverwirklichung für alle Bürger Änderungen des Systems des Kosten- und Gebührenrechts' in Verhandlungen des 51. Deutschen Juristentages (1976) I (own translation)

38 Cf E Blankenburg and J Fiedler Die Rechtsschutzversicherung und der steigende Geschäftsanfall der Gerichte (1981) 129.

39 See the Entwurf eines Gesetzes über die Prozeßkostenhilfe of 17 July 1979 Deutscher Bundestag Drucksache 8/3068 Sachgebiet 310 17-18.

5 THE PRESENT GERMAN LEGAL AID SCHEME

1 Introduction

On 13 June 1980 the Bundestag enacted the Prozeßkostenhilfegesetz[1] (Law Governing the Assistance Towards the Costs of Proceedings). This Act gives effect to the final recommendations of a Commission that was appointed in 1964 to look into the Code of Civil Procedure.

The new term, Prozeßkostenhilfe, was introduced in order to eliminate the negative 'pauper' connotation of the old word, Armenrecht. Except for the changes made with regard to the eligibility for legal aid, the Prozeßkostenhilfegesetz is substantially similar to the old Armenrecht. The new provisions have merely been inserted into the old paragraphs.[2]

This chapter focusses on the main features of the new legal aid scheme.

2 Who is Granted Legal Aid?

Legal aid is granted to any person whose personal and financial circumstances are such that he is unable to defray the costs of the proceedings, or is able to defray the costs only in part, or by instalments.[3]

This new provision introduces the system of instalment legal aid, according to which the legal aid beneficiary

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1 BGBl I 677.

2 §§ 114-127 of the Zivilprozeßordnung.

3 § 114 of the Zivilprozeßordnung. See above at 39a ff for an explanation on the system of costs and fees.

is required to pay back the legal aid grant by instalments. The monthly instalment rate is calculated on a sliding scale basis, and is based on the person's monthly net income and the extent of his financial obligations towards his legal dependants. The table according to which the instalment rate is fixed, starts with a monthly net income of DM 850 and ends with a monthly net income of DM 2400 for single persons. Free legal aid, that is, without the obligation to pay back the grant, is awarded a person who has a monthly income of up to DM 850. For single persons with a monthly net income above DM 850 the monthly instalment rate rises in twelve notches from DM 40 (± 5 per cent of the net income) to DM 520 (± 22 per cent of the net income).

An amount of DM 450 is deducted from the monthly net income for the first dependant and DM 275 for every other dependant. Thus, as can be calculated from table I below, instalment-free legal aid is granted to a married person who has a monthly net income not exceeding DM 2125 and who has four legal dependants. If, in this example, the person has a monthly net income of DM 3160, his monthly instalment rate will be DM 370. Where his monthly net income is more than DM 3675 he would not qualify for legal aid, unless the costs of the proceedings would seriously jeopardize his means of existence.[4]

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4 § 115(4) of the Zivilprozeßordnung.

TABLE I[5]

Income Table for Calculating the Monthly Instalment

Monthly net income rounded off to the Mark with maintenance obligations towards						Monthly rate
	0	1	2	3	4	5 Persons*	DM
up to	850	1300	1575	1850	2125	2400	0
	900	1350	1625	1900	2175	2450	40
	1000	1450	1725	2000	2275	2550	60
	1100	1550	1825	2100	2375	2650	90
	1200	1650	1925	2200	2475	2750	120
	1300	1750	2025	2300	2575	2850	150
	1400	1850	2125	2400	2675	2950	180
	1500	1950	2225	2500	2775	3050	210
	1600	2050	2325	2600	2875	3150	240
	1800	2250	2525	2800	3075	3350	300
	2000	2450	2725	3000	3275	3550	370
	2200	2650	2925	3200	3475	3750	440
	2400	2850	3125		3675	3950	520

*For each extra dependant the amount in this column increases by DM 275.

a Income

'Income' is calculated in accordance with paragraph 76 of the Federal Social Welfare Act[6] which defines 'income' as all receipts in money or money's worth after deduction of the following:

(a) tax duties to the State, excluding wage tax and church tax;

(b) obligatory contributions towards social insurance and unemployment insurance schemes;

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5 Annexure to § 114 of the Zivilprozeßordnung.

6 Bundessozialhilfegesetz of 28 November 1962 BGBl I 692; BGBl III 2170-1-4.

(c) contributions to public[7] or private[8] insurance schemes, provided such contributions are reasonable both as regards the amount and the grounds; and

(d) expenditures incurred for the purposes of earning an income; for example travelling costs to the applicant's place of work.

Also deductible from the income are other special expenditures such as debts and instalment obligations incurred before the application for legal aid is lodged,[9] expenses arising from the procurement of a dwelling; considerable ancillary leasing expenses, for example, excessive heating expenses and expenses incurred as a result of the birth, death or marriage of a member of the family.[10] Contributions of a married couple, in terms of a building-society savings agreement, are also regarded as special expenses which are necessary for the couple's security in the future.[11] Similarly regarded are educational expenses.[12]

Adjustments regarding dependants are made in table I above. The dependants must actually receive support; it is not enough that maintenance money is merely owing to them.[13] Self-supporting dependants are excluded from

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7 For example, motor vehicle liability insurance.

8 For example, life or funeral insurance, private medical insurance, personal accident insurance, house insurance, household insurance, and hail insurance in the case of farmers. E Schneider Prozeßkostenhilfegesetz (12 ed Supplement to R Zöller Zivilprozeßordnung) (1981) 58.

9 Schneider op cit 59.

10 Ibid 59-60.

11 Ibid 60.

12 Ibid.

13 Ibid.

the table and are not taken into account for the purposes of determining the legal aid applicant's monthly instalment rate.

Only the income of the applicant is considered. The same applies in the case of an application for legal aid in divorce proceedings.[14]

b Assets

Legal aid will not be granted to a person who has sufficient disposable assets to defray the costs of the proceedings himself. The Federal Social Welfare Act[15] defines 'assets' as all property that can be converted into money.

However, the applicant is required to finance the suit from his assets only to the extent that this will not endanger his means of existence. The Social Welfare Act expressly forbids[16] the alienation of certain categories of assets as a condition precedent to the granting of social benefits. The legal aid applicant is therefore not required to use the following assets:

(a) building-society savings;[17]

(b) household effects, including inherited items whose alienation would result in the ruination of family relationships;[18]

(c) tools of trade;[19]

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14 Ibid 56.

15 § 89 of the Bundessozialhilfegesetz.

16 Ibid § 88.

17 Schneider op cit 63.

18 § 88(5) of the Bundessozialhilfegesetz.

19 Ibid § 88(4).

(d) money received as compensation for pain and suffering, unless the amount received is high enough to defray the costs of a suit involving a nominal amount in dispute;[20]

(e) bank savings which are not redeemable at any time and which may not be pledged as security;[21]

(f) non-luxury items kept for the satisfaction of the intellectiual, scientific and artistic needs;[22] and

(g) a small real estate, especially a family dwelling-house that is partly or wholly inhabited by the applicant and his next-of-kin and that will serve as a dwelling for the next-of-kin after the death of the applicant.[23]

The applicant is also not expected to raise a loan to pay the costs of the suit.[24]

c Grounds for the Refusal of Legal Aid

As far as the means test is concerned legal aid will not be granted in the following circumstances:

(a) If the costs of the proceedings are less than what the legal aid beneficiary would be required to pay back in 4 monthly-instalments.[25]

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20 Schneider op cit 65.

21 The ratio is that the indigent person should not forfeit the favourable interests that accrue to fixed, long-term savings. Excluded, however, are (a) short-term money deposits that are made merely for the purposes of obtaining high interests on the savings balance and (b) securities at regular interest. Schneider op cit. 65.

22 § 88(6) of the Bundessozialhilfegesetz.

23 Ibid § 88(7).

24 Schneider op cit 66-67.

25 § 115 of the Zivilprozeßordnung.

(b) If the applicant is covered by a legal expense insurance, unless the insurer fails to perform.[26]

(c) If a third party is legally obliged to provide security for costs. For example, a reciprocal obligation exists between spouses to provide security for costs in legal proceedings which affect a personal interest.[27] This obligation exists even where the spouses are separated but not divorced.[28] A similar reciprocal obligation to provide security for costs exists between parents and self-supporting children, in all legal proceedings of vital importance.[29] Legal aid will, however, not be refused in a case in which the relief sought is of such a nature that the matter cannot be postponed for the purposes of establishing first, at the cost of enormous hardship, a third party's obligation to provide security for costs.[30]

d Merits Test

Legal aid will not be granted if the applicant's case does not show a sufficient prospect of success. Whether or not a case shows a sufficient prospect of success, is a

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26 Schneider op cit 65.

27 § 1360(a)(iv) of the Bürgerliches Gesetzbuch of 18 August 1896 RGBl I 195.

28 Ibid.

29 Schneider op cit 69.

30 Ibid 70.

matter for the trial judge who is also responsible for deciding on the application for legal aid. As a general rule, a case will show a sufficient prospect of success only if the applicant is able to tender evidence in support of his claim.[31] However, legal aid will not be refused if there is no legal clarity on the matter to be litigated.[32]

In addition to the 'prospect of success' requirement is *the requirement that the intended legal action must not* appear to be capricious.[33] An action will be regarded as capricious if a reasonable person, who is not in need of legal aid, would assert his claim by means of more expedient and less expensive procedures.[34] A matter will also be regarded as capricious if (a) there is no ground upon which relief may be granted[35]; (b) the applicant causes his indigence intentionally in order to obtain legal aid[36]; it appears that two parties in interest conspire to bring *a suit in the name of the one party who is eligible for* legal aid[37], or (c) the judgement is not enforceable.[38]

e Legal Aid for a Party Acting in an Official Capacity

A party acting in an official capacity, for example, a trustee in insolvency or an administrator of an estate, will

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31 F Meents Das Armenrecht im sozialen Rechtsstaat des Grundgesetzes (unpublished DJur thesis University of Bonn 1975) 134.

32 Decision of the Oberlandesgericht (Stuttgart) of 28 January 1965 3 W 71/64 1965 (6) Monatsschrift für Deutsches Recht 492.

33 § 114 of the Zivilprozeßordnung.

34 Schneider op cit 43-44.

35 Schneider op cit 46.

36 Decision of the Oberlandesgericht (Cologne) of 15 January 1957 9 W 134/56 (1957) 7 Monatsschrift für Deutsches Recht 425.

37 Decision of the Federal Supreme Court of 20 March 1967 VII ZR 296/64 (1967) 34 Neue Jnristische Wochenschrift 1566.

38 Schneider op cit 38.

,ualify for legal aid if the money to cover the costs of the proceedings can be raised neither from the administered assets nor by the parties in interest.[39]

f Legal Aid for Juridical Persons

Legal aid is available only to domestic juridical persons, that is, those with their registered seat in the Federal Republic of Germany.[40] Apart from the 'insufficient prospect of success' requirement, legal aid will be granted to a ju-idical person only if the money to cover the costs of the suit cannot be raised by the parties in interest[41] and if failure to prosecute or to defend the matter will be contrary to the public interest.[42] This will be the case if the judicial decision affects a large section of the population or of the economy[43]; for example, if the decision will give rise to massive unemployment.[44]

General mercantile partnerships with unlimited liability will qualify for legal aid (a) if all the partners are eligible for legal aid and if the assets of the partnership are not sufficient to cover the costs of the proceedings, and (b) if failure to take the necessary legal action is contrary to the public interest.[45]

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39 § 116(1) of the Zivilprozeßordnung.

40 Ibid § 116(2).

41 For example, the shareholders, creditors, or directors.

42 § 116(2) of the Zivilprozeßordnung.

43 D Thomas and H Putzo Zivilprozeßordnung 10 ed (1978) 263.

44 Ibid.

45 § 116(2) of the Zivilprozeßordnung.

3 The Procedure for the Granting of Legal Aid

The person in need of legal aid submits his application to the office of the court where litigation is pending. The application is submitted in writing or by oral declaration taken down by the clerk of the court.[46] The application must set forth the grievance and the available evidence that the applicant has.[47] In addition, the application must be accompanied by documentary proof of the applicant's financial circumstances.[48] If the applicant is the defendant he will have to state his defence.

Although it is not compulsory that the application be submitted by an attorney, in practice the applicant usually does not go directly to the clerk of the court but to an attorney in private practice whom he tells his problem. If the attorney is convinced that litigation is necessary, he will draw the complaint and will submit it together with the application for legal aid to the appropriate court. The clerk of the court is, however, obliged to help an ignorant applicant to fill in the application form for legal aid.[49]

The trial judge, or an official of the court commissioned by him, decides on the application. The applicant may be required to support the credibility of his factual allegations with documentary evidence.[50] Before a decision is reached the opponent must be given a chance to reply

46 § 117(1) of the Zivilprozeßordnung.

47 Ibid.

48 Ibid § 117(2).

49 A Baumbach W Lauterbach J Albers P Hartmann Zivilprozeßordnung I 42 ed (1984) 333. (Cited hereafter as Baumbach et al.) See also W Grunsky 'Die neuen Gesetze über die Prozeßkosten- und die Beratungshilfe' (1980) 38 Neue Juristische Wochenschrift 2041 at 2044.

50 § 118(2) of the ZivilprozeBordnung.

to the claim, unless there are special reasons for not doing so.[51] The reply can be made in writing as the opponent is not compelled to make a personal appearance. However, if the opponent does appear personally he will have to be afforded a fair hearing.[52] The parties themselves are not cross-examined.

The examination procedure is not a substitute for the actual litigation. It is more a summary procedure in which the judge does not have to look beyond the face of the complaint, aside from the amplifying remarks made by the parties themselves. The examination of witnesses and expert witnesses will be permissible only if it is impossible to ascertain by other means whether or not the claim or defence shows a sufficient prospect of success.[53] The witnesses and expert witnesses are not required to swear an oath.[54]

The Court is authorized to make inquiries at the appropriate public authority to make sure about the applicant's financial circumstances.[55] The opponent, however, has no right to be heard on a matter affecting the applicant's financial circumstances[56]; neither does the opponent have the right to examine the part of the applicant's file which contains information on the applicant's financial circumstances.[57]

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51 Ibid.

52 Schneider op cit 92. See also decision of the Bayerischer Verfassungsgerichtshof of 2 February 1962 Vf 109 VI 61 (1962) 14 Neue Juristische Wochenschrift 627.

53 § 118(2) of the Zivilprozeßordnung.

54 Ibid.

55 Ibid § 118(1).

56 Decision of the Bundesgerichtshof of 15 November 1983 VI ZR 100/83 (Hamm) (1984) 13 Neue Juristische Wochenschrift 740.

57 Ibid.

A settlement reached by the parties at this preliminary phase is entered into the minutes of the Court and is enforceable.[58]

The judicial examination of the application for legal aid as well as the settlement, should there be one, are free of costs.[59] The opponent's expenses are not refunded.[60] The expenses of witnesses and expert witnesses are refunded by the State[61], but if the application for legal aid is approved, they become the costs to be borne by the losing party.[62]

A decision rejecting the application for legal aid is appealable, but not if it is made by a Court of Appeal.[63]

4 The Effect of the Legal Aid Grant

The legal aid grant takes effect immediately upon pronouncement.

a The Recipient

The grant has the effect of temporarily exempting the recipient from the obligation to pay the court costs, both arrears and future, and the fees of the bailiff.[64] No obligation rests on the recipient to provide security for costs.[65] The recipient has the right to gratuitous legal representation of his choice (i) in matters in which legal representation is compulsory provided the attorney is prepared to accept the brief[66] and (ii) in matters in which

58 §§ 118(1) and 794(1) of the Zivilprozeßordnung.

59 Baumbach et al op cit 341. See also Schneider op cit 98.

60 § 118(1) of the Zivilprozeßordnung.

61 Ibid.

62 § 127(2) of the Zivilprozeßordnung.

63 Ibid § 122(1).

64 Ibid § 122(2).

65 Ibid.

66 Ibid § 121(1) read with § 122(3).

legal representation is not compulsory but deemed necessary, and the opponent is legally represented, and provided further that the attorney is prepared to accept the brief.[67]

A legal aid beneficiary who is simply unable to brief his attorney properly and who also lacks the means to undertake a journey in order to consult with his attorney will, on application, be assigned a local attorney of his choice to correspond with his attorney.[68] Also, if the legal aid beneficiary is unable to find an attorney who is prepared to accept the legal aid brief - which is rare - the Court will assign an attorney.[69]

The legal aid recipient is also entitled to the advance payment of travelling costs including board and lodging costs at the place of the hearing.[70] If he has already incurred the travelling and accommodation expenses, he will be entitled to reimbursement by the State.[71]

The legal aid grant is valid only for the court of first instance.[72] A new application for aid must be made for litigation before a court of second instance. However, if the appeal is lodged by the indigent party's opponent the court of second instance will dispense with the merits test in its evaluation of the respondent's application for legal aid.[73]

If the legal aid recipient is required to contribute towards the costs of litigation, the Court will fix the monthly instalment rate. The instalments are payable over

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67 Ibid § 121(2) read with § 122(3).
68 Ibid § 121(3).
69 Ibid § 121(4).
70 See Schneider op cit 140-142.
71 Ibid 140.
72 § 119 of the Zivilprozeßordnung.
73 Ibid.

a period of 48 months starting on the date on which legal aid is granted. The instalments are payable to the Land Treasury and, for proceedings before the Federal Supreme Court, payment is made to the Federal Treasury.[74] The Court is authorized to order that payments be provisionally suspended once the instalments have covered the costs of the proceedings or where the costs can be recovered from a party in interest.[75]

The legal aid beneficiary is required to report any change to his personal and financial circumstances in order the instalment rate can be adjusted to the changed circumstances.[76]

If the legal aid beneficiary loses the case he will still be required to pay all the costs of the opposing party[77], except the costs incurred for the purposes of responding to the claim made in the application for legal aid.[78]

b The Opposing Party

In accordance with the principle that the loser pays all, the successful unassisted opponent is entitled to recover his costs from the unsuccessful legal aid party.[79] The successful opponent has no claim against the State. It is submitted that this is unjust especially where the legal aid beneficiary was the plaintiff. In such cases the State ought to be obliged to reimburse the expenses of the legally unaided defendant as the State itself enabled the plaintiff to molest him with an unfounded claim.

74 Ibid § 120(2).
75 Ibid § 120(3).
76 Schneider op cit 116-117 and Grunsky op cit 2046.
77 § 123 of the Zivilprozeßordnung.
78 Schneider op cit 143.
79 § 123 of the Zivilprozeßordnung.
80 Cf Schneider op cit 143.

The fact that the unsuccessful legal aid party is obliged to reimburse his opponent's litigation expenses certainly diminishes the value of legal aid.[80] The spectre of losing the case has the effect of dissuading many poor persons from bringing their claims to be examined by the courts.[81]

5 The Legal Aid Attorney

Under the old system the legal aid beneficiary had no right to be represented by an attorney of his choice although in practice the trial judge usually appointed the attorney chosen by the party. The Prozeßkostenhilfegesetz, however, expressly creates the right to legal representation on one's choice, provided the attorney is admitted to the court where litigation is pending.[82] In practice the attorney who lodges the application for legal aid is usually regarded as the attorney chosen by the legal aid beneficiary.

An attorney is assigned by the judge to represent the party only where no attorney is prepared to accept the brief and where the party requests legal representation.[83] In such a case, the choice of the attorney is in the discretion of the judge, but priority is given to the party's wishes. In practice, however, it is very rare that the party is unable to find a lawyer who is prepared to accept the legal aid brief.

a Fees

Attorneys' fees are regulated by the Federal Regulations on Attorneys' Fees.[84] The fees are fixed according

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81 See below at 65c.

82 § 121 of the Zivilprozeßordnung.

83 Ibid.

84 Bundesgebührenordnung für Rechtsanwälte of 26 July 1957 BGBl I 907 as amended by the Gesetz of 1[illegible] June 1980 BGBl I 677.

the amount in dispute. A fee is chargeable for each of the following stages of the suit: preparation for the hearing; the preliminary hearing at which no evidence is taken; representation in court where evidence is taken; and the settlement.

Over the past decade the legislature has sought to narrow the gap existing between the normal attorneys' fees and the fees chargeable in legal aid matters. There is still no parity. In a matter in which the amount in dispute is DM 6000 the legal aid fee is DM 298 and the normal fee is DM 321. Where the amount in dispute is DM 40000 the legal aid fee is DM 524 and the normal fee is DM 1120. The legal aid attorney is paid by the State and has therefore no claim against the legal aid beneficiary. Where the legal aid beneficiary wins the case the attorney may, in his own name, recover his full fee and cash disbursements from the losing party.[85]

6 Legal Aid in the Special Courts

Whether or not legal aid is available in proceedings before special courts depends on the statutory provisions governing the procedure in these courts.

a Labour Courts

Labour courts have jurisdiction over all matters of labour law such as disputes between employers and employees and disputes between employers' associations and trade unions, especially those arising out of collective bargaining agreements.

The procedure of the labour courts is regulated by the Labour Courts Act.[86] In the courts of first and

85 § 126 of the Zivilprozeßordnung.

86 Arbeitsgerichtsgesetz of 3 September 1953 BGBl I 1267 as amended by the Gesetz of 18 August 1980 BGBl I 1503.

second instance it is not necessary that the parties be represented by attorneys. They may be represented by a representative from the trade union or the employers' association.[87] In the court of first instance, the system of allocating costs and fees varies from the loser-pays-all principle applicable in ordinary civil proceedings in that each party, even the party that prevails, pays its own lawyer. A party that cannot be represented by a trade union representative or representative from the employers' association and that cannot afford to pay the costs of its action will be granted legal aid under the same conditions as in ordinary civil proceedings if the opponent is legally represented.[88]

Legal representation is, however, compulsory for proceedings before the Labour Court of Appeal and the Federal Labour Court, which sits in Cassel.[89]

b Administrative Courts

The procedure in the administrative courts is regulated by the elaborate Administrative Courts Act.[90] Administrative courts have cognizance of all matters of administrative law, except those falling under the jurisdiction of the social courts and fiscal courts.

The attorney's fees are the same as for civil proceedings. The loser-pays-all rule applies, but since the amount in controversy is comparatively low and since the State is usually not legally represented in the court of first instance, the costs risks are much smaller.

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87 Ibid § 11(i).

88 Ibid § 11(a)(i).

89 Ibid § 11(i).

90 The Verwaltungsgerichtsordnung of 21 January 1960 BGBl I 17 as amended by the Gesetz of 20 December 1982 BGBl I 1834.

Legal representation is, however, compulsory for proceedings in the Federal Administrative Court, which sits in West Berlin.

Legal aid is also available for proceedings in the administrative courts, even to a party in interest.[91]

c Social Insurance Courts

These courts have jurisdiction over matters concerning social insurance and veterans' benefits. The Social Insurance Courts Act[92] makes provision for the granting of legal aid to an indigent party.[93] The legally aided person who has not chosen his counsel may request the court to assign counsel to represent him.[93]

d Tax Courts

These courts hear appeals against the decisions of revenue authorities. An indigent party in need of legal assistance may be assigned either an attorney or a tax adviser to represent him.

7 Critical Appraisal of the Legal Aid Scheme

The author has made several unsuccessful requests to the Federal Ministry of Justice to provide him with the national annual statistics on the new legal aid (Prozeßkostenhilfe) scheme.[95] The reasons for the

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91 Ibid §§ 65 and 166.

92 The Sozialgerichtsgesetz of 3 September 1953 BGBl I 67 as amended by the Gesetz of 23 September 1975 BGBl I 2535.

93 Ibid § 73(a).

94 Ibid.

95 At one stage the author was informed by a departmental head in Ministry that the statistics would be available in October 1984 (Letter of 21 March 1984 from Mr Schuster). But even enquiries thereafter elicited no reply.

Ministry's failure or reluctance to furnish these statistics are obscure. Professor Erhard Blankenburg, a prominent legal sociologist, points out that one of the difficulties encountered by legal sociologists in Germany is that they are rarely afforded full access to the data they need.[96] This is regrettable, for not only does this have a dampening effect on legal sociology but, in the final analysis, it is the public which is thereby denied an opportunity to become acquainted with certain facts which might well be of major political significance.

It is, however, estimated that, in 1983, the Federal states spent a combined amount of about DM 400 million on legal aid.[97] This amount is DM 328 million more than the amount spent on legal aid in 1976 and about DM 293 million more than the prognosticated costs of the new scheme.[98]

Several Hamburg attorneys told the author that more people are benefitting under the new scheme than under the old Armenrecht. Indeed, there are a number of factors which, on the face of it, would suggest that the new scheme is more popular than the old one.

First, the new term, Prozeßkostenhilfe (assistance towards the costs of the proceedings) has imparted a new image to legal aid. Armenrecht (law for the impoverished) had the connotation of a State alms-giving programme. This made the old scheme lose its appeal,

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96 See Professor Blankenburg's remarks in G H Roth 'Der Beitrag der Rechtssoziologie zur Reform des Prozessrechts' in W J Habscneid (ed) Effektiver Rechtsschutz und verfassungsmäßige Ordnung (1985) 103 at 110.

97 L Müller-Alten 'Reform der Prozeßkostenhilfe in Familiensachen?' (1984) 11 Zeitschrift für Rechtspolitik 306.

98 Ibid.

especially during the economic prosperity that characterized Germany in the 1970s. The term, Prozeßkostenhilfe, on the other hand, connotes the image of a kind of 'useful service'[99] offered by the State.

Second, the introduction of the instalment concept ought to have the effect of making the law accessible to the lower middle class, which was previously excluded from the benefit of legal aid. Another feature of the new scheme which ought to be of interest to the lower middle class is that the legal aid beneficiary's obligation to pay instalments lapses after 48 months regardless of the amount in controversy, the duration of the proceedings and the number of judicial instances through which the matter is litigated.

Third, the increase in the number of unemployed persons, who now number just over 2 million, has had the effect of automatically increasing the number of persons who are eligible for legal aid.

Fourth, the enactment of the new legal aid provisions and the Legal Advice Act[100] was accompanied by a wide publicity campaign which was conducted through the mass media. As a follow-up, the Federal Ministry of Justice published and distributed pamphlets entitled 'Good Advice is not Expensive' (Guter Rat ist nicht teuer). These pamphlets inform the public about the existence of the legal aid scheme. In addition, each civil summons issued in the Federal Republic is accompanied by an information sheet on legal aid as well as an application form for legal aid. This, it is submitted, is a very good idea.

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99 Frankfurter Rundschau 17 May 1983.

100 Gesetz über Rechtsberatung und Vertretung für Bürger *mit geringem Einkommen (Beratungshilfegesetz)* of 18 June 1980 BGBl I 689.

a The Practice

A court-file study conducted in Lower Saxony by the Ministry of Justice of Lower Saxony shows that legal aid is of benefit mainly in divorce suits.[101] In 1983 a total of 44632 persons were granted legal aid in the courts of first instance in Lower Saxony.[102] Eighty per-cent of the grants were for family-law matters and only 20 per-cent for other civil law actions.[103] Whereas 32 per-cent of the parties in family-law matters received legal aid, in other civil actions it was only 3 per-cent.[104]

The situation in the other Federal states ought to reveal a similar percentage breakdown of legal aid grants. The high incidence of legal aid grants in divorce matters is attributable mainly to the fact that, over the years, divorce suits have become more and more difficult to finance by the parties themselves. In 1976 already, it was pointed out that even the simplest divorce suit involving an amount in controversy of DM 4000 was considered to be a luxury.[105] Since then, both the attorneys' fees and the amount in controversy[106] in divorce suits have increased. The average divorce suit, in which each party has its own lawyer, costs

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101 Müller-Alten op cit 306.

102 Ibid.

103 Ibid note 12.

104 Ibid 306.

105 Grunsky Gutachten A op cit A9.

106 In divorce suits, the amount in controversy is fixed by the court on the basis of the triple monthly income of the spouses. See § 12(2)(ii) of the Gerichtskostengesetz of 18 June 1878 RGBl 141 as amended by the Gesetz of 15 December 1975 BGBl I 3047.

DM 5334.[107] These costs are prohibitive. It ought to be pointed out, too, that legal representation before the family courts is compulsory.[108] The high number of legal aid grants for divorce proceedings is also attributable to the fact that the divorce rate is high. In 1983, there were 13000 more divorces in the Federal Republic than in 1976.[109] This means that, unless simpler and less expensive divorce proceedings are introduced, the number of applications for legal aid in divorce proceedings is bound to increase.[110]

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107 Müller-Alten op cit 310. If the divorce is granted each party pays its lawyer and the court costs are shared. If the application for divorce is turned down, the party that brought the application must pay not only its lawyer, but the lawyer of the spouse as well. Also the party that brought the unsuccessful application will be required to bear the court costs. The court may, however, make a different order as to costs where the payment of the costs by the unsuccessful party would constitute an enormous burden. See, generally, § 93(a) of the Zivilprozeßordnung for the apportionment of costs in divorce suits.

108 In divorce proceedings the judgement concerning the divorce and the judgement concerning the subsequent maintenance arrangements are handed down concurrently where the divorce is granted. The parties may, however, choose to settle the maintenance arrangements in an agreement attested by a notary. This procedure is much cheaper. But because legal aid is only given for legal representation, those who need legal aid usually prefer that the maintenance arrangements be settled in court. This procedure is more expensive as each party must be represented by its own lawyer. The procedure via the notary is cheaper as the parties may agree to be represented by the same lawyer. Each party pays half of the lawyer's fees.

109 See Müller-Alten op cit note 18 at 307.

110 Cf Ibid.

The Lower Saxony study shows that only 3 per-cent of the litigants in other civil actions were granted legal aid. Converted into numbers, the 3 per-cent might well constitute a large number of persons. But this would be due to the fact that the courts are now handling a larger volume of cases than, say, five years ago. Seen in terms of percentages, however, the incidence of legal aid grants for ordinary civil actions remains very small. In this regard the situation is substantially the same as under the old scheme.

b The Weaknesses of the Legal Aid Scheme

A basic drawback of the current legal aid system is that the legal aid beneficiary who subsequently loses the case is still required, as was the case under the old system, to pay the costs of his victorious opponent. This is in accordance with the loser-pays-all rule. The unqualified incorporation of this rule into the legal aid provisions is regrettable. Several attorneys told the author that many persons who contemplate lodging an application for legal aid mistakenly believe that the grant covers the opponent's costs, too, in case he wins. Some simply refuse to go ahead with the case when told that this is not so - even though they might have good prospects of winning the case.

Indeed, the spectre of having to repay one's legal aid grant on the one hand, and,on the other, to reimburse the victorious opponent does have a daunting effect. One elderly lawyer told the author that, for as long as this rule is applied without qualification in legal aid cases, too, very few people will make use of the legal aid scheme despite the instalment arrangement which does constitute an improvement over the old scheme.

A person of modest means obviously has considerable difficulty in deciding whether or not to bring or to defend an action against a large business concern, which has not only acquired experience in litigation, but which also has enough money to litigate the matter up to the Federal Supreme Court, if necessary.

This is a problem which not only confronts the ordinary person, but consumer organizations as well. It ought to be pointed out that German law makes provision for the so-called Verbandsklage - an action instituted by an association which exists to protect interests of a certain character and which is authorized by the legislature to institute proceedings. Since 1965 consumer organizations have the right to sue for injunctive relief against misleading and other acts of unfair competition affecting the interests of consumers.[111] In practice, however, very few actions are brought.[112]

The main reason is that in unfair-competition cases the amount in controversy is very high or is set very high by the courts.[113] With their limited resources, consumer organizations cannot afford to risk bringing an action against large industrial concerns unless they are cocksure of winning.[114] They are thus reluctant to litigate controversial matters in which the legal situation is unclear, or to conduct test cases which

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111 § 13(1) of the Gesetz gegen den unlauteren Wettbewerb of 21 July 1965 BGBl I 625 as amended by the Gesetz of 26 June 1969 BGBl I 633.

112 See P Gilles 'Prozeßrechtliche Probleme von verbraucherpolitischer Bedeutung bei den neuen Verbraucherverbandsklagen im deutschen Zivilrecht' (1985) 98 Zeitschrift für Zivilprozeß 1 at 4-5.

113 Ibid 5.

114 Ibid 5; P Gottwald 'Class-actions auf Leistung von Schadenersatz nach amerikanischem Vorbild im deutschen Zivilprozeß' (1978) 91 Zeitschrift für Zivilprozeß 1 at 25.

could turn out to be of wide benefit for consumers.[115] Test cases, research has shown, are used mainly by financially stable organizations such as insurance companies, professional associations and mainly in such fields as protection of trade rights, insurance law, liability for accidents, and labour contracts.[116]

In order to prevent large business concerns from blackmailing financially weaker parties into a settlement, the legislature introduced a system according to which the financially weaker party may, in certain cases, request the court to reduce the amount in controversy to a level which is commensurate with the party's capacity to meet the costs of the suit.[117] In practice, however, only a very small number of consumer organizations avail themselves of this right.[118] It seems that those consumer organizations that employ private counsel refrain altogether from making use of this right.[119] The reason is that, from the point of view of the lawyer, the smaller the amount in controversy, the smaller will be the fee chargeable.

The courts, too, are not always well disposed to applications for a reduction of the amount in controversy. When considering the financial strength of an organization the courts tend to focus more on the case at hand[120] and not, it seems, on the wider socio-political implications of the financial difficulties encountered

115 Gilles op cit 5-6.

116 See P Arens 'Das Problem des Musterprozesses' (1976) 4 Jahrbuch für Rechtssoziologie und Rechtstheorie 344-354.

117 See p 45 above.

118 Gilles op cit 20.

119 Ibid.

120 Ibid 21.

by consumer organizations. Also, the courts sometimes assume erroneously that the State is obliged to supplement the financial reserves of a state-subsidized consumer organization which cannot afford the costs of litigation.[121]

To obviate these problems, the conservatives in Parliament have suggested that in unfair-competition suits the amount in controversy must not exceed DM 50000.[122] It is submitted that this proposal should be adopted, for the following reasons: First, the present inconsistent judicial evaluation of organizations' economic resources will make way for a uniform rule. Second, the reasonably high amount of DM 50000 as ceiling, is likely to have the effect of encouraging the smaller consumer groups as well to challenge even the mightiest industrial concerns before the courts. Third, state-subsidized consumer organizations will become less vulnerable to budget cuts and thus less dependent on the State.

As far as legal aid is concerned, it is submitted that the loser-pays-all rule be qualified as follows: Where the legal aid beneficiary loses the case, the State must pay the winning party's costs subject to the qualification that legal aid beneficiary be obliged to pay his instalments for a reasonable period beyond the statutory limit of 48 months. The legal aid beneficiary should be totally exempted from the payment of the opponent's costs in cases in which the income of the legal aid beneficiary does not exceed a certain limit. In such cases the State should pay the opponent's costs.

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121 Ibid.

122 Entwurf eines Änderungsgesetzes zum UWG Bundestag-Drucksache 8/1670.

This arrangement would also solve the problem faced by the victorious opponent who is unable to recover his costs from the indigent legal aid party. At present the winner has no right of recourse against the State where the loser is unable to pay.

(i) The Socio-political Limitations

A structural weakness of the German legal aid system is that it makes no provision for legal representation outside the run-of-the-mill lawsuit. It does not provide for law reform, for community action or for community education. The debate preceding the enactment of the enactment of the new legal aid provisions emphasized the need to eliminate the financial obstacles to justice. Very little attention was devoted to the need to bring legal services within the immediate geographic and social reach of the underprivileged groups. Unlike in the United States, Canada, England, the Netherlands and Finland where the traditional judicare legal aid scheme is supplemented by a network of community law centres which are staffed by salaried lawyers, in Germany legal aid is organized purely on judicare lines. This makes it difficult for the legal aid system to be used as an instrument to promote real structural reform for the poor.

The Verbandsklage remains the major instrument for the protection of group interests. But, as pointed out above, only a small number of associations are able to exercise their right to bring enforcement actions against mighty industrial concerns. Another shortcoming pertaining to group representation in the Federal Republic is that consumer organizations can only sue for injunctive relief. They cannot sue for damages. Proposals to the effect that the existing

practice be changed so as to allow organizations to recover damages have met with stern resistance from industrial quarters.[123] Even the Reform Bill rejects the notion that organizations be permitted to recover collective damages on behalf of the victims.[124] Within academic circles, too, the introduction of a class action, in the sense that it obtains in the United States, is regarded as inconceivable.[125] Professor Kötz contends that class actions can be transplanted successfully only if the recipient system (1) provides for some form of contingency fee, (2) offers lawyers sufficient financial incentives to conduct class suits and (3) protects both the lawyer and the class from liability for the opponent's costs if the action fails.[126]

It is submitted that these obstacles are not insurmountable. The trouble is that, by aggrandizing them the need for change becomes minimized, if not opposed altogether. Professor Alfred Grosser, an expert on the post-war German political history, makes this point well when he says:'The notion of a Rechtsstaat, a state based on the rule of law, has dangers of its own: that of legalism, for instance - a fondness for texts that petrify reality, the temptation to hide behind the written word and so avoid change or action of any kind'.[127]

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123 M Cappelletti B Garth and N Trocker 'Access to Justice: Variations and Continuity of a World-Wide Movement' (1982) 46 Rabels Zeitschrift 664 note 98 at 684.

124 For criticism, see Gilles op cit 11-15.

125 Ibid 11.

126 Cited by M Cappelletti and G Garth 'The Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation' in W J Habscheid (ed) Effectiveness of Judicial Protection and Constitutional Order (1983) 117 at 146.

127 Germany in Our Time (P Stephenson trans) 1970 129.

There is a need to rise above traditionalist ways of thinking and to accept the fact, as Professor Gilles puts it, 'that new problems obviously demand new dogmatic solutions when the traditional mechanisms for solving them no longer suffice'.[128]

The discussion on public-interest litigation, which has been going on in Germany for more than ten years, has not taken adequate account of the need to promote a rights consciousness. Access to the law sets out that the individual is aware of his rights, knows when they are infringed or endangered, and knows how to go about enforcing them. Amongst the underprivileged groups in particular, a large number of unsophisticated persons are either ignorant as to their rights or as to the correct means of seeking legal redress. The Lower Saxony study shows that the legal aid scheme is not sufficiently responsive to the legal needs of the poor, except in family law matters. One reason for this is that very little community spadework is being done by way of helping the poor to overcome the feelings of helplessness, resignation, indifference and lethargy insofar as access to lawyers and the courts is concerned.

The establishment of community-orientated and unbureaucratic legal aid centres in underprivileged neighbourhoods would be a step in the right direction. Such centres would allow for a more organized response to the legal needs of the poor as a group. Lawyers, who learn very little about the problems of the poor in law school, would thus become more acquainted with the actual needs of underprivileged minorities. Such centres, which ought to be funded by the State, could also play an important educational role. They could run simple

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128 Op cit 11.

law courses for the public in those areas of the law in which the poor have most problems. Such educational programs would help to make the law and its institutions more transparent to the ordinary person and, by so doing, would help underprivileged people to overcome their prejudices against the administration of justice.

(ii) The Problem of Access to Lawyers

Many an unsophisticated person who has a legal grievance simply does not know how to go about finding a lawyer who is most competent to deal with his case. Lawyers are not allowed to advertise in Germany. Although they are listed in the Yellow Pages, this is of little use to the potential client since the list contains only the address and not the field of specialization as in the case of medical practitioners. Only those lawyers who are specialized in tax law may indicate this on shingles, letterheads and telephone directories. Professor Kötz points out that 'this exception is motivated not by the bar's interest in making its services more accessible to the general public but by the fear of losing still more ground to accountants and other specialist consultants.[129]

A potential client in need of specialist legal assistance may, however, approach the local Bar Council which keeps a list of attorneys who are specialized in certain fields of law or who are proficient in certain foreign languages. But very few people are aware of this possibility. Apart from this, the procedure can be quite bureaucratic. In Hamburg, for example, the offices of the local Bar Council and Bar Association are difficult to find. They are housed in the civil

129 'The Role and Functions of the Legal Professions in the Federal Republic of Germany' in Drobnig and Puttfarken (eds) op cit 77.

courts building - a highly complex edifice with many cheerless and confusing passages. There are no boards which indicate on which floor the Bar Council has its offices.

Under the old legal aid scheme, which did not provide for the right to counsel of one's choice, the courts usually kept lists of lawyers who were willing to take legal aid cases. A lawyer would then be assigned from the list to help the legal aid party who did not have his own lawyer. But the lawyer assigned was not necessarily an expert in the matter of his client. The new legal aid scheme, which makes provision for the right to counsel of one's choice, requires that the legal aid beneficiary finds a lawyer himself. So, while the right to counsel of one's choice is a positive innovation, the problem of effective access to counsel has not been solved.

The Federal Ministry of Justice has, however, announced its intention to allow attorneys and notaries[130] to hold themselves out as specialists in not more than two of the following fields: labour law, social-welfare law and administrative law.[131] This, it is submitted, is a welcome development. It is, however, not clear what conditions attorneys will be required to fulfil to hold themselves out as specialists. It is also not clear whether, in the case of administrative law, which is a wide field, attorneys will be allowed to indicate their specific fields of interest.

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130 In some Federal States attorneys may be admitted notaries so that they are able to exercise both professions concurrently.

131 Frankfurter Rundschau 24 May 1985.

It is submitted that the legislature also authorize attorneys who are specialists in matters related to the Aliens Act and the Asylum Procedure Act to hold themselves out as such.

There is, indeed, a need to ensure that the guest workers, who come mainly from southern Europe, are efforded effective access to the law.[132] The legal situation pertaining to them is far from satisfactory.[133] Although they have been living in Germany for many years they are still isolated politically despite repeated calls by aliens' organizations and church groups that they be integrated into the political process, at the communal level at least. In Parliament it is only the Green Party (die Grünen) who are calling for the political integration of the immigrant population. Within the Government there is disagreement between the Liberals and the Conservatives as to what policy to adopt.towards the guest workers and their families. As opposed to the Liberals, the Conservatives are pressing that the right of the guest workers to live with their families in Germany be curtailed. This never-ending debate amongst politicians produces feelings of legal insecurity amongst the immigrant population.

On account of their relative poor standard of education and inadequate command of the German language, the guest workers usually have difficulty in asserting their rights before government agencies.[134] Their uncertain

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132 In 1982 the entire immigrant population in the Federal Republic of Germany numbered 4,6 million. The Turks who number about 1,5 million are the largest immigrant group. Statistics taken from G Jahn 'Ausländische Selbstorganisationen in der Bundesrepublik Deutschland' (1984) 3 Zeitschrift für Ausländerrecht und Ausländerpolitik 135-136.

133 Cf Ibid 136.

134 Cf Ibid.

legal position exposes them to various forms of arbitrary administrative action.[135] Statements by some politicians to the effect that there are too many foreigners in the Federal Republic are, unfortunately, sometimes accepted by administrative courts as grounds for restricting the right of guest workers to live with their families in Germany.[136]

There is, therefore, a need to ensure that guest workers are afforded more legal protection. One way of doing this would be to establish legal advice bureaux in all areas with a high concentration of immigrants.

(iii) Problems of Access encountered by Political Refugees

Article 16(2) of the Basic Law states that 'persons persecuted on political grounds shall enjoy the right of asylum'. Between 1953 and 1984, a total of 88 376 persons were granted political asylum in the Federal Republic.[137] This figure represents about 17,7 per cent of the total number of applications received during this period.

Most of the asylum seekers entered the Federal Republic in the 1970s. But, as Germany was then enjoying a period of enduring economic success, it also became a favourite destination for so-called 'economic asylum seekers', that is, persons whose request for political asylum amounts to little more than a statement of dissatisfaction with the economic prospects at home. To deter such persons from exploiting the asylum law, the

135 See M Budzinski 'Ausländerpolitik verunsichert Deutsche und Ausländer' (1984) 1 Zeitschrift für Ausländerrecht und Ausländerpolitik 38 at 42-43.

136 Ibid.

137 Frankfurter Rundschau 4 March 1985.

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135 See M Budzinski 'Ausländerpolitik verunsichert Deutsche und Ausländer' (1984) 1 Zeitschrift für Ausländerrecht und Ausländerpolitik 38 at 42-43.

136 Ibid.

137 Frankfurter Rundschau 4 March 1985.

Federal Government abolished the child allowance for asylum seekers; reduced their social welfare benefits; and imposed a two-year employment ban on them.[138] Some of the Federal states ruled by conservative governments have gone a step further by introducing very harsh living conditions in the refugee camps for persons awaiting the outcome of the applications for asylum.[139] The conservative governments of Bavaria, Baden Württemberg and Berlin are demanding the enactment of even harsher deterrent measures such as the imposition of a four-year employment ban on asylum seekers and a periodic review of the status of political refugees.[140]

The official hard line adopted against refugees has provoked considerable criticism from human rights groups and socially engaged lawyers.[141] The Federal Democrats, who also make up the present coalition Government, have already indicated that they are not prepared to curtail the individual's right to political asylum further.[142] The basic trouble with the arguments put forward by conservative politicians is that they tend to be emotional. No attempt is made, at least publicly, to discuss the question of political asylum in the light of both the scale of political oppression in the world

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138 See R Marx Asylrecht I (1984) 72.

139 See, generally, 'Asylanten' in (1980) 6 Entwicklungspolitische Korrespondenz 5-6; Süddeutsche Zeitung 6 March 1985.

140 See Frankfurter Rundschau 4 March 1985. Article 16 of the Asylum Procedure Act (Asylverfahrensgesetz of 16 July 1982 BGBl I 946) makes provision for the cancellation of the asylum grant where the conditions which led to the issuing of the grant no longer exist. In practice, however, neither the Federal Government nor any State Government has hitherto applied this provision. See interview with Burkhard Hirsch, legal expert of the Federal Democratic Party, in Hamburger Rundschau 25 April 1985.

141 See Frankfurter Rundschau 27 January 1984; Süddeutsche Zeitung 14 March 1985.

142 See interviews with Hirsch in Hamburger Rundschau 25 April 1985.

today and the size of the world's refugee population. Rarely is reference made to the situation in other West European countries. The proponents of a more restrictive asylum practice do not mention that some other West European countries, that are not as rich as West Germany, have a much higher per capita refugee population than the Federal Republic.[143]

So much for the political background. In brief, as to the procedure in asylum matters[144]: The proceedings are of an administrative nature. The applications for political asylum are considered by the Federal Office for the Recognition of Alien Refugees. If the application is rejected, the unsuccessful applicant will be called upon by the aliens' office in the area in which he is quartered to leave the country within a stipulated period or else face deportation. The applicant may,however, appeal to the local administrative court and will be entitled to legal aid if he meets both the means and merits test.[145]

Though the asylum seeker need not be represented by an attorney when he lodges his application with the Federal Office for the Recognition of Alien Refugees, in practice the prospects of succeeding are greater for those who engage the assistance of a lawyer.[146] The reason is that most of the asylum seekers simply do not know how to motivate their applications.[147] Some are

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143 For statistics, see Frankfurter Rundschau 4 March 1985.

144 See §§ 6 ff of the Asylverfahrensgesetz.

145 In terms of Art 16(2) of the Refugees Convention of 1951.

146 Rechtsanwalt in Hamburg 'Rechtsschutz und Glaubwürdigkeit' (1980) 6 Entwicklungspolitische Korrespondenz 31.

147 This statement is based on the author's experiences gained in the Amnesty International Asylum Comitter in Hamburg.

afraid of mentioning that they were harassed or tortured for political reasons, out of fear that this might count against them. This fear is particularly discernible amongst those who have been victims of relentless political persecution in their respective mother-countries.[148] Others emphasize unimportant details in their applications. There is, therefore, widespread need for legal assistance.

In practice, however, asylum seekers encounter many hurdles in their quest for legal assistance. The truth is that the authorities are reluctant to provide them access to lawyers.[149] They fear that the availability of legal advice services will only have the effect of attracting more asylum seekers to West Germany.[150] The authorities would prefer to counsel the asylum seekers themselves by means of pamphlets.[151] In 1980 the Government of Baden-Württemberg even went to the extent of expressly forbidding asylum seekers access to lawyers.[152] This prohibition prompted the representative of the United Nations High Commissioner for Refugees to intervene.[153]

Some of the refugee camps are in the country districts, far away from the metropolitan areas where most of the lawyers have their offices, at least those who have developed expertise in asylum matters. Asylum seekers are also *not allowed to leave the districts* to which they have been assigned to sojourn, except in exceptional

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148 Rechtsanwalt in Hamburg op cit; see also G Müller 'Probleme der Rechtsberatung und der Betreuung asylbegehrender Ausländer' (1982) Zeitschrift für Ausländerrecht und Ausländerpolitik 25 at 27.

149 See G Müller op cit 25-26.

150 Ibid 25.

151 Ibid 26.

152 Ibid.

153 Ibid.

circumstances.[154] In Baden Württemberg asylum seekers are not allowed to consult lawyers who practice outside the district in which they are quartered.[155] Apart from this, given the fact that they are not allowed to work, most asylum seekers have no money to afford the services of a lawyer. They are rarely aware of the State legal advice scheme for the poor.[156] Even then most of them cannot afford to contribute the nominal amount of DM 20 as is required under the legal advice scheme.[157]

Legal aid is available for the proceedings before the administrative courts. The lawyer must, however, invest an enormous amount of work in order to meet the requirements of the merits test. The preparation entails research into the theory and the practice of the criminal laws of the asylum seeker's mother-country; soliciting expert opinion and repeated consultation with translators. If the application for legal aid is rejected, the lawyer receives nothing by way of financial remuneration despite the enormous amount of work invested in the case.

Undoubtedly, the most unfortunate aspect of the current restrictive asylum practice is that it affects those who are genuinely in need of political asylum. Some of those who have been repatriated to their respective countries were murdered on their return.[158] The fact that an application for asylum may take several years before the outcome is known, coupled with the fact that asylum seekers are forced to idle around and spend most of their time in boredom, has resulted in a number

154 See Süddeutsche Zeitung 16 February 1985 for examples with regard to the restrictions on movement.

155 G Müller op cit 29.

156 Ibid 29.

157 Ibid.

158 Cf interview with Hirsch in Hamburger Rundschau 25 April 1985.

of suicides amongst asylum seekers.[159] Some have even preferred returning to their respective mother-countries notwithstanding their subjective fear of being victimized.[160]

Some charitable organizations have set up legal aid funds for the purpose of affording asylum seekers better legal protection.[161] The effective utilization of the fund is, however, hamstrung by a number of administrative difficulties.[162] Also, the moneys do not suffice to cover legal representation before the administrative courts.[163] The legal aid fund of the High Commissioner for Refugees is also not well endowed and is used mainly to finance cases in which there is an extreme need for maximum legal protection.[164]

It is submitted that the German Bar Association should pressurize the Government to establish political-asylum legal aid centres in all areas with a high concentration of refugees. Such centres which could be staffed by attorneys who work on a part-time basis, could ensure that legal services for asylum seekers are rendered on a more co-ordinated basis than is the case at present. The legal expertise developed in such centres could be used for the litigation of test cases. Also, such centres could serve as reference centres for other attorneys who handle asylum matters.

The Government ought to have a firm interest in such a project for the simple reason that such centres could help to ensure that only those persons who are genuinely in need of political refuge do, in fact, obtain it.

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159 Marx op cit 20.

160 Ibid. See also Süddeutsche Zeitung 16 February 1985.

161 G Müller op cit 30.

162 Ibid.

163 Ibid.

164 Ibid.

8 The Present Helmut Kohl Government and the Poor

The present Government, which is dominated by conservatives, has shown little sympathy for the poor. The cuts in Government spending are affecting mainly the underprivileged groups - those who have no lobby in Bonn.

Social welfare- and unemployment benefits have been *cut.*[165] *Pension moneys have not been adjusted.* Maternity benefits have been cut. Also Government loans for education have been reduced. Some of the social projects that were established under the Social Democratic/Liberal governments of Willy Brandt and his successor, Helmut Schmidt, which were designed to afford working-class *people equal opportunities* with the privileged groups, have either been abolished or are being under-funded. The Government is also not seen to be making an earnest effort to counter the problem of unemployment.

This 'social dismantling', as the trade unions label the Government's policies, has given rise to feelings of social and legal insecurity amongst the poor. The Government's apparent indifference to the needs of the poor also has the effect of exposing them to exploitation by unscrupulous landlords, businessmen and employers. There is, therefore, greater need for legal protection.

Unfortunately, things do not look bright on the legal aid front. The present Civil Procedure Amendment Bill[166], which is essentially designed to streamline the business of the courts, envisages two amendments to the legal aid provisions which, it is submitted, will have the effect of undermining the public's confidence in the legal aid scheme.

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165 At present there are over 2 million unemployed persons in the Federal Republic.

166 Of 8 November 1984 Bundestag-Drucksache 552/84.

The one amendment provides that the means test must no longer be administered by the judge, but by the Rechtspfleger, the judicial administrator or registrar.[167] The reason is that the Government believes judges administer the means test too liberally.[168] The Lower Saxony study referred to above has, however, shown that judges administer the means test properly.[169a] The fact that the Government overlooks these empirical findings shows that it does not attach much value to informed socio-legal empirical research. The proposed change also does not speak much for the Government's confidence in the judiciary.

The motive for the amendment is tantamount to a directive to the future administrators of the means test *to screen the applicants* rigorously. Indeed, the more stringent and perfect the screening becomes the more will it be resented by the public. The new procedure *is bound to become highly* bureaucratic. It is doubtful whether it will contribute to the streamlining of court procedure. Apart from this, a bureaucratic procedure *is likely to have a* repellent effect on those who are most in need of legal aid but who are least able to put up with formal procedures. This is one of the reasons *why* the old procedure, according to which the legal aid applicant was first required to obtain a 'poverty certificate' from the local welfare office, was abolished.

The Federation of German Judges, which is totally against the amendment, has warned that the new procedure is bound to cause conflict between the judge and the judicial administrator.[169b] The judges foresee the

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167 Ibid.

168 Ibid.

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169b 'Konflikte vorprogrammiert' (1985) 5 Deutsche Richterzeitung 192.

conflict arising particularly in family law matters, which constitute the majority of legal aid cases, where a decision regarding the merits of the case cannot be made, almost without exception, without taking account of the financial circumstances of the party.[170] The judges also point out that the future procedure, according to which the means test will be administered after the merits test, not only contradicts the sequence presently prescribed by statute, but above all, it will have the effect of making the judge appear as a preparatory instance for the judicial administrator.[171] This, the judges say, does not correspond to the image of the judge in the German legal system.

[illegible] amendment has to do with the judicial stipulation of the instalment amount payable by the legal aid beneficiary. The Bill provides that, if the legal aid applicant fails to substantiate, within a certain period, statements made by him with regard to his financial situation, the court must assume that the applicant has a higher income and more assets and can, if need be, reject the application. Also, the court will be authorized to vary the size of the instalment payable once the legal aid beneficiary's situation changes. The legal aid beneficiary will be obliged, at the request of the court, to declare, within a stipulated time, any changes regarding his financial situation. If the party fails to honour the obligation without furnishing adequate reasons, the court will be entitled to cancel the legal aid grant.

The new procedure, it seems, will not be unlike that prescribed for the filling in of an income-tax form. The spectre of having to disclose every detail of one's

170 Ibid.
171 Ibid.

finances will, to reiterate, dissuade many people from using the legal aid scheme.

The main reason for these amendments is the unexpected increase in legal aid spending. The unfortunate part of it is that the rather conservative prognostications as to the cost of the scheme were not based on any concrete evidence of the extent of the legal needs of the poor, but on speculations that were far-removed from reality. The President of the Federal Constitutional Court recently criticized the fact that the legislature is controlled by jurists who are blind to reality and who are reluctant to be confronted with solid basic data.[172] The Federal Minister of Justice has pointed out that there is a need to pay more attention to the findings of socio-legal empirical research when drafting legislation.[173] The Ministry is actually funding such research to the tune of DM 750 000 per year.[174] The fact that the legislature decided to introduce changes to the legal aid practice, regardless of the findings of empirical research, shows that there are areas of the administration of justice in which party-political interests take precedence over concrete social needs.

The reaction of the German Bar Association to the proposed amendments has been rather disappointing. The Bar Association's protest amounted to little more than a statement to the effect that it is prepared to discuss ways in which the exploitation of the legal aid scheme can be combatted, but that it will reject any attempt to cut legal aid expenditure by reducing lawyers' fees

172 See Süddeutsche Zeitung 26 January 1985.

173 Die Welt 25 October 1984.

174 Ibid.

for legal aid cases.[175]

One would have expected a more vigorous protest on behalf of the poor, too. But it seems that within the profession there is no longer a desire to pick up the issue of legal aid again. It appears that after the drawn-out discussion on legal aid, in the 1970s, the profession would like to have its peace.

9 *Legal Aid in Criminal Proceedings*

The right to be defended by counsel of one's choice constitutes a major cornerstone of the German criminal procedure ethic. This right is not only expressly postulated in the Code of Criminal Procedure[176], but it is also deduced from Article 103(1) of the Basic Law which stipulates that everyone shall have a right to a fair hearing before a court.

The Federal Constitutional Court has held that the right to counsel of one's choice, coupled with the established principle of the independence of counsel, is a fundamental postulate of criminal procedure, for it ensures that the accused is not reduced to an object of state action, but that he maintains his position as a subject of the proceedings and that he is able to use his procedural rights effectively.[177] This means that he must be afforded an opportunity to 'avail himself of the necessary expertise' in order to defend himself

175 Handelsblatt 21 September 1984.

176 § 140(1).

