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A comparison between the legal aid systems of South Africa and West Germany in theory and practice.

Fernandez, Lovell Derek

2015-01-20
http://hdl.handle.net/10539/16651

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For the year 1979 the 30 advocates who answered the questionnaires handled a combined total of 29 legal aid cases. Of this number 23 (79,31 per cent) were civil legal aid matters and 6 (20,69 per cent) were criminal legal aid matters. The number of legal aid cases handled by the advocates in the sample was also negligible when compared to the number of other cases they handled in 1979.

Of the 117 civil legal aid matters handled by the attorneys in the sample 59 (50,43 per cent) were litigated. Of this number 54 (91,53 per cent) of the cases were litigated in favour of the legal aid recipient. A total of 58 (49,57 per cent) of the legal aid cases were settled. Of this number 56 (96,55 per cent) were settled in favour of the legal aid recipient. Most of the civil legal aid matters concerned debtor/creditor law, insurance law and divorce.

In the case of the advocates in the sample all of the 23 civil legal aid cases were litigated in favour of the legal aid recipients. Most of these cases were divorce matters.

Some of the responses to questions concerning the administration of the legal aid scheme showed no general consensus amongst the profession. Contrary to expectations, a considerable percentage (43,33 per cent of the attorneys *and 60 per cent of the advocates) said that the composition* of the Legal Aid Board should be left as it is. Strikingly, amongst the advocates the majority in favour of the retention of the present composition of the Board came from the Pretoria Bar.

Whereas both attorneys and ad[illegible] unanimously endorsed the need to raise the in[illegible] bility limits, only 23,33 per cent of the attorn[illegible] only 10,00 per cent

of the advocates were of the opinion that legal aid should be available in all civil matters subject to the means and the merits test being met. Also, only 30,00 per cent of the attorneys and 26,67 per cent of the advocates favoured legal aid being granted in all civil matters in which the opponent is legally represented. All respondents, however, endorsed the need to extend legal aid to civil actions, including actions of personal injury, which are brought by persons who are serving prison sentences. In addition, the large majority of both the advocates and attorneys were in favour of legal aid being made available to persons wishing to appeal provided legal aid was granted to the same person for the same action in the court below. Eighty per cent of the advocates answered 'yes' to the question whether legal aid should be granted to juridicial persons where the funds necessary to cover the costs of litigation cannot be raised by the party in interest themselves, and where failure to institute or to defend an action would affect the public interest. This question was unfortunately omitted in the questionnaires sent to attorneys.

Interestingly, whereas amongst the advocates 56,67 per cent indicated that legal aid fees should be raised, amongst the attorneys it was 93,33 per cent, several of whom glossed their answers with exclamation marks or with 'N B'. As pointed out in chapter 17 the Legal Aid Board did subsequently increase the legal aid fees. What is striking, is that most of the advocates in the survey who were against an increase in legal aid fees were, judging from the nature of their clientele, clearly not dependent for their professional existance on legal aid income.

As to the question regarding disciplinary measures against negligent handling of legal aid cases, most advocates and attorneys considered this desirable but unpracticable. Several pointed out that procedures are already available for those

who do not do their work properly. Whereas only 46,67 per cent of the advocates indicated that legal aid briefs are well prepared, all said that the briefs are submitted in good time and that counsel usually has sufficient time to consult with the legal aid client.

The following question was put to both attorneys and advocates:

> Where a person is indigent but still does not qualify for Legal Aid and where it is likely that the pending action will either go by default or will be poorly contested by the person himself, should the legal profession's right to monopoly of audience before courts of law be relaxed in favour of allowing:
>
> (a) a relative or friend to represent the litigant where, owing to feeble-mindedness, illiteracy, nervousness or speech defects, the litigant would be incapable of pleading his case effectively?
>
> (b) members of other professions (e.g. architects, land surveyors or accountants) to represent litigants where the subject matter relates wholly to matters within the competence of that profession?
>
> (c) qualified social workers to represent clients in actions with crucial social elements, for example, social welfare, pension or housing matters?

Both branches of the profession were almost unanimous in their 'No's'. The few who said 'yes' were established attorneys or senior advocates with a considerable corporate clientele. As these replies were not accompanied by any comments, it is hard to establish whether the 'No's', which came mostly from single practices and small firms, were motivated by the loss of potential income or by a concern for a drop in the standards of justice. Nor is it clear whether those who said 'Yes' said so because financially they would not forfeit much or because of their liberal views. It is interesting in this connection that in South Africa most of

the lawyers who champion publicly the cause for human rights are generally noted advocates or senior partners in well-established law firms.

Few attorneys and advocates made free comments on the topic of legal aid in the space specifically allocated for this in the questionnaires. Those who commented, generally pointed to the need to raise the legal aid fees (in the case of attorneys) and the income ceilings in the means test which, as one attorney put it, 'are much too low and Superior courts especially are virtually out of reach of the lower/middle income groups'. One advocate mentioned that the practice of attorneys passing legal aid cases to whom they like, should be replaced with a voluntary roster of attorneys and advocates willing to do (i) *civil* work, (ii) *criminal* work or both. Perhaps the most controversial comment came from a Johannesburg Black attorney whose firm, ironically, does handle legal aid cases:

> Legal aid is an institution primarily practised by countries with socialist inclinations. The RSA being a country in which "class distinctions" have as a matter of course been institutionalized, cannot for the purpose of vindicating the rights of the indigent hope to bring any significant relief to the "inferior classes".

Except for one Johannesburg Senior Counsel who said that 'legal aid must be administered by the State and controlled *by the legal profession*', *none of the* rest of the respondents made any comments as to the basic administration of the scheme. The lack of comment on the matter, coupled with the fact that an appreciable number favoured retention of the present make-up of the Legal Aid Board, is surprising; particularly when one considers the legal profession's previous *adamant* insistance that it be entrusted with the control of the legal aid scheme. If the questionnaires are anything to go by, then it appears that the profession is gradually reconciling itself to the present make-up of the Board. If

indeed this be so it would be regrettable. Seen generally from the point of the public at large, and specifically from the point of the Black population, the current overwhelming official complexion of the Board operates as a psychological hindrance to a wider use of the legal aid scheme. Public prejudice will remain for as long as the Board does not divest itself of its preponderant government-toned garb.

There is a need for a broader representation of the practising legal profession on the Board. It is submitted that the discretionary powers which the Minister of Justice has with regard to the appointment and the dismissal of the practising legal profession's representatives on the Board, be abolished. Though no representative of the profession serving on the Board has ever been sacked by the Minister, the knowledge that this is possible psychologically weakens the legal profession's bargaining power in the Board. This is evinced by the fact that over the ten years of its existance the Board has not introduced any notable, progressive reform despite the legal profession's intermittent calls for more enlightened policies.

There is a need for such bodies as the Lawyers for Human Rights, which are concerned with asserting the rights of the poor and the independence of the legal profession, to campaign for a wider lawyer and public representation on the Legal Aid Board.

19 LEGAL AID IN CRIMINAL PROCEEDINGS

1 Introduction

South Africa has the highest *per capita* prison population in the world. In 1981 there were 440 prisoners for every 100 000 of the population.[1] One of the primary reasons for the proportionately huge prison population is that the major part of the population, the Africans, are subject to an extensive arsenal of criminal laws which apply only to them. Human activities which in democratic societies are taken for granted, are outlawed in South Africa, at least for Africans. The race laws, however, are only partly responsible for the huge prison population. Criminologists, sociologists and social-psychologists might search somewhere else for the primary causes.

One of the major secondary factors influencing the size of the South African prison population is the almost universal lack of legal representation at the magistrates' courts trials. Recent empirical studies of trials held before both magistrates' and commissioners' courts in different jurisdictions show that the majority of accused are unrepresented.

2 The Incidence of Legal Representation

a Transvaal

The Centre for Applied Legal Studies at the University of the Witwatersrand conducted three studies on the incidence of legal representation in criminal trials. In the first study[2] the Centre's research officers observed the trial procedure at the Johannesburg Commissioners' courts

1 1981 Survey of Race Relations 74.

2 R E Monama and J Dugard 'Defencelessness of the Undefended' Rand Daily Mail 6 March 1979.

over a period of 3 months, from December 1978 to February 1979. The Johannesburg Commissioners' courts are by far the busiest in the country. They handle an enormous volume of cases per day. During the 3-month period of observation it was found that only one person had legal representation - he was acquitted.

In 1980 the Centre studied the court records of 770 persons charged with serious offences before the Witwatersrand Local Division of the Supreme Court between January 1978 and December 1979.[3] Of these 770 persons, under 22,5 per cent were legally represented in the magistrates' courts. The percentage breakdown of persons without legal representation was as follows: Africans 84,9 per cent; Coloureds 70,4 per cent; Indians 76,4 per cent and Whites 39,2 per cent. What is more, of the 53 persons (83 per cent of whom were Africans; 11,3 per cent Coloureds; 1,9 per cent Indains and 3,8 per cent Whites) who were eventually sentenced to death, less than 7,6 per cent were legally represented at the crucial section 115 hearing in the magistrates' courts.

The third and most enlightening study on the procedures and practices of the Commissioners' courts in Johannesburg was undertaken by Mr Ramarumo Monama, a Research Officer in the Centre for Applied Legal Studies.[4] The study was conducted over 10 court days in December 1982 and the main findings are based on the observation of trials held during this period. The total number of cases heard in 5 courts during the period of observation was 2380. Mr Monama and an assistant attended and recorded 360 trials. Only 5 (0,21 per cent) of the accused persons were legally represented.

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3 *See* L D Fernandez 'Bail: An Aspect of Justice' (1982) 6 SACC 72 at 76.

4 R Monama Is This Justice? (1983).

At the beginning of 1980 the *Sunday Times* investigated the first 100 cases heard by the Pretoria commissioners' court. None of the accused had legal representation.[5]

b Cape

A sample survey of 425 cases tried by Cape Town magistrates over a 7-month period showed that 84,5 per cent of the African, 79,0 per cent of the Coloured and 42,0 per cent of the White accused persons were unrepresented when they last appeared in court.[6] A similar survey of 400 persons facing criminal charges in the Retreat Regional court showed that a mere 31 (7,7 per cent) had legal representation at their last court appearance.[7] What is disturbing is that a regional court is authorized to impose a prison sentence of up to 10 years or a fine of pu to R 10 000 and can try, apart from murder and treason, any offence including such serious political offences as sabotage and terrorism.

Another Cape study of about 140 persons tried in the Langa Commissioners' court showed that as many as 86,4 per cent of the accused were unrepresented.[8]

c Natal

Two studies on the trials of juvenile accused were undertaken in Durban. One study established that of the 500 cases heard in the magistrates' court over a 6-month period in only 1,7 per cent of the cases did the accused have legal representation.[9]

All the court-observation studies described above

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5 Sunday Times 23 November 1980.

6 M Slabbert Justice for All? (1981) 29.

7 Ibid 30.

8 Ibid.

9 See McQuoid-Mason op cit 99.

established a strong correlation between the incidence of legal representation and the final outcome of the trial.

3 The Commissioners' Courts

Mr Monama's study[10] reveals some disturbing facts about the procedures and practices employed by the Commissioners' ('Pass') courts. One of the peculiarities of trials observed was that in not a single case was the State witness or the arresting officer present at the proceedings.[11] This is attributed to a provision in the Blacks (Urban Areas) Consolidation Act[12] which places the onus on the accused to prove his innocence rather than on the State to prove the guilt of the accused beyond a reasonable doubt. The absence of the arresting officers at the trials makes it difficult to establish whether they follow the correct procedures when arresting persons without reference books.[13] In the landmark case of Ncube v Zikalala[14] the Appellate Division held that the law does not require an African to carry a reference book on him at all times, and that he should be given an opportunity of fetching it when it is demanded.[15] The fact that in 13,18 per cent of the 365 trials observed the accused alleged that they were denied an opportunity of fetching their books although they were nearby[16] should serve as a broad indication of the number of Africans who are wrongfully arrested annually in South Africa. It is rare that the victims in such cases are aware

10 Is This Justice? op cit.
11 Ibid 27.
12 Act 25 of 1945 s 10(5).
13 Monama op cit 45-47.
14 1975 (4) SA 508(A).
15 Ibid at 509.
16 Monama op cit 48.

of their right to sue for wrongful arrest. In fact, since the Ncube decision in 1975 only 6 unreported cases are known in which the accused person later successfully sued for wrongful arrest on the basis of the rule laid down in Ncube.[17]

The Monama study revealed that in none of the trials observed did the Commissioner inform the accused person of his right to bail, not even when the proceedings were postponed at the request of the State.[18] Only those accused with some knowledge of court procedure requested to be released on bail.[19] Where bail was fixed the amount was extraordinarily high, up to three times in excess of the fine carried by the offence itself, which is usually R 30 or 30 days imprisonment.[20] It is rare that an accused person can afford to deposit the bail money. In practice, the relatives or friends, who could possibly raise the sum, usually know nothing about the accused's whereabouts.

The procedure at the trial shows scant respect for the accepted rules of criminal procedure. Trials involving juveniles are started without the parents or guardians being warned to be present in court as the Act prescribes.[21] The Sunday Times investigation revealed that all the charge sheets failed to allege that the accused had committed the offence either intentionally or negligently. In some cases the charge sheet did not even specify the place where the offence was alleged to have been committed nor the official demanded sight of the reference book.[22] The Monama study showed that on no occasion did the prosecutors read the

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17 Ibid 47.

18 Ibid 28.

19 Ibid.

20 Ibid 29.

21 Sunday Times 23 November 1980. See s 74 of the Criminal Procedure Act 51 of 1977.

22 Sunday Times 23 November 1980.

charge fully.[23] Instead of outlining to the accused the details of the charge, the prosecutor would simply pronounce the abridged form of the statutory provision allegedly contravened: for example, 'Pass?', 'Section Ten', 'Section Fifteen'.[24]

It was found, too, that the interpreters seldom interpret the charge correctly. For example, instead of translating to the accused the question, 'How do you plead?', the interpreter would ask the accused, 'You were found within the prescribed area for more than seventy-two hours. Is that so?' or 'Is it correct that you were found without a permit?' If the accused answered 'yes', the interpreter would tell the court that the accused pleaded guilty, whereupon a conviction could follow without further inquiry into the facts.[25] In one case the accused pleaded guilty but claimed to be a Coloured, who is not subject to the influx control laws. The court did not investigate the matter and convicted the accused on the strength of her plea.[26]

The Centre for Applied Legal Studies' 1979-1980 study on the Commissioners' 'Pass' courts showed that wide use is made of unqualified interpreters.[27] In many cases the prosecutor or a Black policeman would act as the interpreter.

Although the interpreters have an important role to play, the impression gained is that they, like the other officials in the 'Pass' courts, are primarily interested in completing the role as soon as possible. The trials are conducted in

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23 Monama op cit 34.

24 Ibid.

25 Monama and Dugard op cit. See also Monama Is This Justice? op cit 22.

26 S v Koris 8914/82 (cited by Monama Is This Justice? op cit 34).

27 Monama and Dugard op cit. See also Monama Is This Justice? op cit 22.

such a way that they rarely last longer than 3 minutes, even if they end in a sentence of more than 2 months imprisonment.[28]

Another disturbing aspect of the 'Pass' trials is the conduct of the court personnel towards the accused. In none of the trials observed in the Monama study did the Commissioner or the prosecutor address the accused or the witness as either Mr, Miss or Mrs.[29] At times, only the accused's case number was used.[30]

a The Effect of Legal Representation in the 'Pass' Courts

As opposed to the situation where the accused were unrepresented, trials in which the accused were legally represented generally turned out favourably for them. This was strikingly demonstrated in 1981 when the Cape Peninsula authorities arrested some 1000 illegal squatters in a period of 5 weeks - an incident that attracted wide criticism.[31] With the aid of the Athlone Advice Office, a privately run legal counselling bureau for the poor in the Western Cape, a massive array of lawyers from the Cape Bar and the Black Lawyers' Association rallied to defend each of those charged.[32] The presence of defence lawyers alone effected a dramatic change in the style and the tone of the trials. The proceedings suddenly became like those in normal courts.[33] The Attorney General's Office, too, started taking an unprecedented interest in the 'Pass'

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28 M West 'From Pass Courts to Deportation: Changing Patterns of Influx Control in Cape Town' (1982) 81 African Studies 463 at 470. See also Monama and Dugard op cit.

29 Monama Is This Justice? op cit 37-38.

30 Ibid 38.

31 West op cit 474-475.

32 Ibid.

33 Ibid.

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29 Monama Is This Justice? op cit 37-38.

30 Ibid 38.

31 West op cit 474-475.

32 Ibid.

33 Ibid.

courts.[34] Of [illegible] 115 accused who were charged 81 per cent were acquitted or received a *suspended sentence. Many* others received fines after pleas in mitigation.[35]

Trials in which the accused are legally represented last much longer and are often remanded several times. The unexpected appearance of a defence attorney *must* necessarily confound a court which operates on the un*orthodox premise* that all cases are undefended and that all accused plead guilty.[36] If the case is remanded, the legally represented accused is usually granted bail unlike the case where the accused has no legal representation. There are, however, known cases where bail was refused purely out of spite or as a retaliatory measure for making matters difficult for the court. In one such known case bail was *refused despite the defence* attorney's submission of medical evidence that the accused was ill and in need of medical care. The accused was released from custody only at an advanced stage of the illness. He died three days later in hospital.[37]

According to the Athlone Advice Office many accused *prefer* being 'shunted through the court at the rate of one a minute' so that they can pay a fine and return to their work and home.[38] Consequently, some of the accused do not

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34 Athlone Advice Office Report in (1982) 25 Black Sash Magazine 8.

35 Cf West op cit 472. The presence of formally clad, curiously-looking strangers in the court room is known to have brought relief to the unrepresented accused. For example, in 1980 I had occasion to accompany to the Johannesburg Commissioners' Court, a group of visiting American lawyers who were being shown around local legal institutions. *During our thirty-minute sojourn* in one of the pass courts we witnessed eight trials in which the accused had no legal representation. Only *two ended in a sentence!*

36 See West op cit 472.

37 See Sunday Express 9 May 1982.

38 Op cit 9.

even bother to engage a lawyer as this could mean repeated attendance at hearings. This leads to loss of wages or, if the accused has been remanded in custody all the time, loss of employment. In turn, unemployed Africans in a 'White' area expose themselves to a conviction and sentence under section 29 of the Urban Areas Act[39], which in practice means being sent to the notorious Virginia Farm Colony for 2 years where they provide cheap labour for the potato farmers of the Orange Free state.[40] Alternatively, an unemployed African could be arbitrarily deported to one of the homelands under section 45 of the Admission of Persons to the Republic Regulation Act.[41] Such deportation is not subject to appeal or to review by any court and the person is not furnished with reasons. In the second half of 1981 alone, 2758 Africans living in the Cape Town area were deported to the homelands.[42] One therefore understands the reluctance to engage lawyers. But this shows the bad faith and the unreasonableness inherent in the administration of the influx control laws. The whole system is organized in such a way as to discourage intervention by lawyers and superior courts.[43] Defence lawyers are seen as intruders into a closed, legal sub-culture with its own separate set of procedural norms which are applied not in the interest of justice, but in the interest of maintaining the system itself.

This state of affairs poses an enormous challenge to the legal profession. Lawyers have a professional and a social duty to ensure that the Commissioners' courts and

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39 Op cit.

40 See Sunday Express 9 May 1982. See also (1982) 25 Black Sash Magazine 12.

41 Act 59 of 1972.

42 See 1982 Survey of Race Relations 278 and 449 ff for details.

43 Proceedings of trials in the commissioners' courts are exempt from automatic judicial review.

the wider apparatus of which they are part do not harden into an intractible monolith. The profession should concern itself more widely with social impacts of the Pass system. One way of doing this is by actively participating in the run-of-the-mill trials before the Commissioners' courts. Limited but significant headway is being gained by those lawyers who work in co-operation with the Black Sash. Most of the pro-amico defences in the 'Pass' courts in Johannesburg are conducted by Mr Ramarumo Monama of the Centre for Applied Legal Studies, who is an expert in influx control matters.

4 The Position in the Magistrates' Courts

Here, too, a significant correlation was established between the incidence of legal representation and the outcome of the case. In the study conducted at the Cape, 35,5 per cent of the legally represented accused were acquitted as against only 10 per cent of those who conducted their own defence.[44] As regards the proceedings in the Juvenile courts, one study found that 30 per cent of the legally represented accused were acquitted as against only 12,4 per cent of those who were unrepresented.[45] The other study showed a 50 per cent acquittal rate for the represented accused as against 20,7 per cent one for the unrepresented accused.[46]

The study conducted by the Centre for Applied Legal Studies revealed strong correlations between the incidence of legal representation on the one hand, and on the other the plea, the granting of bail and the penalty imposed. Where there was legal representation (in the summary trial proceedings) bail was granted in 74,10 per cent of the cases as opposed to 42,74 per cent of the cases where there was

44 Slabbert op cit 30.

45 See McQuoid-Mason op cit 98.

46 Ibid.

no legal representation.[47] For a similar instance of high frequency it was found that persons refused bail received *more severe penalties than* those granted bail.[48] Almost all the legally represented accused pleaded 'not guilty' and the incidence of the granting of bail was significantly higher (42,40 per cent) for those who pleaded 'not guilty' than for those who pleaded 'guilty' (29,20 per cent).[49] It is significant, too, that 39,31 per cent of those who pleaded 'not guilty' at the section 115 enquiry were finally acquitted in the Supreme Court, as opposed to only 6,00 per cent of *those who pleaded 'guilty'*.

All these findings underscore the importance of legal representation. *It is, therefore, no co-incidence that in* the civilized world today the right to counsel is regarded as a fundamental element of a fair trial. Article 14 (3) of the United Nations Covenant on Civil and Political Rights spells out specifically:

> In the determination of any criminal charge against him,everyone shall be entitled to the following guarantees, in full equality: ....
>
> (d) *To be tried in his presence,*and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; *and to have legal assistance assigned* to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to *pay for it*....

How to realize this postulate is a question which, over *the past decade or so, has been continually debated* in Great Britain, Scandinavia, the United States and Western Europe. The need to render poverty immaterial in the individual's quest for justice was not considered by itself, but in

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47 Fernandez op cit 76-77.

48 Ibid.

49 Ibid.

conjunction with the wider need to create a more equitable social order. This socio-political initiative manifested itself under different national slogans. For example, in the United States the movement was known as 'The War on Poverty', in Great Britain, 'The Rediscovery of Poverty', in the Netherlands, Nivellering (levelling) and in West Germany, Chancengleichheit (equality of opportunity). And it was against the background of these efforts that the United States Supreme Court held in the landmark cases of Gideon v Wainwright[50] and Argersinger v Hamlin[51] that poverty alone is an insufficient ground for denying a person the right to be defended by counsel, and furthermore, that no prison sentence whatsoever may be imposed unless the accused has been legally represented, or has knowingly and intelligently waived his right to counsel.

Although, the superior courts in South Africa have persistently upheld the importance of legal representation in criminal proceedings[52], the Government has been generally reluctant to provide the poor with wider legal protection in criminal proceedings. Unfortunately, it appears that the idea of 'equal justice for all' is inimical to the Government's policy of White domination. The fact that about 90 per cent of the persons charged with criminal offences in South Africa are Blacks is a factor, too.

As seen in connection with the trials in the 'Pass' courts, legal aid is hard to obtain. The reason for this is to be found in the Government's attitude to the criminal justice process. As has been pointed out earlier, from the beginning of their office the Nationalists have been opposed to the idea of legal aid for the poor in criminal proceedings. Various rationalizations were put forward. One was that

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50 372 U S 335 (1963).
51 407 U S 25 (1972).
52 See c 10 supra.

magistrates and judges take care that the unrepresented accused suffers no harm; another was that it would be 'paradoxical' for a government to undo the work of one of its own departments (the police) by giving legal aid. After all, considerable expense was involved in detecting criminals. That the enactment of the Legal Aid Act was essentially because of the pressure from the legal profession and the English-language newspapers and not because of the Government's inner conviction, is reflected in the disapproving tone in which the then Minister of Justice, Mr P C Pelser introduced the legal aid legislation in 1969:

> If legal aid is to give rise to the State having to guarantee to the skolly element *who loaf about, snatch handbags, steal* purses and remove money from people's pockets, the additional security of being defended free of charge by legal practitioners provided by the authorities when they appear in court, I can say even at this early stage that the writing is on the wall. I want to put it very clearly that I shall never be a party to subsidizing crime.[53]

While on the one hand Mr Pelser's deprecatory tone laid the spiritual framework within which the scheme would operate, on the other, it caused widespread public pessimism. Many who had hoped that the legal aid scheme would help to combat social and legal inequities were put off from the very start - even before the scheme came into practice. In the words of the then secretary-general of the Association of Law Societies: 'We are married to the idea of a legal aid scheme, but we are not married to this scheme'.[54] Regrettably, the Legal Aid Board has since done very little to inspire the confidence of the public. Annually some 1 million

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53 House of Assembly Debates col 1496 (26 February 1968).

54 Rand Daily Mail 14 September 1967.

accused persons are tried without legal representation in the magistrates' courts.[55] The Board grants legal aid to less than 1 per cent of those who are sentenced to imprisonment by the magistrates' courts annually[56] - *a state* of affairs which makes nonsense of the claim made by the *Minister of Justice* in 1978 when he said in Parliament: 'Our systems are of such a nature that just about every person who needs legal aid, can obtain it'.[57]

5 Legal Aid

a Exclusions

Legal aid is not rendered -

(i) If pro-deo defence is available, except where an attorney is instructed to assist a pro-deo advocate, provided the attorney's services cannot be dispensed with and the Director consents thereto.[58]

The implications of this regualtion are considered fully in the next chapter. In passing, however, *it ought to be* mentioned that this is perhaps the most unfortunate provision *in the entire Guide*. It brings no relief whatsoever to the indigent person charged with a capital offence. In practice, this means that a poor person facing the death penalty has no right to be legally represented. What an embarrassing lacuna in a legal system whose architects regard it as being administered in the best traditions of the civilized, *western* legal culture! One should not forget the words of Richard *Lillich of the University* of Virginia when he addressed the First International Conference of Human Rights in South Afri-

55 McQuoid-Mason op cit 99-100.

56 Ibid.

57 House of Assembly Debates col 6843 (12 May 1978).

58 Guide para 12.1(a).

ca:

> The right to legal representation is a sine qua non of any legal system worthy of its name: the more severe the alleged crime and potential penalty, the more urgent and vital the individual's right to protect himself against what may be unfounded accusations by availing himself of the right to legal counsel.[59]

(ii) In respect of offences for which admission of guilt has b en determined or which can be compounded.[60]

It is submitted that this regulation is far too wide. The Criminal Procedure Act itself provides that an admission of guilt fine may be reduced 'on good cause shown'.[61] If the indigent person affected lacks the communication ability to show good cause, there is no reason why he should not be granted legal aid to do so effectively. After all, an admission of guilt fine may be as high as R 100; an amount a poor person cannot pay without seriously endangering his means of existence. It is submitted that individual cases be considered on their merits.[62]

(iii) In respect of cases where the commission of the offence is admitted and the accused's defence or excuse is so simple that it can be advanced by the accused himself without aid.[63]

With respect, this regulation reflects no sympathy for the position of the undefended person in court - a position which has been rendered even more precarious since the introduction of the section 115 procedure which provides for

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59 R B Lillich 'Procedural Human Rights' in C F Forsyth and J E Schiller (eds) Human Rights: The Cape Town Conference (1979) 124 at 127.

60 Guide para 12.1(b).

61 S 57 (4).

62 Cf McQuoid-Mason op cit 38.

63 Guide para 12.1(c).

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> The right to legal representation is a sine qua non of any legal system worthy of its name: the more severe the alleged crime and potential penalty, the more urgent and vital the individual's right to protect himself against what may be unfounded accusations by availing himself of the right to legal counsel.[59]

(ii) In respect of offences for which admission of guilt has been determined or which can be compounded.[60]

It is submitted that this regulation is far too wide. The Criminal Procedure Act itself provides that an admission of guilt fine may be reduced 'on good cause shown'.[61] If the indigent person affected lacks the communication ability to show good cause, there is no reason why he should not be granted legal aid to do so effectively. After all, an admission of guilt fine may be as high as R 100; an amount a poor person cannot pay without seriously endangering his means of existence. It is submitted that individual cases be considered on their merits.[62]

(iii) In respect of cases where the commission of the offence is admitted and the accused's defence or excuse is so simple that it can be advanced by the accused himself without aid.[63]

With respect, this regulation reflects no sympathy for the position of the undefended person *in court* - a position which has been rendered even more precarious since the introduction of the section 115 *procedure* which provides for

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59 R B Lillich 'Procedural Human Rights' in C F Forsyth and J E Schiller (eds) Human Rights: The Cape Town Conference (1979) 124 at 127.

60 Guide para 12.1(b).

61 S 57 (4).

62 Cf McQuoid-Mason op cit 38.

63 Guide para 12.1(c).

the discretionary questioning of the accused by the magistrate at the summary trial. Even an educated accused person has difficulty in distinguishing between the giving of evidence and the making of a statement setting out the basis of a defence. How much more difficult is it for the uneducated persons who, incidentally, comprise the bulk of the persons tried in court? A Cape Town study showed that only about 5 per cent of the accused are aware of their procedural rights.[64] What is more, a judicial officer is not obliged to advise the accused to this right to remain silent when he is invited to make a statement in terms of section 115.[65]

In short, without legal assistance the accused person is exposed to considerable procedural disadvantages. The need for legal aid here is great.[66] The unqualified assumption that a 'defence or excuse can be so simple that it can be advanced by the accused himself without aid' disregards the endemic illiteracy amongst the Black people, who are the main clients of the criminal justice system.[67] This aside, the regulation does not specify the criteria according to which the legal aid officer determines the simplicity of the accused's defence or excuse. What may appear simple to him, may not be so for the accused. Besides, the legal aid officer has no way of predicting what impact the actual live, awe-inspiring court proceedings may have on the accused's communication ability. It is consequently submitted that this regulation should be abolished. The decisive criterion for the award of legal aid should be the seriousness of the offence and the nature of the penalty which it carries.

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64 Slabbert op cit 36.

65 S v Muzikayifani 1979 (2) SA 516 (N) at 520.

66 Cf Dugard Introduction to Criminal Procedure 85.

67 Cf Monama op cit 54-55.

(iv) In respect of a traffic offence or any other offence connected with the use of a motor vehicle, unless the Director approves in writing that an exception may be made on account of exceptional circumstances.[68]

Understandably, it would be asking too much of the Board to render legal aid to a poor person charged with petty offences, such as say, a parking offence, or failure to cancel the licence and registration of an obsolete vehicle. But such petty offences represent only a small fraction of the numerous offences arising from the use of a motor vehicle. There are serious offences, too; for example, contravention of the fuel regulations; carrying of contraband goods; reckless driving per se, or culpable homicide arising from reckless driving. Similarly, the penalties carried by offences involving the use of a motor vehicle can vary in degree from light fines to heavy penalties which may involve a stiff prison sentence. The suspension or withdrawal of a driving licence is yet another sanction which can be applied and which can imperil one's means of earning a livelihood.

Although provision is made for 'exceptional circumstances', the *Guide gives no clue as* to what is meant by this. Besides, the onus of proving 'exceptional circumstances' lies entirely with the legal aid applicant. The *assistant* Director of the Legal Aid Board, Mr Joubert, told the author in an interview in June 1980 that this regulation was meant primarily to ward off specious applications for aid, especially those from persons who commit traffic offences whilst driving their employers' vehicles. If in fact this be the underlying rationale then the regulation has the unhappy effect of throwing the baby out with the bath water. As it is presently couched this regulation has a wide deterrent effect.

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68 Guide para 12.1(d).

Under German law an indigent person charged with a traffic offence has no right to be assigned court-appointed counsel. An exception is made if the proceedings will result in the withdrawal of a driver's licence and a consequent ban on practising a profession.[69]

It is submitted that the Legal Aid Guide be amended. Again, the yardstick here should be the nature of the criminal sanction that can be applied. A modified compromise version could read as follows: 'No legal aid shall be rendered in respect of traffic offences which carry a penalty of R 80 and less'.

(v) In a preparatory examination.[70]

At the preparatory examination, after the accused has pleaded to the charge the magistrate may question him as he would under the summary trial procedure.[71] During such questioning the unrepresented accused is highly vulnerable. He might make admissions which weaken his defence and which, if he pleads guilty at the subsequent trial, can be used as evidence against him.[72] The need for legal aid here is even more apparent in the case of state-endangering offences. The offences are invariably so widely framed that most unrepresented accused persons do not understand the charges to which they plead. Most accused persons are unaware of their statutory right to object to vague charges.[73] In practice, too, it is submitted that most magistrates do not bother to ensure that the accused understands the charge brought against him.

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69 Cf c 5 supra.

70 Guide para 12.1(e).

71 S 132 of the Criminal Procedure Act 51 of 1977. See also ss 112 and 115.

72 Ibid s 141 (3) (a).

73 See s 85 ibid.

(vi) For the institution of a private prosecution[74]

Unfounded charges and lack of sufficient incriminating evidence are the principal reasons why the State sometimes withdraws prosecutions against alleged offenders. Unfortunately, these reasons are often advanced as a cover-up for extraneous, untoward pressures to which the prosecutor is exposed. This is typically so where the accused is an influential person and the victim can be satisfied otherwise than by witnessing justice being done. Such irregularities, it is submitted, are not infrequent in South Africa. They usually take place in small, isolated places, out of sight of newspaper reporters and where the prosecutor is more vulnerable to extra-judicial social reprisals that can be taken against him if he goes on with the case than he would be in a metropolitan area.

A real problem arises where the aggrieved person seeks to bring charges against the police but where the prosecutor refuses to prosecute. Here it is essential that the individual be afforded an opportunity to assert his charge in a private prosecution.

The critical shortage of both qualified and experienced prosecutors in South Africa[75] also accounts for a considerable number of alleged criminals not being prosecuted. Because of the work pressure on prosecutors only certain cases are selected for trial.[76]

Failure to bring the alleged wrongdoer to book undermines the victim's confidence in the criminal justice system and may force him to take the law into his own hands. To guard against this eventuality[77], the Criminal Procedure Act

74 Guide para 12.1(f).

75 The Star 6 November 1980.

76 Sunday Times 18 January 1981.

77 Solomon v Magistrate, Pretoria 1950 (3) SA 603 (T) at 609.

grants an aggrieved person the right to prosecute privately 'either in person or by a legal representation' where the State does not take up his complaint.[78] This procedural remedy is, however, of little avail to the poor and the unsophisticated. Apart from the bureaucratic hurdles that the individual *must overcome before he can* bring a private prosecution, he is required to deposit R 100 as security with the trial court, together with such further amount as the magistrate may determine as security for the costs the accused may incur.[79] In practice, most of those persons who have reason to prosecute privately - the poor and the ignorant - are precisely the ones for whom these deposits are prohibitive.