177 Decision of the Federal Constitutional Court of 14 February 1973 Entscheidungen des Bundesverfassungsgerichts vol 34 293 at 302-303. See also the decisions of the Federal constitutional Court of 3 June 1969 Entscheidungen des Bundesverfassungsgerichts vol 26 69 at 71; of 8 October 1974 Entscheidungen des Bundesverfassungsgerichts vol 38 105 at 111.

adequately against excesses by the State or other parties to the proceedings.[178] For

> the dignity of the person demands that his rights are not disposed of abruptly from above. The individual shall not be the mere object of a judicial decision, but shall, before a decision is made which affects his rights, get a hearing in order to influence the course and the outcome of the proceedings.[179]

The need to protect the rights of the accused in criminal proceedings is so highly appreciated in Germany, that the Code of Criminal Procedure expressly spells out the types of cases in which the accused must be assisted by defence counsel. These necessary-defence (notwendige Verteidigung) cases may not be tried without defence counsel. If the proceedings nevertheless take place without the accused being defended, they will be regarded as irregular.[180] If the accused does not have his own privately-retained counsel, the trial judge will appoint counsel to defend him irrespective of the accused's financial circumstances[181] or his ability to defend himself.[182] This means that if it is a necessary-defence case, defence by counsel will be necessary even

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178 Decision of the Federal Constitutional Court of 8 October 1974 Entscheidungen des Bundesverfassungsgerichts vol 38 105 at 111.

179 Decision of the Federal Constitutional Court of 8 January 1959 Entscheidungen des Bundesverfassungsgerichts vol 9 89 at 95 (own translation).

180 Such proceedings constitute an absolute ground for revision in terms of § 338(5) of the Strafprozeßordnung.

181 See Pakelli v Federal Republic of Germany (Decision of the European Court of Human Rights of 25 April 1983) in (1983) 13 Europäische Grundrechte Zeitschrift 344 at 347. See also H Dünnebier commentary to § 140 in Löwe-Rosenberg Die Strafprozeßordnung und das Gerichtsverfassungsgesetz (1978).

182 Ibid.

if the accused is a lawyer.[183] The ratio is that the law regards him as biased.[184]

Counsel who is assigned by the trial judge to defend the accused is called mandatory defence counsel (Pflichtverteidiger).

The legislature has, over the years, gradually expanded the category of cases in which the assistance of counsel is mandatory. At present, paragraph 140(1) of the Code of Criminal Procedure provides that assistance by counsel will be mandatory if:

(a) the main trial at first instance takes place before a State Court or a State Court of Appeal (The State Court is a first instance court for more serious criminal matters which do not fall within the jurisdiction of local courts or that of the State Court of Appeal. The State Court has jurisdiction in all matters which carry a penalty of more than three years imprisonment or in respect of which the person may have to be committed to a psychiatric hospital or may have to be placed under preventive detention. Appeals from the decisions of first instance lie with the State Court of Appeal which also sits as a first instance court in state security matters);

(b) the accused is charged with a major crime;

(c) the proceedings could result in an order which prohibits the accused from exercising his profession;

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183 Ibid.

184 Ibid.

(d) the accused is deaf or dumb;

(e) the accused has, by order or leave of a judge, already spent 3 months in custody and will not be released less than 2 weeks before the main trial starts;

(f) the accused might have to be committed to a psychiatric institution for medical observation;

(g) the state prosecutor does not go ahead with the prosecution because of the offender's lack of legal capacity or criminal responsibility, but applies to the court for permission to order that the offender be subjected to lawful measures - other than punishment for dealing with serious offences - with a view to reformation of the offender and the protection of the public[185] if such an order is expected to be made after the preliminary investigations have been completed[186], or if

(h) the previous defence counsel has been barred from the proceedings.

The Code further provides that in other matters the judge may, mero motu or at the request of the public prosecutor, assign counsel to defend the accused if, on account of the gravity of the offence or the difficulty of the case, assistance by counsel appears to be necessary, or if it is evident that the accused will be

185 For example, withdrawal of a drivers' licence.

186 § 413 of the Strafprozeßordnung.

unable to conduct his own defence.[187]

Furthermore, in criminal proceedings relating to juveniles or adolescents, the judge will assign counsel to defend the accused (a) if counsel would be assigned to defend an adult accused, (b) if the guardian and the statutory representative are stripped of their rights under the Juveniles Court Act or (c) if there is a possibility that the accused will be placed in an institution in order that a report on his level of development be prepared.[188]

Defence counsel is appointed by the trial judge from a list bearing the names of attorneys admitted to practice in one of the courts in the judicial district. Although the accused has no right to be assigned counsel of his choice, the Federal Constitutional Court has held that, unless there are special reasons for not doing so, preference should be given to the wishes of the accused.[189]

a Fees and Costs of the Proceedings.

Whereas at civil law the attorney's fees are determined by the monetary value of the issue, in criminal proceedings counsel's fees are flat rates that range *between statutorily fixed maximum* and minimum limits.[190] Counsel does not receive single-item fees, but is paid a lump sum for his pursuits within a court instance. In

187 § 140(2) of the Strafprozeßordnung.

188 §§ 68 and 109(1) of the Jugendgerichtsgesetz of 4 August 1953 BGBl I 751 as amended by the Gesetz of 8 December 1981 BGBl I 1329.

189 Decision of 16 December 1958 Entscheidungen des Bundesverfassungsgerichts vol 9 36 at 38.

190 *These limits* are laid down in §§ 83-86 of the Bundesgebührenordnung für Rechtsanwälte.

determining the fee, all circumstances are taken into account including the importance of the matter, the amount of work involved and the financial circumstances of the client.[191]

Unlike privately retained counsel whose fee ranges within the prescribed margins, mandatory defence counsel receives a fixed fee which is four times the minimum but not more than half of the maximum statutory fee charged by privately retained counsel.

An accused who is convicted must pay his counsel's fees as well as the expenses incurred by witnesses and expert witnesses.[192] The State may, however, be ordered to pay the expenses of obtaining expert evidence where such evidence turns out in favour of the accused.[193] If the convicted person is a juvenile or an adolescent the trial judge may order that the State pays the costs of the trial.[194] The State usually pays these costs. There is a very good reason for this practice:

> The costs of engaging counsel often constitute the biggest financial burden, especially in proceedings involving juveniles.... To the juvenile, the payment of counsel's fees is equivalent to fine. This has an adverse effect on him and it militates against the educational aim of juveniles' proceedings.[195]

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191 H Dahs Handbuch des Strafverteidigers 5 ed (1984) 608.

192 § 465(1) of the Strafprozeßordnung.

193 Ibid § 465(2).

194 § 74 of the Jugendgerichtsgesetz of 4 August 1953 *BGBl I 751 as amended by the Gesetz of 8 December* 1981 BGBl I 1329.

195 Decision of the State Court in Frankfurt/Main of 19 November 1982 - 5/26 Qs 33/83 in (1983) 2 Strafverteidiger 69 (own translation).

As to mandatory defence cases: The convicted client is required to pay his counsel's fees. If the client is able to pay, counsel will be entitled to recover from him the statutory fees payable to privately retained counsel, but only after the trial court has established the client's ability to pay.[196] If the convicted client is too poor to pay counsel's fees, counsel will be entitled to recover from State the statutory fee prescribed for mandatory defence counsel. If the accused is acquitted counsel will be entitled to recover the normal fees chargeable by privately retained counsel from the State.[197]

b How Effectively Does the Mandatory Defence Scheme Fulfil its Legal Aid Function?

The original idea underlying the introduction of the mandatory defence scheme into the Code of Criminal Procedure of 1877 was that the stiffer the penalty carried by the offence, the greater the need to afford the accused legal protection before the court.[198] The poverty of the accused was not a factor. In fact, a proposal during the first reading of the Bill in September 1875 that indigent accused persons be entitled to be defended by mandatory defence counsel found no support in the Reichstag.[199]

However, in the late 1960s and the 1970s when there was considerable discussion in the Federal Republic on the need to give wider and more meaningful practical effect to the Sozialstaat tenet ensconced in the Basic Law,

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196 § 100(2) of the Bundesgebührenordnung für Rechtsanwälte.

197 Dahs op cit 611.

198 See C Hahn (ed) Die gesamten Materialien zur Strafprozeßordnung vol 1 (1880) 143.

199 Ibid 961-962.

and when equality of opportunity became a guiding principle in socio-political matters, the mandatory defence scheme came to be regarded as a form of legal aid.[200]

There are, however, a number of shortcomings in the mandatory defence scheme which limit its legal aid function. First, it benefits only those indigent persons who come within the rubric of paragraph 140(1) of the Code of Criminal Procedure. Indigent persons who fall outside the scope of this provision have no right to be assigned counsel. The legal aid benefit of the scheme is therefore more accidental than generally intended. Even then, an accused who qualifies for mandatory legal representation but who is not too poor is still required to pay his counsel's fees as well as the expenses incurred by witnesses and expert witnesses. The financial burden imposed on the convicted person makes it difficult for him to rehabilitate himself in society.[201]

Second, persons charged before the local courts, which may impose a prison sentence of up to 3 years, are generally excluded from the ambit of the mandatory defence scheme. Admittedly, in practice the courts do occasionally assign mandatory defence counsel to defend an accused facing a prison sentence of 2 years.[202] But why does the

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200 See the decision of the Federal Constitutional Court of 8 April 1975 in Entscheidungen des Bundesverfassungsgerichts vol 39 238 at 243. See also H Dahs 'Verteidigung im Strafverfahren - heute und morgen' (1968) 1 Zeitschrift für Rechtspolitik 17 at 18; J Welp 'Die Verteidigung als Anwalt des Vertrauens' (1978) 90 Zeitschrift für die gesamte Strafrechtswissenschaft 101 at 105.

201 Cf G Baurgärtel 'Chancengleichheit vor Gericht durch Pflichtrechtsschutzversicherung oder Prozeßhilfe' (1975) 14 Juristenzeitung 424 at 427.

202 See Dahs Handbuch des Strafverteidigers 69.

law discriminate against accused persons who face lesser prison sentences or against those who have ample reason to fear the consequences of a mere conviction? Let us take the example of aliens who are resident in the Federal Republic: The Aliens Act authorizes the administrative authorities to deport an alien who is convicted on a criminal charge.[203] Indeed, the deportation can have an infinitely harsher effect on the person than a prison sentence[204]; it leads to his and his family's financial ruin as well as to other major resocialization hardships especially when children of school-going age are affected by the deportation. It is therefore regrettable that the law does not expressly entitle an indigent alien to be assigned defence counsel where the conviction could result in a deportation order.

It ought to be pointed out that the accused's inability to speak or to understand German does not entitle him to mandatory defence counsel. This is unfortunate, given the fact that a large number of aliens resident in the Federal Republic are ill-conversant with the German language, let alone with German legal vocabulary or criminal procedure.[205] Their ignorance of the language might be the very reason why some aliens come into conflict with the criminal law. Although the law makes provision for the engagement of qualified interpreters

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203 § 10(1)(ii) of the Ausländergesetz of 28 April 1965 BGBl I 353 as amended by the Gesetz of 25 July 1978 BGBl I 1108.

204 Cf G Strate 'Pflichtverteidigung bei Ausländern' (1981) 1 Strafverteidiger 46.

205 Cf R Oellericht 'Voraussetzungen einer notwendigen Verteidigung und Zeitpunkt der Pflichtverteidigerbestellung' (1981) 9/10 Strafverteidiger 434 at 438-439; Strate op cit 46.

where the accused does not understand German, very few interpreters are trained to explain to the accused how a German criminal court works.[206] One Hamburg lawyer has observed that many interpreters have the bad habit of 'filtering' rather than 'translating' the accused's statements - a practice which is particularly noticeable in trials involving persons whose native countries are far removed from central Europe.[207]

Indeed, an accused person who has no inkling of either the language or the procedure of the court is reduced to a mere object of the proceedings. There is very little he can do without the aid of counsel to influence the outcome of his trial. The accused feels cheated out of his rights and this, in turn, certainly undermines his respect for the law.

There is therefore an urgent need to ensure that indigent persons who are ill-conversant with the German language be afforded legal representation[208], not least because of the far-reaching effects which a negative outcome of the trial can have for aliens.

The third major drawback of the mandatory defence scheme has to do with the practice of assigning counsel. A criticism often heard is that counsel is not assigned early enough. In practice, the accused who qualifies for a mandatory defence is assigned counsel by the trial judge only after the prosecutor has preferred the charge. The German Bar Association is presently demanding that counsel

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206 Strate op cit 46.

207 Ibid.

208 Cf the Resolution of the 7th Strafverteidigertag (Defence Counsel's Day) held in Frankfurt/Main in April 1983 in (1983) 6 Strafverteidiger 260 at 262; Strate op cit 47.

be afforded the right to be present at the *immediate* post-arrest interrogation of the accused.[209] This is *a welcome development*. Indeed, the early pre-trial stage of the proceedings is crucial and an unsophisticated accused who is without legal assistance at this stage can do irreparable harm to his case.

The other problem with the assignment *practice is* that the accused are frequently not told early enough that they must be defended by counsel. They are assigned counsel without being given an opportunity to suggest beforehand by whom they would like to be defended.[210]

Far more disconcerting is the type of counsel *assigned in mandatory* defence cases. In practice judges tend to assign counsel from the ranks of attorneys who are known to be pusillanimous and who tend to pander to the whims of trial judges. These 'untroublesome' counsel enjoy the confidence of the trial judge, but not necessarily that of the accused. This sometimes leads to tension between the accused and his counsel, especially in political trials.

This unfortunate practice is partly traceable to the enormous increase in the number of law graduates. Many new-comers to the profession have a very small clientele and are compelled to augment their income by working as taxi-drivers after office hours.[211] To enhance their *prospects of being assigned* more regularly in mandatory defence trials, some young attorneys tend to ingratiate themselves with some judges. It is regrettable that this

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209 This demand was made at the 43rd Anwaltstag (*Attorneys' Day*) *held in* Mannheim in May 1985. See Frankfurter Rundschau of 20 May 1985.

210 R Schlothauer 'Die Auswahl des Pflichtverteidigers' (1981) 9/10 Strafverteidiger 443.

211 Cf Der Spiegel of 30 April 1984; Der Spiegel of 20 May 1985.

sometimes takes place against the interests of the accused.

These shortcomings of the mandatory defence scheme limit its effectiveness as an instrument for affording indigent accused persons adequate protection before the criminal courts. It is, however, surprising that in the discussions preceding the enactment of the new Legal Aid Act very little attention was devoted to the plight of the indigent accused. The debate focused chiefly on the question of access to justic at civil law. But even the law-journal articles and legal commentaries that dealt with the inadequacies of the mandatory defence scheme, seldom attempted to analyse the scheme from a wider socio-legal point of view. Much of the criticism centred around the implementation of the scheme and the technical handicaps inherent it. The main thrust of the arguments was directed more towards the need to afford the accused procedural equality with the prosecutor. Very little was said about the need to afford the indigent accused an opportunity to defend himself as effectively as the wealthy accused. This aspect should have received more attention given the fact the mandatory defence scheme is regarded as a legal aid scheme.

c The Need to Unify the Legal Aid System

The fact that a legal aid construction has been placed on the mandatory-defence scheme has not made it more accessible to the poor. This compels one to ask: Why not replace the mandatory defence scheme with the standard legal aid scheme as it obtains at civil law? This idea has been mooted in recent years.[212] The gist of the ideas put

212 See W Beulke Der Strafvert[illegible] m Strafverfahren (1980) 256; P Rieß 'Pflic[illegible] gung - Zwangsver-teidigung - Ersatzverteid[illegible] form der notwendigen Verteidigung' (1981) 9/10 S[illegible] teidiger 460 at 461.

forward is that indigent accused should be afforded the right to be represented by counsel of their choice at the expense of the State. The merits test would be dispensed with altogether as is presently the case under the mandatory defence system.

The replacement of the mandatory defence scheme by the civil legal aid scheme would have the important effect of ensuring that the impecunious accused too, has a right to counsel of his choice. This, in turn, would have the effect of obviating some of the problems connected with the assignment of counsel under the present practice. Furthermore, uniformity would be introduced into the criminal legal aid scheme.

Seen realistically, it is unlikely that any changes will be introduced in the foreseeable future. It would entail enormous persuasive arguments to bring the Government, which favours a restrictive policy in legal aid practice, to accept that there is a need for more comprehensive legal aid in the sphere of criminal law. Also, it is doubtful, given the long, drawn-out discussion on legal aid in the 1970s, whether the legal profession can muster the energy to tackle the legal aid question afresh.

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6 EXTRA-JUDICIAL LEGAL AID

1 History

a Introduction

Legal advice bureaux in Germany have a long history which dates back to the last decade of the nineteenth century. This was the period of industrialization - the period during which Germany 'turned from a predominantly rural country into a manufacturer second only to the USA.'[1] At the heart of the industrial growth were the labourers. Socialism had become a highly political factor. In the 1880s already, in a bid to win over the marxist-inclined working class, Bismarck enacted the Workers' Health Insurance Law (1883), the Industrial Accidents Law (1884) and the Old Age and Disability Insurance Law (1889).

By the 1890s, the liberals, whose strong influence was reflected in the enlightened legislation that marked the 1870s and the 1880s, no longer had any political influence. The majority of them 'washed their hands of public affairs and withdrew into a liberalism of the spirit.'[2] Bismarck now counted on the conservative support of the Junkers.[3] Thus, unlike in England, 'industrialization strengthened rather than weakened the traditionalism of German values and the authoritarianism of German politics.'[4]

In the administration of justice, too, the liberalism

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1 Pulzer op cit 278.

2 Taylor op cit 142.

3 Ibid 143.

4 R Dahrendorf, 'Law Faculties and the German Upper Class' Sociology of Law (edited by Vilhelm Aubert) (1969 reprinted 1972) 294 at 295.

which had characterized the judiciary in the preceding decades and which constituted the chief weapon with which the middle class had sought to combat bureaucracy[5] gave way to strict conservatism.[6] Although legal aid had made the courts more accessible to the poor, the legal aid scheme was not effective enough. There was still considerable disparity between rich and poor as regards the utilization of the law.[7] At their Erfurt Congress in 1891 the Social Democrats demanded the introduction of a wholly gratuitous legal aid scheme.[8]

b The Emergence of the Legal Advice Bureaux

With the enactment of the social laws in the 1880s, working-class people scurried around for legal advice on how to exercize their social rights. Lawyers had priced themselves out of the reach of the ordinary worker. Besides, the lawyers themselves were inadequately equipped to counsel on working-class problems. In addition, lawyers were barred from representing clients before the industrial trade tribunals - the precursors of the modern labour courts.[9]

To meet the legal needs of the labourers and to combat the growing sceptical attitude towards the legal order, in 1890 the Catholic Church set up an advice bureau (Volksbüro) in the industrial city, Essen.[10] The bureau

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5 E Kehr 'Zur Genesis der preussischen Bürokratie und des Rechtsstaates' (1932) 1 Die Gesellschaft 101 at 118.

6 G Rueche and O Kirchheimer Sozialstruktur und Strafvollzug (Helmut and Susan Kapczynski trans. 1974) 199.

7 Ibid.

8 'Erfurt Programme' (1891) Resolution 8 in Programme der deutschen Sozial Demokratie op cit 81.

9 P Grein Die unentgeltliche Rechtsberatung Minderbemittelter in Deutschland (1937) 9.

10 E Isermann '"Freie Rechtshilfe" und "Gemeinnützige Rechtsauskunftsstellen" vor 1933 in Deutschland und im Ausland' (1975) 2 Recht und Politik 31 at 32.

gave legal advice on working-class problems. This pioneering feat was soon followed by other Catholic and Evangelical organizations.[11] In 1894 the first trade-union legal advice bureau was established in Nuremberg.[12] This bureau counselled mainly on matters concerning accident insurance. The municipalities of cities, towns and hamlets also started to set up their own advice centres which were open to everyone, though they were intended mainly for the poor. Women's organizations, too, set up their own legal advice centres where women were counselled mainly on divorce and maintenance matters.[13] Co-operatives, guilds and employees' associations established similar legal counselling services for their members.[14]

In 1906 the various legal advice bureaux leagued up to form the Union of German Charitable and Unpartisan Legal Advice bureaux.[15] By 1912 there were 916 legal advice bureaux in Germany.[16] During that year alone, the bureaux registered 1,84 million consultations.[17] In 25,42 per cent of the cases legal action was taken on behalf of clients.[18]

During World War I the number of consultations dropped, but the figures are nonetheless impressive. In 1918, for

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11 Ibid.

12 J Falke 'Zugang zum Recht: Eine Fallstudie über die Öffentliche Rechtsauskunfts- und Vergleichsstelle in Hamburg' (1978) 5 Jahrbuch für Rechtssoziologie und Rechtstheorie 13 at 14.

13 Ibid.

14 Ibid.

15 Isermann op cit 32.

16 E Blankenburg 'Why Historical Precedents of the "Access to Law" Movement in Germany Were Not Followed up' in E Blankenburg (ed) Innovations in the Legal Services (1980) 233 at 243.

17 Ibid.

18 Ibid.

example, 1,4 million persons sought the aid of the advice bureaux.[19]

After the war the need for extra-judicial legal services was enormous[20], but most of the bureaux closed down because of the lack of finances and staff and also because of the general political turbulence during the Weimar period.[21] Despite these adverse conditions the cities of Hamburg, Cologne, Nuremberg, Lübeck, Bremen and Erfurt revived their defunct bureaux.[22] The Union of Legal Advice Bureaux was re-established in 1927, and by 1933 it had 230 affiliate bureaux.[23]

c The Political Aspects of the Public Legal Advice Bureaux

A great number of the legal advice bureaux were established at the instance of conservative politicians. The purpose was to counteract the legal advice activities of the trade unions. In 1911 the Judges' Journal (Richterzeitung) exhorted the judiciary to participate in the work of the legal advice bureaux

> lest the trade unions affiliated to the Social Democrats and the labour secretariats guide legal advice for the poor along the wrong course, misuse it for agitation purposes, and thus exploiting the legal plight of the individual in the interest of party politics.[24]

To counteract the ostensible inflammatory advice dispensed by the trade-union advice bureaux, the bureaux

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19 Falke op cit 15.

20 Isermann op cit 32.

21 Falke op cit 15.

22 G van Aulock Rechtshilfe für untere soziale Schichten (1977) 11.

23 Isermann op cit 32.

24 Cited by Reifner 'NS-Rechtsbetreuungsstellen' op cit 188 (own translation).

administered by the public authorities operated under the motto, 'non-partisanship'. Legal advice was thus regarded more as a means to preserve the social peace and the political order than as a means to help the indigent person assert his rights at law. 'Conflicts' had to be 'stifled before they exploded'.[25]

This obviously meant that in many cases the legitimate claims of aggrieved persons were forcibly subordinated to what politicians in the turbulent Weimar period regarded as the 'common weal'.

d Legal Advice under the National Socialists

Under the National Socialists the concept 'legal advice' (Rechtsberatung) was replaced by the concept 'legal care' (Rechtsbetreuung). Fundamental to the latter concept was the official view that in his dealings with clients the attorney must remain neutral. The attorney was required to orientate his work towards the public welfare and not towards the interests of his client. 'He must administer legal care and not give legal advice', as Kaufmann, a chief exponent of the legal-peace ideology, put it.[26] The concept 'attorney' had thus to make way for the concept 'legal caretaker' (Rechtswahrer)[27] o 'representative of the people' (Volksanwalt).[28]

This new orientation in the delivery of legal services formed part of the National Socialist strategy to obstruct

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25 Ibid citation at 189.

26 S Kaufmann 'Rechtsfürsorge und Armenrecht' (1932) Die Rechtsauskunft 40.

27 See Staff op cit 132-133.

28 Klein 'Rechtsfriedensanwalt' (1932) 5/6 Die Rechtsauskunft 34.

access to the ordinary courts. Jessen, then an influential member of the Executive of the German Bar Association, rationalized the Nazi Legal-peace philosophy as follows:

> We do not want to raise a nation of grumblers, pettifoggers and querulous persons. What is more, no assistance shall be given to those who are inclined to be stubborn and vexatious. Legal advice thus has the important function of educating the people - a task the importance of which cannot be overemphasized at present.[29]

In 1934 the then existent private as well as public legal advice bureaux were placed under the control of the newly created 'Office for the Legal Care of the German People'.[30] In turn, this body was supervised by the Confederation of National Socialist German Jurists. By 1935 there were 1323 legal advice bureaux in Germany.[31] The counsellors were qualified attorneys who belonged to the Confederation of National Socialist Jurists.

Legal advice, or legal care, was not given to non-Aryans, 'litigious' persons, the mentally handicapped or to any person who sought to bring suit against any organ or institution of the National Socialist regime.[32] The bureaux were required to submit to the Office for Legal Care a full report on every client who counsulted them.[33]

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29 P Jessen '*Rechtsbetreuung der deutschen Anwaltschaft*' (1933) 10/11 Die Rechtsauskunft 125.

30 Reifner op cit 192.

31 Ibid.

32 G von Aulock Rechtshilfe für untere soziale Schichten (1977) 15.

33 Reifner op cit 192-193.

(i) The Dissolution of the Trade Unions and the Establishment of the Labour Front Advice Bureaux

On 2 May 1933, shortly after Hitler came to power, the storm troopers (Sturmabteilung or SA) occupied the trade-union headquarters throughout Germany.[34] They dissolved the unions and confiscated their funds. Thousands of union leaders were arrested, tortured, put on trial and sentenced to death or to long terms of imprisonment.[35]

A number of enactments followed which stripped the worker of his rights and which restored the employer to his old position of absolute master of the enterprise.[36] As Shire puts it:

> Deprived of his trade unions, collective bargaining and the right to strike, the German worker in the Third Reich became an industrial serf, bound to his master, the employer, much as medieval peasants had been bound to the lord of the manor.[37]

The legal advice bureaux previously run by the trade unions were taken over by the German Labour Front. The Labour Front was an autonomous mass organization that was created for workers but which, in practice, was wholly subservient to the dictates of the Nazi leadership.[38]

In 1934 the Labour Front had 388 legal advice bureaux. By 1940 their number had risen to 492.[39] The bureaux worked busily. In 1934 a total of 1,5 million persons

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34 R Wahsner 'Faschismus und Arbeitsrecht' in Reifner (ed) op cit 86 at 91.

35 Ibid.

36 Ibid 91-94.

37 W L Shirer The Rise and Fall of the Third Reich (1959) 362-363.

38 Wahsner op cit 98. See also Shirer op cit 363.

39 Reifner op cit 197.

sought the assistance of the bureaux. In 1935 the number rose to 3,4 million. Litigation was rare. The official regulations governing the operation of the bureaux expressly forbade the rendering of further assistance where a claim was factually unfounded or where its assertion was not in accordance with the principles of National Socialism or the principles of the 'Honour of Work'.[40] Thus most of the matters were resolved extra-judicially, or where a case did come before the court, by judicial settlement.[41] According to Professor Reifner, in only 0,8 per cent of the matters dealt with by the bureaux did the dispute end with a judicial decision.[42] The low incidence of litigation substantiates the view that the Labour Front advice bureaux 'existed to convince workers that they had no enforceable rights'.[43]

e The Attitude of the Legal Profession towards the Legal Advice Bureaux

When charitable organizations and trade unions opened their legal advice bureaux at the end of the nineteenth century, the legal profession was neither enraged nor enthusiastic about these developments. The Bar's attitude then could be best described as 'aloof'. One reason for the Bar's non-intervention was that the bureaux were not an enconomic threat to the profession.[44] The bureaux dealt mainly with social welfare and labour matters - areas of the law with which attorneys were not familiar. Besides,

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40 Ibid 201.

41 Ibid 202.

42 Ibid.

43 Ibid 201.

44 See P Stein 'Erfahrungen aus der Tätigkeit einer Rechtsauskunftsstelle' (1905/06) 15 Soziale Praxis 746 at 749.

the clientele of the bureaux came from the indigent working classes who, in any case, could rarely afford the services of a lawyer. Also, the legal profession did not regard the legal problems of the poor as a lucrative source of income. Legal aid cases were generally regarded as an 'enormous burden'.[45]

However, in 1909 the German Bar Association called on all its members to volunteer their services for the bureaux, but it warned them to approach the bureaux Gewehr bei Fuß (literally, with the rifle at hand).[46] By 1913 only 2 per cent of the 12 297 attorneys in Germany had volunteered their services.[47] By then there were 1143 legal aid bureaux throughout the country.[48] The Bar Association attributed the low attorney-participation to the fact that the legal profession was still possessed of its wait-and-see attitude.[49]

The economic crisis that struck the Weimar Republic in the late 1920s forced the legal profession to reappraise its stance towards the bureaux. The middle class, the traditional clientele of attorneys, had been ruined by the high inflation. In addition, the number of attorneys had increased enormously. Also, the State was continually cutting the renumeration for legal aid work. All these factors combined to produce a situation which seriously jeopardized the livelihood of attorneys. In 1929,

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45 E Blankenburg U Reifner J Gorges and F Tiemann Rechtsberatung: Die Soziale Definition von Rechtsproblemen (1982) 164. (Cited hereafter as Blankenburg et al).

46 J Stranz 'Gegenwart und Zukunft der Pflichtanwaltschaft' (1909) 17 Juristische Wochenschrift 549 at 558.

47 Blankenburg et al 165.

48 Ibid.

49 Ibid.

1 out of every 8 attorneys was living at the minimum subsistence level.[50] New-comers to the profession had very slender prospects of earning an income.[51]

It was against the background of these developments that the legal profession decided to participate more widely in legal counselling services for the poor. The Bar, however, set itself two main priorities. First, it wanted to gain control of the legal aid bureaux in order to prevent clients who could afford the services of an attorney from obtaining gratuitous legal assistance.[52] Second, participation in the work of the bureaux would give the younger members of the Bar and those without work an opportunity to earn an income.[53]

In 1931, after stringent negotiations between the Union of Legal Advice Bureaux and the German Bar Association, it was agreed that (a) attorneys who worked in the bureaux would be remunerated by the organizations which operated the individual bureaux and (b) clients who could afford legal services would be referred to an attorney. In its subsequent policy statement on extra-judicial legal assistance to the poor, the Bar Association emphasized once again the need for the legal profession to gain the monopoly of the service.[54]

The decision to participate in the work of the bureaux was, however, left to the individual local Bar Associations. According to Isermann,[55] several local Bar Associations,

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50 Ibid 166.
51 Ibid.
52 Ibid 167.
53 Ibid.
54 Ibid 168.
55 Op cit 36.

especially the ones in Leipzig and Cologne, rendered 'exemplary' services. However, it is difficult to assess the commitment of the profession generally and the effectiveness of the new alliance, for by then Adolf Hitler's star was in the ascendance.

Under the National Socialists the financial plight of the attorneys increased. According to one estimate, in 1934 some 2500 attorneys had no income.[56] To ameliorate the situation, in 1935 the Legal Advice Malpractice Act[57] was passed. This law prohibited legally unqualified persons from giving legal advice. Extra-judicial legal advice was now completely controlled by the legal profession. Three years later all Jewish attorneys were disbarred.[58] This had the effect of reducing the number of attorneys from 19 276 in 1933 to 14 800 in 1938.[59]

In practice attorneys were not particularly enthusiastic about the Nazi legal counselling services for the poor.[60]

f Developments after the Second World-War

After the war several local Bar Associations established gratuitous legal advice schemes for the poor. A survey conducted by the German Bar Association in 1973 showed that 64 of the then 170 local Bar Associations had established counselling schemes for the poor. In some

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56 See Blankenburg et al 169.

57 Gesetz zur Verhütung von Mißbräuchen auf dem Gebiete der Rechtsberatung of 13 December 1935 RGBl I 1478.

58 Fünfte Verordnung zum Reichsbürgergesetz of 27 September 1938 RGBl I 1403.

59 U Reifner 'Institutionen des faschistischen Rechtssystems' in U Reifner (ed) op cit 11 at 36.

60 See O Lehmann Die öffentliche Rechtsberatung Minderbemittelter (1936) 52.

cases the schemes were subsidized by local municipalities.[61]

The majority of the Bar Associations offered a decentralized counselling service. According to this model, the person in need of legal advice went directly to the attorney's practice after making an appointment. Other Bar Associations operated their advice bureaux from rooms housed in court buildings.

No uniform eligibility criteria were applied. Each Bar Association applied its own test. There was also no uniformity as regards the extent of legal assistance afforded.[62]

Attorneys generally preferred the decentralized scheme as it did not interfere with routine office work. Clients also favoured the decentralized model. The main reason given was that the atmosphere in the attorney's private practice was more 'real', more 'attorney-like' and more 'personal' than the atmosphere in the advice bureaux.[63] Yet experience showed that the decentralized scheme attracted less clients than the advice bureaux.[64] This was attributed to the psychological obstacles which hinder unsophisticated persons from going directly to an attorney's practice.[65]

The advice bureaux, on the other hand, had their own limitations. As the bureaux were open for only 2 to 3

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61 'Rechtsberatungsdienste der örtlichen Anwaltsvereine' Dokumentation des DAV of November 1973.

62 Baumgärtel op cit 9.

63 H Scherl Verbilligte außergerichtliche Rechtshilfe für sozial Schwache (1977) 70.

64 Ibid.

65 E Röper Rechtsschutz für sozial Schwache (1976) 12.

hours a day, consultations had to be kept brief. Where the matter was complicated the client would be referred to an attorney in private practice and would be charged the normal fee. Several legal advice bureaux were forced to close down when the rooms in which they were housed were taken over for ordinary court business.[67]

The legal profession, however, was not sufficiently responsive to the call for wider social engagement. With the growing degree of specialization and competition within the profession, the idea of working pro amico lost its appeal.[68] Attempts to pass legislation that would compel every local Bar Association to provide gratuitous legal counselling services for the indigent met with stern resistance.[69]

In sum, these services provided no effective answer to the extra-judicial legal needs of the poor.

g Moves towards the Enactment of the Legal Advice Act

In 1974 the German Bar Association, acting on the incentives of the federal Ministry of Justice, drafted a legal advice scheme which, it was said, would give 'tangible expression to the notion of material equality before the law'.[70] This scheme was based on the decentralized model mentioned above. To gauge its effectiveness before being implemented at national level, the scheme was first tried over several years in the Saar, Bavaria and Lower

66 Ibid.

67 Scherl op cit 70.

68 Röper op cit 13.

69 Ibid.

70 'Deutscher Anwaltsverein' (1974) Anwaltsblatt 254 (own translation).

Saxony.

In 1979 the Federal Minister of Justice adopted the scheme by way of the Legal Advice Bill.[71] The Council of States (Bundesrat), which is dominated by the Christian Democrats, was initially opposed to the idea of regulating extra-judicial legal aid statutorily. The Council was of the opinion that the then existent arrangements met the need and that a new law would only serve to aggravate the already undesirable spate of unnecessary laws.[72] The Council, however, relaxed its opposition in the face of mounting criticism from influential Social Democratic judges and legal scholars.

On 18 June 1980, the Legal Advice Act[73] was passed. The Act came into effect on 1 January 1981. The Act is applicable in all Federal Länder except in Hamburg and Bremen. These two Federal city-states have for many years run a well-established system of public legal advice bureaux which operate effectively.

The weekly liberal newspaper 'Die Zeit' has described the Legal Advice Act as 'a classic reform law unparalleled in the history of German law'.[74]

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71 Entwurf eines Gesetzes über Hilfe durch kostenlose Beratung und Vertretung in Rechtsangelegenheiten außerhalb eines gerichtlichen Verfahrens (Beratungshilfegesetz) Bundestag-Drucksache 8/3311. (Cited herafter as Entwurf.)

72 Ibid 17.

73 Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz) of 18 June 1980 BGBl I 689. (Cited hereafter as Beratungshilfegesetz.)

74 Die Zeit 11 March 1983 (own translation).

2 The Theory of the Legal Advice Act

a Eligibility

Free legal advice may be obtained by any person, including foreign nationals resident in the Federal Republic of Germany, whose monthly net income, after obligatory deductions, does not exceed DM 850 in the case of single persons, and DM 1300 in the case of a person maintaining one legal dependant. The amount is raised by DM 275 for each further dependant.[75] The second proviso is that the person is unable to obtain advice elsewhere.[76] Third, the matter must not be capricious.[77]

b Scope of Assistance

Legal advice and, where necessary, legal representation is available in matters of civil, administrative and constitutional law.[78] In criminal matters only advice is given.[79] Excluded from the ambit of the scheme are labour, tax and social security matters. The reason for excluding the latter two was that adequate assistance is normally offered by the appropriate government agencies. As to labour law matters, the argument was that the legal advice bureaux run by the trade unions met the need.

Also excluded from the scheme are matters involving the application of foreign law, unless the facts of the case have a bearing on a domestic matter.[80] It was argued that the proof of foreign law would be too troublesome and too costly given the large number of foreigners in

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75 § 1(1) of the Beratungshilfesetz read with § 114(2) of the Zivilprozeßordnung.

76 § 1(1) of the Beratungshilfegesetz.

77 Ibid.

78 Ibid § 2.

79 Ibid.

80 Ibid.

the Federal Republic who are eligible for extra-judicial legal aid.[81]

c Lodging the Application

The person in need of legal advice may avail himself of one of two prescribed procedures. The first is via the county court (Amtsgericht). Here the application is lodged with the judicial administrator (Rechtspfleger) who also applies the means test. The application may be lodged at any county court in the Federal Republic in the jurisdiction of which the need for legal advice arises.[82] The judicial administrator is also authorized to provide applicants with legal information of an uncomplicated nature, but he is not entitled to evaluate the merits of the applicant's case.[83] Where the applicant satisfies the need test he is given a legal aid certificate (Berechtigungsschein) that entitles him to consult an attorney of his choice who is admitted to practice anywhere in the Federal Republic.[84] No appeal lies against a county court's refusal to grant an application.

The alternative procedure is as follows: The applicant makes a direct approach to an attorney of his choice who applies the means test and who, before giving advice must satisfy himself that the application was not previously rejected by the county court and that the applicant is not seeking a second legal opinion in the same matter.[85] The applicant must, however, satisfy the attorney that he is an indigent in terms of the scheme and must furnish documentary proof.

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81 Entwurf 12.

82 § 4(1) of the Beratungshilfegesetz.

83 Ibid § 6(1). See also W Grunsky 'Die neuen Gesetze über die Prozeßkosten- und die Beratungshilfe' (1980) 38 Neue Juristische Wochenschrift 2041 at 2048.

84 § 6(2) of the Beratungshilfegesetz. See also E Klinge Das Beratungshilfegesetz (1980) 66.

85 § 7 of the Beratungshilfegesetz.

d Effect of the Legal Advice Grant

The Federal Rules of the Bar oblige an attorney to assist a person who qualifies for legal advice under the scheme.[86] However, to eliminate the charity stigma the attorney is entitled to collect from the client a nominal sum of DM 20 which may be waived where the client is in desperate financial need.[87] In addition to the DM 20 the attorney may claim the following amounts from the Land treasury: DM 30 for furnishing the client with oral or written advice; DM 80 for conducting correspondence on behalf of the client; and DM 100 for winding up the case or for effecting a settlement.[88] Added to these amounts are the attorney's out-of-pocket expenses and the value-added tax.

3 Evaluation

a Statistics[89]

In 1981, in all Länder except Hamburg and Bremen there were altogether 150 249 applications for legal advice. Of this number only 9 545 (6,35 per cent) were turned down. In 59,53 per cent of the cases the applicants were either given immediate assistance by the judicial administrator or they were referred to other agencies where they could obtain assistance. Of the 24 180 persons who were referred to attorneys for legal counselling, civil proceedings were

86 § 49(a) of the Bundesrechtsanwaltsordnung as amended by the Gesetz of 13 June 1980 BGBl I 677.

87 § 8 of the Beratungshilfegesetz.

88 § 132 of the Bundesgebührenordnung für Rechtsanwälte of 26 July 1957 BGBl I 907 as amended by the Gesetz of 13 June 1980 BGBl I 677.

89 The statistics were obtained in March 1984 from the Federal Ministry of Justice. The statistics for 1983 are, however, not yet available.

instituted in 3,33 per cent of the cases. Altogether, an amount totalling DM 1 627 427 was paid to attorneys by the Länder.

In 1982 the number of applications increased by 21,39 per cent to 182 385. Only 6,7 per cent of the applications were turned down. The percentage of applicants who were given immediate assistance by the judicial administrator, or who were referred to other agencies for assistance, was 51,32 per cent. Of the 46 508 cases in which legal assistance was given by attorneys, civil proceedings were instituted in 1,63 per cent of the cases. The Länder spent a total of DM 4 248 529 on attorneys' fees. The huge increase in the amount spent on attorneys' fees is probably attributable to the fact that many cases were brought forward from the previous year, so that attorneys were able to submit their accounts only in 1982.

The increase in the number of applications is attributable to three basic factors.

First, in recent years numerous interest organizations and civic action groups have sprung up outside the established political parties. These groups pursue their interests very actively, both by means of exercising political pressure and by utilizing legal procedures. Many of the organizations keep their members informed on how to go about asserting their rights as inexpensively and as effectively as possible. Thus more and more young people are beginning to make use of legal aid.

Second, because of the enormous increase in the number of attorneys over the past few years, law graduates who have only slender prospects of establishing themselves in traditional practices are now looking more and more towards the underprivileged as their new clientele.

Young attorneys are now setting up practices in poor neighbourhoods, too. They are beginning to specialize increasingly in social welfare matters, landlord-tenant law, consumer law, and in legal matters relating to aliens, particularly political asylum matters. Young attorneys are also becoming increasingly aware of how extra-judicial legal aid can benefit persons who have been sentenced to prison but who also have pressing problems of a private law nature.[90] In addition, many law graduates are becoming active in citizens' initiatives and in other interest organizations in which they also have a legal advisory role.[91] These lawyers thus inform people on their rights and how to lodge applications for legal aid.

Third, the high rate of unemployment amongst university graduates has resulted in the emergence of what Professor Blankenburg calls the 'new poverty'.[92] Unlike the usual socially underprivileged persons, the indigent academics are in a better position to recognize infringements of their rights and are able to make more effective use of legal aid.[93]

b Factors Limiting the Effectiveness of the Scheme

(a) The increase in the number of applications for legal advice does not derogate from the fact that there is still widespread ignorance amongst the poor as to the existence of the scheme.[94] Aged persons and women living

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90 E Blankenburg 'Evaluation des ersten Jahres Beratungshilfe' (1983) 2 Zeitschrift für Rechtspolitik 39 at 41.

91 Blankenburg et al op cit 175.

92 E Blankenburg 'Evaluation des ersten Jahres Beratungshilfe' op cit 41.

93 Ibid.

94 Süddeutsche Zeitung 3 January 1983.

alone - traditionally the main recipients of social welfare - rarely make use of extra-judicial legal aid.[95]

(b) There are considerable psychological obstacles which hinder indigent persons from making effective use of attorneys. Many are daunted by the spectre of judicial proceedings. The statistics, too, show that most of the applications for legal advice are not lodged with attorneys, but with the judicial administrators. The legal profession, in turn, has complained that judicial administrators prevent clients from going to attorneys.[96] It is submitted that this complaint is unfounded. The 1981 and 1982 statistics show clearly that a considerable percentage of successful applicants who are also issued with legal aid certificates which they must show to the attorney, do not even go to an attorney for advice. For example, in 1981 a total of 49 644 legal aid certificates were issued, but statistics show that only 24 180 (48,71 per cent) of the clients actually consulted attorneys. In 1982 the percentage increased to 61,78. In fact, this phenomenon was discovered in an empirical study that was made at the experimental phase of the legal advice scheme, a few years before the Act was passed.[97] The legislature, however, did not address itself to this problem.

There are, no doubt, other reasons why the number of legal aid certificates issued does not tally with the recorded number of cases in which attorneys are consulted.

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95 E Blankenburg 'Evaluation des ersten Jahres Beratungshilfe' op cit 41.

96 Die Tageszeitung 14 August 1981.

97 G von Aulock 'Rechtshilfe für untere Schichten und Anweltschaft' (1978) 5 Jahrbuch für Rechtssoziologie und Rechtstheorie 94 at 100.

One reason is that clients consider the procedure of first having to go to the judicial administrator and then to an attorney as too bureaucratic.[98] The other reason is that some attorneys do not bother to submit their accounts,[99] so that it is difficult to establish whether or not the client did in fact consult an attorney.

Attorneys complain of the laborious process of filling in the detailed application forms for the client. In practice, many attorneys do not even bother to fill in the forms; they prefer to counsel the client gratuitously. As one Frankfurt attorney put it: 'The stupid red tape involved in filling in the forms takes a quarter of an hour. It is not worth DM 10.'[100]

A major weakness of the scheme is that only persons who would otherwise qualify for instalment-free legal aid under the Legal Aid Act (Prozeßkostenhilfegesetz) are eligible for gratuitous legal advice under the Legal Advice Act. Thus a considerable number of persons who are unable to afford to pay the normal fees for legal advice but who are not indigent enough to qualify for instalment-free legal aid, are excluded from the ambit of the scheme. This is regrettable as the basic idea underlying the reforms was that not only the very indigent but also a sizeable portion of the underprivileged middle class should be afforded easier access to justice. The fact that the amounts presently spent by the Länder for legal advice constitute only a very small fraction of the Länder budg-

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98 Ibid.

99 E Blankenburg 'Evaluation des ersten Jahres Beratungshilfe' op cit 40.

100 Cited by Die Zeit 11 March 1983.

ets[101] does not, it is submitted, justify the stringent eligibility requirements.

There are other practical shortcomings of the legal advice scheme. For example, no person qualifies for legal advice once civil proceedings have been instituted. This is a 'gigantic lacuna in the Act' as one judicial administrator put it.[102] It has been suggested that an equitable solution to this problem would be to authorize the court offices at labour courts to provide non-trade union members with legal advice.[103]

It is also regrettable that foreign law matters are excluded from the scheme. The argument that it would be too costly to include such matters in the scheme given the huge foreigner population is, with respect, naive. This argument is not based on any concrete evidence regarding the type of legal problems which aliens have.

A rather disconcerting aspect of the scheme is that social welfare matters are excluded from its ambit. Persons who have problems with the social welfare authorities have no one to whom they can turn for help. The welfare office does not advise a person who has a grievance against it on how to go about asserting his right. In practice, too, even poor people have enormous difficulty to assert their claims before the welfare authorities. It is submitted that there is an urgent need to bring welfare matters under the scheme as this exclusion affects precisely those persons who are least able to deal effectively with state departments.

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101 See Süddeutsche Zeitung 3 January 1983. See further E Blankenburg 'Evaluation des ersten Jahres Beratungshilfe' op cit 40.

102 Cited by the Frankfurter Rundschau 17 May 1983.

103 Ibid.

7 LEGAL ADVICE SCHEMES OUTSIDE THE LEGAL ADVICE ACT

1 Introduction

The provision of legal advice is regulated by the Legal Advice Malpractice Act.[1] According to this Act an association may, within the scope of its general purpose, give legal advice to its members[2] but not to anybody. Similarly, local authorities are not authorized to run general legal advice services.[3] A local authority may provide legal advice only in matters for which it is responsible.[4] For example, the Youth Welfare Office is authorized to give legal advice to persons under its care in matters affecting family law.[5]

The prohibition on the provision of legal advice generally does not apply in the case of a Land or a local authority that has administered a public legal advice before the Legal Advice Act came into operation.[6] The city-states of Hamburg and Bremen have, for a long time, run a well-established network of public legal advice services. For this reason the Legal Advice Act does not apply in these two city-states. Berlin, too, has a public legal advice scheme that is run by the local authorities. But unlike in Hamburg and Bremen, the Berlin scheme has been operating parallel to a legal advice scheme administered by the Berlin Bar Association and

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1 Rechtsberatungsgesetz of 13 December 1935 RGBl I 1478, BGBl III 303.

2 Ibid § 3(7).

3 Klinge op cit 50.

4 Ibid.

5 Ibid.

6 Ibid 50-51.

which is now governed by the provisions of the Legal Advice Act. Inhabitants of West Berlin may therefore avail themselves of either of the legal advice schemes there.

This chapter will focus (a) on the public legal advice scheme in Hamburg and (b) on legal advice schemes run by other organizations.

2 The Hamburg Legal Advice and Mediation Centre (Öffentliche Rechtsauskunft und Vergleichsstelle Hamburg)[7]

The Centre was established in 1901 in a working-class suburb of Hamburg.[8] It started as a legal advice bureau where indigent persons were given gratuitous advice on their legal problems arising out of the employment situation.[9] The bureau became so popular that in 1922 it was set up at the Social Welfare Office as a legal advice centre.[10] In 1924 the Centre was given official recognition as a Reconciliation Board.[11] In 1936 the Centre was brought under the control of the National Socialist Legal Care apparatus. This resulted in a decrease in the number of clients. One reason for this was that the counselling attorneys lost interest; another reason was that clients were discouraged by the fact that counsellors were changed frequently.[12]

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7 Except where otherwise indicated information is based on discussions with the Centre's counsellors in November 1983 as well as on the Centre's 1982 Annual Report.

8 A Rendler Außergerichtliche Rechtshilfe in Hamburg bis zur Errichtung der Öffentlichen Rechtsauskunft- und Vergleichsstelle (Unpublished DJur thesis University of Hamburg 1980) 399.

9 Ibid.

10 Carl-Peter Hennings 'Einrichtung und Tätigkeit der Öffentlichen Rechtsauskunft- und Vergleichsstelle in Hamburg (ÖRA)' in T Rasehorn (ed) Rechtsberatung als Lebenshilfe (1979) 79.

11 Ibid.

12 Lehmann op cit 52.

The Centre was re-established in 1946 and was given official recognition as a *mediation Board pursuant to* paragraph 380(1) of the Code of Criminal Procedure.[13]

a Organization

At present the Centre is part of both the local Social Welfare and Labour authorities. It is under the supervision of the Justice authorities.

The main office is situated in the city centre in a building that belongs to the Justice authorities. This office is open to the public from Monday to Friday between 08h00 and 14h00. During office hours a total of 9 qualified attorneys give legal advice to the indigent.

Apart from the main office, the Centre has 21 local branch-offices each of which is situated in a different suburb in a building belonging to the regional Social Welfare authorities. The staff in each of the branch offices varies in size depending on the demand. Ordinarily an *office is manned by a qualified attorney*, a receptionist and a typist. Larger branch-offices have up to 5 qualified attorneys with a corresponding number of office personnel.

The main office is particularly well-equipped with manuals on family law, landlord-tenant law, law of succession, labour law and traffic law. Local court decisions are closely monitored and carefully evaluated to ensure a high standard of legal advice.

The Centre has a total of 287 staff members. Except the Director and the 10 full-time staff members who are paid by the State, all other staff members work in an

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13 *Jennings op cit* 79.

honorary capacity. Legal counsellors receive an allowance of DM 32 for every 2 working hours. Secretaries receive DM 25, clerks DM 21 and typists DM 20.

There are 136 qualified jurists who counsel the public or who act as presiding officers in mediation proceedings. Most of them are active judges, practising attorneys and prosecutors. Counsellors and presiding officers are fully independent and exercise their duties without any orders from above. All staff members are, however, pledged to secrecy especially against other State authorities.

b Legal Advice for the Poor

All indigent persons who live or work in Hamburg are eligible for gratuitous legal advice. The income ceiling is similar to that fixed by the Federal Social Welfare Act. The means test is dispensed with in cases where the client seeks advice on matters relating to medical insurance, accident insurance, old-age insurance, veterans' insurance and social welfare.

Clients are, however, required to contribute a nominal amount which ranges between DM 3 and DM 20 depending on the complexity of the problem, the duration of the counselling and the extent of the aid given. Normally clients contribute DM 12. Client contributions are used to reimburse the staff and to defray administrative expenses.

No time limit is set for the length of a counselling session. What is important is that the client fully understands the advice and is clear to his course of action. Usually, counselling sessions last 30 minutes, but clients sometimes spend more than an hour with the counsellor. Where a client is ill or physically handicapped arrangements are made that the counsellor consult the client at his home, old-age home or hospital.

The scope of aid afforded is limited to legal advice, the writing of letters and telephoning on behalf of the client, the drafting of documents, applications, petitions and pleadings. The Centre does not undertake litigation for the client. But where litigation is necessary the counsellor helps the client to fill in the application form for legal aid.

In 1982 the total number of consultations was 41 330.[14] Practical assistance was given in 21,5 per cent of the cases. The percentage breakdown over the different legal areas was as follows:

	Percentage
family law (especially maintenance matters)	23,2
landlord-tenant law	18,0
law of contract (especially sale)	22,3
labour law	12,3
law of succession	7,3
criminal law and criminal procedure	4,7
civil procedure	3,1
social welfare law	4,2
public law	3,2
law of things	1,3
non-contentious jurisdiction	0,3

14 Statistics were obtained from Mr Hollo, a legal counsellor in the Centre.

The Centre tries, as far as possible, to render court proceedings unnecessary. Legal advice is orientated towards creating an atmosphere that fosters an amicable settlement of disputes.

c Conciliation

The Centre is also a conciliation board within the meaning of paragraph 794(1) of the Code of Civil Procedure. A settlement reached has the strength of an enforceable order. Participation in a formal conciliation is voluntary. Conciliation proceedings are regarded as an important element of the Centre's legal advice activity as parties are able to reach a binding agreement speedily and inexpensively.

d Mediation

The Centre is likewise a *mediation authority* within the meaning of paragraph 380(1) of the Code of Criminal Procedure. This means that the Centre is responsible for conducting reconciliations in the following criminal matters: infringement of domestic privacy, trespasses, defamation, bodily injury, threat, and intentional damage to property. The institution of a private criminal suit must, however, be preceded by an attempt at reconciliation.

The aim of the mediation proceedings is to give the parties an opportunity to discuss the dispute peacefully with the aid of the presiding officer. In 1982, 273 reconciliation proceedings were carried out. Of this number 156 were unsuccessful.

The normal fee charged for reconciliation proceedings is DM 30. The highest fee is DM 300 and the lowest DM 10.

3 Legal Assistance Provided by the Trade Unions

a The German Trade Union Federation (Deutscher Gewerkschaftsbund) hereafter DGB)

With a membership of more than 7 million the DGB is the largest labour organization in the Federal Republic. It is comprised of 17 individual trade unions.

The DGB and the individual unions co-operate in providing legal assistance to members. *In some cases* legal assistance for members is provided by the individual union; in others, this responsibility is entrusted to the DGB.[15]

The DGB unions have legal advice bureaux in all areas with a high concentration of union members. Each bureau is administered by one or more Rechtssekretäre (legal clerks) who are either qualified attorneys or persons who have undergone an 11-month training in labour law and social welfare law. The Rechtssekretäre give legal advice to union members and where litigation is necessary, represent them before the labour courts. Private practitioners are engaged, at the expense of the union, to litigate matters other than labour and social welfare matters. Some unions also engage attorneys in private practice to represent members before labour courts and social welfare courts of higher instance.[16]

Where *the member loses the case*, the DGB or the individual union pays all costs adjudged against him. The legal expenses are paid out of the members' subscriptions.

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15 H Menne 'Rechtsberatung bei den Gewerkschaften' in Rasehorn (ed) op cit 146 at 154.

16 Ibid.

Every year tens of thousands of matters are brought before the courts and the annual amount of money recovered for the members through litigation amounts to well over DM 100 million.[17]

b The German Federation of Salaried Employees (Deutsche Angestellten-Gewerkschaft hereafter DAG)[18]

The DAG, with 470 000 members, groups together salaried staff from the ranks of non-career civil servants and from the various branches of industry.

The DAG has an extensive legal advice service for its members and ensures that they are legally represented where a matter comes before a court. Legal advice or legal representation is available to any member who pays his union subscriptions and who is registered with a union for more than 3 months.

Legal advice may be obtained either over the telephone or through personal consultation. Legal representation is provided for proceedings before courts, social welfare courts and administrative courts.

Labour law matters that are litigated concern mainly unfair dismissals, wage disputes and testimonials. Social welfare matters pertain mainly to disputes members have with labour bureaux, social welfare authorities and the Federal Institute for the Insurance of Salaried Employees. Various matters are brought before the labour courts, including disputes concerning the election of staff coun-

17 Ibid.

18 Unless otherwise indicated, information on the DAG legal assistance activities was obtained from Mr Niederhausen of the legal department at the Federal headquarters of the DAG in Hamburg (letter dated 8 May 1984).

cils. In Hamburg, a considerable number of administrative proceedings are instituted against maritime trade associations. These actions involve mainly the issuing of seafitness certificates without which no seaman is allowed to go to sea.

Litigation in 1983 benefited DAG members to the total amount of between DM 4 and DM 5 million.

4 Consumer Advice Bureaux

Each of the West German Länder has a consumer protection bureau, and each bureau has several regional advice bureaux. There are more than 100 advice bureaux in the country.[19] The advice bureaux supply consumers with information on the quality and value of goods and services, general terms of business, conditions of delivery and guarantees. To save the consumer the trouble of lengthy and expensive law suits, the bureaux also act as mediators in disputes between consumers and producers or sellers.

Numerous consumer complaints are resolved in this manner. The success rate lies between 80 and 90 per cent.[20]

Since 1965 consumer organizations have the right to sue for injunctive relief against misleading and other acts of unfair competition affecting the interests of consumers.[21]

a Legal Advice

Since 1980 consumer bureaux that are financed and su-

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19 R Miletzki Formen der Konfliktregelung im Verbraucherrecht (1982) 67.