It is therefore hard to understand why legal aid is not rendered in private prosecutions. In West Germany legal aid is available in both the enforcement procedure[80] (Klageerzwingungsverfahren) and in the private prosecutions (Privatklage).[81] The effect of the legal aid grant is to absolve the private prosecution from the deposit of security.

No reason exists why this practice should not be adopted in South Africa.

6 *Questionnaires: Some Findings on Criminal Legal Aid Cases*

The questionnaires sent to attorneys showed that criminal legal *aid cases made up only a very small* percentage of the total number of cases dealt with by the individual attorneys' firms in the sample. In 1979 the combined total of criminal legal aid cases dealt with by attorneys in the sample was 53. This number represents 31,18 per cent of all

78 S 7 (1).

79 S 9.

80 See §§ 172ff of the Strafprozeßordnung.

81 Ibid §§ 174 ff.

legal aid cases (civil and criminal) dealt with by the attorneys in the sample in 1979. Of the combinded total of 53 criminal legal aid cases 45 (84,91 per cent) were defended successfully and in 5 (9,43 per cent) cases the charges against the accused were withdrawn. In 3 (5,66 per cent) cases the accused was convicted.

Smaller still was the number of criminal legal aid cases dealt with by advocates in the sample. In 1979 the combined total of criminal legal aid cases dealt with by advocates in the sample was 6.

As the answers below show, both the attorneys and advocates were overwhelmingly in support of expanding the ambit of legal aid in criminal proceedings. Whereas most advocates disagreed with the idea of providing legal aid in private prosecutions, the attorneys were equally divided on this question.

Question: Subject to the financial and the merit test being met, should legal aid be available to:

	Advocates (N = 30)		Attorneys (N = 30)	
	Yes %	No %	Yes %	No %
- any person who is exposed to any sentence of imprisonment?	36,66	13,33	76,66	23,33
- any person exposed to a sentence in excess of 6 months?	93,33	6,66	question not asked	
- a prisoner charged with violating prison discipline where the penalty carried could lead to loss or remission of sentence?	76,66	23,33	83,33	16,66
- an accused at a hearing in terms of Section 115 of the criminal Procedure Act, No. 51 of 1977?	60,00	40,00	76,66	23,33

- persons prosecuting at the private instance?	23,33	76,66	50,00	50,00
- persons involved in traffic offences which carry a penalty which could lead to the loss of a valid driver's licence?	question not asked		53,33	46,66

7 Some Practical Aspects of Legal Aid in Criminal Proceedings

Between the years 1971-72 and 1983-84 applications for legal aid in criminal proceedings increased by approximately 6044 per cent from 96 to 5898.[82] For the period 1972-73 to 1983-84 the number of legal aid grants increased by approximately 1124 per cent from 251 to 3071.[83] Making allowance for the increase in the number of criminal proceedings over the same period, these figures are nevertheless impressive. But they pale into insignificance when seen against the colossal number of indigent unrepresented persons who are sentenced to prison daily. Nobody disputes this observation. The Legal Aid Board, too, grants that applications for criminal legal aid are few.[84] But unlike its critics the Board does not ascribe the poor utilisation of the scheme to public ignorance about its existence. In his address to Lawyers for Human Rights in 1983, Mr Justice J Milne, Judge President of the Natal Provincial Division of the Supreme Court, pointed out that

> the probabilities seem overwhelming that the smallness of the number of Black people who apply for legal aid when charged with criminal

82 Annual Report of the Legal Aid Board for the period ended 31 March 1981 6.

83 Statistics taken from the Annual Reports of the Legal Aid Board.

84 Annual Report of the Legal Aid Board for the period ended 31 March 1977 6.

> offences is due simply and solely to ignorance. They do not know how to go to about getting hold of a lawyer let alone how to get hold of a good and reliable lawyer - what is probably even worse, they do not even know when they need a layer.[85]

Commenting on the 32 930 applications (civil and criminal) it received in the year 1980-81, the Board argues: 'If the services of the Board were indeed so unknown to people, it may well be asked how these people knew about the service'.[86]

It is submitted that the question the Board should ask itself is this: If only 3138 persons sought legal aid in criminal proceedings, what prevented the other million or so from doing the same? This question inevitably raises again the issue of the public's acquaintance with the scheme, but it prompts us, too, to consider other factors which detract from a wider use of legal aid in criminal matters. We could focus on some of these factors before discussing the question affecting the public's knowledge of legal aid.

Psychological Barriers

The Black population in South Africa has been the traditional target of relentless persecution and harassment by the State. The dehumanizing treatment they suffer at the hands of police during raids, arrests and often in custody, has resulted in their widespread antipathy for the machinery of justice. The police, the law, the courts and the prisons

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85 Milne J P 'Address to Lawyers for Human Rights' 18. The copy of the address was made available to me by the secretary of Lawyers for Human Rights, Professor John Dugard, Director of the centre for Applied legal Studies, University of the Witwatersrand Johannesburg.

86 Annual Report of the Legal Aid Board for the period ended 31 March 1981 6.

are seen by Blacks as personifications of the State and its repressive racial policies. The administration of justice is predominatly manned by Whites who are seen to be in control of it, too. In the courts, the magistrate and the prosecutor are, with few exceptions, White - a colour the Black people associate with the might of the State and with their own helplessness. The same applies to the superior courts where Black assessors are very rarely used.[87] All of this has a negative psychological impact on the Black man's perception of the justice authorities. This will be the case for as long as Blacks are overrepresented as clients but underrepresented as functionaries of the system.

Interviews conducted at the magistrates' and the Commissioners' courts in Cape Town show that there is 'a strong feeling of animosity among "Black" and "Coloured" persons towards the criminal justice system. Many believed that the expansion of legal aid services would not enhance their chances in court as the process of detection, apprehension and arrest is based on a system of discrimination'.[87a] One interviewee stated frankly: 'They make the laws in order that they can arrest us. And when they have arrested us then they want us to believe in "legal aid". We do not trust it.'[87b]

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87 Cf F C Ritchings 'Assessors in South African Criminal Trials' (1976) Criminal Law Review 107 at 110.

87a M Slabbert 'Socio-political Factors Influencing Access to and Effect of Legal Representation' in Olmesdahl and Steytler (eds) *op cit* 89 at 94-95. See also L D Fernandez 'The Silent Reality: Racial Discrimination in the Criminal Justice Process' (1984) 1 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 37 at 42-47.

87b M Slabbert 'Socio-political Factors Influencing Access to and Effect of Legal Representation' in Olmesdahl and Steytler (eds) *op cit* 95 (own translation).

are seen by Blacks as personifications of the State and its repressive racial policies. The administration of justice is predominatly manned by Whites who are seen to be in control of it, too. In the courts, the magistrate and the prosecutor are, with few exceptions, White - a colour the Black people associate with might of the State and with their own helplessness. The same applies ot the superior courts where Black assessors are very rarely used.[87] All of this has a negative psychological impact on the Black man's perception of the justice authorities. This will be the case for as long as Blacks are overrepresented as clients but underrepresented as functionaries of the system.

It is against this psychological backdrop that the Black man's attitude to legal aid should be seen. Many Blacks find it hard to believe that the same State which harasses them and which is continually reinforcing its discriminatory laws against them, is simultaneously prepared to finance their legal defence against criminal charges which frequently stem from the implementation of the state's discriminatory racial policies. This is not the fault of the Legal Aid Board. But the Legal Aid Baord could help to combat this justified scepticism. It can do so by adopting a vigorously independent posture which must also be seen to be independent. The Board's present, overwhelming official complexion militates against the adoption of such a stance.

b Procedural Barriers

Mass arrests are a notorious feature of the South African criminal process. Over week-ends, especially, local police cells are usually over-filled with arrested persons, so that those who cannot be accommodated locally are transferred elsewhere, often far away from their homes. Many times re-

87 Cf F G Ritchings 'Assessors in South African Criminal Trials' (1976) Criminal Law Review 107 at 110.

latives or friends are unaware of the person's arrest and, if they are so aware of the arrested person's whereabouts, they frequently do not know the date and the venue of the trial and how to go about finding this out. Given the thin legal protection available to Black workers, few can afford to stay away from work to go about looking for the arrested friend or relative. As only a few Black township houses have telephones, the arrested persons are usually unable to contact their family or friends to arrange for bail or for legal assistance. Although some court cells display legal aid notices, this is not very helpful to illiterate accused persons or to those who have no way and no time to contact a lawyer before the trial starts. Even if relatives know of the accused's whereabouts and of the need to procure legal aid for him, they cannot possibly go to the legal aid offices when they themselves are at work. Legal aid offices keep strict office hours and are closed over week-ends and on public holidays - when most arrests are made.

At the trial itself the unrepresented accused has only a slender chance of being granted bail. Even if he is granted bail he will have to remain in custody until a friend or relative brings the bail money. As court offices close early, those able to pay the bail money cannot do so. In Johannesburg, for example, the courts do not sit after 016h00 to hear applications for bail. They also do not sit on Sundays and public holidays.[88] This, according to the Chief Deputy Commissioner of Prisons, also creates 'administrative and other problems' for the prison authorities.[89]

All of these factors can combine to awaken within the accused a feeling of utter helplessness - a feeling which

88 W Lane 'Sit up and Take Note... Your Human Rights are Being Eroded' in Human Rights in South Africa (Produced and Distributed by Lawyers for Human Rights Johannesburg) 8 at 10.

89 Rand Daily Mail 5 February 1981.

can translate itself into anger and a blind indifference as to the eventual outcome of the matter.

c Problems Affecting Appeals

The Guide provides that legal aid may be granted to prosecute on an appeal against a conviction and/or sentence of a lower court.[90] The Department of Prisons has agreed to notify prisoners about this possibility.[91] It is unclear, however, whether this is really done and if so, how widely it is done. Neither is it known whether sentenced prisoners are afforded an effective chance of applying for legal aid. The ban on the publication of uncensored information about conditions in South African prisons[92] makes objective inquiry into this matter impossible. Statistics published by the Legal Aid Board do not show how many applications for legal aid are received from sentenced prisoners. According to the Durban based Prisoners' Education Committee, prisoners have 'a limited, if any opportunity to fight for their rights'.[93] Indeed, it is hard to imagine what opportunities exist to consult with a lawyer in the case of the many short-term prisoners who are sent to isolated rural jails to work for local farmers. In his address to the Lawyers for Human Rights Mr Justice Milne drew attention to the 'sheer physical difficulty of instructing a lawyer when you are in prison'. It is bad enough for a White man - it is very, very difficult for the majority of Black people'.[94]

The Centre for Applied Legal Studies at the University of the Witwatersrand, Johannesburg, has started work on the question of prisoners' rights. The aim of the project is to

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90 Para 17.1.

91 Annual Report of the Legal Aid Board for the period ended 31 March 1979 4.

92 See s 44(f) of the Prisons Act 8 of 1959.

93 1979 Survey of Race Relations 118.

94 Op cit 19.

compile an up-to-date set of prison regulations to assist legal practitioners in this neglected area of the law.[95]

d Ignorance of the Legal Aid Scheme

One of the most striking findings of the Vaal Triangle survey discussed earlier was the widespread public ignorance as to the existence of the legal aid scheme. Only 16,1 per cent of the Whites, 10,8 per cent of the Africans, 3,6 per cent of the Coloureds and 4,7 per cent of the Indians knew about legal aid. Most of the respondents who knew about legal aid were better educated, higher income, professional persons. The majority said that they knew about legal aid from newspapers. A few said that they had heard about it at work, or through friends. Of those who knew about legal aid 52,4 per cent did not know whether or not there was a legal aid office in the area where they lived.

The poor public awareness of the scheme's existence is, indeed, alarming; particularly, if one considers that the Vaal Triangle is the industrial heart of South Africa. The ignorance might have to do with the fact that the Vaal Triangle does not have a single voluntary legal advice office for the poor such as exist in Johannesburg and Cape Town, for example. It is submitted that the primary reason for the widespread ignorance as to the legal aid scheme's existence has to do with the Board's lacklustre advertisement campaign.

Until 1977-78 the Board had spent R 4188 on advertising the legal aid scheme.[96] The Board's subsequent annual reports do not reflect expenditure for advertising. However, the amount thus far spent on publicizing the scheme is far too little; particularly, when one considers that the target group of the advertising campaign comprises over half of the national population. Thus far, the advertising campaign has

95 See Third Annual Report: September 1980 - September 1981 of the Centre for Applied Legal Studies (University of the Witwatersrand Johannesburg) 8.

96 See McQuoid-Mason op cit 74.

been directed primarily at State departments, welfare organizations and professional bodies - all of which ordinarily deal with poor people who might need legal aid. To be sure, this is an effective way to promote public awareness of the scheme, provided only (a) that the circular sent out by the Board filters down the bureaucracy to the ordinary clerk who deals with the public and (b) that the grievance in respect of which an indigent might seek legal aid, is not directed against the very administration official charged with alerting the public to legal aid.

Very little advertisement has been directed at the public itself and, where this has been done, it has been fitful and uncoordinated. For example, in 1979 notices were displayed at the administration offices in Soweto and in the wards of Baragwanath hospital.[97] Why not in other towns and in other rural growth points as well? Legal aid is advertised in the *Johannesburg* magistrates' courts but not in the Commissioners' criminal courts.[98] Furthermore, the Board's advertisement campaign is directed mainly at the literate public. It ought not to be forgotten that the illiterate are precisely the ones who are in most need of legal aid.

It is submitted that the Board should make imaginative use of radio and television to promote awareness of the scheme. Indeed, the Board's recent decision to explore the use of audio-visual media for publicizing legal aid[99] is a welcome step. In West Germany, the issue of summonses in civil matters is always accompanied by application forms for legal aid. These forms set out what legal aid is, who can apply for it and how. Similar practices could be adopted in South Africa.

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97 Annual Report of the Legal Aid Board for the period ended 31 March 1978 4.

98 Moname op cit 55.

99 Annual Report of the Legal Aid Board for the period ended 31 March 1982 5.

The Legal Aid Board, by itself, can achieve little without the co-operation of the police, the prisons authorities, the Administration Boards, the Department of Co-operation and Development, the Commissioners' courts and the Justice authorities. Each of these departments has, on paper, undertaken to spread word about legal aid amongst indigent persons who are brought into contact with the criminal justice machinery. In practice, however, these promises are being realized only haphazardly. It makes no sense to inform an indigent accused or convicted person about legal aid while on the other hand preventing him from obtaining it. There is a need here for practice to be brought in line with theory. It is therefore submitted that a provision be inserted in the Criminal Procedure Act, which imposes an obligation on police, prosecutors, magistrates, Commissioners, judges, and prison authorities to (a) inform the accused or convicted person about legal aid and how to go about obtaining it and (b) give the person concerned an effective chance to obtain legal aid.

One way in which the courts could help an accused person indirectly to obtain legal aid would be to fix bail at a level that is commensurate with the accused's economic circumstances. An empirical study conducted in Durban in 1981 showed that as far as Blacks are concerned even the standard bail amount of R 50 can only be met with the greatest difficulty.[104] The result is that a large number of persons are forced to languish in custody unnecessarily.[105] A good conclusion that was drawn from the Durban study was that the courts must be compelled, by way of a mandatory bail sheet, to take account of the

104 N C Steytler 'Deciding on Liberty - a Bail Study of the Durban Magistrates' Courts' in Olmesdahl and Steytler (eds) op cit 119 at 137.

105 *Ibid* 139.

accused's personal circumstances before fixing the bail sum.[106] This would help to ensure that more accused persons are able to deposit the bail amount and to approach the legal aid office for legal assistance.

Serious consideration should be given to the proposal of Professor Dugard that whenever a legally unrepresented accused person is sentenced to imprisonment for more than 3 months, in a case involving intricate problems of law, the very fact of non-representation means that the proceedings have not been in accordance with justice.[107]

At a broader level, it is submitted that the Legal Aid Board should use its weight to press for the abrogation of those laws which apply only to Blacks and whose implementation not only costs the tax-payer a vast sum of money but, more importantly, does more harm to the social fabric of society than the legal aid scheme can make good. The Board's duty to do this grows out of its function as an ancillary agent for the promotion of social justice and social peace.

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106 Ibid.

107 C J R Dugard 'A Review of South African Legal Education' in Legal Aid in South Africa 160 at 168.

20 PRO-DEO LEGAL AID IN CAPITAL TRIALS

1 Introduction

As pointed out earlier, the practice of lawyers helping poor litigants for God's sake stems from *mediaeval Europe. Working gratuitously* for the poor was godly; taking money from them was despised as ignoble and unchristian.

Today pro-Deo legal services are still rendered in South Africa. Whereas in the Middle Ages such work formed part of the Church's diaconic relief scheme, *the current* South Afri*can variant* of pro-Deo work has nothing to do with the Church anymore; nor do South African lawyers regard it as means of buying God's salvation. At best, the pro-Deo *institution in South Africa could* be regarded as a mere mediaeval relic which, by customary adherence, has come to occupy an odd place in the South African legal culture.

Pro-Deo legal services are rendered in both civil and criminal matters, the latter being of interest *to the discussion here.*

2 Comparison to the German Pflichtverteidigung

Whereas the German Pflichtverteidiger is assigned to represent an indigent accused *in a limited number of* criminal *matters*, the pro-Deo counsel is assigned only where the accused is facing a capital charge. But as in Germany, pro-Deo counsel is assigned only if the accused has *no self-retained counsel. In practice*, however, the overriding criterion for the assignment of counsel in both systems is not so much the indigence of the accused as the exceptional nature of the case. Whereas the *Pflichtverteidiger is appointed* by the trial

judge, the pro-Deo advocate is appointed by the Bar Council or committee[1] on the instructions of the State.

In South Africa there is no right to a pro-Deo defence.[2] In Germany the accused has both the right and the obligation to be defended by mandatory counsel in the applicable cases. This exemplary principle should be incorporated into the South African legal aid practice and should be applied in all cases where the indigent accused is facing a prison sentence.

In theory, both the pro-Deo advocate and the Pflichtverteidiger are obliged to accept the assignment unless compelling reasons exist for not doing so. The German law is particularly strict in this regard, and counsel's right to refuse is interpreted narrowly. Some courts have held that the grounds for refusal must be extra-ordinarily serious.[3] General grounds, for example, inadequate financial renumeration, are not sufficient.[4]

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1 See S v Gibson NO and others 1979 (4) SA 115 (D) at 123.

2 R v Mati 1960 (1) SA 304 (A) at 306. In S v Chaane 1978 2 SA 891 (A) it was held that the refusal to grant the accused's request for pro-Deo counsel does not constitute an irregularity.

3 See decision of the Oberlandesgericht (Coblenz) of 1 April 1971 1 Ws 161/71 in (1971) 8 Monatsschrift für Deutsches Recht 678 at 679.

4 Decision of the Oberlandesgericht (Oldenburg) of 16 March 1972 2 Ws 70/72 in (1972) 10 Niedersächsische Rechtspflege 244-245. Acceptable grounds for refusal include the ff: (a) lack of experience in criminal law and procedure because of years of specialization in other fields; (b) inundation with other criminal work; (c) irreparable disruption of the confidential relationship between counsel and client, for example, the ideological motives underlying the offence with which the accused is charged are so alien to counsel that he will be unable to impart to the accused the feeling that he will defend him assiduously; (d) if a conflict of interests exists, for example, if counsel acts as the victim's legal adviser, or (e) if counsel feels that on account of his advanced age he will be unable to weather the strain of the trial. Löwe-Rosenberg Die Strafprozeßordnung und das Gerichtsverfassungsgesetz II 23 ed (1978) 106.

In practice, however, neither the South African Bar Councils nor the German trial judges force counsel to accept the assignment . In Germany, for example, the trial judge first ask counsel by telephone whether or not he is prepared to accept the assignment. If he is not prepared another lawyer is asked. Judges are usually guided by a list containing the names of all those lawyers who have agreed to act as Pflichtverteidiger. In Hamburg, for example, the list is comprised mostly of new-comers to the profession; lawyers with small clienteles; but also socio-politically minded lawyers who are sensitive to the legal needs of the poor.[5]

In South Africa silks are rarely briefed in pro-Deo cases and senior juniors only occasionally. One reason for this, according to Advocate Gilbert Marcus of the Johannesburg Bar[6], is that the preparedness to accept briefs in criminal cases decreases with the rise in seniority. Usually pro-Deo matters are defended by less experienced junior counsels. According to Advocate Marcus, for the young advocate the atmosphere in court is psychologically strenuous. The mere thought that one's client is facing a capital charge induces 'a terrible shock'. Advocate Marcus recalled the case of an advocate who, after losing his first pro-Deo case, became so depressed that even today he refuses pro-Deo briefs despite his considerable experience in criminal law generally. Critics charge that, as pro-Deo counsel are without the usual help of attorneys, the quality of legal representation rarely matches that rendered to an accused who is able to afford counsel of his choice.[7] In S v Gibson NO and others[8] Milne J

5 Information obtained from Mr Thomas Dietrich, a lawyer in Hamburg.

6 The author conducted an interview with Advocate Marcus in January 1984.

7 Gross op cit 199; Dugard Human Rights and the South African Legal Order 129.

8 1979 (4) SA 115 (D).

regretted this state of affairs, but went on to say: '*Courts permit such persons* to appear because they have a right to appear and, furthermore, they consider that some representation by counsel is better than none.'[9]

An advocate who has accepted a pro-Deo brief may not withdraw from the case unless the Court gives him permission to do so. In the Gibson case Milne J said: 'It is the usual practice if pro-Deo counsel wishes to withdraw for him to ask leave to withdraw; but I have some doubts as to whether the Court would be entitled to refuse to allow him to do so.'[10] The German courts on the other hand, place strict limitations on the Pflichtverteidiger's right to withdraw once he has accepted the assignment. A ground for withdrawal exists, for example, when the confidential relationship between counsel and client is disturbed.[11] Such is the case, for example, where the accused, through no fault of his own, loses confidence in his counsel; but not where counsel himself characterizes the confidential relationship as being disturbed because of his client calling him 'a puppet of the Court'.[12]

Until recently the financial reward for pro-Deo work was niggardly, perhaps more symbolic - R 10 per consultation and R 30 per court day. At present the fees chargeable are R 25 per consultation and R 75 per court day.

Though the fees charged by the Pflichtverteidiger are below the normal tariff, they nonetheless provide a basis for living. In fact, in practice it often happens that privately retained counsel representing clients who qualify for

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9 Ibid at 127.

10 Ibid at 123.

11 Decision of the Oberlandesgericht (Hamm) of 10 January 1958 2 Ws 482/57 in (1958) 17 Neue Juristische Wochenschrift 641 at 642.

12 Decision of the Oberlandesgericht (Hamm) of 4 January 1975 2 Ws 40/75 in (1975) 27 Neue Juristische Wochenschrift 1239.

mandatory representation make an application to the trial court to have their status converted to that of a Pflichtverteidiger. The advantage gained thereby is that counsel is assured of remuneration by the State. Before 1972 fees payable to the Pflichtverteidiger were very meagre; for instance, for murder cases the Pflichtverteidiger would receive DM 150 and the interpreter, if one was necessary, up to DM 900. In one local jurisdiction the Pflichtverteidiger organized a strike, as a result of which their remuneration was substantially improved.[13]

3 Questionnaires

To study the experiences of advocates in respect of the pro-Deo system, and their attitudes towards it, 60 questionnaires were sent to advocates practising at both the Johannesburg and Pretoria Bars. The advocates were chosen on a random sample basis. Thirty (50 per cent) answered the questionnaires, 10 from the Pretoria and 20 from the Johannesburg Bar.

a General Findings

All the respondents were males with an average age of 41,4 years, ranging between 26 years and 68 years. Sixteen had Afrikaans as their mother-tongue and 14 English. The numerical breakdown according to the University attended was as follows: Pretoria University 5; Stellenbosch University 3; University of South Africa 4; University of the Witwatersrand 10; University of Cape Town 2; Potchefstroom University for Christian Higher Education 4; and Rhodes University 4. The average period of practice of the Bar was 10 years, the range being between 1 year and 26 years.

13 Helms op cit 185.

b Field of Specialization

Not all respondents answered the questions on their field of specialization. Of the 23 who did, 13 specialized in criminal law, 2 in civil law generally, 1 in insurance law, 4 said they specialized in trial work and appeals and 3 said they had no special field.

c Preparedness to Do Criminal Work

A total of 24 (80 per cent) respondents said they accepted criminal matters. Of this number, 20 (83,3 per cent) were prepared to accept all criminal matters including security law matters, and 4 (16,7 per cent) all criminal matters excluding security law matters. Of the 6 (20 per cent) who did not accept criminal matters at all, none was prepared to be briefed on a criminal matter even if it involved a major or regular client.

d Bar Council Requirements

Whereas all respondents from Pretoria said that their Bar Council did require them to do pro-Deo work, no uniform answer was given from the Johannesburg Bar. Two senior advocates gave opposite answers. Perhaps the choice of the word 'require' in the question was unfortunate. However, the majority of the Johannesburg respondents said that they were required to do pro-Deo work, but were not compelled against their will, except in exceptional circumstances. This is the case at the Pretoria Bar as well. Indeed, 36,7 per cent of the respondents said that they had occasion to cancel a pro-Deo assignment after accepting it. In all these cases the reason was generally because of 'other pressing commitments'.

During 1979 a total of 15 respondents defended a combined total of 53 pro-Deo matters, giving an average of 3,5 cases per advocate. The highest number of pro-Deo cases for a single advocate was 22. Except for one respondent who had been in

practice for 7 years, all other respondents who handled pro-Deo cases during 1979 had less than 3 years experience at the Bar.

e *The Pre-Trial Phase*

Most (73,3 per cent) of the respondents said that pro-Deo counsel usually receive their instructions in time, and 80,0 per cent said that pro-Deo counsel usually have sufficient time for pre-trial conference with the accused.[14] What most respondents regretted was the negative attitude of the accused towards pro-Deo counsel. Eighty per cent believed that the accused regard pro-Deo counsel as representatives of the State.

Respondents were asked to select from a check list the word(s) which, in their opinion, best described the general attitude of accused persons towards pro-Deo counsel. Below are the words together with number of times each was ticked off.

open	0
jovial	0
confident	0
cynical	6
apologetic	0
indifferent	22
suspicious	30
resentful	0
doubtful	14
fearful	6

Seven (23,3 per cent) respondents had experienced a situation in which the accused refused to be represented by pro-Deo counsel. In all these cases the accused did not ask for another advocate, but refused to be represented altogether.

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14 Contra Rand Daily Mail 24 November 1979 in which Mr Savvas, a Pretoria advocate, was quoted as saying, 'advocates defending pro-Deo cases were often given clients' confessions and statements late and this made it difficult for them to prepare cases.'

In addition to the psychological barrier there is the language barrier which exists between counsel and most of the accused. Except for 2 advocates who spoke a foreign language (Greek and German) and one with a 'working knowledge of Zulu', none of the other respondents spoke another language apart from Afrikaans and English - a regrettable fact considering that most of the accused are uneducated Africans with little understanding of the official languages. Respondents said that language barriers were bridged with the aid of interpreters. From the answers, however, it appears that not all interpreters used in the pre-trial consultations were qualified. Five respondents mentioned calling a warden to act as an interpreter. One respondent mentioned, 'I demanded the assistance of a State interpreter unless I could, by virtue of my previous profession, make other arrangements.'

Several advocates mentioned the hardships they encountered in tracing witnesses, especially where the crime of which the accused was charged took place in rural areas, or where the accused did not know the addresses of the witnesses. All respondents, however, were against the idea of engaging State-paid investigators to assist with the pre-trial investigation. All favoured the idea of attorneys being appointed to act pro Deo together with counsel, the majority (76,6 per cent) being of the opinion that attorneys should be given the right of appearance in pro-Deo cases. Another idea which elicited a positive response from 80 per cent of the respondents, was that the law students from the local universities be engaged to conduct the necessary pre-trial investigation in exchange for recognized academic credit.

f The Trial Phase

In reply to the question whether they had ever been able to acquire the free services of a psychiatrist or physician where the accused raised the defence of mental or

emotional disturbance 50 per cent of the respondents answered 'easily', 43,3 per cent 'with difficulty' and 6,7 per cent answered 'not at all'.[15]

The fact that most respondents said that pro-Deo counsel is usually briefed in good time does not, however, derogate from one radical weakness inherent in the pro-Deo system, namely, the late stage at which counsel enteres the proceedings. Counsel is briefed only after the proceedings in the magistrates' court. Most of the accused are thus unrepresented at the crucial section 115 hearing. A court study of 770 persons charged with serious offences before the Witwatersrand Local Division of the Supreme Court showed that only 22,42 per cent had legal representation in the magistrates' courts.[16] The advantage of having legal representation at this stage of the proceedings was clear with regard to the question of bail. A striking correlation was found between the incidence of legal representation and the granting of bail. Where the accused had legal representation bail was granted in 74,10 per cent of the cases as opposed to 47,74 per cent of the cases where the accused was without legal representation. Again, as regards the plea it was found that in almost all cases where the

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15 A separate study by the author of the files of 770 persons charged with serious offences before the Witwatersrand Local Division of the Supreme Court showed that in only 5,78 per cent of the cases was expert evidence led, and in only 1,89 per cent of the cases where the death penalty was imposed. No significant difference emerged between pro-Deo counsel and self-retained counsel in the use of expert evidence. But a significant correlation was established between the incidence of the use of expert evidence and the race and sex of the accused. Where the accused was a White male, expert evidence was led in 26,74 per cent of the cases; in the case of White females it was 50 per cent; Black females 2,56 per cent; Coloured males 3,95 per cent and Black males 2,48 per cent. See L D Fernandez 'Aspects of Legal Representation in Criminal Proceedings'(1982) 99 SALJ 660 at 662.

16 See, generally, Fernandez 'Bail: an Aspect of Justice' 75-77.

accused was legally represented a plea of 'not guilty' was entered. In turn, the incidence of the granting of bail was significantly higher (42,40 per cent) for those who pleaded 'not guilty' than for those who pleaded 'guilty' (29,20 per cent). It is significant, too, that 39,31 per cent of those who pleaded 'not guilty' at the summary trial were finally acquitted in the Supreme Court, as opposed to only 6,00 per cent of those who pleaded 'guilty'.

These findings underscore the need to provide the accused with legal counsel at the magisterial hearing. 'If this is not provided it will inevitably affect the fairness of [illegible] subsequent trial.'[17]

Connected to the question of bail is the question of tracing the witnesses. An accused who is remanded in custody in Johannesburg, for example, can guide counsel only vaguely on how to reach an important witness living, say, on one of the farms in a remote area such as Nigel or 'somewhere near the Post Office in Kathlehong township'. Whereas the accused, even if he does not know the address, would easily find such a witness by social instinct, this cannot be expected of a White counsel, who most likely has never weathered the social environment of Blacks. As seen above, a sore point amongst pro-Deo advocates is the hardship they encounter in locating witnesses. Indeed, 9 respondents (31,03 per cent) in the sample believed that the outcome of the trial, which resulted in the accused being sentenced to death, would have been different if the witnesses were traced.

The extent to which the witnesses problem operates as a real obstacle to effective representation is evinced by

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17 J Dugard 'Legal Assistance to a Detainee brought to Court' in J Dugard (ed) Report on the Rabie Report (Centre for Applied Legal Studies University of the Witwatersrand, Johannesburg 1982) 58.

the sweeping approval respondents gave to the idea that attorneys be appointed to act pro Deo together with counsel - even to the extent of breaking with tradition by giving attorneys in pro-Deo matters the right of appearance before the Supreme Court. Another idea was that of engaging law students to conduct the necessary pre-trial investigation in return for academic credit.

In 1983 the Johannesburg Bar Council introduced a scheme according to which final year LLB students at the University of the Witwatersrand assist pro-Deo counsel in the preparation and the conduct of pro-Deo defences.[18] The names of counsel to whom cases have been allocated are sent to a liaison officer in the law faculty who then sees to it that students who wish to assist in the various matters telephone the counsel concerned to make arrangements for such assistance. The Judge President, after consultations with other judges in the Division, has ruled that:

(a) Students should not be present at consultations, because the presence of students may make accused persons more reticent than they otherwise would be in confiding in pro-Deo counsel.

(b) Accused persons should be told that counsel will be assisted in the conduct of his defence by a student and if the accused objects the student should not assist in the matter.

(c) Students may sit in the well of the Court to assist counsel during the hearing, especially in the taking of notes.

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18 Information about the scheme was obtained from Advocate M B Labe, chairman of the pro-Deo subcommittee of the Johannesburg Bar Council (August 1984).

(d) The student should not be introduced to the *presiding judge.*

(e) The students must sign a declaration in which they pledge not to disclose any information obtained in the course of their assistance of pro-Deo counsel.

(f) *The University authorities should* be responsible for procuring the signature of the student to the declaration. *Counsel should* also ensure, before enlisting the assistance of the student, that the declaration has been signed.

It is perhaps too early to appraise the practical aspects of this scheme. It ought to be pointed out, however, that in the early 1970s a similar scheme involving student assistance was not 'particularly popular' with students.[19]

The question that necessarily springs to mind is the following: Why not enlist the assistance of attorneys? After all, an attorney's office has

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19 Dugard 'A Review of South African Legal Education' in Legal Aid in South Africa 162.

a greater resource potential than is available to the student and which, unlike students, operates continuously and independently of such seasonal events as university examinations and university vacations.

The second reason against the use of students in capital cases is an ethical one. The life of the accused is of major importance in a capital case. This concern transcends the interest in providing law students with a 'unique opportunity' of gaining practical experience. It is objectionable enough that poor persons facing the death penalty are being defended by inexperienced advocates. Reform efforts should aim at enlisting the services of more experienced counsel to handle such cases; not less experienced undergraduates.

g Factors Influencing the Outcome of the Trial

With regard to cases in which their clients had been convicted and sentenced to death respondents were asked to tick off from a list the factors which, in their opinion, would have led to a different outcome of the trial.

Would the outcome of the trial have been different if:

	Yes	No
- the accused had been more candid and open with you?	14	15
- the accused had been assigned more experienced counsel?	12	17
- the accused had been of another racial group?	0	29
- the victim of the crime had been of another racial group?	0	29
- the brief had been given to you in time?	0	29
- you had more pre-trial conference with the accused?	6	23

	Yes	No
- witnesses were traced?	9	20
- the trial had been given wider publicity?	1	28
- the interpreter had been more competent?	0	29
- the Bench had been differently composed?	7	22
- you were assisted by an attorney?	17	12

h Quality of Pro-Deo Representation

Twenty-nine (96,66 per cent) respondents said that the eagerness to accept pro-Deo cases is greater among younger members of the Bar. Several, however, glossed their answers with remarks such as, 'have no choice', 'must earn a living', 'it is not eagerness but compulsion'. Twenty-one (70 per cent) believed, however, that an accused suffers prejudice at the hands of young and inexperienced counsel. When asked which of the following should be assigned to defend an accused pro Deo this is how they answered:

(a) a young and inexperienced advocate who has sufficient time to prepare a defence	-	13,33 per cent
(b) an older and experienced advocate whose normal case-load affords him relatively little time to prepare a defence	-	33,33 per cent
(c) neither (a) nor (b)	-	53,33 per cent

Four of the respondents who chose (b) added the proviso 'only if the fees are increased'.

i Pro Deo and Legal Aid

All respondents said that the pro-Deo system should be incorporated into the Legal Aid scheme.

j Attitudes, Observations and Suggestions

The respondents were asked, 'In one or two *words*, *how* would you characterize (a) your own attitude and (b) the general attitude at the Bar towards the *pro-Deo system*?'

The personal attitudes spelt out reflected mainly feelings of resignation, grievance and dutifulne s. The following, which are quoted in full, could be said to be representative: 'fulfils a need', 'too busy to do pro Deo', 'cynical', 'imperfect but useful', 'could be better', 'has to be done but difficult to fit into practice', 'good but room for improvements', 'an essential service', 'a financial loss but a good experience', 'terrifying but valuable experience', 'best experience one can obtain', 'unsatisfactory because of quality of counsel', 'must be done but avoided if possible'.

Most of the respondents characterized their personal attitudes as reflecting the general attitude at the Bar. The few comments on the Bar's attitude generally were: 'a good experience to young advocates', 'should be better renumerated', 'not interested' and 'a necessary burden to be carried'.

The gist of the observations and suggestions made was that if fees were increased, more senior juniors would accept briefs and that would improve the quality of representation to an acceptable level. One young advocate remarked: 'Judges should behave better to counsel bearing in mind they perform a service to the court. Where the cases run in excess of the time estimated by the state, postponements should be granted to accommodate other commitments of counsel.'

4 Conclusion

One observes that in *modern, oppressive,* political *environments,* independent professional groups with strong public service orientations, tend either to adapt to the reigning political mood, or as an alibi for the neutrality towards the Government's inequitable racial *policies, are* forced to assume some *collateral,* social patch-up role - not unlike the role played by chivalrous knights and pious clerics towards the poor under the absolutistic regimes. Whereas this cannot be generally said of the legal profession in South Africa, it certainly holds true for its *apparent* tolerance of such *charitable services* as the pro-Deo, pro-amico, *and in forma pauperis* institutions.

The pro-Deo system is completely *incompatible with* modern access-to-justice *standards* maintained in democratic, *free-market* economies. Hence it comes as no surprise that in practice pro Deo work cannot effectively compete with other remunerative work for the services of established advocates. The responsibility for doing pro-Deo *work is conse*quently placed on the *shoulders* of the novices. The view *that novices are* thereby provided with valuable experience is indefensible, for in practice,once the young advocate has become wise and skilful through experience, he stops doing pro-Deo work. The experience gained is *thus not ploughed back* for the benefit of the *class of* accused from which it was *gleaned.*

After a careful consideration *of the pro-Deo* system one is forced *to the conclusion* that this system should be abolished and be replaced by the legal aid scheme. The Legal Aid Board, too, has accepted, in principle, that there is a need to extend legal aid to persons charged with capital offences.[20] Unfortunately, the *Board has*

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20 Annual Report of the Legal Aid Board for the period ending 31 *March* 1984 8.

made the *implementation* of the scheme subject to the availability of funds.[21] It is submitted that where the life of an indigent person is at stake, the State, *especially one which* proclaims to be inspired by civilized values, has an obligation to ensure that such a person has an automatic right to counsel of *his choice* throughout all phases of the proceedings regardless of the nature of the capital offence with which he is charged. The exercise of this right should *not be made dependent* on the availability of funds. The fact that in practice about 90 per-cent of the accused persons in capital trials are defended by *pro-Deo* counsel[22] should not detract from the more fundamental need to ensure that such persons are afforded a right to legal aid counsel.

21 Ibid.

22 *D J McQuoid-Mason* 'Discretion in the Provision of State-Financed Legal Aid Services to Indigent Accused in South Africa' in Olmesdahl and Steytler (eds) op cit 103 at 104.

21 LEGAL ASSISTANCE FOR THE POOR IN POLITICAL TRIALS

1 Introduction

Today the political trial is a regular phenomenon in both South Africa and West Germany. In South Africa this has become even more of a feature of contemporary politico-legal life since the 1976 Soweto school unrest which has resulted in a new political awareness among the urban Black population. Blacks are becoming more and more sensitive to political injustice. There is a wide and stiffening resistance to the Government's race policies. The demand for radical political reform has been reinforced by the newly-won independence of Angola, Mozambique, Zimbabwe, and now looming large, Namibia. Acts of political violence continually sweep the face of South Africa. The Government sees itself being subjected to a 'total onslaught', and has consequently expanded the definition of state-endangering crimes. Between 1 December 1980 and 30 November 1981, 630 persons were detained under the omnibus security laws in South Africa and the independant homelands.[1]

In West Germany, on the other hand, one can distinguish two major periods of political trials, starting from 1949. During the 1950s and 1960s the bulk of the political trials involved members of the outlawed Communist Party of Germany (Kommunistische Partei Deutschlands).[2] In the 1970s political

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1 1982 Survey of Race Relations 84.

2 The Federal Government applied in 1951 for the ban on the KPD, which was granted by the Constitutional court on 17 August 1956. The ban was imposed in accordance with Article 21 of the Basic Law which says in subsection 2 that parties whose aims or behaviour jeopardize or prejudice the existence of the free democratic order are unconstitutional. In 1968, by which time the Federal Republic was confident in its own existence, a communist party was once more allowed to exist - but not the same one. So in April 1969 the German Communist Party (Deutsche Kommunistische Partei) was founded. It still exists today, together with other Communist parties which have since been formed.

trials revolved primarily around members of the Baader-Meinhof gang - an ultra left terrorist group comprised of the left-over, uncompromising faction of the 1968 student rebellion. After most of its members were convicted and imprisoned the group reorganized itself as the Red Army Faction (Rote-Armee Fraktion) which, today, poses a threat to the security of the State. Several RAF ringleaders have been apprehended and are presently facing charges of assassination, kidnapping and other State-endangering crimes.

2 Access to Counsel

Most of the persons detained under the 'drastic processs' provisions of the Internal Security Act, 74 of 1982[3] and the enactments it replaced are denied access to legal counsel or to anybody except an official of the State during the critical pre-trial phase of the proceedings.[4] In practice, however, the individualized justice that official discretion allows produces great i equities. For instance, the security police have un- tructed access to the detainee. Even where the security police know the name and the address of the counsel retained privately by friends or relatives of the detainee, they have on occasion deliberately forestalled counsel's appearance in court by withholding the trial date, thus forcing the accused to go unrepresented or to opt for a

3 For criticism of this Act see J Dugard 'A Triumph for Executive Power - An Examination of the Rabie Report and the Internal Security Act 74 of 1982' (1982) 99 SALJ 589-604.

4 See s 29(7) of the Internal Security Act 74 of 1982.

pro-Deo advocate.[5] Where the accused's counsel makes a belated appearance, an adjournment is not automatically granted, but is in the discretion of the presiding judge.

Perhaps the harshest example of the effects of deliberately denying the accused legal representation is the case of S v Tsotsobe, Shabangu and Moise.[6] In this case two of the accused were brought before a magistrate to plead to charges of treason within only minutes of their arrest. None was legally represented. Both made admissions on important issues which were later referred to by the trial judge as evidence supporting their conviction on charges of high treason. Both were sentenced to death.

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5 Examples of cases where the security police deliberately withheld trial dates are S v Madondo (Ermelo Circuit Court) cc 133/78; S v Mlukeki and others (Port Elizabeth Regional Court) cc RC8/280/78; S v Mahlungu (WLD 1 March 1978) cc 558/77; S v Molete (Springs Regional Court) cc 147/78.

In S v Gibson NO and others 1979 (4) SA 115 (D) at 139 Milne J commented critically:

> 'I think it may be desirable to say, however, that the authorities, including the Security Police, are clearly under an obligation to take all reasonably practicable precautions to ensure:
>
> (a) that accused persons are advised at the earliest opportunity of the fact that their friends or relatives have arranged for legal representation, if that is known to the police (or other authorities); and
>
> (b) that the legal adviser so instructed should be kept fully informed as to the date when the accused is to be tried and of the general nature of the charge against him.'

6 CC 154/81 heard by the Transvaal Supreme Court in June - August 1981. See J Dugard 'Legal Assistance to a Detainee Brought to Court' in J Dugard (ed) Report on the Rabie Report: An Examination of Security Legislation in South Africa (Centre for Applied Legal Studies, University of the Witwatersrand Johannesburg 1982) 51 at 57-58.

Although in West Germany the accused in a political matter is guaranteed legal representation, the right to counsel itself has been glossed with a number of qualifications which give the State important advantages over the accused. The restrictions on the right to counsel were introduced in the 1970s as a legislative response to the tactics employed by the accused and their defence counsel in the so-called Baader-Meinhof trial. Each of the accused in that trial selected between 10 and 16 defence counsel with whose aid an ingenious information network was established amongst the inmates of various penal institutions and their sympathisers on the outside.[7] By exploiting their rights to the full the defence counsel succeeded in engineering considerable delays in procedure.[8]

To forestall further conspiratorial activities amongst the accused and their counsel the legislature enacted a measure which limited the maximum number of defence counsel to 3 per accused.[9] The legislature also forbade the joint defence of several accused by a single defence counsel.[10]

Another measure was enacted which provides for the exclusion of counsel where counsel is under grave suspicion of being an accomplice in the commission of the act which is being investigated; or of misusing his contact with the detainee to commit criminal offences or to endanger prison security; or in the case that the accused is convicted, of thwarting the execution of the penalty.[11]

In September 1977, shortly after the Baader-Meinhof terrorists kidnapped the president of the German Employers'

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7 D Krauss 'The Reform of Criminal Procedure Law in the Federal Republic of Germany' (1979) 24 Juridical Review 202 at 210.

8 Ibid.

9 § 137(1) of the Strafprozeßordnung.

10 Ibid § 146.

11 Ibid § 138(a).

Association and killed two of his aids, the controversial Kontaktsperre-Gesetz (Contact Ban Act) was enacted.[12] This law provides that where a terrorist organization poses a present danger to the life, body or liberty of a person all oral and written communication between certain detainees and the outside world including the defence counsel, can be forestalled for a period of 30 days in order to avert this danger. The establishment of the danger has to be confirmed within 2 weeks by the responsible Provincial Court of Appeal or the Federal Supreme Court.[13]

This measure was aimed at cutting off communication between suspect terrorists detained in separate establishments and those still at large. The events leading to the enactment of this law were the following: The authorities suspected that those terrorists who were holding Schleyer hostage were being supported, if not directed, by both the suspect and convicted terrorists in the various prisons.[13a] It was suspected that some of the defence counsel were maintaining the contact.[13b] In order to save Schleyer's life and to secure his release the justice ministers of the states in which suspect and convicted terrorists were held, in agreement with the Federal Minister of Justice and the justice ministers of the other Federal states, ordered the total isolation of those prisoners accused of supporting or membership of a terrorist organization.[13c] As there was

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12 Law of 30 September 1977 BGBl I 1877.

13 §§ 31-38 of the Einführungsgesetz zum Gerichtsverfassungsgesetz of 27 January 1877 RGBl 77 as amended by the Änderungsgesetz of 8 December 1981 BGBl I 1329.

13a O R Kissel commentary to § 31 of the Einführungsgesetz zum Gerichtsverfassungsgesetz op cit Gerichtsverfassungsgesetz (1981) at 1424.

13b Ibid.

13c Ibid. See also S Cobler Law, Order and Politics in West Germany (F Mc Donagh trans 1978) 144.

no statutory basis for this executive act the responsible ministers invoked a state of emergency.[13d] They said that the measure would be maintained until the end of the kidnapping.[13e]

A number of lawyers appealed to the Federal Constitutional Court.[13f] 'At this point the "large crisis committee" decided that attack was the best form of defence, and presented the so-called "contact ban law" to the Bundestag for approval'.[13g] According to Cobler, this law had been prepared long before Schleyer's kidnapping, but there was little chance then that the Bundestag would pass it.

a Critical Discussion of the German Access-to-Counsel Provisions

These anti-terrorist enactments constitute deep legislative inroads into the procedural rights of both the accused and defence counsel. These incursions undermine the liberal reform-spirit of the Criminal Procedure Amendment Act of 1965.[13h] This Act extended the procedural rights of both the accused and counsel substantially. For example, counsel was afforded the right to communicate freely with his client in custody.[13i] Before then, written communication between counsel and his client in custody was subject to judicial control and, where the reason for the arrest was the danger of

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13d Cobler op cit 144-145. See also Kissel op cit 1424.

13e Cobler op cit 145.

13f Cobler op cit 145.

13g Ibid.

13h Gesetz zur Änderung de[illegible] eßordnung und des Gerichtsverfassungsgess[illegible] 9 December 1964 BGBl I 1067. This law ca[illegible] effect on 1 April 1965.

13i Ibid § 148.

collusion, oral communication, too, between the detained client and his counsel was subject to control.

This Act also extended the category of cases which entitle the accused to be defended by mandatory defence counsel. Furthermore, counsel was afforded the unrestricted right to inspect the file.[13j] To protect the person against self-incrimination at the time of the arrest, the Act made provision for cautionary rules which the interrogating instances must observe in their questionning of the accused.[13k] These rules are similar to the South African Judges' Rules of 1931. The difference is that in Germany they are legally binding.

It is against the background of these positive innovations that the wider implications of the anti-terrorist measures should be seen. A disquieting aspect regarding the anti-terrorist laws is the relative superficiality of the debate preceding their enactment.[14] The Contact Ban Law was passed without any chance for public control or influence.[14a] The then Social Democratic Liberal coalition Government was under heavy public pressure, generated by right-wing politicians and those media close to them, to act, and quickly at that. This undermined the rational search for equally effective alternative measures of lesser socio-political import. Yet, in opting for the enactment of this drastic legislation, the legislature undermined the principles which constitute the very Rechtsstaat which it seeks to safeguard. Professor Krauss observes correctly:

13j Ibid § 147(2) and (4).

13k Ibid §§ 136(1) and 163 (a)(3).

14 Cf Krauss op cit 213; Vereinigung Demokratischer Juristen (ed) Zur rechtspolitischen Entwicklung in der Bundesrepublik Deutschland (1983) 94.

14a Cobler op cit 145.

> What is far more important and threatening is Parliament's continual readiness to assert an accompanying legislative control of individual criminal proceedings while they are in progress. This is not only objectionable as being individual case legislation, *and thus itself a constitutional absurdity* because it undermines the principle of the division of power; it is also, even more damagingly, an obstruction which impedes a broader view of criminal procedure and which concentrates legal-political attention on specific exposed points of procedure, thereby blocking the way towards comprehensive reform.[14b]

It is submitted that the law which provides for the exclusion of counsel from the criminal proceedings[14c] *constitutes an affront* to the legal profession. It impinges sorely on counsel's professional self-respect. The fact that a minute number of lawyers may have misused *their professional* status to further the aims of terrorism, is, indeed, regrettable. But this surely does not justify the enactment of a law that casts such moral discredit on the entire profession. The basic trouble with this law is that it lends itself to judicial misuse. It can be exploited by judges who merely want to get rid of 'awkward' or 'disagreeable' counsel. The danger that this might happen is greatest in political trials. The reason is that in some political trials the mere suspicion of complicity in the crime suffices to exclude counsel from the proceedings.[14d] Furthermore, counsel who asserts himself tenaciously on behalf of his client could easily risk provoking the suspicion that he is trying to thwart the ends of justice.[14e] There is

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14b Op cit 216.

14c See note 11 above.

14d See § 138(a)(2) of the Strafprozeßordnung op cit.

14e Cf I Müller Rechtsstaat und Strafverfahren (1980) 166.

also the danger of counsel pandering to the idiosyncrasies of the judge merely to avoid unnecessary victimization.

In short, from whichever point one regards the exclusion rule, it is not conducive to the healthy administration of justice.

It is submitted that the law prohibiting the joint defence of several accused by a single counsel constitutes yet another unwarranted legislative interference with the ethical rules of professional conduct. Heinrich Hannover, a well-known defence counsel in political trials, makes this point well when he says that this law

> is based on a distrust of the legal profession, which, contrary to an *established* tradition of the Rule of Law, is no longer regarded as capable of determining for itself the conflict-of-interest cases which preclude the defence of several accused in the same proceedings.14f

The trouble with this law is that it impairs the effectiveness of the defence in cases in which the accused are charged en bloc with, say, being members of a criminal organization and where the culpability of the accused hinges on a finding on the nature of the organization. *An effective defence sets out first that the organization's* structure, aims and activities be defended. To prepare such a defence a common discussion between the accused persons and counsel is necessary. Under the present arrangement, each of the accused in the example would be compelled to employ his own counsel. This would not only have the effect of multiplying the costs of the proceedings but also of protracting the procedures.

14f H Hannover 'Strafverteidigung in der Vertrauenskrise' in H Hannover W Holtfort and G Maus (eds) Strafverteidigung und Anwaltsorganisation (1979) 7 at 16 (own translation).

The most drastic of all the anti-terrorist measures is the Contact Ban Law. While on the one hand this law denies *counsel access* to his detained client, on the other hand the interrogating authorities have free access to him. The interrogation takes place in counsel's *absence*.[14g] The detainee is thus denied the help of counsel at a crucial stage of the proceedings.

Two aspects of this law merit attention: First, the *decision whether* or not to apply the contact ban lies not with the judge, but with the executive - 'after proper exercise of discretion'.[14h] *The appropriate* judge is only called upon to 'confirm' the need for the contact ban.[14i] Second, the contact ban law affects not only founders or members of terrorist organizations, but it can also be used against persons who are suspected of 'supporting' *or* 'publicizing' a terrorist organization.[14j]

These two aspects impart an ominous perspective to this law. The danger is that it could be used by the government of the day as an instrument for *getting rid* of its political enemies. The then Social Democratic Party deputy, Coppik, one of the few members of Parliament *who voted against* the enactment of the Contact Ban Law, warned against the effects of its wide sweep when he said:

> Anyone who still says, "what does it have to do with me? I am not involved with terrorists", must be told clearly that under the new law nobody, no matter how innocent, *can be sure of not* being imprisoned as a result of denunciation and

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14g § 34(3)(iii) of the Einführungsgesetz zum Gerichtsverfassungsgesetz.

14h Ibid § 31(4).

14i Neither the accused nor his counsel have a right to be heard - I Müller op cit 116.

14j Ibid for a real example.

> disappearing into a prison for weeks and months without contact with a lawyer or even with his relatives.[15]

Till now, the Contact Ban Law has been applied only once, namely in the circumstances that led to its enactment. Is this not a good reason for dispensing with this measure altogether?

b The Present Situation with Regard to the Contact Ban Law

In the coalition talks preceding the formation of the current Federal Government in 1982, the Federal Democratic Party (the Liberals) pressed its prospective conservative coalition partners, the Christian Democratic Union and its sister party, the Christian Social Union, to accept the need to water down the Contact Ban Law. But till now this law has not been amended. The reason, one speculates, is that the Liberals, who also hold the Federal Justice portfolio, have been systematically warding off attempts by the Christian Social Union to tighten the laws regulating political asylum and other matters affecting aliens. The failure to reach consensus on these issues certainly lessens the chances of reaching a compromise on an issue of internal security.

Instead, with the present renewed outbreak of acts of terror, both the Christian Democratic Party and the Christian Social Union have been calling for the rigorous application of the Contact Ban Law.[15a] These calls have also found sporadic echo among some politicians in the Social Democratic Party, the main opposition party.[15b] Some conservatives, such as the Minister of Justice of

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15 Coppik (SPD) Bundestag Debates of the 8th Legislative Period 44th Sitting (29 September 1977) 3372 (own translation).

15a See the Süddeutsche Zeitung 9 January 1985.

15b See Die Welt 9 January 1985 and the Frankfurter Allgemeine 15 January 1985.

Baden-Württemberg, Heinz Eyrich, have even been calling for the enactment of a law that authorizes the control of oral communication between counsel and political detainees.[15c] For Franz Josef Strauss, the Prime Minister of Bavaria, the anti-terrorist measures do not go far enough. In a recent emotional speech he pointed that it is high time that the 'long overdue' 'legal-political errors' be corrected.[15d]

Indeed, such statements are disquieting, especially when uttered in defence of the Rechtsstaat as is usually the case.

c The German Bar Association and the Anti-Terrorist Laws

Whereas a number of German civil rights groups, including the Association of Social Democratic Jurists *and those judges and state prosecutors in the Public* Service and Transportation trade union, voiced energetic protest against the provisions of the anti-terrorist laws, the German Bar Association kept a low profile.[15e] Neither did any local Bar Association nor any local Bar Council call an extra-ordinary meeting.[15f] The then President of the German Bar Association, Wagner, accused foreign lawyers who criticized the German measures of

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15c Die Welt of 18 February 1985. It ought to be pointed out that the so-called Anti-Terror Gesetz of 18 August 1976 (BGBl I 2181) provides for the control of written communication between counsel and the accused in certain criminal matters of a grave nature.

15d See the Frankfurter Rundschau 8 February 1985.

15e See W Holtfort 'Interessenvertreter ohne Interessenvertretung (Die berufsständischen Anwaltsorganisationen)' in H Hannover W Holtfort and G Mauz (eds) Strafverteidigung und Anwaltsorganisation (1977) 25 at 45.

15f Ibid 48.

emotionalizing the issue.[15g] The Bar Association leadership chose instead to parry the foreign criticism by pointing to some of the illiberal criminal procedure provisions in foreign jurisdictions.[15h] Echoing the sentiments of one conservative politician, the Bar Association leaders stated that the 'very liberal' criminal procedure reforms that were effected in 1965 had, in fact, gone far beyond what is customary in other liberal states.[15i] The Association's reaction to the Contact Ban Law was: 'bitter, but necessary medicine'.[15j]

In short, the Bar Association's attitude was more palliative than critical. This is disappointing, particularly when one has regard to the fact that it was the pusillanimity of the German Bar Association which, only some four decades ago, encouraged the Nazis to reduce the Code of Criminal Procedure to an engine for racial and political oppression.

d The Rabie Commission

In its Report[16], which was tabled in the South African Parliament in February 1982, the Rabie Commission of Inquiry into Security Legislation justified the lea provision which denies counsel access to detainees. The Commission's main argument was that lawyers or

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15g Ibid 45.

15h Ibid note 43 at 53.

15i Ibid 47.

15j Cited by H Hannover 'Zum Kontaktsperregesetz' (1979) 2 Demokratie und Recht 184 at 185.

16 RP 90/1981.

in custody, sometimes up to 5 years.[24] During the period in custody each detainee is kept in solitary confinement regardless of the part each played in the alleged crime. Detainees are sometimes subjected to a form of torture known to psychologists as 'sensory deprivation'. This is a form of torture in which the sensory stimuli are strongly reduced. This is done by exposing the detainee 'to constant light, almost complete silence, white-walled cells on which nothing hangs, white furniture and almost continuous observation.'[25] Amnesty International has strongly criticized this practice.[26]

In its decision on the applications of Gudrun Ensslin, Andreas Baader and Jan Raspe the European Commission of Human Rights pointed out the dangers of isolation for both the physical and spiritual well-being of the detainee. The Commission stated that the international literature on criminology and psychology shows that isolation can suffice to impair severely the physical and spiritual well-being. The following findings can be diagnosed: chronic apathy, fatigue, emotional instability, concentration difficulties, disturbances of the vegetative nervous systems.[27]

The Rabie Commission which was appointed in 1979 to examine the South African security laws regrettably did not

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24 Amnesty International Amnesty Internations Arbeit zu den Haftbedingungen in der Bundesrepublik Deutschland für Personen, die politisch motivierter Verbrechen verdächtigt werden oder wegen solcher Verbrechen verurteilt sind: Isolation und Isolationshaft (AI Index Eur 23/01/80 May 1980) 15. Accused persons in ordinary criminal proceedings seldom spend more than six months in pre-trial custody.

25 Ibid (own translation).

26 Ibid 31-44.

27 Decision on the Applications Nos 7572/76, 7586/76 and 7587/76. See further Decision of the European Commission of Human Rights on Application No 5310/71 (Ireland v the United Kingdom).

even bother to look into the interrogation methods applied to political detainees - this despite the numerous detainee deaths and the complaints of torture made by ex-detainees.[28]

Indeed, a person who is brought to trial after being tortured is reduced to a mere object of the proceedings - even where he has legal representation. This submission is based on the simple recognition that the accused, too, has an important role to play at the trial. He must be alert for he has to stand up for cross-examination and re-examination; he has to listen carefully to the evidence led and must point out to his defence counsel misstatements or any other forgotten details which might suddenly spring to his mind. Together with counsel he has to make quick and intelligent decisions on important matters affecting the case. All of this is possible only if the accused is possessed of his normal senses. Therefore it is essential that at the pre-trial stage already the accused should not only have the right to consult with his counsel, but above all, the right to do so in a sound psychological condition.

In November 1982, the Minister of Law and Order in South Africa issued directions regarding the treatment of persons held under section 29(1) of the Internal Security Act, 74 of 1982.[29] In part, the directions are:

> (a) that the detained person shall be informed of the reasons for his detention and also of his limited rights to request the authorities to release him;[30]

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28 See The Star 11 March 1982. See also The Sowetan 1 October 1982. For a detailed report on the torture of detainees in the Ciskei see N Haysom Ruling with the Whip: A Report on the Violation of Human Rights in the Ciskei (Centre for Applied Legal Studies, University of the Witwatersrand Johannesburg 1983) 58-63.

29 Notice 877 of 1982 Government Gazette No 8467 of 3 December 1982.

30 Ibid ss 2-4.

(b) that the detainee's relatives shall be informed of his detention 'unless this will hinder any investigation or endanger the security of the State';[31]

(c) that the detainee's health shall be protected[32]; and that the detainee shall have decent facilities 'where practicable';[33]

(d) that the detainee shall be treated humanely;[34]

(e) that the interrogating officers shall not take firearms into the interrogation sessions 'unless there are compelling security reasons for doing so';[35] and

(f) that complaints brought by a detainee against the security police shall be investigated forthwith by an officer from another branch of the police force.[36]

Lawyers for Human Rights rightly points out that as long as 'section 29 remains in force in its present form, one cannot really expect an improvement in conditions of detention'.[37] Also, unless the directions are given the force of law and as long as several of the directions 'have wide escape clauses which permit the police to evade the spirit of the directions',[38] political detainees are not adequately safeguarded against abuse of police power.

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31 Ibid s 7.
32 Ibid ss 27-29.
33 Ibid s 13.
34 Ibid s 13-17.
35 Ibid s 22.
36 Ibid s 19.
37 Marcus and Dugard op cit 89.
38 Ibid 86.

Lawyers for Human Rights has therefore *recommended*

(a) '(t)hat the directions should be given the force of law;[39]

(b) '(t)hat the terms "torture" and "*inhuman* or degrading treatment" should be given specific form so that it is not left to the police to decide on the meaning to be assigned to them';[40]

(c) *that* '*(a)n independent* ombudsman should be charged with securing compliance with the *directions*';[41] *and*

(d) that 'there is a real need for the proper education of the security police in respect of the directions and the hazards of interrogation to the health of the detainee.'[42]

4 The Need for Equality of Procedural Rights

The South African Government continually denies that South Africa has political detainees, political trials and political prisoners.[43] Imprisoned popular leaders are officially branded as ordinary criminals. In one trial the presiding judge even threatened to report defence counsel *to the Bar for suggesting* that there were political trials in South Africa.[44] But anyone familiar with the South African *political culture knows* that official mistiling

39 Ibid 89.

40 Ibid 90.

41 Ibid 92.

42 Ibid 93.

43 For criticism of the Government's attitude see Dugard Human Rights and the South African Legal Order 205.

44 The judge was Steyn J and the case: S v *Ramudzuli and* Duma (Krugersdorp Supreme Court) 20 February 1978 to 30 May 1978.

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and semanti[illegible]splitting are favourite devices used by the Government to market its policies abroad.

Irrespective of the appellation the Government might reserve for them, persons arrested under the security laws are denied an opportunity *to defend themselves effectively* against the charges. The procedural regulations of state-security legislation lean strongly in favour of the State; *they determine not only the outcome* but also the conduct of political trials. In its decision on the applications of Ofner and Hopfinger v Austria[45] the European Commission of Human Rights held that the procedural equality of the accused iwth the prosecutor is an inherent element of a fair trial. Although the equality spoken of here certainly applies to the trial itself, its application at the pre-trial phase, admittedly, cannot apply literally. This is because the roles of prosecutor and defence are by their very nature different ones. The equality here then can best be seen as a structural principle, particularly in a civil law jurisdiction such as Germany where the prosecutor cannot really be regarded as a party at all. But this does not derogate from the right of the accused to be given substantial parity with the State, and the right to an effective chance of challenging any and all evidence produced by the State and to present evidence in defence.

The South African practice of laying too much emphasis on *the security of the State and very* little on the security of the individual is dangerous as it can only breed contempt for the State and its institutions; particularly in South *Africa* where the majority of the population does not equate national security with their own security. The numerous state-security laws passed over the last three decades have not created more security, but less. Perhaps the lesson to

45 Applications Nos 524/59 and 617/59.

be drawn here is that security is based on respect of the individual's fundamental rights, not on their abolition. 'Man's security comes from within himself, and the security of all men is founded upon the security of the individual', Manly Hall once said.[46] One could go further and say, the best way to defend the security of the State is to defend the person standing before the court. This idea, it is submitted, should become the hall mark of state-security legislation.

5 The Costs of Political Trials

Political trials are, by their nature, costly. Huge expenses are incurred in preparing for trial. Witnesses, who are sometimes scattered all over the country, have to be traced and subpoenad to the trial. As they are compelled to attend the trial for as long as they are needed, accommodation has to be arranged for them. The same applies to expert witnesses who sometimes have to be flown in from overseas.[47] In South Africa these trials are sometimes held in remote areas, far from the domiciles of the accused. In such a case counsel, if the accused is privileged to have one, is forced to leave his office for weeks or months on end. His travelling and hotel costs have to be paid. Friends and relatives of the accused have to travel from far to attend the proceedings, at much cost and physical sacrifice.

The accused, on the other hand, are generally too poor to afford the enormous costs of engaging counsel. In South

46 Quoted by L J Peter Peter's Quotations (1979) 461.

47 For example, in the trial of the Peace Committee (Friedenskomitee) in Düsseldorf, West Germany in 1959/1960, the defence presented 50 expert witnesses from all over the world to rebut the charge that the Peace Committee was a communist front. See H Hannover 'Verteidigung als Menschenrecht' in 3. Internationales Russel-Tribunal - Zur Situation der Menschenrechte in der Bundesrepublik Deutschland IV (1979) 25.

Africa most of the political accused are schoolchildren, students, labourers clerics. In Germany, too, the political accused are mainly from the underprivileged groups.

6 Legal Aid

a Germany

In Germany state security trials take place before the State Court of Appeal. An accused who is charged before this court has a right to mandatory legal representation.[48]

Over the past few years, however, considerable controversy has developed around the question of mandatory defences where the accused is charged with a politically motivated crime. This needs to be explained: In practice, even where counsel has been retained privately with the aid of funds raised by the accused's political sympathisers, the courts still appoint counsel against the wishes of the accused to act side by side with the accused's own counsel.[49] The reason for this is that the accused tend to sabotage the trial by disengaging their counsel in the course of the court proceedings. When this happens, judges have to close the trial and appoint counsel to defend the accused. But since security trials are complex, the newly assigned counsel might need several months before the trial is re-opened from the start again. All this costs time and money.

Thus, to prevent a complete collapse of the trial the courts assign mandatory counsel who, should the accused drop his counsel, will be able to continue with the defence without the proceedings being interrupted.

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48 § 140 of the Strafprozeßordnung.

49 See, generally, M Künzel Erfahrungen eines Zwangsverteidigers (1981) 9/10 Strafverteidiger 464-466.

The primary purpose for the assignment of such counsel is, therefore, to ensure that the proceedings go on. It is precisely this point which has given rise to criticism.

One attorney who was assigned to act alongside the private counsel in the Baader-Meinhof trials points out that the circumstances in such trials are such that it is absolutely impossible for assigned counsel to continue with the defence when the accused discharges counsel midway through the trial.[50] The first reason is that the accused simply does not have confidence in someone who has been assigned to defend him against his wishes. The Republican Lawyers Association (Republikanischer Anwaltsverein)[51] - a group of radical lawyers who inter alia criticize the traditional Bar Association for its insensitivity to some socio-political issues - rightly points out that no reciprocal feeling of trust can develop as long as the accused is suspicious of his lawyer.[52]

The second reason is that mandatory counsel rarely knows what the defence strategy for the trial is since, in practice, genuine confidential consultations between the accused and his counsel cannot take place in the presence of mandatory counsel who has been forced onto the accused.[53] For mandatory counsel the whole situation is very unpleasant and one can understand why attorneys are not eager to be assigned in such cases.

There is widespread agreement as to the need to remedy this intolerable practice.[54] One interesting suggestion that has been made is that the presiding judge should

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50 Ibid.

51 Founded on 11 February 1979.

52 See, generally, H Hannover 'Strafverteidigung in der Vertrauenskrise' in Hannover Holtfort and Mauz (eds) op cit 7-23.

53 Künzel op cit 465.

54 Rieß op cit 463 especially note 32.

afford the accused an opportunity to chose at least two counsel to defend him at the cost of the State where the trial is complex.[54a] The need for the appointment of mandatory counsel would thus be obviated since it is unlikely that all defence counsel would be simultaneously relieved of their mandates during the trial.[54b] There is, however, no chance that this proposal will be adopted given the fact that the conservatives in Parliament favour a hard line against persons charged with state-endangering offences. A more realistic alternative would be to assign mandatory counsel only where the accused agrees that he acts side by side with his own counsel[54c] or only where the accused fails to engage new counsel within a reasonable time after disengaging his previous counsel.[55]

The requirement that convicted indigent persons, too, pay back the huge costs of the proceedings and the interpretation expenses[56] has, in the past, resulted in the

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54a See B Haffke 'Zwangsverteidigung - notwendige Verteidigung - Pflichtverteidigung' (1981) 9/10 Strafverteidiger 471 at 484.