20 Ibid.

21 § 13(1)(a) of the Gesetz gegen den unlauteren Wettbewerb of 21 July 1965 BGBl I 625.

pervised by the State are authorized to give legal advice to consumers.[22] Many consumers avail themselves of this opportunity and attorneys at the bureaux describe *their experiences as positive.*[23]

5 Legal Assistance by Tenants' Associations[24]

Tenants' associations emerged at the end of the last century in the wake of the housing problem posed by the influx of workers into industrial areas. Their emergence also represented a collective response and challenge to the exploitative practices of politically influential landlords, who had already grouped themselves into landlords' associations,whose main purpose was to assert the rights of landlords effectively through the creation of uniform lease-agreement forms. The need to form powerful tenants' associations was strongly emphasized at the time by Professor Rudolph Sohm, the eminent legal historian and co-author of the German Civil Code. He wrote:

> Tenants' associations must become a force in our German fatherland. This is essential for the sake of the rights of German tenants, for the sake of the policies on real estate, and for the sake of the German nation.[25]

Over the years, tenants' associations have grown steadily in strength. At present the dynamic and highly effective German Federation of Tenants (Deutscher Mie-

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22 Art 1 § 3(8) of the Rechtsberatungsgesetz of 13 December 1935 RGBl I 1478, BGBl III 303-22. See R Altenhoff H Busch K Kampmann Rechtsberatungsgesetz (6 ed) (1981) 115-116.

23 Miletzki op cit 68.

24 Unless otherwise indicated information is obtained from B von Grünberg 'Rechtsberatung für sozialschwache Mieter' in Rasehorn (ed) op cit 170-177.

25 Cited by von Grünberg op cit.

substantial influence on legislation pertaining to housing and to urban planning.

Legal advice to members is given top priority. There are about 750 legal advice bureaux scattered across the Federal Republic. The bureaux are staffed with young lawyers who have developed enormous expertise in landlord-tenant matters. Where litigation is necessary attorneys in practice are appointed to represent the aggrieved tenant. Legal expenses are paid by the Association from the regular monthly contributions made by the individual tenants.

6 Evaluation

The success of the ÖRA and the other legal advice agencies outlined above is traceable to the fact that they have been in existence for a very long time. Their activities are well known, for they champion the interests of the individual in matters of basic concern: labour, housing and consumerism. In addition, trade unions, consumer organizations and tenants' associations pursue interests that are identical to those of their respective members.

What about the legal interests of the non-unionized workers, the tenants not belonging to tenants' associations, the guest workers, persons seeking political asylum or other non-organized indigent minorities? These categories of persons do not have effective access to justice, either because of the peculiar configuration of their problems - with which most lawyers are not well acquainted - or because the problems that they have are not covered by the legal advice scheme; for example, labour matters.

Attempts by philanthropic organizations and several social institutions to institute legal advice services for these categories of persons are strenuously opposed by the legal profession which, by virtue of the Misuse of Legal Advice Act, monopolizes legal advice services. For example, an application by a Land branch of the German Federation of Trade Unions to run a gratuitous legal advice service for non-unionized members was successfully opposed by the Bar Association.[26] Another example: A social worker who asserted a legal claim on behalf of an alien under his professional care was prosecuted and ended up losing his job.[27] Local Bar Associations have repeatedly taken legal action against illustrated magazines or technical journals which express legal opinion on issues raised in the readers' columns.[28]

The Misuse of Legal Advice Act was enacted by the National Socialists to prevent disbarred lawyers and pettifoggers from giving legal advice.[29] After the War, this Act was annulled by the Allied Control Council on the grounds that it was a Nazi measure.[30] It was later re-enacted as a Federal law after the racist provisions were eliminated.[31] The justification for this Act today is that it protects the public against unqualified legal advisors.[32] In practice, however, the Act has the effect of rejecting the good with the bad. Indeed, there are cases in which organizations, because of their experience in certain areas, could counsel a client more effectively

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26 H Kötz 'Anwaltsberuf im Wandel: Rechtsvergleichender Generalbericht' in Kübler (ed) op cit 79 at 98.

27 Ibid.

28 Ibid.

29 A Kierdorf 'Gedanken zum Rechtsberatungsgesetz' in Rasehorn (ed) op cit 69.

30 Ibid.

31 Ibid.

32 Ibid 74.

than a lawyer; particularly in matters in which the problem has eminent social components.

It appears that financial self-interest is the major reason why the legal profession has sought to assert its monopoly in the domain of legal advice. In this regard, it is interesting that in both England and the Netherlands, too, the legal profession was initially hostile towards the public-sector legal aid projects that were started in these countries in the early 1970s.[33] The profession feared that the new schemes would divert potential clients away from private practitioners. But when the practitioners in both these countries realized that the experimental projects were in fact promoting the usage of lawyers, they abandoned their mistrust in favour of active co-operation. A similar shift in the profession's attitude was witnessed in the German town of Würzburg: In 1972 law students in the University of Würzburg established a Legal Aid Clinic for guest workers.[34] The Clinic was housed in the town-hall in a room donated to the students by the town authorities. Foreign students at the University acted as interpreters - a gesture which increased the popularity of the student service. Initially, the Clinic provoked resentment amongst local legal practitioners who denied that there was a need for such a service. The local Bar Association even made unsuccessful representations to the Bavarian Ministry of Justice to close down the Clinic. The attorneys, however, soon relaxed their opposition, even to the extent of becoming co-operative, when the students started referring the more difficult cases to them for litigation. The Clinic, however, closed down because of lack of support from the law school.

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33 See chs 9 and 10 infra.

34 For details, see I Holzinger 'Rechtsberatung für ausländische Arbeiter' in Rasehorn (ed) op cit 178-188.

Indeed the German Bar Association's intolerant attitude towards organizations that provide legal advice is a major reason why public-sector legal aid schemes have been unable to take root in the Federal Republic. Another reason is that the German law schools, unlike those in the Netherlands and the USA, for example, have kept aloof from the social politics of legal aid. This is traceable to the fact that legal education is directed more towards equipping the student for the public service in a broader sense than preparing him to grapple with concrete social problems.[35] Little attention is devoted to the social and political underpinnings of the law.[36]

In the 1970s calls were made for the introduction of a legal education that would echo the social realities of the society in which the prospective lawyer would work. Several law schools responded by introducing Sociology of Law as one of the optional subjects in the academic curriculum. But the scope and teaching of this subject is severely curtailed and empirical socio-legal research conducted by the law schools is very rare.[37]

While there has been much discussion on the need to reform legal education, in practice no significant changes have been effected. Even the new law[38] governing

35 J H Merryman 'Legal Education There and Here' (1975) 27 Stanford Law Review 859 at 867. See also D Luban 'The Sources of Legal Ethics: A German-American Comparison of Lawyers' Professional Duties' (1984) 2 Rabels Zeitschrift 245 at 279.

36 See G Casper 'Vergleichende Anmerkungen zu der Ausbildung der Juristen in der Bundesrepublik und den Vereinigten Staaten' (1984) 5 Zeitschrift für Rechtspolitik 116 at 117. See also M Blank H J Brauns H D Pangmann und P Uesseler Wohin treibt der Rechtsstaat (1977) 278-279.

37 See Rechtssoziologische Forschungen am Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg (1979) 2. See also E Blankenburg 'Empirische Rechtssoziologie am Ende' in Frankfurter Rundschau 24 April 1981.

38 Drittes Gesetz zur Änderung des Deutschen Richtergesetzes of 25 July 1984 BGBl I 995.

legal education sticks to the traditional dogmatic curriculum. It is strange that legal education is designed to equip the student for a career as a judge when, in practice, less than one-fifth[39] of the law graduates become judges. At the moment it is estimated that only between 3 and 5 per cent of the law graduates can find employment in the judicial sphere.[40] Also, very few positions are available in the civil service or in industry.[41] The majority of law graduates are thus compelled to earn a living in private practice. But due to the enormous increase in the number of law graduates over the past decade it has become very hard for newcomers to the profession to cover even their overhead expenses.[42]

The unfortunate aspect of all this is that although the explosion in the number of lawyers was foreseeable the profession undertook nothing by way of exploring the possibilities of creating employment opportunities in non-traditional fields, especially those connected with legal aid and legal advice for the poor. Although the profession was aware that in the United States and Holland, for example, the neighbourhood law centres for the poor were not only creating new areas of employment but also breaking down the barriers to access to lawyers, no initiatives were undertaken in this regard. This is regrettable particularly in view of the fact that the Social Democratic/Liberal Government under Willy Brandt and later Helmut Schmidt supported social projects designed to afford the poor the same opportunities as the better-situated classes.

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39 Kötz in Drobnig and Puttfarken (eds) op cit 69.

40 Der Spiegel 20 May 1985.

41 Ibid.

42 Ibid.

As far as the legal needs of the poor are concerned, it certainly cannot be said that the increase in the number of lawyers is more than the number of potential clients.

7 Legal Expenses Insurance

Legal expenses insurance, which covers the insured's legal expenses, has been in existence in West Germany for a long time As early as 1946 the combined annual intake in premiums amounted to DM 1,1 million. By 1977 this figure had increased to DM 1,3 billion.[43] It is estimated that about 40 per cent of all German households carry some form of legal expenses insurance.[44] Of these, about 93 per cent have coverage that is related to the ownership and driving of motor vehicles; about 50 per cent have coverage for contractual disputes and about 29 per cent have real estate coverage.[45]

The standard legal actions covered in the case of motor-vehicle insurance are claims for damages against third parties on account of accidents, criminal defences, administrative proceedings concerning the revocation and suspension of driver's licences, contracts of any kind relating to the insured vehicle, including warranties, service and repair agreements, lease or rental contracts, and transportation.[46] Coverages for the average employed person and his family include claims for damages, employment and social security matters, criminal proceedings, enforcement of contractual rights and legal consultations

43 E Kininger Rechtsschutzversicherung als Mittel zur Überwindung prozessualer Ungleichheit (1978) note 4 at 109.

44 W Pfennigstorf and S L Kimball Legal Service Plans (1977) note 48 at 504.

45 Ibid.

46 W Pfennigstorf Legal Expense Insurance (1975) 55.

concerning family law matters and the law of succession.[47]

Legal expenses insurance is also available for *business concerns, farmers, associations* (mainly sports and social clubs) and for municipalities.[48]

The findings of an empirical study show that the civil actions involving persons who have legal expenses insurance are mostly in matters arising from motor-vehicle accidents, followed by matters arising from the purchasing of a motor-vehicle or repairs.[49] In the local courts, about 43 per cent of the plaintiffs in matters arising from motor accidents have legal expenses insurance.[50] But in all other matters before the local court insured persons make up only about 2 per cent of the litigants and in labour court matters, 6 per cent. An interesting finding is that insured persons do not risk litigation anymore than in the average case before the court where the constellation is comparable.[51] Nor were insured persons found to be particularly stubborn litigants.[52] As far as the attorneys are concerned, it was found that their legal advisory and other pre-trial activities were much more extensive than someone would expect whose point of departure was: in cases involving insured clients there is an unhibited zeal to litigate, given the fact that neither the attorney nor his client have to bother about the costs risks inherent in litigation.[53] It was found that only 30 per cent of the actions for damages landed in

47 Ibid 57.

48 Ibid.

49 E Blankenburg and J Fiedler Die Rechtsschutzversicherung und der steigende Geschäftsanfall der Gerichte (1981) 114.

50 Ibid.

51 Ibid 113.

52 Ibid.

53 Ibid.

court.[54] In 59 per cent of the cases the attorneys cleared the matter through correspondence with the other side.[55] In 11 per cent of the cases legal advice was given to prevent further conflict.[56] It was found that attorneys play an important role in mobilizing the interest of all parties in avoiding the costs of litigation.[57]

Many insured persons do not know which lawyer to engage and they consequently approach the insurer for tips in this regard.[58] Some insurers have their favourite lawyers whom they always suggest to ignorant persons.[59] In the realm of criminal law, some insurers have fixed agreements with certain attorneys according to which the attorneys undertake to charge a fee which is close to the minimum fee chargeable in criminal cases irrespective of how complex and difficult the case is.[60] Some attorneys enter such agreements in the hope that the income derived from such referrals will make up for their losses in other areas.[61] This clandestine form of touting is regarded as highly unethical and perilous for the independence of the legal profession.[62] The fact that at the moment many young lawyers are unable to earn a living is obviously conducive to the growth of such malpractices.[63]

The underprivileged section of the population is

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54 Ibid 115.
55 Ibid.
56 Ibid.
57 Ibid.
58 Ibid.
59 Dahs op cit 606.
60 Ibid.
61 Ibid.
62 Ibid.
63 See, generally, Der Spiegel 20 May 1985.

least covered by legal expenses insurance. One important conclusion emerging from the empirical study referred to is that, on account of their low level of social activity and their inability to assert their interests effectively, underprivileged persons would least be able to deal with lawyers and insurers in the assertion of their rights.[64] It has therefore been recommended, correctly it is submitted, that the legal protection of the poor would be far better effected by the establishment of public legal advice centres outside the government hierarchy whose activities should be geared towards equipping the poor and the foreigner population with the ability to assert their rights before government agencies.[65]

64 Blankenburg and Fiedler op cit 129.

65 Ibid.

for the integration of the other social sciences into the law. This lacuna in the Bill has been criticized[39], particularly because there was widespread agreement as to the need to foster a closer symbiosis between theory and practice and between the law and other social sciences.

39 See D Haak 'Die von der Bundesregierung geplante Neuordnung der Juristenausbildung - ein Jahrhundertwerk?' (1984) 5 Zeitschrift für Rechtspolitik 113-116. See generally U Haug (ed) Juristenausbildung 1984 (1984).

8 LEGAL ASSISTANCE FOR THE POOR UNDER ENGLISH LAW

1 History

a Introduction

In the six centuries intervening between the Anglo-Saxon and the Norman conquests, England was a turbulent maze of classes and sub-classes. Such judicial system as then existed was crude and archaic. Civil procedure and rules of evidence were primitive, harsh and rigid.[1] The oath was the primary mode of proof, the outcome of the case depending mainly on the social rank and status of the person taking the oath.[2] Where the accused failed to clear himself, either because he had no oath-helpers or because he was too poor to furnish security, he was sentenced to corporal ordeal.[3]

b Relief for the Poor

Much of the legal protection for the poor came from the early Church. Inspir d by the spirit of Isaiah, 'help the oppressed, do justice to the fatherless, plead for the widow'[4], pious men such as St. Ivonius of Bretagne, 'the only advocate ever canonized'[5], worked hard to bring legal protection to the poor. Ecclesiastical lawyers, created by special canonical statute, took up the causes of the poor and the defenceless before lay

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1 F Pollock and F W Maitland The History of English Law before the Time of Edward I 2 ed I (1898) 37-38.

2 Ibid 39.

3 Ibid. See also E Jenks A Short History of English Law 5 ed 9-10.

4 Isaiah 1.17.

5 Cappelletti et al op cit 12.

judges.[6] However, in 813 a canon of the Council of Mayence enjoined churchmen from taking part in secular suits except when defending orphans and widows.[7] And in 1199, by a decree of the Lateran Council, the exception was extended to include indigent persons who could not manage their own affairs.[8] This decree was reinforced in 1217 by a constitution of the Bishop of Salisbury, which forbade clerics and priests to act as advocates in secular courts unless when conducting their own cases, or those of indigent litigants. These measures were ostensibly aimed at stopping the habit amongst churchmen of litigating suits for material gain.[9]

By the time of Henry III (1216 - 1272) it had bec an accepted maxim that the poor should not pay for th writs.[10] Under Edward I (1272 - 1307), too, a poor man could 'sue his plaint upon the pledge of his promises only'.[11]

The famous clause in Chapter 40 of Magna Carta, 'To no one will we sell, to no one will we deny, or delay right or justice' promised more than it could give, Although it did reduce the cost of obtaining justice and checked some of the rampant abuses which had crept into the justice machinery under King Julius' reign, the 'elaborate glosses which overlaid the king's promise'[12], ensured

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6 H Cohen 'The Origins of the English Bar' (1915) 31 Law Quarterly Review 56 at 72; A K R Kiralfy Potter's Historical Introduction to English Law 4 ed 10.

7 Cohen op cit 72.

8 H Cohen The History of the English Bar and Attornatus to 1450 (1929) 158-159.

9 Ibid 159.

10 Pollock and Maitland op cit 195.

11 J M Maguire 'Poverty and Civil Litigation' (1923) 36 Harvard Law Review 361 at 362.

12 W S Holdsworth A History of English Law I 5 ed 58.

the continued levying of the king's fees. So, for example, indigent subjects were not exempted from the payment of court fees.[13] The fair implementation of the Fortieth Chapter was hamstrung by beaurocrats whose ultimate function it was to reinforce feudal structures rather than to champion the legal claims of commoners.[14]

An indigent subject could also turn for relief to the king's justices in Eyre to plead for remedies invoked in the name of God and charity.[15] It being the age of 'Cabinet Justice' the king could occasionally, on special supplication by an aggrieved indigent, exercise his prerogative to ensure fairness. The Chancellor's court, which initially was a poor man's court, soon outgrew its associa[illegible] poor litigants.[16] In its stead, as a court f[illegible]ersons, was created the Court of Requests. But with a[illegible]earance of the latter no institutionalize safeguards other than charity remained for poor litigants.[17]

c Statutory Assistance for Poor Litigants

In 1495 the first English statute requiring the judge to assign counsel for poor litigants was passed. This statute, known as the In Forma Pauperis Act, provided

> (E)very poor person... shall have... writ or writs... according to the nature of their causes, therefore paying nothing to your Highness for the seals of the same, nor to *any person for* the writing of the same writs,... and that the Lord Chancellor shall assign...

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13 Ibid; Pollock and Maitland op cit 195.

14 Maguire op cit 364.

15 Kiralfy op cit 573; E J T Matthews and A D M Oulton Legal Aid and Advice (1971) 9-10.

16 Kiralfy op cit 170.

17 Ibid.

> learned counsel and attorneys for the same without any reward taking thereof; and ... *the Justices* shall assign to the same poor person or persons counsel learned by their discretion, which shall give their counsel nothing taking for the same; and the Justices shall likewise appoint attorney and attorneys for the same poor person or persons and all other officers requisite... *which shall do their* duties without any reward for their counsel, help and business in the same.[18]

Although the pauper procedure represented a more organized approach to the problems of the poor, it had three shortcomings. First, the Act did not spell out the eligibility criteria. Second, the indigent party was not *absolved from reimbursing* the costs of the victorious opponent. Third, pauper proceedings benefited only plaintiffs in matters before the common law courts[19] though in the Chancery Courts its benefit was extended to include dependants as well. However, the Chancery Courts forbade appeals to be brought in forma pauperis.[20] The losing party's obligation to reimburse the costs incurred by his opponent was *subsequently substituted* by the infliction of other punishment as was though reasonable.[21] Where the pauper received judgement for more than £5 he became liable for the payment of both the court fees and attorney's fees.

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18 In Forma Pauperis Act 1495 (11 Hen 7 c 12). In Scotland, however, provision for indigent litigants was made as early as 1425. See C N Stoddart 'A Short History of Legal Aid in Scotland' (1979) 3 Juridical Review 170.

19 R Egerton 'Historical Aspects of Legal Aid' (1945) 61 Law Quarterly Review 87.

20 Ibid.

21 This probably meant *whipping and pillory*. See Matthews and Oulton op cit 11; Egerton op cit 89.

In 1853 a Rule was promulgated which provided that 'no fees shall be payable by a pauper to his counsel and attorney... by reason of a verdict being found for such a pauper exceeding £ 5'.[22] In the case of Carson v Pickersgill it was held that a successful pauper litigant had to reimburse only his attorney's out-of-pocket expenses.

The 1495 pauper procedure was not substantially revised until 1883 when the maximum capital limit was raised from £ 5 to £ 25. Also, the pauper proceedings were made available to defendants and plaintiffs alike.[24] In 1893 the use of this procedure in appeals was modernized[25] although, for appeals to the House of Lords, the financial eligibility ceiling was kept at £ 5. Besides, the appellant had to show that he had a prima facie good case.

The pauper procedure was, however, repealed with effect from December 1960 as a result of State legal aid being introduced.[26]

d Legal Assistance in Criminal Proceedings

Assistance by counsel in criminal proceedings did not become a legal right until 1836.[27] Before then only a

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22 Rule 121 of Hilary Term of 1853 (Cited by Egerton op cit 89).

23 54 LJQB 484.

24 Maguire op cit 380.

25 See the Appeals (Forma Pauperis) Act 1893 (56 & 57 Vict c 22).

26 See s 17(3)(b) of the Legal Aid and Advice Act (12 & 13 Geo 6 c 51). This Act was repealed by the Legal Aid Act 1974 (c 4).

27 6 & 7 William 4 c 114.

person charged with treason was allowed counsel.[28] However, during the eighteenth century assistance by counsel was often tolerated by judges, but with some restrictions.[29] For example, counsel defending an accused charged with a felony was prohibited from addressing the jury.[30] Also, an accused was obliged to cross-examine witnesses without counsel's assistance.[31]

2 The Legal Aid Scheme

a *Administration*

The legal aid scheme was introduced in 1949.[32] The scheme is administered by the Law Society - 'a remarkable example of the confidence of the Treasury in the lawyers'.[33] According to one writer[34], the Law Society threatened not to participate in the scheme when leftist Members of Parliament attempted, with considerable public support, to place laymen in positions of authority in the administration of the scheme.

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28 7 William 3 c 3.

29 J B Thayer A Preliminary Treatise on Evidence at the Common Law (1898) note 4 at 161.

30 J F Stephen A History of the Criminal Law of England I (1883) 424.

31 Ibid.

32 See the Legal Aid and Advice Act (12 & 13 Geo 6 c 51). This Act was repealed by the Legal Aid Act 1974 as amended. (Cited hereafter as the Legal Aid Act.)

33 M Zander 'The English Legal Profession' in Anwaltsberuf im Wandel F Kübler (ed) (1982) 59 at 64.

34 R D Abrahams 'The English Legal Assistance Plan: A Description of its Machinery' (1950) 36 American Bar Association Journal 31. For a discussion of the way the Law Society dominated legal services policy in the 1920s, 1930s and 1940s, see P C Alcock 'Legal Aid: Whose Problem?' (1976) 3 British Journal of Law and Society 151-174.

The Law Society is responsible to the Lord Chancellor for the proper administration of the civil legal aid scheme.[35]

The scheme is administered in 15 legal aid areas in both England and Wales. Each area has a legal aid office run by an area secretary who has substantial powers to grant but not to refuse legal aid.[36] Legal aid may only be refused by a committee consisting of practising solicitors and barristers.[37] Each area has a general committee that deals with applications for legal aid, and an area committee that deals with appeals against refusals of legal aid and with financial matters, including the assessment of bills.[38]

The scheme is financed by moneys appropriated by Parliament, partly by the contributions of legal aid recipients[39], partly by the costs and damages awarded to legal aid recipients[40] and partly by solicitors and counsel who, in legal aid cases in the House of Lords, the Court of Appeal or the High Court, accept a 10 per cent reduction in their fees.[41]

The Law Society is responsible for the administration of the Legal Aid Fund.[42] The accounts of the Fund are audited by the Lord Chancellor's auditors.[43]

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35 S 15 of the Legal Aid Act.
36 The Law Society Legal Aid Handbook 5 ed (1983) 3.
37 Ibid.
38 Ibid.
39 See ss 4 and 9 of the Legal Aid Act.
40 Ibid s 8(1) d.
41 Ibid s 10 read with Part I of Schedule II.
42 Ibid s 17(1).
43 Ibid s 18(2).

b Legal Aid in Civil Proceedings

Legal aid is available for civil proceedings in the House of Lords, the Judicial Committee of the Privy Council, the Court of Appeal, the High Court and in any county court.[44] It is available for both original and appellate proceedings. Legal aid is also available in magistrates' courts for certain matters such as maintenance proceedings, guardianship of minors and affiliation proceedings.[45] Legal aid may also be granted for proceedings before a coroner and for proceedings in the Lands and the Employment Appeals Tribunal.[46]

The Royal Commission on Legal Services, which reported in 1979, recommended[47] that legal aid should be made available for the following proceedings:

(a) defamation;

(b) relator actions for defendants;

(c) contested election petitions;

(d) all those civil proceedings in magistrates' courts; other than licensing proceedings; and

(e) proceedings in the Court of Protection which cannot be dealt with by the Court's Personal Application Branch.

(i) Eligibility

The applicant must satisfy both a means and a merits test. The merits test is carried out by the area offices

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44 Ibid s 7 read with Part I of Schedule I.

45 Ibid.

46 Ibid.

47 The Royal Commission on Legal Services Final Report Cmnd 7648 (1979) para 13.70.

and the means test by the legal aid assessment offices of the Department of Health and Social Security.[48]

The means test distinguishes between:

(a) those for whom legal aid is entirely free;

(b) those eligible only if they pay a contribution; and

(c) those whose means exclude them from legal aid.

The test embraces both disposable capital and disposable income. Those with an annual disposable income of less than £2050 are eligible without contribution whereas those with an annual disposable income of more than £4925 are ineligible for legal aid. As regards disposable capital, those with less than £3000 are eligible without contribution and those with more than £4500 are ineligible unless it appears that the applicant cannot proceed without legal aid.[49] The resources of husband and wife who are living together must be aggregated unless the case is brought by one against the other.

As regards the merits test the criterion is often expressed by asking, 'If this applicant were the private client of a solicitor would he be advised to take or defend the action?'.[50] The general committee has, however, a large discretion to determine the merits of the case.[51]

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48 Legal Aid Handbook 3.

49 P F Smith and S H Bailey The Modern English Legal System (1984) 390.

50 Ibid.

51 Ibid 391.

When the legal aid scheme came into operation in 1950 over 80 per cent of the population was eligible for legal aid on economic grounds.[51a] By the end of 1978 this figure had declined to around 25 per cent.[52] The eligibility limits were raised in 1979, 1982 and in 1983. The scrutiny of the Royal Commission on Legal Services no doubt helped to promote this development. The Royal Commission recommended[53] that the eligibility ceilings should be regularly updated in future to avoid the long downward slump which took place until April 1979.

(ii) Effect of the Legal Aid Grant

The legal aid grant entitles the recipient to be represented by a solicitor of his choice, and if the case requires counsel, he has the right to make the selection himself.[54] The exercise of this right is, however, subject to the circumstances in which a solicitor or counsel may refuse or give up a case or entrust it to another.[55]

If the legal aid recipient wins the case, he will normally have his costs paid by the losing party.[56] It is, however, necessary to explain how the English law of costs works:

The general rule is that 'costs follow the event'[56a], which means that the successful party can expect the

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51a I H Jacob 'Access to Justice in England' in M Cappelletti and B Garth (eds) Access to Justice I 419 at 445.

52 J Cooper Public Legal Services (1983) 27.

53 Op cit para 12.24.

54 S 12(1) of the Legal Aid Act.

55 Ibid s 12(2).

56 Zander op cit 65.

56a Rules of the Supreme Court (hereafter RSC) Ord 62 r 3(2).

judge to order his opponent to pay some or all of his solicitor's bill. In all cases, however, the award of costs is subject to the Court's discretion.[56b] The Court can award costs against the winner, for causing undue delay or for not following proper procedures.[56c] The successful party, however, does not recover all his costs. The reason is that the costs are normally taxed on a party and party basis, which means that only such costs are allowed 'as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed'.[56d]

The Royal Commission on Legal Services recommended that this illiberal basis of taxation be abolished in favour of a common fund basis, according to which a reasonable amount in respect of all costs reasonably incurred is allowed. At present, however, assessment on this basis is uncommon.[56e]

The legal aid fund claims the full costs of the action first from the costs paid by the loser, then from the contribution paid by the winner and third, from the damages awarded the winner.[57] In practice the legally aided plaintiff gets his contribution back and the whole or virtually the whole of his damages.[58]

Where the legal aid recipient loses the case his liability must not exceed the amount which is reasonable for him to pay having regard to the means of the parties.[59]

56b *See* s 51(1) of the Supreme Court Act 1981 (c 54).
56c Smith and Bailey op cit 364.
56d R S C Ord 62 r 28(2).
56e Smith and Bailey op cit 363.
57 See ss 8(1)d and 9(9) of the Legal Aid Act.
58 Zander op cit 65.
59 S 2 A(5).

The Royal Commission recommended[60] that the liability of an unsuccessful legal aid recipient to pay costs should be limited to the amount of his maximum contribution to his own costs.

The German legal aid scheme, for example, does not make provision for the successful unassisted party who is unable to recover his costs from the legal aid recipient. Under the English system this unfairness is mitigated by the rule that the successful unassisted party can apply to have his costs met out of the legal aid fund if he can show that he would otherwise suffer severe financial hardship[61] – 'a test that is easily fulfilled since the courts have held that even insurance companies can qualify'.[62]

c Legal Aid in Criminal Proceedings

Legal aid is available in the following cases:[63]

(a) Where a person is charged with an offence before a magistrates' court, or comes before such a court to be dealt with;

(b) where a person is or is to be brought before a juvenile court;

(c) where a person makes an application to a magistrates' court for a review of compensation orders;

(d) where a person convicted or sentenced by a magistrates' court wishes to appeal to the Crown Court;

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60 Op cit para 13.66.

61 S 13 of the Legal Aid Act.

62 Zander op cit 65.

63 S 28 of the Legal Aid Act.

(e) where a person is committed to or appears before the Crown Court for trial or sentence.

(f) where a person wishes to appeal to the Court of Appeal;

(g) where a person wishes to appeal to the Courts-Martial Appeal Court;

(h) where either party wishes to appeal to the House of Lords from the criminal division of the Court of Appeal or the Courts-Martial Appeal Court;

(i) where the criminal division of the Court of Appeal or the House of Lords orders a person to be retried by the Crown Court; and

(j) where a person is liable to be committed or fined for contempt.

Applications for criminal legal aid are made to the relevant criminal court. Legal aid may be granted by the clerk of the court but it can be refused only by a magistrate.[64] There is no appeal against a refusal although nothing prevents the applicant from making a further application.[65]

(i) Eligibility

Generally, the merits test is whether the granting of legal aid is in the interests of justice.[66] In the magistrates' courts the merits test is based on whether representation is needed because the defendant is threatened with loss of liberty or livelihood or serious loss of reputation or because he does not speak English, or

64 Legal Aid Handbook 6.

65 Ibid.

66 Zander op cit 66.

has some mental handicap or for other reasons cannot cope.[67]

In each year between 1972 and 1982, 99 per cent of the applications for trial at the Crown Court were granted.[68] The proportion of legally aided defendants in the Crown Court rose from 93 per cent in 1972 to 97 per cent in 1982.[69] Legal aid is granted irrespective of whether the accused pleads guilty or not guilty.[70] The need for legal aid in cases involving serious offences was spelt out in the following words by Lord Parker C J in R v Howes[71]:

> When a man, albeit he is going to plead guilty, is involved in a serious offence, carrying a penalty which ... turns out to be one of seven years, the cases must be rare indeed in which justice does not demand that he be granted full legal aid, solicitor and counsel.

Legal aid is mandatory in the following cases:

(a) where the accused is charged with murder[71a];

(b) where the prosecutor appeals or applies for leave to appeal from the criminal division of the Court of Appeal or the Courts-Martial Appeal court to the House of Lords[71b];

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67 *Ibid.*

68 Smith and Bailey op cit 514. The Crown Court has jurisdiction to try all indictable offences. It also hears appeals by persons convicted summarily in the magistrates' courts and it sentences those summarily convicted.

69 Ibid.

70 Zander op cit 66.

71 1964 2 QB 459 at 463.

71a S 29(1)(a) of the Legal Aid Act.

71b *Ibid* s 29(1)(b).

(c) where a person charged with an offence before a magistrates' court is brought before the court in pursuance of a *remand* in custody and is liable to be remanded in custody and is not (but wishes to be) legally represented;[71c] or

(d) where the *accused* is kept in custody to enable inquiries or a report to be made to assist the court in sentencing or *dealing with him* for the offence.[71d]

The *means* test is roughly the same as for civil legal aid. In respect of disposable income the accused must contribute a weekly amount for a *period of 6 months*[71e]; *and* in respect of disposable capital, the whole of the amount in excess of £3000.[72] The contribution shall not exceed the actual costs of the defence.[72a] *Any contribution* in excess will be refunded.[72b] The court has the discretion to remit the contribution where the accused is acquitted or his appeal against *conviction is allowed*.[72c]

71c Ibid s 29(1)(c).

71d Ibid s 29(1)(d).

71e Average weekly *disposable income*, £42.01 - £48, contribution £1; £48.01 - £52, contribution £2; £52.01 - £56, contribution £3; £56.01 - £60, contribution £4; £60.01 - £64, contribution £5; *thereafter* at the rate of £1 for every £4 or part of £4 in excess of £64. Figures taken from Smith and Bailey op cit note 72a at 516.

72 Smith and Bailey op cit 516.

72a Ibid.

72b *Ibid.*

72c Ibid.

3 Extra-Judicial Legal Aid (The Green Form Scheme)

Legal advice and assistance is regulated by Part I of the Legal Aid Act.[75]

Under the scheme a client may consult a solicitor in private practice and obtain help in the form of oral or written advice, negotiation, drafting of documents, obtaining an opinion and preparation of a tribunal case.[76] There is no merits test. The only prerequisites are (a) that the matter in respect of which advice or assistance is sought involves the application of English law and (b) that the applicant satisfies the means test.[77]

Financial eligibility is established by the solicitor himself with the aid of a green form[78] which sets out the eligibility limits and the contribution scale. The income test is based on the applicant's take-home pay in the previous week. The disposable income limit is £ 93 a week and the disposable capital limit is £ 655.[79]

The successful applicant is entitled to obtain up to £ 40 of assistance. If the solicitor wishes to undertake more than £ 40 worth of work (£ 75 in the cases leading to the preparation of an undefended divorce or judicial separation petition), he must obtain the permission of the legal aid authorities.

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75 Ss 1-5.

76 Legal Aid Handbook 3.

77 Ss 1 and 2(1) of the Legal Aid Act.

78 Hence the name 'Green Form Scheme'.

79 S 1 of the Legal Aid Act.

The solicitor is responsible for collecting the contribution, if any, from the client. It is not possible to recover the contribution from the Law Society where the client fails to pay it.[80]

Since 1980 the legal advice and assistance scheme can also be used to cover representation in civil cases in magistrates' courts. The solicitor must, however, obtain the permission of the legal aid office before undertaking any representation.

The Royal Commission on Legal Services recommended[81] that half an hour's legal advice and assistance from solicitors who undertake legal aid work should be available to everyone, irrespective of means, free of charge. The Commission recommended further that a solicitor should be able to provide legal advice and assistance for a further 4 hours on his own authority.[82]

4 Law Centres

a Historical Background

It became evident in the 1960s that the judicare legal aid scheme was no longer meeting the needs of the public. The number of poor persons ineligible for legal aid had increased.[83] Furthermore, there was a maldistribution of solicitors. In 1968, for example, Bentham Green, a London suburb, had only 2 firms of solicitors for a population of 46 000.[84] In a comparable area, Poplar, with a population of 68 000 there was only one firm.[85]

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80 Legal Aid Handbook.

81 Op cit paras 13.5-13.6.

82 Ibid paras 13.7-13.8.

83 Cooper op cit 26.

84 Zander 'The English Legal Profession' 69.

85 Ibid.

In 1968 the Society of Labour Lawyers recommended that neighbourhood law centres staffed by salaried solicitors be established to fill the gap in legal services.[86] Both the Government and the Law Society rejected the idea.[87] The Law Society was of the opinion that the legal needs of the public could best be met by the solicitor in private practice 'provided that he is readily available to members of the public seeking his help, and is able to deal with their problems'.[88]

In 1972 the Legal Aid and Assistance Act[89] was passed. Part II of this Act authorized the Law Society to employ salaried solicitors to provide legal services directly to the public. The scheme, however, never got off the ground as no financial provision was made for its implementation.[90]

b The Emergence of Law Centres

Undaunted by the Government's and the Law Society's rejection of the idea of neighbourhood law centres, young lawyers, community workers and other interested persons started planning the organization of legal advice centres that would provide free legal services to the public.[91]

The first new centre opened in North Kensington, London, in 1970. It was set up by a group of lawyers and laymen and was funded from charitable sources. After a

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86 See Cooper op cit 22. See also Zander 'The English Legal Profession' op cit 69.

87 Cooper op cit 22.

88 Cited by M Zander 'Waivers - The End of a Long Story?' (1977) 127 New Law Journal 127.

89 (c 50). This Act was consolidated by the Legal Aid Act 1974 (c 4).

90 The Royal Commission on Legal Services op cit para 8.2.

91 Cooper op cit 22.

modest start this centre later won acclaim for its vigorous advocacy of legal rights. For example, it involved itself in controversial issues of police harassment of West Indian immigrants and it addressed itself to the housing issues of racial minorities in metropolitan London.[92]

In succeeding years law centres were established at the average rate of about 4 a year, mostly in London.[93] Initially they were regarded with suspicion and hostility by local private practitioners and the Law Society, who feared that the advent of law centres deprived private legal practitioners of much paying work.[94] To ensure that this did not happen a waiver agreement between the Law Society and law centres was issued in 1977 after lengthy discussions. The agreement was that, in return for permission to establish offices in areas determined by the funding agency as 'areas of need', law centres would not trespass on work from which the private profession profits considerably: conveyancing, commercial work, personal injuries, divorce or criminal cases involving adults.[96]

c The Position at Present

Law centres have become an established feature of the English legal landscape. In 1982 there were 42 centres in operation and some 30 steering groups for new centres were in existence.[97] The Royal Commission on Legal Services

92 F H Zemans 'Recent Trends in the Organization of Legal Services' in Effectiveness of Judicial Protection and Constitutional Order W J Habscheid (ed) (1983) 373 at 398.

93 Royal Commission on Legal Services op cit para 8.1.

94 Ibid; Zander 'The English Legal Profession' 69.

95 For an account of the discussions see Zander 'Waivers - The End of a Long Story?' op cit 1236-1239.

96 Ibid 1238.

97 Cooper op cit 23.

found that

> (t)he impact of law centres has been out of all proportion to their size, to the number of lawyers who work in them and to the amount of work it is possible for them to undertake. The volume of work they have attracted has shown how deep is the need they are attempting to meet. It has dispelled the possibility of complacency over the institution of the legal aid scheme, has emphasized the importance of a wider distribution of legal services and has shown the desirability of enabling and encouraging lawyers to take up work elsewhere than in their traditional areas of activity and types of practice.[98]

Jeremy Cooper attributes[99] the growth of the law centre movement to the Law Society's declining influence on public sector legal services. Very few Law Society administrators have committed themselves to the innovation of alternative legal services schemes.[100] According to Cooper one reason for this is that the Law Society leadership comes almost exclusively from the ranks of successful middle class solicitors who have 'very little conception of what the real needs of the poor are'.[101]

At present the Law Society is a strong supporter of the law centre movement.[102] Usually law centres refer to

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98 Op cit para 8.11.

99 Op cit 26-35.

100 Ibid 34. At pp 34-35 Cooper maintains: 'The Law Society remains content with the legal aid/judicare scheme as the basis of its legal service to the poor, and the initiatives it has sponsored seem to reflect a rather half-hearted sense that they ought to be "seen to be doing something" rather than any real commitment to change. The main thrust of the policy position of the Law Society is directed almost exclusively at its trade union function - to look after the interest of solicitors - despite continual statements by successive Presidents that it is also the guardian of the public interest'.

101 Ibid 30.

102 Zander 'The English Legal Profession' 69. See also Royal Commission on Legal Services op cit para 8.3.

private practitioners cases that they can handle on a remunerative basis and private practitioners refer to law centres work that they find unremunerative. There is thus a reciprocal benefit, 'and their services complement each other rather than being competitive'.[103]

The centres obtain their finances from various public sources. Some are funded wholly by the Lord Chancellor's Department, others wholly by local authorities. Some are funded partly by the local authority and partly by the Urban Aid Programme of the Department of Environment.[104]

The lack of adequate funding, however, prevents the centres from offering as comprehensive a service as they wish.[105] Whereas between 1978 and 1981 spending on civil and criminal legal aid increased from £ 44 million to £ 66,5 million a year, the amount voted for law centres remained at £ 1/3 million. The centres are thus not able to renumerate their staff adequately or to provide for their pensions. The Royal Commission recommended[107] that the centres be financed wholly out of funds provided by the Central Government. The Commission also called for substantial expansion in the number of law centres.[108] At present the great majority of the centres are in London and in other industrial cities. The Anti-Poverty Action Centre in South Wales, which was funded partially by the European Economic Community and which was the only centre which provided legal services to the rural poor, closed down in 1982.

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103 Zander 'The English Legal Profession' 69.
104 Ibid.
105 Royal Commission on Legal services para 8.16.
106 Cooper op cit 79.
107 Para 8.27.
108 Para 8.15.

The present Thatcher Government is, however, reluctant to expand public sector legal services.

d The Work of the Centres

Basic to the work of all law centres is the aim to cater for those legal needs that are not met by the traditional judicare legal aid scheme. The centres, however, differ in their constitutions, internal administration and strategies. Dr Cooper has singled out the Brent Law Centre as being particularly effective in its work.[109]

(i) Brief Description of the Work of the Brent Law Centre[110]

The Centre is situated in a bourough with a population of over 100 000. The Centre employs a staff of 7, most of whom are lawyers. The staff are paid on a parity basis, unlike in some centres. There are no secretarial or administrative staff, nor a receptionist or a switchboard. Each day one of the staff is nominated to answer the numerous telephone calls, most of which are from members of the public wanting legal advice.

Although, in principle, the Centre does not provide legal services directly to individual members of the public, anybody who telephones is given legal advice and if the person is eligible for legal aid, the Centre recommends a solicitor to whom the caller could go for further help. In some cases the caller is referred to a local organization that specializes in that type of problem, or the caller may be invited to come to the Centre for initial advice. If the problem is still not solved, the Centre will decide whether

109 Cooper op cit 298.

110 Information on the Brent Law Centre is taken entirely from Cooper op cit 102-123.

or not to proceed with the matter.

As a public relations exercise the Centre does not refuse certain persons, for example, landlords, legal advice. Many of the callers are themselves counsellors in other local advice agencies and they telephone on behalf of their own clients.

Two principles underlie the work of the Centre.

First, except the legal advice service offered over the telephone, the Centre does not assist members of the public directly. The United States experience teaches that the heavier the demand for a centre's service, the greater the chances that the quality of service will be effected. Furthermore, experience with the traditional judicare legal aid scheme shows that routine casework for the poor does not lead to real socio-political change.

Second, the Centre maintains that if it opens its doors to everybody, it will not be able to measure its relative benefit to the community as a whole.

The Centre is therefore selective in the matters it handles. Priority is given to the collective interests of both the local tenants association and the trade unions - groups that are already working for the collective interest of the poor and the working classes. The Centre's management committee is also dominated by representatives from these two organizations. The committee meets monthly to set broad policy guidelines. Representatives of the community thus have a major say in matters affecting the use of the Centre's resources. They also decide what areas of the law should be given priority.

The deep community roots thus ensure that the real needs of the people who make up the Centre's client com-

munity are being met. The Centre has, for example, helped the entire local tenant population to obtain security of tenure and indemnity against the carrying out of their own repairs. It also helped the community in its attempt to stay the closure of a local hospital and in its attempt to improve fire regulations in high-rise blocks; to improve local road-safety regulations and to publicise the new equal opportunities legislation. The Centre also provides group legal services to many specific sectors of the community, including overseas students at a local polytechnic.

The Centre also produces many publications on socio-legal matters and on many occasions members of the staff have led discussions in workshops on legal services.

5 Other Recent Innovations in the Provision of Legal Services

a Duty Solicitor Schemes in Magistrates' Courts

There are over 100 duty solicitor schemes under which solicitors in private practice attend court on a rota basis to advise unrepresented accused persons on matters relating to the plea, bail, legal aid and the adjournment.[111] If the accused pleads guilty, he will normally be represented by the solicitor. If the accused pleads not guilty, the duty solicitor will appear for him on ordinary legal aid.[112] The solicitor is paid from the legal advice and assistance scheme.[113]

b Rota Schemes in Citizens' Advice Bureaux

There are about 700 Citizens' Advice Bureaux that ad-

111 Zander 'The English Legal Profession' 70.

112 Ibid.

113 Ibid.

vise the public on various matters, many of which have a legal component.[114] In over 300 schemes solicitors attend the bureaux on a rota basis to give gratuitous legal advice to members of the public.[115] If the client requires further legal assistance, the solicitor will transfer the matter to his office and will handle it under the ordinary legal advice assistance or legal aid scheme.[116]

Some advice bureaux employ salaried solicitors to advise bureau workers and their clients.[117]

c The Fixed Fee Scheme

Under this scheme solicitors in private practice give half an hour of diagnostic advice on payment of a fixed fee of £ 5, irrespective of the client's means.[118] About 80 per cent of solicitors' firms participate in the scheme.[119] The aim is to help clients overcome their initial reluctance to consult an attorney out of fear of the costs.[120]

d Referral Lists

In 1976 the Law Society initiated the practice of publishing lists of solicitors who accept legal aid briefs in defined areas of the law.[121] The lists also indicate whether a firm operates a fixed fee scheme and whether it has an emergency telephone number. These lists are distributed throughout the country, free of charge.

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114 Ibid.
115 Ibid.
116 Ibid.
117 Ibid.
118 Ibid.
119 Ibid.
120 Ibid.
121 Cooper op cit 32.

In practice, very little use is made of the lists. One reason for this is that they 'are tucked away in the local library or Citizens' Advice Bureaux'.[122]

The Greater Manchester Legal Services Committee is presently experimenting with a far more comprehensive list which sets out, for example, the names of solicitors who are willing and able to represent clients before certain tribunals; the solicitors' date of admission, their field of speciality and their emergency telephone numbers.[123] The lists also indicate the foreign languages, if any, spoken in the firm and the foreign legal systems in which solicitors have experience.[124]

6 General Comment

The universal criticism against the legal aid scheme is that the financial eligibility limits are too low and, therefore, have the effect of excluding many worthy applicants from the benefit of legal aid. That the means test operates as a real barrier is evidenced by the 1982/83 statistics which show that 78 per cent of the legal aid grants made were without any contribution on the part of the legal aid party.[125] The Margaret Thatcher Government has, as could be expected, rejected the fundamental recommendation by the Royal Commission on Legal Services that the financial eligibility limits should be abolished and that the contribution be fixed at an appropriate level.[126] This is unfortunate since the basic public grievance against the scheme still remains.

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122 Ibid.
123 Ibid 33.
124 Ibid 34.
125 Ibid.
126 See ibid 358.

The widely reported announcement by the Government in June 1985, that it intends to cut social spending drastically, does not augur well for the developments on the legal aid front. First, because there is a very strong likelihood that the Government will be disinclined to uprate the eligibility levels regularly to keep pace with inflation. Also, one can expect more rigorous means-testing, especially in the realm of criminal legal aid. In 1981 already the Lord Chancellor's Department issued a circular to justices' clerks in which they were pressurized to ensure that 'legal aid in criminal proceedings should secure value for money' and that 'realistic' down payments should be required in all suitable cases'.[127]

The other disturbing feature of the Government's austerity programme which is likely to come into effect in 1987, is that in certain cases aggrieved social welfare recipients will no longer have the right to appeal to the Social Security Appeal Tribunals.[128] This means that the poor, those who are least able to assert their rights, will be exposed to arbitrary action on the part of those officials who will be acting vigorously to implement Government directives on cost-saving. At present, the claimant before a Social Security Appeal Tribunal receives only compensation for loss of earnings and travelling expenses whatever the outcome of the hearing. No costs can be awarded against him.[129]

Thirdly, the Government's proposed austerity programme is bound to have a dampening effect on the more radical reform initiatives which aim to expand public sector legal aid and to overcome the social and psychological barriers

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127 L C D Circular 81(3) reproduced in (1981) 131 New Law Journal 359.

128 The Times 21 June 1985.

129 Smith and Bailey op cit 367.

which prevent the underprivileged from availing themselves of legal services.

The problem of access to lawyers has not been solved by the legal aid scheme. Solicitors, too, are not making enough use of the opportunities afforded them through the relaxation of the rules on advertising.[130] At the moment advertising is sporadic and still very modest. This is apparently due to the fine distinction which the Law Society makes between 'informative' and 'informational' advertising - a distinction which is difficult to make in practice. Some local law societies claim that nobody other than the Master of the Rolls and the Council of the Law Society can recognize this distinction.[131] It seems, however, that the profession has not yet fully overcome its traditional negative attitude towards advertising legal services.[132] The effect of this is that the poor and the uneducated, whose chief source of information is limited to the mass media, are not being adequately alerted to the availability of legal assistance in areas in which people are not generally aware that lawyers can help, such as social security, housing, employment, discrimination and immigration.

There is a need for wider and more regular advertisement. Statistics show, too, that 77 per cent of the public, as opposed to 15 per cent, are in favour of advertising.[133] In the United States empirical studies on the advertising of legal services show also that it reduces costs and increases access to lawyers without any adverse effect on

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130 See J Loosemore and R Parsons 'Legal Services - The Way Ahead for Solicitors' (1985) 135 New Law Journal 525; S Kreppel 'Solicitors' Advertising: Is Anything Going on?' (1985) 135 New Law Journal 567.

131 'Changing Professional Rules' (1985) 135 New Law Journal 524.

132 Loosemore and Parsons op cit 525.

133 Kreppel op cit 568.

the quality of legal services.[134]

Once lawyer advertising in England gains momentum, as it surely will, the legal profession as a whole will have to take a critical and realistic look at the need to retain the division of the profession into solicitors and barristers. The reason is that if solicitors hold themselves out as specialists in certain fields and if they do consequently develop enormous expertise in the various fields, it will make no sense to continue to deny them a right of audience in the superior courts. The traditional argument for the maintenance of the status quo is that barristers have more time to prepare cases. But even this argument will flat once most solicitors have modern, time-saving technological equipment in their offices.

Very recently, some radical young barristers, 'the Bar Reform Group', drafted a private member's Bill which inter alia would abolish the Bar's monopoly in the superior courts and the distinction of Queen's Counsel.[135] The Bill would 'end restrictive practices, stop the endless multiplication of fees, introduce genuine competition, and democratize a profession which is in danger of becoming a caste. It would end the flummery of legal practice, and hopefully bring down escalating fees'.[136]

Needless to say, this 'intriguing'[137] Bill has little chances of being passed. But it is important for the fact that it depicts the type of discussion which, through advertising, is bound to develop around the question of the costs of legal services - certainly much more so than

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134 See D J McQuoid-Mason 'Ethics and the Attorneys' Profession: Fact or Fiction? Some Perspectives from the Consumer's viewpoint' (1983) Acta Juridica 213 at 224.

135 See 'Austin Mitchell Tackles the Bar' (1985) 135 New Law Journal 524.

136 Ibid.

137 Ibid.

in the past. The fact that the profession has lifted the ban on advertising and has abolished the two counsel rule (at least in theory) - matters which were taboos less than a decade ago - shows that even the most die-hard traditional practices are not all that immune from reform.

There is one feature of the British legal practice which, if allowed to flourish, will seriously undermine the spirit of legal aid, namely, racial discrimination within the profession. This problem is most vivid at the Bar where Black barristers have difficulties in finding tenancies. Also, many White solicitors, as a matter of principle, do not instruct Black barristers[138] - sometimes even when the client asks that a particular Black barrister be briefed.[139]

At present there are 210 Black practising barristers, yet only 48 of the 320 sets of chambers have Black tenants.[140] There are only 5 Black barristers practising outside London.[141]

The Law Society has repeatedly sought to pretend that there is no racial discrimination against Black solicitors and has consequently not undertaken anything concrete to curb discriminatory practices. At a recent conference held in London Black solicitors made a scathing attack on the Law Society for ignoring discrimination against Black members of the profession.[142]

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138 Editorial: 'Minority Entry into the Legal Profession' (1985) 135 New Law Journal 521 (cited hereafter as Editorial).

139 J Morton 'Discrimination in the Legal Profession' (1985) 135 New Law Journal 573 continued at 587.

140 Editorial 521.

141 Ibid.

142 See generally Morton op cit.

The Royal Commission on Legal Services correctly pointed out that 'a failure to remove even the appearance of discrimination from the legal profession reduces the confidence of every sector of the public in the administration of justice'.[143] It really makes no sense for the profession to speak of equal access to the law on the one hand, and on the other to make it difficult for minorities to enter the profession. From a legal aid point of view alone, Black lawyers could play a major role in servicing the needs of the underprivileged immigrant population - legal needs which are rarely met in practice either because they are not perceived as legal needs or because most White lawyers are simply not equipped to deal with the problems of minorities. There is, therefore, apart from all else, a need to promote the entry of Black lawyers into the profession.

The law centres are fulfilling an important function in mobilizing collective legal needs to accomplish wider socio-political change through the law. In this regard they are meeting those needs which cannot be serviced by the judicare legal aid and advice scheme. But they have one common problem: funding. Judging by the tone of the Government's 'belated' and insulting[144] reply to the recommendations put forward by the Royal Commission on Legal Services, it is most unlikely that the law centres will receive additional funding from the Lord Chancery's Department.

The Government did not even bother to respond to an important recommendation of the Royal Commission, namely, that legal aid be made available for relator actions, which are actions by the Attorney-General on the relation of the person or group (the relator). It ought to be pointed out that 'the relator can only act in the name of the At-

143 Op cit para 35.2.
144 Smith and Bailey 374.

torney-General if he has the Attorney-General's consent to do so, and it is for the Attorney-General alone to decide in each case whether to allow his name to be used and the litigation to be instituted'.[145] Relator actions are, however, expensive to finance. First, because the relator must employ both a solicitor and counsel even to obtain the permission of the Attorney-General. Secondly, because the court proceedings are usually complex and lengthy. An ordinary person of modest means can ill-afford to bring such an action. As legal aid is not available for relator actions only a wealthy person or an organization endowed with sufficient resources can afford to bring such actions. There is therefore a real need to extend the legal aid scheme to cover actions brought in the interest of groups, for in practice it is usually the poor, as a group, who are most vulnerable to the effects of unlawful conduct of industrial concerns and administrators.

Legal expenses insurance which defrays the costs of litigation is only of recent innovation.[146] It provides cover for individual persons, members of families or groups.[147] At present it is marketed through the profession but the response has been small.[148]

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145 J A Jolowicz 'The Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation' in Habscheid (ed) Effektiver Rechtsschutz und verfassungsmäßige Ordnung (1985) 53 at 63.

146 Smith and Bailey op cit 374.

147 Ibid.

148 Ibid.

9 LEGAL ASSISTANCE FOR THE POOR UNDER ROMAN-DUTCH LAW AND DEVELOPMENTS THEREAFTER

1 Legal Representation

Under the early Roman-Dutch Law a litigant was not allowed to be formally represented in court by another; he had to act in person.[1] In the course of time, however, the courts of Holland began assigning a special class of representatives called *taelmannen*, *procuratores* or *procureurs* to plead for their principals.[2] In the case of an indigent accused, the judge was obliged to appoint such a *taelman* who was 'schuldich in des anders woirden te comen ende sijn beste te bedinghen mit recht....'[3]

In June 1450 the Court of Holland decreed that thenceforth all litigants had to have legal representation.[4] It was not necessary that the party appear personally before the Court as long as the attorney was armed with a proper mandate from his principal.[5] Before inferior tribunals an attorney alone could conduct and defend the case, but in the superior courts the accused had to have the assistance of both advocate and attorney.[6]

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1 For the development of the law of procedure from the time of the Frankish Empire, see Wessels *op cit* 174 ff.

2 Ibid.

3 J P De Monté Verloren *Geschiedenis van het Wettenschap van het Strafrecht en Strafprocesrecht in de Noordelijke Nederlanden vóór de Codificatie* (1942) 9.

4 C H Van Zyl 'A Brief History of the Law of Attorneys so far as South Africa is Concerned' (1912) 29 *SALJ* 261 at 263.

5 Van Leeuwen *Het Rooms-Hollands Recht* (1664) 5.4.4; Voet *Commentarius ad Pandectas* (1698 - 1700) 3.3.12-3.3.14.

6 Voet *op cit* 3.3.14-3.3.15; G Wassenaar *Praktyk Judicieel* (1746) 27.4-27.6 and 27.4.8-27.4.10.

Article 14 on an ordinance of Philip II promulgated on 9 July 1570 forbade an accused in a criminal trial to be represented by counsel unless the judge deemed it necessary.[7] This prohibition did not apply where the accused was unskilled in forensic matters, or where he was intoxicated or where his behaviour upset the decorum of the Court.[8] Also, the prohibition against the right to counsel had no universal application in Holland. In some towns burghers could insist that their defence be conducted by an advocate.[9] But these exceptions should not detract from the severity of the extraordinary criminal proceedings which the 1570 Ordinance sought to make more common. Lamenting the departure from the ordinary procedure which afforded an accused continued recourse to counsel, Fruin, in his Toelichting to the July 1570 Ordinance pointed out:

> In het ordinaris proces kan die beschuldigde zich gedurende den ganzen loop van het process doen bijstaan door een procureur en voor de hoven bovendien nog door een advocaat: in het extraordinaris mag hij alleen na die ondervraging in de gevangenis een rechtsgeleerde raadplegen. In het ordinaris proces staan twee gelijke partijen tegenover elkaar: in het extraordinaris staat tegenover den beleedigden staat een weerloos misdadiger.[10]

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7 Van Leeuwen op cit 5.4.3. and 5; Voet op cit 3.3.1. In criminal trials it appears that in the year 1406 already every accused 'hi si poirter of landman, mocht altijd een "tael" - of "talman", advocaat nemen, die syne tale hout; deze behoefde geen stedeling te zijn.' P J Blok Geschiedenis eener Hollandische Stad (1910) 231.

8 S Selikowitz 'Defence by Counsel in Criminal Proceedings under South African Law' (1965/1966) Acta Juridica 53 at 58.

9 Wessels op cit 376; Selikowitz op cit 58-59. For the harsh effects of the Ordinance, see J Dugard Introduction to Criminal Procedure (1977) 6-9.