54b Ibid.

54c Rieß op cit 464.

55 Ibid.

56 See § 645 of the Strafprozeßordnung.

The long-standing German practice of requiring non-German-speaking accused persons to pay interpretation costs in *criminal proceedings leading to their conviction* has been recently held by the European Court of Human Rights in the case of Luedicke, Belkacem and Koc to be in breach of Article 6(3)(e) of the European Convention on Human Rights which provides that anyone who cannot speak or understand the language used in court, has the right to receive the free assistance of an interpreter. The Court held that *'the words "free" (gratuitement) in* Article 6(3)(e) have in themselves an ordinary meaning that is clear and determinate: they denote a once and for all exemption or exoneration from liability to pay interpretation expenses and not a conditional remission, temporary exemption or suspension'. Judgement of 28 November 1978 Yearbook of the European Convention on Human Rights (1978) 630 at 634 (*Summary of the Judgement*).

families of politically persecuted persons being subjected to bitter financial distress for years'.[57] Although the State Treasury has occasionally granted individual persons partial remission of the costs it is also known to have insisted mercilessly on the repayment of the full costs of the proceedings regardless of the individual's economic and social circumstances. The Treasury's inflexibility in such cases has been criticized as a form of extra-judicial political disciplining of unrepentant opponents of the prevailing political order.[58]

b South Africa

In practice, state legal aid is not available to persons charged with political offences. One reason is that political trials in South Africa are often capital trials for which pro-Deo advocates are assigned to defend the indigent accused where he is not able to instruct counsel of his choice. In capital cases legal aid can be granted only if an attorney is instructed to assist pro-Deo counsel, but here again, only if the Director of Legal Aid agrees to his appointment.[59] This exception, however, exists only on paper for in practice pro-Deo advocates are never assisted by attorneys no matter how complicated the case.

Raymond Tucker, a well-known Johannesburg civil-rights attorney, told the author[60] that another reason is that accused in political trials reject pro-Deo counsel, whom they regard as representatives of the State. They prefer to be represented by experts. Indeed, most of the political trials are defended by skilled senior counsel. These trials are

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57 W Amman (ed) Referate der 1.-15. Arbeitstagung des erweiterten Initiativeausschusses für die Amnestie und der Verteidiger in politischen Strafsachen, Heidelberg 1957 (manuscripts) 15. Tagung 24.

58 See A von Brünneck Politische Justiz gegen Kommunisten in der Bundesrepublik Deutschland 1949-1968 (1978) 293.

59 Guide para 12.1(a).

60 Interview in January 1984.

on politically active Black lawyers in the 1960s very few Black lawyers have been prepared to accept briefs in political cases; this despite the fact that only a tiny percentage of the Black lawyers have been engaged in extra-professional political activities. Their general argument is that they fear harassment by the security police. Does this mean that White lawyers who have been involved in *political trials all along have nothing to fear*? Raymond Tucker's reply to this question was that there ought to be no fear if a lawyer conducts the case in a truly professional manner and to the limits of his professional abilities.

It would, however, be unfair to make the unqualified assertion that the present second generation of Black lawyers are indifferent to the legal plight of political offenders, most of whom are Black. First, it ought not to be overlooked that most Black lawyers, like most of the other Blacks who have professions, have gone through enormous social, economic *and political hardships* to obtain their education. Most of them want to reap the economic fruits of their professional expertise and the social prestige that goes with it. This tends to lead to a political conservatism and a disinclination to grapple with the harsh political realities of the day. Second, as pointed out earlier in this study, the majority of the Black lawyers in South Africa occupy their premises on a very flimsy legal basis. They have no *security of tenure*. The fact that their permits to practise in urban areas can be cancelled at any time is perhaps one reason why they shun involvement in the legal defence of enemies of the State. Third, Black lawyers who, for some or other reason, fall into disfavour with the Government do not have the guarantee that their respective Law Societies will speak up for them. The past record of the attorneys' profession has not been encouraging when it comes to the *question of intervening boldly*

on behalf of Black colleagues who have fallen victim to arbitrary executive action.

More recently, however, a growing - though still very small - number of Black lawyers are becoming involved in political trials. One reason for this is that with the growing politicization of the Black population, pressure is being brought on Black lawyers and other leaders in the Black community to show more concern for the political problems of the Black people. Another reason is that with the increasing interest shown by civil-rights organizations abroad, for the human rights cause in *South Africa*, Black lawyers are being asked more and more by their colleagues from abroad what they - who deal with the mechanics of the law - are doing to enhance the cause of the Black population.

(i) The Funding of Political Trials

With the banning of the South African Defence and Aid Fund in 1966 the principle source for providing political accused with skilled, privately retained defence counsel was sealed off. In 1971 the Dean of Johannesburg was prosecuted under the Terrorism Act with, inter alia, providing funds for the legal defence of *political offenders*. The basis of the charge was that the Dean's action was likely to encourage potential offenders to step up their hostility towards the State. This contention was rejected by the Court.[61]

As a result of the Government's action local people were reluctant to provide funds for the defence of persons charged with political offences. Civil-rights lawyers also feared that the stepped-up official action would dissuade donors abroad from financing the defence of indigent political offenders. This has not happened.

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61 S v ffrench Beytagh 1972 (3) SA 430.

At present most of the funds for political trials come from abroad. The Lawyers' Committee for Civil Rights in Washington, USA, is a major source. Various lawyers and law firms in Great Britain, as well as charitable organizations in Europe also provide funds. The defunct International University Exchange Fund (IUEF) was another source. Mr Tucker told the author that without the funds from abroad very few accused persons in the political trials would have been in a position to instruct counsel of their choice.

(ii) Legal Aid Provided by the South African Council of Churches[62]

The South African Council of Churches (hereafter SACC) plays a major voluntary role in the financing of the defence of political offenders. The SACC's legal aid scheme is administered under the auspices of a daughter body, the Dependants' Conference (hereafter DC).

The DC has regional offices in the Transvaal, the Cape Province, Natal and in Namibia. Each of these offices is staffed by one or two field-workers who visit the families of banned persons, political detainees, and political prisoners. The aim of these visits is to provide material relief for the deprived families, or where a family member is awaiting trial, to arrange for legal assistance.

The DC provides legal assistance only in political cases. The concept 'political' is defined widely and embrac other legal actions arising out of racial victimization. For example, the DC has funded legal actions (a) against the authorities for withholding the school examination numbers of Black scholars who protested against their inferior

62 Information on the SACC's legal aid work was obtained from Anne Hughes of the SACC.

education and (b) against the Minister of Police for damages arising from the medical neglect of persons detained under the state security laws. Also, the DC has provided legal counsel to political prisoners on Robin Island, who were charged with violating prison rules.

The procedure for the granting of legal assistance is as follows: A family member or friend of the political detainee goes to the DC's regional office to lodge an application for legal assistance. The application is then forwarded for consideration to the General Secretary of the SACC in Johannesburg, Bishop Desmond Tutu, supported by information, documents and legal opinion on the case obtained by the Regional Director. Should the application be approved, legal counsel is engaged and paid out of the SACC's Asingeni Relief Fund (the name meaning 'we don't go in'), or out of the Legal Costs Trust Fund. Over 90 per cent of the funds are donated by organizations abroad.

As far as possible, the DC refers thte applicants to attorneys of their choice. Most of the attorneys in the Transvaal and the Cape Province know about the service, and have agreed to a scale of fees which ensures that the DC's limited funds are stretched further than might otherwise be the case. Attorneys and advocates assisting the accused remain in contact with the DC offices and continually report back on the progress of the proceedings.

Because of the DC's limited funds all applicants for legal aid are asked to contribute a nominal sum, no matter how small, towards the legal costs. The willing response 'has been very heartwarming'.

Besides financing legal representation, the DC helps people to locate the whereabouts of detained relatives or friends and arranges that they be brought clean clothing and food. When political trials are held in distant areas,

the DC arranges for the transport and accommodation of indigent family members attending the trials. Also, in pursuance of its policy of preserving the unity of the family, the DC encourages relatives to visit political prisoners on Robin Island. Transport to, and accommodation in cape Town are arranged for those who are unable to afford the trip.

All in all, the DC has brought much legal and material relief to the affected persons. Attorneys and advocates working under the scheme can boast a high success record. Their intervention on behalf of convicted persons has in many cases resulted in lighter penalties being imposed.

(iii) The Report of the Eloff Commission

The Report[63] of the Eloff Commission which was appointed by the Government to look into the activities of the SACC was critical of the political motives underlying the SACC's legal aid scheme. Although the Commission found that the provision of legal aid for the accused and of succour for the dependants is praisseworthy, it criticized the fact that the aid is not extended to persons charged with non-political offences.[64] The Commission made the unqualified criticism that 'the political offender is as much a criminal as the robber or the murderer'.[65] With respect, this undifferentiated equation is unfortunate. Admittedly, from a technical point of view a *political offender is as much* a criminal as the robber. One could even go further and say that the political offender is as much a criminal as the traffic offender. This latter comparison shows the extent to which one could go if one looks at the matter purely from a technical point of view.

63 RP 74/1983.

64 Ibid para 6.5 at 178.

65 Ibid.

The Commission's criticism of the SACC's bias towards *political offenders is unfair.* The Commission overlooked the fact that in practice the Legal Aid Board is loathe to give legal aid to persons charged with political of-*fences.*

Indeed, it is hard to avoid the conclusion that the Commission's findings in regard to the points mentioned above were calculated to harmonize with the Government's view that there are no political trials in South Africa and that all convicted persons are ordinary criminals.

The Commission asserted that the SACC, by boasting a high success record of counsel engaged by it, was assuring *'would be terrorists'* that 'if they happened to be caught the SACC would throw in its financial weight to save them from conviction'.[66] This same argument was raised in Parliament in 1978 by the then Minister of Justice, Mr J T Kruger.[67] As stated before, this argument has been rejected by the Appellate Division. It is surprising that, although the Commission heard evidence that 'political cases often presented special difficulties calling for the employment of skilled counsel'[68], it nevertheless went on to imply, as Mr Kruger did in 1978, that privately retained counsel are unnecessary as the State does provide pro-Deo counsel.[69] Quite apart from the fact that in practice senior counsel are rarely appointed to act pro Deo, even where the accused faces the death penalty, the Commission overlooked the fact that the accused reject pro-Deo counsel whom they regard as representatives of the State.

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66 Ibid.

67 See House of Assembly Debates col 6849 (12 May 1978).

68 Para 15.4.2 at 288.

69 Ibid at 289.

The Commission examined the SACC's fund raising in the light of the Fund Raising Act, 107 of 1978. This Act exempts religious bodies which promote 'religious work' from the obligation to obtain the permission of the Director of Fund Raising to collect contribution.[70] As the SACC regards its legal aid work as religious work it has not taken any steps to obtain the Director's permission. The Commission recommended inter alia that, to ensure that the SACC does not fall within the rubric of the exemption clause, the Act be amended so as to substitute the word 'spiritual' for the word 'religious'.[71] The proposed narrowing of the concept 'religious' is clearly designed to put a stop to the SACC's legal aid scheme. The interpretation of the concept 'spiritual', however, will be left to the courts.

Conclusion

It is likely that the Government will implement the recommendations of the Eloff Commission, but it is unlikely that it will do so soon. The reason is that the Government clearly underestimated the concern which the Eloff Commission has evoked in Europe and in the USA; and this at a time when the South African Government is making renewed efforts to improve its image abroad.

But the uncertainty surrounding the future of the SACC's legal aid scheme remains. Such are the hazards to which privately-run, charitable legal aid schemes are exposed. Their existence depends not only on the financial vicissitudes of their patrons, but also, as in the case of the SACC, on the political temperament of the government of the day. This, however, should not derogate from the fact that the responsibility of ensuring that all citizens have effective access to the courts, rests with the State. This duty should not be left to private organizations.

22 LEGAL ASSISTANCE IN ADMINISTRATIVE PROCEEDINGS

1 Introduction

In proportion to its population, South Africa has one of the most extensive and the most involved network of state administrative machinery *in the western world*.[1] *The bulk of* the administrative apparatus has been erected to implement *the* Government's race policies. To ensure their rapid and unimpaired implementation, the legislature has exempted a sizeable measure of administrative acts and decisions from judicial review while simultaneously investing the administrative organs with wide discretionary powers previously held only by judges.

The discretionary justice dispensed by administration officials affects chiefly the poor - the Black population. Their exclusion from Parliament renders them particularly vulnerable to the manner in which the race laws are implemented. Take for example the laws governing race classification, *place of residence and* the *movement* of Africans. These laws are implemented with a measure of brutality that the western world has rarely witnessed since the Second World War. Kinghorn rightly points out:

> If those who are most directly affected by the system of apartheid and in particular by the administrative bodies set up to enforce the system were directly represented in the central *legislature, political control* of such bodies, even assuming that they continue to exist, would be different. It also seems obvious that if those who are most directly affected by the system of apartheid were directly represented on the various administrative bodies, those bodies would exercise their powers in different ways.[2]

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1 M Wiechers Administratiefreg (1973) 18-19.

2 C Kinghorn 'Apartheid and Administrative Bodies' *in* P Randall (ed) Law, Justice and Society (1972) 65 at 75.

A person aggrieved by an administrative act or ruling may, however, have recourse to an ordinary court where, for example, judicial review is not expressly or impliedly excluded by the enabling statute, or on the common law ground that the authority has committed a recognizable irregularity in the proceedings.[3] In practice, however, most of the persons aggrieved by administrative decisions do not turn to the courts for help. This is because most of the affected persons are ignorant of their rights. Secondly, most of them are too poor to afford legal assistance. The third reason has to do with the fact that a considerable amount of administrative functions are performed by magistrates who are themselves judicial officers. In the rural areas, for example, the magistrate is the local representative of many State departments. Most of the Black people do not know that magistrates also function as administrative officers. The traditional image of the magistrate in the minds of Black people is that of someone who embodies the law and authority. Consequently persons who are aggrieved by the magistrates' administrative decisions back out in the belief that magisterial acts always have judicial finality.

Indeed, where the courts cannot control the administration, either because Parliament wills it that way or because the courts themselves remain inaccessible for the poor, the administration sooner or later becomes corrupt. And where, as is the case in South Africa, the victims of administrative action have no Parliamentary representative to whom they can turn for help, corruption within the administration becomes endemic. Today Black persons in South Africa are finding it increasingly hard to assert the few rights they have without first greasing the palms of administration officials. In the Transvaal, for example, the notion of 'tsjo-tsjo' (an omnibus colloquial term for 'bribe money') is a household word

3 Shidiack v Union Government 1912 AD 642 at 651-2.

amongst township Blacks. Families often have to starve for months in order to raise money necessary to 'buy' a driver's licence or to secure some other indispensible official sanction.

The effect of such practices is that both Government and citizen lose respect for each other. In short, the nation is deprived of a sense of democracy. This is the last thing South Africa can afford.

The Founding Fathers of the West German State were well aware of the dangers of the uncontrolled executive state. Accordingly, article 19(4) of the Basic Law states clearly that 'recourses to a court must be open to anybody whose rights have been infringed by the act of a public authority'. Every effort is made to give this postulate practical meaning. Thus judicial review applies even to 'a decision by a school authority that a pupil must repeat a year, or a decision by the examining board of a university that a candidate has failed an examination'.[4] To ensure that the constitutional postulate becomes meaningful also to the poor, legal aid is available to an indigent aggrieved and also to indigent parties in interest.[5]

The obligation to provide victims of arbitrary administrative action with quick, inexpensive and easily accessible remedies should become a major concern of the South African Government. The first practical step to be taken in solving this need should be along preventive lines. This means that legal representation should be provided already at the time of the individual's initial confrontation with the administrative machinery. In the light of these considerations I shall examine the current position regarding legal representation in administrative proceedings.

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4 H Kötz and N Horn German Private and Commercial Law (1982) 42.

5 See c5 supra.

2 The Right to Legal Representation in Administrative Proceedings

In South Africa no right exists to legal representation in quasi-judicial administrative proceedings except where it is conferred by statute.[6] In Dabner v South African Railways and Harbours[7], Innes CJ held: 'No Roman-Dutch authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know of none.'[8] This precedent which was set by the Appellate Division in 1920 has since been followed in a number of cases.[9] Although the Dabner philosophy was once again underscored in the recent case of Smith v Beleggende Outoriteit van Kommandement Noord-Transvaal van die Suid Afrikaanse Weermag[10], in his judgement *Cilliers AJ suggested that even when a right* to legal representation cannot be inferred from the statute, it *might not be inappropriate to consider allowing legal* representation in view of the nature of the charge.[11]

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6 Examples of statutes which confer this right are: s11(5)(a) of the Population Registration Act 30 of 1950; s36(3)(a) of the Publications Act 42 of 1974, *as amended* by Act 44 of 1979; s45(c) of the Water Act 54 of 1956 as amended by Act 84 of 1980; s83(12) of the Income Tax Act 58 of 1962 as amended by Act 96 of 1981; s15(1) of the Arbitration Act 42 of 1965; ss415(6) and 418(1)(c) of the Companies Act 61 of 1973 as amended by Act 84 of 1980. Under the Prisons Act 8 of 1959 as amended by Act 43 of 1981 a right to counsel for trial procedures held at prisons is conferred by s58(2). Prison regulations have, however, made serious inroads into this right. See s123(2)(f) of Prison Service Regulations as amended by Government Notice R 350 Government Gazette No 6860 of 18 February 1980. For criticism see (1980) 48 Annual Survey of South African Law 519.

7 1920 AD 583.

8 Ibid at 598.

9 See Mandblakayise Ngcobo v Chief Native Commissioner for Natal 1936 NPD 94; Director of Education v Lekhatoa 1949 1 SA 183 (T); Balomenos v Jockey Club of South Africa 1959 (4) SA 381(W) 390; Bell v Van Rensburg NO 1971 (3) SA 693 (C) and Williamson v Helleux 1978 2 SA 348 (T).

10 1980 (3) SA 519 (T).

11 Ibid at 526.

It is submitted that the right to legal representation should be afforded not only to a person who is facing grave, administrative disciplinary charges, but also to a person desirous of exercising his rights or privileges affirmatively but who is unable to do so personally because of lack of skill. The following distinction which Wiechers draws between someone facing a charge and someone applying for a licence, cannot be endorsed:

> In most cases of quasi-judicial proceedings (in the sense used to describe the term) the quasi-judicial action is executed at the instance of the subject, therefore the workings of the rules of natural justice may sometimes be curtailed where circumstances clearly demand it. Nobody forces one to apply for a trade licence; if in certain cases the law wants to exclude legal representation by implication or expressly, it cannot be alleged that the applicant has been treated unfairly. In the case of disciplinary measures it is altogether different: here the official is unwillingly confronted with a charge, the effect of which can be extremely grave.[12]

First, administrative organs are not only policing agencies, but also agencies which enable the subject to realize his rights and privileges. Similarly, a lawyer is engaged not only to defend the vital interests of his client, but also to help give concrete effect to his client's rights under the law. Where the subject is unable to present his demands eloquently and forcefully enough, no reason exists why he should not use a legal representative to do so; particularly if the matter is of vital importance to the subject, for example, if it concerns an application for a hawker's licence the refusal of which would seriously affect the applicant's means of livelihood.

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12 Op cit 155 (own translation).

Professor Wiechers, however, correctly points out that, when deciding on whether legal representation should be allowed or not, the essential question to ask is whether the person has an opportunity to put his case properly, taking into account the nature and the extent of the proceedings and the possible effects on the rights and privileges of the person.[12a]

Under English and Commonwealth law there appears to be general agreement that a person who is entitled to appear in person at an oral hearing also has a right to be represented by counsel of his choice.[12b] There is, however, some controversy around the question of whether lawyers *should be involved more, less or at all in* proceedings before administrative tribunals. The core of the argument against lawyer participation is that the presence of counsel has the effect of increasing the length and the formality of the hearings and the likelihood of subsequent judicial proceedings.[12c] With their technical and legalistic approach lawyers are seen to rob tribunals of those qualities which they are supposed to display, namely speed, *informality, inexpensiveness and expertise.* It has also been argued that where discretion is an important element a legalistic approach is likely to hinder the operation of discretion to the disadvantage of the claimant.[12d]

As to *the virtues of legal representation* Flick points out:

> Counsel can inter alia, act as a deterrent to the summary dismissal of a party's case; bridge possible hostilities between the party and tribunal members;

12a Op cit 221.

12b See GA Flick Natural Justice (1979) 144.

12c SA de Smith Judicial Review of Administrative Action 3ed(1973)187.

12d RM Titmuss 'Welfare "Rights", Law and Discretion' (1971) 42 Political Quarterly 113-132.

> clear up vagaries and inconsistencies in testimony; and can focus the attention of tribunal members on elements of a party's claim. Moreover, it is fair to observe that a lawyer has a rather unique ability to interpret relevant statutory provisions and to ensure consistency in administrative decisionmaking by *marshalling whatever* prior decisions of the tribunal or the courts serve as a guide to the exercise of administrative discretions. The ability of a lawyer to delineate what may otherwise be a complex legal and factual issue and his role in acting as a check upon the administrative process should never be underestimated.[12e]

The criticism against the need for lawyers in proceedings *before tribunals has, however,* not been able to prevail. The predominant view is that lawyers have some role to play.[12f] In England, the tendency has been to expand rather than to restrict the right to counsel.[12g] Although under English law there is no general provision conferring a statutory right to legal representation before tribunals, it is only in the case of tribunals appointed to investigate complaints against practitioners under the National Health Service that lawyers are positively prohibited. The reason put forward by the Council of Tribunals is that there is a 'strong likelihood that if legal representation were permitted it would be the practitioners who would avail themselves of it, so that complainants would be deterred from coming forward'.[12h]

The Royal Commission on Legal Services recommended that 'every applicant before any tribunal should be able to present his case in person or to obtain representation.[12i]

In the United States, section 6(a) of the Federal Administrative Procedure Act provides:

> A person compelled to appear in person before an agency or representative thereof is entitled

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12e Op cit 144.

12f Smith and Bailey op cit 569.

12g de Smith op cit 188.

12h Cited by FJ Garner and BL Jones Garner's Administrative Law 6ed (1985) 239.

12i Op cit para 15.11.

> to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.[12j]

Some State legislatures even impose an obligation on administrative organs to inform the party of its right to counsel.[12k] Professor Schwartz points out, however, that in certain matters the maximum fees chargeable by attorneys are so small that in practice 'it is virtually impossible to obtain an attorney'.[12l] Also, the courts have refused to extend the Gideon v Wainwright principle to indigents in administrative proceedings.[12m]

This brief excursion into the legal practice in England and the United States suggests that in both those jurisdictions legal representation has become an integral feature of the administrative law culture. It is submitted that, for as long as administrative procedures are not simplified to the extent that the subject can present his case properly himself, and for as long as the adjudicating instances are not made to play a more active role in quasi-judicial hearings, the need for legal representation will not diminish. The desirability of simplified procedures should not obscure the need to safeguard the procedural rights of the subject. As Botha JA held in Turner v Jockey Club of South Africa:

12j 5 USC §555(b). See also Goldberg v Kelly 397 US 254 (1970).

12k See Flick op cit 155.

12l B Schwartz Administrative Law 2ed (1983) 468.

12m Ibid. See at 207 and 366 above.

> *Having regard to the fact that the person charged* is not entitled to legal representation, and that no prosecutor appears to present the evidence..., a board conducting an inquiry should, therefore, in my view, particularly where, as here, the evidence consists of written statements, take an active part in the proceedings in its quest of the truth, and not assume a *mere passive role by* limiting itself to an adjudication on the evidence presented.[12n]

It is, however, rather disconcerting that South African legal literature has devoted relatively scant attention to the issue of legal representation in the administrative process. It is submitted that, except in matters affecting political detainees, discourses on this question have been too academic. This is unfortunate given the wide discretionary powers vested with administrative officials with regard to matters affecting the huge racially oppressed section of the population in particular.

In recent years public interest lawyers representing aggrieved Black claimants have won test cases with far-reaching socio-political effects against Black Administration Boards. In these cases the intervention by lawyers and the subsequent judicialization of an essentially administrative matter helped to stay executive high-handedness and, what is more, helped to focus international attention on one of the evil aspects of Apartheid.

12n 1974(3) SA 633(A) at 652-3.

3 Legal Aid

The official policy concerning the granting of legal aid to poor persons involved in administrative proceedings is vague. The Guide states that legal aid is given 'in all cases where the assistance of a legal practitioner is normally required'.[13] It follows, therefore, that in all deserving cases where the right to legal representation is conferred by statute, or where it can be inferred form an interpretation of the statute, legal aid should be given. According to the Legal Aid Board's annual reports, applicants for legal aid in quasi-judicial matters are seldom referred to attorneys. For the period 1977-78 to 1980-81 an average of 4,5 per cent of the applicants were referred to attorneys. For the period 1983-84 only 2,36 per cent were referred to attorneys. According to the Board's reports most of the cases 'are resolved by mediation of the Board's representatives or are referred to other institutions.' Again, it is difficult to tell from this whether the person did in fact receive help. The progressive increase in refusals, together with the sharp decline in the cases being referred to attorneys, has led to the conjecture that legal aid for quasi-judicial matters will eventually fall away.[14]

The suggestion that legal representation before administrative tribunals lies outside the purview of the legal aid scheme and that instead law students should represent indigent persons before such tribunals[15], is, with respect, unfortunate. Implicit in this argument is the suggestion that administrative proceedings are not that crucial. It is often forgotten that some of the worst social injustices obtaining in South Africa today are in a large measure the product of

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13 Para 11.1.

14 See McQuoid-Mason op cit 113.

15 See Editorial 1976 De Rebus Procuratoriis 108 (cited by McQuoid-Mason op cit 180).

the discretionary justice dispensed at administrative level. The need for legal protection here is obscured by the fact that much of the actual, personal suffering takes place far from the public eye - in squatter camps, in mental asylums, in reformatories, on prison farms and in the desolate homelands. Corder rightly points out that

> the results of an administrative hearing can often be as disastrous for a person's rights and freedom or worse than, the result of a court hearing, and, if a party is allowed legal assistance there, then he should be allowed it in a tribunal.[16]

Indeed, the socio-legal implications of the administrative process in South Africa are too far-reaching to be of no concern to the legal profession. Lawyers have an important role to play in laying bare the workings of the administration and their social effects. Any government which professes to be democratic has a fundamental interest in ensuring that its administration remains transparent and that the executive *does not become a 'state within a state'*. Therefore, it is absolutely necessary that administrative malpractices are not concealed from public scrutiny merely because the aggrieved persons lack the means of exposing official excesses before independant judicial forums. Hence, the legal profession's role in the administrative sector must be increased, not reduced. The public should make more use of the lawyers, not less. Undoubtedly, law students have an important role to play, too. They can educate underprivileged persons on their public rights and obligations, write letters or fill in forms on behalf of those who cannot do so themselves[17], and they can initiate legal proceedings where necessary. But the

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16 H Corder 'The Content of the Audi Alteram Partem Rule in South Africa' (1980) 43 THRHR 156 at 177.

17 Cf McQuoid-Mason op cit 180.

responsibility of representing the indigent client before an administrative tribunal must remain with qualified lawyers. The plea here is for a full recognition of the need for a State-funded legal aid scheme for poor persons involved in legal disputes with public authorities. This responsibility should not be delegated to law students. Care should be taken that the paternalistic, charitable legal aid attitude is not rejuvenated.

In reply to the question 'should legal aid be available to persons engaged in proceedings before all administrative tribunals?' 63,33 per cent of the attorneys surveyed said 'yes' as opposed to 20 per cent of the advocates. The huge discrepancy here is inexplicable. Perhaps the reason is that, as opposed to advocates, attorneys have, within the ordinary scope of their work, a higher incidence of contact with administrative authorities and are therefore in a better position to gauge the need for legal aid there.

Hitherto the discussion has focussed more on legal representation and legal aid as a partial prophylaxis against administrative excesses. Legal aid should also serve as a useful medium for bringing the socially deprived within the protective arm of the administration. Take, for example, the situation regarding Black juvenile offenders - an issue which Professor Frances Bosman, a former Juvenile Court prosecutor, raised with the Hoexter Commission inquiring into the functioning of the courts.[18] Many Black children who are arrested for committing childish pranks are brought before the Juvenile Court on criminal charges. They are usually convicted, sentenced to receive a whipping and are then left to their own devices again. In practice, court proceedings are often started without the presence of parents as is required by law. About 90 per cent of the children are without legal representation. Consequently, some plead guilty to

18 See Sunday Express 9 November 1980.

assault where they have acted in self defence and should enter a plea of not guilty. In the recent case of S v M[19], Didcott J commented critically on this practice:

> Accused persons sometimes plead guilty to charges, experience shows, without understanding fully what these encompass. The danger of doing so *is so obvious in a* society like ours, which sees many who are illiterate and unsophisticated coming before the courts with no legal assistance. The danger is greater still, it goes without saying, when such a one is a young child with a limited grasp of the proceedings.[20]

The intervention by legal aid attorneys here could ensure that the children are remitted to the Children's Court where they can be assigned social therapists instead of being tried and branded as criminals - a stigma which, after all, could disqualify them from obtaining legal aid should they need it in the future.[21]

a Legal Aid to Persons Aggrieved by Administrative Decisions

Obviously, no legal aid is available where the administrative decision is not judicially reviewable. But is legal aid available where the matter is judicially reviewable?

Again, the Legal Aid Board's policy here is nebulous. The Guide stipulates the criteria for the granting of legal aid in civil and criminal appeals, but mentions nothing about legal aid for review at the first instance. In the case of Scott and others v Hanekom and others[22], otherwise known as the Mbekweni case, *legal aid was denied a group of indigent*, Black township residents who were contesting the validity of

19 1982 (1) SA 240 (N).

20 Ibid 242.

21 See para 10.1 of the Guide.

22 1980 (3) SA 1182 (C).

the procedures used to establish a community council for them.[23] Legal aid was refused although all the applicants satisfied the means test and did in fact have a prima facie good case, the disputed election being subsequently set aside by the Cape Supreme Court. The criteria used to reject the application for legal aid were not in accordance with the Guide, but were extraneous to and in conflict with it. The Director of the Legal Aid Board did not even reply to the attorney's protests about the refusal of aid, nor to the attorney's request for information concerning the procedure for appeal to the Chairman of the Legal Aid Board.[24]

The Board's negative and demoralizing stand in the Mbekweni case might not be representative of its overall attitude. But what it does show, however, is that the granting of legal aid in review proceedings is virgin soil. Some of other major issues raised by the Mbekweni case and on which no clarity exists, concern, for example, the extent of the confidentiality of the information furnished by the legal aid applicant and the extent of the Director's competence to entertain an application for legal aid where it is sent directly to him. Indeed, an urgent need exists for the Guide to spell out clearly the regulations governing the granting of legal aid in this crucial sphere of public law.

b Legal Aid to Persons Contesting the Validity of Subordinate Legislation

A striking characteristic of the laws affecting Black persons, notably Africans, is the impetuosity with which they are enacted. Little heed is paid to the advice of experts, and those for whom the laws are meant are not

23 For a full discussion of this case, 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.

24 Ibid.

consulted at all. This inevitably results in laws which are worded unintelligibly and ambiguously and which often reflect no regard for the basic human interests they affect. By-laws and proclamations issued under such twilight laws are often more ill-conceived, and in their application usually cause patently unreasonable constraints and hardships on the politically emasculated and indigent Black people. Legal redress against discriminatory and unreasonable by-laws has the important advantage of effecting a broad protection of class interests - at least for the time being.

In the questionnaires sent to practising lawyers 70 per cent (21) of the attorneys and 73,33 per cent (22) of the advocates favoured the idea of legal aid being made available to indigent persons contesting the validity of subordinate legislation. That a wide need for legal protection exists here, was recently highlighted by several cases in which socially conscious lawyers made applications on behalf of indigent persons to the courts to set aside local proclamations on grounds of their unreasonable application. Thus in Komani v Black Affairs Administration Board, Peninsula Area[25], the Appellate Division of the Supreme Court declared invalid the Black Residential Regulations which separate married couples where the husband, but not the wife, qualifies for residence in an urban area. In S v Adams; S v Werner[26] the Appellate Division turned down applications challenging the validity of the Group Areas proclamations. But the continual publicity these cases received in the press attracted wide public attention to the plight of persons who are displaced and rendered homeless by the Group Areas laws. After the Appellate Division's unfortunate decision the State resumed prosecution of the Black persons living in 'White' areas in contravention of the proclamation and in whose interests the

25 1980 (4) SA 448 (A).
26 1981 (1) SA 187 (A).

appellate actions were brought. But the public-spirited attorneys who volunteered their services for the indigent accused staged vigorous defences, at times challenging the proclamations on grounds not considered in the appellate actions. This led to a large number of cases being withdrawn.

In November 1982, in the case of S v Govender[27], the Transvaal Provincial Division delivered an historic decision in the series of Group Areas cases. In this case an Indian woman, Mrs Gladys Govender, had been convicted by the Johannesburg magistrates' court of *unlawful occupation of* premises in a 'White' group area. The magistrate had further ordered that Mrs Govender, together with all persons living *with her, be ejected from the premises she was* occupying illegally. On appeal, the Supreme Court, per Le Grange J, held that no person convicted under the Group Areas Act *may* be evicted without the Court first enquiring into the circumstances relevant to the ejectment order. Examples of such circumstances are 'the personal hardship which such an order may cause and the availability of alternative accommodation'[28] As the Department of Community Development had not offered Mrs Govender alternative accommodation and because she had no alternative place to live, the magistrate should have exercised his discretion to stay the eviction order until the authorities could find alternative accommodation.

The Govender decision was subsequently confirmed by four judges in the unreported case of S v Cassim.[29] Professor John Dugard, who represented *the appellant* in the latter case and who also spearheaded the legal initiative against the eviction of persons convicted under the Group Areas Act, rightly

27 Transvaal Provincial Division case no A 1461/82.

28 Ibid at 5.

29 See Fifth Annual Report: September 1982 - September 1983 of the Centre for Applied Legal Studies (University of the Witwatersrand Johannesburg) 7.

comments that these decisions represent 'a triumph for co-operation among lawyers committed to the furtherance of justice through the legal process'.[30]

In none of these cases was legal aid granted. When the author asked some of the accused why they had not applied for legal aid, they became very critical of the legal aid scheme, referring to it as a 'waste of time' and 'useless'.[31] More recently, however, the Legal Aid Board has granted legal aid to indigent Africans in the Western Cape contesting the validity of township housing regulations used to prevent wives of locally qualified men from living with their husbands in urban areas.[32] This is a welcome innovation. But there is still considerable public misgiving as to the Board's overall attitude to the granting of legal aid in actions against public authorities. Socially committed lawyers see the Board's rigidity as discouraging the emergence of effective public interest litigation. It would, however, be short-sighted to dismiss these misgivings. The fact is that they exist. Indeed, if the Legal Aid Board is serious about combatting its negative image, and if the Board genuinely wants to gain the confidence of the public, especially that of the Blacks who are continually victimized by the unreasonable application of local proclamations, it will have to show more flexibility in considering applications for legal aid in 'test cases' of wide socio-political import.