10 R Fruin Geschiedenis der Staatsinstellingen in Nederland tot den Val der Republik 2 ed (1922) 146. See also Voet op cit 48 2.20.

In civil proceedings the attorney's role in the technicalities of civil litigation became increasingly indispensable.[11] It was, however, illegal for an advocate or an attorney to contract with a client for a share in the proceeds of a lawsuit. Their fees were fixed by tariff.[12]

a Pro Deo

The Roman-Dutch Law did grant leave to indigent persons to sue pro Deo.[13] The indigents' applications to be represented gratis and pro Deo, had to be accompanied by proof of poverty[14] The application was rejected where the poverty was faked or where the intended action did not constitute a ground upon which relief could be granted.[15]

How effective the pro-Deo system operated for the benefit of the accused remains speculative. Voet (1647 - 1713), the great Dutch jurist at the time, advised against exempting experienced and eminent counsel from pro-Deo work. The judge, Voet said, should equalize the division between the parties, lest the client sustain defeat more by reason of the inexpertness of 'raw members and novices than by the injustice of his cause'.[16]

2 Subsequent Developments in the Netherlands

Pro-Deo legal aid was abolished in 1957 with the introduction of a State-subsidized legal aid scheme.

a The Legal Aid Scheme

The legal aid scheme is regulated by the Wet op de Rechtsbijstand aan On-en Minvermogenden[17] (Legal Assistance

11 Wessels op cit 196.
12 Ibid.
13 Van der Linden Institutes of Holland (H Juta trans 1884)3.1.25.
14 Ibid.
15 Ibid.
16 Op cit 3.1.11 (Gane's translation).
17 Of 1957.

to the Needy and Indigents Act).

Under this scheme the legal aid applicant first goes to the local municipality where a means test is conducted.[18] Where the applicant satisfies the means test he is given a certificate of indigence which he then submits to the local legal aid office.[19] The legal aid office decides whether or not an attorney should be assigned.

As in West Germany and in England, legal aid is granted on a contribution basis. Families with a monthly net income of less than Hfl 2000 are entitled to free legal aid.[20] It is estimated that about 60 per cent of the Dutch population is eligible for legal aid.

In recent years the legal aid scheme has been subjected to considerable criticism. Professor Jessurun d'Oliveira points out:

> The present Act, the WROM, is no longer adequate. Not only does it contain discriminatory, humiliating and paternalistic elements, and are aliens, as a rule, unjustifiably excluded from legal aid, but furthermore, practices have developed which this Act no longer takes care of.[21]

To eliminate these flaws and to provide 'the legal bedrock for social developments'[22] a preliminary draft of a new Legal Aid Act (Wet op de Rechtshulp) was published in 1980.[23] The Bill has, however, been withdrawn in the light of the recent cuts in Government spending.[24]

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18 H U Jessurun d'Oliveira 'Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation' (1983) 30 Netherlands International Law Review 161 at 182.

19 Ibid.

20 Ibid note 72.

21 Ibid 83.

22 Ibid.

23 Ibid.

24 Cooper op cit 299.

b Law Shops (Rechtswinkels)

The social awareness that developed amongst young people in the wake of the student unrest in the late 1960s had a profound effect on the provision of legal services in the Netherlands.

In June 1970, a special issue of the Journal of Dutch Law Students, Ars Aequi, was dedicated to the problem of unmet legal needs.[25] The Bar was strongly criticized for its unwillingness to attend to the legal needs of the poor. The students called for the establishment of a 'Social Bar'. In 1969 already, some law students in the University of Tilburg set up a law shop in old premises in the centre of town. The students wanted simply to offer legal advice to the poor and to make their skills socially useful.[26]

Within a few years of the opening of the Tilburg law shop, about 90 law shops were established in all university towns throughout the country.[27] The law shops are staffed mainly by student volunteers who are assisted by socially committed lawyers, both practising and academic. The law shops are open to the public a few hours a day. Each law shop has had an average of between 6000 and 7000 consultations per year - four times the number of persons who are assisted under the legal aid scheme.[28] Professor Freek Bruinsma writes:

> The law shop movement derived its political influence from the fact that it put into

25 See 'De balie: een leemte in de Rechtshulp?' (1970) 6 Ars Aequi 226 ff.

26 B Garth Neighbourhood Law Firms for the Poor (1980) 119. See also Cooper op cit 46.

27 Blankenburg and Cooper op cit 279.

28 J C Houtappel 'Access to Justice in Holland: A Summary' in M Cappelletti and B Garth (eds) Access to Justice I book 2 (1978) 581 at 591.

> practice an alternative legal service: the existence of a law shop was a practical criticism of the professional legal services by the private bar. In the first years of their existence, some doubts were raised about the quality of the legal services by law students, but these were not substantiated, while the law shop movement referred convincingly to the accessibility of the law shop, the kind of legal problems the law shops handled, i.e., welfare state law, and the kind of people the law shops serviced, i.e., low income people. At all these points a law shop scored better than the office of a lawyer, at least in the eyes of the public at large.[29]

Law shops are subsidized by the Ministry of Justice. Some law shops are opposed to Government funding out of fear of forfeiting their cherished independence.[30]

Initially, the Dutch Bar Association was opposed to the law shops. But when practitioners in private practice recognized that the law shops were not diverting clients or income away from them but were instead referring previously unrepresented clients to them, they sensed the need to co-operate.[31] The Bar Association then joined the law shops in lobbying the Government to establish legal aid bureaux (Buros voor Rechtshulp) - a concept which grew out of a research project conducted by the Institute for Criminology at the Free University, Amsterdam.[32]

c Legal Aid Bureaux

The first bureau was set up in Amsterdam in 1974. By 1983 bureaux had been established in 19 administrative districts.[33] Most of the bureaux have branch offices. The

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29 Cited by Zemans op cit 394.

30 Blankenburg and Cooper op cit 279.

31 Zemans op cit 394.

32 Blankenburg and Cooper op cit 276.

33 Ibid 277.

bureaux are private foundations, subsidized entirely by the Government.[34] Each bureau has a management board consisting of nominees of the Minister of Justice, representatives of the Bar, and persons not directly involved in legal aid.[35]

The bureaux have the dual purpose of granting legal aid certificates for the judicare scheme and giving elementary or so-called 'eerstelijnsrechtshulp'.[36] They also recommend lawyers who accept legal aid briefs, especially those who are specialized in the legal problems of the poor as a class. The bureaux do not conduct any litigation themselves.

In 1982 the bureaux were consulted by approximately 240 000 people. Altogether the bureaux employ some 200 lawyers and 100 administrative workers. Lawyers employed by the bureaux are not allowed to become members of the Bar.[39] This is because attorneys are not allowed to advertise their services whereas the bureaux do so.[40]

An empirical study undertaken by Professor Freek Bruinsma of the University of Utrecht showed that because of the heavy caseloads the quality of legal advice given by the bureaux was poor in one-third of all cases. It was found that the bureaux generally neglected giving advice on the social aspects of the clients' legal problems. It was also found that, contrary to their 'alternative' ideology, many bureau

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34 Ibid.

35 Ibid.

36 N Huls 'Rechtshulp' (1983) 3 Recht en Kritiek 343 at 347.

37 Ibid 344.

38 Ibid.

39 Blankenburg and Cooper 277.

40 Ibid 278.

41 Huls op cit 349.

workers projected a formal 'Officer of Justice' profile.[42]

To remedy these defects several bureaux are now limiting their in-take capacity in order to improve the quality of the work.[43]

d Lawyers' Collectives

Lawyers' collectives, generally referred to as the Social Bar, were first established in 1974-1975 in the wake of the law-shop movement.[44] The collectives offer perspectives for young lawyers with socio-political inclinations. Many lawyers who belong to collectives are themselves politically and socially active. Some are active in mobilizing clients with collective problems, such as those related to housing, traffic congestion, pollution and urban renewal.[45]

Initially, some of the collectives received interest-free loans from the Government, but at present they depend almost entirely on legal aid income. Their average per capita income is, however, below the average national minimum wage.[46]

3 The Importance Attached to Legal A :

Between 1972 and 1982, Government expenditure on legal aid jumped from Hfl 25 million to Hfl 225 million.[47] This impressive amount, for a population of about 14 million, testifies of the enormous drive of the Dutch legal aid movement. The Netherlands has rightly been referred to

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42 Ibid.
43 Ibid.
44 Blankenburg and Cooper op cit 279.
45 Ibid.
46 Cooper op cit 82.
47 Zemans op cit note 38 at 394.

as the 'potential bright spot in the reform of legal aid'.[48]

The legal aid movement derives its strength from the strong alliance between the law faculties, social scientists and the public-sector lawyers. There is a continuous debate on the subject of legal services, and there is a common interest to use legal aid to effect structural change. To these ends lawyers' collectives, legal aid bureaux, universities and private practitioners - all who have a common interest in reform projects - have grouped together to form the Legal Aid Association (Vereeniging voor Rechtshulp).[49] The Association has regular meetings with the Ministry of Justice and also has a say in proposed legislation on matters which concern it.[50] Recently the Association was given funds by the Ministry of Justice to employ a part-time administrator.[51]

4 Future Developemnts

In the light of recent cuts in social welfare budgets, the Minister of Justice announced his plans to introduce provisional austerity measures in the sphere of legal aid.[52] These include the exclusion of certain matters from the ambit of the legal aid scheme, the introduction of a more stringent means test and a 10 per cent reduction in remuneration for legal aid work.[53]

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48 M Cappelletti B Garth N Trocker 'Access to Justice: Variations and Continuity of a World-Wide Movement' (1982) 46 Rabels Zeitschrift 664 at 677.

49 Blankenburg and Cooper op cit 280.

50 Ibid.

51 Ibid.

52 See P Ingelse 'De Sociale Advocatuur: niet voor God, maar naar God' (1983) 7 Nederlands Juristenblad 212.

53 Ibid.

These announcements have provoked strong opposition from the profession. It is estimated that if the Minister's plans are implemented the lawyers' collectives, for example, will lose between 20 and 30 per cent of their present income.[54] This would mean the end of the Social Bar. But the Dutch are known for the social experiments. Indeed, the growth of legal services programme is largely attributable to resourcefulness and bold experimentation. It is therefore unlikely that the Minister's provisional measures - if they are implemented - will destroy the legal aid infrastructure. As one of the chief exponents of the legal aid bureaux put it: 'De rechtshulp is hier hechter verankerd en beter beschermd tegen scherpe bezuinigingspolitiek.'[55]

54 Ibid. See also P de Koning and P Verberne 'Rechtshulp' (1984) 1 Recht en Kritiek 94 at 102.

55 Huls op cit 362.

10 ACCESS TO THE LAW IN SOUTH AFRICA: AN HISTORICAL SURVEY

1 The Early Period

When van Riebeeck and his entourage occupied the Cape in 1652, the law of Holland became the law of the Cape.[1] All legal matters, both criminal and civil, were administered by the Raad van Justitie (Council of Justice) which sat in Cape Town. Although the law was certain[2], it was uncertain to the extent that the judges had only a vague understanding of it; the only requirements for judicial office being that judges should be members of the Dutch Reformed Church and not closely related to one another.[3]

The procedure in civil and criminal cases was regulated by the Ordinances of Philip II of Spain passed in 1570 and 1580 respectively.[4] The principal functionary of the Raad was the fiscal, a high-ranking official invested with extensive powers and responsible only to the Here Seventien whose interests he looked after.[5] His was a thankless office which attracted nothing but the opprobrium of company servants. Because he received a share of the fines imposed by the court, he was usually far from regarding the protection of the subject as lying

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1 H R Hahlo and E Kahn The South African Legal System and its Background (1973) 572.

2 Ibid 574.

3 C G Botha 'The Early Inferior Courts of Justice at the Cape' (1921) 38 SALJ 406.

4 Wessels op cit 362.

5 C G Botha 'The Public Prosecutor at the Cape Colony up to 1829' (1918) 35 SALJ 399-400.

within his province.[6] The slaves loathed him with a hatred that lacked nothing in depth and sincerity, a state of mind that was cordially shared by a large number of Europeans as well;[7] The few acquittals of company subjects is explained by the fiscal's reluctance to prosecute where the chances of securing a conviction were slim.[8]

Courts of landdrosts and heemraden were later established in country districts to relieve the Raad of trivial cases. These courts had jurisdiction over water cases and in all cases in which the amount in controversy did not exceed 50 rixdollars (£ 10).[9] Crimes committed in the landdrost's district were prosecuted by him before the Raad in Cape Town, subject to the fiscal's right of prevention in the prosecution of all crimes.[10]

The strong democratic principle espoused by Commissioner van Rede 'om ieder regt ende gelijck te doen hebben sonder aansien van personen'[11] found no immediate echo amid the harsh facts of experience. The Rule of Law was non-existent. Justice was administered roughly.[12]

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6 M Wilson and L M Thompson (eds) The Oxford History of South Africa 1 (1969) 297. See also C G Botha 'Criminal Procedure at the Cape During the 17th and 18th Centuries' (1915) 32 SALJ 319.

7 V de Kock Those in Bondage (1950) 160.

8 R H Elphick The Cape Khoi and the First Phase of South African Race Relations (1972) 246.

9 Botha 'The Early Inferior Courts of Justice at the Cape' 408 and 411.

10 Ibid 409.

11 A J Boeseken Nederlandsche Commissarissen aan de Kaap 1657 - 1700 (1939) 127.

12 Wilson and Thompson op cit 297.

People could be banished without trial and any company servant could be summarily transferred to another station without redress.[13] Court proceedings took place in foribus clausus.[14] Although judgement was pronounced in public, no grounds were given, and torture was frequently used to extract confessions.[15]

a Access to Justice for the Khoi

In practice, only freemen and company servants had access to the courts.[16] Slaves were regarded as non-existent at civil law.[17] Disputes between Khoi and the White settlers were handled extra-judicially by the commander or his agent.

Although the Khoi were regarded as a free and independent people, in the eyes of the law they were an inferior class.[18] The field-cornet was empowered to inflict corporal punishment on a Khoi without the formality of a trial.[19] A Khoi who lodged a complaint against an employer was liable for detention in prison till his case was heard; and where the complaint was unfounded, he was, like the slave who brought an unfounded charge of maltreatment against his master, punished according to the nature of the case.[20] Only in 1671 - 72 did the authorities extend

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13 Ibid 222.

14 Ibid.

15 Botha 'Criminal Procedure at the Cape During the 17th and 18th Centuries' 321-322.

16 Wilson and Thompson op cit 297.

17 For legislation affecting the slaves, see I B Edwards Towards Emancipation (1942) 224-226.

18 Elphick op cit 241. See also W M Mac Millan The Cape Colour Question (1927) 156.

19 Mac Millan op cit 156.

20 Ibid.

the jurisdiction of the Raad to include the trial and punishment of Khoi.[21]

In 1748 Khoi were granted the right to lodge complaints against Whites, before the courts. However, in 1797, when a Khoi summonsed a White woman before the Stellenbosch College, the heemraden protested bitterly out of fear that Khoi would gain the impression 'gelykstandig met een burger te zijn'.[22] The heemraden were reluctant to agree with the landdrost who said that it was his duty to treat Khoi 'als zig zelve; dat zulks de waare gelijkheid uitmaakte, wijl men voor't regt alle gelijkstandig waaren'.[23]

MacMillan's remarks about the obstacles beretting racially discriminated persons in their quest for justice are as valid today as then:

> Where the laws themselves were so far from perfect, the hope of reasonable protection for the coloured people now depended more than ever upon the efficiency of administration. In the best possible circumstances, it is hard to measure the disadvantages of a backward Native who has to appear in a court of law, whether as plaintiff or complainant. He is deficient in, if not totally ignorant of, the language of the courts' proceedings; even if he understands more than fragments from an interpreter, the atmosphere of a law court must add to his natural embarrassment in the presence of masters who are still more conscious of their own superiority to this ragged, unwashed, stammering mortal. This very feeling of superiority is a sore tax on the white man's impartiality and sense of justice in deciding for a

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21 Elphick op cit 241.

22 Cited by P J Venter Landdros en Heemraden (published in Archives Year Book for South African History (1940 II) 38.

23 Ibid.

> coloured person against a white man. The conditions in those days were even more unfavourable than they are today....The appeal to the law was a novelty; distances were far longer, and the Judges of High or Circuit Court necessarily dealt only with cases passed on by the Landdrosts, and followed only the main roads, never reaching the remote and outlying districts where supervision was most necessary. The welfare of the Hottentots therefore would depend in the first instance on the nearest official, the field cornet; and much definite evidence goes to show that the interests of these minor officials were so completely identified with those of their fellow farmers that they were unlikely to dispense a partial justice. [24]

The Bible, although it formed no part of the Roman-Dutch law, frequently played a lively role in court proceedings. For example, in 1685 in a case where a master was charged with the murder of his slave, a Stellenbosch landdrost cited 2 Exodus 21.21-22 to support the argument that it is not the crime itself but the criminal's status which should determine the nature of the punishment.[25]

2 Eighteenth-Century Enlightenment and its Effect at the Cape

The last three decades of the eighteenth century could aptly be described as the Age of Reason. New ways of thinking about man, society, state and the economy emerged. This intellectual force expressed itself dramatically in the American Revolution, the French Revolution, the unification of Germany under Bismarck and the wars of liberation in Latin America and Greece. The

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24 MacMillan op cit 159.

25 Venter op cit note 82 at 38.

secular natural law, the principal propellant of the revolutionary movement, provided new approaches to law and the administration of justice. Obsolete and unjust political orders were supplanted by new structures in which the accents were placed on the concept that all men are created equal - an idea which became firmly established as a new guiding principle in Europe.

Such revolutionary thought found no echo at the Cape. The remoteness of the Cape from Europe and the isolated frontier mentality are, perhaps, factors which counted against the importation of European radicalism. Instead, the intense hatred the Boers had for a selfish, monopolistic company rule reduced their political outlook to a fierce obsession with producing the sterling qualities necessary for survival. The isolated life of the frontier district was ideal for this. It bred an independent, resourceful and hardy strain of man and woman. Steeped in the pastoral traditions of the Old Testament, the Boers began to see themselves as God's chosen people. Strenuous constructions were placed on biblical texts to give currency to the rationale that the inequality of man and racial oppression were divinely ordained.

3 First British Occupation (1795 - 1803)

In 1795 a British squadron wrested the possession of the Cape from the Dutch. Since the new regime was only temporary and was reluctant to antagonize the colonists, it introduced only a few changes to the existing order. The administration of justice did not undergo radical reform. An instruction to Governor Macartney read: 'The administration of the civil and criminal justice do continue on the ancient grounds, except where it shall have

already been altered'.[26] The governor was instructed to take 'especial care that in all Courts established within the said Settlement Justice be impartially administered'.[27] Torture was abolished in 1796, so too were the barbaric forms of punishment.[28] However, the administration of justice remained in the hands of unqualified judges.[29]

4 Batavian Period (1803 - 1806)

In 1803, pursuant to the Treaty of Amiens, the Cape was restored to Holland, then known as the Batavian Republic.

De Mist, the new commissioner, introduced important changes in the Administration of Justice. The judicial and the executive powers, which in practice were synonymous, were separated, thus establishing the independence of the Bench.[30] A legal qualification became a prerequisite for presidency of the Raad.[31] An Attorney-General replaced the fiscal, and was no longer entitled to part of the imposed fines.[32] Arrests could be effected only by judicial decree[33] and the searching of burghers' homes

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26 Proclamation of 24/26 July 1797 Kaapse Plakaatboek (1795 - 1803) V.

27 G W Eybers Select Constitutional Documents Illustrating South African History, 1795 - 1910 (1918) 6.

28 G M Theal Records of the Cape Colony 1793 - 1831 (1897 - 1905) II 6. See also S P Whiting South Africa in the Making 1652 - 1806 (1966) 204-205. For a comprehensive discussion on the extent of the judicial reforms, see G G Visagie Regspleging en Reg aan die Kaap van 1652 tot 1806 (1969) 91-97.

29 C F Muller (ed) Five Hundred Years: A History of South Africa 2 ed (1975) 103.

30 Visagie 100-101.

31 Ibid 101.

32 Muller (ed) op cit 111.

33 Visagie op cit 105.

was subject to the fiat of the governor and the knowledge thereof by the president of the Raad.[34] The Raad was instructed to issue 'prompte en goede Justitie' irrespective of person[35] and landdrosts were ordered to guard the interests of slaves and Khoi.[36]

Furthermore, qualifications were clearly laid down for the admission of legal practitioners. The right to practise as an attorney or advocate was subject to the approval of the Raad.[37] Legal practitioners had to be of'good standing', 'good reputation' and 'proficient in the Dutch language', and they were required, except those who already had a law degree, to take an examination in judicial practice before commissaries of the Raad, before they could be admitted to practice.[38]

In proceedings before the Colleges of landdrosts and heemraden litigants were, as a rule, required to conduct their pleadings orally and in person. Legal representatives were allowed only where the circumstances of the matter required a different procedure.[39] The Colleges adhered to this practice until they ceased to exist.

In proceedings before the Raad, where a party was unable to secure the voluntary aid of a legal practitioner,

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34 Ibid.

35 Ibid 103.

36 Ibid 109.

37 Ibid 107.

38 Ibid.

39 Art 134 the Ordinance of 23 October 1825 provided: 'Voor Landdrost en Heemraden zullen partyen gehouden zyn, hunne zaak zelve, en by monde, voor te dragen en te defenderen; ten ware het Kollegie om dringende redenen billyk mogt oordeelen, een gemagtigte, of ander naar regten bevoegd persoon toe te laten, of dat de natuur der zake, behalwe de productie van bewys-stukke een Schriftelyk voordraft of defensie noodzakelyk maakte; hetgeen echter in geen geval tot een gewoon schriftelyk proses sal mogen leiden'.

the Raad could appoint either an advocate or an attorney, or both, to represent the party pro Deo or against payment.[40]

5 Second British Occupation

From 1806 to 1834 the Cape reverted to a crown colony under the full control of the British government.

Amongst the first reforms introduced by the British was the creation, in 1811, of Circuit Courts which were designed to bring justice within the reach of persons living in remote parts of the frontier. These courts would speed up the process of bringing criminals to book; in civil matters, they would eliminate the costs barriers and the practical inconveniences which discouraged aggrieved persons from seeking redress at law.[41]

In 1812 the British Parliament established a special Circuit Court to investigate complaints made by Khoi to missionaries against White farmers. Despite the practical difficulties of substantiating charges of violence committed many years before, several farmers were found guilty of withholding wages.[42] The colonists were incensed at the idea of being summonsed to appear in court at the instance of Khoi whom they held in contempt.

Pursuant to the aim of bringing into harmony with English jurisprudence the harsh and archaic procedural l[illegible] then in force at the Cape, Cradock declared that proceedings should be conducted in open court to inspire the

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40 Venter op cit 60.

41 Visagie op cit 42 and 107; Wessels op cit 363.

42 L Marquard The Story of South Africa (1955) 99-100.

confidence 'that equal Justice is administered to all in the most certain, most speedy, and least bothersome manner'.[43] Indeed, the British Government remained firm in its efforts to establish the Rule of Law a the Cape. But the Boers still felt that a man should be allowed to be a judge in his own cause. In de Kiewiet's words:

> The rule of law and the orderliness of a modern government invaded the isolation of the frontier... it was more than the law and its agents that came into the lives of the burghers. The spirit of a new age came to perplex the conservative mind on the Colony as well.[44]

6 Humanitarianism and its Effects at the Cape

While Cape frontiersmen searched for scriptural justification to entrench racist attitudes, Britain was aflame with a religious upheavel which emphasized the equality and the brotherhood of man irrespective of race. This philanthropic movement emboldened by men such as Clarkson, Strong and Somerset and which fed on eighteenth-century revolutionary thought, brought a sustained onslaught on the savage laws and barbarous institutions then existent.

In Europe the movement expressed itself chiefly through Voltaire and the Italian, Becarria, whose monumental work Of Crimes and Punishments generated strong public sentiment against the abhorrent criminal procedure of the times. One of the fundamental demands made was that all accused should have the right to counsel in criminal pro-

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43 Proclamation No 68 of 25 September 1813.

44 C W de Kiewiet A History of South Africa (1957) 42. See also Marquard op cit 55 and 111-112.

ceedings.[45]

Despite its weaknesses, the English criminal procedure was the most humane yet known. The institution of the jury had already been established and counsel was granted to an accused except in the case of felony. Eighteenth-century reformers, such as Voltaire, considered the English law the most just and the most democratic in Europe and called for reforms along common law lines.[46] Merriman points out that because judges in Anglo-Saxon jurisdictions had often been a progressive force on the side of the individual against abuse of power by the sovereign and that the struggle between the prosecutor and the defence is safeguarded by other institutions, the judiciary in England and America was not a target of the revolutionary thrust in the way it was in France.[47] Consequently, the humanitarian movement in England concentrated chiefly on improving the loathsome penal policies of the time, rescuing children from the cruel and oppressive conditions in mines and factories, and on abolishing the savage institution of slavery.

The developments in Britain and on the European continent struck no responsive chord at the Cape. Instead, farmers generated a fierce antipathy for the philanthropic movement which expressed itself on the Cape frontier in the image of British missionaries who were concerned chiefly with the lot of the oppressed subject-groups in the colony. Men such as Spearman and Barrow stringently opposed the differentiated standards of justice and the

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45 A Esmein A History of Continental Criminal Procedure II (1914) 398. See also J H Merryman The Civil Law Tradition (1969) 136-137.

46 M T Maestro Voltaire and Beccaria as Reformers of Criminal Law (1942) 106.

47 Merryman op cit 17.

barbarous punishments which landdrosts and heemraden reserved specially for the oppressed groups.[48] Pertinent are Venter's remarks:

> Die plaaslike Kolleges en veral die heemrade, was nie dieselfde gevoelens toegedaan nie. Die kolonis was nie 'n ideoloog nie. Hy was 'n praktiese persoon wat die kleurling geken het en verstaan het, en die teories van die gelykheid van alle mense, wit of swart, was iets wat hy nie kon aanvaar nie. Sy verhouding teenoor die slawe, sy ervarings met die Boesman en met ander gekleurde rasse, het alles daartoe bygedra om die kleurling in die oë van die koloniste op 'n laer peil te plaas.[49]

7 The Xhosa and the European Law

Individual cases of gross injustice meted out to Black offenders, as opposed to the astonishingly light fines imposed on Whites for brutally assaulting Blacks, are well chronicled by Bannister, the late Attorney-General in New South Wales, when he visited the Cape during 1828 - 1829.[50] Only those Blacks, he noticed, who accidentally benefited from experienced legal advice or whose grievances filtered through to the governor, were given a fair trial.[51]

In contrast to the case-loads of justice dispensed with in the inferior courts, Bannister was profoundly struck by the stringent legal discipline and strong sense

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48 Wilson and Thompson op cit 272-275; Venter op cit 47.

49 Venter op cit 47.

50 S Bannister Humane Policy or Justice to the Aborigines of New Settlements (1830) 27-38.

51 Ibid 31.

of justice amongst the Xhosa.[52] To this observation he adds:

> Little, then, need be said of the acuteness with which flagrant injustice is likely to be felt by them, when inflicted too by strangers, whom all appearances indicate not only to be planning the overthrew of their natural independence but also the spoliation of their very poor possessions.[53]

Among some of the suggestions put forward by Bannister were the following.[54]

(a) that suitable Blacks be appointed as judges and assessors;

(b) that the death sentence, banishment and corporal punishment for Black offenders be abolished:

(c) that interpreters be provided in the courts;

(d) that there should be equality of rights before the courts; and

(e) that the legal codes of Black tribes be studied closer and respected.

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52 Ibid 34: 'The Koussas are indeed known to be great lawyers, having individual chiefs famed for their knowledge of decided cases. They are said by well-informed persons to hold mock debates, in order to be better prepared when real business arises. Mr. Bentham, and the continental jurisconsults of Europe, would be interested to find that in all cases the parties charged criminally or civilly not only have an opportunity of answering questions in the suit, but their replies are weighed by the judge as part of the evide.. e, subject to proper deductions for their interest. The foundation of the interrogating system is doubtless to be found in usages like that of the Caffres; and it deserves notice that at our requisition they lately condemned four murderers with the clearest justice, who would probably have escaped by English procedure. They were Caffres who had killed two British soldiers without provocation'.

53 Ibid 48.

54 S Bannister British Colonization and Coloured Tribes (1838) 279-280.

8 The Right to Counsel and Trial by Jury

With the introduction in September 1819 of a code of criminal procedure, entitled 'Crown Trial', which was to regulate the conduct of proceedings in criminal cases until 1828, the criminal justice process at the Cape was brought into conformity with English standards. Among some of the radical changes the code introduced was the abolition of the important dinstinction between ordinary and extraordinary procedure.[55]

The code distinguished between misdemeanours not subject to public punishment and crimes subject to public punishment. In proceedings of the latter type the accused had no right to counsel until he had been interrogated by the Court, but thereafter he was allowed to employ an advocate 'to assist him in putting questions to the witnesses both in favour of and against him', and was further 'allowed to entrust an advocate with his defence on all points of law that may immediately turn up and with all pleading in defence of the main cause'.[56] The belated engagement of counsel often resulted in ill-prepared defences.[57]

In criminal proceedings pertaining to misdemeanours, no interrogation of the accused was allowed.[58] The accused was denied the assistance of counsel at any stage of such proceedings unless he was incapacitated by 'old age, or other legal impediment' in which case the court allowed him to engage an attorney.[59]

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55 Art 136. For the text of the Code, see Theal op cit XXV 90.

56 Arts 65 and 67.

57 Theal op cit XXXIII 82. See also J Dugard Introduction to Criminal Procedure IV (1977) 22.

58 Art 110.

59 Art 125.

In 1827 Colleges of landdrost and heemraden were abolished and replaced by full-time resident magistrates.[60] In the same year a Supreme Court, consisting of judges with security of tenure[61], was established for the Cape of Good Hope.

Ordinance No. 40 of 1828 provided that an accused committed for examination was not allowed, prior to committal for trial, the access of his friends or legal advisers without the permission of a magistrate.[62] Nor was a prisoner, as of right, entitled to the assistance of a legal adviser during the preparatory examination.[63]

Trial by jury was instituted[64] without regard to the recommendation of the Bigge and Colebrooke Commission of Enquiry that such an institution would afford the Blacks little protection against the prejudices and hostile feelings of Whites who would - by virtue of eligibility requirements - constitute the juries.[65] In interracial suits, the jurors were predominantly or entirely White, a factor which resulted in serious miscarriages of justice from time to time.[66] Eligibility to act as juror was not based on colour or race. However, in practice, Mohammedans were always excluded because they swear by the Koran.[67]

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60 Ord No 33 of 19 December 1827.

61 By letters patent of 24 August 1827: Theal op cit XXXII 254ff.

62 Art 38.

63 Art 39.

64 By letters patent of 24 August 1827: Theal op cit XXXII 254ff.

65 See generally, Dugard Introduction to Criminal Procedure 23-24.

66 Ibid 39.

67 W Wright Slavery at the Cape of Good Hope (1831) 52.

Other persons of colour, together with a great portion of the Boers, were generally rejected on the grounds that they were not acquainted with the English language.[68]

9 Right to Counsel in the Trekker Republics

a Orange Free State

In the Free State, the Colleges of landdrosts and heemraden continued to exist until 1902 when they were replaced by resident magistrates' courts.

The rules regarding access to a prisoner by friends, relatives or counsel, were taken over from Ordinance No. 40 of 1828 of the Cape Colony.[69] Landdrosts were, for the most part, farmers who knew little or nothing about the law and could receive little guidance from Attorneys-General. The naivete of one such Attorney-General, Papenfus, emerges in a circular sent to landdrosts in which he stated that it was wrong (verkeerd) to provide an accused at a preliminary hearing with counsel, because it multiplies the costs and difficulties of the proceedings, all for the sake of acquitting a guilty person.[70]

In appeals to the Hoog Gerechtshof it was not necessary that the accused be present in person; he could be represented by counsel. But where he was too indigent, a pleitbezorger was assigned by the appellate court to act Pro Deo.[71]

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68 Ibid.

69 See Ord No 4 of 1856 in Wetboek (1851 - 1884).

70 G D Scholtz Die Constitusie en die Staatsinstellings van de Oranje-Vrystaat 1854 - 1902 (1937) 150.

71 Art 150 (Wetboek).

Following the British annexation a new criminal procedure ordinance[72] was enacted. Article 45 entitled the accused to counsel's assistance during the examination and after, not before[73], and to demand that any witnesses offered by him be heard.

b South African Republic (Transvaal)

Prior to 1858, the Administration of Justice in the South African Republic was governed by the Thirty Three Articles drawn up in 1844.[74]

As in the Free State, the justice machinery was in the hands of untrained and unskilled men who constituted the Burger Raad. A party appearing before the Burger Raad could conduct his own case or appoint another to appear on his behalf.[75]

Leave to institute pro-Deo proceedings in civil matters was granted by the Grondwet of 1858.[76] The indigent party was required to submit to the court where the litigation was pending, a written application accompanied by written evidence from the local field-cornet and two neighbours which attested the applicant's indigence. The court then examined the applicant's claim, and only after hearing the opponent would it decide whether there was a cause of action.[77]

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72 No 12 of 1902.

73 Art 44.

74 J G Kotzé 'The Administration of Justice in the South African Republic (Transvaal)'(1919) 36 SALJ 128 at 129.

75 Ibid.

76 Art 156. For the text of the Grondwet, see F Jeppe and J G Kotzé De Localen Wetten der Zuid Afrikaansche Republiek 1849 - 1885 (1887) 35 ff.

77 Art 156(a).

The accused's right to counsel in criminal trials was given recognition with the enactment of the Criminal Procedure Ordinance No. 5 of 1864[78] which closely resembled the Cape Ordinance No. 40 of 1828. Also in 1864, members of the Volksraad were authorised to appear for others in court.[79] An indigent accused, or one who was deprived of income because of imprisonment, was assigned pro-Deo counsel.[80]

In 1903 a comprehensive code of criminal procedure was enacted for the Transvaal.[81] Unlike the Cape Ordinance No. 40 of 1828 on which it was largely based, the Transvaal code also regulated the trial itself. Article 168, however, replaced the 'generous provision'[82] which allowed for pro-Deo legal representation of an indigent accused[83] by a general recognition of the accused's right to counsel at his trial.

c Natal

The rules regarding the right to counsel in criminal proceedings were identical to those in force at the Cape except that the Natal law, in 1861, allowed any prisoner under commital for examination or for trial, the access of a legal adviser.[84]

Regarding persons under preparatory examinations the Natal law contained two restrictive provisos: the one

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78 Art 90. See S Selkowitz 'Defence by Counsel in Criminal Proceedings under South African Law' (1965 - 1966) Acta Juridica 53 at 67.

79 Volksraadbesluit of 14 June 1870 (art 181).

80 Art 98.

81 Ordinance No 1 of 1903.

82 Dugard Introduction to Criminal Procedure 31.

83 Note 81 supra.

84 S 4 of Law No 16 of 1861.

being that the room or building in which the magistrate was conducting the examination was not to be deemed an open court; the other being that the magistrate could enjoin any person from having access to the arrested person if the ends of justice would be best answered by so doing.[85] In the case of Regina v Nomcabe and Others[86] it was held that the Supreme Court would not interfere by way of interdict to stay proceedings in a preparatory examination where the magistrate had exercised his discretion against allowing counsel's presence at such an examination. In his dissent, Turnbull J held that since the passing of the 1861 law a prisoner had an absolute right to the access of his legal adviser:[87]

> I may here state that I cannot imagine a case which the ends of justice would be best answered by refusing the access of a legal adviser. The "ends of justice" surely include justice to the prisoner as well as the public.[88]

10 The Right to Counsel in Post-Union South Africa

The criminal procedure codes of the various colonies remained in force until 1917 when they were consolidated into the Criminal Procedure and Evidence Act.[89] This Act, which was based largely on the Transvaal Criminal Procedure Ordinance of 1903, accorded the accused the right to counsel after arrest[90], during the preparatory examination[91]

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85 Ibid.
86 (1892) 13 NLR 247.
87 Ibid at 250.
88 Ibid at 252.
89 Act 31 of 1917.
90 Ibid s 97(1).
91 Ibid s 97(2).

and at the trial.[92] But like the Transvaal Ordinance, no provision was made for pro-Deo legal representation of the indigent accused.

The provisions on the right to counsel were re-enacted in the Criminal Procedure Act of 1955[93] and again in the present Criminal Procedure Act, 51 of 1977. At present the accused is entitled to counsel from the time of his arrest subject (a) to prison regulations[94] and (b) to the 'drastic process' provisions of the Internal Security Act.[95] The accused's right to counsel is furthermore subject to the provision that counsel 'is not in terms of any law prohibited from appearing at the proceedings in question'.[96]

This latter proviso is intended to refer to those lawyers who are actively opposed to the Government's policies and upon whom the Minister of Justice has imposed restrictions in the exercise of their professional duties. In the 1950s and 1960s especially, a number of lawyers attracted official resentment for their active roles in opposition politics. Among them were Rowley Ahrenstein, Hyman Barner, 'Bill' Bhengu, Richard Canca, Joel Carlson, 'Bram' Fischer, Ruth Hayman, Sam Kahn, Anton Lembede, Nelson Mandela, Ismail Meer, George Montsioa, 'Duma' Nokwe, Alfred Mangena, Godfrey Pitje, Pixley Seme, Jaydew Singh, Joe Slovo and Oliver Tambo.[97] They were frequently harassed by the authorities. Some of them who

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92 Ibid - 218.

93 Act 56 of 1955.

94 S 73(1) of Act 51 of 1977.

95 Act 74 of 1982.

96 S 73(2) of Act 51 of 1977.

97 See, generally, T Karis and G Carter (eds) From Protest to Challenge: A Documentary History of African Politics in South Africa 1882 - 1964 IV (1977).

regularly defended persons charged with political offences were visited with banning orders which curtailed their professional work and diminished their usefulness to the public, especially the Black population. A case in point is that of Advocate Nokwe whose banning order made it impossible for him to appear in the Supreme Court in Pretoria.[98]

a Case-law on the Right to Counsel

A 'good many years' prior to Union, a judge presiding over a murder trial in Port Nolloth warned that he would in future refuse to try a murder case should the accused be unrepresented.[99] This attitude underscores the gravity with which Courts in South Africa have viewed the individual's right to legal assistance.

The fundamental nature of this right has been upheld in a number of cases: In Brink and Others v Commissioner of Police[100], Galgut J stated forcibly:

> It 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.[101]

And further, this right

> is so fundamental that it should only be taken away if the regulations specifically say so, or if the regulations say so by necessary implication.[102]

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98 Ibid 121.

99 See (1913) 30 SALJ 186 at 187.

100 1960 (3) SA 65 (T).

101 Ibid at 67. Cf concurring judgement of Bressler J in R v Slabbert 1956 (4) SA 18 (T) at 22.

102 Brink's case at 69.

In R v Mtetwe[103], Smit A J P held:

> Every person is entitled to obtain for himself legal representation at his trial and should be afforded an opportunity of doing so when it is reasonably demanded.[104]

The right to counsel is not absolute and in no case has it been held that the fact per se that an accused is denied legal representation constitutes a ground to vitiate proceedings.[105] Nor are proceedings vitiated where the accused refuses legal representation and where no irregularity occurs by which he is deprived of it.[106] Where the accused is not legally represented, the court draws the accused's attention to the advantages of being legally represented. Should the accused fail to secure legal assistance, the court takes all reasonable steps to protect the interests of the accused.[107]

But a straightforward refusal to allow an accused at his trial to have audience through counsel is, in the words of Van Zyl J in S v Blooms[108],

> such a gross departure from the established rules of procedure that the accused in such circumstances has not been properly tried and this being per se a failure of justice it is not necessary for a reviewing tribunal to enquire whether a "reasonable" trial court would inevitably have convicted if the irregularity had not taken place.[109]

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103 1957 (4) SA 298 (O).

104 Ibid at 299.

105 S v Nongila and another 1970 (3) SA 97 (E) at 99.

106 S v Baloyi 1978 (3) SA 290 (T) at 291.

107 R v Hepworth 1928 (A) 265 at 277. Cf Baloyi's case (previous note) at 293; S v Seheri en andere 1964 1 SA 29 (A) at 35.

108 1966 (4) SA 417 (C).

109 Ibid at 421. Cf S v Wessels and another 1966 (4) SA 89 (C) at 97; Khumbusa v The State and another 1977 (1) SA 394 (N) at 397.

An accused who is unrepresented at a trial through his attorney's fault does not forfeit his right to legal representation; and a refusal by the court to grant a postponement to allow the accused to be represented at a later stage constitutes a failure of justice.[110] The presiding officer's discretion whether or not to grant postponement derives from section 168 of the Criminal Procedure Act.[111] An appellate court will interfere with such a refusal to grant postponement only if the discretion has not been exercised in a judicial manner.[112] It is important, however, that the accused's application for legal assistance should not be capricious or designed to obstruct justice.[113] But on the other hand, an accused is entitled to refuse to plead in terms of section 115 (1) of the Criminal Procedure Act until consultation with a legal adviser. In S v Mkhize[114] Goldstone A J held:

> Om aan the dring dat 'n beskuldigde moet pleit nadat sy te kenne gegee het dat sy eers 'n regsverteenwoordiger wil raadpleeg is 'n growwe afwyking van die gevestigde prosesreels en teenstrydig met so 'n beskuldigde se fundamentele reg tot bystand.[115]

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110 S v Seheri en andere (supra note 107) at 36.

111 51 of 1977.

112 Desai v R 1953 (1) PH 414; R v Zackey 1945 505 (A) at 511; R v Joannou 1957 (4) SA 385 (FC) at 386; Ndanozonke and another v Nel NO and another 1971 (3) SA 217 (E) at 219-220; S v Seheri en andere (supra note 107) at 33.

113 S v Heyman and another 1966 (4) 598 (A) at 604; R v Second 1969 (4) 255 (RA) 257.

114 1978 (3) SA 1065 (T).

115 Ibid at 1066.

11 THE POOR, THE LAW AND THE COURTS (1910 - 1935)

1 Introduction

Before describing the efforts undertaken to provide legal assistance for the poor, it is necessary to review broadly the milieu of the times. The period looked at is that between the time of the Union in 1910 until the 1930s. It was the period which witnessed the rapid transformation of a subsistence economy into a money economy, a phenomenon marked by a competition between political and social rights on the one hand, and economic interests on the other. At the same time it was the period which marked the birth of Afrikaner nationalism, which depended for its survival on the wholescale subordination of the Black man. With the tacit approval of the colonial power, Great Britain, which feared antagonizing the Boers once again, the Union Parliament began enacting laws which gradually weakened the Black man's influence in both the political and economic spheres. The historian, de Kiewiet, points out:

> The Union Constitution, in native policy, at all events, represented the triumph of the frontier, and into the hands of the frontier was delivered the future of the native peoples. It was the conviction of the frontier that the foundations of society were race and the privileges of race.[1]

2 Repressive Laws

One of the first harsh laws passed by the Union Parliament was the Natives Land Act of 1913.[2] This law made

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1 Op cit 150.

2 Act 27 of 1913.

it impossible for Africans to acquire land in most parts of the country. In addition, it aimed at eliminating rent-paying rural squatters, or to reduce them to the status of labour tenants. White farmers were thus able to evict Africans who, in some cases, had occupied the land for generations before the White owner acquired it.[3]

To reduce the Africans to circumstances of servitude, the old Masters and Servants Acts[4], a typical feature of British and French colonial policy, were retained. These laws criminalized the breach of an employment contract and permitted the infliction of corporal punishment on male servants up to 18 years of age for any contravention of these Acts. The Master and Servants laws were reinforced by the Native Service Contract Act of 1932[5] which stipulated that a contract entered into by an African is binding on his children, without consent, up to the age of 18 years. The whole family was thus automatically exposed to criminal sanction.

To control the movement of African workers into the urban areas and to regulate their movements in the towns, the notorious 'pass laws' were enacted.[6]

Under the Government's 'civilized labour policy' several industrial laws were enacted which aimed at blunting the competitive edge of African workers. The word 'civilized' applied only to Whites, for it was felt that wages

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3 F Troup South Africa: An Historical Introduction (1975) 219.

4 These laws were modelled on an old Cape statute, Act 15 of 1856 (C).

5 Act 24 of 1932.

6 The Natives (Urban Areas) Act 21 of 1923 as amended by Act 25 of 1930 and the Native Taxation and Development Act 41 of 1925.

paid to Africans should be in keeping with 'the bare requirement of the necessities of life as understood among barbarous and underdeveloped peoples'.[7] For the benefit of White workers, the Industrial Conciliation Act[8] was passed. It excluded Africans from the definition of 'employee' and from membership of recognized trade unions. The Apprenticeship Act[9] was used to make it impossible for Africans and the great majority of Coloureds to be enrolled as apprentices. At the instigation of White workers, the so-called 'Colour Bar' Act[10] was passed which specifically excluded Indian and African workers from obtaining certificates of competency in certain classes of mining occupations. And to ensure that there was no political activity amongst African workers, the Native Administration Act[11] was passed which empowered the governor-general to govern all African areas by proclamation and to ban political dissidents to particular areas without judicial sanction - a drastic measure considering that, in fact, the aggrieved African Labourer had 'no possible chance of asserting his rights through civil procedure'.[12]

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7 Department of Labour Circular No 5 of 31 October 1924.

8 Act 11 of 1924 as amended by Acts 24 of 1930 and 7 of 1933.

9 Act 26 of 1922 as amended by Acts 15 of 1924 and 22 of 1930.

10 The Mines and Works Act, re-enacted as Act 25 of 1926.

11 Act 38 of 1927. Already in 1914 the Riotous Assemblies and Criminal Law Amendment Act 24 of 1914 was passed. This law provided for the imposition of penalties on persons who compelled others to join trade unions or breach employment contracts in public utility services. Furthermore, it empowered magistrates, acting under special authority from the Minister of Justice, to prohibit public gatherings which, in their opinion, jeopardized public peace and to order the arrest of any speaker or listener at such meetings and, lastly, to order the police to fire.

12 Report of the Economic and Wage Commission UG 14 of 1926 40.

3 The Social Climate

The eviction of Africans from the farms gave rise to landlessness and poverty.[13] The thousands who wandered into the towns in search of work, swelled the overcrowded urban slums.[14] To augment their low wages, many were driven to engage in various illegal activities which, in turn, made them the object of intense police harassment.[15]

The Old Age Pension Act[16] made provision only for Whites and Coloureds. Africans and Indians were excluded. Unemployment insurance, rural housing, hostels for low-paid workers, assistance for the physically unfit, homes for old aged - all these were inadequately provided for Whites, very occasionally for Coloureds and Indians, but not at all for Africans.[17] In the work environment African women

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13 Troup op cit 220.

14 E H Brookes The History of Native Policy in South Africa (1924) 403 and 499.

15 Troupe op cit at 257-258 writes: 'Their extreme poverty made the brewing and sale of beer the obvious and often the only way women could augment a family income that might be far below the bread line. So brewing and illicit liquor-dealing were big business. The constant and often brutally conducted police raids in search of contraventions of the regulations made the liquor laws second only to pass laws as a source of resentment against the Government and of bitter hostility between Africans, particularly women, and the police; tinder which could and frequently did flare into rioting'.

16 Act 22 of 1928.

17 J Burger The Black Man's Burden (1943) 148. For Africans, until 1934, compensation for industrial disablement was available only under the Native Labour Regulation Act of 1911 which made no provision for temporary disablement. This situation was changed by the Workmen's Compensation Act of 1934 which provided for the appointment of an official at the Native Affairs Department to look into cases entitled to compensation, and to assess and collect the amount due.

and juveniles enjoyed limited protection under the Factories Act of 1918[18] which placed restrictions on their working hours and which provided for inspectors to ensure decent working conditions. But because of ignorance and partly because of the employers' reluctance to inform them of their rights, Africans seldom benefited from the provisions of this Act, especially their right to remuneration for overtime work done.[19]

a The Poor Whites

The numerous laws passed to secure the rights and privileges of the Whites did nothing to contain the growing number of poor Whites. This class of Whites who were noticed already during the Boer War[20] were, for the most part, unsuccessful farmers, bijwoners or squatters on the farms of others, and victims of excessive sub-divisions of land under the Roman-Dutch laws of succession.[21] Despite the massive material support given to them by the Government[22], their number increased gradually to about 300 000[23] at the start of the world economic recession and to about 450 000 (20 % of the white population) in the year 1939.[24]

The poor-Whites problem was aggravated by their 'natural contempt for hard unskilled labour which the existence

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18 Act 29 of 1918 as amended by Act 26 of 1931.

19 C Leubuscher Der Südafrikanische Eingeborene als Industriearbeiter und als Stadtbewohner (1931) 104.

20 J Bryce Impressions of South Africa 3 ed (1899) 382.

21 Troup [illegible] 236.

22 Between April 1933 and December 1934 the Government spent 20 million in state support for the poor Whites. R Krahmann 'Die Armen Blanken in Südafrika' (1938) Zeitschrift für Geopolitik 544 at 545.

23 H Krieger Das Rassenrecht in Südafrika (1944) 45.

24 M Timmler 'Armut inmitten des Goldes' (1939) Deutsche Kolonialzeitung 355.

of slavery inspired in the Whites.'[25] They had no sense for the ethical value of work and spurned all the work done by Africans and Coloureds as 'kaffir work' below their dignitey.[26] They would only do manual work when 'driven to it by starvation'.[27] Rather than working side by side with Africans and Coloureds they resigned themselves to idleness, vagrancy and beggary.[28] Given their low social status, they attached great importance to the colour of their skin and were generally hostile to other racial groups, particularly the Africans. Brookes comments:'Cases of third grade clerks, messengers and policemen displaying boorishness are quite common. Partly it is the old "drest in a little brief authority" tag; partly it is that these minor officials, feeling that their superiority to the Native is not exactly self-evident, wish to emphasize it.'[29]

The fact is that poor Whites were troubled by deep-seated feelings of insecurity. They had just emerged from a hard, gruesome war which they lost. Some 4000 of their men, including their politicians who had been generals in the war, were killed in battle; not to speak of their 26 000 women and children who succumbed to the barbarous conditions that prevailed in the concentration camps set by the British.[30] Their land which had been their way of life and pillar of respect had been laid waste by the British.

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25 Bryce op cit 382.

26 Leubuscher op cit 58; Troupe op cit 236.

27 Report of the Transvaal Indigency Commission 1906 - 1908. T.G. 13 (1908) 36 (cited by Leubuscher op cit 58). Cf Bryce op cit 382.

28 Krieger op cit 44.

29 Op cit 487.

30 Troup op cit 190.

They were fearful of urban life and afraid of being exploited.[31] The Church's Armesorg (parochial relief) program provided them with food and blankets, but what they needed, too, was hard, practical legal advice on how to assert their rights in fields so largely controlled by English and Jewish interests.[32] The large-scale resocialization caused by the industrial expansion had created a maze of new and complex legal relationship which contrasted sharply to the semi-feudal, legally undefined, bywoner status to which many of the 'poor Whites' had grown accustomed. The legal profession, like all other professions, was dominated by Jews and the English from whom the Afrikaners, as a whole, were separated by a psychic barrier. Besides, legal services had become costlier and only a few could afford the aid of an attorney. Gone were the days when raad (counsel) could be obtained cheaply from the stoeps of the old Republican presidents.[33]

4 The Administration of Justice

The basis of the civil law was the Roman Dutch law while the statute law was fundamentally British. Native law enjoyed only limited recognition on the grounds that part of it was 'repugnant to the general principles of humanity obtaining throughout the civilized world.'[34] However, in 1927 the Native Administration Act gave statutory recognition to Native customary law in all provinces of

31 G M Carter The Politics of Inequality (1958) 259.

32 Ibid.

33 See E Walker A History of Southern Africa 3 ed (1957) 647.

34 South African Native Affairs Commission 1903-5 V 380.

the Union.[35] This Act provided for the creation of special courts, Native Commissioners Courts, for the hearing of civil disputes between Africans.[36] In criminal matters Africans were subject to the ordinary criminal law of the Union except for the limited extent to which chiefs' courts disposed of minor criminal cases.

The criminal laws which were enacted purely in the interests of bolstering White supremacy, reflected no sympathy for the social and cultural heritage of the Africans[37]; nor did they reflect consideration for the economic needs of the resocialized urban Black population: Africans, Coloureds, and Indians. But of more concern to the entire Black population was the administration of the law which, as Lord Hailey correctly points out, is a matter of greater interest to the population and affects 'its respect for law more vitally than any matter of legal principle'.[38] The principle of 'equality before the law' which was repeatedly enunciated by the Supreme Court of South Africa at the time, found no echo in the practical administration of the law. Nowhere was this as strikingly illustrated as in the field of criminal justice.

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35 Act 38 of 1927.

36 Ibid s 10 (1). In disputes between Africans involving 'customs followed by Bantu', Commissioners have the judicial discretion to decide whether African customary law or the general law of the land shall apply. S 11(1).

37 African customary law, for example, makes no sharp distinction between a crime and a delict. Theft, for example, is, according to customary law, a civil wrong punishable by restitution of the res and compensation in kind. Murder was punishable by death. Imprisonment was unknown. See Brookes op cit 176.

38 An African Survey: A Study of Problems Arising in Africa South of the Sahara (1938) 280.

a The Police

For the large part, the police were recruited from the ranks of the 'young country-bred' [39] Whites who generally had no respect for the Black man nor any understanding of the urban worker.[40] In their dealings with Blacks they were generally callous.[41] From the point of view of Blacks, on the other hand, the police were more of a persecuting than a protection force[42] - a justifiable attitude in view of the fact that most Blacks were usually arrested for statutory crimes which carried no moral opprobrium. In 1935 alone, 63 149 Africans were arrested under the 'pass' laws, 70 957 under the liquor laws and 63 072 under the Native Taxation Act.[43]

In the country districts, far from the public eye, police often overstepped their powers when investigating complaints by White farmers against their Black labourers. In this regard Burger observed:

> A policeman called out to the European farm on a suspected case of stock theft is just as anxious to obtain a conviction as is the owner of the stock. He meets the farmer so-

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39 E A Walker 647.

40 Ibid.

41 Brookes op cit writes at 492: 'The manners of the police towards Natives require but little comment. Nothing could be more offensive than the way in which a Native, walking out on Sunday afternoon with his friends, is suddenly and peremptorily held up to produce his pass. This production is quite uncalled for and unnecessary: it serves no purpose but the temporary magnifying of the policeman's self-importance. But the manner in which the document is called for instils into the mind, even of the apathetic "kitchen-boy", a burning hatred of the Pass and everything connected with it'.

42 Burger op cit 165.

43 Official Year Book of the Union of South Africa 1937 424. For criticism of the legislation rendering Black persons criminal, see Report of the Interdepartmental Committee on Native Pass Laws U G 41 of 1922 paras 720 ff.

> cially, hears the whole story from him, and then proceeds to interrogate the accused, usually in the presence of his employer. These interrogations are often irregular, and not infrequently witnesses and accused are compelled by force to give the desired evidence that will secure a conviction. An accused Native is ignorant of his legal rights, and police fail to inform him, that he is not legally compelled to make a statement, or that such a statement may be used in evidence against him.'[44]

b The Courts

Before 193. criminal trials were normally held before a judge and a jury, but the accused could choose whether he wished to be tried by a judge with assessors, instead of a jury.[45] In practice, however, the principle 'a man shall not be tried except by a jury of his peers' did not apply to Africans, who were not eligible to serve on juries. Eligibility to act as a juror was based on both franchise and property qualifications. In practice this meant that in the Transvaal[46] and the Orange Free State[47] only Whites

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44 OP cit 164.

45 S 216 (1) of the Criminal Procedure and Evidence Act 31 of 1917.

46 Art 131 of the Transvaal Grondwet of 1858 stipulated that only enfranchised persons could act as jurors. But according to the Wet Regelende het Algemeen Kiesregt der Burgers 1 of 1876, only Whites qualified for enfranchisement in accordance with the principle 'het volk wil geene gelijkstelling van gekleurden met blanke ingezetenen toestaan, noch in Kerk noch in Staat' (Art 9 of the Transvaal Grondwet). See also S 2 of the Jury Ordinance 10 of 1902.

47 The majority of Africans and Coloureds were disqualified from acting as jurors by S 1 of the Ordonnansie Reguleerende de Kwalificatie en Pligten van Jurymannen 2 of 1857 which prescribed the ownership of immovable property as qualification to act a juror. Only in exceptional cases were Coloured persons allowed to own property. See SS 1-10 of the Ordonnansie ter Bepaling der Rechten van Kleurlingen ten opzichte van Vastgoed (Wetboek van die Oranjevrijstaat 1891).

could act as jurors. The same was true of Natal which had only a negligible number of African, Indian and Coloured registered voters.[48] In the Cape, the majority of Coloured and African registered voters were disqualified from serving on juries by the stringent means test which was almost triple that laid down by the Franchise and Ballot Act 9 of 1892.[49]

The invariably White juries were in most cases prejudiced against the Black accused where the victim was White, or prejudiced in favour of the White accused where the victim was Black - a phenomenon which led to much injustice.[50] But Africans, Coloureds and Indians were seldom aware of their right to be tried without a jury.[51] In response to the grave miscarriages of justice, in 1935, the Minister of Justice was empowered to direct that certain cases of alleged crimes by 'non-Europeans' against 'Europeans', or by 'Europeans' against 'non-Europeans' be tried by a judge and assessors instead of a jury.[52]

Most of the criminal cases were conducted in the magistrates' courts. Of immense disadvantage to the Africans who constituted the major clientele of the courts, was the formal, rigid court procedure which contrasted sharply to

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48 For statistics from 1911 onwards, see Official Year Book of the Union of South Africa 1938 123.

49 S 4(a) of this Act raised the property qualification for all from £25 to £75. Also introduced was a simple literary test (S 6). These requirements alone had the effect of disqualifying the large majority of Coloureds for the franchise.

50 See Dugard Introduction to Criminal Procedure 39 especially note 51 on the same page.

51 Hailey op cit 281.

52 S 36 (5) of Act 46 of 1935.

the leisurely and popular atmosphere of the chiefs' tribal courts.[53] In the Union courts proceedings were conducted in English or Afrikaans. Magistrates were not required to possess any standard of knowledge of the vernacular.[54] Though interpreters were widely used, the standard of interpretation was poor.[55] Because of indigence, the accused were invariably without legal assistance except when facing a murder charge, in which case state-remunerated pro-Deo counsel was provided. In the small country towns White attorneys, fearing public opinion, generally shied away from defending Africans especially where the charge was brought by a local White employer.[56]

While judges took pains to ensure that the accused was afforded a fair trial with all the procedural safeguards, this was not universally so in the case of magistrates who, in the smaller towns, were amenable to White opinion.[57] Also, magistrates were overworked officials who had to attend to both judicial and administrative duties, and they were, as a rule, not prepared to listen patiently to the dilatory and picturesque evidence of Africans. For the most part magistrates were practically minded men with little training in theoretical jurisprudence.[58] Their early training had as a rule

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53 For a detailed description of litigation according to African customary law, see S M Seymour Native Law in South Africa (1953) 38-39. See further Brookes op cit 175-176 and Burger op cit 155.

54 Hailey op cit 282.

55 Ibid. See also Burger op cit 154-155.

56 Burger op cit 155.

57 Ibid 153 and Hailey op cit 282.

58 Brookes op cit 228.

accustomed them to look through the eyes of the public prosecutor and trust overmuch to police evidence'.[59]

In the magistrates' courts the sentences imposed on Africans were in many cases disproportionate to the crime committed and differed sharply from those imposed on Whites found guilty of similar crimes.[60] This caused the editor of the East-London Daily Dispatch to comment on 24 June 1938:

> Previous convictions seem to be the usual excuse for imposing sentences which are obviously out of all proportion to the crime which calls them forth. Thanks to the pass laws and poll tax (the general tax) previous convictions in the case of Natives, especially poor Natives, are generally hard to find. The magisterial conscience can apparently satisfy itself with these purely technical offences. The Department of Justice, whose job it is to look out for discrepancies and to intervene if necessary to scales of justice even, is apparent[illegible]ed by the unenviable reputation that must inevitably attach to a system where magistrates have continually to be rebuked in the very strongest terms by the judges. Can the people of South Africa really rest content to have their system of justice arraigned at the bar of civilised opinion as a barbarous and iniqu[illegible]us one? [61]

5 Legal Assistance for the Poor

As pointed out above[62], the practice of appointing counsel or an attorney to act for a poor litigant had been in force both under the Roman-Dutch law and the English law.

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59 Walker op cit 647.

60 Ibid 646-647. See further Burger op cit 156-158.

61 Cited by Burger op cit 157.

62 In C 10.

This practice was incorporated into the South African legal system and is still extant today. At civil law indigent litigants are assigned gratuitous legal assistance under the rules governing pauper proceedings; and in the criminal justice process an indigent accused facing a capital charge is assigned counsel who acts pro Deo.

The discussion below focuses on both the pauper and pro-Deo proceedings together with other relief schemes as they functioned during the first three decades of this century, being the period under discussion.

a Pauper Proceedings

In theory, any person who did not have the means of going to law, could petition the court where the litigation was pending, for leave to sue, or defend, in forma pauperis. In the petition, the applicant was required to set forth briefly the claim, the cause of action and that he did not own property to the value of a fixed amount apart from household goods, wearing apparel, tools of trade and the thing claimed in the suit. The application had to be verified by affidavit and had to be accompanied by the sworn statements of two other parties, or the attorney acting for the petitioner, testifying as to the petitioner's indigence.

Where the application was granted, a Rule nisi would be issued, calling upon the opponent to show cause why the petitioner should not be allowed to litigate in forma pauperis. If on the return day of the Rule no cause, or not sufficient cause to the contrary was shown, the indigent party was allowed to sue or defend as a pauper.

Attorneys and counsel acting for paupers were enjoined from taking any fee except where costs were awarded against the pauper's opponent, in which case they were entitled to their usual fees and costs on taxation.

The broad theory outlined above was so thickly glossed with technical exceptions and limitations that in practice it was only of slender benefit. The application and interpretation of the rules differed from province to province and were amended from time to time. In the Cape Province, for example, only incolae could sue in forma pauperis[63]; peregrini wishing to do so had to furnish security for costs.[64] The merits test, too, was applied with vacillating strictness, varying from the requirement that the applicant show a prima facie case[65] to the requirement that the applicant show that on balance the probabilities were in his favour.[66]

The means test was stringent. The property ceiling was fixed at the conservative level of £25 in ordinary matters and £15 in divorce proceedings. In the Appellate Division the ceiling was £50 for the appellant and £20 for the respondent. No adjustments were made to these ceilings despite the changing real value of money. Instead, they were adhered to for more than half a century![67]

The grant of pauper relief exempted the beneficiary only from paying the attorney's and counsel's fees and the Court fees; not from all other expenses such as the Deputy Sheriff's and the agent's charges, witnesses' expenses, advertisements in the newspapers in the case of edictal proceedings, postages and stationery.[68] The spectre of

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63 L D van Winsen J P G Eksteen and A C Cillier The Civil Practice of the Superior Courts in South Africa 3 ed (1979) 804.

64 Slocock v Plenderleith 1927 C 338.

65 Brink v N G Kerk in de Transvaal 1907 T 183 at 185.

66 Du Plessis v Marais 1931 E at 72.

67 H R Hahlo and E Kahn The Union of South Africa: The Development of its Laws and Consititution (1960) note 94 at 290.

68 C H Van Zyl The Theory of the Judicial Practice of the Colony of the Cape of the Good Hope and of South Africa Generally (1902) 340-341.

having to pay for these items caused many a potential litigant to abandon the idea of an action.[69] In the Cape, the Rules of Court relating to the Poor Fund were practically useless, as no such fund existed, nor was provision ever made for creating one.[70]

Apart from the technical barricades within the in forma pauperis procedure itself, there were many other levels of personal barriers which had to be overcome before indigent persons could effectively vindicate their rights. Included among these barriers were: the problem of recognizing a legally enforceable right; awareness of the existence of the pauper relief institution; courage and psychic willingness to assert the claim at law; access to attorneys; ability to describe the grievance intelligibly; preparedness to risk the outcome of potential court proceedings, and not least, the actual willingness of the attorney or advocate to assist despite the dismal economic prospects. It is only recently that sociologists have, by empirical research[71], established the interrelationship of these barriers and the ability of underprivileged persons to pursue the legal claims. According to Mayhew[72],

> We have a vast array of disputes, disorders, vulnerabilities and wrongs, which contain an enormous potential for the generation of legal actions. Whether any given situation becomes defined as a legal problem, or even so defined, makes its way to an attorney or other agency for possible aid or redress, is a consequence of the social organization of the larger society - including shifting currents of social ideology, the available legal machinery and the channels for bringing perceived injustices to legal agencies.

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69 Ibid 341.

70 Ibid.

71 See L Mayhew 'Institutions of Representation - Civil Justice and the Public' (1975) 10 Law and Society Review 401 ff; B Abel-Smith M Zander and T Booke Legal Problems and the Citizen (1973).

72 Op cit 406.

For the hundreds of thousands of illiterate who knew they had been wronged but were possessed neither of the ability to frame their legal claims intelligently themselves, nor of the courage to go directly to a lawyer, the in forma pauperis procedure was useless. Nor was it of any use to those poor persons who sought nothing more than plain, prophylactic legal advice.[73]

In practice, therefore, pauper proceedings benefitted only a very thin slice of the underprivileged. For those who literally lived from hand to mouth and who could not afford paying for the extra items mentioned above, nothing could be done. Equally neglected were the greater majority of the lower middle classes who were not too poor to qualify as pauper, yet poor enough not to afford a lawyer.

b The Native Commissioners' Courts

The official rationale underlying the establishment of separate Native Commissioners Courts to try civil cases involving Africans, was that these courts would be more serviceable to African litigants than the ordinary courts of the land. Of particular advantage would be the low tariff of costs[74] - much lower than in the ordinary courts - and the speedy settlement of disputes. The success of this scheme was premised in the belief that the adjudicating officers would be particularly well versed in indigenous law; and they would readily apply it without the cumbersome and costly procedure of proving it.[75] The simplified procedure would also enable the litigants to conduct their cases themselves.[76]

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73 D G John 'Justice for the Poor: How Legal Aid Bureau Works' Rhodesian Monthly Review May 1954 8.

74 Hahlo and Kahn The Union of South Africa: The Development of its Laws and Constitution 332-334.

75 Ibid.

76 Ibid.

In practice, these expectations were not realized. After exhaustive research on the expedience of the Native Commissioners' Courts, Raymond Suttner, a renowned expert on African law, came to the following conclusion:

> It is not clear that Commissioners are especially well qualified to decide these cases. Costs have not proved to be lower than in other courts. The procedure, as one glance at the rules will disclose, is as cumbersome as that operating in other courts, so that it is necessary if one wishes to litigate effectively, to brief attorneys and sometimes advocates.[77]

c Pro Deo

Where the indigent accused was charged with a crime carrying the death penalty, counsel was assigned to defend him pro Deo. In earlier times pro-Deo counsel was appointed by the Registrar of the Supreme Court[78] but this task was gradually taken over by a member of the Bar on behalf of the Registrar.

At first, pro-Deo counsel were unpaid, but in later times they were paid a small, nominal fee and travelling expenses by the State.[79]

In practice, the pro-Deo system, like its counterpart at civil law, in forma pauperis, had crucial flaws:

First, an indigent person charged with a capital crime had no right to be defended pro-Deo; nor could he elect the

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77 'African Civil Law: Special Legal Aid Problems' in Legal Aid in South Africa (Faculty of Law, University of Natal, Durban 1974) 189. See also J Lewin Studies in African Native Law (1947) 19-20.

78 S v Gibson NO and others 1979 (4) SA 115 (D) at 123.

79 Hahlo and Kahn The Union South Africa: The Development of its Laws and Constitution note 91 at 290.

pro-Deo counsel of his choice. The practice of appointing counsel in such cases is one which was established by the courts themselves.

Secondly, pro-Deo cases were usually defended by young and inexperienced advocates. This was linked to the fact that pro-Deo work was remunerated only meagrely, thus making it unattractive for more experienced and highly skilled advocates, who tended to devote their time to more remunerative work. Indeed, the Association of Law Societies, in its memorandum on Legal Aid in the Union of South Africa was severely critical of the quality of service rendered by pro-Deo counsel.[80] What certainly detracted from the quality of pro-Deo defences, was the fact that counsel were appointed only after the preparatory examination - during which the accused were often unrepresented[81] - and at that, only a few days before the trial began.[82] No effect was given to the recommendati[illegible]he Lansdowne Commission of 1947 that pro-Deo coun[illegible]ppointed to assist the accused at the preparatory [illegible]nation.[83]

For all its imperfections, the pro-Deo system, at least, offered some form of assistance to the accused. But pro-Deo cases constituted only a small percentage of all criminal cases brought to court. Most of the ordinary criminal cases involved Africans charged with statutory offences. The large majority of them were legally unrepresented, and being too poor to afford paying a fine, they generally chose to go to jail. To be convicted and jailed for a technical offence carried no moral stigma.[84] Prison had in a

80 See South African Institute of Race Relations Paper 84 of 1956 1.

81 Hahlo and Kahn The Union of South Africa: The Development of its Laws and Constitution 287.

82 Selikowitz op cit 89-90.

83 Report of Penal and Prison Reform Commission U G No 47 of 1947 para 226.

84 Wilson and Thompson op cit II 220.

real sense become the staple gauntlet which Africans were born to run.

d Dock Defences

In other criminal proceedings before the Supreme Court indigent accused persons could avail themselves of the 'dock defence'. This institution was available to any accused who could pay counsel three guineas. Counsel were assigned from a roster, as with pro-Deo defences. The 'dock defence', however, was rarely used as its existence was generally unknown to accused persons.[85]

e Pro-Amico Assistance

From time to time public-spirited attorneys and advocates offered their services to poor persons free of charge. The fact that such services were never heralded in public or written about, bespeaks the fine sense of honour with which they were rendered.[86] However, professional chivalry of this kind was too thinly scattered within the legal profession, and perhaps too contingent upon the giver's propensity to do charitable work, to have constituted an organized solution to the unmet legal needs of the poor.

f Social Services Association

A private organization called the Social Services Association of South Africa which was founded in 1912[87], provided limited but valuable social and legal relief under its Prisoner's Aid scheme. So-called 'prisoners' friends' who were voluntary members of the organization would visit the court cells on every morning of a court day to counsel persons in pre-trial custody and to arrange for the payment

85 South African Institute of Race Relations Paper 99 of 1935 4.

86 Cf F van Blommestein Professional Practice for Attorneys (1965) 138.

87 Sunday Times 21 April 1968.

of the bail money and fines.[88] This scheme also provided for the assistance of needy families whose breadwinners were serving prison sentences. But on the whole, work of this kind was too limited, both geographically and in terms of personal coverage, to have had widespread tangible effect. Besides, Social Services was heavily dependent for its existence on donations which, at times, only trickled.[89]

Taken individually or collectively, the schemes surveyed above offered no solution to the legal wants of the poor. Their coverage was too narrow, and focussed solely on court proceedings. No provision was made for legal advice. The in forma pauperis and the pro-Deo institutions which were products of the Middle Ages were hopelessly unsuited to cope with the complex legal needs of an industrial, laissez-faire society. The Government itself did nothing to assure effective access to the courts; it was enough that it paid out meagre sums for pro-Deo work performed mainly for Blacks. This gesture, one could argue, served no more than an alibi function for the large-scale racial inequality which the Government actively promoted.

But on the whole, the Government's inertia reflected the nineteenth-century, individualistic philosophy of rights, then still prevailing:

> A right to access to judicial protection meant essentially the aggrieved individual's formal right to litigate or defend a claim. The theory was that, while access to law and, more particularly, access to justice may have been a "natural right", natural rights did not require affirmative

88 Hahlo and Kahn The Union of South Africa: The Development of its Laws and Constitution 290.

89 See The Star 13 May 1968.

> state action for their protection. These rights were prior to the state; their preservation required only that the state did not allow their infringement by others.[90]

The difference was that in South Africa the State forsook its overall guardian role in favour of actively reducing the majority of the population to a legal, second-class citizenry which could be bullied, harassed and exploited - a situation which increased the need for less cumbersome routes to justice.

90 Gappelletti Garth and Trocker op cit 670-671.

12 THE LEGAL AID BUREAUX (1935 - 1958)

1 History

On the 5th December 1935 representatives from the South African Institute of Race Relations[1], the Transvaal Law Society[2], the Johannesburg Bar[3] and the Johannesburg Rotary Club[4] met with officials of both the Department of Justice[5] and the Department of Native Affairs[6]. The meeting was called to discuss 'the special conditions obtaining in the courts, where the majority of accused persons were Natives who were poverty-stricken, ignorant of the ways of the courts, and in many cases had traditional ideas in conflict with the legal conceptions underlying European forms of justice'.[7] Beyond this, the meeting would also discuss suggestions which the deputation had brought along on how to make justice more easily accessible for 'unfortunate' persons of all races brought before the courts.

It was felt that some form of legal aid should be given to poor persons facing criminal charges. Of the 798 persons tried in Witwatersrand Local Division of the Supreme Court in 1934/1935, only 192 had been defended.[8] The deputation pointed out that though magistrates and prosecutors were, in theory, fully aware of the importance of legal represen-

1 Professor R F Alfred Hoernlé and Messrs J W Langstaffe and J D Rheinhalt Jones.

2 Mr J Cranko.

3 Advocate A Suzman.

4 Mr H Britten (former senior magistrate of Johannesburg).

5 Dr van Ransburg (Secretary for Justice) and Mr C H Blaine (Under-Secretary for Justice).

6 Mr D L Smit.

7 South African Institute of Race Relations Paper 117 of 1935 3.

8 Ibid.

tation, in practice they were too overburdened with work to ensure that undefended accused persons were accorded a fair trial."

The Secretary for Justice made it clear that the responsibility for providing legal aid for poor persons did not lie with the State, but with the legal profession. He said he would support a legal aid arrangement only if the selection of those persons in need of legal aid was left to the senior public prosecutor.[10] He then made the following suggestions, which were adopted by the meeting and subsequently approved of by the Minister of Justice, as an experiment to be tried out first in the Johannesburg magistrates' courts:

1. The senior public prosecutor and his staff would select from the daily records undefended persons who, in their discretion, deserved legal assistance. Those selected would be told of the defence facilities available and would have to decide whether or not they wished to avail themselves of the defence facilities.

2. The Law Society and the Society of Advocates would be asked to form panels of attorneys and advocates and to arrange that someone act as secretary for the panel.

3. The Senior prosecutor's office would inform the secretary of the panel daily of the names of the accused persons who wanted legal assistance and the secretary would arrange for their defence.

4. The question of paying attorneys and advocates would be left to the Law Society and the Society of Advocates.

5. The Department of Justice would arrange that in cases already committed for trial undefended accused be informed by magistrates of the defence facilities available.

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9 Ibid.

10 Ibid.

Ir April 1936 another meeting of representatives from the same bodies was convened to discuss the practical implementation of the plan.[11] As the Council of the Law Society was against members rendering their services gratuitously, it was agreed that attorneys working under the scheme would be paid £2.2.0. per day, £1.1.0. per day refresher and £5.5.0. as the maximum for any case. Counsel would be paid £3.3.0. per day. The fees would be collected from the accused if they could afford to pay. The South African Institute of Race Relations, which was to act as secretariat for the scheme, would try to raise a sum of money as a fund for paying fees where accused persons were unable to pay themselves. Mr Britten, then former senior magistrate of Johannesburg was to act as secretary of the panel of attorneys, and Advocate Bram Fischer was to nominate counsel from those advocates who were available for dock defences.

In practice, the scheme did not work. The arrangement whereby prosecutors selected cases from the daily roll proved to be clumsy and impracticable.[12] Between March 1937 when the scheme came into operation and July 1938 only 28 cases had been defended. Of these, 11 were referred by the courts and 17 were defended at the request of the accused, his employer, attorney or other interested persons.[13] Magistrates made no effort to inform accused persons of the defence facilities available.[14]

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11 South African Institute of Race Relations Paper 67 of 1937 1.

12 South African Institute of Race Relations Paper 33 of 1938 1.

13 Ibid.

14 Ibid 2.

As the experiment was unsuccessful, the scheme was not tried in other areas.

2 The Johannesburg Legal Aid Bureau[15]

In keeping with its broadly liberal and humanitarian approach on civic matters, the South African Institute of Race Relations (founded in 1929) opened up the Johannesburg Legal Aid Bureau. Originally conceived as a liaison secretariat between the magistrates' courts and the panel of attorneys under the ill-fated scheme described above, the Bureau gradually expanded its function to include the giving of legal advice to poor people from all population groups.

By the year 1942, the Bureau was handling some 3000 cases per year, the majority of the beneficiaries being Africans.

a Personnel

The Bureau was manned by one person, Miss Ruth Hayman, who acted both as director and administrative officer. Her work involved telephoning and writing letters on behalf of aggrieved persons, giving oral legal advice, and arranging for lawyers to appear on behalf of indigent accused persons.

b Types of Cases

In the beginning the Bureau dealt only with criminal matters, but because of the demand, it widened its scope to assist also in civil matters.

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15 Except where otherwise stated, information on the Johannesburg Legal Aid Bureaux is derived from South African Institute of Race Relations Paper 114 of 1942.

c Means Test

Assistance, in both civil and criminal matters, was given only to persons who could not afford legal assistance elsewhere. A means test had been worked out for each population group in consultation with the social welfare agencies and was well above the in forma pauperis level.

d Forms of Assistance

In civil matters assistance was given in all realms of private law, most notably in matters relating to family law, landlord/tenant law, labour law and hire-purchase agreements. An important feature of the Bureau's policy was to avoid unnecessary litigation and to work more towards friendly out-of-court settlements. But where this was impossible, the Bureau engaged attorneys to represent the indigent client in court.

In criminal matters, assistance was primarily in the form of legal representation. The Supreme Court interpreter, Mr Keys, would voluntarily visit the magistrates' courts cells every morning to interview arrested persons. He would then report to the Legal Aid Bureau the names of those arrested persons with prima facie reasonable defences. The Bureau would then arrange for the legal defence of the accused, or in straightforward cases, advise the accused on how to conduct his own defence. In other cases the Bureau would try to obtain a withdrawal of the charge, or arrange for the granting of bail.

Where someone was a victim of a criminal act, the Bureau would advise him to lay charges against the aggressor, and would assist in obtaining medical evidence, or in tracing witnesses and referring them to the police. Friends

or relatives of persons arrested for criminal offences in other parts of the Reef could also go to the Bureau to apply for legal assistance on behalf of the arrested person.

e Help from the Legal Profession

The advocates and the attorneys who were engaged by the Bureau, rendered their services gratuitously. Although most law firms were short-staffed and overworked because of the War, the response from individual legal practitioners was excellent. In 1941, for example, there were roughly forty advocates and 122 Johannesburg law firms in the voluntary service of the Bureau. In other areas in the Transvaal the Bureau could count on the help of 84 law firms.

The legal profession bore the main burden of the Bureau's court work; the defence, the institution of civil claims, the writing of legal opinions, and the conducting of appellate actions. The court work involved a great deal of sacrifice on the part of both attorneys and advocates, and the number of cases defended bore only a small relation to the numerous legal consultations and the vast amount of work done in preparation of court actions.

Perhaps the most spectacular engagement of the legal profession in the service of the Bureau was witnessed in the 'Vereeniging riots' case in 1937. In this case 88 Africans were arrested and charged in connection with matters arising out of the riot. The local White attorneys in Vereeniging met and agreed not to defend any of the accused.[16] At the request of the South African Institute of Race Relations, the Bureau retained the services of a Johannesburg

16 Burger op cit 155.

firm of attorneys who appeared for the defence at the preparatory examination.[17] Counsel was briefed to appear at the official enquiry into the riots and at the trial in Pretoria. To finance the defence, the accused themselves raised a sum of £29.14.1. and a sum of £85 was provided by the Bantu Welfare Trust.[18] The Bureau, out of its own resources, raised an amount of £53.5.11.[19] The staff of the Institute of Race Relations played a valuable part by undertaking the arduous task of typing copies of the record of the proceedings of the Preparatory Examination for the use of both counsel and attorneys.[20]

Of the 88 persons originally charged, 58 were committed for trial before a judge and assessors, 31 were indicted and 10 were convicted.[21]

f Control and Financing of the Bureau

From the time of its establishment in 1937 to 1942 the Bureau functioned under the auspices of the South African Institute of Race Relations. It was financed by grants from both the Institute and the Argus Printing and Publishing Company, and by private donations.

In October 1942 the Bureau became an independent, voluntary organization. Indeed, the success of the Bureau until then was attributable to its reputation of being free of government control, a feature which enabled it to assist effectively in several test cases of a political nature involving African trade unionists.[22] Attempts by

17 South African Institute of Race Relations Paper 39 of 1938 2.

18 Ibid.

19 Ibid.

20 Ibid.

21 Ibid.

22 N Abramowitz, 'Legal Aid in South Africa' (1960) 77 SALJ 351 at 354.

the State to bring it under both the administrative and financial control of the Department of Social Welfare were stringently opposed by the committee of the Bureau as well as the Johannesburg Bar Council, largely because the Bureau would be seriously inhibited in assisting persons in cases involving the State, particularly those of a political nature.

From 1944 onwards the Bureau ran into severe financial problems. These were caused by the public's withdrawal of donations and bequests following a publication by the Minister of Justice, Mr H Lawrence, that the Department of Social Welfare would thenceforth assume the costs of running all the legal aid bureaux in the Union.[23] By March 1945 the Bureau had only enough funds to meet its running expenses for that month.[24] In the same year the Government temporarily withdrew its nominal, quarterly grant to the Bureau, ostensibly because the Bureau had assisted two Africans charged under the Riotous Assemblies Act in October 1944.[25]

The Bureau was tottering on the verge of a wholesale collapse when the Government resumed its grant. This respite, together with a grant from the Johannesburg Municipality and small grants secured from other municipalities on the Reef, kept the Bureau from closing down altogether.[26]

In 1949 the Bureau was brought under the control of the Transvaal Law Society, and in the same year it became a registered welfare organization in terms of the Welfare Organization Act, 40 of 1947. However, the Bureau continued

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23 Ibid 357.
24 Ibid.
25 Ibid.
26 Ibid.

to suffer financial hardships and at times it could not even afford the services of a criminal investigator. Notwithstanding its difficulties, it continued to be of invaluable assistance to the poor. For example, in 1952 the Bureau conducted 11 658 interviews and provided legal assistance in 110 criminal cases and 1 306 civil cases.[27]

On the 1st July 1953 the Bureau, together with all other legal aid bureaux then existent, was placed under the control of the Department of Justice.

3 The Cape Town Legal Aid Bureau[28]

The Cape Town Bureau was established in May 1941 by the South African Institute of Race Relations.

a Personnel

The Bureau was run by a full-time officer who was assisted by a clerk and who was responsible for all the administrative work including the supervision of all civil and criminal matters handled by the Bureau. In addition, the Bureau employed a part-time criminal investigator who was assisted by an interpreter. Like his colleague in Johannesburg, the criminal investigator was required to visit the cells every morning and to notify the Bureau of the names of arrested persons with prima facie defences but who could not afford legal representation.

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27 John op cit 8.

28 Except where otherwise stated, information on the Cape Town Legal Aid Bureau is derived from the South African Institute of Race Relations Paper 104 of 1954.

b Types of Cases

Originally the Bureau handled only criminal matters but from May 1942, it assisted also in civil matters.

c Means Test

The Bureau helped only indigent persons. The financial eligibility for aid was left to the discretion of the Legal Aid Officer or the Investigator who set criteria conforming roughly to the in forma pauperis levels. In 1953 a new means test was devised and was based on the efficient minimum level figures compiled by the Social Science Department of the University of Cape Town.

d Form of Assistance

As was the case in Johannesburg, in criminal matters assistance centred primarily on providing legal assistance at the trial. Other forms of assistance in criminal matters comprised the advising of an accused in regard to his defence, or negotiating with the prosecutor to secure the withdrawal of charges considered to be unfounded. As a general rule, defences depending solely on a plea in mitigation were not undertaken by the Bureau.

In civil matters assistance consisted chiefly of informing poor persons of their rights and duties, referring them to the appropriate official channels, and counselling on the advisability of instituting court proceedings. The Bureau always tried to settle disputes amicably and out of court. However, where litigation was necessary clients were advised on how to proceed in terms of the in forma pauperis rules of the magistrates' court of the Supreme Court.

e Help from the Legal Profession

The Bureau engaged attorneys and advocates mainly for court work. They rendered service free of charge. Attorneys

were chosen from a panel voluntarily constituted by local attorneys; and counsels were assigned on an annual basis by the Cape Town Society of Advocates. In civil cases, panel members were asked to represent persons in court who did not qualify as paupers in terms of the in forma pauperis rules, but who were still too poor to afford legal fees.

The advocates working under the scheme, particularly the younger ones, showed a great deal of enthusiasm and were of valuable assistance. The attorneys, on the other hand, showed very little interest in the Bureau. This is reflected by the fact that between 1952 and 1954, the Bureau referred only eight cases to the panel of attorneys. According to Mrs. Yvonne Matham, the then director of the Bureau, many attorneys simply 'closed their eyes'[29] to the existence of the scheme.

f Control and Finances

Originally the Bureau was controlled by a local committee of the South African Institute of Race Relations. The Institute also bore the financial costs of running the Bureau and was partly assisted by a grant from the Department of Social Welfare. From April 1945, the Bureau became fully financed by the Department of Social Welfare and in July 1945, the administration of the Bureau's funds was transferred to the Law Society of the Cape of Good Hope. On the 1st July 1953, the Bureau, together with all other bureaux in the Union, was transferred to the Department of Justice.

g Problems of the Bureau

In criminal matters the Bureau received very little co-operation from the prosecutor's office. As the courts

29 Sunday Times 5 September 1965.

were understaffed, prosecutors had no time to read through the dockets and to discuss deserving cases with the Bureau's criminal investigator. Also, the interruption of 'smooth' court proceedings to arrange legal representation for the accused, was generally 'frowned upon' by magistrates who set a high premium on time and on streamlining the bottleneck of cases which the court had to dispose of everyday.

The gravest problem that harassed the Bureau was the financial one. Because of limited funds the Bureau was unable to employ more staff to cope with the swelling volume of work. The consequences of the workload are described by Nathan Abramowitz, at one time Assistant Legal Aid Officer at the Cape Town Bureau:

> This pressure of work led to the staff having to take work home to do at night in order to keep pace. The hours during which the Bureau was open for interviews were curtailed - but clients arrived very early in the mornings and queued up, often verging on to fights about who had got there first. Work fell into arrear as a result of numerous changes in staff (mainly because the salaries were too low to retain qualified male employees, female employees being unobtainable), and the filing system became unmanagerable because there was no time to destroy old files. The deficit came to add to these difficulties.[30]

These conditions, coupled with the refusal by the Department of Justice to increase the Bureau's subsidy, led to its closure in November 1957.[31] It reopened in January 1958 with a larger staff drawing larger salaries, but with no corresponding increase in the Bureau's budget.[32]

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30 Op cit 359-360.

31 Ibid.

32 Ibid.

This proved catastrophic and in September 1958 the Bureau closed down altogether due to lack of funds.[33]

4 Legal Aid Bureaux in Other Centres

During the 1940s legal aid bureaux were set up, too, in Pretoria, Bloemfontein, Pietermaritzburg, East London, Durban and Port Elizabeth. Except the latter two, all closed down because of financial problems. The Port Elizabeth Bureau, however, was forced, by the limited funds at its disposal, to curtail its assistance.[34] It rarely assisted in criminal matters as it could not afford a criminal investigator.[35] The Bureau used to close down for one month whenever the legal aid officer was absent on her annual leave, as there was nobody to take over from her.[36] Despite the huge demand for help in civil law matters, particularly amongst the Coloureds, the Bureau referred only a minimum of cases to attorneys.[37] The fear was that if the amount of pauper work referred to them became any greater, the attorneys would withdraw their names from the panel.[38]

5 The Government's Attitude to the Legal Aid Bureaux

The Department of Justice which took over the entire Legal Aid Bureaux scheme in 1953, spelt out its attitude to the Bureaux in its critical Annual Report for the year 1958.[39] The report stated:

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33 Ibid.

34 South African Institute of Race Relations Paper 120 of 1954 1.

35 Ibid 2.

36 Ibid.

37 Ibid.

38 Ibid.

39 G P -S 7535004 - 1959/60 - 620.

a) In the first place the staff of the bureaux left much to be desired as most of the employees were not legally qualified or fully bilingual.[40]

b) Bureaux also appear to operate in the wrong fields. For example, they spend much time on people's domestic problems which could be handled just as well or even better by the Department of Social Welfare or other institutions.[41]

c) 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.[42]

d) Even if it is conceded that miscarriages of justice may occur the machinery for appeal and review and certain administrative measures are deemed adequate to remedy them.[43]

e) In 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.[44]

f) Civil cases, however, differ materially from criminal cases in that the conduct of these cases is primarily in the hands of the parties with the result that the presiding judicial officer can do very little to assist an unrepresented party. The same applies to appeals in such cases. Legal assistance in civil cases therefore appears to be justified.[45]

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40 Ibid 4.

41 Ibid.

42 Ibid 4-5.

43 Ibid 5.

44 Ibid.

45 Ibid.

Nowhere did the Report pay tribute to the work done by the Bureaux. Instead, it disparaged them, but offered no alternative solution other than that Bureaux had proved to be redundant. The arguments in the Report were themselves unconvincing, and if anything, served only to rationalize the State's then ubiquitous indifference to the needs of the underprivileged groups.

Purely fastidious was the objection that legal counsellors were not 'fully bilingual'. The irony is that the Bureaux themselves never complained of language difficulties. If at all, communication barriers would have been experienced with African clients, whose mother tongue was neither English nor Afrikaans, and who constituted, collectively, the major clientele of the Bureaux. However, where language problems did crop up, they were bridged with the aid of interpreters, as pointed out above. A sometime counsellor at the Cape Town Legal Aid Bureaux points out that where a language problem did actually crop up, it was in a case involving a foreigner who spoke only German and French, but here, too, assistance was given.[46]

The fact that the Bureaux lacked legally qualified staff was the fault of the Department of Justice itself. Since it took over control of the Bureaux in 1953, the Department made little effort to increase the salary payable to a qualified Legal Aid Officer, or at least, to bring it on par with the salaries it offered equally qualified persons working in the Public Service.[47]

The objection to Legal Aid Bureaux interfering in domestic problems which were allegedly the responsibility of the Department of Social Welfare alone was spurious. Conflicts and hardships within the family often have overlapping

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46 Abramowitz op cit 361.

47 Ibid.

social and legal components which should be considered together when remedies are undertaken. The appreciation of the interrelationship of these factors is reflected in the constructiv spirit of co-operation that existed between the Bureaux and social welfare agencies such as the Armesorgrade, Christelike-maatskaplike rade, marriage-guidance bureaux, and the Children's Aid Society.[48]

Equally unconvincing was the argument negating the need for legal representation in ordinary criminal trials. This view contrasted sharply to the view of Supreme Court judges who were reputed for their impartiality and painstaking attentiveness to the procedural rights of the accused, but who, nevertheless, emphasized both the gravity and the expedience of being legally represented.[49] In the landmark American case of Gideon v Wainwright, Justice Black declared: 'Reason and reflection require us to recognize that in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him'.[50]

Without the aid of counsel, an ignorant, timid accused is reduced to a mere object of the court proceedings. This, purely from an administrative point, is ideal since no time is lost in disposing of the case. Translated into the context of magistrates' courts that were usually clogged with criminal cases of a statutory nature, and where - as pointed out above - both magistrates and prosecutors were too borne down with work to keep a vigilant

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48 Ibid 362. See also South African Institute of Race Relations Paper 114 of 1942 3 and Paper 39 of 1938 3.

49 See C 10.

50 372 U S 335 (1963) at 344.

eye on the procedural rights of the accused, little doubt exists as to which group of poor persons would suffer the denial of counsel most: the Blacks.

The Report's justification of pro-Deo defences in capital cases detracts from its idealistic statement that judicial officers and prosecutors ensure that unrepresented accused are not prejudiced. If the procedural prophylaxis against miscarriages of justice occurring was so reliable, in capital cases, too, legal representation would be unnecessary.[51] Also, the Report's reference to the availability of appeal and review proceedings as safeguards against miscarriages of justice in the lower courts, is in itself and admission that the conduct and the decisions of magistrates are not always beyond reproach. Appellate procedures, however, are not self initiatory and, in practice, can be invoked only with professional legal expertise. For the unrespresented convicted person the Appellate Court has only formal consolation and brings to mind the cynical and strikingly illustrative proverb: 'The law, like the Ritz hotel, is open to all'. By 1958 automatic review applied only in a limited number of cases. Indeed, the peculiar South African institution of automatic review did afford the unrepresented accused limited protection. Where the magistrate imposed a sentence above a certain minimum, the record of the proceedings was automatically transmitted to a judge of the Supreme Court who might confirm or alter the conviction and/or sentence in accordance with justice. However, most of the sentences imposed by magistrates' courts on Blacks were excluded from automatic review. Examples here are whippings of males under the age of 21 years[52]

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51 Cf Abramowitz op cit 366.

52 S 96 of the Magistrates' Courts Act 32 of 1944.

and fines of up to £ 50.[53] In 1955 Parliament excluded the decisions of regional courts from automatic review: 'Thus a valuable safeguard against injustice was removed, and this in respect of those inferior courts whence the heaviest sentences usually emerge'.[54]

The Report correctly recognized the need for legal representation in civil cases, but why a distinction was made in the cases of criminal matters is unclear. What counts in both criminal and civil proceedings is the participation strength of the opposing parties; each should be afforded a symmetrical chance to mobilize the resources necessary for securing the most favourable outcome. 'This principle applies both to the parties and their counsel in civil cases and to the prosecution and the defence, i.e. the accused with his counsel in criminal cases'.[55]

Informing the public of their rights and legal obligations is an important medium for promoting legal certainty and respect for the rights of others. Knowledge of the law enhances the individual's self-awareness in his dealings with other people and reduces his legal vulnerability - an important consideration in the labour sphere where the Blacks, in any case, were excluded from the benefit of the industrial laws. A commendable feature of both the Johannesburg and the Cape Town Legal Aid Bureaux was their effort to diffuse tensions within the society by seeking to resolve disputes in a friendly manner; in the racially charged South African social climate, this was one way of diluting racial prejudices and promoting better race relations.[56]

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53 S 25 of the Magistrates' Courts Amendment Act 40 of 1952.

54 Hahlo and Kahn The Union of South Africa: The Development of its Laws and Constitution (1974) 264.

55 F Castberg The European Convention of Human Rights (1974) 123.

56 Gross op cit 171.

13 NATIONAL PARTY POLICY ON ACCESS TO JUSTICE (1948 - 1968)

1 Inequality between Black and White

The post-1948 period was one of intense political turmoil. It was a period marked by the clash of nationalisms. On the one hand was the White, Nationalist Government newly elected to power and resolutely dedicated to the assertion of the Volkswil at all costs. On the other hand was the vigorous thrust of African nationalism which laid down 'that South Africa belongs to all who live in it, Black and White and that no Government can justly claim authority unless it is based on the will of all the people'.[1]

To ensure the supremacy and the privilege of the White man, the legislature immediately went about enacting a formidable arsenal of repressive laws directed against the other population groups. To preserve the racial purity of the White race, marriages, and indeed any sexual relations between Whites and other races were prohibited.[2] The voting rights given to the Indians in 1946[3] were withdrawn[4] and the Coloured voters were removed from the Common Roll.[5] Africans over the age of 16 years were forced to carry reference books to be produced on demand by the police or

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1 Preamble to the Freedom Charter of the Congress of the People adopted at the 'Congress of the People' 26 June 1955 at Kliptown (near Johannesburg).

2 The Prohibition of Mixed Marriages Act 55 of 1949 and the Immorality Amendment Act 21 of 1950.

3 The Asiatic Land Tenure and Indian Representation Act 28 of 1946.

4 The Asiatic Law Amendment Act 47 of 1948.

5 The Separate Representation of Voters Act 46 of 1951.

other designated officers.[6] The laws governing the movement of Africans into certain urban areas were extended to all urban areas and to apply to African women.[7] In the labour sphere, the principles of job reservation for Whites were tightened and it became illegal to employ Africans on skilled building work in White areas.[8] Africans were excluded from trade union rights and were prohibited from striking.[9] Existing laws providing for separate residential areas for the different racial groups were intensified and executed in callous disregard of the human suffering they caused.[10] To eliminate political opposition, the Communist Party was outlawed[11] and African political dissidents could be banished without a court hearing.[12] Africans were prohibited from carrying firearms, axes, loaded sticks and other weapons.[13] Passive resistence to any law was punishable by severe penalties which included whippings, confiscation of property, fines and imprisonment.[14] Police were given extensive powers relating to searches and seizures. They could search premises and seize documents without a warrant, if they considered the delay in obtaining a warrant from a judicial officer would defeat the object of the search.[15]

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6 The Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952.

7 The Native Laws Amendment Act 54 of 1952.

8 The Native Building Workers Act 27 of 1951.

9 The Industrial Conciliation Act 28 of 1956 and the Native Labour (Settlement of Disputes) Act 48 of 1953.

10 The Group Areas Act 41 of 1950 and the Prevention of Illegal Squatting Act 52 of 1951.

11 The Suppression of Communism Act 44 of 1950.

12 The Native Administration Amendment Act 42 of 1956.

13 Proclamation 135 of 1958.

14 The Criminal Law Amendment Act 8 of 1953.

15 The Criminal Procedure Act 56 of 1955.

It was these discriminatory measures which, together with many other laws and proclamations, transformed Black people into legal lepers plagued by a maze of restrictions of which they were invariably in unwitting breach. They lived in constant fear of criminal sanction. Thus, one may well ask, given the coerced political, social, and legal discrimination, how desirable was it to the State that Blacks be accorded equal justice before the courts?

To start with, the Government's conception of justice differed radically from the construction placed upon it by the judiciary. For the Government, the yardstick was 'the sense of justice of the people'[16] - the White people. Racial inequality, an important plank in the Nationalists' political platform, was presented as a sine qua non for achieving justice. Mr P W Botha, then Secretary of the Cape National Party declared that

> to gain a clear view regarding fair treatment and the rights of non-Europeans, we should first answer another question and that is: do we stand for the domination and supremacy of the European or not?....For if you stand for the domination and supremacy of the European, then everything you do must in the first place be calculated to ensure that domination.[17]

The judiciary, on the other hand, construed justice according to the canons inherited from the Roman-Dutch law in which is inherent the postulate that all men are equal before the law and that the 'law preserves equality and binds the citizens equally'[18], and that, it is the primary function of the Court to safeguard the rights of individuals,

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16 Cited by Carter op cit 98.

17 Ibid.

18 Voet Commentarius ad Pandoctas 1.3.5.

irrespective of whether 'the individual occupies a palace or a hut'.[19] This was the guiding philosophy which, at the same time, formed the bedrock of decisions in which the Appellate Court in the 1950s held unreasonable and hence unconstitutional legislation which established separate but unequal facilities for different racial groups.[20]

The judiciary's valiant stand on these issues drew vituperation from the Government. A Cabinet Minister, Dr T E Donges, launched a 'judges versus the people' propaganda which he laced with the constant threat that if the people did not give the Government a sufficient mandate, it might have to make political appointments to the judiciary in order to be able to rule.[21] In a speech at Potchefstroom, Mr P W Botha declared: 'We are sick and tired of legal cunning (slimmigheid) in South Africa'.[22] The Government feared that the judiciary's refusal to sacrifice the individual's rights for political principle would encourage Black people to turn more and more to the courts for legal succour. And this was precisely what the Nationalists were determined to avoid.[23] Mr C R Swart, the Minister of Justice, stated bluntly: 'This is our policy; but to leave its interpretation in the hands of courts, to compel people constantly to go to court - that is an impossible task for which we are not prepared'.[24]

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19 Zgili v Mc Cleod (1904) 21 S C 150 at 152.

20 R v Abdurahman 1950 (3) S A 136 (A) and R v Lusu 1953 (2) S A 484 (A). See also R v Carelse 1943 (C) 242.

21 Die Transvaler, 24 March 1953, and Die Volksblad, 23 March 1953 (Cited by Carter op cit 171).

22 Die Volksblad 28 March 1953 (Cited by Carter op cit 171).

23 Carter op cit 98.

24 House of Assembly Debates vol 82 col 2165 (4 September 1953).

2 Barriers to Justice

To stop Black people from going to law to complain about being discriminated against in the use of public facilities, a law was passed expressly authorizing discriminatory treatment of different races.[25] Another law was enacted which empowered urban local authorities to banish any African without a court hearing if his presence was held to be 'detrimental to peace and order'.[26] To eliminate opposition to the administration of the Group Areas laws and removal of squatters, courts were enjoined from interfering in any way whatsoever with any order made by Government officials requiring an African to vacate or be removed from any place.[27]

3 Black Lawyers and Problems of Access

This section will focus on the position of Black attorneys and advocates who are themselves members of racially victimized groups. To what extent has the Apartheid order affected Black legal practitioners in the exercise of their profession?

Although this section is still part of the historical survey, this discussion here will focus much on the present situation regarding Black legal practitioners. The reason for this is that the question posed above is as pertinent today as it was in the 1950s.

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25 Reservation of Separate Amenities Act 49 of 1953.

26 Native (Urban Areas) Consolidation Act 25 of 1945 as amended by 29 bis of the Native (Urban Areas) Amendment Act of 1956. Before this amendment an African's departure from an urban area could be ordered only if he failed to find work, or if a Bantu Affairs Commissioner so ordered after a trial.

27 Native (Prohibition of Interdicts) Act 64 of 1956.

a Legislative Obstacles

In the pursuit of their profession Black legal practitioners are hamstrung by the implementation of two major statutes. These are the Group Areas Act[28] and the Blacks (Urban Areas) Consolidation Act.[29] According to the Group Areas Act no member of one racial group may occupy any land or premises in a group area set aside for another racial group, except under authority of a permit.[30] The Blacks (Urban Areas) Consolidation Act, on the other hand, was enacted to curb the movement of Africans into 'White' urban areas or towns and to control their conduct while there.[31]

These two laws have made it very difficult for Black legal practitioners to set up their practices in the centre of towns and cities. However, before discussing the hardships they face in obtaining permits to open their offices in towns or cities, it is essential to explain why Black legal practitioners are reluctant to set up offices in the townships set aside for them.

b The Disadvantages of Township Practices

First, the townships set aside for Blacks are located far from towns and cities. Lawyers who practise in the townships would thus be far from the courts, from counsels' chambers, from the law libraries and from government offices to which they frequently have to have recourse.[32]

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28 Act 36 of 1966.

29 Act 25 of 1945.

30 S 26(1).

31 See s 10.

32 Cf A Subel 'An Examination of "The Legislative and Conventional Obstacles Placed in the Way of Black Lawyers Wishing to Practise Law" and the Effect this Has on the Provision of Legal Services in South Africa' (unpublished B Proc IV paper University of the Witwatersrand 1980) 18. This paper was made available to me by the supervisor of the project, Mr Ramarumo Monama, Research Officer at the Centre for Applied Legal Studies, University of the Witwatersrand, Johannesburg.

Second, Black townships have no available premises for housing lawyers' offices.[33] Lawyers would thus be forced to use their own private residences as offices in the same way as many Black medical practitioners are forced to convert parts of their private residences into surgeries.

Third, an attorney who has his practice in a Black township would, in practice, be of little benefit to the Black community. It ought not to be overlooked that during week-days most of the adult township residents are at their place of work which is usually in town. As these townships are far from the towns or cities, the workers have to leave for work very early in the morning and return only in the evening. During the day the only time they have to attend to their personal affairs is during the lunch hour. Those who have legal problems and who can afford legal assistance, would prefer to consult an attorney who is situated near their place of work.[34] It would be both time-consuming and expensive to travel to a Black township to consult an attorney there.

Fourth, the areas set aside for Blacks have a very weak economic infrastructure. Commercial activity is limited mainly to small-sized retail trading. An attorney who practises in a Black area would therefore have little opportunity to acquire professional expertise in industrial and commercial law matters. It is regrettable that the large business concerns which are situated in the homelands do not entrust their legal matters to local Black attorneys who practise there, but to law firms in the major urban centres such as Pretoria.[35]

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33 Ibid.

34 Ibid.

35 Ibid 21-22.

c Hardships Suffered under the Permit System

As prescribed by law, no Black legal practitioner may set up an office in a White urban area without the permission of the authorities. The application form for the permit is very detailed. It must contain the names of the administrative staff to be employed, together with the qualifications of each member of the staff in terms of section 10(1) of the Urban Areas Act. The outcome of the application thus depends, too, on whether or not an attorney's employees are legally entitled to work for him.[36] In addition, the applicant must state why he cannot establish his business in an appropriate homeland or in a local Black residential area.[37]

Attorneys normally wait 6 to 9 months to know the outcome of the application.[38] In the meantime they are compelled to occupy premises illegally, thus exposing themselves to exploitation by some unscrupulous landlords.[39] If the attorney does in fact obtain a permit, the permit usually entitles him to occupy only the unattractive premises which are situated on the edges of the central business district. The offices of some Black attorneys in Johannesburg have been described as not being unlike a 'railway waiting room'.[40]

The permit does not entitle the attorney to security of tenure, for the Minister of Community Development may withdraw it at any time without giving reasons. This is why many Black attorneys do not enter into a lease agreement with their landlords.[41]

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36 Ibid 13.
37 Ibid 12.
38 Ibid 13.
39 Ibid.
40 Ibid 14.
41 Ibid.

All of these factors combine to make it very difficult for the Black attorney to establish a stable practice and one which inspires the public with confidence.

d The Position of the Black Advocate[42]

Advocate Ismail Mohammed SC, at present one of the only two Black senior counsels in South Africa, was forced to spend his first 12 years of practice at the Johannesburg Bar without an office. It was only in 1969 that the authorities granted him a permit to occupy an office in the advocates' chambers in Johannesburg. During the time that he had no office, Advocate Mohammed usually used the offices of considerate White colleagues who happened to have legal matters to attend to in other parts of the country. Some earlier Black advocates refused to practise under such conditions and emigrated. Some tried to practise away from other advocates, but this caused them to lose many of the professional benefits that could be gained by being continually in the company of other advocates. Those who practised away from other advocates were also deprived of an opportunity to become immersed in the ethics and professional standards of the Bar.

e Other Forms of Racial Discrimination Affecting the Legal Profession

Black law graduates have traditionally encountered much more difficulty than their White colleagues to obtain articles of clerkship. In the 1950s, for example, it was not uncommon for the young Black law graduate to pay a premium of up to £ 1000 or more to become articled.[43] Although this practice has stopped, there are still many

42 Unless otherwise indicated information regarding the situation affecting Black advocates was obtained from Advocate Ismail Mohammed SC in an interview with him held on 10 January 1984 in Johannesburg.

43 Mohammed (Interview).

Black law graduates who come out of university with only slender prospects of entering the organised legal profession.[44] It appears that one reason for this is that there is a proportionately higher percentage of LLB (Bachelor of Laws) graduates amongst Whites who are looking for places as articled clerks than amongst Blacks. Another reason, it is submitted, stems from the physical isolation of 'Black' law schools. Unlike the 'White' universities, most of the 'Black' Universities are situated far away from the main business or judicial centres where many lawyers practise. Black law students are thus deprived of the practical opportunity of establishing early contacts with the practising profession and to foster these contacts with a view to facilitating their search for articles later.

But these are not the only reasons. Black law graduates in search of articles of clerkship still encounter a considerable degree of racial prejudice on the side of individual members of the profession, mostly those who run a one-man practice. This is not so much because of the resistance from the clients and staff, but because of other attorneys who refuse to deal with Black clerks.[45]

Indeed, it is a sad reflection on the ethic of the legal profession that entry into it is, to some extent, still dependent on the colour of one's skin. This is even more disturbing given the fact that 'South Africa has too few trained lawyers to meet the needs of a total population of 25 million people'.[46] One cannot but agree with Advo-

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44 Cf A Chaskalson The Report of the Legal Resources Centre for the Year ended 31 March 1982 17-18.

45 Subel op cit 27.

46 Fourth Interim Report of the Commission of Inquiry into the Structure and Functioning of the Courts RP 52/1982 176.

cate Arthur Chaskalson, the Director of the Legal Resources Centre, when he says: 'If positions are not and cannot be made available for black articled clerks, an alternative to articles as a requirement for being admitted as an attorney should be found'.[47]

In the 1950s and 1960s, this being the period addressed in this chapter, Black legal practitioners were subjected to discriminatory treatment in the courts as well. The theory stated that 'everyone is equal before the law'. But in the magistrates' courts, which usually had separate entries for Whites, Black attorneys were compelled to sit at tables specially set aside for them. A Black Johannesburg attorney, Mr Godfrey Pitje, once refused to conform to this practice and was convicted of contempt of court. This conviction was upheld by the Appellate Division.[48]

Many courts provided separate consulting rooms for attorneys of different races.[49] It was practice, too, in the Transvaal and Natal, to have separate robing rooms for Black advocates.[50] Advocate Mohammed points out that this had the effect of diminishing the status of the advocate before both attorneys and clients.[51]

As a member of the Indian community, Advocate Mohammed was prohibited, until recently, from remaining in the Orange Free State for more than 24 hours. This

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47 Op cit 18.

48 R v Pitje 1960 (4) SA 709 (A). For criticism see J Dugard Human Rights and the South African Legal Order (1978) 321-322.

49 Subel op cit 26.

50 Mohammed (Interview).

51 Ibid.

prohibition, which dated back to pre-Union times, caused Indian advocates great inconvenience whenever they had to appear before the Appellate Division of the Supreme Court, in Bloemfontein.[52]

All these practices show how important race had become to the Justice authorities. The race factor blurred the line between the formal rules of court procedure and racist ideology; and it undermined the percept that 'justice is colour blind'.[53]

There have been considerable improvements in recent years. One such positive development was the abrogation of the long-standing rule which restricted membership of the Pretoria Bar to Whites. There are, however, still a number of conventional disabilities to which Black legal practitioners are subjected. For example, no Black advocate has ever been asked to sit as an assessor; nor has a Black advocate ever been elevated to the Bench. This is not because Black advocates are incompetent. Advocate Mohammed, for example, has acted as a judge in the highest court in both Swaziland and Lesotho, but he is prevented from doing so in his own country.

In sum, the cumulative effect of all these obstacles is that Black lawyers are unable to develop to the maximum of their talents.

4 Academic Indifference to the Legal Problems of the Poor

In the 1950s the then principal media for reflecting academic legal thinking, the South African Law Journal and the Tydskrif vir Hedendaagse Romeins-Hollandse Reg showed a somewhat brazen unconcern for the grim social fabric

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52 Mohammed (Interview).

53 Cf Dugard Human Rights and the South African Legal Order 322.

woven by the Apartheid laws. Scholastic writing was primarily concerned with the exegesis of the substantive law institutions of Roman Law and the Roman-Dutch Law.[54] The fact that more than three-quarters of the South African population could be summarily deprived of their most fundamental rights, seemed of little consequence to the academic legal community - this despite the primacy attached to the protection of civil liberties by the then newly adopted Universal Declaration of Human Rights around the world. Discourses upon the race laws were reduced to formalistic, technical, and dogmatic dispositions, designed more to clarify the statute than to evaluate its social, political and economic import. The academic approach to racial statutes was therefore either value-free, or, by implication, teleological. Joel Carlson, an exiled civil rights lawyer who was a law student during the 1950s laments:

> My law studies never taught me about the law as it applied to black people or, indeed, to any people. The theory and practice of the law I learned related to the property disputes of litigants involving money claims, or criminal law involving illegal acts committed by 'criminals' on the person or property of another person or persons. In the Fordsburg court I learned not only of the law of one class as it was applied to another class, I learned raw politics, raw economics, and their terrible effects on the relationship between black people and white people in our society.[55]

The firstdown-to-earth analysis of the social aspects of the Apartheid laws was made by Muriel Horrel of the South African Institute of Race Relations in a work entitled Race Classification in South Africa: Its Effects on Human Beings.[56] Except for the more critical voices of a tiny few

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54 Cf J Dugard 'South African Lawyers and the Liberal Heritage of the Law' Law, Justice and Society (1972) 19 at 31.

55 J Carlson No Neutral Ground (1973) 17-18.

56 South African Institute of Race Relations (1958).

legal academics such as Professors Ben-Zion Beinart, Donald Molteno and D V Cowen, incisive critique of the administration of justice in South Africa was reflected mainly in law journals in the United States, Canada and Great Britain.

Furthermore, despite the enactment of numerous victimizing criminal laws, the mass arrests, and the convictions under the Pass laws, the enactment of laws exempting arbitrary executive action from judicial sanction, and the establishment and the collapse of legal aid bureaux, the academics' theoretical conception of access to justice underwent no change. The formal right to legal representation was taken for granted and was implied in theoretical discourses on the rules of procedure and their operation in hypothetical situations. The differential economic status of litigants and the incidence and effectiveness of legal representation were not perceived as a variable that could influence the outcome of the proceedings, and hence the mould of the law. In short, legal scholarship kept clear of the economics of the court system. Hence, nothing came of the suggestion by the director of the Johannesburg Legal Aid Bureau, Ruth Hayman[57], that law students be drawn into the Bureau's legal aid work for poor people.

It was not until the Evershed Committee[58] in England tabled its findings, that in South Africa the question of

57 See South African Institute of Race Relations Paper 114 of 1942 5.

58 This was a committee appointed in England by the then Lord Chancellor to investigate methods of reducing the cost of litigation and streamlining the business in the English courts. The Committee derived its name from its chairman, the Rt Hon Sir Raymond Evershed, Master of the Rolls. The final report of the Committee's work was tabled in 1953. Cmnd 8878 (1953).

the costs barriers to justice began to be discussed - but only amongst legal practitioners. In 1954 the first law journal article on this subject appeared under the heading 'Reform of Superior Court Procedure'[59] and was, understandably (it being no man's land) written under a nom de plume. The writer made useful, practical suggestions on how to simplify the civil procedure in South Africa and reduce the costs of litigation. A year later, *Advocate V G Hiemstra, a prominent counsel later elevated* to the Bench, pursued this question in a critical essay under the topic 'Die hoë Koste van Gedingvoering'.[60] Nothing came of the suggestions they made. Then again, in 1957, as a sequel to Sir Tom Eastham's address to a Cape Town gathering of judges, advocates and attorneys, on the Evershed Committee's Report, this matter was raised again.[61] The high cost of litigation was attributed principally to the cumbersome Supreme Court procedure: its long delay; the 'fruitless technical interlocutory and dilatory applications' and its prolixity.[62] Reforms were suggested on the basis of the writers' practical experience with court procedure. But these suggestions, too, fell flat.

5 Legal Aid Provided by the Department of Justice

In the late 1950s and early 1960s the Johannesburg Legal Aid Bureau helped to provide counsel for persons charged with political offences. This annoyed the Government, and it responded by terminating its subsidy to the

59 (1954) 71 SALJ 129-136.

60 (1955) 18 THRHR 249-256.