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30 Ibid.

31 I gained first hand knowledge of the Group Areas prosecutions in 1981 in my capacity as an executive member of the Action Committee to Stop Evictions (Actstop), the organization which arranged the legal defence for the accused.

32 Letter received form Noël Robb, Director of the Athlone Advice Office dated June 1982.

See Annual Report: October 1st 1980 - December 31st 1981 Athlone Advice Office (Under the auspices of the Black Sash and the S A Institute of Race Relations) 16.

The Board's hitherto mechanistic approach should give way to a more liberal approach in which the Director's considerable discretionary powers are exercised more fully in favour of the underdog.

4 An Ombudsman: A Supplement to Legal Aid

A well known extra-judicial instrument for controlling the administration and one which is being adopted in a growing number of countries, is the institution of the ombudsman.[33] Ombudsmen or ombudsman-like institutions function in 73 countries.[34]

According to Rowat, the ombudsman's office can be defined as follows:

(1) The ombudsman is an independent and non-partisan officer of the legislature, usually provided for in the constitution, who supervises the administration;

(2) He deals with specific complaints from the public against administrative justice and maladministration, and

(3) He has the power to investigate, criticize and publicize but not to reverse, administrative action.[35]

By serving as a clearinghouse for complaints, the ombudsman helps to identify areas of conflict between the subject

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33 Named after and modelled on the Swedish Justitieombudsman, established in 1809.

34 W Gellhorn 'Protecting Human Rights in the Administrative State', in Forsyth and Schiller (eds) op cit 177 at 184-185.

35 D C Rowat The Ombudsman Plan (1973) 147. In 1974 the International Bar Association defined the ombudsman's office as one created 'by the constitution or by action of the legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports'. Gellhorn op cit 185.

and the state. People gain a sense of security in knowing that there is someone to whom to turn. Gellhorn says:

> When a complaint comes to an ombudsman, however, it is the ombudsman, not the complainant, who chooses what to consider and how to investigate and whether to criticize the official. The complainant gains, as against that loss of control, freedom from the emotional strain and expenditures of time and money that presenting his case to the courts or other organs would have entailed.[36]

Heedful of the ombudsman's existence, officials tend to be more careful in their dealings with the public. This improves the quality of the administration's work. Not only the public, but civil servants, too, complain to the ombudsman about their work conditions. 'Because ombudsmen, in every land they have served, have regarded themselves as improvers of public administration rather than primarily as exposers of malefactors, they have on the whole engendered a co-operative spirit among officials.'[37]

The need to establish an ombudsman's office in South Africa is widely endorsed by the country's academic and practising lawyers.[38] At the international Bar Association Conference on the ombudsman which was held at Stellenbosch (S A) in April 1981, many delegates spoke enthusiastically in favour of an ombudsman in South Africa. The General Council of the Bar of South Africa, for example, was entirely in favour of such an institution.[39] The Government, however, feels that an ombudsman is not necessary in South Africa. In a

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36 Gellhorn *op cit* 185.

37 Ibid.

38 See G C Kachelhoffer 'Die Ombudsman, 'n nuwe Konstitusionele ontwikkeling' (1967) 30 THRHR 339 at 352; C Kinghorn *op cit* 75; M Wiechers *op cit* 271-272; G N Barrie 'The Ombudsman: Governor of the Government' (1970) 87 SALJ 224 at 238; J D Van der Vyver Die beskerming van menseregte in Suid-Afrika (1975) 184; Editional 1979 De Rebus Procuratoriis 299; H Rudolph 'The Ombudsman and South Africa' (1982) 99 SALJ 92 at 107.

39 See 'Letter to the Editor' from A Chaskalson The Star 1 May 1982.

parliamentary debate in 1973 Nationalist members felt that the existing channels of parliamentary control of administrative action were adequate.[40]

In practice, however, Parliament has proved incapable of protecting the citizen effectively against administrative abuses. Take the administration of the security laws. Many people have died whilst in police custody. Many have complained of torture. Take the situation regarding prison labour. Here, too, several prisoners have died of exposure *whilst working on private farms*. Many have complained of being assaulted by farmers. Take the corruption of some administration officials when it comes to the issuing of houses for Black persons, residence permits, trade and drivers' licences.

The recent establishment of the office of Advocate-General[41] to combat corruption and maladministration in the civil service, signifies a belated recognition by Parliament that its control of the administration is far from adequate. This office was created after the so-called *'Department of Information* scandal' which involved the misappropriation of State funds by senior Government officials and which resulted in the resignation of the then State President, Mr B J Vorster, and Dr C P Mulder, a *Cabinet* Minister.

The Advocate-General's usefulness to the public is undermined by the narrow ambit of his jurisdiction. Second, the procedures for lodging complaints are formal and bureaucratic. Third, the press is afforded only limited access to the Advocate-General's reports.[42] These drawbacks impart *to the Advocate-General's* office the profile of a Government department and not that of a citizen-orientated in-

40 See House of Assembly Debates cols 3353-3356 (23 March 1973). See also Rudolph op cit 98-100.

41 See Advocate-General Act 118 of 1979.

42 For criticism of these shortcomings, see Rudolph op cit 101-104.

stitution as it ought to be. It is therefore not surprising that between August 1979 and July 1981 only 65 complaints were brought to the Advocate-General.[43]

It has been recommended that the Advocate-General's jurisdiction be broadened, that the procedure for bringing complaints be simplified, and that the Advocate-General be empowered to act on his own initiative.[44]

Indeed, it is the composition of the South African Parliament itself which calls for an urgent introduction of an autonomous ombudsman. In a country where the majority of the population have no say in Parliament, where laws are enacted impetuously and without regard to the interests of the disenfranchised, where the disenfranchised have no political outlet for their grievances, except but not of the persons they purport to represent, where the disenfranchised resort increasingly to public violence to draw official attention to their plight, the establishment of an ombudsman's office would be a welcome innovation. Admittedly, the ombudsman's effectiveness is limited by the nature of his office. He may investigate, criticize and publicize, or change laws. But, as Gellhorn puts it, no one can expect him to 'expunge systematic injustices'[45] in a society. These limitations, however, should not detract from the usefulness of the ombudsman as instrument for protecting individuals and the public at large against abuses by government administrators. 'An ombudsman or similar office may serve not only as a link between government and the citizen, but may also result in the more equitable application

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43 Statistics taken from Rudolph op cit 104.

44 Ibid 107-108.

45 Op cit 186.

of laws and regulation.'[46]

As regards low-income citizens, the ombudsman can, in theory, supplement the State legal aid service in two ways: First, he could work towards an elimination of those problems which the poor, the ignorant and the illiterate generally have with the administration such as intolerance and impoliteness on the part of officials, delay in being attended to, language problems, difficulty with filling in forms and practical hardships in locating or getting to a particular administration office. These are irritating problems which cannot be conceived in legal terms but which usually lead to bigger and more painful problems with the administration. Secondly, the ombudsman could mediate on behalf of a particular individual who, say, has suffered an injustice at the hands of an administration official but who, for some reason or another was unable to obtain legal assistance.[47]

Now all this is easier said than done. Experience in other countries has shown that ombudsmen 'are chiefly helpful to persons who possess a 'rights consciousness' infrequently found in the least advantaged elements of society'.[48] Gellhorn points out: 'In Sweden, for example, the ombudsman receives few complaints from migrant workers; in New Zealand, Maoris rarely seek the ombudsman's help;

46 Editorial 1979 De Rebus Procuratoriis 299. At the end of his thorough study on the protection of human rights in South Africa, Van der Vyver op cit 184 comes to the conclusion: (T)he establishment of an ombudsman's office should be considered seriously. A country with an extensive administrative law and in which the Executive is invested with wide and far-reaching powers, can hardly afford not to have one. Such a person, who should be above party politics, can keep a vigilant eye over, amongst others, executive actions which in the usual run of things are regarded as confidential and which therefore never come to light (own translation).

47 Cf Rudolph op cit 107.

48 Gellhorn op cit 186.

in Israel, Arabs do not venture often to the ombudsman's office.'[49] The Black population in South Africa might similarly not make effective use of an ombudsman. One reason for this is that their enforced political, social and legal isolation put them at a real disadvantage vis-a-vis Whites when it comes to making effective use of national social services. Another reason is that after *decades or being harshly discriminated against, Blacks* have become deeply mistrustful of any official innovation purporting to be in their interest. Parliament has deluded them time and again. Consequently, even when the legislature enacts an objectively beneficial *measure, Blacks have* second thoughts as to its usefulness for them.[50]

To avoid the ombudsman's office functioning to the exclusion of *those persons who are most in need of protection*, the establishment of this institution should be preceded and accompanied by an extensive educational campaign in which the public, especially the poor and the uneducated, are enlightened on everything concerning the ombudsman, including his political neutrality and how to enlist his help. Such an educational program will be expensive, but worthwhile.

5 The Position in West Germany

In the Federal Republic the notion of the ombudsman has been unable to take root. It was felt that the existence of a fully developed system of administrative courts makes an

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49 Ibid 186-187.

50 For example, in November 1980 the Department of Education and Training announced that it was to introduce compulsory education for Africans at the primary school level. The scheme was tried in 201 schools with a combined enrollment of 45 000 children. In their consultations with the school committees of the affected schools, Department officials encountered strong opposition to the implementation of the scheme. See, generally, 1981 Survey of Race Relations 346-347.

ombudsman superfluous. Instead, the Länder parliaments as well as the Federal Parliament itself have decided to widen the powers of the petition committees (Petitionsausschüsse). The petition committees receive complaints from citizens and have the right to examine official files and to *investigate the matter on behalf* of the aggrieved.[51] In practice the petition committees are of slender benefit to the aggrieved individual. Instead of investigating the complaints they pass them on to the administrative authorities against whom the grievances are brought. Two eminent German judges have noted:

> 'In order to portray themselves most favorably (*sic*), *the administrative* bodies try to make each matter appear as though there was neither an infringement of individual rights nor a threat to the public interest. In practically every case, the petition committees of the parliaments permit themselves to be satisfied with these glossed-over administrative reports.'[52]

a The Parliamentary Commissioner for Military Affairs (Wehrbeauftragter des Bundestages)[53]

The Parliamentary Commissioner acts as an ombudsman for the armed forces. He watches over the constitutional

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51 In addition to a petition committee the Land North-Rhein *Westphalia has a so-called citizens'* commissioner (Bürgerbeauftragte). His function is to ensure that grievances laid before the petition committee are brought quickly and without red-tape to the Land government for consideration. Unlike the petition committee the citizens' commissioner has the power to by-pass the Land government and take up the matter directly with the administrative organ *against which the complaint* lies. Should he, however, fail to secure relief for the citizen, the matter is once again brought before the petition committee.

52 B Bender and T *Strecker* 'Access to Justice in the Federal Republic of Germany' in M Cappelletti and B Garth (eds) op cit 527 at 575.

53 *This office was established in* 1957 by an Act of the Bundestag: Gesetz über den Wehrbeauftragten des Bundestages of 26 June 1957 BGBl I 652.

rights of the citizen in uniform and is required to see to it that the army's so-called 'principles of internal guidance'[54] (Grundsätze der inneren Führung) are observed. This means that he has to ensure that the army remains a democratic citizens' army in close contact with the people and that it does not return to its old authoritarian ways. After the experiences of the Weimar period it was felt that this time the armed forces should not be allowed to become a 'state within a state'. The Commissioner exercises control over the German armed forces stationed in the Federal Republic as well as over those on military exercise overseas.[55]

His main task consists in investigating complaints from members of the armed forces or from other sources, concerning a variety of matters, such as allegations of the violations of the soldiers' rights. Any soldier or officer may lodge a complaint directly with the Commissioner without going through the official channels and without fear of any disciplinary measures being taken against him.[56] Anonymous complaints are not considered.[57] The Commissioner, however, is not obliged to disclose the name of the aggrieved.[58] After receiving complaints the Commissioner is empowered to inquire into them at any level of the armed forces or defence department, and may institute legal proceedings or disciplinary action against any person or office in the army if there is evidence of violating a soldier's rights. The Commissioner may inspect the files and records of all military agencies mero motu and may visit any army installation without notice.

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54 These are a set of principles which define the role of the army in society and the officers' conduct towards the men.

55 Das Parlament 27 November 1982.

56 § 7 of the Gesetz über den Wehrbeauftragten des Bundestages.

57 Ibid § 8.

58 Ibid § 9.

The Commissioner is elected every 5 years in a secret ballot by a majority of the Bundestag.[59] He reports annually to the Bundestag or its Defence Committee about his work and the complaints he has received, and he may recommend improvements of the conditions that he has found.[60]

In practice, the effectiveness of the Commissioner depends on who occupies the office. In theory, any enfranchised West German citizen above the age of 35 years and who has served at least one year in the army is eligible for this office. But in practice it is hard to find the suitable man. He has to be acceptable to the main political parties, knowledgeable in military affairs and must not be opposed to soldiering in principle. The first Commissioner, General Helmuth von Grolmann, a former commander of the cavalry division, was forced to resign because of a scandal in his private life.[61] His successor, *Vice Admiral Hellmuth Heye, formerly an arch critic of* Hitler's expansionist military policies and known for his strong, independent mind, was forced to resign, too, after some of his articles criticizing the structure and behaviour of the armed forces had appeared in a magazine called Quick.[62] Heye's articles which were based on his annual reports to the Bundestag engendered a heated public debate on military affairs, thus forcing the Bundestag to introduce reforms. Rowat, who followed the Heye polemics with interest, writes:

> The ombudsman's stand probably also helped to strengthen parliament in relation to a too-powerful executive. The fact that he could force such an important debate to take place was a significant mark of democratic health in West Germany.[63]

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59 Ibid § 13.

60 Ibid §§ 1 and 2.

61 See, generally, Rowat op cit 39-44. See also A Grosser op cit 207.

62 Grosser op cit 207.

63 Op cit 27.

The current and fifth incumbent of the Commissioner's office is Karl Wilhelm Berkhan, a World-War II veteran and former Social Democratic member of the Bundestag. In practice, Berkhan, who is now in his second term of office, enjoys the confidence of the armed forces. Both generals and servicemen turn to him with their complaints.[64] The Commissioner receives thousands of complaints annually. In 1980[65] he received 7 244 complaints and in 1981 the number was 7 265.[66] In the latter case he resolved 5 398 (74 per cent) complaints[67] and instituted measures against offenders in 603 cases.[68] In practice, roughly one-third of the complaints are successful. In two-thirds of the cases the Commissioner and his 30 assistants find the complaints are unfounded. But even then the Commissioner asks the authorities concerned to reconsider the matter, so that here, too, individual relief is granted in several cases.[69]

Commissioner Berkhan's success is traceable to the wide publicity he gives to his work. In his bi-annual, week long visits to every army division, he informs servicemen about his work and talks about everyday military matter with representatives from each hierarchy in the division. The Commissioner also has a say in the preparation of legislation affecting his work. In June 1982, a law was passed

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64 Berkhan: 'For example, a general wrote to me saying that he found certain measures of his commanding authorities to be unjust to his soldiers. He asked me to change this regulation.' Quoted by Das Parlament 27 November 1982.

65 Unterrichtung durch den Wehrbeauftragten des Bundestages, Jahresbericht 1980 Bundestag Drucksache 9/240 17 March 1981 2f.

66 Unterrichtung durch den Wehrbeauftragten des Bundestages, Jahresbericht 1981 Bundestag Drucksache 9/1406 3 March 1982 30.

67 Ibid.

68 Ibid 37.

69 Das Parlament 27 November 1982..

which expressly underscored the position of the Commissioner as an aid of the Bundestag in the exercise of control, and which invested him with wider powers. Berkhan himself comments satisfactorily:

> I cannot complain that the legislature treats the Commissioner's suggestions lightheartedly. Some of the things the commissioner has regarded as right have often been put through; others remained by the wayside because of lack of money or because of other pressing needs.[70]

All in all, the office of Parliamentary Commissioner is an effective institution against arbitrary infringement of the rights of the citizen in uniform. Thus Rowat states:

> How to ensure civilian control of the military and how to preserve the rights of the citizen when he becomes a soldier are difficult problems to solve in any country, and have become particularly pressing with the postwar growth of modern armies. After all, cases of military cruelty or arbitrary authority are not unheard of in other democracies, including Britain, Canada and the United States. In countries which do not have an ombudsman, however, such cases are not easily brought to light. The creation of the office of military ombudsman is a significant step towards solving these problems.[71]

It is submitted that the South African legislature should seriously consider the introduction of a similar office for the South African Defence Force (SADF). The SADF complaints service that was instituted in 1979 does not appear to be effective. Indeed, when he gave evidence before the Hoexter Commission inquiring into the functioning of the courts, a Cape Town magistrate, Mr Norman Patterton, spoke of 'fatal irregularities' which take place in the SADF military courts. Amongst the anomalies he pointed out, were: (a) that trial officers receive no more than 20 hours

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70 Das Parlament 27 November 198[illegible] (own translation).
71 Op cit 43.

legal training; (b) that in military summary trials (which make up 95 per cent of all trials) the accused are not allowed legal representation; (c) that for no good reason the public and the press are barred from attending the trials and that in about 30 per cent of the military cases he had received for review, he had set aside convictions because of irregularities in court procedure.[72]

b Commissioner for the Protection of Data (Datenschutzbeauftragter)

In 1977 the Bundestag passed the comprehensive Data Protection Act.[73] The aim of this Act is to protect any personal interests of the individual that warrant protection against the misuse of personal data which are stored modified or erased in data banks or which are communicated to third persons from data banks.[74]

To ensure that public authorities observe the Act's provisions, the Act established the office of the Federal Commissioner for the Protection of Data. The Commissioner is appointed by the Federal President on the recommendation of the Bundestag.[75] The Commissioner, who holds office for five years, is attached to the Federal Ministry of the Interior to whom he also reports.[76]

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72 Reported in Sunday Tribune 30 November 1980 and Rand Daily Mail 27 November 1980.

73 *Gesetz zum Schutz vor Mißbrauch personenbezogener Daten bei der Datenverarbeitung* (Bundesdatenschutzgesetz - BDSG) of 27 Jan 1977 BGBl I 201. This law was enacted pursuant to the resolutions adopted on 20 September 1974 by the Committee of Ministers of the Council of Europe on the protection of the privacy of individuals vis-a-vis electronic banks in both the public and the private sectors. *See Resolutions* (74) 29 and (73) 22 (published in Forward in Europe Legal Supplement No 11 Information Bulletin of the Directorate of Legal Affairs October 1974).

74 §§ 1 and 2.

75 Ibid § 17(1).

76 Ibid § 17(5).

Any person may complain to the Commissioner if he believes that his right of privacy has been violated as a *result of his personal data being processed* by public authorities or other public establishments in the Federal Republic.[77] After receiving the complaint the Commissioner investigates the matter. He and his assistants are authorized to examine documents and files related to the processing of personal data, and especially to stored data and to data processing programmes.[78] Should he discover an infringement he complains to the authority concerned *and he may submit proposals* for the elimination of the irregularities he has found.[79] Infringements are punishable by fines or prison sentences of up to 1 year and up to 2 years where the offender acted *for profit or out of malice*.[80] Proceedings are instituted at the instance of the person concerned.[81]

An important aspect of the current Act is the right it gives the individual to know the information stored about him. Thus paragraph 13 states that the person concerned has (a) the right to be given on request information on *personal data* stored about him; (b) the right to have incorrect data corrected; (c) the right to have his personal data blocked where their accuracy is disputed or where they are no longer required for the *accomplishment of the tasks* for which the storage unit is competent, and (d) the right to have his personal data erased when their storage was inadmissible or where they are no longer required for the accomplishment of the tasks for which the storage unit is *competent*.[82]

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77 Ibid § 21. An exception is made in the case of courts of law, provided they do not deal with administrative matters.

78 Ibid § 19(3).

79 Ibid § 20.

80 Ibid §§ 41(1) and 41(2).

81 Ibid § 41(3).

82 See generally § 13 of the Act.

Each of the Länder governments has enacted a data protection law which accord with the Federal law. And each Land has its own data protection commissioner and supervisory authority who ensure that the provisions of the law are observed in both public and private spheres.

In practice the Federal Commissioner and his Länder counterparts are amply qualified for the tasks of probing the darker reaches of the modern computer technology. Roughly 1000 automated data systems are registered with the Federal Commissioner.[83] The numerous investigations conducted in 1981 in both the public and the private domain revealed many dubious practices involving the storage, processing and transmission of personal data. In some cases the improprieties were subsequently eliminated, in others, especially in the sphere of state security, advisory consultations with the Minister concerned or with the agencies themselves are still continuing.[84] Together with his Länder colleagues, the Federal commissioner issues a brochure entitled The Citizen and His Data (Der Bürger und seine Daten). This brochure which is widely and easily available informs the citizen about the actual and the likely places where his personal data are stored and how he can assert his rights under the Act. The brochure is continually revised and is written in simple and easily understandable language.

The continual publicity the public media give to the work of the data protection commissioners, including concrete example of cases where they have helped aggrieved persons, has generated wide public awareness of the existence of the preventive and remedial measures they have against illegal invasion of their privacy. To make the Act even more mean-

83 Prof Dr Bull Vierter Tätigkeitsbericht des Bundesbeauftragten für den Datenschutz gemäß § 19 Absatz 2 Satz 2 Bundesdatenschutzgesetz dem Deutschen Bundestag vorgelegt zum 1 Januar 1982 15.

84 Ibid 6 ff.

ingful to the ordinary person the *following amendments are* to be effected:[85]

(a) All persons shall have the right to cost free information on data stored about them (presently the fee is 10 DM).

(b) All persons whose privacy has been illegally invaded shall have a right to claim immaterial damages irrespective of a finding of fault on *the part of the offending instance.*

(c) All persons hall have the right to know whence data about them was obtained and which agencies regularly receive data.

(d) The general right of the state security authorities to refuse to give information they keep on persons is to be abrogated and shall apply only where the personal interest has to be subordinated to the wider public interest.

(e) Where personal data have been corrected, the corrected data shall be transmitted to all agencies in possession of the incorrect data.

The need for these amendments grows out of the increasing concern of the public about the long term social effects of the cybernatics revolution. Young people, especially, have become very critical of the general practice of data storage. *A striking example of their concern was* the proposed massive boycott of the 1983 national census which did not take place.

All in all, the implementation of the Data Protection Act *represents an imaginative* example of how a legislature can meet directly a public legal need. The substantive protection of both the individual and the public at large against abuses by government administrators has been rendered meaningful by eminently practical procedures *of which the ordinary* person can readily avail himself. In a sense, one could call this a form of direct, legislative, extra-judicial aid embodying preventive, remedial and educative elements. For the

85 Ibid 58.

remedial aspect to be effectively realized, lawyers will *have to concern themselves increasingly* with the socio-legal impacts of the cybernetics revolution.

South Africa has no standard statute which regulates the storage, processing and transmission of personal data by public authorities. The subject has no right to sanction inter-departmental transmission of his personal data. Neither does he have the right to know which government bodies store his personal data, nor the right to know what information is stored about him, for what purposes and for how long. He has no right to inquire into the legality of the means used to obtain information about him. This, in turn, means that he has no way of ascertaining the accuracy of the information kept about him. *All of these deficits*, coupled with the wide discretionary powers vested with the public authorities and the limited judicial control over *administrative action, coalesce* to render the individual particularly vulnerable to the infringement of his privacy by public authorities. The most vulnerable here are the *politically ostracized*, the poor and the unsophisticated - all who are least able to defend themselves. What is worse, legal aid is not granted in actions for invasion of privacy.[86]

There is a real need for a controlling statute regulating the storage, processing and transmission of personal data in both the public and the private spheres.[87] Several states have already enacted such statutes.[88] The need for such a statute

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86 Guide para 13.1 (c).

87 Cf, generally, D J McQuoid-Mason *The Law of Privacy in South Africa* (1978) 197.

88 Sweden and the U S A (1974); New Zealand (1976); West Germany (1977); France, Denmark, Norway, Canada, Luxemburg and Austria (1978); *Hungary and Israel* (1981). Similar legislation is about to be introduced in Belgium, The Netherlands, Switzerland, Great Britain, Italy, Finnland, Portugal and Japan. For details, see Prof Bull op cit 58-63.

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should be actively canvassed in South African law journals. Law schools, too, could play a catalytic role in giving the issue currency. One way of doing this would be to introduce a seminar on say, 'computers, society and law' with the emphasis on the computer impact on society and the resulting legal developments relating to privacy. Computer scientists and other professionals from the computer industry could participate.

6 Conclusion

How to control the range of administrative discretion and how to provide quick, inexpensive and easily accessible remedies to victims of administrative impropriety, is a major concern of most democratic states today. As has been shown in the historical section of this work, the current South African Government had made no secret of its disinclination to allow this concern to accompany, let alone supersede, the implementation of its race policies. The systematic erosion of judicial powers over the last three decades has resulted in a monolithic administrative machinery which steam-rollers human rights wherever they interfere with official policy. Bannings, arbitrary arrests, deportations, detention without trial, torture, withdrawal of passports, forced removals and evictions, invasion of privacy, refusal of residence permits - all effected without the obligation to provide reasons - have become a permanent *feature of the South African legal order*. Calls for the appointment of a commissioner to look into the powers of the executive[89] have gone unheeded. The right to counsel in administrative proceedings has partly been whittled away by Parliament and partly been made to hinge on a too

89 See M Wiechers 'Die Legaliteitsbeginsel in die Administratiefreg' (1967) 30 [illegible] p 309 (325); Van der Vyver op cit 184.

rigid academic classification of administrative functions *into judicial, quasi-judical and purely administrative* functions.[90] For the poor, the majority of the population, the existing channels of redress against administrative impropriety are as good as closed. The Legal Aid Board's policies on the granting of legal aid in administrative review proceedings is vague and discouraging. The number of cases in which legal aid is granted bears no relation to the real scale of injustice which the poor suffer at the hands of administrators. Indeed, the Board's attitude underscores the widely held suspicion that legal aid is granted only grudgingly, or not at all, where primary Government interests might be affected. It is small wonder that for the year 1981-1982 the Board received no applications for assistance in quasi-judicial matters.[91] It is therefore submitted that:

a) *Parliament should create a* right to legal representation in all administrative proceedings;

b) The Legal Aid Board should abandon its equivocating stance for a positively affirmative policy which accords with its overall aim - that of making poverty an inconsequential factor in the pursuit of justice. *The need for generous* legal aid in administrative proceedings is dictated by the very nature of the relationship between the subject and the public authority. It is a relationship which involves 'parties who ... are in principle unequal - namely, on the one side individuals, and on the other side the bearers of public power';[92]

90 Cf Corder op cit 160.

91 Annual Report of the Legal Aid Board for the period ended 31 March 1982.

92 Bender and Strecker op cit 546 (emphasis my own).

c) Parliament should create the institution of the ombudsman, or ombudsman-like institution such as the ones existing in West Germany.

d) Parliament should appoint a committee to look into the practices and procedures of administrative tribunals with the aim of making them inexpensive, accessible and simple.

23 ALTERNATIVE PATHS TO JUSTICE: A SHORT REVIEW OF EFFORTS TO ALLEVIATE PRESSURE ON THE COURTS AND TO REDUCE THE HIGH COSTS OF CIVIL PROCEEDINGS

1 Introduction

The problem of delayed justice is one of the most pressing problems of our times. In many countries the courts are congested, the judiciary is overworked, and a complex bureaucracy environs the business of the courts. The effect of this is that procedures are sluggish, time-consuming and disturbingly expensive.

A sluggish machinery of justice affects the poor in particular. As opposed to the wealthy litigant the indigent litigant is less able to weather the financial strain caused by drawn out legal proceedings. He is thus more likely to abandon a promising action, or to be blackmailed into a settlement. One cannot but agree with William Gladstone's famous saying: 'Justice delayed is justice denied.' The wider effect of lethargic court procedures is summed up by Professors Schwab and Gottwald in their comparative survey of constitutional order and civil procedure: 'Nothing does more damage to the image of the administation of civil justice than the tardy winding up of proceedings.'[1]

Several states have adopted basic constitutional rules which guarantee the individual the right to accelarated justice.[2] This, however, has not solved the problem. The vital point is to realize the constitutional guarantees.

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1 K-H Schwab and P Gottwald 'Verfassung und Zivilprozeß' in Effektiver Rechtsschutz und verfassungsmäßige Ordnung (edited by W J Habscheid) (1983) 1 at 63.

2 Ibid 63-64.

2 Efforts to Solve the Problem

In a number of countries, notably in the United States, reforms to ease the pressure on the courts and to bring justice within the reach of the common are underway.[3] The main thrust of the reform movement is directed towards the creation of informal, non-judicial institutions for resolving civil disputes. A recent survey shows that there is an emerging trend in favour of conciliation.[4] One reason for this, as Professors Denti and Vigoriti point out, is that conciliation grants access 'not to a different kind of justice, but simply to traditional justice, at lower costs.'[5]

a West Germany

At present, the problem of congested courts is the subject of an extensive debate amongst judges, practising and academic lawyers, and the Ministry of Justice. Various reform proposals are being put forward. These vary mainly from (a) analysing first the reasons for the increase in litigation[6], (b) reviving the institution of arbitration (Schiedsmann)[7] to (c) creating institutions which emphasize mediation and settlement.[8]

The Stuttgart Model of civil procedure, the main features

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3 See Cappelletti Garth and Trocker op cit 686 ff.

4 *V Denti and V Vigoriti* 'The Role of Conciliation as a Means of Avoiding Lawsuits and of Conflict Resolution' Effektiver Rechtsschutz und verfassungsmäßige Ordnung (edited by W J Habscheid) (1983) 345 at 371.

5 Ibid 372.

6 R Blankenburg 'Schlichtung und Vermittlung - Alternativen zur Ziviljustiz?' (1982) 1 Zeitschrift für Rechtspolitik 6 at 7-8.

7 *K F Röhl 'Erfahrungen mit Güteverfahren'* (1983) 3/4 Deutsche Richterzeitung 90 at 96-97.

8 C Strecker 'Möglichkeiten und Grenzen der Streitbeilegung durch Vergleich' (1983) 3/4 Deutsche Richterzeitung 97 at 98 ff.

of which were adopted in the Simplification Amendment of 1976[9] gives effect to the idea of conciliation as means for resolving civil disputes. The procedure here is essentially designed to afford the parties an opportunity to settle the matter before the final hearing of the witnesses. A recent study, which is based on the 1981 Bavarian court statistics, seems to suggest that the Simplification Amendment has brought significant relief to the courts.[10] The study shows that despite the increase in the number of actions, as compared with the year 1971, the Bavarian courts disposed of more cases within the same time period than was the case before the Amendment came into effect.[11] This leads the author, Professor Gottwald, to conclude: 'Hence there is no need to establish special small claims courts, state conciliation boards or other alternatives which have been heavyly discussed in recent years.'[12]

It is, however, unlikely that Professor Gottwald's observations will affect the quest for alternative modes of dispute settlement. In fact, in 1982 the Federal Ministry of Justice launched a number of pilot projects to explore alternatives to the orthodox civil procedure.[13] The main thrust of these projects will be (a) to examine ways of increasing the scope of extra-judicial legal advice generally, (b) to intensify legal advice to consumers in particular, (c) to observe the activity of the recently-created mediation centre in Hesse, which regulates conflicts related to building contracts,

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9 BGBl I 3281.

10 P Gottwald 'Simplified Civil Procedure in West Germany' (1983) 31 American Journal of Comparative Law p 687.

11 Ibid 700.

12 Ibid 700-701.

13 See D Strempel 'Alternativen in der Ziviljustiz: Bericht über Bestandsaufnahme und Forschungsvorhaben des Bundesministeriums der Justiz' (1983) 9 Jahrbuch für Rechtssoziologie und Rechtstheorie 186 at 188 ff.

(d) to explore other, more effective ways of collecting debts against private persons and (e) to increase the use of arbitrators in civil disputes.

These pilot projects are to run for several years and will be supervised mainly by the Zentrum für Europäische Rechtspolitik at the University of Bremen.

b South Africa

(i) Small Claims Courts

In December 1983 a Bill which provides for the establishment of small claims courts in South Africa, was published for comment.[14] The Bill gives effect to the main recommendations contained in the Fourth Interim Report of the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts.[15]

The Bill provides for the establishment of small claims courts which shall adjudicate over claims of up to R 750 and immoveable property, actions of ejectment, mortgage bonds and credit agreements.[16] The courts shall be presided over by commissioners who shall be appointed by the Minister of Justice.[17] The commissioners shall be appointed from the ranks of legal practitioners outside the Public Service and who shall have at least seven years uninterrupted experience either as an advocate, attorney or a magistrate.[18]

Only natural persons shall be permitted to institute actions, but not against the State.[19]

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14 Bill to Establish Courts for the Adjudication of Small Civil Claims; and to Provide for Incidental Matters Government Notice no 919 Government Gazette No 8993 of 9 December 1983.

15 RP 52/1982.

16 S 15.

17 S 9.

18 S 9(2).

19 S 14(2).

(a) Pre-trial Procedure

The plaintiff shall deliver the prescribed summons to the clerk of the court together with a copy of the written demand which he has previously sent to the defendant.[20] If the plaintiff's summons complies with the requirements, the clerk of the court shall issue the summons and hand it to the plaintiff, who shall deliver it to the messenger of of the court for service on the defendant.[21] If the defendant enters appearance to defend, the clerk of the court will appoint a day for the hearing of the claim.[22] Apart from the summons no further pleadings shall be required of the parties. The defendant may, however, before the hearing, hand to both the clerk of the court and the plaintiff a statement setting forth the nature and the basis of his defence.[23]

No person shall be bound to bring an action before a small claims court if the dispute also falls within the jurisdiction of a conventional court. Should the plaintiff in fact sue in the small claims court, the defendant will be obliged to submit to its jurisdiction.[24]

(b) Proceedings in Court

All hearings of the small claims court shall be public, unless both parties request the commissioner to conduct the proceedings in private.[25]

Perhaps the most striking aspect of the proposed small claims trial will be the absence of legal representatives. Except in the case of a minor or a person who is precluded from appearing in court unassisted, in which case the court shall allow representation by a parent or guardian, the parties to an action shall appear in person without legal as-

20 S 29(1).
21 S 29(2).
22 S 31(1).
23 S 32(2).
24 S 24(1).
25 S 4.

sistance.[26] The court shall function inquisitorially and shall not be bound to the existing rules of evidence.[27] Both parties shall be entitled to call witnesses, but no person shall be compelled to testify before the court.[28] Witnesses shall not be entitled to any compensation or allowance.[29]

(c) The Hoexter Commission's Reasons for Recommending the Exclusion of Legal Representation

The Hoexter Commission's objection to legal representation at small claims trials was based on the following considerations:

- Legal representation would have the effect of increasing the costs of litigation, thus creating the very problem which small claims courts were designed to solve.[30]
- *Experience in Australia, Eng* ... the United States shows that so long as t... ...eedings are actively inquisitorial the absence of legal representation results 'in an easier and speedier fact-finding process'.[31]
- The presence of legal representatives at a small claims trial tempts the adjudicator to relinquish his inquisitorial role and 'to lapse into a more familiar adversary system of resolving disputes'. *Legal representatives* inevitably 'tend to infuse into the proceedings that air of formality and

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26 S 7.