61 'The High Cost of Litigation - An Address and Three Letters' (1957) 74 SALJ 399-417.

62 Ibid: A E Ettlinger (2) 'The Cost of Litigation: Suggested Reforms' 405-414; H L May (3) 'The Prolixity of the Law' 414-417.

Johannesburg, Durban and Port Elizabeth Legal Aid Bureaux in April 1961.[63] The official reason was that the bureaux 'were not achieving their object, and were doing very little work - largely through lack of public knowledge and interest and therefore Funds'.[64] The bureaux in Durban and Port Elizabeth withered away, but the one in Johannesburg continued its work - thanks to the grants from the Johannesburg City Council and the donations from the public.[65] But the growing number of applications for legal aid, coupled with the shortage of lawyers prepared to work free of charge, made it impossible to help all applicants. It became a general rule that, in criminal matters, only applications from first offenders could be considered. In Durban, some form of legal aid was given by the office of the Protector of Indian Immigrants[66], but the coverage was too small and too narrow.

In 1962 the Department of Justice started its own legal aid scheme after consultation with the Association of Law Societies.[67] The following is the theory of how the scheme was to work[68]:

The Department of Justice would appoint from its staff legal aid offices at the seat of every magistrates'

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63 House of Assembly Debates vol 107 cols 4916-17 (9 April 1961).

64 1961 Annual Survey of South African Law 436.

65 In 1965 the City Council's annual grant to the Bureau totalled R 1800 (The Star 18 March 1965). As its annual budget was roughly R 7000, it depended on the charity of the public to the extent of R 5000 per year (The Star 14 December 1966).

66 See The Star 8 March 1965.

67 G W Cook 'A History of Legal Aid in South Africa' in Legal Aid in South Africa 28 at 31.

68 Information on this scheme is derived from Cook op cit 31-32.

court and Bantu Affairs Commissioners' court. At each of these courts local legal aid committees would be appointed by the Justice Department. Each such committee was to be governed by a board consisting of:

a) the local magistrate who would be ex officio chairman,
b) the local Bantu Affairs Commissioner who would be ex officio vice-chairman,
c) a social welfare officer,
d) an advocate, and
e) an attorney.

The powers and duties of these boards would be:

a) to fix a means test and to adjust it from time to time,
b) where necessary, to review and vary any decision of the legal aid officer regarding an application for legal aid,
c) to deal in general with any problem arising form the scheme, and
d) where necessary, to make suggestions to the Department of Justice concerning the operation of the scheme.

Poor persons in need of legal help could lodge an application with the legal aid officer. The applicant would be subjected to a means test which would vary from race to race. Where the application was successful a lawyer would be appointed to help free of charge - only his out-of-pocket expenses would be refunded.

In practice, however, this scheme did not work. There are a number of reasons why it failed:

First, legal aid committees existed only in the larger metropolitan areas and not at the seat of every magistrates' and Bantu Commissioners' court as was promised. The vast rural areas of the Platteland were covered only in theo-

ry.[69] But even in cities and towns where legal aid committees did exist the benefit was slender. One of the reasons is that the existence of the scheme was unkown and no effort was made to advertise it. Nor did officials within the various phases of the criminal justice process inform indigent accused persons of the existence of the scheme and how to go about applying for legal aid.[70] Unlike the voluntary Legal Aid Bureaux, the Government's scheme did not have a 'criminal investigator' who sought out and referred to the legal aid office the names of poor persons in pre-trial custody, who had prima facie good defences.

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the Government's scheme. Where they did (.t, le-
offices were situated in court buildings;
court buildings are marked by a cold and impersonal air with which Black people in particular associate nasty personal experiences with the criminal law. The intimate relation between the legal aid officer and the Department of Justice made people suspicious of the integrity of the lawyers assigned to help them. This scepticism was not evident in the case of the voluntary Legal Aid Bureau in Johannesburg, which, despite the Government's scheme, reported a large increase in applicants for aid.[71] The public's confidence in the voluntary Bureau was probably attributable to the fact that it was widely known, it was easily accessible (situated in a shopping complex in the city centre), the application procedure was informal and straightforward, and above all it was reputed for its vigorous independent profile. How much these features counted with

69 D Ream 'The Right to Counsel in South Africa' (1970) 18 University of California Law Review 335 at 354.

70 Ibid.

71 The Star 18 March 1965.

lawyers in the voluntary service of the Bureau, is not clear, but it does seem that the Government's legal aid office in Johannesburg tacitly recognized the voluntary Bureau's successful edge. This is reflected in the fact that by March 1966, the Government's legal aid office was referring the few applicants who came to it for aid, to the voluntary Legal Aid Bureau. It is possible that the legal profession's sympathetic though limited involvement in the work of the Bureau[72], as opposed to its disenchantment with the Government's scheme, stemmed from the fact that lawyers knew the Bureau was financially unable to pay them whereas the State was.

In the 1960s the need to spend money on improving access to the courts for the poor was out of the question as far as the Government was concerned. Of principal concern then was the need to consolidate White privilege and to tame Black opposition. How the poor managed their legal problems was their own business, not the State's. The need to help poor litigants in civil matters - a need recognized by the Department of Justice in 1958 - was never acted upon. The Government's view was that in criminal cases it was enough that the formal right to legal representation existed. Hence the statement by the Department of Justice in 1965:

> 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 could also undermine the administration of justice and would moreover be completely inconsistent with the general juridical and social position in this country.[73]

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72 Rand Daily Mail 25 March 1966.

73 Annual Report of the Department of Justice for the calender year 1965.

This statement is significant for two reasons: for one, it showed an unequivocal refusal by the State to assume the responsibility to provide legal assistance for the poor. No doubt exists as to which 'indigent accused persons' were being referred to: the Blacks, the chief clients of the criminal justice process. For another, the statement represented a microcosm of the official attitude to the provision of social services. This is connoted by the phrase 'juridical and social position in this country'. The theory as expounded by the then Prime Minister, Dr H F Verwoerd, was that the State should not undertake anything that would make life for the Africans in 'White' South Africa too easy, lest they grow reluctant to return to their homelands: 'There is no place for (the Bantu) in the European Community above the level of certain forms of labour'.[74] To clothe the Africans with social rights equivalent to those of Whites would only give them a false sense of security. The African, Dr Verwoerd said, should not be misled 'by showing him the green pastures of European Society in which he was not allowed to graze'.[75] The Pass laws and the manner in which they were administered served as a painful reminder to Blacks that juridically they were not equal to Whites. The arrests, prosecutions and imprisonments under such discriminatory laws 'cost the State large sums of money' and served 'no useful purpose'.[76] For the Government still to have gone out of its way to provide legal aid for persons charged under the omnibus criminal laws would be tantamount to being hoist with its own petard. This was readily admitted by the then

74 Bantu Education Policy for the Immediate Future Dept of Native Affairs (7 June 1954).

75 Ibid.

76 General Circular No 23 of 1954 Dept of Native Affairs (14 June 1954).

Deputy Secretary of Justice, Mr J N Oberholzer when he said it would be paradoxical for the Government to undo the work of the police by giving legal aid.[77] The Deputy Secretary stated that basically it makes no difference whether an accused has a lawyer or not. This statement was supported by the Department's staple, idealistic argument: 'This is because there is no doubt that our judicial officers realise their responsibilities and do their best to hear both sides of the case'.[78] The fact that most of the accused persons were ignorant, frightened and nervous - factors which reduced them from participants to mere objects of the proceedings - were entirely overlooked by the Department.

But to evaluate the Department's public statements at face value would be to miss the point. The Government's then indifference to the need for legal representation was tied to its wider political interest in another social phenomenon: prison labour and its benefit to the agricultural sector.

From the late nineteenth century it became practice for the State to hire out convicts to help the Cape wine farmers. This practice was expanded in 1934 with the introduction of a farm-labour scheme in terms of which an African serving a short prison sentence was permitted to take up employment with a farmer for the unexpired part.[79] It was called the 'six penny' scheme as the farmers paid sixpence a day to the Department of Prisons for each labourer. In 1954 the Department of Native Affairs, with the consent of the Secretary for Justice and the Commissioner of the South African Police, introduced a countrywide scheme

77 General Circular No 23 of 1954 Dept of Native Affairs (14 June 1954).

78 Ibid.

79 E Kahn 'Crime and Punishment 1910-1960' (1960) Acta Juridica 191 at 215.

in terms of which Black persons arrested for technical offences were theoretically allowed to choose between being prosecuted and going to work on farms.[80] This scheme was devised specially to satisfy the labour-starved farmers on whose electoral support the Government counted heavily.[81] At the same time the victim was, by inexpensive, circuitous routes and without a court trial, condemned to suffer the qualitative equivalent of actual prison punishment[82] except that he was paid a symbolic ninepence a day which he became entitled to only on his release.

This so-called 'voluntary scheme' was open to grave malpractices and much evidence came to light of people being compelled to volunteer for farm labour.[83] In some cases the victims disappeared for months without their relatives or friends knowing anything of their whereabouts. This prompted a series of habeas corpus applications which were widely publicized in the press causing public condemnation of the scheme.[84] Out of embarrassment the Government suspended the scheme in 1959[85] though it continued to apply to foreign Africans.[86]

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80 General Circular No 23 of 1954 Dept of Native Affairs (14 June 1954).

81 Ibid para f: 'Priority should be given to farm labour in this connection'.

82 African petty offenders convicted and sentenced by a proper court of law were normally sent to farm jails to augment the farmers' labour pools.

83 Kahn op cit 215; Wilson and Thompson op cit 149.

84 A case in point is that of Mr James Sadika who was sent to work on a farm for six months because he briefly hesitated to pay 5 shillings for a residence permit. For details, see Carlson op cit 95-102.

85 House of Assembly Debates vol 102 col 8242 (17 June 1959).

86 Foreign Africans arrested on the Witwatersrand without a pass or a passport and who chose not to be prosecuted were simply dumped on the northern borders of the Transval. Wilson and Thompson op cit 149.

In response to the pressure from farmers the Government stepped up the building of farm jails to solve the agricultural labour problem. The idea of erecting prisons in agricultural districts was first mooted by the United Party Government in 1947, but it was the Nationalists who carried it to full fruition. The official argument for building these jails was this: The jails are overcrowded because they are small and it is sensible to relieve the situation by sending the prisoners into the country districts where they can work constructively.[87] Large prisons were built for the farmers in the Cape, the Free State and the Eastern Transvaal. By 1966 there were 23 such prisons.[88] The costs of building these prisons were met by the farmers themselves, whose share of prison labour was determined by their share capital. The farmers' shares in the prison boosted the value of their property immensely. In the Western Cape, for example, the right to empty prison labour was valued at R 1000 a convict.[89] Wilson and Thompson state:

> The argument that the growth of the system led to a vested interest in crime is cogent. To have found an empty jail which cost them anything up to 25,000 pounds sterling would have been painful to local farmers no matter how much they deplored lawlessness.[90]

These aspects of the criminal justice system help to explain the Government's attitude in the 1950s and mid 1960s to the question of legal aid.

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87 This was the argument of the Minister of Justice, Mr C R Swart (later State President), an enthusiastic supporter of this scheme. Rand Daily Mail 29 August 1952 (Cited by Wilson and Thompson op cit 148).

88 Wilson and Thompson op cit 148.

89 Ibid.

90 Ibid.

5 Legal Aid in Political Trials

From ancient times political offences have numbered amongst the gravest crimes. Treason was the most serious political crime. But the scope of the concept 'treason' was much broader than in modern penal law; it was not limited to offences against the state as a community, but embraced the act of playing another person or that person's goods into the hands of the enemy. The criminal sanctions for treason were brutal and included hanging, burning and breaking on the wheel. With the advent of the sovereign state treason became generally understood as conspiracy and rebellion against the sovereign or in the cities, against the council. The offence was, in principle, punishable by death, though in practice sentences were less severe.[91]

It was, however, not until after the bourgeois revolutions that political offenders were no longer treated as ordinary criminals who had acted for personal gain, but as conquered national enemies who had fought in an unequal struggle for a political conviction. The trial of the offender no longer became a mere end in itself but was regarded as an auxiliary instrument of government policy by which an existing regime could publicly discredit its opponents according to established rules of procedure. In democratic political orders rules of legal procedure came to embody the principle of fairness - a principle which serves also to underwrite support for the government

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91 C Hinckeldey (ed) Criminal Justice through the Ages (J Fosberry trans 1981) 130.

of the day.[92] Therefore it is in the interest of the democratic government itself not to deny the accused opponent his procedural rights amongst which are the right to legal representation of his choice and the right to an open trial before an impartial tribunal.

The importance of these procedural values were appreciated by the South African Union Government and were applied in political trials.[93] In all political trials the accused had legal representation either because he could afford it, or as in the case of the rebels in 1914, the White miners charged with treason in 1922 and the anti-war rebels, the accused had many sympathisers who helped to arrange for defence counsel.[94]

After the Nationalists came to power, the political trial took on a new character, both as regards the racial component of the accused and the Government's response to the political offender. Whereas until 1948 the accused were predominantly Whites and generally Afrikaners who plotted against the Imperial factor, after 1948 the majority of the accused in political trials were Blacks who challenged directly the core of the South African political structure: the White minority's right to rule. The Govern-

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92 Otto Kirchheimer defines political justice as 'the utilization of judicial proceedings for political ends'. He recognizes that courts do play a political role and distinguishes political trials because of their concern with destroying the power or legitimacy of the opposition and bolstering the legitimacy and power of the existing regime. 'Politics and Justice', in Burin and Shell (eds) Politics, Law and Social Change: Selected Essays of Otto Kirchheimer (1969) 408.

93 In his book Human Rights and the South African Legal Order Dugard points out at 252 that where procedural irregularities did occur, these 'arose from the peculiar circumstances of the particular case and not from general procedural deviations authorized by the legislature'.

94 S Kentridge 'Legal Aid and Political Trials' in Legal Aid in South Africa 213 at 213-214.

ment responded with a fury which rubbed off mainly against the established rules of criminal procedure. Steep barriers were erected against the accused's use of legal representation and of legal aid.

It is often said, and rightly so, that the formal right to counsel alone without the means, either procedural or financial, of using it, is useless. Equally useless to the accused is the situation where he can afford counsel but is not allowed to engage him - or at least, not at a critical phase of the proceedings. In the 1950s and 1960s the accused in the South African political trials fitted both these categories. Most of them, however, were indigent - it having become usual to arrest the rank and file of political resistance movements - and their effective right to counsel was obstructed. How the barriers were erected and what their consequences were, will now be considered.

a Obstacles to Counsel

Following the Sharpeville shootings in March 1960 when 67 Blacks were shot and killed and 186 wounded by police gun-fire for protesting against the 'Pass' laws, the Government invoked a state of emergency which gave the executive limitless freedom of action in dealing with political dissidents. Courts were enjoined from entertaining any application arising out of the arrest and detention of a person. The writ of habeas corpus was put out of use for detainees. Except with the approval of the Minister of Justice, no detainee could consult with a legal adviser. When asked why this measure was invoked the Minister of Justice, Mr Erasmus, replied that it was necessary to prevent defence lawyers from cautioning their clients against answering any

questions during the pre-trial police interrogation!95

In 1963 a law was passed providing for 90 days detention without trial.96 In 1965 this period was extended to 180 days97 and in 1967 provision was made for indefinite detention without trial and for solitary confinement for interrogation purposes.98 In none of these cases was the detainee allowed pre-trial access to a legal adviser, or to anybody for that matter, except a State official. At the same time the legislature expanded the scope of political crimes to include definitions flexible enough to allow every new set of 'enemies of law and order' to be labelled and fought as the occasion demanded. But this is another question. Of concern to the theme of this study - legal aid - are the judicial consequences ensuing from the individual's denial of counsel at a critical juncture of the criminal proceedings. From the above measures it is clear that where the accused was brought to trial - it being in the Attorney-General's discretion to do so - the accused came to court with a clear disadvantage vis-a-vis the prosecution.

b The Problem of Legal Aid in Political Trials

In the 1960s scores of persons were put on trial under the security laws. The accused were normally tried en masse, resulting in inevitably long trials which lasted for months and sometimes years. In 1960 the International

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95 Quoted by Mr F Elwyn Jones Q C M P in his Statement of 6 June 1960, on his mission to South Africa on behalf of the International Commission of Jurists. International Commission of Jurists South Africa and the Rule of Law (1960) 108.

96 S 17 of the General Law Amendment Act 37 of 1963.

97 S 215 bis of the Criminal Procedure Act 56 of 1955 as inserted by S 7 of the Criminal Procedure Amendment Act 96 of 1965.

98 S 6 of the Terrorism Act 83 of 1967.

Commission of Jurists commented as follows on the mass political trials held in South Africa:

> Under any system of law designed to protect the rights of every individual accused, it has proved impossible to conduct a mass trial fairly.
>
> .....
>
> However independent the judiciary is and however fairly the trials are conducted, there is no effective way of preventing or redressing the injury suffered by the prolonged nature of the trial. The award of costs against the prosecution is rarely experienced in South Africa, there is little if any form of legal aid for the accused.[99]

The Government's ill-fated 1962 legal aid scheme did not help indigent persons in political cases. The Johannesburg voluntary Legal Aid Bureau on the other hand used to help provide counsel in political trials, but when, in the 1960s the political trials assumed their mass dimensions this task became impossible.[100] The responsibility of arranging for the defence of indigent persons facing political charges devolved onto public-spirited individuals and organizations.

The first major public fund-raising campaign was launched in 1957 to help to pay for the defence of 156 people in the Treason Trial which lasted four years. This fund, called the Treason Trial Defence Fund, was established under the chairmanship of a retired judge, the late Mr Justice Lucas.[101] Money was collected locally and abroad on an enormous scale to finance the defence which was conducted by some of South Africa's most eminent advocates. After

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99 Op cit 62.

100 See The Star 18 March 1965; Rand Daily Mail 25 March 1966.

101 Kentridge op cit 215.

the Treason Trial in which all the accused were acquitted, the South African Defence and Aid Fund was established. This Fund was inspired by Bishop Ambrose Reeves, bishop of Johannesburg, and was administered by a committee under the South African ex-Labour Parliamentarian, Alex Hepple. Support for the Fund came from local and foreign sources.[102] Contributions from abroad were channelled to South Africa via a related body, the International Defence and Aid Fund, which had its headquarters in London. The contributions were substantial. At one point the World Council of Churches gave R 60 000.[103] In addition to financing the defence costs in political trials, the Fund also provided for the impoverished relatives where the breadwinner was detained, being tried or imprisoned under the security laws.[104]

The Government was specially intolerant of lawyers who defended political cases. There was a marked official *tendency to confuse the professional role of the lawyer with* the political persuasions of his client. In 1960 already, the Minister of Justice issued a veiled warning to defence lawyers in political trials when he said that 'in South Africa lawyers come too easily into the position where they could act as lawyers under the protection of officers of the court'.[105] The success record of lawyers engaged by the Fund annoyed the Government as this frustrated its effort to silence the extra-Parliamentary opposition. Many of the lawyers were harassed by the authorities, and some were

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102 The United States, Great Britain, Belgium, Switzerland, Australia, New Zealand, Denmark, Sweden, the Soviet Union, Pakistan and India. See 1965 Survey of Race Relations note 53 at 71-72.

103 1964 Survey of Race Relations note 53 at 98.

104 1965 Survey of Race Relations note 53 at 70-72.

105 House of Assembly Debates col 2329 (25 April 1960).

restricted by house-arrest orders and had to suspend their legal work. Some were compelled to leave the country.[106] At times trials were deliberately conducted in small towns on the Platteland to discourage the attendance of spectators and of the press.[107] In such cases, provided the security police informed the accused's counsel of the date and venue beforehand, the defence lawyers who were based chiefly in the metropolitan centres, had to absent themselves from their offices for the entire duration of the trial. This had distinct economic disadvantages especially for the one-man practice. Attorneys in political trials charged substantially lower fees than in other cases.[108] In addition, lawyers defending political cases in remote conservative towns often faced hostility from the local communities.[109]

For the accused, too, political trials conducted in isolated country districts were procedurally hazardous. Despite the gravity of the charges, there were cases in which the accused were tried without any form of legal representation. In one such known case that occurred in the Transvaal in 1963 a number of mainly school-going youths were charged with sabotage. Many of them were convicted and sentenced to up to 20 years imprisonment. None of them was legally represented.[110] Advocate Sidney Kentridge S C rightly labelled this a 'low-water mark' of the South African jurisprudence.[111]

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106 See Raymond Tucker 'Legal Aid and Political Trials' in Legal Aid in South Africa 218 at 221. See also Carlson op cit 160-161.

107 See Carlson op cit 161; Tucker op cit 221; Dugard Human Rights and the South African Legal Order 215.

108 Tucker op cit 221.

109 Carlson op cit 161.

110 Kentridge op cit 215.

111 Ibid.

These aberrations, however, did not detract from the otherwise immense beneficial value of the Defence and Aid Fund for political defendants and their destitute families. The Fund's executive committee made every effort to ensure that the accused were provided with high-quality defence counsel. In the Eastern Cape, the traditional seat of Black political resistance, the Fund brought much relief. For example, in mid-1965, with the commencement of political trials relating to membership of the banned A N C and P A C movements, the Fund's Port Elizabeth branch provided counsel for 450 defendants.[112]

On 18 March 1966 the Fund was banned under the Suppression of Communism Act and its funds confiscated. The official reason for the banning was that some of the Fund's administrators were 'known Communists' and that part of its resources 'was flowing into unlawful organizations which busied themselves with subversive activities'.[113] The Fund lodged an appeal on the ground that its denial of the right to be heard before the banning order was issued, constituted a violation of the audi alteram partem rule. The Appellate Court, however, rejected the application in a decision[114] that was roundly criticized by academic lawyers.[115] Attorneys and advocates towards whom the Fund had incurred liabilities were paid out of the Fund's frozen assets.[116] In the end the Liquidator paid the remaining R 12 000 to the Association of the Law Societies by order of the Minister of Justice. This amount was in turn paid

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112 1965 Survey of Race Relations 68 and 71.

113 Department of Foreign Affairs of the Republic of South Africa South Africa and the Rule of Law (1968) 32.

114 South African Defence and Aid Fund and another v. Minister of Justice 1967 (1) S A 263 (A).

115 See Dugard Human Rights and the South African Legal Order 343.

116 Cook op cit 33.

to the Legal Aid Board established under the Legal Aid Act of 1969.[117]

c Government Legal Aid for Accused in Political Trials

The whole question of legal aid for persons facing political charges became a major issue after the banning of the Defence and Aid Fund. The Government was widely criticized, both locally and abroad, for its repressive action against the Fund. In response the Ministry of Justice announced its introduction of a legal aid scheme for political accused which, in theory, would operate in the following manner:[118]

A person accused of a political offence would be asked if he wished to be legally represented (who would ask him, is not clear). If he did, but could not afford a lawyer's fees, he would be required to fill in a form giving particulars about himself and about his case. After that the accused would be brought before the trial magistrate who would decide on the merits of the application. If the magistrate approved the application, he would ask either the local Law Society or the local Bar Council to appoint an attorney or counsel whose fees would be chargeable to the Department of Justice.

Details of the scheme were circulated to all chief magistrates, who were required to pass them on to their local Law Societies and Bar Councils.

In practice, however, little, if anything, came of the scheme. When the scheme was actually introduced is not

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117 Act 22 of 1969.

118 Information on the operation of the scheme is taken from the following: Rand Daily Mail 4 August 1966; Sunday Times 7 August 1966; and Sunday Express 7 August 1966.

clear; what is clear is that 'several months' after it had come into operation the Johannesburg Bar Council knew nothing about its existence.[119] In the Easter Cape, where most political trials were being held and where the scheme was already in operation, most of the indigent political accused preferred to conduct their defences in persona rather than accept lawyers in the payment of the Department of Justice.[120] This psychological barrier is understandable, for the Government's sudden benevolence towards political accused was irreconcilable with its previous witch-hunt for political dissidents. Questions likely to have roamed the minds of the accused are these: If the Government was so sincere about providing legal representation for them, why did it ban the Defence and Aid Fund? Why did it harass some defence lawyers in political cases? Why the anti-lawyer pre-trial procedural regulations for political detainees? Why such [illegible] statements by the Ministry of Justice about the redun[illegible] legal representation in criminal cases? And coming to the scheme itself, why did the application have to be considered by a magistrate - an official of the Department of Justice?

These considerations made the Government scheme a predicta[illegible] non-starter. Between the years 1966 and 1969 lawyers w[illegible] e appointed to act for the accused in only 22 cases - a small fraction of the number of persons charged with political crimes during that period. However sincere the Government was in its effort to provide political offenders with counsel, it had, politically at least, done nothing to inspire the belief amongst Black people that it meant good with them. So, for all practical purposes, the scheme remained inoperative [illegible] was consequently put in abeyance.

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119 Sunday Express 7 Augu[illegible] 966.

120 Sunday Times 7 August 1966.

14 COMPARATIVE HISTORICAL REVIEW: THE DEVELOPMENT OF LEGAL AID INSTITUTIONS IN GERMANY AND SOUTH AFRICA FROM THE SEVENTEENTH CENTURY TO THE 1960s

1 Introduction

To understand the law of a country it is useful to know something of its general history, that is, the intellectual, social, political and economic forces out of which legal institutions were conceived and developed. Ernst Rabel, the great legal comparatist says:

> The student of the problems of law must encompass the law of the whole world, past and present, and everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country's history – war, revolution, colonisation, subjugation – religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes. Ideas of every kind have their effect...[1]

As far as possible, this work has sought to tease the social, political and economic strands which had a bearing on the development, or non-development, of legal aid for the poor. Rabel's exhortations have been followed only peripherally. To follow every contour of his idealistic counsel is a task better left to institutes of comparative law which are endowed with the necessary material resources.

In the discussion on the history of legal aid, this work has treated the two countries, Germany and South Africa,

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1 K Zweigert and H Kötz An Introduction to Comparative Law I (T Weir trans 1977) 27.

separately. But merely to juxtapose the events in both countries is not enough. We should, as Rabel puts it 'take the similarities and differences together'.[2] This will be the aim of this chapter. Our comparative conspectus begins with the seventeenth Century, it being the epoch during which South Africa was first colonized by the White man whose legal system prevails today.

2 Access to Justice under the Seventeenth- and Eighteenth-Century Autocratic Rulers

In the seventeenth century the V O C rule at the Cape, like the rule of the Habsburg dynasty in Germany at the time, was characterized by a rigorous absolutism. It was the rule of the strong over the weak. Both political systems were based on the naked exploitation of the masses. The administration of justice, like the other machinery of state, was geared to preserve the economic self-interest of the sovereign. In both systems functionaries within the administration of justice were firmly controlled by the sovereign. At the Cape, for example, the Council of Justice was composed entirely of V O C officials and the prosecutor - the fiscal - was directly responsible to the company's supreme directorate in the Netherlands. In Germany, on the other hand, not only were the judges and the prosecutors under the direct control of the Obrigkeit (the authority), but also the lawyers who, in the year 1781, were declared civil servants.[3]

In both systems the notion of equality before the law was non-existent. The Cape was a slave state where the Roman

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2 Ibid 36.

3 Weissler op cit 349. This status they held until 1 July 1878 when independent advocacy was introduced (Law of 1 July RGBl I 177).

law of slavery and other nefarious features of the Roman penal system applied.[4] Access to the courts, particularly in matters involving complaints against the company, was hamstrung by a cumbersome bureaucracy and official discretion inclined towards upholding the overriding mercantilistic interests of the company. The quality of justice dispensed frequently gave rise to complaints from the inhabitants.[5] In criminal matters the archaic extraordinary procedure of Philip II's Code of 1570 provided for only limited use of legal assistance. And with money being scarce, the costly and dilatory procedure of taking appellate actions to India had only formal significance. Help for poor litigants was unavailable. This is perhaps one reason why the Burghers were wont to take the law in their own hands - a practice invariably visited with the punitive scorn of the authorities.

For the underprivileged subjects in the German territorial princedoms the path to justice was no less tortuous. In the seventeenth century especially, the moral decay occasioned by wartime turmoil infested also the administration of justice. The courts were corrupt and the judiciary bribable. But unlike the situation at the Cape, where relations between the company and the subjects were marked by tensions and suspicion, the German Burgher, reliable for his unquestioned allegiance to the Obrigkeit, could petition the sovereign for legal intervention in his cause. It being the age of Absolutism where the monarch was invested with both legislative and jurisdictional powers, such supplications were possible. Exercising his patrimonial, or so-called 'cabinet' justice, the sovereign could - depending on his whim - order that the pauper be legally

4 See Hahlo and Kahn The South African Legal System and its Background note 48 at 575.

5 Ibid note 23 at 569-570.

represented free of charge or could give instructions to initiate, accelerate or discontinue court proceedings. But benevolent gestures of this kind were erratic and not forthcoming were State, Church or specific class interests would be jeopardized.

In some German states, statutes were enacted providing for the cost free legal assistance of the poor. Yet, it would be wrong to mistake these for the modern notion of state legal aid. First, such statutes were not based on the political theory that the State is responsible for the social and economic well-being of its citizens. Also, these statutes were not permanent, institutionalized guarantees for poor litigants and often did not survive the reign of their promulgator. They were purely acts of charity, remnants of mediaeval altruistic ideals which were based on the Christian duty to care for the poor.

3 The Enlightenment

Still at the time of the first Dutch occupation of the Cape, a new intellectual movement, the Enlightenment, started to spread from England. The cutting edge of this movement lay in its rigorous eschewal of the mediaeval religious orthodoxy which was now seen as one of the tools by which the ruling classes kept the rest of the population in a condition of bemused and uncritical servitude. A central component of the Enlightenment philosophy was the concept 'humanism'. Its representatives such as John Locke (1632 - 1704) and Jean Jaques Rousseau (1712 - 1778), taught that all human beings are by nature free and are endowed with equal rights and liberties. The law under which man lived, and its usefulness to the individual therefore, required urgent consideration.

While in France this rationalist philosophy contributed to a thorough reform of the administration of justice, no

such immediate impact was discernible at the Cape Colony nor in the German territorial states. First, from the point of the Cape authorities, foreign ideas of equality before the law were anathema as they spelt the collapse of the V O C's tyrannical stranglehold of the Colony. And this is precisely what they wished to avoid. The criminal justice system, itself a relic of the Spanish colonial era, had proved to be an effective instrument to preserve the status quo. The limited right to counsel ensured that even within the supposed neutrality of the court-room, opportunity between the accused subject and the State remained unequal. Secondly, though themselves an oppressed group, the Cape burghers could not fully accept the idea of equality before the law, irrespective of race. This attitude which stemmed from a mixture of both doctrinaire and drummed up religious beliefs has become the guiding principle for the present Apartheid policy.

Unlike the Cape settlement which lacked a fertile intellectual soil for the fruitful dissemination of rationalist thinking, Germany on the other hand had a long tradition of intellectual activity. True, the Enlightenment did find an echo in the German philosophers, but unlike the philosophy of the Frenchmen Rousseau and Voltaire which was intimately tied to the existing social injusti in France, German rational thought was abstracted from the immediate social inequality prevailing in Germany. And unlike the French philosophers who were sharply critical of the monarchy, Samuel Pufendorf (1632 - 1694), the most influential German jurist of the time, preached implicit obedience to the sovereign. He disapproved of rebellion and taught that the citizen should endure the most hideous injustice, for even the most cruel prince is still 'Vater des Vaterlandes' (father of the fatherland) who should not only be accorded respect, but thought of respectfully.[6]

6 De officio II c 9 para 4.

Pufendorf's philosophy left its imprint on the General Law of the Prussian States (Allgemeines Landrecht der Preussischen Staaten) of 1794. In this piece of legislation human rights were based on the natural freedom of man 'to be able to seek and further his own well-being without injuring the rights of others'.[7] Yet, for all its systematic ordering of the law, the Prussian code did nothing to eradicate the rigid legal barriers between the classes. Article 82 stated categorically that the rights of an individual are determined by his birth and class. On the question of materializing one's rights, article 89 stated: 'He who is accorded a right by law is accorded also the means without which the right cannot be exercised'. For the poor, however, this remained an unfulfilled promise. Smooth access to justice, like access to the other portals of state remained the privilege of the upper classes. The poor still had to depend on the sovereign's patrimonial justice.

Two German jurists, however, should be singled out for their practical contribution to a more humane system of criminal justice. One was Christian Thomasius (1655 - 1728), famous for his campaign against witch-hunting, and criticism of the traditional Roman law. His famous Disputatio de Tortura in foris Christianorum proscribenda, published in 1705, subsequently led several German states to abolish the use of torture in criminal proceedings. The other was Paul Johann Anselm von Feuerbach (1775 - 1833), founder of criminal psychology and of the modern German criminal jurisprudence. His theory on the deterrent effect of the criminal law was a decisive contribution to the development of a more liberal court system in the nineteenth century.

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7 Art 83. Cf Pufendorf op cit c 6 paras 2ff.

But *seen against* the need to make the law - about which much was philosophized - accessible to all, the German Enlightenment provided no answer.

4 The Influence of the French Revolution

The ideas which impelled the French Revolution did not remain in France. They spread to the Cape via the French *conquered Netherlands, and to the rest* of Germany via the French occupied Rhineland states.

Inspired by the revolutionary spirit of Rousseau, the Dutch accepted the principle 'dat alle menschen met gelijke rechten geboren worden en dat deze naturlijke hun niet kunnen worden ontnommen'.[8] In pursuance of this ideal the Commissioner-General at the Cape, de Mist, introduced a gust of *liberal reforms in the 'miserable state...* and disgraceful condition'[9] of the administration of justice at the Cape colony. But the liberalization fell short of materializing the revolutionary vision demanding that courts of law be equally accessible to all citizens. The procedural barricades of the effective use of counsel remained unaffected. And although the revolutionary principle of equality was accepted, it was not extended to apply between White and Black.

Under British rule, much was undertaken at the Cape to spread the judicial network and to liberalize the court system. The humble litigant brought into contact with the new process of the law was slow to appreciate the advantages of British justice. He could not address the court sitting in Cape Town in the Dutch language. At a circuit

8 Algemene Beginselen van de Staatsregeling van 1798.

9 The Memorandum of Commissary J A de Mist (Van Riebeeck Society Publications No 3 1920) 234.

court, if summoned to give evidence, he might be required to make a journey of several hundred miles on horseback. Civil proceedings were lengthy whilst jury service was commonly regarded as an unwelcome burden.[10] But the use of counsel in criminal proceedings was permitted only sparingly. In civil cases indigent litigants could avail themselves of the pauper proceedings which resembled the pauper statutes enacted by several German states in the wake of the Napoleanic influence. Whereas the German provisions exempted the litigant only from the payment of court fees and witnesses' expenses, the Cape provisions required that lawyers render their services for charity.

Both these schemes were underlined by the common reluctance of the state to pay lawyers to serve the poor. This attitude harmonized with the nineteenth-century political theory which required that the state do no more than pledge to protect the natural rights of its citizens and prevent their infringement by others. The need for positive state action to redress the legacy of historic oppression and to effect actual equality before the law, was not regarded as the state's function. This view was sustained by the unconcern of legal scholars to relate the law, particularly the law of procedure, to its contemporary social problems. With the rise of positivism in England and on the European continent, legal scholars confined themselves to presenting the law in a logical and systematic manner with mechanical precision. To Friedrich von Savigny (1779 - 1861) leader of the German school of historical jurisprudence, law was a form of mathematics, a 'Rechnen mit Begriffen'[11] (a calculus of concepts). Legal education focussed solely on understand-

10 A F Hattersley An Illustrated Social History of South Africa (1973) 67.

11 F C von Savigny Vom Beruf unserer Gesetzgebung und Rechtswissenschaft (1814) 29.

ing the law as it was and applying it mechanically.[12] Neither the Cape lawyers who had received a positivistic British legal education, nor the German lawyers moulded along the conceptualistic Begriffsjurisprudenz were therefore professionally sensitive to the wider socio-legal needs of the poorer sections of the public. The study of law was a privilege which only the rich could afford. Thus lawyers identified more with the established interests of the upper classes from which they came than with the legal wants of the underprivileged groups. Hence the lament by Sir George Grey in 1858 that 'till now the Church, the bar and the medical profession had been hopelessly closed to young colonials without rich parents'.[13]

5 Industrialization

Though the industrial epoch in Germany started earlier than in South Africa, the basic social features accompanying it were similar in both countries. One such feature was the wide-spread poverty caused by the sudden change from an agrarian to a competitive industrial environment. Whether it was the German peasant who had previously squatted on a Junker estate, or the indigent Afrikaner bijwoner from the platteland, or the Black man forcibly evicted from his farm, the industrial world brought many problems. The complex laws regulating trade, labour, crime, housing, transport and health made the services of lawyers indispensible. But access to lawyers, like access to other commodities in the free market economy, was available only to those who could pay.

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12 This school of Pandects was strongly criticized by Rudolf von Jhering (°818 - 1892) who described law as a means of defending the interests of the individual and who taught that rules could be understood only in the light of their purpose and the interests they were designed to protect.

13 The Cape Argus 23 December 1895 (Cited by Hattersley op cit 170).

The poor, according to the earlier laissez faire individualistic philosophy, were responsible for their own legal well-being. But with the growth of complex industrial associations and the shift from individual to group interests, a new political theory began to emerge. It demanded that the state assume the responsibility for the social and economic well-being of all its citizens. Inherent in this theory was the notion that transcendental *criteria such as class, wealth and status* should operate independently of the individual's realization of his democratic rights. It was in the framework of this vision that the need to afford the poor legal protection became manifest. And here, however, we begin to notice a fundamental difference of approach between the Union Government of South Africa and the Monarchial German Government. A comparison is necessary if only because the policies each government adopted then, formed the ideological trunk from which future ideas of legal aid would grow.

The reign of both Bismarck towards the end of the last century, and of Wilhelm II at the turn of our century was *marked by intensely reactionary politics.* Yet, common to both these rulers was the desire to win the support of the vastly growing working class. Consequently, under both regimes, progressive social legislation was enacted which stood in contrast to the other conservative home policies then prevailing.

Laws were enacted establishing three branches of insurance, which are still covered by the present German social insurance: health, accident, and invalidity. The social reform made its impact, too, on the administration of justice. Provision was made for the recovery of damages by persons wrongfully arrested.[14] Women were allowed to

14 Law of 14 July 1904 RGBl I 321.

act as jurors[15] and to enter legal profession.[16] Discriminatory rules obstructing the poor from acting as jurors were abolished[17] - unlike in South Africa where the exclusion of Blacks from the jury operated until the institution of the jury was abolished.

With the enactment of the Code of Civil Procedure in 1877, legal aid became available nationally to anyone unable to defray the costs of litigation without endangering his or his family's existance. Initially attorneys were obliged to assist legal aid recipients free of charge. As the idea of working for charity became increasingly untenable, state compensation for private attorneys doing legal aid work was introduced in 1919 - 1923. In practice, however, lawyers were poorly equipped to handle the characteristic problems of the working class. Legal education 'gave wide berth to social problems which came under the laws governing labour, wage-scales, mergings, agreements, public gatherings and social insurance'.[18] Another problem was that legal aid was limited only to litigation. It was in an attempt to fill these gaps that a wide network of legal advice centres were established by enlightened interest groups in the first two decades of this century.

In South Africa, on the other hand, it was the votelessness of the poor - the majority of the population - which influenced the Government's reluctance to afford them legal protection. Unlike the case in Germany, no legislative overtures were necessary to win the support of the Blacks. Inequality between Black and White was vigorously espoused by the ruling White class and was enforced

15 Law of 25 April 1922 RGBl I 465.

16 Law of 11 July 1922 RGBl I 573.

17 Law of 13 February 1926 RGBl I 99.

18 D W von Westernhagen Recht und soziale Frage (1975) 29.

by discriminatory legislation which ensured that no Black man can participate with his White counterpart at any level of the social structure.

In Germany, as indeed elsewhere, the legal protection sought by the industrial working class was primarily in the realm of civil matters. In South Africa, however, this held true mainly for the indigent White working class whose general illiteracy, ignorance and low social status made them a target for legal chicanery. Their effective access to justice was undermined in turn by the very same qualities which rendered them so legally vulnerable, including their deepseated fear of being exploited by lawyers. Being, however, generally too poor to afford legal services, yet not too poor to avail themselves of the pauper proceedings, they were compelled to stomach considerable civil injustice.

As regards the Black working class, legal protection was sought primarily in the sphere of criminal law. The numerous criminal laws governing the movement of Blacks were introduced for no other reason than to ensure the White employer a stable, exploitable pool of cheap labour. These omnibus laws brought the Blacks into constant conflict with the White man's law of criminal procedure to which they were not accustomed. Though theoretically they could avail themselves of legal assistance, in practice they were too poor to afford it. Though in theory there was equality before the law, no legal aid was available to the poor, except in capital trials where defence counsel was assigned for God's sake, not as a matter of right.

When measured against the then emerging progressive legal aid reform in Germany, South Africa had not yet broken with the nineteenth century charitable model where the equality sought was formal rather than actual. Under South African law effective pro ction of the individual's rights continued to be slighted by his economic status and his race.

But the lead which Germany had taken in the world in respect of legal aid, was only of short duration. Following the onset of world economic crisis in 1929 austerity measures were introduced which seriously affected the accused's procedural rights. In 1932 a law was enacted[19] which invested the police with wide powers of arrest while at the same time limiting (a) participation of defence counsel in summary proceedings and (b) appellate actions against certain decisions of the county courts. The official reason for these measures was that they were necessary to economize and to counter the 'poverty dictatorship' (Diktatur der Armut).[20] In practice, however, they had the effect of provoking numerous appellate actions, thus making court proceedings more expensive.[21]

Indeed, even if South Africa was then as crippled by the recession as Germany was, it is unthinkable, given the judiciary's traditional firm commitment to defending the procedural rights of the accused, that the legislature could risk fighting inflation by eroding the Rule of Law. That this was possible in Germany is attributable to the fact that the German judiciary had not entirely freed itself from the nineteenth-century positivism. Indeed, it was the failure to take a firm juristic stand in favour of the rights of citizens, which laid the foundation for the most repressive dictatorship in modern history - National Socialism.

From 1933 to 1945 legal aid was adapted to give effect to the ruthless policies of the Hitler regime. In short, legal aid lost its meaning.

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19 Law of 14 June 1932 RGBl I 285.

20 F Shlegelberger 'Die Notverordnungen vom 14. Juni 1932, A. Verordnung des Reichspräsidenten über Maßnahmen auf dem Gebiete der Rechtspflege und Verwaltung' (1932) 27 Juristische Wochenschrift 1929.

21 A Hellwig 'Sparmaßnahmen in der Strafrechtspflege' (1932) 37 Juristische Wochenschrift 2672 at 2674.

6 Developments after World-War II

After the Second World War both South Africa and Germany witnessed the birth of new political eras. In South Africa the Nationalists, espousing racial politics, came to power. In West Germany democracy was introduced with the enactment of the Basic Law in 1949.

To avoid at all costs the return of any form of dictatorship in which law and human dignity are trampled underfoot, the fathers of the German Basic Law were resolved to enshrine the Rule of Law as the supreme value of the new German state. As Max Guede, a former Advocate-General at the Federal High Court, once said in a Bundestag debate: 'We are all agreed here that while democracy is of course a good thing, the rule of law is as vital to us as the air we breathe'.[22] Article 3 of the Basic Law spells out clearly that 'all are equal before the law'. The right to a hearing in the courts, the freedom from punishment under retroactive laws and the freedom from double punishment for a single act are spelled out in Article 103, the arrest and detention of an individual is subject to judicial sanction.[23] Torture, both physical and psychological, is expressly forbidden.[24] In the case of detention, a relative of the accused, or a person in his confidence, is to be informed immediately.[25] Though the Basic Law says very little about the individual's social and economic rights, Article 20 states that 'the Federal Republic of Germany is a democratic and social welfare federal state'. The principle of the social welfare state is a modern supplement which

22 Quoted by A Grosser Germany in Our Time (P Stephenson trans 1970) 129.

23 Art 104 of the Basic Law.

24 Ibid.

25 Ibid.

goes beyond the nineteenth-century notion that the State must abide by the law. It obliges the State to protect the socially weaker and always to strive for social justice. Furthermore, inherent in the concept 'social',

> is the idea that all laws shall tend towards the protection and welfare of the economically disadvantaged or the socially weak. ... The principle of the social welfare state therefore, obliges all organs of the State, including the courts, in all their activities, to pay regard to social justice in all their measures and decisions.[26]

In pursuance of these ideals, the Federal Government, in the 1960s, introduced a wide framework of social legislation covering such matters as education, sickness, accidents, old age, child support, rent subsidy, and the promotion of work and of vocational training. But nothing was done about the legal needs of the poor. As regards the judicial system in general, the main priority of the Government had been to purge the procedural law of the jarring aberrations grafted onto it by the Nazis. Removing the barriers to the courts for the underprivileged was of little moment. Neither the Commission for the Reform of the Civil Procedure, nor the Social Democratic Justice Reform Commission, both appointed in the 1960s, came up with useful suggestions on how indigent citizens could vindicate their rights without incurring excessive financial risks.

Apart from all else, the post-Nazi government had a moral obligation to ensure that nobody be denied justice

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26 Wassermann op cit 73.

because of circumstances outside his control; this, precisely because Germany had just emerged from an era in which the institutionalized denial of a fair hearing before the courts had caused millions of people untold human misery.

It was only after the students' revolts of 1968 in which demands were made for a more radical implementation of social equity, starting with universities, that the whole question of Chancengleichheit (equal opportunity) surged to the fore. Legal scholars began to look critically at the law of procedure as a vehicle for promoting social justice and social peace. Massive criticism was levelled at the century-old legal aid apparatus which showed up as becoming increasingly incapable of bearing up to the demands of a modern industrial society. With the increased bureaucratization of the law, the legally illiterate had become more and more isolated from the legal system and its workings. And with the professionalization of the law, legal services had become expensive; not only for the poorer classes, but for a large slice of the middle class, too. A more effective legal aid scheme, with a wider social coverage, had become imperative.

It was because of the relentless waves of criticisms by legal sociologists, coupled with the decision by the German Law Society to make Legal Aid the central theme of its 1976 deliberations, that the legislature enacted the new legal aid provisions in 1981.

Unlike Germany, South Africa has no Bill of Rights. And unlike the constitutions of the other major South African political parties at the time[27], the manifesto which carried

27 See arts 2, 3 and 5 of the Constitution of the Liberal Party of South Africa; art 4 of the Constitution of the South African Congress of Democrats; art 2 of the Bill of Rights of the African National Congress (adopted on 16 December 1945 in Bloemfontein); and art 7 of the Constitution of the United South African National Party.

the Nationalists to power in 1948 said nothing about equality before the law. The Nationalists' political philosophy, itself heavily weighted by Calvinist doctrine as interpreted by the Dutch Reformed Church, rejected the humanist theory that all men are equal, and so all, Black and White, must participate in the legislative process. This philosophy is strongly opposed to liberal democracy.

The reconciliation of Calvinism and Nationalism provided the Government with the mainspring from which it was to launch its programme of racial segregation - Apartheid.

The gross injustices accompanying the implementation of these laws reduced millions of people to the level of bare existence. Whereas the laws themselves could not be challenged in court[28], the discriminatory manner in which they were implemented could - at least in theory. In practice, however, steep barriers faced those victims of Apartheid seeking legal redress:

First, the victims - the Blacks in particular - were simultaneously the poorest section of the population, who could ill-afford the costs of legal services. Conjunctive to the poverty was the widespread ignorance of the law which again had its pinnacle within the Black population.

Second was the systematic banning of persons (especially lawyers), organizations and political movements championing for the rights of the Blacks. Not only was the effect of these bannings to render the Black population more vulnerable to arbitrary government action, but they deterred many people from seeking legal redress against shady administra-

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28 'Parliament may make any encroachment it chooses upon the life, liberty or property or any individual subject to its sway, and ... it is the function of courts of law to enforce its will.' Sachs v Minister of Justice, 1934 A 11 at 37. See also s 59 of the Constitution of the Republic of South Africa Act 32 of 1961.

tive practices, out of fear of collateral, official retribution.

One other variable which influenced the failure of the Black people in general to gain effective access to the courts, was the indifferent unresponsiveness shown by the White legal profession to the social injustices taking place in the country. One may well ask the question: In respect of the Apartheid laws, what would have been the moral standards of both the legislature and the executive today, if in the early 1950s there had been a Lawyers for Human Rights organization as is the case at present, or if there had been vigorous social-orientated public-interest legal representation, in the form presently conducted by the Legal Resources Centre and the Centre for Applied Legal Studies in Johannesburg? Indeed, given the then still appreciable reserve (still not depleted) of judges with a deep appreciation of the socio-political ambits of the Rule of Law, our South African decisional law today would be more liberally strewn with fundamental precedents upholding human dignity.

All these above-mentioned handicaps coalesced to expose the Black population at large to even more legal abuses in their daily private lives: police excesses, exploitation by employers, merchants and landlords. This kind of victimization affected, too, a significant percentage of the White population. Though they had a privileged political, social, and legal status many Whites were hostage to biting poverty, illiteracy and ignorance. But like the Armenrecht in Germany, legal aid under the pauper procedure had become patchy and unresponsive to the demands of modern poverty. And like the attitude of the German Government at first, the South African Government saw no reason to intervene effectively on behalf of indigent litigants.

It was enough that the right to legal representation was formally guaranteed. This explains in part the South African Government's reluctance to co-operate financially with the South African Institute of Race Relations in intensifying and expanding the activities of the legal advice bureaux. The Government's primary fear was that an across-the-board legal aid scheme would afford its opponents an opportunity to thwart the effective implementation of its policies. This is envinced by the banning in 1966 of the Defence and Aid Fund which financed the legal costs of indigent persons charged with political offences and the Government's repeated threats directed at the receipt of foreign funds which are used to finance the legal defence of persons charged with political offences.

7 Movement towards a Legal Aid Act in South Africa

By the year 1966 it was clear that the Government's 1962 legal aid scheme had failed. There was a general feeling within the legal profession that a new legal aid scheme was necessary. The archaic procedures, in forma pauperis and pro-Deo, had long since proved to be hopelessly inadequate for meeting the legal needs of South Africa's predominantly impoverished population. With its limited funds, the privately sponsored Johannesburg Legal Aid Bureau could impossibly handle the flood of applications for legal aid. It was quite clear that something had to be done, and urgently, too.

At the national conference of the Association of Law Societies held at Kimberley in May 1966, Mr Sam Gross, a Cape Town lawyer[29] and a vigorous campaigner for the legal

29 Then chairman of the Cape Town Side Bar Association.

aid idea, delivered a thoughtful paper entitled 'Legal Aid and Advice - Its History, Development and Future in South Africa'.[30] Mr Gross' paper was based on an examination of legal aid systems in 24 countries and contained useful suggestions as to how legal aid in South Africa should be organized.[31] It was mainly as result of this paper that in August of that year the Association of Law Societies appointed a National Committee on Legal Aid to take the steps necessary to realize the introduction of a national legal aid scheme.[32] Two months before this, the General Council of the Bar decided to ask the then Minister of Justice, Mr B J Vorster, to appoint a judicial commission to consider the question of legal aid.[33] The Liberal Party which disbanded in 1968 also called for an introduction of a legal aid scheme.[34] The wide publicity[35] given to these initiatives by the press made the whole question of access to justice for the poor a public issue. A law journal article pleaded for a trumpet call for indigent accused in South Africa.[36] The Government, which had banned the Defence and Aid Fund only a few months before, found itself under immense pressure to provide an effective alternative. After all Mr B J Vorster, the Prime Minister designate had promised to do justice to every group and every member of

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30 Cook op cit 34.

31 See Gross op cit 178.

32 This Committee consisted of four lawyers: Mr G W Cook (convenor); Mr J H F Cawood of Cape Town; Mr C H P van der Post of Bloemfontein and Mr B E S Agar of Durban (Cook op cit 34).

33 Rand Daily Mail 20 June 1966.

34 Sunday Express 10 July 1966.

35 See, for example, Rand Daily Mail of 10 April 1966; 25 August 1966; 22 march 1967. The Star of 1 April 1966; 22 June 1966; 21 September 1966. The Sunday Times of 1 May 1966; 10 July 1966; 7 August 1966; 24 May 1967 and 16 July 1967.

36 C J R Dugard 'The Right to Counsel: South Africa and American Developments' (1967) 8 SALJ 1-6.

every group.[37]

The National Committee on Legal Aid met the Secretary for Justice several times. The central issue concerned the control of the proposed legal aid scheme. The Justice authorities resisted Mr Gross' idea that control be vested with each of the provincial law societies. Ultimately, the Convener of the National Legal Aid Committee, Mr G W Cook presented a compromise draft which was accepted by both the authorities and the profession. This led to the promulgation of the Legal Aid Act on the 26th March 1969.[38]

37 . Quoted by Troup op cit 387.
38 Act 22 of 1969.

15 A SURVEY OF THE LEGAL NEEDS OF THE PUBLIC TODAY

1 Introduction

During 1981 the author conducted a survey in the Vaal Triangle (pop. 219 997).[1] The aim of the survey was to try to find out the characteristics of the public with regard to their: perception and characterization of legal problems; methods of resolving such problems; access to lawyers; awareness of legal aid and legal advice facilities, and general attitudes to and experiences with lawyers and the law. This survey was complemented by questionnaires mailed to attorneys in the Vaal Triangle and to advocates at both the Johannesburg and Pretoria bars. The aim here was to find out what lawyers think about legal aid and legal advice services for the underprivileged. This chapter, however, discusses only the findings of the public survey. The questionnaires sent to the lawyers will be dealt with in the discussion of the Legal Aid Act below.

The public survey was based on a proportionate random sample of all population groups living in the Vaal Triangle. The areas surveyed were: urban White residential areas of Vereeniging, Van-der-Bijl Park and Sasolburg; the African townships Sharpeville, Sebokeng, Boiphatong; the Coloured township Rust-ter-Vaal: the Indian township Roshnee, and the rural areas north of Vereeniging stretching from the plot-holdings of Houtkop, through the district of De Deur, to the farms east of Meyerton.[2]

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1 Statistics given to the author on 24 March 1981 by Mr Cunningham of the Department of Statistics, Pretoria.

2 Updated, detailed maps of these areas were obtained from: the Town Engineer's office at Vereeniging, Meyerton and Sasolburg; the tourist office at Van-der-Bijl Park and the Orange-Vaal Administration Board at Sebokeng.

Except in the case of Zulu- and Xhosa-speaking respondents where interpreters were of great help, all interviews were conducted by the author personally. On the average, an interview lasted twenty minutes. On approaching the respondent, the author encountered considerable mistrust at times. This mistrust was especially marked in the case of African respondents. What helped to overcome this barrier was mainly the strict anonymity guaranteed the respondents, and the assurance that their answers were strictly of academic interest. Also, every effort was made to conduct the interview in a casual atmosphere.

Of the 350 interviews planned, 297 were conducted. Forty-four persons refused to be interviewed and 9 were 'not at home' despite call-backs. However, not everyone of those interviewed was prepared to answer all the questions. Instead of answering a particular question some respondents would simply laugh or shrug the shoulders. Mainly Coloured and African respondents did this. In other cases the author would be told 'you are going too far' or 'is it really necessary for you to know this', or simply 'I am not prepared to answer the question'. This was primarily the case with White respondents. Unanswered questions were skipped. This accounts for the numerical variability of answers in some of the tables below.

2 Cumulative Findings

a Social Data

The statistical breakdown of the respondents with regard to population group, age, sex, personal status, occupation, income, educational qualification and number of dependants, is shown in the tables below.

(i) Table II

Racial Breakdown of Respondents

White	African	Indian	Coloured
n = 108 (36,36 %)	n = 127 (42,76 %)	n = 37 (12,46 %)	n = 25 (8,42 %)

(ii) Table III

Age Breakdown of Respondents

29 yrs. and under	30-39 yrs.	40-49 yrs.	50-59 yrs.	60 yrs. and above
35 (11,78 %)	91 (30,64 %)	104 (35,02 %)	53 (17,85 %)	14 (4,71 %)

(iii) Table IV

Sex of Respondents

male	female
64 (21,55 %)	233 (78,45 %)

(iv) Table V

Personal Status of Respondents

single	married	divorced
32 (10,77 %)	248 (83,50 %)	17 (5,72 %)

(v) Table VI

Occupation of Respondents

professional	administrative and clerical	self employed	artisan
54 (18,18 %)	33 (11,11 %)	46 (15,49 %)	40 (13,47 %)

unskilled labourer	unemployed
110 (37,04 %)	14 (4,71 %)

(vi) Table VII

Educational Level of Respondents

no schooling	primary school	secondary school	matriculation
84 (28,28 %)	74 (24,92 %)	51 (17,17 %)	42 14,14 %)

post matriculation (non-university)	university
34 (11,45 %)	12 (4,04 %)

(vii) Table VIII

Income Breakdown of Respondents

R199 and less	R200-R299	R300-R399	R400-R499
33	48	40	53
(11,11 %)	(16,16 %)	(13,47 %)	(17,85 %)

R-600-R699	R700 and above
25	57
(8,42 %)	(19,19 %)

3 Legal Problems and Access to Lawyers

a Use of Lawyers

All respondents were asked whether they had, in the previous 5 years, gone to see a lawyer about a legal problem specifically listed in the questionnaire. The list of the problems together with the respondents' answers are tabulated below.

Problem	number and % of respondents answering 'yes'
- the buying or selling of a house or building	47 (15,82 %)
- divorce or maintenance	24 (8,08 %)
- insurance claims	28 (9,43 %)
- criminal offence	19 (6,40 %)
- labour dispute	6 (2,02 %)
- pension or social welfare problem	3 (1,01 %)
- hire-purchase problems	5 (1,68 %)
- making of a will	27 (9,12 %)
- settling of an estate	25 (8,42 %)
- landlord/tenant problem	4 (1,35 %)

Problem	number and % of respondents answering 'yes'
- traffic tickets	13 (4,38 %)
- other contract problems	16 (5,39 %)
- advice on business matters	19 (6,40 %)
- tax matters	7 (2,36 %)
- pass offences	4 (1,37 %)

As can be seen above, the highest frequency of contact with lawyers stemmed from matters bearing on property law, law of succession, family law, insurance law, and criminal law.

A highly significant correlation was found between the use of lawyers on the one hand, and population group and income on the other. But this was valid only in respect of matters bearing on property law, law of succession and business law. The two tables below show the correlation between race and income on the one hand, and on the other contact with lawyers in respect of property matters.

Table IX

Table Showing Contact with Lawyer by Population Group in Matters Affecting the Buying or Selling of a House or Building

Contact with Lawyer	Population Group			
	Whites	Africans	Indians	Coloureds
No	N = 77 (30,8 %)	124 (49,6 %)	[illegible] (7,2 %)	31 (12,4 %)
Yes	N = 31 (66,0 %)	3 (6,4 %)	7 (14,9 %)	6 (12,8 %)

$x^2 = 37.57$; p: 0.000

Table X

Table Showing Contact with Lawyer by Monthly Income in Matters Affecting the Buying or Selling of a House or Building

Contact with Lawyer	R199 and less	R200-R299	R300-R399	R400-R499	R500-R599	R600-R699	R700 and above
No	31 (12,4%)	48 (19,2%)	40 (16,0%)	50 (20,0%)	38 (15.2%)	19 (7,6%)	24 (9,6%)
Yes	2 (4,3%)	0 (0,0%)	0 (0,0%)	3 (6,4%)	3 (6,4%)	6 (12,8%)	33 (70,2%)

$x^2 = 102.23$; p: 0.000

That race should be an important variable influencing the use of lawyers in property matters is traceable to the fact that Africans in urban areas are forbidden to own immovable property; let alone that African women are, because of their contractual limitations under customary union marriages, prohibited from purchasing immovable property. At the time of interviewing, however, the department of Co-operation and Development had announced that it was about to implement a new 99-year leasehold scheme for urban Africans. Registration of lease agreements under this scheme will, of necessity, require the services of an attorney, also because of the 'obstructive bureaucracy'[3] involved.

Indians and Coloureds on the other hand are allowed to own property situated in the residential areas specially set

[3] 1980 Survey of Race Relations 309.

aside for them. This accounts for their comparatively higher incidence of lawyer contact in property matters as opposed to Africans.[4] The comparatively lower incidence of contact with lawyers amongst Coloureds and Indians as opposed to Whites is attributable in part to the fact that Coloureds and Indians in the Vaal Triangle acquired the right to purchase property only in 1968, with the creation of the townships Rust-ter-Vaal and Roshnee. And only a few have, thus far, obtained title deeds to their property.

The percentage of each population group which had consulted a lawyer on business matters was as follows: Whites 11,11 %, Africans 0,78 %, Indians 20,83 %, and Coloureds 2,70 %. The low incidence of lawyer contact amongst Africans and Coloureds is explainable partially by the fact that the law severely curtails Black people in general from conducting business.

Except in the case of Pass offences in which race was a strong factor, in all other matters in respect of which lawyers were used no significant correlation was found between the use of lawyers on the one hand, and the geographical are, age, sex, personal status, occupation and educational qualification of the respondents on the other.

b Access through Social Contact with Lawyers

The findings showed income and race to be important variables influencing contact with lawyers at the social level. A total of 57 (19,3 %) respondents said that they had a friend or a relative who is a lawyer or who is becoming one. It is significant that 56,1 % who said so were

4 The African respondents in the sample who consulted a lawyer on property matters lived in Evaton (now Sebokeng) - perhaps the only area in urban 'White' South Africa where - at the time of interviewing - Africans still had freehold rights.

Whites. It is equally significant that 56,2 % of those who said they had social contact with lawyers had a monthly income above R 600. It is interesting, too, that the majority (69,6 %) of those who said they had social contact with lawyers said that they had a specific lawyer in mind to whom they would go if they had a legal problem. Unclear, however, is whether the lawyer they meant is the one with whom they had social contact. On the other hand, *only 26,5 % of those who did not have social contact with* lawyers said that they had a specific lawyer in mind to whom they would take their legal problems.

Empirical research elsewhere has shown that social status is an important variable influencing social contact with lawyers. A survey conducted in California found that less than 30 % of the lower-income groups have either a friend or relative who is a lawyer, compared to 75 % of the upper-income group.[5] In West Germany it was found that approximately 21 % of the population have a friend or relative who is a lawyer. The social-class percentage breakdown was as follows: 8 % of the lower class; 18 % of the lower middle class; 25 % of the upper middle class, and 53 % of the upper class.[6]

The differential frequency of contact with lawyers between Black and White South Africans confirms the findings of both the American and German Survey, given the fact the race in South Africa determines social status. But within each of the population groups, too, a highly significant correlation was found between income (x^2 = 95.31; p: 0.004) and education (x^2 = 95.31; p: 0.000) on the one hand and

5 J E Carlin and J Howard 'Legal Representation and Class Justice' (1965) 12 UCLA Law Review 381 at 427.

6 W Kaupen 'Das Verhältnis der Bevölkerung der Bundesrepublik zur Rechtspflege'(1971)12 Neue Juristische Wochenschrift 497.

social contact with lawyers on the other. As regards education, only 7,1 % of the respondents with no schooling said they had social contact with a lawyer, compared to 59,5 % of the matriculants. And as regards income, only 3,0 % of those with a monthly income of less than R 199 said they had social contact with a lawyer, compared to 32,0 % of those in the R 600- R 699 bracket and 38,6 % of those earning R 700 and above.

The comparatively high layman - lawyer social contact amongst Whites can be explained as follows: First, most lawyers in South Africa are Whites. The ratio of White lawyers, law students and articled clerks to the rest of the White population is much higher than in the case of Blacks. Furthermore, the laws restricting social integration amongst the different population groups prevent Black laymen from coming into social contact with White lawyers.

Casual contact with lawyers can benefit the layman in several ways: He has an opportunity of asking general questions about the law and how it works - questions he would hesitate to put to a lawyer in the formal matter-of-fact office setting. He has an opportunity of being informed of his rights and duties regarding certain matters of interest to him. When he has a legal problem, he can be advised on how to go about solving it. In the case of a complicated problem, he can be referred immediately to other lawyers specialized in a particular field. Furthermore, he has an opportunity of obtaining broad legal advice along more preventive lines at the planning or preparatory stage of a legal arrangement. The advantages for the layman are, therefore, threefold: educative, remedial and prophylactic.

But as emerged from the sample, it is precisely those persons who would benefit most from such contact - the poor and uneducated - who are least likely to come into

casual contact with a lawyer; if and when they do seek legal advice, it is only after the damage has already been done.

Although Indians are subject to the same business restrictions as Africans and Coloureds, several Indian respondents occupied major business premises in the central business district of Vereeniging. Indeed, at the time of interviewing all Indian respondents who were businessmen, said that they were busy consulting lawyers to help them fight against the implementation of the Group Areas Act, in terms of which they were compelled to vacate their business premises for alternative sites situated in the 'Oriental Centre' on the outskirts of the town. And as a considerable number of Indians in the Vaal Triangle are engaged in business, their comparatively high frequency of lawyer consultation in business matters, as opposed to other groups, is not surprising.

In the case of divorce and maintenance problems, population group was an important variable influencing the use of lawyers, but not income. Of the respondents who had consulted a lawyer on divorce or maintenance problems 58,4 % were Whites, 25,0 % Africans and 16,7 % Coloureds.

c Non-Engagement of Lawyers despite Legal Problems

A total of 70 cases were recorded in which the respondents said that they had had legal problems but had not consulted a lawyer about them. Of this number 20 were Whites, 34 Africans, 11 Coloured and 5 Indians. These respondents were then asked to state the nature of the problem they had and to select from a list read out to them the reason(s) why they had not consulted a lawyer. The check-list of reasons put to the respondents was based on my own normative assumptions. It was designed to overcome the methodological difficulty that some respondents might not, out of their own,

reveal the true reason out of fear that it might seem ridiculous. Room was left for respondents to list other reasons, not included in the list, that they might have had for not going to a lawyer. This proved fruitful as important data came to light which should be taken seriously and which could serve as a guideline for broader, co-ordinated investigations into the structural and psychological barriers isolating people in South Africa from the administration of justice.

Below is the list of reasons - as contained in the questionnaire - together with the incidence of answers.

	Yes	No
- You did not know you had a legal problem?	10,96 %	89,04 %
- You could not afford to pay a lawyer?	73,24 %	26,76 %
- You did not know any lawyers?	20,00 %	80,00 %
- You did not have time to go to a lawyer?	11,43 %	88,57 %
- You live far away from lawyers?	24,14 %	72,86 %
- You had bad experiences with lawyers before?	4,29 %	95,71 %
- You find it hard to communicate with lawyers?	7,14 %	92,86 %
- You felt that a lawyer would not be helpful?	32,86 %	67,14 %
- You are scared of lawyers?	8,57 %	91,43 %
- You were confident that you would solve the matter personally?	20,34 %	79,66 %

As the table above shows, costs emerged as the most frequently cited obstacle to the engagement of a lawyer. But it was not the only obstacle cited; each of the check-list of reasons found resonance, though in varying frequencies. I expected to find highly significant correlations between some of the reasons and the sociographic data of the respondents. This was not the case, except as regards the sex. But

here, too, the number of females was very small. Females, more than males, felt that a lawyer would be of no help and that they could solve the problems alone. Males, on the other hand, more than females were afraid of lawyers and had more difficulty in communicating with lawyers.

d Other Reasons for Not Consulting Lawyers

As stated, room was left for respondents to give other reasons why they had not taken their problems to a lawyer. The reasons given were divergent, but they could be grouped into broad categories. And as marked differences were discernible, particularly between Africans and Whites, the discussion here will focus separately on each racial group.

(i) Whites

The problems experienced by Whites were broadly consumer problems involving complaints about: exorbitant purchase costs for poor quality or defective goods; poor workmanship in repair services, especially motor repair services; landlords for neglect of flats or buildings and for unwarranted rent increases; spurious mailing-houses demanding payments for books or long playing records for which no order was placed, or which were not delivered at all. In three cases the matter involved a traffic offence.

More varied in their configuration were the reasons given for not going to a lawyer. The more typical reasons were: 'the matter was not so serious'; 'it was useless getting involved in a legal battle as opponents were big business concerns who could afford the best lawyers'; 'lawyers are not interested in working for poor people'; 'lawyers are only interested in big cases in which they can profit a lot'; 'I wanted to go to a lawyer, but my husband refused'; 'I didn't want to dig up old bones'.

(ii) Africans

The problems experienced by Africans surpassed those of the other groups both in range and complexity. Except for a few family law problems in which a private person was the opponent, most of the problems experienced by Africans had to do with organized bodies: the administrative authorities; employers; police; insurance companies and merchants.

In the labour sphere respondents reported problems in trying to persuade their employer to supply them with the 'blue card' (UF 74) which entitles them to benefits under the Unemployment Insurance Fund. They had difficulties in asserting the claims under the Workmen's Compensation Act. There were problems in obtaining old-age pensions, welfare and sick benefits. Several respondents complained about being summarily dismissed from work without reason. In other cases employers arbitrarily withheld or deducted wages. Farm labourers complained about their unusually long working hours for which no over-time was paid. One such case involved a male respondent who was paid only in kind and had not been granted annual leave for the previous two years. A female farm worker reported that her husband had been beaten up by a farmer, causing his leg to be broken, only because he absented himself from work for two days without notice.

Problems with the township administrative authorities revolved around the difficulties in obtaining residential permits for relatives, and the corruption of officials. Linked to these hardships was the problem of the Pass laws. A total of 9 respondents said that a family member had been convicted under the Pass laws; 3 of them twice. At the time of interviewing a woman respondent said that she was experiencing massive hardship in tracing the whereabouts of her brother who had been arrested under the Pass laws. Two

respondents reported about the humiliatory treatment to which they had been subjected to by police in the exercise of search powers under the Pass laws. In one case the police broke the respondent's door and windows only because he did not open the door promptly.

Problems with the school authorities involved difficulty in having children registered at school and in obtaining transfers from other schools; dismissal of children from school for not waring uniforms or for being in arrears in the payment of their school fees.

Consumer problems were legion and concerned mainly Hire-Purchase agreements. Several respondents said that they had affixed their signature to blank HP forms ignorant of their contents or of their legal import. This resulted in the seller filling in a higher price for the goods than that to which respondent originally agreed. This, in turn, gave rise to steep instalments, default payments and eventually to repossession. Second-hand automobile dealers tricked ignorant respondents into signing hire purchase and voluntary surrender forms without explaining their contents. Also, whilst parents were at work, children were deceived by salesmen into signing forms resulting in repossessions.

Five respondents had problems with hamper clubs. These respondents had made regular payments to the hamper clubs *throughout the year, but on the approach of Christmas* the hamper clubs ceased to exist and never delivered the groceries.

The reasons given for not consulting a lawyer were widely divergent. Here are some: 'I don't have a lawyer'; 'my lawyer is God'; 'lawyers don't help people they don't know'; 'lawyers don't understand our problems'; 'the law protects only Whites, not Africans'; 'I did not have the

courage to go to a lawyer'; 'going to a lawyer would only have complicated matters'; 'who would look after my wife and children if the lawyer lost the case and I had to go to jail'; 'lawyers delay handling Black peoples' problems'; 'it was not really a matter for the courts; it was purely a matter between my employer and myself'; 'I can neither read nor write, so what would be the use of going to a lawyer'; 'lawyers are White people and are not prepared to fight against their own people'; 'there was nobody with whom I could go to a lawyer'; 'lawyers have not time for Black people'; 'a lawyer would want to take the matter to court and this would result in me getting a court record, which I did not want because no employer will offer me a job knowing that one has a court record'; 'White people know how to bribe lawyers'; 'a lawyer exploits one when he sees one is uneducated'.

4 Discussion

To what extent the reasons recounted above could be said to be mere rationalizations for other concealed causes is hard to ascertain. It is important, however, that these reasons reveal personal attitudes held - attitudes that are spelt out in public, and whose effect cannot be underestimated.

Perhaps the first insight gained from an analysis of these reasons concerns the stereotyped, negative image of the lawyer: that of 'a man who helps you get what is coming to him'. This tainted image of the lawyer is a hangover from earlier times when lawyers in England were abused as 'needy pettifoggers', or those in Germany 'böse Christen' (bad Christians). These attitudes were exported also to South Africa and nurtured in accounts of the early gold rush in which one finds such insinuations as 'all the bar has trekked

to the Transvaal'[7] or that there has been 'a large immigration of lawyers to the gold diggings in Victoria'.[8]

It is unfortunate that this adverse image of the lawyer has remained uninfluenced by the good work done by lawyers over the years, both in professional as well as in public office. More regrettable is the fact that these negative attitudes are more current amongst those persons who are most in need of legal protection: the poor and the uneducated. On the other hand, the legal profession in South Africa has, as a unit, done very little to combat actively this scepticism. The profession's collective protest against the political and legal inequities suffered by the poor has been faint and disjointed. What is needed is a more vigorous commitment towards defending the dignity of the person - not only in court, but outside it, too. The recent establishment of the Democratic Lawyers' Association and the Lawyers for Human Rights is a significant starting point.

Emerging, too, from the analysis of the reasons is the mistaken view that all lawyers are White. The fact, that 2 of the 19 respondents implied it, shows that this is not an uncommon view; nor is this a theory held only by Africans. It seems, however, that this belief would actually operate as an access barrier to a White lawyer only where the opposite party is White, or the other way round. But this, too, is destressing to know since this kind of prejudice seriously undermines the professional integrity of lawyers. Unfortunately, the enforced social estrangement between the different population groups in South Africa only serves to increase ignorance of and prejudice towards each other.

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7 Hattersley op cit 170.

8 Ibid.

The ignorance as to the existence of Black lawyers is justified. The number of Black lawyers in South Africa is negligible. At the time the survey was conducted, there were only 4 Black lawyers practising in the Vaal Triangle. Furthermore, the gross overrepresentation of Whites as functionaries within the administration of justice encourages the feeling that legal institutions are for Whites only.

Two of the reasons, both given by Black respondents, were based on an erroneous understanding of how the machinery of justice works. The idea of going to a lawyer conjured up the scene of a court with a prison looming in the background. Losing the case (a civil one) was equated with going to prison, or with being branded as criminal.

Indeed, the layman's *inability to distinguish between* a crime and a tort and the type of legal penalties accompanying each is more widespread than is generally assumed. In the case of Africans this ignorance could be partly attributed to the fact that African customary law drew no distinction between an actionable wrong and a criminal act; nor does African law know the concept of a prison sentence. Also, the fact that most of the Black people who land in South African courts, land in its prisons, too, is perhaps one reason why some people avoid contact with the legal apparatus. Mr Justice H C J Flemming rightly told the Hoexter Commission of Inquiry into the structure and functioning of the courts that there was an urgent need to make the courts better known to the public.[9]

Considering that the reasons briefly discussed above all came from uneducated respondents, suggests that lack of education impairs a persons understanding of the law and reduces his capacity to make effective use of the legal sys-

9 The Star 13 November 1980.

tem. This was shown, too, in a survey conducted in Durban, South Africa. The respondents there were confronted with a set of hypothetical legal problems and were asked to whom they would go for help. It was found that lesser educated people did not answer 'attorney' as frequently as those better educated, but gave more 'don't know' answers.[10]

In West Germany, too, the seriousness of the lack of legal knowledge as an obstacle to legal assistance was shown by the answers to the question: 'In your opinion, why are many people not prepared to assert their rights through the courts if necessary?' Of those interviewed, 59,2 % chose the answer: 'They don't know what their rights are'; 33,7 % the answer: 'Lawyers fees and court fees are too high'; and 7,1 % the answer: 'Most lawyers and judges don't understand their problems anyway'. In addition, 71,4 % thought that many people did not consult a lawyer because they did not know how effectively a lawyer would deal with their special problem. And 66,7 % said, that a lawyer should be consulted only after all other possibilities of solving the problem have been exhausted.[11]

5 *Financial Obstacles*

In two of his articles in the Law and Society Review, Marc Galanter emphasizes the distinction between 'one *shotter*' (OS) and '*repeat player*' (RP) litigants - a distinction which is based primarily on the frequency of encounters with the courts. His assumption is that in the American setting individuals roughly fit the notion of OS

10 M K Robertson Preventive Law (unpublished LLM dissertation University of Natal Durban 1981) 73.

11 Falke op cit 30.

(one shotter) and that organizations roughly correspond to RP (repeat player).[12] The observations of Blankenburg are similar:

> In a society which is shaped by growing bureaucracies, judicial institutions are largely busy with conflicts in which at least one party is closely tied to some bureaucratic institution. Private parties seldom take a case to the courts. When they do, it is often with the support of organizations.[13]

According to Galanter the 'repeat players' have the following advantages over the 'one shotters'.

- Their legal experience permits better preparation for the proceedings.
- They can develop informal relations with the members of the deciding bodies.
- They can spread the risks of going to court over more cases.
- Their costs for bringing an additional case to court is relatively small.
- They can plan litigation to improve their chances of winning future suits.

These postulates, it is fair to say, assume an especial relevance in litigation which results in fundamental and compulsive judicial decisions. In South Africa it would be so in the case of litigation before the Supreme Courts and the Appellate Division whose decisions have far-reaching legal and social implications. Yet, it is a fact that the higher a litigant climbs up the judicial hierarchy the more prohibitive the costs and the more incalculable the cost risks become. Whereas the ordinary individual can barely afford being legally represented in the magistrates' court,

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12 'Why the "haves" come out ahead: speculations on the limits of legal change' (1974) 9 Law and Society Review 95-160; 'Afterword, Explaining Litigation' (1975) 9 Law and Society Review.

13 'Studying the Frequency of Civil Litigation in Germany' (1975) 9 Law and Society Review 308 at 318.

large organizations can draw on a standing pool of legal advisers in the large law firms, or can engage prominent and influential senior counsel irrespective of costs. As the survey showed, it is not only the very poor who are unable to pursue their claims through the higher courts; the middle-income groups find themselves in the same position. According to a Johannesburg attorney: 'Most people cannot afford the deposit (between R 200 and R 400) necessary to take matters to the Appeal Court. Some people go to the Legal Aid Board but often are refused help if they are earning more than the prescribed limit.'[14]

These costs barriers result in many people having to abandon promising cases. But what is more, some of the most pressing legal needs of the public are thus smothered. This is a dangerous phenomenon, particularly in South Africa where three-quarters of the population are without political representation in the central Parliament. Research elsewhere has shown that unredressed legal grievances find their destructive expression in civic violence and deliberate non-compliance with the rules of law and order.[15] A similar warning was echoed by Advocate A Chaskalson S C of the Legal Resources Centre in Johannesburg: 'The feelings of helplessness, resentment and ultimately anger, generated by exploitation and over-reaching or by intricate statutory controls which inhibit and constrain an individual's freedom are ignored by society at its peril.'[16]

That in recent years in South Africa there have been isolated cases of underprivileged individuals bringing appellate actions against government bodies and other organized interests on crucial social matters such as housing, public

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14 Quoted by the Sunday Express 23 November 1980.

15 J Falke G Bierbauer and K Koch Access to Justice: A Case Study on the Public Bureau for Legal Advice and Settlements out of Court in Hamburg in M Cappelletti and J Weisner (eds) Access to Justice II book 1 (1978) 105 at 106.

16 Rand Daily Mail 3 November 1980.

transport, labour relations, and family matters within the framework of the influx control measures, is attributable to the financial backing these individuals received from voluntary organizations and to the gratuitous services of some lawyers. This type of assistance, however, does not represent a permanent, organized solution to the legal needs of the underprivileged. The duty of ensuring that everybody has effective access to legal services is one which rests with the State and not with private groups.

It would be useful to examine the civil court records of both superior and magistrates' courts of say the past decade to find out the percentage of cases in which private persons, businessmen, and organizations have been plaintiffs/respondents; the social or organizational status of the parties; the legal relationships of the parties; the nature of the dispute; the incidence and professional ranking of legal representation; the amount in controversy; the length of the proceedings; the outcome of the matter and its impact on the social or legal landscape. Research of this kind could guide the legislature in eliminating the causes of the most conflict prone legal relationships and could provide the Legal Aid Board, too, with more concrete criteria for the granting of legal aid.

6 Consumer Problems

The miscelluneous consumer grievances recounted by respondents above will not be dealt with individually. Suffice it to say that these are grievances which are generic to the uneducated and the low-income groups. One reason for this is that although theoretically suppliers and consumers face each other as equals, in practice the consumer's position is weakened by his lack of information, which is widespread amongst the poor and the uneducated. Whereas theoretical advertising could compensate for this lack of information, thus making it easier for the consumer to decide, the inten-

sity and shrewdness with which it is conducted in practice, results in the market losing transparency to the ordinary consumer. One thus finds it hard to make a rational choice between different goods, services and terms of credit.

The South African Government rightly boasts that the country's advertising industry is on par with that in most free-enterprise economies.[17] Yet, unlike most of the free-enterprise countries[18], the South African Government has done very little to foster critical consumerism amongst its huge illiterate and poor population. The interests of the South African consumer, like the question of environmental protection, have been subordinated to the broader governmental interest in creating a favourable market for foreign investments on which the country's economy is so heavily dependent.

Though the Federal German economy is also heavily dependent on foreign capital investments, the German legislature has not overlooked the need to lace its market economy with corrective social components. Protection of the German consumer had become an important responsibility of the State. Major consumer protection laws passed in the last decade include the Instalment Peyments Act which informs the buyer of the special obligation he enters into with instalment payment schemes, stipulates that legal proceedings against the buyer may be instituted only at his place of residence since only there can he properly defend himself. To protect the individual against high-pressure salesmanship, the law gives the individual who has been lured into entering an instalment payment transaction one week within which to rethink his future financial obligations and to resile from

17 1976 Official Yearbook of the Republic of South Africa 799.

18 For developments in Europe, for example, see E von Hippel 'Verbraucherschutz in Europa' (1981) 45 Rabels Zeitschrift 353-376.

the contract if necessary. To strengthen further the position of the weaker party the Federal legislature enacted in 1977 the General Condition of Sales Act (Allgemeine Geschäftsbedingungen-Gesetz: AGB).[19] This law deals with the general standard forms of contract fixed unilaterally by commercial undertakings. It has eliminated most of the injustices which customers previously had to stomach because of their weaker position. The law states that the customer is no longer presumed to accept general sales conditions without being referred to them and without being given an opportunity of reading them before entering into the contract.

In South [illegible] n the other hand, the general view has been tha[illegible]sumer should safeguard his own interests.[20] A critical study of the South African consumer laws has shown 'that drastic, and urgent, change in and reform of the law are required'.[21] The responsibility of safeguarding consumer interests has devolved largely on the South African Co-ordinating Consumer Council (SACCC) which was established in 1970 with the aid of Government funds.[22] Its function is: to co-ordinate the interests of private consumer organizations, to channel consumer grievances to the Government with recommendations for improvement, as well as to provide information and guidance to consumers. No evidence exists, however, of any information and guidance filtering through to those who need it most - the illiterate and the poor. The reason is that the SACCC represents the interests of organized bodies only - bodies whose broader interests, too, are not incongruous to government policy.

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19 Law of 9 December 1976 BGBl I 3317 which came into effect on 1 April 1977.

20 Official Yearbook of the Republic of South Africa (1976) 515.

21 P Aronstam Consumer Protection, Freedom of Contract and the Law (1979) 236.

22 1976 Official Yearbook of the Republic of South Africa 515.

Because the underprivileged groups lack the resources to articulate their needs from influential platforms, their interests are largely ignored; particularly in the case of Blacks whose legalized isolation from the legislative process makes them highly vulnerable to scheming business practices.

Several English and Afrikaans language newspapers run legal advisory columns for consumers. These include 'Star Line', run by The Star (Johannesburg); 'Argus Action', run by the Daily News (Durban); 'Jan Burger', run by the Sunday newspaper Rapport, and 'Verbruikersrubriek', run by Die Vaderland (Johannesburg). The Rand Daily Mail runs a supplement called 'Consumer Mail', which informs readers about the comparative quality and price of goods and services on the market. The emphasis here is on preventive consumer education. A similar institution exists in Germany. It is called Stiftung Warentest (Comparative Testing Foundation) and was established in 1964 in Berlin. The Foundation examines and evaluates all kinds of consumer goods and services and publishes a monthly magazine, Test, which contains the findings and important legal information of use to the consumer.

The existence of the newspaper consumer advice service is widely unknown.[23] Its shortcoming is that it is available only to the literate - an unfortunate fact, if one considers that roughly half of the African adult population - the most exploited group - is illiterate.

In the survey the question was asked: 'Is it possible to write to a newspaper, or a radio station, or a television station asking for help to solve legal problem?' Of 292 who responded 17,75 % said 'No'; 34,47 % said 'Yes' and 47,78 % said 'Don't know'.

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23 Cf Aronstam op cit 234.

Table XI

Table of Racial Group's Knowledge of Legal Advice by Public Media

Racial Group	Yes	No	Don't know
Whites	n = 23 21,3 %	n = 40 37,0 %	n = 45 41,7 %
Africans	n = 12 9,7 %	n = 36 29,0 %	n = 76 61,3 %
Indians	n = 4 16,7 %	n = 12 50,0 %	n = 8 33,3 %
Coloureds	n = 12 33,3 %	n = 13 36,1 %	n = 11 30,6 %

Total 292

$x^2 = 22.21$; DF: 6 P: 0.001.

7 General Remarks

What the survey showed is that problems Africans experienced under the influx control laws (housing, passes, labour, social welfare) are not the problems taken to lawyers. It is not because these problems are of a non-legal character; on the contrary, they have a sharp legal edge notwithstanding their strong socio-political overtones. What is more, these are normally problems which cut deep into the bone of the individual's existence. For example, an African from a rural area (homeland) who is unfairly dismissed from work by his urban employer, loses his rights of residence in the urban area[24], is repatriated back to

24 Regulation 13(d) of Proclamation 74 Government Gazette 2029 of 29 March 1968.

the rural area where there are no employment opportunities and where he and his family can starve to death.[25]

Seen objectively, there are perhaps three reasons why these problems are not dealt with by lawyers. One of them is that legal services are expensive and only a few people can afford legal representation. Another reason is that the law[26] forbids Africans from obtaining court interdicts pending a determination of their rights of residence. This law severely limits the scope of assistance a lawyer can give, so that many lawyers are discouraged from accepting matters touching on residential rights. And as problems impinging on residence are, by their nature, structurally interwoven with labour matters, the two are invariably lumped together even though labour conflicts offer room for legal manoeuvering, though limited. None of the attorneys to whom I mailed questionnaires mentioned handling labour matters, neither in the course of their routine work, nor under the Legal Aid Act.

The third reason is that the daily problems of the poor, and those of Blacks in particular, are generally conceived of by lawyers as being essentially the concern of politicians, welfare authorities, labour bureaux and administration boards. This is the narrow view which takes no account of the larger political and social role of the lawyer in society. Advocate Chaskolson rightly says: 'To achieve the purpose of providing services to all sections of the community it may be necessary for the legal profession to examine its attitudes and practices.'[27] A more pointed description of the lawyers' wider role is spelt out by S E Cahn and J C Cahn in their famous article, 'The War on Poverty: A Civil-

25 1982 Survey of Race Relations 239.

26 Act 64 of 1956.

27 Op cit.

ian Perspective'[28]:

> The lawyer's function is essentially that of *presenting* a grievance so that those aspects of the complaint which entitle a person to a remedy can be communicated effectively and properly to a person with power to provide a remedy. Slum dwellers have many grievances not thought of as *calling for lawyers'* skills. Yet the justiciability of such grievances *should* not be prejudged; they require the scrutiny of a skilled advocate, for it is altogether possible that for many a remedy is available if the grievance is properly presented - even though the decision-maker may be a *school board, principal*, welfare review board, board of police commissioners, or urban renewal agency.

Indeed, the reluctance of most lawyers to concern themselves with social issues, is not confined to South Africa. In West Germany the findings of a *questionnaire sent out* to Munich lawyers showed that not only do lawyers in West Germany serve only a small section of the population, but also that the very structure of *their practices* and the average type of work they handle does not equip them well to cater for the needs of the less privileged strata of society.[29]

It is submitted that the legal profession's narrow view of the law and of *the lawyers'* role is shaped largely by the accents placed on legal education. As in most German law schools, legal education in South Africa has very little to do *with the harsh* social and political realities of the day.

8 Advertising Legal Services

We have seen that lack of money does not constitute the only obstacle to the use of lawyers. There are a num-

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28 (1964) 74 Yale Law Journal 1317 1336.

29 Götz von Aulock 'Rechtshilfe *für untere* Schichten und Anwaltschaft' 1975 (5) Jahrbuch für Rechtssoziologie und *Rechtstheorie* 94 *ff*.

of other reasons which could be grouped under the broad term, ignorance; be it ignorance as to the perception and characterization of a legal problem, the choice of a lawyer, the role of the lawyer or the workings of the machinery of justice. In a wider socio-political context the racial segregation and racial discrimination, which pervades the South African way of life, no doubt helps to nurture ignorance, suspicion and prejudice. But as both the West German and English experience teaches, the problem of access to lawyers obtains also in desegrated societies.

Lawyers in South Africa are not allowed to advertise their services. In Natal and the Transvaal practitioners are listed in the Yellow Pages.[30] But this relatively recent concession is of no benefit to the potential client in search of a lawyer who specializes in a particular field. Institutional advertising appears to be acceptable[31] but this sets out that the person knows about this, which is rare, and has adequate access to the Law Society. A study conducted in Johannesburg showed that, in practice, members of the public rely heavily on informal social contacts in obtaining legal services.[32]

Sixty per-cent of the attorneys surveyed in the Johannesburg study were against advertising, mainly on the grounds that there is a need to protect the professional status of the attorney.[33] The public surveyed was equally divided on this question, with a slight preponderance in favour of advertising.[34] Those who were opposed to advertising also stressed that there is a

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30 DJ McQuoid-Mason 'Ethics and the Attorneys' Profession: Fact or Fiction? Some Perspectives from the Consumer's Viewpoint' 1983 Acta Juridica 213

31 Ibid.

32 D Van Zyl Smit 'Professionalism and the Access to Legal Services' in MCJ Olmesdahl and NC Steytler (eds) Criminal Justice in South Africa (1983) 77 at 88.

33 Ibid 81.

34 Ibid 83.

need to protect the ethics of the profession.[35] Those who favoured advertising emphasized that the services offered by specific practitioners should be made known to the public.[36]

The fact that solicitors in England are now allowed to advertise their services is likely to influence the outlook of South African attorneys on this matter. Also, the fact that the legal profession is already losing valuable business to specialist consultants, estate agents, banks and insurance companies should serve as a strong indication to the profession that the traditional image of the omnicompetent lawyer does not stand up to the demands of our times and that there is a need for lawyers, too, to hold themselves out as specialists in certain fields.

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35 Ibid.

35 Ibid.

16 CURRENT PROCEDURAL DEVICES FOR ASSISTING THE POOR OUTSIDE THE STATE LEGAL AID SCHEME

1 Pauper and Pro-Deo Procedure at Civil Law

With the introduction of the legal aid scheme many lawyers hoped that the in forma pauperis and the pro-Deo procedures at civil law as well as the pro-Deo defence in criminal proceedings would be abolished in favour of the new scheme with a broader base and a realistic fee table. Unfortunately, these procedural instruments are still part of the South African legal aid system.

Although the uniform rules of court[1] promulgated under the Supreme Court Act of 1959[2] have simplified the procedures governing the institution of actions by poor persons[3], considerable obstacles to the use of pauper proceedings still remain. For instance, the means test remains unrealistic. It is fixed at a ceiling of R 100 worth of property, excluding necessary household goods, wearing apparel and tools of trade.[4] Only the extremely impoverished, in the proper mediaeval sense, can satisfy this requirement and not the poor person living in an industrial State in the late twentieth century. The fact that there are persons who satisfy this illiberal test is an indictment of the way material resources are distributed in South Africa.

Another weakness in the pauper rules is that the merits test is not applied uniformly in all provincial jurisdic-

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1 GN R48 1965.

2 Act 59.

3 See generally above.

4 Rule 40(2)(a).

tions.[5] The same applies in the case of pro-Deo civil proceedings in which judges have been unable to construe the words 'prima facie case' uniformly.[6] This causes uncertainty. Furthermore, Peregrini, who sue as paupers are still required to furnish security for costs.[7] Also, leave to appeal as a pauper is not granted lightly and the applicant has a heavy onus to discharge.[8] A radical flaw, too, in both the pauper and pro-Deo proceedings is that attorneys and advocates must act gratuitously unless the indigent person wins and is awarded costs.[9] An unsuccessful pro-Deo litigant on the other hand is not exempted from the payment of costs.[10]

Considered together, neither the pro-Deo rules of the magistrates' courts nor the pauper rules of the Supreme Court satisfy the legal wants of the poor. The technical barriers inherent in these procedures make them useless to most poor persons. It was on account of these limitations that in the early 1940s, already, the South African Institute of Race Relations started legal aid bureaux for the poor.[11] *Presently, registrars are referring* an increasing number of pauper and pro-Deo applicants to the Legal Aid Board. This has resulted in a gradual drop in pauper applications granted by the courts. Whereas in 1970 a total of 6516 pauper applications were granted, *in 1980 the number* had shrunk to 484.[12] So, one could well ask, why not abo-

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5 See Van Winsen, Eksteen and Cilliers op cit 810-812.

6 See Ex parte Oliphant 1940 CPD 537 at 541

7 Fourie v Ratefo 1972(I)SA 252(O) at 255.

8 Botha v Botha 1923 PH F22(E). See also Van Winsen, Eksteen and Cilliers op cit 817.

9 Rule 40(5) of the *Consolidated Rules of the Supreme* Court, and Rules 53(5) and 53(6) of the magistrates' courts rules.

10 Rule 53(7)(a) of the magistrates' courts rules.

11 See Race Relations Papers 114 of 1942 and 104 of 1954.

12 Statistics taken from J McQuoid-Mason An Outline of Legal Aid in South Africa (1982) 62.

lish these antiquated procedures altogether? Why should lawyers in a *modern industrial State* which subscribes to a free market economy be expected to work free of charge?

It is submitted that both the in forma pauperis and the pro-Deo rules be repealed and be replaced by the *State legal aid scheme.*

2 Review Proceedings at Criminal Law

At criminal law the institution, review, 'indicates the legal machinery for placing before a superior court the proceedings of an inferior court for supervision, reconsideration and correction of irregularities or illegalities which may have occured during the hearing in the inferior court'.[13] The need for such an institution in *South Africa, in particular,* is emphasized by Advocate Lansdown as follows:

> When *it is borne in mind* that the overwhelming majority of persons standing trial in the criminal courts of the Republic are members of the less favoured section of the community, unsophisticated, illiterate and on the whole without legal representation, it will be appreciated that the procedure *of review* provides a wholesome curb upon any possibly misdirected, arbitrary or despotic exercise of their functions by arbiters in the lower tribunals.[14]

The Supreme Court Act[14a] lays down the grounds[14b] upon which the procedures of an inferior court may be brought under review before a provincial division.

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13 A V Lansdown in A V Lansdown and J Campbell South African Criminal Law and Procedure V (1982) 677.

14 Ibid.

14a Act 59 of 1959.

14b Ibid S 24.

These are:

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

The procedure to be applied to bring a matter under review is prescribed by Rule 53 of the Rules of the Supreme Court relating to Criminal Proceedings.[14c] This procedure is, however, 'strictly formal and costly'.[14d]

The *Criminal Procedure Act*[14e] *on the other hand*, makes unique provision for simple and inexpensive procedures according to which certain convictions and sentences of magistrates' courts are scrutinized by a judge of the provincial division or the provincial court of appeal to determine whether the proceedings were in accordance with justice and to correct proceedings which are found to be not in accordance with justice.

14c Issued in terms of s 43(2)(a) of the Supreme Court Act 59 of 1959 GN No R 48 GG No 999 of 12 January 1965 (Reg Gaz No 437). Rule 53(1) was amended by GN No R 235 of 18 February 1966 (Reg Gaz No 624), and by s 21 of GN 2004 of 15 December 1967.

14d V G Hiemstra Suid-Afrikaanse Strafproses 3 ed (1981) 673 (own translation).

14e Act 51 of 1977.

a Automatic Review

The following sentences imposed by an ordinary magistrates' court, not a regional one, are subject to automatic review by a judge of the provincial division having jurisdiction:

(i) imprisonment of more than 3 months or a fine exceeding R 250 if imposed by a magistrate of less than 7 years' standing[14f];

(ii) imprisonment of more than 6 months or a fine exceeding R 500 if imposed by a magistrate of more than 7 years' standing[14g];

(iii) any sentence of whipping, other than one imposed on a juvenile male under s 294 of the Criminal Procedure Act.[14h]

These provisions are subject to the following qualifications:

(i) Automatic review applies only 'with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser'.[15] This means that the accused must have been legally represented not only during the hearing, but also when sentence was imposed.[15a]

(ii) Each sentence on a separate charge must be regarded as a separate sentence. If the

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14f Ibid s 302(1)(a)(i). Imprisonment includes detention in a reform school as defined in s 1 of the Children's Act 33 of 1960.

14g Ibid s 302(1)(a)(ii).

14h Ibid s 302(1)(a)(iii).

15 Ibid s 302(3)(a).

15a S v Chabagae 1978 4 SA 807 (O) at 810. See also S v Mboyany 1978 2 SA 927 (T) at 930. For criticism of the latter case, see Hiemstra op cit 681.

aggregate of sentences imposed on an accused in respect of more than one charge in the same proceedings exceeds the periods or amounts in section 302(1), the case shall not be automatically reviewable.[15b]

(iii) If a fine is imposed section 302(1) will apply only if a sentence of imprisonment is imposed as an alternative to the fine and the fine is not paid or no time is given for it to be paid before the person convicted is imprisoned. If the person convicted is imprisoned, at any time, because he failed to pay the fine or part of it, the sentence of fine shall be automatically reviewable.[16]

(iv) A case otherwise subject to automatic review is not reviewable if the period of imprisonment is suspended in whole or in part. The case will, however, be subject to automatic review if the sentence or part of it is enforced.[16a]

(v) A case on appeal is not subject to automatic review unless the appeal is abandoned. But once judgement in the appeal is given the case shall no longer be subject to automatic review.[16b]

15b S 302(2)(a) of the Criminal Procedure Act 51 of 1977.
16 Ibid s 302(3)(b).
16a Ibid s 302(2)(b).
16b Ibid s 302(1)(b).

(i) Automatic Review under Other Statutes

Section 302 of the Criminal Procedure Act applies exclusively with regard to criminal cases in which there were criminal sentences. Apart from the sentences which are subject to automatic review there are other orders which are automatically reviewable in terms of other laws.

Under the Mental Health Act[16c] a reception order is reviewable by a judge before whom is placed the medical report and the relevant certificate in respect of the detained mental patient.

The Abuse of Dependence-producing Substances and Rehabilitation Centres Act[16d] provides that an order made in terms of sections 30, 31 or 32 of the Act is subject to the law relating to appeals and any form of review as if the order were a sentence passed by a magistrates' court.[16e] A court order, made under section 296 of the Criminal Procedure Act, that a person be detained at a rehabilitation centre must be submitted for automatic review.[17]

Under the Blacks (Urban Areas) Consolidation Act[17a] orders made against idle or undesirable persons are automatically reviewable.[17b]

Under the Prisons Act prison trials are subject to

16c Act 18 of 1973 (s 19).

16d Act 41 of 1971 (s 33).

16e S 30 deals with the committal of persons to rehabilitation centres; s 31 deals with the postponement of an order made at an enquiry under s 30; and s 32 deals with the temporary custody of persons pending enquiry or removal to rehabilitation centres. See s 255 of the Criminal Procedure Act 51 of 1977.

17 S v Dalton 1978 3 SA 436 (T); Mac Donald 1978 4 SA 200 (T).

17a Act 25 of 1945.

17b Ibid s 29(15); orders made under subsec (7)(b), (c), (d) or (f).

automatic review.[17c] The review is not limited to the irregularities; any point which could also have been raised in an appeal is considered.[17d] The aim is to *maintain general control in order to ensure that* justice was done.[17e]

(ii) Submission of Proceedings for Automatic Review

Where the case qualifies for automatic review under section 302 of the Criminal Procedure Act, 1977, the clerk of the trial court must, within one week, forward to the registrar of the provincial division having jurisdiction, a record of the proceedings together with any remarks by the magistrate and any statement or argument of the convicted person.[18] The registrar then lays the record before a judge, who will endorse it and return it to the trial court if he finds that the proceedings were in accordance with justice.[18a] Should the judge consider the proceedings not to be in accordance with justice, he must obtain from the trial magistrate the reasons for the conviction and sentence, and must lay this statement and the trial record before the court of the provincial division which sits as a court of appeal.[18b]

The court may confirm, alter or set aside the conviction or sentence, or remit the case to the magistrates' court instructing it to deal with the matter in a manner the provincial deems fit, or act as the magistrates' court ought to have acted in the case, or it may make any order in connection with the trial-court procedure which to it

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17c S 56 of Act 8 of 1959.
17d Hiemstra op cit 684.
17e Ibid 685.
18 S 303 of the Criminal Procedure Act 51 of 1977.
18a Ibid s 304(2)(a).
18b Ibid.

seems likely to promote the ends of justice.[18c]

The review is not limited to the irregularities of the proceedings.[18d] Any point which could also have been raised in an appeal is considered.[18e] If the court wishes to have a question of law or of fact arising from the case argued, it may direct the question to be argued by the attorney general and by counsel appointed by the court.[19]

A magistrate's court imposing a sentence which is automatically reviewable, must inform the person convicted that the proceedings will be transmitted within one week and the person may then inspect and make a copy of the record before transmission or while in the possession of the provincial division, and may set down the case for argument.[19a]

A sentence imposed by a magistrate which is not subject to automatic review under section 302 or any sentence imposed by a regional court may also be reviewed by the provincial division if it is brought to the notice of the court that the proceedings in which the sentence was imposed were not in accordance with justice.[19b] While this provision is meant for the trial court which seeks legal redress of proceedings which are not subject to automatic review[19c], it also offers the aggrieved accused an opportunity to bring before the reviewing instance a case which is otherwise excluded from automatic review. Given the fact that the provisions of section 302 of the Criminal Procedure Act, 1977, have been designed

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18c Ibid s 304(2)(c).
18d Hiemstra op cit 679.
18e Ibid.
19 S 304(3) of the Criminal Procedure Act 51 of 1977.
19a Ibid s 306.
19b S 304(4).
19c Hiemstra op cit 687.

to reduce the number of cases subject to automatic review it is likely that the courts will be more inclined to exercise their powers under section 304(4) than in the past where a possible failure of justice is brought to their attention.[19d] 'There is a need for such a procedure in a country with a large number of impecunious accused persons. The accused has otherwise to rely on an ordinary appeal or a review in terms of section 24 of the Supreme Court Act. It gives rise to costs which the large majority cannot afford to pay'.[20]

No review procedure exists for irregularities which take place in trials in superior courts. But provision is made for a so-called special entry, an essentially appellate procedure, according to which the accused may, if he considers his trial to be irregular or not according to law, apply for a special entry to be made on the record.[21] The court is obliged to grant the accused's application, unless it is of the opinion that the application is in bad faith, 'or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.[22] If the court rejects the application the accused will be entitled to petition the Chief Justice for a special entry to be made on the record.[23] Where a special entry is made on the record, the convicted person may, within twenty-one days, appeal to the Appellate Division against his conviction on the grounds of the alleged irregularity.[24]

19d S v Eli 1978 1 SA 451(E).

20 Hiemstra op cit 687 (own translation).

21 S 317(1) of the Criminal Procedure Act 51 of 1977.

22 Ibid.

23 S 317(5) of the Criminal Procedure Act 51 of 1977.

24 Ibid s 318(1).

In practice, however, the special entry procedure is of little avail to a person who is without legal representation. An unsophisticated person who does not understand court procedure does now know whether or not the proceedings in his trial are irregular.

The institution of automatic review provides a crucial procedural safeguard against magisterial high-handedness for the thousands of persons who are sentenced daily in the magistrates' courts. Its retention in the 1977 Criminal Procedure Act is welcomed and is primarily due to the judiciary who were prepared to put up with the cumbersome work that review proceedings entail - a laudable stand, given the heavy case-load and unwieldy bureaucracy presently encumbering the business of the courts.[25]

Much as one appreciates the value of automatic review, one has to recognize its inadequacies. A major drawback is that those proceedings in which the most glaring irregularities occur which affect thousands of people annualy, namely, the proceedings of 'pass' trials in the Commissioners' courts, are exempt from automatic judicial review. Indeed, if there are accused persons who are in dire need of legal protection it is the thousands of Black persons without legal assistance who are sentenced daily in the 'pass' courts.

Another shortcoming is that automatic review does not apply to the sentences imposed by regional courts. The need for some form of control here is underscored by the fact that regional courts now have more powers as

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25 See Dugard Introduction to Criminal Procedure 107.

regards sentencing[26] and jurisdiction.[27] They also have jurisdiction in respect of some political offences.[28] Magistrates are civil servants, and their competence to preside in cases involving state-endangering crimes is seriously questionable. Already, several cases have come to light involving political trials in regional courts in which proceedings were started without notifying the defence lawyer.[29] In one such case involving a juvenile the magistrate authorized the prosecutor to read the charges to the accused despite the fact that no parent or guardian was present as is required by section 74 of the Criminal Procedure Act.[30]

Considering everything, however, the automatic review is a valuable institution, though it cannot compensate effectively for the disadvantage suffered by an accused standing before a court alone, without the assistance of counsel.

b West Germany

Automatic review does not exist in Germany. The procedural remedies available to the aggrieved are (i) the Berufung, which is an appeal on the merits of the case, and (ii) the Revision, in which only procedural irregularities

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26 See s 9 of Act 51 of 1977.
27 Ibid ss 7, 14 and 15.
28 See ss 4 and 5 of Act 83 of 1967.
29 See below.
30 Johannesburg Regional Court (cc41/27/78).

are reviewed.[31] For small crimes (penalty up to one year imprisonment[32]) and for more serious crimes (penalty up to three years imprisonment[33]) two higher instances are available to the aggrieved: the Regional Court (Landgericht) which sits as a court of appeal, and the Higher Regional Court (Oberlandesgericht) which is a review court. For especially serious crimes (e.g. murder)[34] and for state-endangering crimes[35] only one further instance is available, the Federal Court of Justice (Bundesgerichtshof) which, curiously, is not at all concerned with matters of fact.

In practice, however, both the appellate and review procedural remedies are of slender benefit to most of the persons sentenced by the county courts. Most of these are too poor to afford the aid of a lawyer, without which review

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31 The reviewing instance is not authorized to enter a new judgement, but must refer the case back for a retrial.

There is another legal device known as the Wiederaufnahmeverfahren (reopening of trial). According to this statutory provision a sentenced prisoner is entitled to reopen the proceedings if the statute under which he was convicted is later declared unconstitutional (paragraph 79(1) of the Bundesverfassungsgerichtsgesetz). But the Federal Constitutional Court has held that one cannot use the Wiederaufnahmeverfahren if the procedures under which one was convicted are later declared unconstitutional. Decision of 7 July 1960 Entscheidungen des Bundesverfassungsgerichts 11 (1961) 263.

32 Court of first instance is the County Court (Amtsgericht) with a single judge.

33 Court of first instance is the Jury Court (Schöffengericht) consisting of a county court judge and two laymen called Schöffen.

34 Court of first instance is the Grand Criminal Chamber (Große Strafkammer) of the Regional Court consisting of three judges and two laymen.

35 Court of first instance is the Criminal Senate (Strafsenat) consisting of five judges.

and appellate proceedings cannot be instituted. Legal aid is not available in criminal proceedings, and persons charged before county courts are generally not entitled to court-appointed counsel. The majority of the lawyers the author spoke to estimate that between 65 % and 75 % of the persons on trial before the county courts are without legal representation.

Consequently, a considerable number of those sentenced and who have good prospects of success in the next instance, are forced to abandon promising defences for prison terms.

This situation has had a marked impact on the prison population. Today West Germany has the highest per capita prison population in Western Europe.[36] The number of prisoners per 100 000 population is 100[37]; in South Africa the ratio is 4,4 times higher.[38] Although the German prisons are not overpopulated as those in South Africa, those in Lower Saxony, for example, have already reached breaking strain.[39] A contributory factor is that a growing number of persons who are sentenced to pay fines are unable to do so and have, consequently, to go to prison.[40]

As a procedural remedy, the German Bar Association has suggested that the period of pre-trial custody entitling an accused to mandatory legal representation should be reduced from 3 months to 1 month.[41] To be sure, such an arrangement would afford more poor persons better chances before the

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36 Frankfurter Rundschau 18 December 1982.

37 Ibid. In France it is 67,7, in Denmark 56, in Norway 43 and in the Netehrlands 25. Also prison terms imposed by German courts are, on the average, four times as high as those imposed in other west European states, and the prison conditions are measurably harsher.

38 See 1982 Survey of Race Relations 74.

39 Frankfurter Rundschau 18 December 1982.

40 Ibid.

41 See Frankfurter Rundschau 5 January 1983.

courts. Besides, earlier access to counsel would likely result in fewer ungrounded charges and hence, less congested courts. On the other hand, to condition access to counsel on the expiry of a definite time is to overlook the vulnerable legal position of the unaided accused during the immediate, post-arrest phase. Although, by its nature, the role of the German prosecutor vis-a-vis the accused differs from that of say, his South African counterpart, this does not derogate from the need to afford the accused legal assistance from the start. The basic trouble with the one-month time span is that the prosecuting authorities can exploit it technically to the detriment of the accused. This is presently witnessed in the practice often resorted to by prosecutors of setting the case down for trial only a few days before the expiry of the three-month period. In this manner the accused is practically cheated of his right to mandatory legal aid and is reduced to a mere object of th l which can take place speedily and without any hitc

A more effective measure, it submitted, would be to expand the category of crimes for which mandatory legal representation may be assigned. Such a measure would ensure wider legal protection at county court level already. In addition, the accused in custody would have the prompt help of counsel right from the start.

3 Aid Centres for Africans

In an attempt to divert the majority of technical offenders under the Pass laws away from the courts and the prisons and to give them a chance to get their affairs in order, aid centres were established for Africans. These centres were established in terms of Section 25 of the Bantu Labour Act[42] of 1964, but only started operating in 1971.

42 Act 76 of 1964.

Presently, nineteen such centres exist mainly in mining regions and in port areas.

Any African arrested under the influx control laws may be referred to an aid centre. The centre's officials then identify the offenders, check their records and decide who can be helped. The centre may recommend that no criminal action is taken against the person referred to the centre and may order that he be: (a) placed in employment; (b) given the necessary documents; (c) permitted to stay in the area, or (d) repatriated to the homeland. Those who cannot be helped are referred to the Commissioners' Court for trial.

So much for the theory. In practice, the arrested person rarely escapes the hardships which the aid centres are *supposed to eliminate.* Usually the arrested person is first referred to the court, which issues an order that he be *locked up while the aid centre* investigates his case, ostensibly to 'safeguard the person concerned from repeated *prosecutions'*.[43] Because of the large number of person arrested, the identification can last more than a week as *this involves tracing* and confirming previous residence and employment and checking fingerprints against the records *kept at the* Central Reference Bureau in Pretoria. As no data transmission apparatus exists[44], police courier services *and express* postal services are used.[45] Another reason for the delay is that both the aid centres and the points of *contact* where the centres obtain the necessary information

43 Report of the Commission of Inquiry into Legislation Affecting the Utilisation of Manpower (Excluding the Legislation Administered by the Departments of Labour and Mines) RP 32/1979 para 3.186 at 56.

44 Ibid para 4 134(d)(ii) at 151.

45 M Horrel Laws Affecting Race Relations in South Africa (1978) 183.

on the arrested person, keep strict office hours and are closed on public holidays and over weekends[46], when most people are arrested. A problem is that even after the aid centre has investigated and disposed of a case, the person remains in detention until the prosecutor withdraws the charge.[47]

Despite these flaws, and despite other negative evidence laid before it concerning the effectiveness of the aid centres, the Commission of Inquiry into the Legislation Affecting the Utilisation of Manpower[48] (known as the Riekert Commission), recommended the retention of the aid centres. The Commission found that the centres 'serve a positive purpose'[49] and that 'so many offenders benefit by the aid centres system without the intervention of the courts'.[50] The Commission, however, criticized the inefficient administration of the system and it questioned the necessity of arresting large numbers of offenders[51] and their continued detention after disposal of the case by the aid centre. It recommended that the law be amended to ensure that all arrested persons be referred to the aid centres.[52] The Commission, however, found that the aid centre system should eventually be phased out as the offences decline due to the implementation of its other recommendations.[53]

But the Government's reluctance to implement some of the major recommendations of the Riekert Commission renders farcical its acceptance of the recommendations on the aid cen-

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46 Report para 4.128 148.
47 Ibid.
48 Op cit.
49 Report para 4.134(a) at 150.
50 Ibid para 4.134(b) at 150.
51 Ibid para 4.134(a) at 150.
52 Ibid para 4.134(e) at 151.
53 Ibid para 4.134(h) at 151.

tres. Instead, the influx control laws are being enforced more stringently than before. Contrary to the Commission's recommendation thousand of Africans are still being arrested on the streets. In 1982 alone, 206 022 persons were arrested under the Pass laws.[54] This is an approximate 27 % increase over the 162 024 persons arrested in 1981 and an approximate 90 % increase over the 1980 figure of 108 499. Aid centre statistics for the period 1975 to 1979 show a 20 % decrease in the number of persons referred to the centres[55] (from 221 537 to 151 430). But the percentage referred to trial increased from 44,22 % in 1975 to 52,92 % in 1979. For the same period an average of 50,92 % were given as 'not prosecuted'. Included in this category are those persons who were (a) 'placed in employment', (b) 'returned to the homelands' and (c) 'helped in other ways'. Those sent for trial and those sent to the homelands together made up about 67 % of all the persons referred to the aid centres.

What the statistics do not disclose are the number of 'legal' persons who were wrongfully arrested and referred to the centres. That such persons are not reflected in the statistics is surprising, for whenever the police or the administration officials raid the township houses in the small hours of the morning, a not insignificant number of lawful residents are arrested in the confusion. That lawful residents who are in custody lose their jobs and are consequently rendered illegal cannot be discounted, given the drawn-out identification procedure. It is unclear whether such persons are included under 'helped in other ways'. In 1981, Mr Klein, a former Commissioners' court prosecutor, submitted

54 House of Assembly Debates cols 236-237 (22 February 1983).

55 Statistics for 1975 to 1977 taken from the commission of Inquiry (Riekert), op cit, p 55; and those for 1978 and 1979 from the 1979 and the 1980 Survey of Race Relations at 397 and 306 respectively.

a report to the Attorney General of the Transvaal in which he claimed that aid centres were being used to obscure the true statistics of the number of pass offenders arrested. A circular sent to aid centre officials instructed them to colour the statistics in order to present a favourable picture.[56]

Although the aid centres do prove helpful in a number of ways, especially to stranded persons who voluntary make use of them, they have failed to realize their main aim - that of deflecting most of the technical offenders away from the courts and the prisons. For the tens of thousands who are annually deported to the desolate homelands, the concept 'aid centre' is a misnomer. The large number who are put on trial without legal representation do not regard themselves as being aided at all. Surely, if the authorities meant it earnestly they would see to it that the indigent technical offender who is facing a prison sentence is defended. Why are pass offenders, in practice, excluded from the purview of the legal aid scheme? The need for legal representation in the Commissioners' courts has been highlighted by a recent study[57] which will be discussed in greater detail in chapter 19.

a The Becker Street Advice Office in Johannesburg[58]

In 1979 the South African Council of Churches together with the Legal Resources Centre, the Centre for Applied Legal Studies and the Black Sash set up a roster system according

56 See 1981 Survey of Race Relations 238-239.

57 R Moname Is This Justice (1983).

58 Information on this advice offices was obtained from Professor John Dugard, Director of the Centre for Applied Legal Studies at the University of the Witwatersrand, Johannesburg. Professor Dugard is one of the lawyers participating in the scheme.

to which Pass offenders in the Johannesburg area would receive legal representation on a pro-amico basis. The scheme was administered by the Witwatersrand council of Churches from an advice office situated in Becker Street in Johannesburg. Some 20 lawyers participated in the scheme.