27 S 27(1).

28 Ibid.

29 Ibid.

30 *Fourth Interim Report of the Commission of Inquiry into the Structure and Functioning of the Courts* RP 52/1982 179.

31 *Ibid* 179-180.

technicality which is fundamentally alien of the real spirit of small calims procedures'.[32]

- To allow legal representation 'is to give to the wealthy litigant an improper advantage over a poor opponent'. This would frequently lead to an unequal contest 'between an indigent and unrepresented plaintiff on the one side and on the other side a lawyer representing an affluent business client'.[33]

(d) The Award of Costs

The Bill provides that an award of costs in the small claims court shall be limited to (a) court fees, (b) an amount in respect of the issue of summons, and (c) costs of service upon the defendant.[34]

(e) Review Proceedings

No appeal shall lie from the decisions of the small courts.[35] An aggrieved party shall, however, have a limited right of review to the Supreme Court. The grounds for review shall be those set forth in paragraphs (a), (b) and (c) of section 24(1) of the Supreme Court Act.[36]

(ii) Comment

The proposed small claims court promises the person with little or no means a readily accessible justice. The South African Co-ordinating Consumer Council has rightly hailed this development as a 'giant step for justice'.[37] The success of the small claims court will, however, depend on several factors.

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32 Ibid 180.

33 Ibid.

34 S 38.

35 S 45.

36 Act 59 of 1959. See s 46 of the Bill.

37 Rand Daily Mail 21 October 1983.

First, the public must know about the existence of the court. It is submitted that the Department of Justice launch a wide and an intensive campaign to inform the public, particularly the Black population, about the existence of the small claims courts, where they are situated, how they work and how one should go about seeking their protection. It is submitted that this advertisement campaign be directed at the person self and not at governmental agencies as has usually been the case with the advertisement of legal aid. Extensive use should be made of radio, television and other illustrated media to bring the existence of the courts to the notice of the common man.

Second, the courts must be easily accessible, both geographically and as regards their hours of operation. It is submitted that both these factors will determine the extent to which the Black population uses the courts. It is submitted that effect be given to the recommendation by the Hoexter Commission[38] that court hearings be conducted in the evenings outside ordinary office hours, and possibly during Saturday mornings. This will necessarily require considerable flexibility on the part of commissioners, who, it appears, will be mainly practising lawyers.

The third factor concerns the practical assistance that should be given to litigants at the preparatory phase of the proceedings. As it presently reads, the Bill makes no provision for such assistance to be given to the parties. The need for assistance here was emphasized strongly by the Hoexter Commission when it said:

> The Commission wishes to state quite unequivocally that in South Africa a small claims court will operate successfully only if, at the stage of the filing of the claim by the plaintiff, and

38 Op cit 185.

> thereafter during the entire process of pre-trial preparation, specialized assistance by full-time and salaried legal or paralegal staff is available both to the plaintiff and the defendant.[39]

It is submitted that this recommendation be implemented in full.

Fourth, an important factor will be how the small claims court is perceived by the public, particularly by the Black population. It is submitted that winning the confidence of the public should be a primary concern from the start. The court should guard against lapsing into the image of the traditional governmental agency, which is characterized by formality and officialdom - an image that would be incompatible with the notion of a 'peoples' court'. For it to gain social acceptance, the small claims court would have to be seen as a social rallying point, a kind of village hall.

The mode of procedure envisaged for the small claims court bears some resemblance to that of the African customary court. Features common to both procedures are the absence of legal representatives, the inquisitorial nature of the proceedings, the informality and the deviation from the generally accepted rules of evidence. *This tempts one to raise the question:* Does the African customary law, both substantive and procedural, not perhaps harbour important clues which could help to solve *some of the problems inherent* in the application of South African law?

It is submitted that there is a need for a wider and deeper research into African traditional law, not alone for purposes of documentation and analysis. The plea here is for research with a comparative perspective, the wider purpose of which is to tease from the African customary law those ideas which could be adapted to meet the legal needs of a wider section of the South African population.

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39 Op cit 181.

24 EXTRA-JUDICIAL LEGAL AID

1 Introduction

According to the Legal Aid Guide, legal aid includes advice.[1] Yet, a study of the Guide leaves one in no doubt that legal aid is available only for judicial proceedings. No provision is made for extra-judicial legal advice alone. In practice, the 'advice' referred to in the Guide means essentially legal counselling incidental to litigation. No provision is made whatsoever for the indigent person seeking mere prophylactic legal advice, or the person who seeks legal advice on matters such as the legal implications of a contract entered into, or the legal implications or the lawfulness of a specific administrative action; or how to go about making a will or filling in a tax form, or entering into an ante-nuptial contract, or asserting an insurance claim, or how to go about registering a charitable organization. These are some of the routine, yet crucial problems encountered mainly by the underprivileged and which, if they are not dealt with timeously, sooner or later bring the person into involuntary contact with the machinery of justice.

The legal profession, except a handful of lawyers, has generally shunned the question legal advice for the poor. The Government, on the other hand, has been wholly unresponsive to the need for such a service. As was shown in the historical part of this work, the Department of Justice searched for various excuses to withhold its support for the legal advice bureaux which emerged in the 1940s and 1950s.

Despite an unco-operative and somewhat hostile Government attitude the Johannesburg Legal Aid Bureau has managed to

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1 Para 1.1(g).

survive. More than that, this Bureau has been the spiritual driving-force behind the establishment of several other agencies which provide gratuitous legal advice to the poor. All or these have sprung up over the past two decades. This chapter will focus on each of them from the point of finance, structure, location, operation and the type of problems handled.

2 University Legal Aid Clinics

a The 'White' Universities

(i) University of Cape Town (situated at Rondebosch, Cape Town)

The Legal Aid Clinics here are the oldest in the country. They have been in existence since March 1971 and have provided the main impulse for the establishment of the Clinics at the Universities of Stellenbosch and the Western Cape.

The founder and convener of the University of Cape Town Legal Aid Clinic was Peter Gross[2], whose father, Sam Gross, was one of the main campaigners for the introduction of the State legal aid scheme.

(a) Finance

This is provided by the University's Student Representative Council and amounts to some R 3 000 a year.

(b) Organization

The Clinic has 7 branches which are manned by some 100 law students who are under the central control of a management committee. A total of 64 attorneys who work voluntarily on a roster basis supervise the Clinics. Each Clinic is controlled by 2 centre heads, a convenor

2 For a description of the Clinics' work in the early 1970s, see Gross op cit 187-189. Unless otherwise indicated, information here is taken from McQuoid-Mason op cit 139-143.

and a Clinic co-ordinator. A part-time secretary is employed for the typing.

(c) Location

Six of the off-campus Clinics are scattered over the Cape Flats in the Coloured townships of Heideveld, Kensington, Manenberg, Crossroads, Elsies River and Retreat. One Clinic is situated in Mowbray. Except for two Clinics which are housed in community centres and the Mowbray Clinic which is housed on the premises of the Domestic Workers Employment Project (DWEP), the rest of the Clinics are housed in buildings belonging to the University Student Health and Welfare Corporation (SHAWCO).

The Western Cape Administration Board turned down a students' request to open a Clinic in the African township of Langa. Even an appeal in Parliament to the Minister of Co-Operation and Development was unsuccessful.[3]

(d) Operation

The on-campus Clinic is open on Tuesdays and Thursdays between 13h00 and 14h00. The off-campus branches are open one night a week, Mondays to Thursdays from 17h00 and 22h00. Clinic work is divided into administrative and advisory spheres. The final year students do the counselling part. The extent of the help given consists in giving legal advice, conducting correspondence and referring the client to the Legal Aid Office, or if it is a social problem, to a welfare organization. If the client qualifies for legal aid a file is opened on the matter by the administrative section which is manned by 4th year students. No action is taken without first consulting the supervising attorney. The Clinics handle a large volume of cases, well over 2000 per year. Most of

3 The Argus 25 March 1980

the problems concern divorce and maintenance matters.

In 1976 the Legal Aid Clinics Committee of the University considered the idea of allowing members of the Coloured community to run the Heideveld Clinics themselves.[4] The idea was dropped; instead the students decided to start a 6-month training scheme for the local residents. The aim of the scheme would be to train community members to counsel on socio-legal problems. Ideally, these people would then run the Clinic under another name, with the law students assisting in the less numerous, purely legal matters.[5] It seems that the scheme is still in its experimental phase.

(ii) University of Stellenbosch[6] (situated in Stellenbosch)

The Legal Aid Clinic was started in April 1975.

(a) Finance

This is received from the Urban Foundation.

(b) Organization

The 5 Legal Aid Clinics which are situated in and around Stellenbosch are manned by some 50 law students. The number is not definite as more students than can be utilized are keen to participate in the Clinics' work. This is especially true of the junior students. Each of the Clinics is staffed by a team of students under a clinic leader.

(c) Location

The 5 Clinics are situated at the following places: in

4 Sunday Times 15 February 1976.

5 Sunday Times 29 February 1976.

6 Information was obtained from Pieter Pretorius, Chairman of the Legal Aid Clinics of the University of Stellenbosch (letter dated 18 April 1982).

the town of Somerset West (about 20 kilometers from Stellenbosch); in Macassar, a Coloured township near Somerset West; in Scottsdene, a Coloured township about 20 kilometers from Stellenbosch. Two are situated in Stellenbosch itself; one on the university campus for students and employees of the University and the other next to the local magistrates' courts. The latter is meant mainly for the local residents.

(d) Operation

The extent of the assistance given is limited to counselling, conducting correspondence and making applications for State legal aid on behalf of clients. Two of the Clinics are supervised by practising attorneys. The chairman of the Legal Aid Clinic laments the lack of support from local attorneys. A faculty member, who is a qualified attorney, has been asked to canvass for support amongst local attorneys.

During the year 1982 the Clinics were consulted by a total of 235 persons, most of whom were Coloureds. The break-down of the problem areas was as follows: divorce 41,03 per cent; maintenance 17,95 per cent; matters related to the obtaining of identity documents and the registration of births and deaths 20,51 per cent; housing and rent problems 10,25 per cent; hire-purchase 5,13 per cent and motor vehicle insurance 5,13 per cent.

Legal Aid is a compulsory course in the 4th year of study.

(iii) University of Port Elizabeth[7] (situated in Port Elizabeth)

The Clinic was started in August 1974.

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7 Information taken from McQuoid-Mason op cit 143-144.

(a) Finance

This is provided by the University's Students Representative Council. In 1978-79 a total of R 140 was voted for the Clinics.

(b) Organization

The Clinic is run as a sub-committee of the Students Law Society, a body attached to the Students Representative Council. There are, however, plans to include the Clinic in the University's Community Services Project Committee.

(c) Operation

There are 3 Clinics: 1 on campus and 2 off campus which are located in the Coloured townships of North End and Gelvandale. Another Clinic is being planned for the African township of Kwa Zakhele. The Clinics are manned by small teams of students who work under the supervision of attorneys. Deserving persons are referred to the Legal Aid Office and those who do not qualify for legal aid are told to go to an attorney of their choice - but not without first considering the matter carefully. Most of the clients are Coloureds and Africans. Most of the some 200 cases handled annually concern domestic problems.

The lack of academic credit for work done in the Clinic, together with the lack of participation in the Clinics' work by faculty members, and the lack of adequate finances all seem to militate against student enthusiasm for following up cases.

(iv) Rhodes University[8] (situated in Grahamstown)

The Legal Aid Clinic was started in January 1979.

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8 *Information was obtained from* Professor R C Beuthin of the Faculty of Law, Rhodes University and Mr A J G Lang, Director of the Legal Aid Clinic (letter dated 27 January 1983).

(a) Finance

This is provided by the Students Representative Council of the University from the funds allocated to it by the University to finance student activities. The Clinic's budget for 1982 was R 1500.

(b) Organization

The Clinic is administered by a Director, appointed by the Faculty of Law. He is assisted by a committee of 4 students, all in their 5th or final year of study. They are elected by the 4th and 5th year students, some 25 in all, who volunteer for and perform Clinic duties. This activity forms no part of the degree curriculum and is not used in any way to assess students.

(c) Operation

The Clinic is open from 17h00 - 19h00 on every Wednesday except for 4 weeks in the year. It operates with the permission, and under the auspices of the Law Society of the Cape of Good Hope. Students have no right of audience in the ordinary courts. The extent of the assistance given is therefore limited to legal counselling, conducting correspondence outside litigation and helping clients to apply for State legal aid.

In 1982 a total of 178 persons consulted the Clinic for help. The bulk of these persons were African residents of Grahamstown and the rest were students of all races from the university community. Maintenance, labour and general contract problems constitute the bulk of the cases.

(v) University of the Orange Free State[9] (situated in Bloemfontein)

Presently the University has no Legal Aid Clinic. However,

9 Information was obtained from Professor J L Snyman of the Faculty of Law, University of the Orange Free State, Bloemfontein (letter dated 24 February 1983).

plans for the creation of an all-embracing welfare society which will operate on a multi-disciplinary basis, are well advanced. Legal advice for the poor will form one limb of the welfare service. This service will be run by law students under the guidance of the teaching staff, but in close liaison with the Legal Aid Board and the practising legal profession.

Interestingly, the Dean of the Faculty of Law asked the Legal Aid Board to permit the University's law students to manage the Bloemfontein Legal Aid Office.[10] The Dean emphasized that clients would be treated in a 'dignified and excellent way' and that the Board would be assured of the services of 'highly qualified jurists (at least LLB degree), who would render service on a continuous basis'.[11] The Board appreciated the offer but turned it down for 'legal and administrative reasons'.[12] The Board, however, encouraged the Law Faculty to set up its own Legal Aid Clinic which can refer possible legal aid cases to it.[13]

(vi) University of Natal, Durban (UND)[14]

The Legal Aid Clinic was established in 1973.

(a) Finance

This is provided by the Students Representative Council.

(b) Organization

A management committee consisting of representatives from the students, the law faculty staff and the practising profession determine the Clinic's policies. The Clinic

10 Annual Report of the Legal Aid Board for the period ended 31 March 1982 6.

11 Ibid.

12 Ibid.

13 Ibid.

14 Information obtained from McQuoid-Mason op cit 153-159.

employs a part-time secretary to do the typing, to act as receptionist and to ensure that students maintain contact with their clients.

(c) Location

One Clinic is on campus, the other off campus, in a church hall which is situated in an industrial area.

(d) Operation

The on-campus Clinic is open on Fridays from noon to midnight during term-time, while the off-campus branch is open Saturday mornings for 2 hours, throughout the year. Two members of the teaching staff, one of whom is an attorney, supervise the campus Clinic. The off-campus Clinic is supervised by practising lawyers. Staff members supervise all new files opened. Clinic work consists in conducting correspondence, negotiation, drafting documents and referring clients to other agencies. 'Feedback' cards which are stamped and addressed to the clinic are given to those clients who are referred to the Legal Aid Office. The Legal Aid Officer is requested to return the card indicating whether legal aid was granted and if not, the reasons for refusal.

Final year Bachelor of Laws students have to attend at least 2 legal aid clinics as part of the professional practice course.

The campus Clinic, which is open to students, staff and members of the public, deals with about 100 cases annually, most of which concern motor collisions involving students. The off-campus branch has a larger clientele (185 during 1980) most of whom are Africans (over 60 per cent). The cases involve mainly labour, motor collisions, divorce, crime and hire-purchase. One of the main problems experienced by the Clinics is a shortage of funds. Most of the funds are used for remunerating interpreters used in the Clinics.

(vii) University of Natal, Pietermaritzburg *(UNP)*

The Clinic was established in June 1974.

(a) Organization

This is on the same basis as the Durban Clinic.

(b) Location

There are 3 Clinics: 1 on campus and 2 off campus. The off-campus branches are housed in the Lay Ecumenical Centre in the African township, Edendale, and in the Civic Centre in the Indian township, Northdale.

(c) Operation

The off-campus Clinics which operate on Saturdays from 9h00 - 12h00, are supervised by attorneys. Some 40 students are involved in clinic work. They counsel, write letters, draw documents, negotiate on behalf of clients and refer appropriate cases to the Legal Aid Office or to other agencies. Most of the cases concern divorce.

Transport is a major problem of the Clinic.

(viii) Rand Afrikaans University[15] (situated in Johannesburg)

The Clinic was started in February 1981.

(a) Finance

The University's student welfare organization *Reusorg* sponsors the Clinic. Grants are also made by the Urban Foundation. A large chain store contributed desks and chairs towards the establishment of the Clinic.

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15 Information received from G Joubert, Director of the Rand Afrikaans University Law Clinic (letter dated 20 May 1983).

(b) Organization

The Clinic is administered by the University Council. Its Management Committee consists of: a Director, an Assistant Director, a Manager, the Dean of the Faculty of Law and members appointed by the Faculty.

(c) Location

Three Clinics are in operation. One is situated on campus. Of the 2 off-campus branches one is situated in a library in the nearby Coloured township, Western; the other is situated in the administration building of another Coloured township, Davidsonville, some 12 kilometers from the campus.

(d) Operation

The on-campus Clinic is open on Wednesdays between 14h30 - 17h00; the one in Western, on Mondays and Wednesdays between 16h00 - 18h00, and the one in Davidsonville on Wednesdays between 14h30 - 17h00. Clinic work involves 28 students who take the compulsory Practical Legal Studies course (praktiese regskunde). This course is compulsory also for part-time students irrespective of their practical legal experience. At present 2 attorneys, 8 state prosecutors and 3 articled clerks are taking the course.

(e) Litigation

Clinic work is supervised by practising advocates and attorneys, together with faculty staff. The Clinic has been granted permission by the Law Society of the Transvaal to practise through attorneys involved in the Clinic's work. Any type of legal work is done, including litigation, except litigation affecting matrimonial matters, third party motor vehicle insurance and the transfer and registration of immoveable property. The means test used by the Clinic corresponds roughly to that of the

Legal Aid Board, though exceptions are made in deserving cases.

(f) Social Work Reports

Social Work students under the supervision of the Department of Social Work also work at the Clinics as counsellors in legal cases with eminent social components. In divorce matters the students draw up the necessary probation reports and refer their clients, if they qualify, to the Legal Aid Office for further help. In 1981, 16 such reports were drawn.

The number of persons using the Clinic increased from 79 in 1981 to 194 in 1982. Most of the cases received are from the off-campus Clinics and concern mainly divorce, insurance claims and administrative law.

(ix) University of Pretoria[16] (situated in Pretoria)

The Legal Aid Clinic was opened in June 1980.

(a) Organization

The Clinic is run by some 15 law students under the supervision of 5 members of the staff. Ultimate control is vested with the Faculty of Law, but routine matters are handled by students.

(b) Location

The Clinic is located in the Coloured township, Eersterust, and operates from the Eersterust Child Welfare Offices. A new branch is planned for the African township, Mamelodi.

(c) Operation

Students do the counselling. They conduct correspondence on behalf of the clients, negotiate settlements, draw

16 Information taken from McQuoid-Mason op cit 152.

simple contracts and wills and refer applicants to the Legal Aid Office or to other agencies.

In its first year of operation the Clinic handled 56 cases most of which were divorce and criminal matters.

(x) University of the Witwatersrand[17] (situated in Johannesburg)

The Clinic here was started in 1973.

(a) Finance

The Clinic is subsidized by the University. The Clinic also conducts an account in which donations from private persons are deposited.

(b) Organization

The Clinic is supervised by an attorney from the Legal Resource Centre who has been seconded to the University for this purpose. There are 2 part-time administrative secretaries who work Mondays to Fridays from 08h00 to 12h45. In addition to their routine secretarial duties the administrative secretaries co-ordinate the activities of the student counse''ors and help them to become acquainted with the system of record keeping.

(c) Location

The Clinic is situated on the main campus of the University. It is open to all students and members of the staff and, in deserving cases, to members of the public.

(d) Operation

The Clinic is open on Mondays and Thursdays from 10h00 to 14h00. A list of the counsellors' names together with

17 Information is based partly on my discussions with the supervisor of the Clinic, Liezel Power, in January 1984 and partly on the Clinic's 1983 Report.

the times when they are on duty is pinned on the counsellors' notice board. The counsellors are law students who participate either voluntarily or in fulfilment of the requirements of the Practical Legal Studies course. During 1983 a total of 32 students were involved in the Clinic's work. The supervisor is present at the Clinic on the 2 days on which it is open and she remains there until late in the afternoon going through the files.

Of the 327 clients who consulted the Clinic during 1983, advice and assistance was given in 177 cases. A total of 70 clients were referred to other appropriate legal aid agencies, including the Legal Aid Board. As regards the rest, 50 clients did not return and 16 decided to abandon the matter. In 13 cases the Clinic was unable to assist and in one case it withdrew for ethical reasons.

Most of the cases dealt with by the Clinic were claims arising from motor vehicle accidents, breach of contract and credit agreements, housing, property, landlord and tenant matters and matters relating to family law. During 1983 the Clinic collected R 19 519 on behalf of its clients and it saved them a further R 8 640. At the beginning of 1984 the Clinic's supervisor was investigating the possibility of obtaining permission from the Law Society and the Bar Council for members of the academic staff to practise as Clinic practitioners. At present there are 2 attorneys and 4 advocates on the staff of the law faculty. If permission is granted the Clinic will be able to litigate matters on a limited scale.

The Clinic, together with the Clinics at the Rand Afrikaans University and the University of South Africa, aims to realize the intentions expressed at the Legal Aid Conference which was held in Durban in 1983. At this conference the need was raised for the formation of an Association of Law Clinics which would liase with its members,

the organised profession and Government institutions with regard to

a) the admission of student practitioners;
b) the introduction of standardized student practice rules;
c) student involvement in the proposed small claims court;
d) the provision of video training material for use in the Clinics; and
e) the exchange of standardized documents and research materials.

b The 'Black' Universities

(i) University of the Western Cape[18] (situated near Bellville)

The Legal Aid Clinic was established in 1975.

(a) Finance

A considerable sum is raised from social functions organized by the law students. In 1980-81 the Clinic was granted a sum of R 1020 by the Law Faculty.

(b) Organization

The Clinic is organized along the same principles as the University of Cape Town Legal Aid Clinic.

(c) Location

Altogether 4 Clinics are operative. Three are situated on the Cape Flats in the coloured townships of Hannover Park, Bellville South, Manenberg (jointly with the University of Cape Town Clinic). The other Clinic is situated in Paarl-East, some 20 kilometers north of the University. The Hannover Park Clinic is housed in

18 Information obtained from McQuoid-Mason op cit 144-146.

a shopping centre; the one in Manenberg in a community centre, and the other two in church halls.

(d) Operation

The Clinics are staffed by about 24 students, and work on the same basis as the University of Cape Town Clinics. The students do the counselling. They also conduct correspondence on behalf of clients, draw simple wills and contracts and refer deserving persons to the Legal Aid Office.

Although the students who participate in the Clinics are enthusiastic, they have been unable to obtain support from the other law students in the University. This causes staffing problems. The Clinic acquired a vehicle to overcome transport problems. Other aspects of the Clinics, for example, the preventive legal education schemes, are hamstrung by lack of finance.

In 1980-81 the Clinics were consulted by 671 persons who had mainly divorce and maintenance problems.

(ii) University of Zululand[19] (situated about 160 kilometers north of Durban)

The Clinic was started in 1978.

(a) Finance

Sponsoring appears to be fitful and uncertain.

(b) Organization

Volunteer students run the Clinic under the guidance of a member of staff. During the 1980 July vacation 2 students were employed at a nominal salary to keep the Clinic going.

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19 Information obtained from McQuoid-Mason op cit 159-160.

(c) Location

The clinic is situated on the campus. An off-branch was planned for 1982.

(d) Operation

The Clinic is open on Saturdays between 8h00 - 12h00. Labour and contract matters make up the bulk of the cases. Welfare clients are referred directly to the social workers. This has caused a 50 per cent decline in the number of cases handled by the Clinic.

(iii) University of Durban-Westville[20] (situated on the outskirts of Durban)

The Clinic, which was started in 1978, ceased functioning at the beginning of 1981.

Lack of funds appears to have been the major reason for the closure. The University stopped financing the Clinic when the Attorneys' Fidelity Fund discontinued its financial support for the Legal Aid Clinics generally. A sum of money donated by an oil concern, at the request of the law students, was frozen by the University administration which monopolizes the University's main fund-raising.

This affected the Clinic badly. As the Clinic was situated in the Indian township, Chatsworth, some 30 kilometers away from Durban, the costs of transport were immense. The University provided a vehicle for which the Clinic paid a nominal sum. The Rotary Club donated some money as well.[21] But the Clinic was short of proper premises, too. An outbuilding at the back of a church formed the

20 Unless otherwise indicated information is from McQuoid-Mason op cit 159.

21 Natal Post 16 September 1979.

makeshift counselling room.[22] It had no filing cabinet, no telephone and no stationery.[23]

The Clinic was also undermined by other law students who were opposed to the formation of such bodies on campus.[24]

(iv) University of the North[25] (situated about 25 kilometers east of Pietersburg)

This Clinic, which was started in 1977, suspended its operation in May 1983. Here are the reasons:

(a) Problem of Staff

Originally it was hoped that the students themselves would run the Clinic with guidance from the teaching staff. In practice, however, students lacked the enthusiasm. The bulk of the administrative work devolved on the staff member serving as Supervisor on the Clinic's Management Committee. Staff members found it hard to allocate their resources to do what was essentially students' work. Consequently, since its inception the Clinic operated by fits and starts, at times activity was halted altogether. For example, a Management Committee was not even elected for the year 1983.

(b) Problem of Continuity

This was a severe problem. Each year when the new Management Committee took over, the task of training new students to run the Clinic came to rest squarely on the shoulders of the faculty's supervisor. Whenever supervisors changed, difficulties were encountered in getting the Clinic operational again.

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22 Ibid.

23 Ibid.

24 Ibid.

25 Information obtained from D H Rossouw, Department of Jurisprudence (letter dated 9 June 1983).

(c) Problem of Location

Apart from the Mankweng complex, other judicial and administration centres are far away. This made personal liaison, which was often necessary, almost impossible. The Clinic's geographic isolation also affected the number of persons who came to it for help. The transport facilities are poor and villages are far apart. This also made it difficult for students to maintain effective contact with their clients.

(d) Problem of Balancing the Interests

The establishment of the Clinic was largely due to the initial optimism of one member of the staff that such a Clinic would serve the educational need of the student. Clinical work would, on the one hand, help the student to bridge the theory/practice gap; on the other hand it would be a beneficial community service. Today the teaching staff is sceptical of the Clinic's capacity to fulfil these functions effectively. At one stage the Clinic considered launching a preventive law campaign with the accent on difficult, high-frequency legal problems. But because of the Clinic's isolation it was felt that contact to the neighbouring population would be hard to establish. However, a study project on crime in the Mankweng district was launched, but students lost interest as the project was more academic than practice-orientated.

All these factors dissipated the enthusiasm for the Clinic among both the academic staff and the students. Hence it was felt that 'a temporary breather might be the right medicine'.

The academic staff is of the opinion that a Legal Aid Clinic's ideals can, in principle, be fulfilled more effectively through similated practice; for instance, a moot court.

c Universities in the 'Independent' Homelands

(i) University of Bophuthatswana[26] (situated in Mmabatho)

The Clinic here was established in February 1984. To avoid any confusion with the State Legal Aid Board, the Clinic is called a Law Clinic. The Clinic is run by a full-time Director who is assisted by a secretary. Clinic work is compulsory for all 4th year law students.

The Clinic has the dual function of providing practical legal training for law students and serving the needs of the community. It is not envisaged at this stage that the Clinic will litigate on behalf of indigent persons. It will act merely as a clearing house or referral body.

(ii) University of Fort Hare[27] (situated at Alice, Ciskei)

The Law Faculty does not have a Legal Aid Clinic or counselling services of any kind. The reason is that the University is isolated and there are no practising attorneys close enough who would be able to supervise the Clinics as required by the Law Societies. The Dean is of the opinion that, for such a Clinic to operate effectively, there must be students who are present throughout the year to keep it going. Almost every law student in the faculty comes from a distance and returns to his home during the holidays.

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26 Information obtained from the Director of the Clinic H Paiker (letter dated 6 March 1984).

27 Information obtained from Professor G Seymor Wood, Dean of the Faculty of Law (letter dated 10 May 1983).

(iii) University of Transkei[28] (situated at Umtata, Transkei)

The Faculty of Law here was formed only in 1979. Faculty members are, however, conscious of the need of establishing a Clinic, and hope to 'do so in the not too distant future'.

d Correspondence University

(i) University of South Africa (situated in Pretoria)

The Legal Advice Centre was started in 1981.

(a) Organization

The Centre is organized under the broad auspices of the University Council. It is made up of representatives from the teaching staff and is under the chairmanship of Professor Marinus Wiechers, the driving force behind the establishment of the Centre. A full-time legal aid officer has been appointed to run the Clinic on campus. Two members of the Atteridgeville Community Council have been co-opted to serve on the steering committee of the township Clinic.[29]

(b) Location

One Clinic is on campus; the other is situated in the African township, Atteridgeville, near Pretoria.

(c) Operation

The on-campus Clinic is meant mainly for the staff of the the University, both academic and non-academic. It deals with staff and staff-related problems. The off-campus

28 Information obtained from Professor S M Miller, Dean of the Faculty of Law (letter dated 11 May 1983).

29 Sowetan 5 March 1983.

Clinic is open on Thursdays between 17h30 and 19h00. Counselling is done by the University's law students, under the supervision of a staff member.

The township Clinic is very busy and counsellors are finding it hard to cope.[30] The cases involve mainly hire-purchase, housing and local administration problems. Those whose cases need following-up are referred to the legal practitioners on the academic staff. Those who qualify under the means test are referred to the Legal Aid Officer.[31]

One of the central aims of the Advice Centre is to provide students with practical experience. Other Universities with Legal Aid Clinics have been asked to accommodate University of South Africa law students in their respective Clinics.[32] Students who participate in Clinic work may, as an alternative to a written academic paper, submit a report on some aspect of the Clinic's work.[33] A long term aim of the Advice Centre is to develop depth and expertise in a special field.

3 Other Major Legal Advice Agencies

a The Legal Resources Centre (hereafter LRC)[34]

(i) Its History

The LRC's history dates back to a memorandum submitted to the Johannesburg Bar Council in 1976 by Advocate Felicia Kentridge, until recently Director of the Practical Legal Studies course at the University of the Witwatersrand, and an active protagonist of the modern idea of legal aid. The

30 Ibid.

31 Ibid.

32 McQuoid-Mason op cit 153.

33 Information obtained in April 1981 from Professor Van Rooyen of the Faculty of Law, University of South Africa.

34 Unless otherwise indicated, information is taken entirely from the annual Reports of the Legal Resources Trust and the Legal Resources Centre.

memorandum espoused the need to create a Law Foundation to provide an alternative legal aid service modelled on the English Law Centres.[35] The Bar Council supported the idea and agreed to establish so-called 'legal workshops' at which attorneys and advocates could work on a full-time basis.[36] A firm proposal was then put to both the Johannesburg Bar Council and the Transvaal Law Society to set up a pilot scheme for the establishment of a Legal Resources Centre in Johannesburg. The Centre would be staffed by competent legal practitioners working full-time and it would help to supervise law students working at the existing Legal Aid Clinics.

The Johannesburg Bar Council accepted this proposal and adopted in principle the rules formulated by the English Law Society for the Law Centres there.[37] The proposal was then put to the General Council of the Bar of South Africa which approved of it unanimously in July 1978. By the end of 1978 the Transvaal Law Society, too, had agreed to the implementation of the scheme. Thus on 1 January 1979 the LRC, a non-profit making association, opened its office in the Advocates' Chambers in Johannesburg.

(ii) Organization

Originally, the LRC started with a professional staff of 2 lawyers, 1 administrative assistant and a part-time director, Arthur Chaskalson, a prominent senior counsel. At present the LRC has offices in Johannesburg, Durban and Cape Town. The latter was opened late in 1983. Presently the LRC is investigating the need for nother office in the Eastern Cape. Together the 3 offices now employ a combined staff of over 40 persons, half of whom are qualified advocates and attorneys.

35 A Chaskalson SC 'The Legal Resources Centre: Why it was established and what it Hopes to Achieve' (1980) De Rebus Procuratoriis 19 at 21.

36 Ibid.

37 Ibid.

(iii) Funding

The LRC's funds came from the Legal Resources Trust whose trustees are a judge, 6 senior advocates and 4 attorneys. The LRC's Director is an ex-officio trustee. The Legal Resources Trust is supported by a number of companies and charitable foundations at home and abroad. The major portion of the funds derived from American donors. The *income of the Trust for the year* 1982/83 was R 1 019 506. The Trust is registered under the Fund Raising Act of 1978, and has a tax-exempt status.

(iv) The Johannesburg LRC

The Johannesburg LRC is presently housed in the city centre where it occupies a floor. It runs the Hoek Street Law Clinic which is housed in a popular part of the city, next to the main railway station.

(a) Its Work

The LRC is a public interest law centre. This means it takes on poor persons' cases whose outcome can benefit a large number of persons in the same position. The litigation covers a wide field and is not limited to test cases, much of the legal aid work concerns the enforcement of rights. During the period 31 March 1982 to 31 March 1983 the LRC took on 769 cases. The cases are referred to it by its Hoek Street Law Clinic and by other legal advice agencies.

It has been mainly in matters related to influx control, bus tariffs, housing, small claims and consumer exploitation that the LRC has proved to be of enormous benefit to poor persons who might not otherwise have had access to justice.

Perhaps the most famous court rulings secured by the LRC for thousands of persons at a time were in the test cases, Komani v Bantu Affairs Administration Board, Peninsula Area[38]

38 1980 (4) SA 448 (A).

and Rikhoto v East Rand Administration Board.[39] The significance of the Komani case is that it opened the way for African women to be united with their husbands in the towns where the latter work, without first having to obtain a 'lodgers permit' which was previously required but seldom granted. The LRC successfully processed over a hundred cases against administration officials who refused to give effect to the Komani judgement. Rikhoto's significance is that it entitles an African migrant worker who has worked continuously for an urban employer for 10 years to live permanently in town with his family.

In 1980 the LRC successfully opposed an application to increase bus tariffs for Black commuters in Soweto and Alexander Township (outside Johannesburg), thus saving the commuters R 1 million a year. In 1981 the Centre successfully opposed another application to increase bus tariffs for Black commuters in the Cape Peninsula area. This resulted in commuters saving approximately R 10 000 per day. Commenting on the first triumph, the Rand Daily Mail, a leading English-language newspaper said:

> We have here a prime example of how concerned groups can organize against an unjustified action, gain the attention of the government tribunal and insure a decision which helps the poorer sections of the community, while thus also defusing a potentially dangerous situation.[40]

The importance of the LRC's work in this domain should be measured against the Government's decision in 1982 to appoint a Commission of Inquiry to examine, amongst other issues, the question of bus transportation.

The LRC has also been able to obtain legal redress against administration officials for unlawfully evicting

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39 1982 (1) SA 257 (W).

40 Quoted in the Report by the Director of the Legal Resources Centre (Durban) for the year ended 31 March 1982 5.

persons from their homes, and against a municipality for cutting off electricity supplies and threatening to evict tenants disputing rent increases. In 1982 the LRC concluded some 150 small-claims cases as a result of which over R 75 000 was recovered. A number of applications were also brought against hoax burial and benefit societies which extracted premiums from poor persons in return for little or no service. One of the key companies was subsequently placed in liquidation.

(b) The Hoek Street Law Clinic

This Clinic was established in July 1979. It is staffed by 3 members of the LRC's professional staff. Final year law students are also drawn into its work. The Clinic provides a certain number of places for law students of the University of South Africa. The Clinic in the University of the Witwatersrand also uses the Hoek Street Clinic for the training of students who take the Practical Legal Studies course.

Although it was conceived primarily for consumer law problems, the Clinic now handles a large number of labour and housing matters. During the period 31 March 1982 to 31 March 1983 a total of 9 411 interviews were held and 1 458 new cases taken on. At present about 40 persons consult the Clinic per day. In fact, the case load exceeds the Clinic's intake capacity. To reduce the intake and to promote the securing of more enduring results the LRC staff are now developing an issue-orientated approach to the cases they take on.

In the 5 years of its existence the Clinic has established itself as an effective instrument for championing the rights of the poor.

(c) Fellowship Programme

The fellowship programme which was introduced in 1980 is designed to give recent law graduates, mainly from Black universities, practical training. The year serves as a bridge between university and practice and provides an opportunity to participate in work which is of importance to the community. Fellows are paid a salary which is approximately that paid to an articled clerk.

(d) Community Advice Offices

As a result of its numerous legal successes the LRC was approached by several Black community groups who asked it to help them to set up their own advice offices. With the active encouragement of the LRC 10 advice offices have now been established around Johannesburg. These offices, like the LRC, do not charge for their services.

The offices are manned by community workers and students. The LRC provides them with a back-up legal service. It conducts seminars at which problems encountered or likely to by encountered by the para-legals are discussed. To enhance the efficiency of the advice offices the LRC is compiling manuals on legislation relevant to the work of the advice offices. Where the counsellors are unable to deal with the problem, they refer it to the LRC. In one such case the LRC was able to compel the local administration board to repair dilapidated tenant houses. Previous requests by the tenants had been turned down by the authorities.

Indeed, the establishment of community-based advice offices is an important development in the history of legal services in South Africa. As pointed out in the brief overview of the English legal aid system, a primary reason for the success of the English Law Centres has been their ability to strike roots deep into the community.

(v) The LRC (Durban)

This office was opened in January 1982. The staff comprises 1 advocate, 3 attorneys, 2 law graduates in the fellowship programme, 1 clinic organizer and 5 administrative staff members.

On account of the legal hardships experienced by poor persons in rural areas the Durban LRC has acquired a combi type of vehicle to ferry staff, witnesses and clients to distant places. The mobile Clinic serves the rural areas along the Natal coast as well as some inland areas. Lawyers travel to particular rural areas on specified days in order to meet clients from such areas. Between visits contact with clients is maintained through a representative in each area who is willing to act as an intermediary between the LRC and the clients. This Clinic has dealt, inter alia, with complaints brought by rural Blacks against farmers in matters concerning ill-treatment and unlawful impoundment of stock.

The Durban LRC also handles other legal matters such as those related to housing and urban rights for Africans, labour and pension. Estimates are that 80 per cent of the persons entitled to pensions do not receive them. The LRC has therefore been particularly active in helping persons to enforce their pension rights.

Community education forms an important part of the Durban LRC's work. The Centre conducts seminars for para-legal personnel. To help the para-legals to enforce the rights of the poor extra-judicially, the Centre distributes law manuals in which the basis of the law and the relevant procedures are set out in simple form. These manuals address high-frequency legal problems, such as pension and influx control matters. The manuals appear to be bearing fruit for in most cases the clients receive their pension money without the matter first being taken to court.

The Durban LRC also intends to help local communities to set up their own para-legal advice offices. The para-legal advisors will be trained at the LRC and will be able to draw on its resources.

b The Black Sash Advice Offices

(i) History

The Black Sash (a women's movement) activity in the legal aid and legal advice dates back to 1957 with the founding of the Cape Association to Abolish Passes for African Women (CAPATAW).[41] This body was founded by the Black Sash Cape Western Region, in conjunction with the ANC Women's League, the Anglican Church Mothers' Union, the National Council of Women, the Cape Town branch of the Society of Friends, and the South African Federation of Women.[42] CAPATAW's aim was to pressurize the Government by protest and to provide legal aid to pass law victims and direct aid to their families.[43]

When the other CAPATAW members withdrew the Black Sash continued alone, and was later joined by the South African Institute of Race Relations and the Civil Rights League, the latter giving mainly financial support.[44]

As these initiatives were started at a time when the Government was advocating an intensification of its influx control laws, the official attitude towards legal aid to prisoners and to the accused was one characterized by 'keen disfavour'.[45] The Government accused CAPATAW and the Black Sash of inciting Black resentment of the pass laws. This

41 C Michelman The Black Sash of South Africa (1975) 104.
42 Ibid.
43 Ibid.
44 Ibid.
45 Ibid.

attitude negatively influenced potential private donors. But as some Black Sash women were themselves lawyers, or were married to lawyers, or had the sympathy of lawyers, they achieved some measure of benefit by way of pro-amico work.[44]

However, in 1958 the Black Sash received a £ 200 interest-free private loan to set up a Bail Fund for helping women arrested under the pass laws.[47] Thus the Bail Fund Office in Athlone (outside Cape Town) was established. It became of enormous benefit to the accused and their families.[48] It was primarily because of the flood of applications besieging the Bail Fund Office, that the Black Sash decided to introduce a country-wide service for the victims of the 'Pass' laws. Thus several Black Sash Advice Offices were established in major centres throughout South Africa.[49]

(ii) At Present

Today the Black Sash provides legal advice services at its offices in Johannesburg, Pretoria, Durban, Port Elizabeth, East London, Grahamstown and Cape Town. The latter is run jointly with the South African Institute of Race Relations. The Administrative Office is in Pietermaritzburg. The daily administration rests with a management committee of 5 persons, a representative from the South African Institute of Race Relations, and another person in a purely advisory capacity.[50]

The Advice Offices are financed by the Black Sash and are run by voluntary workers.

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46 Ibid 105.
47 Ibid.
48 Ibid.
49 Ibid.
50 (1982) 25 The Black Sash Magazine 21.

(iii) Work Done

All Advice Offices deal mainly with influx control problems; but also with the myriad legal and social problems arising from the implementation of the some 800 laws and regulations effecting only the African population. The Athlone Advice Office has been actively involved in arranging for the legal assistance of hundreds of persons forcibly evicted from their homes.[51] The Pretoria Office is actively trying to help the indigent, denationalized residents of Winterveld to assert their claims against state departments.[52] With Black labourers becoming conscious of their workers' rights Advice Offices are being increasingly besieged by requests for help to assert these rights. For example, of the 230 cases handled by the East London Office in 1982, 60 per cent concerned labour and labour related problems.[53] In Natal, of the 1036 matters dealt with by the Advice Office in 1982 roughly 30 per cent were labour and labour related problems.

Besides the multi-faceted influx-control and labour problems, Advice Offices deal routinely with problems related to hire-purchase contracts, housing, widows compensation,maintenance. Black Sash counsellors have, through everyday experience, acquired enormous expertise in handling the problems brought to them. The legal aspects of their work involve counselling, writing letters or telephoning on behalf of the indigent persons, and explaining the content of documents to the illiterate. Each Advice office has one or more interpreters who aid the counsellor in interviewing

51 Ibid 6-7.

52 Information obtained from Mrs M J Harrop-Allin, Chairwoman of the Pretoria Black Sash and Director of the Pretoria Advice Office (letter dated 23 April 1983).

53 1982 Annual Report of the Black Sash Advice Office - East London.

the clients and who explain the nature of the problem for which aid is sought. Interpreters have to ensure that the client understands the counsellor's recommendation, directions and advice.

Should further legal assistance be necessary the client is referred with a letter to either the Legal Aid Board, or to one of the attorneys who voluntarily assist Black Sash clients, or contact is made with either Legal Resources Centre or the Centre for Applied Legal Studies. The landmark Komani case was first taken up and financed by the Athlone Advice Office until it ran short of funds. The case was then taken up by the LRC in Johannesburg, and because the client won the Advice Office recovered its R 2500 deposit and the LRC's costs.[54] The Black Sash Offices also refer a significant number of cases to attorneys who are members of the recently established Lawyers for Human Rights. The lawyers assist on a pro-amico basis.

Because of the increasing number of criminal laws being enacted by the South African legislature Black Sash counsellors continually consult their lawyers to ensure that their work is still within the law. The Government has time and again threatened to close down the offices. The Black Sash, however, continues to speak out against social injustice. Sheena Duncan, for example, the Director of the Johannesburg Advice office, which between February 1982 - January 1983 handled 12 432 cases[55] is known for her outspoken criticism of the Apartheid order.

c The Johannesburg Legal Aid Bureau

The Johannesburg Legal Aid Bureau is the oldest legal advice office in South Africa. Its origins and history are

54 Information received from Mrs Noël Robb, Director of the Athlone Advice Office (letter dated June 1982).

55 Annual Report of the Johannesburg Advice Office for the period February 1982 - January 1983 8.

fully described in the historical part of this work. The Bureau has been able to hold its own despite earlier political pressure from the Government and despite its perennial financial hardship.[56]

(i) Finance

Today the Bureau still battles for funds. It depends mainly on charitable grants from the Johannesburg City Council, the Johannesburg Bar, business concerns and on donations or requests from private persons. But what it receives is just enough to keep it from closing down. Street collections were dropped many years back because the public thought the collection was for impoverished lawyers and nobody believed there were any.

(ii) Staff

The Bureau, which is housed in a shopping complex in the heart of the city, has a staff of 5 persons: a Director, a co-Director, 2 interviewing clerks and a typist. The Director, Pauline Lipson, has been the Bureau's backbone for more than 30 years. Despite the urgent need the staff remains small, solely because of the shortage of funds. The staff receives a nominal salary the payment of which is often postponed because of the Bureau's financial hardships.

(iii) The Bureau's Work

The waiting room fills up with clients as soon as its doors open at 8h00. Whereas in the 1940s, 1950s and 1960s a sizable number of Whites sought the Bureau's aid, today about 95 per cent of the clientele are Blacks, mainly Afrikans. A means test, roughly the same as that of the State legal aid, is used. However, exceptions are made in deserving cases.

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56 Unless otherwise indicated, the information here is based on my personal observation of the Bureau at work and a brief interview I had with the Director in February 1981.

The legal problems dealt with range from motor vehicle insurance claims, hire-purchase agreements, wage disputes, unemployment insurance claims, divorce and maintenance matters, deceased estates, race classification to criminal appeals. The bulk of the problems are dealt with by the Director, who has a legal background.

The assistance rendered varies from counselling, explaining documents, writing letters or making telephone calls on behalf of the client, negotiating settlements, interceding with administration officials, to litigation. Where litigation is necessary, the client is referred with a letter to either the State Legal Aid Office or to one of the local lawyers who do pro-amico work on a roster basis for the Bureau's clients. According to the Director some 60 per cent of the clients are helped. The Bureau's statistics show that between 1971 and 1980, 75 per cent of the 527 accused who were defended on behalf of the Bureau were found not guilty or had the charges against them withdrawn.[57]

For the year 1981-1982 the Bureau's staff conducted 14 039 interviews - an average o 1170 per month. Attorneys acted in 439 civil cases and counsel was appointed to act in 236 matters.[58]

d Lynwood Ridge Advice Centre (situated in Pretoria)[59]

This Advice Centre was opened by a group of volunteers in March 1981. It is situated along the main bus route from the city centre to the African township, Mamelodi. The Advice Centre is housed in a church building, in a room donated to it for the purpose.

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57 McQuoid-Mason op cit 132.

58 The Star 9 September 1982.

59 Information was given to me by Mrs Van Rooyen, Director of the Centre, during my visit to the Centre in March 1981.

The Centre is manned by 3 persons, one of whom is the Director. It is open on Tuesdays and Thursdays between 09h00 - 12h00.

An average of 5 interviews are conducted per day. The clientele is mainly African and the problems brought to the Centre involve influx control, unemployment benefits and workmen's compensation matters.

e The Centre for Applied Legal Studies (situated in the University of the Witwatersrand, Johannesburg)[60]

The Centre for Applied Legal Studies (hereinafter referred to as CALS) was established in July 1978. The CALS engages in research, public education and litigation in the fields of civil rights, labour law and laws affecting the Black population of South Africa. The core of CALS' work consists in promoting equal justice and in activating co-operation amongst lawyers who are dedicated to the Human Rights' cause.

(i) Organization

CALS has a staff of 10 comprising a Director, an Assistant Director, 4 Research officers, a Research Assistant, 2 Administrative Secretaries and a Labour Law Trainee. CALS is accountable to a 19-member Control Board consisting of prominent civil rights lawyers, senior academic staff from the University's law faculty, a Deputy Vice-Chancellor of the University who is also Chairman of the Control Board; and popular public leaders from the Johannesburg Black community.

CALS is funded by three American foundations and by the University of the Witwatersrand which also accommodates it.

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60 Unless otherwise indicated source information is (a) based on my experience as a Research Officer at the Centre for Applied Legal Studies from August 1980 to March 1981 and (b) taken from the first five Annual Reports of the Centre for Applied Legal Studies, for the period September 1978 - September 1979 to September 1982 - September 1983.

(ii) Its Work

CALS pursues its goals by means of a multi-faceted activity programme which comprises academic teaching and publication, empirical research and documentation, supervision of student projects in fields tangental to CALS' work, *public lectures, seminars and teach-ins,* comments in the public media, and legal advice to and litigation on behalf of individual persons and public interest groups. The Director, Assistant Director and the Research Officers are all qualified legal practitioners. In addition, CALS acts as the national secretariat for the recently *formed* civil rights organization, Lawyers for Human Rights (LHR).

[illegible]nge of activity makes CALS a reliable social-hearin[illegible] and a touchstone of contemporary socio-pol[illegible]cal currents in South Africa. *This enables CALS' staff t* make informed representations to governmental commissions of inquiry whose reports could result in laws which have wide socio-political implications for the underprivileged Black population. Also, because of the topicality of CALS' work, its Director, Professor John Dugard, a long time campaigner for justice and for equality before the law, is frequently invited *by overseas' universities* and civil rights organizations to participate in public forums on civil rights issues. In turn, this has helped to broaden support amongst influential persons and organizations abroad for the pursuit of justice and equality before the law in South Africa.

(iii) The Accents of CALS' Work

To avoid spreading its resources thinly over a wide field, CALS has developed a carefully-chosen catalogue of priority projects. These are:

(a) The Monitoring of Racially Discriminatory Laws;

(b) Research into the Implementation of the Security Laws;

(c) Labour Law; and

(d) Freedom of Expression.

These areas have been chosen for their enormous socio-political radial or catalytic capacity. But since one can impossibly describe fully CALS' activity in these areas - for the sheer extensiveness of it - the discussion below will limit itself to teasing those strands of CALS' work which are of immediate consequence to the theme at hand, which is legal aid.

(iv) Legal Aid and Advice to the Poor

CALS' concern for the rights of the poor arises from its very aim, which is, to promote justice and equality before the law. The Director, for example, helped to raise funds for the Legal Resources Centre in both South Africa and overseas. CALS has also invited prominent American public interest lawyers to visit South Africa and to address meetings on the subjects of public interest law and race and law. Within the scope of their work the CALS staff give legal assistance to the poor in a number of ways.

(a) Broad Spectrum Prophylactic Legal Advice

The CALS' labour law unit has developed enormous expertise in the sphere of industrial relations. Two of its regular publications deserve mention here. One is the Complete Guide to Wage Regulating Measures.[61] This work, which provides a ready means for ascertaining individual wage determinations, is widely used by legal aid clinics, legal advice *bureaux, labour lawyers and by workers' complaints bureaux.* The other is the Health and Safety Series, which is published in booklet form jointly with the Federation of South African Trade Unions (FOSATU). These serialized booklets alert workers to the specific hazards to which they are exposed in the work environment. Trade unions and individual labourers are thus able to make informed demands on employers to safeguard their health on the shop floor. The first two

61 Compiled and edited by Hanson Cheadle and Louise Silver.

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series, the one dealing with foundries, solvents and asbestos, and the other, with cotton dust and the danger of contacting 'brown lung' disease, found wide echo amongst unionists and in the press.[62] These booklets are written in simple, understandable language. Forthcoming booklets in this series will deal with the Workmen's Compensation Act, the Factories Act, and with how to prepare litigation in a health-and-safety case.

As seen above, statistics show that a large number of indigent persons who seek the help of legal advice clinics or bureaux are persons who have either been short-changed by their employers, who are ignorant of their rights, or whose poverty prevents them from enforcing their rights. The CALS publications thus fulfil the important function of educating the poor as to their rights and how to enforce them, and more importantly, how to guard against their infringement.

Besides publishing, the labour law unit runs three day intensive courses for shop stewards. These courses focus on complaints handling and comprise grievance procedures, dismissal procedures, the Factories Act, work conditions, and other aspects of the law relevant to the worker. The labour unit has also prepared simple material on labour law for the literacy magazine Learn and Teach.

(b) Legal Aid in Labour Matters

CALS' labour law unit has in many ways also become a walk-in clinic for workers seeking legal advice on a variety of matters, such as unfair dismissal, withdrawal of pension contributions, the closed shop, migrant labour contracts, the racially discriminatory provisions in the Mines and Works Act and problems relating to the registration of a trade union.

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62 See Rand Daily Mail 26 October 1982.

Members of the CALS staff give legal assistance to trade unions. They assist in the drafting of recognition agreements between unions and employers. They have also assisted in the formulation of multiplant and industry-wide agreements. As lawyers in private practice are either unable or unwilling to intervene on behalf of workers during industrial emergencies, trade unions frequently request CALS to represent them during strikes. In a number of matters heard by the Industrial Court, CALS has been able to secure favourable judgements and settlements for various trade unions. One such case Metal and Allied Workers Union v Stobar[63] established the precedent that no employee may be dismissed without the employer first holding an inquiry in order to grant the employee an opportunity to be heard in the matter.

(c) Legal Aid in Group Areas Matters

Since its inception CALS has been the main driving force behind a number of appellate actions brought by Black persons who were convicted in the magistrates' courts under the *Group Areas Act*. As pointed out in a preceding chapter, through persevering advocacy considerable legal relief has been obtained for the victims of the Group Areas Act. The Director of CALS, together with a large number of private legal practitioners in Johannesburg, continues to render pro-amico legal aid in the Group Areas cases. CALS also provides a continuous pro-amico legal advice service to the Action to Stop Evictions - the body which represents the interests of those persons affected by the Group Areas Act.

(d) Legal Aid in the 'Pass' Courts

Members of the CALS staff are on the list of lawyers who render pro-amico legal assistance to Africans who are arrested under the influx-control laws. A member of the CALS

63 Judgement reported in (1983) 1 Industrial Law Journal 85.

staff, Mr Ramarumo Monama, frequently appears for the accused in the Johannesburg Commissioners' courts at the request of the Black Sash.

(e) Legal Aid in Administrative Proceedings
Appeals to the Publication Controls Board

The provision of legal aid in censorship matters is a major component of CALS' freedom of expression programme. CALS intensive activity in this field grows out of one of its basic aims which is to campaign actively for the application of fundamental rights as a norm. Indeed, the right to freedom of expression and its corollary, the right to be informed, are indispensable elements of a democratic political order. For example, the West German Basic Law lays down unequivocally in article 5(1): 'Eine Zensur findet nicht statt.' (There is no censorship.)

In line with its reformist approach to censorship CALS gives legal advice to student editors, publishers and film makers in matters relating to banned material. To secure the unbanning of important publications members of the CALS staff represent the affected publishers, editors or film makers before the Publications Appeal Board. Most of the publications and films deal with a theme relating to race or State security. Other appeals deal with potentially popular works which are banned on the grounds of obscenity.

In the past years CALS has secured the unbanning of many publications. Amongst these are the works of popular authors such as Ezekiel Mphahlele (The Wanderers), Cyprian Ekwensi (Jagua Nana), Ayi Kwei Armah (Two Thousand Seasons and Why Are We So Blest), Christopher Hope (A Separate Development), Sipho Sepamla (A Ride on the Whirlwind), Wessel Ebersohn (Store up the Anger and Divide the Night), Ferdinand Oyono (Houseboy), Tom Sharp (Riotous Assembly), Harry Bloom (Episode), Sylvester Stein (Second Class Taxi) and Nkem Nwankwo (My Mercedes is Bigger than Yours). CALS also helped to secure the release of the films The Grass is Singing which

is based on the novel by Doris Lessing, City Lovers and Country Lovers both of which are based on short stories by Nadine Gordimer. In addition, CALS has secured the unbanning of several student publications, news magazines, literary journals, black-township newspapers and academic works of a political nature.

The most important development arising out of CALS' legal activities in the field of censorship has been, in the words of Professor Dugard, 'the emergence of a more enlightened jurisprudence on the part of the Publications Appeal Board in respect of publications and films with a racial or political theme'.

This demonstrates the importance of legal aid in administrative proceedings.

(f) Miscellaneous Legal Aid Work

Where possible CALS also gives legal assistance to prisoners in matters concerning the conditions of imprisonment and the regularity of the criminal proceedings in which they were convicted. Complaints are taken up with the authorities. In addition, CALS also applies for parole on behalf of prisoners and arranges for legal representation for prisoners in prosecutions, bail applications and in actions against the prison authorities.

Legal assistance is also given in the following human rights issues: bail applications for persons convicted under the Internal Security Act; representation against prosecutions under the Immorality Act; defence to charges of violation of banning orders; actions against the Minister of Law and Order for damages arising out of assaults committed by the police and defences to charges of possession of undesirable publications.

CALS has continually shown concern for the neglected rights of rural Africans. To this end it has compiled a booklet for use by para-legal personnel attached to rural organizations. The Director, who is also a specialist in Public International law, periodically counsels individuals and bodies on the legal problems arising from the Government's homeland policies.

4 Evaluation of Extra-Judicial Legal Aid Services

A striking feature emerging from the panorama of the legal advice services surveyed above, is the rapid increase in the growth of the services over the past decade. Whereas in 1970 there were only 6 legal advice agencies for the poor in the whole of South Africa, today their number has risen to approximately 40 - if one includes the various branches of the University Legal Aid Clinics. Diverse factors have contributed to this growth in counselling services. Law students might regard the enactment of the Legal Aid Act in 1969 and the Legal Aid Conference in 1973 as primary factors. Social activists might look to the stepped-up legal disentitlement of the Black population by the legislature. Those close to the labour movement might see the expanding network of advice services as the inevitable by-product of a growing rights-consciousness amongst Black workers. Protagonists of the Black Consciousness idea might see all these advice bureaux as a concerted effort amongst Establishment-minded liberals to deflate the political clout which the legally disgruntled masses are capable of engendering.

One thing is clear: the growing constellation of legal advice agencies testifies of both a continuing need to make the law accessible to the underprivileged, and a growing public concern on how to meet this need.

The legal advice services outlined above have undoubtedly been an important propellant of the legal aid movement in South Africa. They have enabled a sizable number of persons to benefit from the State legal aid scheme. At the grass-roots level they are contributing towards spreading the word amongst the underprivileged about the existence of legal aid and how to go about obtaining it. By writing letters for clients, making telephone calls for them and by working towards amicable settlements of disputes, the legal advice agencies are contributing in their own way towards diffusing social tension. The preventive law campaign which is conducted by some Clinics and the community education projects mounted by the LRC and CALS are a notable contribution towards insulating the poor against exploitation. Beyond these achievements the Clinics have provided the main impulses for a new orientation in legal education. White students who are brought up in an exclusively White milieu have the opportunity to acquaint themselves for the first time with the day-to-day problems of the Black community. In turn, students are now beginning to question the traditional rigid and formal content of legal education and the role of the law school in an Apartheid society. The introduction of the Practical Legal Studies course at some universities and the emerging trend towards giving academic credit for work performed in the Clinic, reflects a serious effort in the direction towards making legal education more relevant for the future lawyer and for society generally. This is a welcome development.

For all their strengths and benefits, the existing legal advice agencies have very real limitations. First, they serve only a tiny section of the population. The Clinics, for example, exist only in university towns and at that, mainly in the Coloured townships. The Government appears to be against the idea of White students running Clinics in African

townships. This is evidenced by its refusal to allow the University of Cape Town Legal Aid Clinic to open a branch in a local African township.

Second, only those Clinics which are attached to the large, established White universities appear to be functioning well. This is because White universities as opposed to the Black universities, have more funds and have a better developed extra-mural infrastructure from which the Clinics can be launched. White universities also have larger law faculties, both staff- and studentwise. Furthermore, White students are less dependent on public transport than Black students - an important factor considering the poor transport facilities to outlying townships. As seen in the case of the Universities of the North, Fort Hare and Durban-Westville, the geographic isolation of the Black universities is another factor which seriously impairs the operation of the Clinics. The political climate on the Black campuses is yet another factor affecting the livelihood of the Clinics there. The founding of the Legal Aid Clinics in the early 1970s coincided with the emergence of the Black Consciousnes movement on Black campuses. This movement emphasizes the need for Black people to go it alone and not to co-operate with bodies which give the illusion of accomplishing change but which in reality can achieve nothing. Legal Aid Clinics were seen as devices which grapple with the effects of the Apartheid order, rather than with the causes. Although over the past few years the Black Consciousness movement has relaxed its rigid stance in favour of a pragmatic alliance with serious-minded Whites, the go-it-alone approach still has considerable support among Black students.

This sceptical attitude is understandable, especially if one considers how many times in the past Blacks have been deluded by bodies which appeared to be working in their

interests but which, in effect, were undermining their main political aspiration. But this attitude overlooks the potential educative impact of legal advice services for the poor. By informing the ignorant of their rights and how to assert them, legal advice agencies arm the poor with a rights consciousness which, in turn, can be mobilized to press for concrete political reform.

The third factor which limits the effectiveness of the existing legal advice services, especially those of the Clinics, is the extent of co-operation received from lawyers. While some Clinics can boast an enthusiastic participation by local lawyers, others, like the Stellenbosch Clinics for example, are finding it hard to enlist active lawyer support. This variability reflects the practising legal profession's 'neither-fish-nor-flesh' attitude to the Clinics. The support appears to be more vocal than real. While on the one hand an editorial in the attorneys' journal De Rebus has hailed the Clinics' socio-educational value[64], on the other hand, the attorneys' Fidelity Fund has withdrawn its financial support for them.

The reason for the practising profession's equivocal support is that lawyers are not paid for their services in the Clinics. Of the 60 attorneys and advocates who returned questionnaires only two (3,33 per cent) indicated that they participated voluntarily in legal counselling services for the poor. Both are senior advocates in Johannesburg. All attorneys from the Vaal Triangle attributed their non-participation to the lack of advice facilities in their area. The Johannesburg lawyers attributed their non-participation to the fact that they were not approached to take part in such services and to the fact that they have heavy case loads. Altogether 14 (23,33 per cent) said they were not prepared to

64 Editorial (1976) De Rebus Procuratoriis 108.

work for charity. Except for 5 (8,33 per cent) none of the respondents was prepared to participate in counselling services free of charge. All, however, said that they would be willing to participate in a State-subsidized legal counsel service. The number of hours each would be prepared to spend per week, varied from 1 to 16. Some said this would depend on the renumeration, the circumstances, and the extent of their office commitments.

These replies point unmistakably of the need for the State to remunerate private practitioners for their extra-judicial counselling services for the poor. If the State recognizes the need to reward lawyers for judicial legal aid work, there is no reason why it should not reward them for extra-judicial work. After all, the two go together. The Guide itself states that legal aid includes advice.[65] The trouble is that under the present state legal aid scheme, the advice part falls very short. It is time that the Board recognized this deficiency and the role the existing legal advice agencies are playing to combat it. More than that, there is a need for the Board to give substantial financial support towards the expansion of the now established legal advice agencies.

A major priority should be to spread the legal advice network to the rural areas, where the poor are exploited mercilessly. Except for the rural poor living along parts of the Natal Coast, who benefit from the mobile Clinic run by the Durban LRC, the rest of the country's indigent rural population has no effective access to the law. Presently, it seems that the only realistic means of meeting the legal needs of the rural indigent is by way of para-legal personnel. The Board should consult with the LRC and CALS, both of which are already working on legal education projects for rural

65 Para 1.1 (g).

people, with the aim of drawing a common syllabus for the teaching of para-legal personnel by the various universities. The course could last over say, an 18-month period, 12 of which are devoted to theory and 6 to practicals. The theoretical part could focus on the legal aid scheme and on high-frequency legal problems normally encountered by underprivileged groups. The practical part could consist of participation in an urban legal advice office.

The para-legals, who should be employed by the Board, could be stationed at rural growth points around the country.

a The Need to Find a Supplementary Legal Services Delivery Model

The Vaal Triangle survey showed that for the underprivileged access to lawyers is obstructed by a number of factors: poverty, ignorance, feelings of helplessness, social prejudice, fear, and political isolation. Also, problems congenital to Africans in particular, are not usually dealt with by lawyers but by administration officials who are themselves the cause of the grievence. In the criminal justice process, too, access to legal representation for the large number of indigent accused is in most cases obstructed by a top-heavy bureaucracy and a widespread official indifference to accepted norms of procedural justice.

The problem of overcoming the barriers to the use of lawyers is, however, not unique to South Africa, though, one should add, the institutionalized racial discrimination in South Africa accentuates it. As seen earlier on, in West Germany, too, the underprivileged are not making adequate use of gratuitous legal counselling by lawyers under the new Legal Advice Act. Ignorance of the scheme, fear of ultimately landing in court and the social estrangement to lawyers are some of the reasons. The legislature's failure to anticipate

these handicaps, is to some extent and indictment of the general academic approach of neglecting the social milieu within which laws take their effect. At present, those who benefit from the legal advice scheme are primarily the unemployed academics, persons who have been alerted as to the existence of the scheme by lawyers who have set up their offices in poor neighbourhoods and persons who are affiliated to socially active organizations which, too, operate mainly from poor neighbourhoods.

The idea of easing access to the law for the poor by setting up legal aid services in their immediate neighbourhood, first took root in the United States. In 1965 publically funded neighbourhood law firms were started there. The neighbourhood law firm idea centres around three basic ideals. First, by bringing the law within their reach, poor persons will be able to enforce their rights. Second, poor neighbourhood lawyers are uniquely situated to learn the problems of the poor and to counterbalance organized commercial and governmental interests by using test cases which in turn can result in legislative reform which improves the position of the poor as a class. Third, neighbourhood lawyers can help organized interest groups to develop a rights consciousness and a political identity. As it is put, 'to help the poor, You must organize them to give them political power'.[66]

Over the past 17 years pub ic funded, decentralized offices based on the neighbourhood law firm model have emerged in Norway, Great Britain, the Netherlands, Canada, Australia, and more recently in Belgium and France.[67]

None of the existing legal aid models in South Africa fits the classical neighbourhood law firm concept. Though the University Legal Aid Clinics are situated in poor neighbourhoods,

66 Garth op cit 143.
67 Ibid 132.

they are structurally tied to the judicare or referral system. In practice, the Clinics and the other legal advice agencies depend on the voluntary co-operation of the private Bar. There are two limitations inherent in the system. First, the extent to which each advice agency can rely on the services of lawyers depends on what commitments lawyers have to their own private, fee-paying clients. As seen above, economic interests are a factor affecting lawyer co-operation. Second, where litigation is necessary the extent of assistance given the indigent ultimately depends on whether or not State legal aid is available for the matter. As seen earlier, many legal problems affecting the poor, particularly the Africans, are excluded from the ambit of the State legal aid scheme.

The LRC and CALS on the other hand, though not situated in poor neighbourhoods and though they are privately funded, project a neighbourhood law firm profile. They both have their own staff of lawyers and both litigate test cases of socio-political relevance to the poor as a class. Private funding could be regarded as an advantage, particularly when seen against the fundamental Government policies which the LRC and CALS attack in court. On the other hand, private funding could also be regarded as their weakness, at least when measured against the Nationalist Government's traditional attitude to privately funded legal aid organizations. In the past the Government has not hesitated to cut off the supply of private funds used to challenge the legitimacy of Executive actions in court. This has been the experience with the Defence and Aid Fund and now, looming large, the potential fate of the Dependants' Conference.

These are perhaps the main weaknesses or inherent obstacles affecting the legal services delivery models operating in South Africa. That there is a pressing need to bring legal services closer to the home of the poor is reflected by the mounting requests being made to the LRC by representatives

from several Black townships around Johannesburg to assist them to establish legal advice bureaux in their respective townships.

These initiatives should be taken seriously. One could regard them as the rudiments of a movement towards the establishment of neighbourhood law firms in South Africa. Similar initiatives are bound to take root in other major South African cities. At present, these legal advice bureaux are manned by para-legal personnel trained by the LRC which also provides the necessary back-up service. This appears to be the most realistic assistance the bureaux can obtain at the moment. It seems unlikely, however, that the LRC, given its own stretched resources, will be able to sustain its auxiliary service indefinitely; particularly when the public's demands on the bureaux increase.