In practice, very few clients made use of the scheme. One reason for this was that the administrators at the advice office did not go to the Commissioners' courts to inform the accused persons about the service. Instead the office waited for clients to come to it.

Towards the end of 1983 the Black Sash arranged another meeting to revive the roster system in such a way that it be of wider benefit to the victims of the influx control laws.

b The Need for a Wider Solution

The State should ensure that all indigent persons charged with Pass offences before the Commissioners' courts are legally represented. The various Law Societies could appoint lawyers on a rotational basis to do the work. The lawyers could be appointed on, say, a weekly or a fortnightly basis. They should be paid a fixed salary which could be negotiated between the Law Society and the Legal Aid Board. Lawyer participation in the scheme should be voluntary. What is important is that they should be independent of the Justice authorities and that they are seen to be independent. The lawyers could be helped by paralegal persons situated at the prisons. Their duty would be: (a) to inform the arrested person en bloc of their procedural rights and of the availability of legal aid for those who cannot afford to retain their own lawyers, and (b) to take down the personal particulars of the arrested person, his financial circumstances and say, the facts leading to his arrest - in short, all information which could help the lawyer in his application for bail, his de-

fence or in his plea in mitigation.

Measured against the Legal Aid Board's *current expend*iture, such a scheme would be costly. But when seen in relation to the R 32 million which the State *spends annually* to administer the influx control laws[59], quite apart from the enormous sums it spends on marketing *the Pass system* at home and abroad, the costs of such a scheme would be justifiable. The implementation of such a scheme *would (a) reduce* the prison population and the productive man hours which are presently lost as a result of *indiscriminate arrests;* (b) help to retrieve the faith of the African people in the principles of procedural *justice and (c) create* wider confidence in the legal profession.

Such a scheme, however, would not eliminate the universal suffering caused by the Pass laws. What is needed is a complete abrogation of the influx control system. The fact that close to a quarter million of people are still being arrested annually under influx control laws, shows that this system does not work. Instead, it is damaging the country enormously. At the human level it has broken up thousands of homes and has rendered millions of children fatherless. At the socio-political level it has done untold harm to race relations. From the point of view of the administration of justice, it has brutalized the criminal justice system and has caused widespread hatred and disrespect for the law enforcement machinery. From an economic aspect the influx control system is incompatible with the principles of a free market economy - a system which prescribes that the individual enjoys the liberty of travel and residence and the right to sell his services to the highest bidder.

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59 An estimate made for the year 1979 by Professor Michael Savage, a sociologist at the University of Cape Town. *Reported in* 1979 S. vey of Race Relations 390-391.

It is submitted that the huge sums spent on implementing this harsh but unworkable system should rather be used to build more homes for Africans and to provide more work opportunities for them.

17 THE STATE LEGAL AID SCHEME

1 The Structure of the Scheme

The State legal aid scheme is regulated by the Legal Aid Act[1] which came into force in South Africa on 29 March 1971 and in South West Africa/Namibia[2] on 16 June 1971.[3]

a The Legal Aid Board

The Legal Aid Board is a corporate body[4] *established* by the Act to provide legal aid to the poor.[5] For this purpose the Board is authorized, inter alia, (a) to procure the services of lawyers[6] and *(b) to determine the* conditions pertaining to the granting of legal aid.[7]

The Act determines the Board's constitution.[8] Altogether 11 members make up the Board. They are: a judge of the Supreme Court who is appointed by the Minister of Justice[9], 4 practising attorneys and 1 practising advocate who are nominated respectively by the General Council of the Bar and the Association of Law Societies and who are appointed by the Minister[10], an additional member appointed by the Minister[11], and 4 representatives from state departments, namely the Secretary for Justice[12], the Secretary

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1 22 of 1969.
2 Including the Caprivi Zipfel.
3 Guide para 4.3.
4 S 2 of the Legal Aid Act.
5 Ibid s 3.
6 Ibid s 3(a).
7 Ibid s 3(d).
8 Ibid s 4(1).
9 Ibid s 4(1)(a).
10 Ibid s 4(1)(b).
11 Ibid s 4(1)(g).
12 Ibid s 4(1)(c).

for Co-operation and Development[13], the Secretary for Social Welfare and Pensions[14] and the State Attorney[15] or their representatives.[16] If in his opinion there are good reasons for doing so, the Minister may at any time end the period of office of any appointed member or his representative.[17]

The Board may decide how often it wants to meet.[18] Six members constitute a quorum.[19] The meetings are presided over by the judge or in his absence, the Secretary for Justice or his representative.[20] Usually, the Board meets biannually.[21]

The Board may receive money from any source in addition to the money appropriated by Parliament.[22] The Minister of Justice is empowered to ask the Board for periodic reports on its work and its financial situation.[23] Furthermore, the Board must provide the Minister with an annual activity report including audited financial records, which the Minister must table in Parliament.[24]

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13 Ibid s 4(1)(d).
14 Ibid s 4(1)(e).
15 Ibid s 4(1)(f).
16 Ibid s 4(2)(b).
17 Ibid s 4(2)(a).
18 Ibid s 5(1).
19 Ibid s 6(1).
20 Ibid s 4(5).
21 Annual Report of the Legal Aid Board for the period ended 31 March 1981 2.
22 S 9(3) of the Legal Aid Act.
23 Ibid s 9(10).
24 Ibid s 9(11).

2 Administration of the Legal Aid Scheme

a The Guide

The Consolidated Legal Aid Guide[25] (hereinafter Guide) is the basic document devised by the Board, which explains the workings of the legal aid scheme. In essence, the Guide stipulates: the eligibility requirements for the granting of legal aid; the types of matters for which legal aid may be granted; and the procedure which legal aid offices must adopt when entertaining an application for legal aid. Furthermore, the Guide contains directives to legal practitioners, regarding the handling of legal aid matters and the basis for their remuneration.

The legal aid scheme is administered by way of resolutions by the Board which are implemented under the supervision of an official of the Board, known as the Director of the Legal Aid Board.[26] The first and present incumbent of the office of Director is Mr J J A Mostert, a former control prosecutor and magistrate.[27] His office is at the Board headquarters in Pretoria.

At present the Board has 7 branch offices situated in the large cities: Johannesburg, Cape Town, Athlone (Cape), Port Elizabeth, Durban and Germiston. New branch offices are being planned for Pietermaritzburg, Vereeniging, Krugersdorp and Roodeport.[28] Each of the existing branch offices is manned by a full-time legal aid officer in the employ of the Board. Where it does not have a branch office, the Board is represented at a magistrate's or at a Black Commissioner's office in the district. These offices are manned on a part-time basis by serving officials of the Departments of Justice and of Co-operation

25 First Revision.

26 Guide para 4.2.

27 Rand Daily Mail 5 June 1971.

28 Annual Report of the Legal Aid Board for the period ended 31 March 1982 4.

and Development. The Board has a representative in every magisterial district in the Republic of South Africa and in South West Africa/Namibia.

Each of the 'independant' homelands, Transkei, Bophutatswana, Venda and the Ciskei[29] sponsors its own legal aid scheme which is essentially based on the Legal Aid Act 22 of 1969.

3 Who Qualifies for Legal Aid?

The applicant must satisfy two basic requirements *before he may be granted* legal aid. First, he must be indigent.[30] Second, he must 'to a certain extent' be 'permanently resident or economically active in the Republic of South Africa' or in South West Africa/Namibia (including the Eastern Caprivi Zipfel).[31]

a Indigent Person

Because the Act does not define 'indigent person' the Board lays down the means test.[32] In applying the test, the applicant's calculated income is taken into account.[33] 'Calculated income' means assets as well as income received *from all sources*[34] *after deduction of taxes, compulsory* pension contributions and maintenance payments.[35] Voluntary contributions towards the upkeep of a natural or a legally adopted child who is not in the applicant's custody may also be deducted, plus 1 per cent of the unencumbered value in

29 The legal aid scheme here took effect on 1 May 1982. See Ciskei Gazette 74 GN 39/1982 of 25 July 1982.

30 Guide para 9.1.

31 Ibid.

32 Guide para 5.1.

33 Ibid para 5.2.

34 This includes bonuses, pensions, allowances, maintenance and benefits received in kind.

35 Ibid.

excess of R 1000 of the joint assets of the applicant and his spouse.[36] The value of furniture, clothing, groceries and tools of trade are not taken into consideration.[37]

In the case of married persons, the joint income of both spouses is brought into account.[38] This applies to estranged spouses, too, except in a matrimonial matter in which case only the applicant's income and assets are taken into account.[39] Where a parent applies for legal aid on behalf of a minor, the financial position of the parents is considered.[40] If the parents are not indigent, legal aid will be refused. Furthermore, legal aid will also be denied an applicant who has sufficient disposable capital to finance the action himself.[41] 'Disposable capital' means cash in hand and deposits as credit in a bank or savings account, not required for the usual daily necessaries of life.[42]

Between 1971 and 1978 a separate means test applied for Whites, Africans and Coloureds/Asiens. According to the Director[43], the reason for the differentiated test was that each person should be treated according to the economic status of his colour group. This would ensure an equitable and proportionate distribution of legal aid grants through all population groups.[44] What the Board had overlooked, however, was that the costs of legal services are the same for everybody, irrespective of race.

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36 Ibid.
37 Ibid para 5.3.
38 Ibid para 5.2.
39 Ibid.
40 Ibid.
41 Ibid para 5.5.
42 Ibid para 1.1(e).
43 Rand Daily Mail 5 June 1971.
44 Ibid.

Consequently, the racial distinction in the means test was abolished in September 1978 and replaced by a uniform test according to which the White maximum income level became applicable to all. It was hoped that a non-differentiated means test would ease access to justice for lower income groups.[45] This hope has not materialized. One reason for this is that the income ceilings remain illiberal. Although the income ceilings are revised periodically, they are not adjusted realistically enough to keep up with inflation.

At present the income ceiling for single persons and estranged spouses is R 220,00 per month, plus R 40,00 for each dependant child.[46] 'Dependant child' means the applicant's natural child or legally adopted child wholly supported by him.[47] For married persons the ceiling is R 440,00 per month, plus R 40,00 for each child. Seen realistically, these eligibility limits are stringent and benefit mainly the extremely deprived. A large segment of the middle-income group who earn more than the stipulated maximum but not enough to afford the costs of legal action, are stranded.

To make legal aid accessible to a wider segment of the South African population a new means test should be devised. The new German system of partially subsidized or instalment legal aid could serve as a useful lead. Contribution-free legal aid could be granted to persons earning up to a certain amount, the cut off level being one which allows for a modest standard of living fixed by an official index. Persons with a monthly earning and disposable income above the ceiling could be granted legal aid subject to personal a contribution which is fixed on a sliding-scale basis and which

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45 The Director of the Legal Aid Board, quoted by the Rand Daily Mail 22 August 1974.

46 Annual Report of the Legal Aid Board for the period ending 31 March 1981 3.

47 Guide para I.I(c).

should be repaid over a fixed period.[48] The size of the contribution or instalment could vary between say 5 per cent and 20 per cent of the net income, allowance being made for tax, insurance and other obligatory liabilities. The size of the contribution would necessarily have to be varied where the person's financial circumstances change.

It is submitted that such an arrangement would reduce the financial hardship caused by the present disposable capital regulation which has the effect of eating away the hard-earned savings of middle income persons who are presently excluded from the legal aid scheme. The adoption of such an arrangement would also serve as a motivation for a widening of the category of legal matters for which legal aid may be granted.

b The Residence Requirement

The requirement that the applicant for legal aid must to a certain extent be permanently resident or economically active in the Republic of South Africa or SWA/Namibia is, with respect, unfortunate. In an interview with the Assistant Director in June 1980 the author was told that visiting British lawyers who are close to the legal aid movement there were critical of this South African regulation. With respect, criticism is justified.

Technically, this regulation is unclear. What is meant by 'economically active'? Would this include, say, the 'non-South African', who is employed seasonally as harvester on a farm? What about the 'citizen' of Venda working illegally in Johannesburg? What about the African

48 Cf P Ellum Legal Aid Developments in South Africa (1975) 63. Cf further Mr Justice Corbett 'Common Law Protection and the Consumer' (paper delivered at the 10th Annual Conference of the Association of Law Societies of South Africa, Durban 14 April 1981).

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University student from Bophutatswana, who has never been economically active and who is regarded as being only temporarily resident at a South African University? Another point: This regulation is worded in the present tense - 'persons who are'. This necessarily raises the question: what about Africans who have been resident and working in South Africa all their lives and who, through forced eviction to the homelands, are suddenly deprived of their rights and privileges in South Africa? This is not a far-fetched example. Take the eminently real case of the inhabitants of Winterveld. Winterveld is a large enclave inside the independent homeland, Bophutatswana. The majority of the some 800 000 Winterveld inhabitants is not recognized as Tswanas by the Bophutatswana Government nor as South Africans by the Pretoria Government. These people are practically in a legal limbo.

According to the Pretoria Black Sash Advice Office most of the elderly Winterveld inhabitants have worked all their lives in South Africa and are encountering enormous hardships in trying to assert their pension rights under the South African laws.[49] They have no income at all and survive on handouts.[50] Files kept by the Black Sash are full of examples of indigent persons who are technically excluded from availing themselves of the state legal aid scheme. The Legal Aid Board in the 'independent' homelands do not appear to be helpful either. This Ciskeian Legal Aid Board is known to operate inefficiently[51] and in Venda no application for legal aid

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49 Letter received from the Director of the Pretoria Black Sash Advice Office, Mrs M J Harrop-Allin dated 23 April 1983.

50 Ibid.

51 Letter from Mrs P M Flemmer of the East London branch of the Black Sash Advice Office dated 2 march 1983.

has ever been approved.[52]

The residence requirement is inequitable. It is submitted that this regulation be abolished.

(i) Legal Aid for Aliens in the Federal Republic of Germany

Until the enactment of the new Legal Aid Act aliens in West Germany were entitled to legal aid provided that the State of which they are nationals granted legal aid to West German nationals by virtue of multilateral treaty or actual practice. The courts had the discretion to grant legal aid to stateless persons and usually did so as long as such persons were resident in the Federal Republic and satisfied the other prerequisites for receiving legal aid. *Refugees were granted legal aid only in matrimonial and in guardianship matters.*[53]

Critics[54] charged that these limitations were discriminatory *and in violation of articles 6(1)*[55] *and* 14[56] *of*

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52 Letter from Mr J Namashi Secretary for Justice in the Republic of Venda dated 3 February 1983. My repeated requests to the authorities in the Transkei and in Bophutatswana for statistics on legal aid there have gone unanswered.

53 S 3 of Law No 23 of the Allied High Commission (17 March 1950) in Amtsblatt der AHK (1950) 140.

54 J Berkemann 'Armenrecht für ausländische Staatsangehörige bei fehlender Gegenseitigkeit (§ 114 Abs 2 Satz 1 ZPO)' (1979) 13 Juristenzeitung 545 ff; H Diemer Die Gewährung des Armenrechts im Zivilprozeß (1977) 16-18.

55 This article provides: 'In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair public hearing within a reasonable time by an independent and impartial tribunal established by law'.

56 This article provides: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

the European Convention on Human Rights which has the force of domestic law in the Federal Republic. It was further contended that the reciprocity requirement infringed article 103 of the Basic Law which provides: 'In the courts everyone shall be entitled to a hearing in accordance with the law.' The argument here was that article 103 applies not only to German nationals.[57]

The legislature reacted positively to the criticism. The new law makes no reference to aliens. This means that they are entitled to legal aid under the same conditions as German nationals.

c The Question of Legal Aid to Juristic Persons

The wording of paragraph 9.1 of the Guide does not suggest that legal aid may be granted to juristic persons. As pointed out, in Germany, juristic persons may, subject to other provisions in the Code of Civil Procedure, qualify for legal aid where neither juristic person self nor the parties in interest can raise the funds for the legal action, and where failure to bring or to defend an action would harm the public interest. It is submitted that this is a sound practice which could be adopted in South Africa, too.

d Unemployment and Criminality as Grounds for the Refusal of Legal Aid

The Guide authorizes a legal aid officer to refuse legal aid if he is satisfied that the applicant is unemployed for no sound reasons or that he leads a criminal life.[58]

This is a harsh provision as it shows no sympathy for the plight of Africans in particular.

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57 Berkemann op cit 551; W Däubler 'Bürger ohne Rechtsschutz? Kostenrisiko und Grundgesetz' (1969) 13 Der Betriebsberater 545 at 551..

58 Para 10.1.

As to the unemployment stigma first. It ought not to be forgotten that the laws governing Africans severely restrict their employment opportunities. Indeed, if there are any unsound reasons for Africans being unemployed, they should be sought more in the laws than amongst the people. Here is a typical case reported in the 1982 - 1983 Annual Report of the Black Sash:[59]

> MR M W N is typical of the hundreds of excluded people we have seen this year. He comes from Giyani in Gazankulu and lost his job after working for his employer for 9 years and 6 months.
>
> He found two new jobs in quick succession but was refused registration in both of them so was discharged. He went back to Giyani and waited for four months at the Labour Bureau for recruitment. He says that during that time no jobs whatsoever were offered. He has a wife and two children. He has no land to plough and no cattle. He must have a job in order to survive and to buy food for his children. The law does not allow him to work in the jobs he found for himself. We can do nothing whatsoever to help him or to help the thousands of others like him.

Supposing Mr M W N is subsequently forced to go and look for work in an urban area and supposing he is arrested for being illegally, he would undoubtedly have *enormous* difficulty in convincing a legal aid officer of his previous frustrated attempts to find work; more particularly since he would have no documents to prove this.

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59 At 8.

In the case of In re Duma[60], Didcott J criticized the fact that in practice the sole criterion used by Black Commissioners to determine whether or not an African should be declared an 'idle person', is physical and mental fitness.[61] The learned judge went on to hold that the reason for the unemployment 'is always more informative than its bare existence'.[62]

Second, to refuse an applicant legal aid because of his criminal way of life is to overlook a peculiarly South African social phenomenon, namely, that the greatest part of the population is deliberately victimized and criminalized by the law. Because of their high exposure to criminal sanctions Africans have a higher frequency of contact with the law than other groups. In practice legal aid is not granted for Pass offences. This leads to a high conviction and sentence rate. Although these offences are purely technical - the accused self being the victim - they are taken into account when sentence is passed in respect of similar or other crimes subsequently committed by the same person.[63] This results in the bizarre situation of an accused being sentenced to 8 years imprisonment for stealing a fowl, as the Deputy Commissioner of Prisons told the Hoexter Commission in 1981.[64]

It is submitted that precisely where the accused has a criminal record and where previous convictions expose him to a potential stiff prison sentence, that legal aid should be granted, not refused. Furthermore, in a large number of cases personal inclinations to a criminal way of life are induced by socio-psychological factors. Again, it

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60 1983 (4) SA 469 (N).

61 At 477.

62 At 481.

63 Cf Monama op cit 32.

64 The Star 4 February 1981.

is precisely in such cases that legal aid, as a medium for promoting social justice, should come into play. Legal aid lawyers could ensure that drug addicts and delinquents do not land in prison, but in the care of social therapists.

In short, unemployment and crime proneness are inequitable grounds for refusing a person legal aid. This provision should be abolished.

4 Procedure for Obtaining Legal Aid

The person in need of aid first goes to the legal aid officer at one of the Board's offices in the major centres or to the magistrate's office in other areas. If the person requiring legal aid is unable to consult the legal aid officer personally, a close friend or other responsible person familiar with the circumstances may do so on his behalf.[65] If the matter is not one in which the Board assists, the legal aid officer must inform the applicant that the Board is unable to help, and if possible refer him elsewhere where he can obtain help.[66] If the matter is one in which the Board assists, the legal aid officer must preferably fill in the application form himself or help the applicant to do so.[67] The legal aid officer must, as far as possible, verify the information given to him by the applicant and should, for example, always try to ensure that:

(a) the applicant does in fact maintain the number of children given;

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65 Guide para 15.5.
66 Ibid para 14.2.
67 Ibid para 15.1.

(b) the applicant has not previously been assisted or refused assistance elsewhere in respect of the same case;

(c) the applicant in an intended divorce action is acting in good faith and is not misusing the Board's services to 'frighten' the other spouse;

(d) the applicant has not previously engaged a lawyer in and is merely using the Board to obtain another opinion.[68]

The legal aid officer then applies the means test. He may require the applicant to verify his indigence by way of documentary proof of income, value of assets and other relevant matters.[69] Should the applicant satisfy the means test, the legal aid officer fills in the instruction form and refers the applicant to any local attorney who is prepared to act in the matter.[70] Where practicable, effect must be given to the applicant's choice to attorney.[71]

If the applicant has no income, the legal aid officer must briefly indicate the reasons for this on the triplicate instruction form which is sent to the board's Head Office in Pretoria.[72] Generally, if the legal aid officer doubts the veracity of the information given by the applicant, he must refer the matter to the Director in Pretoria.[73]

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68 Ibid para 14.5.
69 Ibid para 6.1.
70 Ibid paras 14.4 and 20.1.
71 *Ibid para 20.1(c).*
72 Ibid para 6.2.
73 Ibid para 14.6.

a The Unsuccessful Applicant

If the applicant is unsuccessful, the legal aid officer must inform him accordingly.[74] He must also be informed of his right of appeal to the Director against the refusal.[75]

b Confidentiality of Applicant's Information

The information supplied by the applicant must be treated as confidential; but it is not privileged.[76] In practice there is at least one known case where there were strong evidence suggesting that the Board had disclosed the contents of an application for legal aid to the opposing party - in this particular case, an administrative authority.[77] Criticizing the Board's action, Andrew Ladley rightly cautions: 'Applicants and lawyers are unlikely to make use of the scheme if the principle of confidentiality is not strictly observed.'[78]

It is submitted that the legislature adopt the recommendations made in 1973 by the attorneys' profession that the lawyer-client privilege be extended to statements made by legal aid applicants to legal aid officers.[79]

c Legal Aid Application for Appellate Actions

The procedure here is the same as that for ordinary

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74 Ibid para 14.3.

75 Ibid para 19.1.

76 Ibid para 23.1.

77 See A Ladley 'A Guide to Legal Aid? Some Issues Arising from the Refusal of Legal Aid in the Mbekweni Community Council Case' (1982) 99 SALJ 237-254.

78 Ibid 247.

79 See D J McQuoid-Mason An Outline of Legal Aid in South Africa (1982) 40.

legal aid.[80] The application must be considered by the Director and must be accompanied by full reasons and, if available, a copy of the record of proceedings and the judicial officer's reasons for the judgement.[81] The legal aid officer must notify the applicant and the attorney of the delay in obtaining the Director's decision and that they should decide whether or not to note the appeal in the meantime.[82]

Legal aid will be granted for an appellate action if the Director is satisfied that there are reasonable prospects of success.

d Appeal against the Refusal of Legal Aid

A refusal of legal aid is appealable to the Director. As pointed out above, the legal aid officer must inform the unsuccessful applicant of this right. The Guide does not expressly confer a general right of appeal in respect of matters excluded from the ambit of the scheme. The wording of paragraph 19.1, however, suggests that an appeal to the Director lies not only against a disqualification under the means test, but also in respect of those cases excluded from the scheme.

The grounds of appeal must be submitted in writing to the legal aid officer who must then forward these to the Director together with the application documents and his own comments.[83]

In practice, illiterate persons find it hard to motivate their appeal to the Director, particularly since legal aid officers are not obliged to give the reasons for their refusal. It is precisely at this point that many

80 Paras 17.2 and 18.2.

81 Ibid.

82 Ibid paras 17.3 and 18.3.

83 Guide para 19.1.

ignorant persons abandon the whole matter and do not even bother to consult a lawyer for further assistance. It is submitted that legal aid officers must not only furnish the applicant with the reasons for the refusal, but must also refer him to local places or persons who could possibly help him to lodge an informed appeal. In the big centres, the applicant could be referred to the legal aid clinics or other legal advice offices for the poor. In rural areas where no such facilities exist, the applicant could be referred to a local lawyer who has agreed to be appointed by either the provincial Attorneys' Association or the Legal Aid Board to help unsuccessful legal aid applicants lodge their appeals.

e Appeal to the Chairman of the Board

An applicant has a right of appeal to the Chairman of the Board against the Director's refusal to grant him legal aid.[84] Here, too, the grounds of appeal must be motivated in writing and be submitted to the Director who is required to forward them to the Chairman, together with the application forms and his own comments.[85]

It is submitted that the Director, too, should: (a) give the reasons for his refusal, (b) inform the applicant of his right of appeal to the Chairman and (c) inform him where he can obtain help to lodge an appeal.

At common law the applicant may ask the Supreme Court to review an unreasonable refusal of legal aid by the Chairman.[86] In practice, however, the Board seldom turns down an application unjustifiably.[87]

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84 Ibid para 19.2.

85 Ibid.

86 Cf McQuoid-Mason 41.

87 Cf Lalley op cit 253.

In Germany, the trial judge's refusal of legal aid is always appealable irrespective of the reasons given for the refusal. No appeal, however, lies against a refusal of legal aid by the Landgericht or Oberlandesgericht.

5 The Effect of the Legal Aid Grant

a The Recipient

Once the legal aid officer has approved the application the matter is referred to any local attorney who is prepared to accept the case.

In certain circumstances the legal aid recipient is exempted from furnishing security for the opponent's costs and from paying specific court fees.[88] In deciding whether or not to exempt the litigant from furnishing security, the court is guided by his financial circumstances, his prospects of succeeding and the circumstances of the case.[89] As is the case with the in forma pauperis litigant, the legal aid litigant must furnish security in terms of the Compulsory Motor Vehicle Insurance Act.[90] The Legal Aid Board recently decided to provide the funds for furnishing security.[91] This is a welcome step.

In the case of appeals the legal aid recipient obtains a copy of the lower court's judgement free of charge.[92] The Court, however, does not have the power to order a

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88 See rule 47A of the Supreme Court Rules, rule 6(6) of the Appeal Court Rules and rule 5(4) of the Magistrates' Courts Rules.

89 Cf Putzier v Union and South West Africa Insurance Co Ltd 1976 (4) SA 392 (A) at 400.

90 56 of 1972 s 24(2)(b)(ii). See also van Winsen Eksteen and Cilliers op cit 824.

91 Annual Report of the Legal Aid Board for the period ended 31 March 1980 4.

92 Rule 51(1) of the Magistrates' Court Rules: See Guide para 30.1.

registrar to bear the costs of preparing copies of the record.[93] It has been suggested that in appropriate cases the Legal Aid Board assumes the payments of these costs.[94]

The Legal Aid Board does not accept liability for costs awarded against an unsuccessful legal aid recipient.[95] Neither is the Board liable for the recipient's transport or subsistance expenses[96] nor for the costs of tracing witnesses.[97] But the transport expenses and loss of wages of a necessary witness (other than the legal aid recipient) in a civil case, are claimable.[98]

In Germany the State assumes the legal aid recipient's round-trip travelling expenses. The same applies in the case of an indigent accused. No fresh means test is applied. The only consideration is whether or not the expenses are necessary for conducting the case.[99]

It is submitted that in appropriate cases the Legal Aid Board should assume at least the transport expenses of the legal aid recipient.

The successful legal aid recipient is, however, deemed to have ceded his right to costs to the Legal Aid Board. Legal aid officers are required to explain this to the applicant seeking aid in civil cases.[100]

In the case of a settlement, the legal aid recipient is

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93 Strauss v Strauss 1973 (3) SA 788 (A) at 792.

94 Ibid at 793.

95 Guide para 46.6(1).

96 Ibid para 45.6(j).

97 Ibid para 45.6(k).

98 Ibid para 45.6(j).

99 See above.

100 See ss 3(d) and 8A(1) of the legal Aid Act; cf Guide para 21.2.

entitled to the balance of the settlement amount after deduction of costs to which the Board is entitled.[101] If the legal aid recipient is aggrieved by this arrangement, the matter may be negotiated with the Director with a view to abandonment of all or part of the costs.[102] Should the legal aid recipient unreasonably refuse an offer of settlement or insist on an exorbitant claim, the matter must be brought before the Director.[103] The Director, in turn, may refuse further legal aid in the matter.[104]

According to Mr Justice Friedman of the Cape Provincial Division of the Supreme Court, legal aid recipients in motor vehicle insurance matters are less likely to settle cases out of court.[105] This results in cases going on for longer than normal.[106] But this is a problem which essentially derives from the cumbersome court bureaucracy. What is needed is a radical streamlining of court procedure. Mr Justice Friedman suggested that a system of no-fault insurance would drastically cut down the time spent by judges dealing with motor vehicle insurance cases.[107]

b The Opponent

The Legal Aid Board is well aware of the danger of the legal aid recipient using the Board's funds to blackmail the opponent into a settlement.[108] This danger is particularly manifest where the unaided opponent is a person of ordinary means and who is aware that even if costs are awarded against the indigent party, he would not be able to recover

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101 Guide para 36.2.

102 Ibid.

103 Ibid para 36.3.

104 Ibid.

105 Cape Times 27 November 1980.

106 Ibid.

107 Ibid.

108 Mr Joubert The Assistant Director of the Legal Aid Board (interview June 1980).

them. The Board is not liable for any costs awarded against the legal aid recipient.

The same applies in Germany[109] where commentators have criticized the legislature's failure to make provision for the recovery of costs of the successful unassisted party.[110] One commentator argues that if the unsuccessful indigent party possesses attachable property, the successful adversary who is awarded costs can, by way of a writ of execution, compel payment and thus practically force the indigent party to the edge of the minimum existence level - a state of affairs which runs counter to the objects of legal aid.[111]

In England, if the proceedings are decided in favour of the unassisted party, the court may order that part or all of the costs incurred by him be paid out of the legal aid fund.[112] Such an order will be made if the proceedings in the court of first instance were instituted by the legal aid recipient and if the court is satisfied that the unassisted party will suffer severe financial hardship unless the order is made.[113]

The call for an introduction of a similar arrangement in South Africa[114] should be given serious attention; particularly, since the overwhelming majority of the population is not covered by a legal expense insurance. Indeed, South African lawyers believe that there is an urgent need for such a scheme in South Africa.[115]

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109 See § 123 of the Zivilprozeßordnung.

110 See Schneider op cit 143.

111 Ibid 143.

112 S 13(1) of the Legal Aid Act 1974 (c4).

113 Ibid s 13(3)(a) and (b).

114 Gross op cit 196.

115 P Ellum Legal Aid Developments in South Africa (1975) 32.

6 The Legal Aid Attorney

An attorney who is unable to accept a legal aid matter must inform the legal aid officer of his circumstances and must refer the applicant, with the instruction forms, back to him.[116] If the attorney accepts the case he must ensure that the instructions are clear and that the forms filled in properly.[117] If the applicant is required to make a contribution, the attorney must collect the amount before any costs are incurred.[118]

If the instructions are unclear the attorney must consult the legal aid officer or refer the matter to the Director.[119]

a Duties

An attorney who accepts a legal aid brief must keep the original instruction form as proof of the Board's instruction to him and must send promptly a duplicate to the Director.[120] The attorney must act personally, but may brief a correspondent or advocate of his choice where necessary.[121] Advocates are briefed in accordance with the rules of the local Bar.[122] The correspondent or advocate must be prepared to work at the legal aid tariff and is bound by the Guide's provisions.[123]

The attorney, however, must obtain the Director's written permission to: (a) brief an advocate where he himself is en-

116 *Guide* para 27.1.
117 Ibid para 27.2(a).
118 Ibid para 27.4.
119 Ibid para 27.3.
120 Ibid para 27.5(a) and (b).
121 Ibid paras 27.6 and 27.7.
122 Ibid para 27.7.
123 Ibid.

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116 Guide para 27.1.
117 Ibid para 27.2(a).
118 Ibid para 27.4.
119 Ibid para 27.3.
120 Ibid para 27.5(a) and (b).
121 Ibid paras 27.6 and 27.7.
122 Ibid para 27.7.
123 Ibid.

titled to appear except if he forwards an account for only those monies to which he would have been entitled had he appeared himself; (b) brief *a senior advocate; and* (c) to prosecute an appeal.[124] The attorney also requires the Director's written consent to act outside his instructions or to make applications or institute suits in addition to the main suit.[125] If necessary, he may, however, proceed by way of substituted service or edictal citation without the prior consent of the Board.[126]

In a civil case, before engaging in litigation, the attorney or advocate must satisfy himself that the legal aid client has reasonable prospects of succeeding; and in a criminal case, that the accused has an acceptable defence, or if the accused has admitted committing the offence, that there are extenuating circumstances which he is unable to advance himself.[127]

Lest the Board forfeit the right to recover costs deemed ceded to it, the attorney is obliged to inform both the opponent and the registrar or clerk of the court in writing that the Board is aiding the other party.[128]

The attorney, however, is not obliged to furnish the Board with regular progress reports. But he must notify the Director once the necessary aid has been rendered, or if the matter peters out for some reason or other. The same applies if there is a long delay in the finalisation of a case.[129] If within a year of the date of instruction the attorney has not submitted *a final account in respect of* the matter, or has failed to report a delay, he must be issued

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124 Ibid para 27.6.
125 Ibid para 27.10.
126 Ibid *para* 31.1.
127 Ibid para 27.9.
128 Ibid para 28.1.
129 Ibid para 38.1.

with a written request to do so within 21 days. *If he does* not comply, the Board must close its file and it will be deemed, without waiver of any rights of the Board, *that* no monies are owed to the attorney.[130]

Should the legal aid recipient's financial circumstances improve during the handling of the matter to such an extent that he no longer qualifies for aid under the means test, the attorney or advocate acting in the matter must report this to the Director and may not proceed with the case without the Director's written consent.[131] It is submitted that the adoption of the suggested contribution based on a sliding scale income table would obviate the detriment which would accrue to the legal aid recipient should the Director decide to withdraw the legal aid grant because of a change in the person's economic circumstances.

b The Attorney's or Advocate's Right to Refuse or to Withdraw from a Case

No legal obligation rests on any legal practitioner to accept a legal aid brief. He may also withdraw from a case as he would in a non-legal aid matter.[132] However, as a withdrawal can cause the Board to incur extra costs for instructing another practitioner, the attorney must weigh the matter thoroughly first, and if possible, inform the Director of his circumstances beforehand.[133]

7 Remuneration for Legal Aid Work

a Attorneys' Fees

After finalizing a matter the attorney must promptly notify the Director.[134] In a civil matter, the Director

130 Ibid para 28.2.
131 Ibid para 41.2.
132 Ibid para 37.1.
133 Ibid para 37.2.
134 Ibid para 44.1.

must simultaneously be informed of the benefit obtained for the legal aid recipient and of fees recovered or those which appear recoverable.[135] In a criminal case the Director must be informed of the result.[136]

Attorneys are generally remunerated in accordance with the tariff of fees contained in Annexure J of the Guide. Provided that if the attorney was instructed before 1 January 1979, the account to the Board (except for the global amount in the case of a divorce action) must be reduced by 10 per cent.[137]

Because of the spiralling cost of living, in 1982 the Association of Law Societies of South Africa asked the Board to increase remuneration for legal aid work.[138] The Association suggested that attorneys be compensated according to statutory tariffs, less a certain percentage. To facilitate the checking by the Board's officials, the Association also suggested that the accounts be submitted to the taxing masters of the courts beforehand. The latter suggestion was submitted to the Department of Justice which accepted it only insofar as accounts in contested Supreme Court matters are concerned.[139]

The Board agreed to increase the fees and the following basis of compensation was accepted:

(a) An attorney is remunerated on an attorney and client basis according to the statutory tariff in force at the time less 20 per cent.

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135 Ibid.

136 Ibid.

137 Ibid para 44.2.

138 Annual Report of the Legal Aid Board for the period ended 31 March 1982 3.

139 Ibid.

(b) In quasi-judicial matters and Commissioner's Court matters, scale A of the Magistrate's Court tariffs apply.

(c) In (Black) Divorce Court matters, scale B of the Magistrate's Court tariff applies.

(d) In non-litigeous matters the existing legal aid tariff applies, plus 25 per cent.

(e) In criminal cases the existing legal aid tariff plus 25 per cent applies and an item is added: 'Waiting time - R 15,00 for everyfull hour.'

(f) In undefended divorce actions where only one attorney appears, a global amount of R 250,00 plus disbursements is allowed; and R 312,50 where a correspondent is instructed.[140]

Where the costs which the court awards the legal aid recipient appear recoverable, the attorney must draw up and have taxed a party and party bill of costs and must proceed to recover the taxed amount, except where otherwise indicated.[141] After recovering these costs the attorney must retain, in addition to the allowed disbursements and after expenses cleared during the course of the proceedings have been brought into account, 80 per cent of the taxed fees as his remuneration. The balance plus the recovered advocate's fee exceeding the advocate's net account (if any) must be paid to the Board. The attorney must simultaneously furnish the Board with a copy of the taxed party and party bill of costs. The same applies where a settlement provides that the legal aid recipient be awarded his party and party costs or a round figure instead. A copy of the agreement must be sent to the Director.[142]

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140 Ibid.

141 Guide para 44.3.

142 Ibid para 44.5.

Where an advocate was briefed, the full advocate's fee is taxed and not merely the amount paid out by the Board.[143]

b Attorneys' Accounts

The attorney's accounts to the Board must be itemized and the date on which action was taken must be indicated against the item concerned.[144] Where a fee is calculated on a time basis or per folio, the time or number of folios must be indicated.[145] Amounts owing to a correspondent, advocate or expert witness must be indicated and the attorney must attach these accounts as a voucher.[146] A correspondent's account must be duly specified and the items claimed must correspond with the prescribed tariff.[147] The attorney must ensure, too, that the advocate's account accords with the prescribed tariff and where applicable, that the required certificate has been attached and that one quarter discount has been brought into account.[148]

The Board does not compensate the attorney for his dealings with the Board for aid to the client.[149] Also, no compensation is paid for any dealings for establishing the willingness to accept a particular case or for perusing the Board's instruction.[150] No fee is allowed for the drafting of an account to the Board.[151]

The Board accepts liability only for costs incurred from

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143 Ibid para 44.3.
144 Ibid paras 45.1 and 45.6(d).
145 Ibid para 45.1.
146 Ibid para 45.3.
147 Ibid para 45.4.
148 Ibid para 45.5. See also Annexure K, r 5 (e) (VI) (IX).
149 Ibid para 45.6(a).
150 Ibid para 45.6(b).
151 Ibid para 45.6(e).

the date of its instruction.[152] In Germany, too, the Treasury is only liable for costs incurred from the date of the legal aid grant. Where the legal aid grant does not indicate the date of award, the grant is assumed to have been made on the date on which the application for legal aid was lodged.[153]

The levy of 100 per cent for which provision is made in the Supreme Court Rules for party and party costs is not applicable to the Board.[154]

In criminal matters, where the attorney defends more than one legal aid recipient in a joint trial, the costs in respect of the same items may only be claimed once.[155]

If a legal practitioner acts both as attorney and advocate, he can claim for the work done as attorney, according to the tariff which is applicable to attorneys and for the work done as advocate, according to the tariff which is applicable to advocates.[156]

A dispute between an attorney and the Board over an account must be referred to the provincial Law Society concerned.[157]

c Advocates

The Bar does all legal aid work requiring counsel's services. Each local Bar is entitled to administer its own scheme for the distribution of legal aid work among its members.[158] Each Bar informs the provincial Attorneys'

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152 Ibid para 45.6(c).
153 Schneider op cit 105.
154 Guide para 45.6(f).
155 Ibid para 45.6(h).
156 Ibid para 45.6(i).
157 Ibid para 45.9.
158 Guide Annexure K r 1.

Association whether an attorney may brief counsel directly or whether the Bar will nominate counsel who may be briefed.[159] This arrangement applies to all legal aid work for which counsel is retained by an attorney, including work before any tribunal.

(i) Advocates' Fees

Counsel who has carried out his instructions is entitled to claim his fees in accordance with the rules and tariffs provided for in the Guide.[160] No additional fees may be received.[161] A fixed tariff is laid down for matrimonial pleadings, undefended divorces, third party me 's under Compulsory Motor Vehicle Insurance Act[162] and fo Black Divorce matters.[163]

As regards all other fees, counsel must submit the fee list to the 'taxing secretary' who is appointed by the Bar Counsel.[164] The 'taxing secretary' must certify that the fees are in his opinion fair and reasonable.[165] Thereafter counsel receives an amount equal to 75 per cent of the fee certified by the 'taxing secretary'.[166]

This, however, does not apply in the case of the fixed-tariff matters listed above where the full fee provided for is payable.[167]

Counsel thereafter submits the fee list to the attorney, who then submits it to the Board. The Board pays the Attor-

159 Ibid r 2.
160 Guide para 43.1. See Annexure K r 5.
161 Guide para 43.1.
162 56 of 1972.
163 Guide Annexure K r 5(a) (c) and (d).
164 Ibid r 5(e) (III).
165 Ibid r 5(e) (V).
166 Ibid r 5(e) (VI).
167 Ibid r 5(e) (VII).

ney and the attorney pays Counsel.[168]

The reduced tariff also applies in those instances where the legal aid recipient is awarded costs.[169] Any amount allowed on taxation in excess of counsel's entitlement as set out above, benefits the Legal Aid Board.[170] All Bars have agreed to relax their black-listing rules if they are satisfied that the attorney concerned has performed his obligations and that payment has been delayed by the Board.[171]

d *Reduced Tariff for Publications and Medico-Legal Ser*

Accor[illegible] in agreement reached with the Board, the Press Union of South Africa has recommended that its members publish advertisements in legal aid cases at a reduced tariff.[172] The attorney who sends in the advertisement must certify that it is a legal aid matter and must request a 'charity tariff'. The recommendation of the Press Union must be pointed out to the newspaper concerned.[173]

The Medical Society of South Africa has, on the Board's request, recommended to its members to charge two-thirds of the customary fee in legal aid cases.[174] Here, too, the attorney must point out that it is a legal aid matter and must direct the physician's attention to the recommendation of the Medical Society.[175] A copy of the request for a reduced tariff must be forwarded to the Director.[176]

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168 Ibid r 5(e) (X).
169 Ibid r 5(f) (I).
170 Ibid r 5(f) (II).
171 Ibid r 5(g).
172 Guide para 32.1.
173 Ibid para 32.2.
174 Ibid para 33.1.
175 Ibid para 33.2.
176 Ibid.

The Department of Internal Revenue exempts legal aid documents from stamp duty.[177]

177 In terms of s 4(1)(f) of th. Stamp Duty act 71 of 1968; Guide para 22.1.

18 LEGAL AID IN CIVIL MATTERS

1 Availability of Legal Aid

a Exclusions

As a general theoretical rule, and unless otherwise provided by the Guide, legal aid is available in all matters where the assistance of a legal practitioner is normally required.[1] In civil matters, legal aid is not granted in a number of cases.

(i) In proceedings in terms of sections 65, 72 and 74 of the Magistrates' Court Act[2]

According to the Board, the reason for this exclusion is that the person concerned has had a number of chances of which he did not make use.[3] As regards insolvency proceedings the reason is that the interests of other parties will be affected.[4] It appears, however, that the Board is prepared to assist in an appeal arising from a section 65 hearing.[5]

It is submitted, however, that the category of persons excluded from legal aid here be not turned away flatly by legal aid officers. These persons could be referred to *other legal advice agencies for the poor.* Professor McQuoid-Mason rightly points to a potential useful role which University legal aid clinics can play here.[6] Law students could, for example, help the court to arrive at an equitable order which prevents the debtor from over-committing himself,

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1 Guide para 11.1.

2 32 of 1944; Guide para 13.1 (a).

3 Interview with the Assistant Director June 1980.

4 Ibid.

5 McQuoid-Mason op cit 33.

6 Ibid 174.

Such help could comprise writing a letter to the court suggesting reasonable instalment settlements, or pointing out the reasons why an application or garnishee order should be set aside or amended in a particular case.[7]

(ii) For the administration of an estate and for the voluntary surrender of an estate[8]

In the urban areas especially, many African women are ignorant of the legal steps which they must undertake when their spouses die. They have to register the death, claim money under the deceased's pension scheme, the Unemployment Insurance Fund and, if the deceased was insured, the insurance company must be notified. Furthermore, the surviving spouse has to lodge an application to retain occupation of the house if it was registered in the husband's name when he died. Failure to act promptly and correctly can result in the deceased's family being saddled with far-reaching social and economic problems.

It is submitted that here, too, legal aid officers should not turn the applicants away, but refer them to legal advice agencies, insofar as they exist locally.[9] In the rural areas where no legal counselling services for the poor exist, the legal aid officers themselves should counsel applicants on how to go about lodging their claims and applications.

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7 Ibid.

8 Guide para 13.1(h).

9 Ibid for the role University Legal Aid Clinics can play here.

(iii) In an action for damages on the grounds of defamation, breach of an engagement contract, infringement of dignity, infringement of privacy, seduction, adultery and inducing someone to desert or stay away from his spouse[10]

The official policy underlying this excluded category of cases is that these are actions for sentimental loss and that an award of damages serves no purpose.[11] In the opinion of the Director, actions for seduction are anachronistic.[12] It seems, however, that the Board is prepared to aid if the claim is for pecuniary loss. For example, the Board has aided in seduction matters where the claim was for lying-in expenses. No aid is given if the claim is vague, or for indirect pecuniary damages.[13]

If legal aid is given for claims concerning pecuniary loss, it means that aid should be available, too, in an action for breach of an engagement contract where the plaintiff sues at contract for pecuniary loss (e.g. trousseau, loss of employment) resulting from a breach of promise. Such an action would, for example, also lie against a third party who has maliciously and from improper motives induced a breach of an engagement contract.

Thus, legal aid should be granted, too, in a defamation action where the defamatory statement results in the loss of patrimonial damage both actual and prospective. Similarly, legal aid should also be granted in an action involving infringement of privacy where the plaintiff has suffered patrimonial loss as a result of false or unlawfully obtained information being used against him. Indeed, the proliferation of private data banks in South Africa exposes a huge

10 Guide para 13.3 (c).

11 Ellum op cit 14.

12 Ibid.

13 Interview with Assistant Director (June 1980).

section of the population to the dangers of commercial malpractices in this regard.

It is submitted that the Guide's exclusion of all these matters is far too wide and undifferentiated. Furthermore, the denial of legal aid in actions involving sentimental damages overlooks the purpose of the legal aid scheme which is to approximate the position of the indigent person to that of the well-to-do client. There is no reason why a poor person should be denied legal aid merely because he is suing for sentimental damages.[14] The exclusion here, it is submitted, is discriminatory and contrary to the spirit of legal aid.

(iv) In a claim for maintenance which can be decided by a Maintenance Court without the assistance of a legal practitioner[15]

This exclusion applies only to a maintenance matter in the court of first instance. The reason is that these proceedings are of a quasi-criminal nature. The Board does, however, aid in appeals from the maintenance court.[16] It is submitted that this be clarified in the provision.

In Germany maintenance and paternity actions are regarded as being so fundamental to the existence of the person that the Federal Constitutional Court has held legal representation in these actions to be mandatory.[17]

(v) In a law suit in which the Board is a party[18]

The Legal Aid Board is a public body which is financed from public funds. The public thus has a firm interest in seeing to it that the Board administers the legal aid

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14 Cf Ellum op cit 15.

15 Guide para 13.1 (d).

16 Interview with Assistant Director (June 1980).

17 Decision of the Federal Constitutional Court of 18 June 1957 Entscheidungen des Bundesverfassungsgerichts VII 53.

18 Guide para 13.1 (e).

scheme equitably. Indeed, the Board itself has, by way of the Guide publicly declared its eagerness to accept public criticism[19] and, by necessary implication one could add, judicial criticism regarding the operation of the scheme.

It seems only logical therefore that the Board be equally willing to provide legal aid to an indigent person seeking judicial pronouncement on an operative aspect of the scheme, which affects his legal rights directly. The Board's obligation to assist here grows out of its very purpose, which is, to make legal aid available to indigent persons. The fact that the Board is a party in the law suit should be irrelevant.

b Divorce Cases

Legal aid is not rendered in divorce cases where -

(i) there is a reasonable possibility of a reconciliation[20];

(ii) the divorce will not substantially benefit the applicant.[21]

This provision is unacceptable from a social point of view. A large number of persons institute divorce proceedings not only for their own benefit, but for that of the spouse and above all, for the benefit of the children. Second, the concept 'benefit' has various aspects: legal, economic, social and psychological. These are all weighty issues which should be decided by a court of law, and not by a legal aid officer.

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19 Ibid para 47.1.

20 Ibid para 16.1(a). Cf s 4(3) of the Divorce Act 70 of 1979.

21 Ibid para 16.1(b).

(iii) The applicant's problems can be solved by administrave action on the part of a state or other institution[22];

(iv) the applicant is party to an adulterous union unless it appears from the circumstances that the aid is desirable and that the parties to the said union have the bona fide desire to marry: Provided that the financial position of the other party to the adulterous union shall be taken into consideration in determining whether or not the applicant qualifies as an indigent person in terms of the scheme.[23]

This provision is unfair. It retains the fault requirement which has since been abrogated by the Divorce Act.[24] According to section 4(1) of the Act, a court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that there is no reasonable prospect of restoring a normal marriage relationship between the parties. The fact that the applicant is party to an adulterous union is irrelevant.

It is submitted that this provision be abolished.

(v) The applicant had previously sued for and obtained a divorce with the Board's assistance[25]

This provision, too, is unfair. It reflects no sympathy for the unfortunate person whose subsequent marriage is ill-fated, too.[26] It is submitted that this provision be abolished.

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22 Ibid para 16.1(c).
23 Ibid para 16.1(d).
24 Op cit.
25 Ibid para 16.1(e).
26 Cf McQuoid-Mason 36.

(vi) The applicant had previously sued for divorce with the Board's assistance, but failed to proceed with his action; unless it is proved that the Board's expenses in connection with the previous cases have been recouped[27]

This provision is intended to prevent persons from wasting the Board's resources.[28] Professor McQuoid-Mason correctly points out that this provision may be unfair 'where an innocent spouse has managed to effect a reconciliation which is subsequently reneged upon by the other spouse'.[29]

(vii) Taking all the circumstances into account, it does not appear to be a deserving case.

c Procedure for Obtaining Legal Aid in Divorce Proceedings

In order to decide on application for legal aid in a divorce matter the legal aid officer must call for a social work report which deals inter alia with the above-listed matters in respect of which legal aid is not rendered.[30] The report must also indicate whether or not the applicant's children are in danger of being physically assaulted by the other spouse. Legal aid officers, however, are not bound by the recommendations contained in the reports.[31]

The legal aid officer may, however, waive the requirement to call for a social work report where he is satisfied that the delay in obtaining the report may prejudice the applicant or endanger the welfare of the children.[32]

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27 Guide para 16.1(f).

28 See McQuoid-Mason op cit 36.

29 Ibid.

30 Guide para 16.2.

31 Ibid para 16.4.

32 Ibid para 16.7.

An applicant who is granted legal aid in a divorce matter must himself obtain the marriage certificate. The Board is not liable for any expenses in this connection.[33] The legal aid recipient may also be required to make a contribution towards the Board's expenses. The amount is determined according to income and presently does not exceed R 35,00.[34]

Legal aid officers are required to ensure that the legal aid applicant in a divorce matter is acting in good faith and is not merely using the Board's services to 'frighten' the other spouse.[35]

(i) Critique

Three striking aspects of legal aid for divorce proceedings are. (a) the negative tone of the Guide; (b) the cumbersome bureaucracy; and (c) the wide discretionary powers of legal aid officers.

(a) The Negative Tone of the Guide

Nowhere does the Guide positively affirm that legal aid is available for divorce proceedings.[36] Instead it sets out a long list of disqualifications. The Guide's negative tone here testifies to a basic disinclination on the part of the Board to aid indigent persons in divorce matters. In fact, in 1978 the Board suspended legal aid grants for divorce matters because of a cut in its annual budget. This decision came as a shock to the legal profession, causing the editor of the attorneys journal De Rebus Procuratoriis to remark a year later: 'We trust that it will not be necessary anymore to curtail legal aid in this area.'[37]

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33 Ibid para 16.9.

34 See Annual Report of the Legal Aid Board for the period ending 31 March 1981 3.

35 Guide para 14.5(c).

36 Para 16(1) of the Guide states: 'Legal aid shall not be rendered in a divorce case if ...' (emphasis my own).

37 (1979) De Rebus 631 (own translation from Afrikaans).

(b) The Cumbersome Bureaucracy

Normal divorce proceedings take long. This is due to the sluggish court administration and case bottlenecks. The long delay is particularly noticeable in the Black Commissioners' Courts where divorce proceedings can last up to 2 years.[38] 'Too often incompetent work by clerks, in preparing summonses and other paper work, causes unnecessary distress and delay to the public.'[39]

This harsh reality calls for a radical re-evaluation of the procedure governing the application for legal aid in divorce matters. Because of the large number of applications and the paucity of qualified social workers in South Africa, in practice, probation reports take months to complete. The fact that legal aid officers are not at all bound by the recommendations made in the reports, raises the important question: Given the expense, time and effort spent in drawing the report, is it worth it?

These considerations apart, the requirement of a social worker's report makes it more difficult for a poor person than a rich person to obtain a divorce.[40]

(c) The Wide Discretionary Powers of Legal Aid Officers

The wide discretionary powers vested with legal aid officers with regard to entertaining applications for legal aid in divorce matters, is a disturbing feature of the Guide. There are three reasons why legal aid officers should be divested of these powers:

First, the exercise of these powers by the legal aid officers contradicts the basic arrangement of the legal aid scheme in terms of which legal aid officers are responsible

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38 See Sunday Express 23 November 1980.

39 Ibid.

40 Cf Gross op cit 200.

only for the means test, and lawyers for the merits test. There is no reason why divorce matters should be exempted from this rule.

Second, divorce matters have such far-reaching personal and social implications that they can impossibly be entrusted to legal aid officers. In his book, The New Divorce Law[41], A H Barnard argues convincingly:

> (T)here is a very *real danger that important* basic principles of justice such as the audi alteram partem rule and the objective determinding of fact by means of cross-examination may be disregarded *if the determination of* irretrievable break-down is left to persons other than judges.[42]

The third reason and one which emerges from the two above, concerns the potential danger of legal aid officers extending *their discretionary powers in* respect of divorce matters to applications for legal aid in other civil matters. Although the Johannesburg legal aid officer the author spoke to, vehemently denied that legal aid officers look into the merits of the case it is an open secret that they do.[43]

Between the years 1974-75 and 1981-82 an average of 32 per cent of the applications for legal aid in civil matters were 'resolved' by legal aid officers or were 'referred to other institutions'.[44] Perhaps one or two remarks about this statistic: First, 'resolved' should not be mistaken to mean, solved satisfactorily *from the point of view of the* applicant. Legal aid officers who refer the applicants to other institutions do not follow up the matter and thus have no way telling whether or not the matter has been satisfactorily resolved from the point of view of the applicant.

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41 (1980).

42 At 87.

43 Cf Ellum op cit *16; Ladley op cit note* 52 at 253.

44 Statistics taken from the annual reports of the Legal Aid Board.

Second, the statistics do not disclose the percentage of applicants who were referred back to the legal aid officers with covering letters and who were subsequently awarded legal aid. In practice, this happens mainly in the large centres where privately run legal aid bureaux often help unsuccessful applicants for legal aid to be awarded legal aid.

2 Lawyers' Experiences with and Attitudes to Legal Aid

As part of the present study questionnaires were sent to practising members of the legal profession. The questionnaires were mailed on a random sample basis to 60 advocates practising at the Johannesburg and Pretoria Bars and to 60 attorneys practising in the Vaal Triangle and in Johannesburg. Thirty attorneys and 30 advocates responded. Of the advocates 20 were from the Johannesburg Bar and 10 from the Pretoria Bar. The 50 per cent response was disappointing, particularly as the questionnaires were mailed together with a self-addressed and stamped envelope. On the other hand it is possible that many lawyers were put off by the considerable length of the questionnaires. The discussion here focuses on the response to questions regarding legal aid in civil matters.

Of the 30 firms of attorneys who answered the questionnaires 27 (90 per cent) pointed out that they accepted legal aid briefs, and 3 indicated that they did not do legal aid work on principle. For the year 1979 the 27 law firms handled a combined total of 170 legal aid cases. Of this number 117 (68,82 per cent) were civil legal aid matters and 53 (31,18 per cent) were criminal legal aid matters. However, legal aid cases constituted only a small fraction of the total number of cases which each of the 27 law firms handled in the year 1979.

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Name of thesis A Comparison Between The Legal Aid Systems Of South Africa And West Germany In Theory And Practice. 1984

PUBLISHER:
University of the Witwatersrand, Johannesburg
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