What these bureaux presently need, is active material support of the Legal Aid Board. It is submitted that the Board should assume a substantial part of their running costs and that it should seriously consider employing salaried lawyers to man these bureaux on a full-time basis. This would not replace the present judicare legal aid; it would supplement it in much the same way as the LRC is doing right now. In fact, in no other country have neighbourhood law firms which are publicly funded ousted the judicare system. 'Lawyers are a very strong interest group, and recent history shows that the preservation of judicare income is an issue capable of mobilizing the full power of the profession.'[68] There are good reasons to combine the present judicare system with the publicly funded neighbourhood law offices. First, neighbourhood law firms provide access to the law for underprivileged persons who for various reasons cannot make effective use of the judicare system. Second, lawyers are given a chance to develop

68 Garth op cit 137.

professional expertise in handling the legal problems peculiar to the poor - problems with which the private Bar has little experience. Third, if the client is not happy with the assistance afforded by the publicly funded lawyers, he can go to a private lawyer by way of judicare. Fourth, the standards in the delivery of legal services are improved.

25 CONCLUSION

This work has sought to compare the legal aid systems of two countries which differ fundamentally in their political systems, legal cultures and in their social structures. In a sense one could speak of this as being a 'contrastive' rather than a 'comparative' study. Yet, for all their differences both South Africa and the Federal Republic of Germany have, like all other countries, one thing in common: a need to make the courts and other machinery of justice accessible to the underprivileged. Indeed, this has become one of the most pressing needs of our times. Central to this study, however, has been this concern: How has each of these two countries responded to this need?

All the approaches having been discussed, the first conclusion that emerges pertains to the broad concept of equality before the law. In West Germany, the State has, since the enactment of the Basic Law, systematically sought to give concrete meaning to the guiding principles of a social state based on the Rule of Law. Legal aid and legal advice facilities for the poor are meant to give tangible effect to these principles. Our discussion of the German legal aid system has shown that it has both strengths and shortcomings, both of which must be taken into account when dealing with the reform of legal aid in South Africa. What can be learned from the German system?

An exemplary feature of the German scheme is that legal aid is offered across the legal landscape. The legal aid provisions in the Code of Civil Procedure are not glossed with catalogues of cases which fall outside the ambit of legal aid. German lawyers, therefore, do not have to waste time requesting the legal aid authorities to

make exceptions in certain cases. One simply applies for legal aid and one will obtain it if one meets the test. Also, the German legal aid scheme does not discriminate against the person of the applicant as is done in South Africa where the applicant must also fulfil certain moral requirements. Furthermore, the German scheme does not discriminate on the basis of nationality as the South African scheme does. In this regard the constitutional tenet that everybody shall be equal before the law is applied as a norm. The means test, too, is designed to ensure that legal aid is not only available to the impoverished but to a wide segment of the middle class.

All these features of the German system are in keeping with the spirit of legal aid. They should be incorporated into the South African legal aid practice. The South African Legal Aid Guide has far too negative a tone. From a psychological point of view this operates as a real barrier to a wider use of the scheme. South Africa could also learn from the practice of German courts of including an application form for legal aid and an explanatory note on legal aid in all civil summonses issued. This practice ensures that the person is not only informed about the availability of legal aid, but that he is also spared the trouble of obtaining the application form himself. More than this, legal aid is thus made part and parcel of the practical civil procedure culture.

Perhaps the most admirable feature of the German criminal procedure ethic is the principle of mandatory legal representation. Leaving aside all the imperfections inherent in the practical implementation of this principle one has to grant that the motive underlying this principle is noble. The idea is that the accused must be afforded an opportunity to make effective use of his defence rights. It is often said that a right without the means to assert

it is worthless. In this regard *German law not only af-* fords a right to counsel but prescribes that certain trials shall not take place where the accused is not legally represented. In South Africa on the other hand hundreds of thousands of persons are put on trial without legal representation. A large number of them are convicted and sentenced simply because they were unable to make use of their defence rights. For Black persons in particular a prison sentence can result in extremely harsh economic and political side effects which affect not only the person himself but the entire family. There is therefore a pressing need to ensure that in such cases the accused shall be represented. This would go a long way towards eliminating the injustices that take place in the Commissioners' 'pass' courts.

We have seen that German law makes wide provision for the protection of the individual against administrative excesses. Legal aid is available not only to the aggrieved party but also to the party in interest. There are data protection commissioners who protect the privacy of the individual against unwarranted encroachment by Government agencies. The Parliamentary Commissioner for Military *Affairs ensures that the constitutional rights of the* citizen in uniform are not trampled underfoot and that the army remains a democratic citizens' army. In South Africa more and more discretionary powers, which are not subject to judicial review, are being vested with administrative organs, particularly those charged with the administration of matters relating to the poorest and largest population group. The need for legal protection here and for legal aid especially, cannot be overemphasized.

What should be done in South Africa that has not been adequately done in Germany? Most importantly, there is a need to politicize the whole issue of access to justice for the poor. Legal aid should serve as a major rallying

point for radical ideas on how to effect real structural change in society through the legal process. What is needed is a strong legal aid movement as the Dutch have it; a movement with a high degree of genuine commitment and innovativeness. We have seen that in Germany the legal profession, unfortunately, takes a very narrow view of legal aid. The clients of the legal aid scheme are seen mainly as impecunious persons. Other concomitant social deficits which impair access to the law and to legal aid are ignored. Legal aid is organized rigidly along judicare lines. No attempts are made to relate legal advice facilities to the social milieu in which the potential clients of the system find themselves. The profession is intolerant of social initiatives which are designed to help the poor to assert their rights. The Misuse of Legal Advice Act, which was originally enacted as a discriminatory measure against Jewish lawyers in the Nazi era, is presently used to suppress activities of legally unqualified persons in the sphere of legal advice for the poor. Yet the law schools, which are not involved in legal aid work, are doing very little by way of equipping lawyers to deal with the problems of the poor. As we have seen, the legal needs of the minority groups are not being met. The law schools continue to equip the future lawyer for a career in the public service despite the fact that only a few law graduates today are able to find employment in the public service.

Legal aid cannot thrive in such a conservative legal environment. There is too little social input. The trouble is that empirical socio-legal research is not accorded the importance it deserves. There is also a basic unwillingness to make experiments. The German legal profession has also displayed considerable reluctance to learn from the experiences gleaned from legal aid experimental projects abroad. It is therefore not surprising that reform of legal

aid in Germany has been largely reduced to technicalities. And, as we have seen, the legal aid scheme has far from realized its potential which is vast.

These are *the faults that South Africa would do* well to avoid or to remedy.

In South Africa, on the other hand, the principle of equality before the law in its broad sense is not applied as a norm. The legalized racial inequality militates both theoretically and in practice against the effective realization of equality before the law. This, however, should *not discourage us from pressing firmly* for a democratic right for equal participation in the legal process. As Zemans puts it:

> Like Onate, we recognize the barriers to a more democratic legal system, and we realistically assess the possibility for chan[illegible]herent in litigation. We are nevertheless u[illegible]d to abandon the movement for access becau[illegible]e obstacles. The presence of such impediment[illegible]d rather *justify more ambitious* access in [illegible]ives which will make the movement for legal services more politically sophisticated and viable. There appears to be no merit in the argument that access is an unworthy objective merely because there are substantive as well as procedural inequities in the legal system. Either out of *supreme optimism, political naivete*, partisan rhetoric, or sound reasoning, some form of model of legal services for the underprivileged can be rationalized. The greater difficulty for the analyst of legal services lies in articulating what the character and the form of these services should be.[1]

Zemans' exhortations are of a special relevance to South African lawyers, legal academics, judges and magistrates and to all those who *deal directly with a legal system in which* race and poverty are major variables influencing the quality of justice meted out to citizens. This work has not only been concerned with identifying more clearly the barriers which prevent the socially weak from obtaining justice, but more importantly, it has attempted to explore the potential for

1 Op cit 382-383.

a reform of the South African legal aid system. Taking it all in all one may conclude with the following submissions:

1 The Legal Aid Board needs to undergo a radical change of attitude. Its present image is that of a conservative body which is incapable of inspiring the confidence of the public. The Board must devlop a new social image; it must begin to appreciate its crucial social role which is to pursue vigorously the attainment of social justice. As to the personal qualities of the Chairman: what is needed is someone who is truly committed to the legal aid idea; someone with an independent and an open mind and a positive vision on human rights; someone who is sensitive to the legal problems of the poor and who can champion their cause forcefully and persuasively - in short, someone who can boost legal aid.

2 The discretionary powers vested with the Minister of Justice with regard to the appointment and dismissal of representatives of the legal profession serving on the Board, should be abolished. This provision is discriminatory and undermines the bargaining power of the profession's representatives on the Board. More importantly there is an urgent need to expand the representation of the legal profession and of the ordinary public on the Board. The present preponderance of State interests on the Board undermines the Board's independence and consequently the public's confidence in it.

3 The present per capita expenditure on legal aid is niggardly, especially when one compares the amounts spent on legal aid in Europe, Canada and the United States - countries with which the South African Government proclaims to share a common set of values. The Legal Aid Board itself does not appear to be doing enough to convince Parliament of the need for a substantial increase in legal aid funding. The Board's annual reports - the basis upon which parliamentary financial appropriations for legal aid are

ploratory and must set visions - in short they must inspire.

4 A major observation emerging from this study is the widespread public ignorance about legal aid. This operates as a serious access barrier. There is an urgent need for the Legal Aid Board to mount a massive and a continuous publicity campaign. The campaign must not only be conducted through the medium of official bodies which have coincidental contact with the poor, but it must be aimed directly at the poor. The Board must make more imaginative use of radio and television to spread word about the existence of legal aid. More than that, there is a need to conduct the publicity campaign in primary schools and secondary schools.

5 The present financial eligibility criteria must be abolished and replaced by a contribution-free legal aid for persons earning up to a certain amount. Those earning above the cut-off level should be granted legal aid subject to a personal contribution fixed on a sliding scale basis and payable over a fixed period. The size of the contribution could vary between 5 per cent and 20 per cent of the net income of the person, allowance being made for tax, insurance and other necessary liabilities.

Eligibility for legal aid must not be based on residence. The present residence requirement is highly discriminatory as it is designed to exclude a major section of the African population from the legal aid scheme.

6 Furthermore, there is a need to consider the granting of legal aid to juristic persons where neither the juristic persons itself nor the parties in interest can raise the funds for the legal action and where failure to bring or to defend an action would be contrary to the public interest.

The present provision which disqualifies a person from obtaining legal aid if the legal officer is satisfied that the applicant is unemployed for no sound reasons or that he leads a criminal life, must be abolished. This provision is ill-conceived, discriminatory and contrary to the spirit of legal aid.

7 The restrictions pertaining to the granting of legal aid in criminal matters must be abolished. These restrictions are discriminatory and they undermine the fundamental nature of the right to counsel. Legal aid must be made available, subject to the other provisions of the Guide, to all persons facing a charge which carries a prison penalty.

8 The pro-Deo system must be abolished and replaced by legal aid.

9 The Legal Aid Board must employ private lawyers on a weekly or fortnightly basis to defend indigent persons charged with 'pass' offences before the Commissioners' courts. The lawyers should be paid on a salaried basis. Their participation, however, must be voluntary. It is important that they are seen by the accused to be independent. The lawyers could be assisted by para-legals employed by the Board and who are situated at the detention centres. Their duty would be to inform the arrested persons en masse of their procedural rights and of the availability of legal aid for those who cannot afford to retain a lawyer privately. Second, they could help the indigent accused apply for legal aid, collect all personal data of the accused including all the facts surrounding the arrest - in short all information which could help the lawyer in his application for bail, or in his defence, or in his plea for mitigation. The urgent and widespread need for legal aid in 'pass' trials should not, however,

derogate from the more compelling need to abolish the entire pass system as well as all other *discriminatory* laws whose social effects do more harm to the fabric of society than legal aid can make good.

10 The Criminal Procedure Act should oblige police, warders, prosecutors, magistrates, *Commissioners and judges* (a) to inform the accused or the convicted person about legal aid and how to go about obtaining it, and (b) to give the person concerned a real and effective chance of obtaining legal aid.

11 A striking feature emerging from the analysis of the South African legal aid system concerns the use of puritanical and moral criteria to exclude persons from legal aid. For example, in criminal proceedings legal aid is not available to persons charged *with murder. In* civil proceedings, too, legal aid is severely restricted in divorce cases and is, in principle, not available in bankruptcy proceedings and in actions for damages arising from infringement of dignity, seductions and adultery. This moralistic attitude to legal aid is incompatible with modern access to justice standards. As Zemans puts it: '*Criteria with moral overtones are* particularly vexatious in periods of economic restraint such as the present where we find legal services curtailed on the basis of selective value judgements.'[2] The civil matters which paragraph 13.1 of the Guide excludes form the ambit of the legal aid scheme must been narrowed as suggested.

12 Legal aid must be made available in all divorce proceedings except (a) where there is a reasonable possibility of reconciliation; (b) the applicant's problems can be solved by an administrative organ of the State or by other bodies, and (c) taking all the circumstances into account

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2 Op cit 385.

it does not appear to be a deserving case. Legal aid offices must be divested of the discretionary powers they presently enjoy with regard to the entertaining of an application for legal aid in divorce matters. The personal and social implications of marital problems are too fundamental to entrust to legal aid officers. Indeed, the general practice of legal aid officers looking into the merits of applicants' cases is unacceptable and contradicts the standard arrangement in terms of which legal aid offices are responsible only for applying the means test.

13 A person who is refused legal aid should be informed (a) of the reasons of the refusal, (b) his right to appeal to the Director and where applicable to the Chairman of the Board, (c) where he could obtain help to lodge and appeal. In urban areas, the unsuccessful applicant should be referred for help in this regard to a local legal advice agency. In rural areas, the applicant should be referred to a local lawyer who has agreed to be appointed by either the Legal Aid Board or the provincial Attorneys' Association to help unsuccessful applicants for legal aid lodge appeals to the Director.

14 Legal aid should be automatically granted to a person instituting an appellate action provided legal aid was granted to the same person for the same action in the court below.

15 The Legal Aid Board should reimburse part or all of the costs incurred by the legally unaided victorious opponent of the legal aid beneficiary.

16 The Legal Aid Board should, in appropriate cases, assume at least the transport expenses of the legal aid recipient. As to proceedings before administrative tribunals:

(a) Parliament should create a right to legal representation in all administrative proceedings. (b) The Legal Aid Board should abandon its equivocating stance for a positively affirmative policy which accords with the Board's overall aim which is, to make poverty an inconsequential factor in the pursuit of justice. There is a need for widespread legal aid in administrative *proceedings.* (c) Parliament should create the institution of the ombudsman, or ombudsman-like institutions such as the ones existing in West Germany. (d) Parliament should appoint a committee to look into the practices and procedures of *administrative tribunals with the aim* of making them inexpensive, accessible and simple.

17 A weakness of the judicare system applying in South *Africa and in West Germany,* as indeed elsewhere too, is its inherent inability to initiate a more radical social reform. This is because of the substantive limitations of the legal aid Guide and also because of the structural and psychological barriers *which prevent the* poor from taking their problems to the traditional private Bar. The Bar itself has been unable to develop expertise in dealing with the socio-legal problems which affect the poor as a class. The present emergence of citizens' advice bureaux represents a realistic attempt by lay people to bring the law within the social and geographic reach fo the poor. The State must support this development and must seriously consider complementing the para-legal staff with qualified attorneys who work on a fixed salaried basis. Such an arrangement would and should not supplant the existing judicare system but would complement it in various ways.

18 The present judicare scheme makes no effective provision for legal advice. There is an urgent need for the Board to expand the ambit of preventive, remedial and educational

legal advice for the poor. To this end the State must (a) give active material support to the existing legal advice agencies (b) remunerate lawyers who participate in legal advice schemes, and (c) finance the training of para-legals who should be stationed in rural communities. 'Training citizen advocates to represent their own community and to work within their particular areas of interest offers new potential and challenge to delivery of legal services.'[3]

19 Generally the problem of how to increase the reach of legal aid should become a major priority of the legal profession as a whole. Regrettably, until recently, South African legal scholarship has been weighted clearly in favour of refining the rules of the substantive law. Developing the substantive law is undoubtedly necessary; but is it not true that the growth and the refinement of the law would be effectively served by also criticizing and improving the procedural mechanisms by which the claims and the defences of rich and poor alike are brought to judicial forums for adjudication? It profits us little to have a highly sophisticated substantive law from whose benefit the major part of the population is excluded. Scholars in procedural law should continually search for ways to make the law accessible, inexpensive and less bureaucratic. The fervour with which scholars of the Roman-Dutch Law are seeking to adapt that legal system to new legal situations *should inspire* legal anthropologists, legal historians and legal sociologists to expand and adapt to our modern times the easily accessible, informal and inexpensive conflict-resolution procedures available under the African customary law.

20 There is a need for both judges and magistrates to concern themselves more earnestly than they have done with the problem of access to the courts for the poor. At the be-

3 Zemans op cit 409.

ginning of this century Lord De Villiers, one of South Africa's most eminent judges, said: 'It is the primary function of the court to protect the rights of individuals which may be *infringed, and it makes* no difference whether the individual occupies a palace or a hut.'[4] This principle must be extended to the dynamics of court procedure and it must be defended staunchly against encroachment by the legislature. The right to an opportunity to be heard and to effective justice are cornerstones of the Roman-Dutch and the *English common law heritage*. The menacing problem of court bureaucracy and delayed justice must be dealt with more concretely. Judges and magistrates can no longer afford to keep clear of these matters. Finally, this ought to be emphasized: When one helps the poor to materialize their rights one is *simultaneously educating* the public to respect the law and its institutions. More importantly, one educates the nation to think and to act justly - something South Africa can ill-afford not to have, neither now nor in the new society.

4 Zgili v McLeod (1904) 21 SC 150 at 152.

A QUESTIONNAIRE TO THE PUBLIC

PLEASE NOTE: In answering the questions, place an X in the appropriate empty box beside each question.

	under 29 years	between 30yrs and 39yrs	between 40yrs and 49yrs	between 50yrs and 59yrs	60yrs and over
~ Age:					

	female	male
~ Sex:		

	single	married	divorced
Status:			

Home language: _ _ _ _ _ _ _ _ _ _ _ _ _ _ _

~Occupation: _ _ _ _ _ _ _ _ _ _ _ _ _ _ _

~ Educational qualification: _ _ _ _ _ _ _ _ _ _

	White	Black	Indian	Coloured
~ Population group:				

	less than R199	R200-R299	R300-R399	R400-R499	R500-R599	R600-R699	R700 and more
~ Monthly income:							

Questions about your experiences with: legal problems; the law; lawyers and the courts

	Yes	No
~ Do you have any friend or relative who is a lawyer?		

~ Have you, in the past 5 years, ever gone to see a lawyer about:

	Yes	No
the buying or selling of a house or building?		
a divorce or maintenance problem?		
insurance claims?		

a crime of which you were accused? | Yes | No |

a problem with your employer/employee? | Yes | No |

pension or social welfare problems? | Yes | No |

the re-possession of goods you bought on hire-purchase? | Yes | No |

making a will? | Yes | No |

settling of an estate? | Yes | No |

problems with your landlord/tenant | Yes | No |

traffic tickets? | Yes | No |

contract disagreements? | Yes | No |

advice on business matters? | Yes | No |

tax matters? | Yes | No |

pass offences? | Yes | No |

any other? (please specify)_____

_____

- Where you did have any of the problems mentioned above, did you have to go to court?

Yes	No	Not in all cases

- Did the person/official/organization against whom you had the case, have a lawyer?

Yes	No	Not in all cases

- How did the matter end? (place an X in the appropriate empty box)

you won the case	
you lost the case	
you settled it out of court	
it has not yet ended	

- If you did have any of the problems mentioned above, but did not go to a lawyer, was it because: (more than one answer possible)

you did not know you had a legal problem? | Yes | No |

you could not afford to pay a lawyer? | Yes | No |

you did not know any lawyers? | Yes | No |

you did not have time to go to a lawyer? Yes | No

you live far away from a lawyer? Yes | No

you have bad experiences with lawyers in the past? Yes | No

you would find it difficult to communicate with a lawyer? Yes | No

you felt that a lawyer would not be of much help? Yes | No

you are afraid of lawyers? Yes | No

you were confident you would win the case without the help of a lawyer? Yes | No

any other reasons?__ __ __ \

- Do you have a lawyer to whom you always go whenever you have a legal problem?

Yes	No

- Where you are not satisfied with the performance of your lawyer, are you allowed to *change to another lawyer?*

Yes	No	Don't Know

- If you had the *choice*, to which of the following lawyers would you go for help :

(a)

female lawyer	male lawyer

Why?_____

(b)

White lawyer	Black lawyer	Coloured lawyer	Indian lawyer

Why?_____

- Are you allowed to take off from work to go and see a lawyer for help?

Yes	No	Don't Know

- Do you belong to any club, organization, association or union which does the *following:*

informs you of your legal rights?

Yes	No

gives you legal advice whenever you have a problem?

Yes	No

finds a lawyer to help you solve your problem?

Yes	No

helps you to pay for the legal costs?

Yes	No

- Is it possible to write to a newpaper, or a radio station, or a TV station for help to solve a legal problem?

Yes	No	Don't Know

- Did you ever write to such a newspaper/radio/TV for legal help?

Yes	No

- Did it (they) actually help you?

Yes	No

LEGAL AID

- Do you know about legal aid? | Yes | No |
- If yes, how did you come to know about it?_____
_____
- Is there a legal aid office in the area where you work or live? | Yes | No | Don't Know |
- Is legal aid for:
  - Whites Only? | Yes | No | Don't Know |
  - Blacks Only? | Yes | No | Don't Know |
  - Indians Only? | Yes | No | Don't Know |
  - Coloureds Only? | Yes | No | Don't Know |
  - for all races? | Yes | No | Don't Know |
- Did you ever go to the legal aid office for help? | Yes | No |
- If you did go, did you get help? | Yes | No |
- If you were refused help, what was the reason?_____
_____
- If the legal aid office did help you, were you satisfied with the help? | Yes | No |
- If you were not satisfied with the help, why was it so?
_____
_____

- Would you advise anybody with a legal problem to go to the legal aid office? | Yes | No |

- If no, why not?_____

_____

- Do you know of anybody: (a) who was refused help by the legal aid office? | Yes | No |

(b) who was given help by the legal aid office? | Yes | No |

Thank you.

F QUESTIONNAIRE TO ATTORNEYS

Please indicate your answers by placing an X in the appropriate empty squares provided.

-In what capacity are you answering this questionnaire?

Partner	Professional Assistant	Articled Clerk

-City or town where your firm is situated__ __ __ __ __ __ __ __ __ __

-Which part of the city/town is your firm situated?

Centre	Outskirts

- How old is your law firm? -- -- -- -- -- -- --

-Number of attorneys of different races in your firm?

Black	White	Indian	Coloured

-Number of articled clerks of different races in your firm?

Black	White	Indian	Coloured

-Please indicate the number of legally qualified persons in your firm who completed their legal education at anyone of the following universities:

UNISA	PRETORIA	RAU	WITS	POTCH	UNIV OF THE NORTH	O.F.S.	NATAL

UNIV OF ZULULAND	RHODES	FORT HARE	UNIV OF P.E.	STELL.	U.W.C.	UNIV OF DBN. WESTVILLE	U.C.T.

-Language normally spoken in your firm__ __ __ __ __ __ __ __

-Please indicate your relative proficiency in each of the following languages:

	Good	Fair	Poor	Nil
Afrikaans				
English				
Zulu				
Sotho				
Venda				
Tsonga				
Tswana				
Xhosa				
Other? (please specify)				

- Approximate, total number of clients for the year 1979 -- -- -- --

- Of the total number of clients for the year 1979, approximately what percentage were:
  White__ __ __%
  Indian__ __ __%
  Black__ __ __%
  Coloured__ __%

- Is your firm willing to accept clients from all racial groups?

Yes	No

- Of the total number of clients for the year 1979 what percentage were:
  private persons_ __ __%
  business concerns__ __%
  governmental or administrative bodies___%

- Of the private clients approximately what percentage were:
  self employed__ __ __ __%
  white-collar workers__ __%
  labourers__ __ __ __ __ __%
  unemployed__ __ __ __ __%

- Is your firm specialized in certain legal fields?

Yes	No

- If there is specialization, in which fields? (please specify)

__ __ __ __ __ __ __ __ __ __ __ __ __ __
__ __ __ __ __ __ __ __ __ __ __ __ __ __
__ __ __ __ __ __ __ __ __ __ __ __ __ __
__ __ __ __ __ __ __ __ __ __ __ __ __ __

- Does your firm specialize in private law and commercial law?

Yes	No

- If YES, do you refuse to handle:

(a) all criminal cases?

Yes	No

(b) criminal cases not affecting commercial clients?

Yes	No

(c) security law cases?

Yes	No

- Number of Legal Aid cases your firm handled in 1979:

	Litigated	Settled out of court	Litigated successfully in favour of Legal Aid client	Settled out of court in favour of Legal Aid client
Divorce				
Maintenance				
Labour law				
Landlord/Tenant				
Criminal law				
Debtor/Creditor				
Family law				
Insurance claims				
Administrative Law				
Property Law				
Other (please specify)				

- If you have not dealt with any Legal Aid cases, was this because: (more than one answer possible)

(a) no cases were referred to you? ☐

(b) your firm did not handle the type of cases referred to you? ☐

(c) Legal Aid cases are not sufficiently remunerative? ☐

(d) your firm just does not take on Legal Aid cases? ☐

(e) your firm is opposed to Legal Aid? ☐

(f) the Legal Aid beneficiery referred to you disappeared and never came to you? ☐

(g) other reasons (please specify) _____

_____

- When approached by an indigent person in search of legal assistance, which of the following would you do?
  - (a) offer your services ☐
  - (b) refer the person to the Legal Aid Office ☐
  - (c) assist the person in applying for a Legal Aid grant ☐
  - (d) refer the person to another attorney ☐
  - (e) turn the person away ☐
  - (f) other (please specify) _____

-Should the composition of the Legal Aid Board be

- (a) left as it is? ☐
- (b) reflect greater lay participation? ☐
- (c) reflect greater participation by advocates and attorneys? ☐
- (d) other? (please specify) _____

- Regardless of the merits of the case, should Legal Aid be available to any indigent person in any criminal trial before superior courts?

Yes	No

- Subject to the financial and the merit test being met, should Legal Aid be available to:
  - (a) any person who is exposed to any sentence of imprisonment?

Yes	No

  - (b) persons involved in any civil suit?

Yes	No

  - (c) persons involved in any civil suit provided the opponent is legally represented?

Yes	No

  - (d) a prisoner desirous of instituting or defending a civil action brought on his behalf, including an action for personal injury to himself?

Yes	No

  - (e) a prisoner charged with violating prison discipline where the penalty carried could lead to loss of remission of sentence?

Yes	No

  - (f) persons legally contesting the validity of subordinate legislation?

Yes	No

(g) an accused at a hearing in terms of Section 115 of the Criminal Procedure Act, 51 of 1977.?

Yes	No

(h) an accused at a hearing in terms of Section 119 of the Criminal Procedure Act, 51 of 1977?

Yes	No

(i) persons prosecuting at the private instance?

Yes	No

(j) persons involved in traffic offences which carry a penalty which could lead to the loss of a valid driver's licence?

Yes	No

(k) persons engaged in proceedings before administrative tribunals?

Yes	No

(l) persons wishing to appeal provided Legal Aid was granted to the same person for the same action in the court below?

Yes	No

- Should the legal profession set up monitoring Boards to ensure that Legal Aid cases are not negligently or incompetently handled?

	Yes	No	Opinion
Practicable			
Desirable			

-Where a person is indigent, but does not qualify for Legal Aid and where it is likely that the pending action will either go by default or will be poorly contested by the person himself, should the legal profession's right to monopoly of audience before courts of law be relaxed in favour of allowing:

(a) a relative or a friend to represent the litigant where, owing to feeble-mindedness, illiteracy, nervousness, or speech defects, the litigant would be incapable of pleading his own case effectively?

Yes	No

(b) members of other professions (e.g. architects, land-surveyors, accountants) to represent litigants where the subject matter relates wholly to matters within the competence of that profession?

Yes	No

(c) qualified social workers to represent clients in actions involving crucial social elements e.g. social welfare, pension or housing matters?

Yes	No

- Should the present financial income ceiling for receiving Legal Aid (R170 per month for single person; R340 per month for a married couple to which R30 is added for each child) be:

(a) left as it is ? ☐

(b) raised? ☐

(c) lowered? ☐

- Should the present fees payable to attorneys for handling Legal Aid cases (2/3 of Statutory Fees; 80% of taxed fees where Legal Aid litigant has been awarded costs) be:

  (a) left as they are? ☐
  (b) raised? ☐
  (c) reduced? ☐

- Any reservations, comments, criticisms or suggestions you would like to advance on the topic of Legal Aid?

_ _ _ _

- When asked, would you be willing to participate in public, legal counselling services: (a) free of charge? ☐

  (b) subject to remuneration? ☐

- Would you be willing to participate in a state-subsidized legal counselling service for indigent persons in which advocates and attorneys would give advice and be paid on an hourly basis?

Yes	N

  If YES, how many hours per week would you be prepared to set aside for such a scheme? _ _ _ _ _ _ _ _ _ _

GENERAL

- Where an attorney is a specialist, should he be allowed to refer to himself as a specialist in referral lists and other documents?

Yes	No

- Should advocates be allowed, subject to control by the Bar Council, to give detailed information about themselves and their professional specialization so as to facilitate the attorney's selection of counsel?

Yes	No

- Should a person who is acquitted on a criminal charge be entitled to indemnification of all reasonable expenses he incurred in establishing his innocence?

Yes	No

Thank you.

C QUESTIONNAIRE TO ADVOCATES

Please indicate your answers to the questions by placing an X in the empty squares provided.

- Age __ __ __years
- Home language__ __ __ __ __ __ __ __ __ __ __
- Other languages spoken (please specify) __ __ __ __ __ __ __ __
  __ __ __ __ __ __ __ __
  __ __ __ __ __ __ __ __
- Sex

female	male

- City where you practise__ __ __ __ __ __ __
- How long have you been practising at the Bar?__ __ __ __ __ __ __
- Name of university at which you obtained your legal education__ __ __ __ __ __ __ __ __ __ __ __ __ __
- Do you specialize in a particular legal field?

Yes	No

  If YES, in what field(s)? (please specify)__ __ __ __ __ __ __ __
  __ __ __ __ __ __ __ __
  __ __ __ __ __ __ __ __
  __ __ __ __ __ __ __ __
- Approximate, total number of clients you had in 1979__ __ __ __ __
  Of this number what percentage were: Whites?__ __ __%
  Blacks?__ __ __%
  Indians?__ __ __%
  Coloureds?__ __ __%
  Foreign nationals__ __ __%
- Approximately what percentage of your clients in 1979 were:
  private persons?__ __ __ __%
  companies, business concerns?__ __ __ __ %
  governmental or administrative bodies__ __ __ __%
- Of the total number of private clients, approxiamtely what percentage were:
  self employed?__ __ __ __%
  white-collar employees?__ __ __ __%
  labourers?__ __ __ __%
  unemployed?__ __ __ __%

- Of the total number of attorneys who briefed you in 1979, approximately what percentage were:

  Black?__ __ __ __%
  White?__ __ __ __%
  Coloured?__ __ __ __%
  Indian?__ __ __ __%

- Do some attorneys: (a) brief only you if available? Yes | No
  (b) brief you regularly? Yes | No

  If YES in either (a) or (b), or both, are these briefs largely confined to your field of specialization? Yes | No

- Are you willing to accept briefs outside your field of specialization? Yes | No

- Are you willing to accept briefs involving clients from all racial groups? Yes | No

- Do you accept criminal cases? Yes | No

  If YES, which of the following criminal cases have you accepted:
  (a) all criminal cases including security law cases? ☐
  (b) all criminal cases excluding security law cases? ☐
  (c) mainly security law cases? ☐
  (d) only those criminal cases involving a major or regular client of yours? ☐

pro Deo

- Did you represent an accused pro Deo in 1979? Yes | No
  If YES, on approximatley how many occasions?__ __ __ __

- In the squares below, please indicate the number and the racial group of the accused you defended pro Deo and the result:

racial group of accused	convicted of capital crime	not convicted of capital crime
White		
Black		
Coloured		
Indian		

- Are you willing to take on pro-Deo cases? Yes | No

If NO, is it because: (a) you are overburdened by other work? Yes | No

(b) the level of fees does not justify the work done? Yes | No

(c) you do not consider yourself experienced enough to handle cases involving capital offences? Yes | No

(d) you do not wish to appear in capital cases where the death penalty is a possibility? Yes | No

(e) any other reasons? (please specify)__ __ __ __ __ __ __ __

__ __

- Does your Bar Council require you to handle pro Deo cases? Yes | No

If YES, approximately how many per year?__ __ __ __ __ __ __ __

- Have you ever appealed against a conviction/sentence from a pro-Deo trial? Yes | No

If YES, was the appeal successful? Yes | No | Only in few cases

- Where an accused you defended pro Deo was finally convicted and sentenced to death, in your opinion, would the outcome of the trial have been different if:

(a) the accused had been more candid and open with you? Yes | No

(b) the accused had been assigned more experienced counsel? Yes | No

(c) the accused had a higher social status? Yes | No

(d) the accused had been of another racial group? Yes | No

(e) the victim of the crime had been of another racial group? Yes | No

(f) the brief had been given to you in time? Yes | No

(g) you had more pre-trial conferences with the accused? Yes | No

(h) witnesses were traced? Yes | No

(i) the trial had been given wider publicity? Yes | No

(j) the interpreter had been more competent? Yes | No

(k) the Bench had been differently composed? Yes / No

(l) you were assisted by an attorney? Yes / No

- Which of the following words would, in your opinion best describe the general attitude of an accused towards pro Deo counsel? ☐ open? ☐ confident? ☐ apologetic? ☐ cynical? ☐ indifferent? ☐ suspicious? ☐ resentful? ☐ doubtful? ☐ jovial? ☐ fearful?

- Do accused persons sometime regard pro-Deo counsel as representatives of the State? Yes / No

- Have you ever had difficulty in communicating with an accused at a pre-trial consultation because of a language barrier? Yes / No

If YES, how did you overcome the language obstacle?

(please specify)_____

- Has an accused ever reject your offer to defend him pro Deo? Yes / No

If YES, did the accused: (a) refuse to be represented altogether? Yes / No

(b) request another counsel? Yes / No

- Do you know of anybody charged with a capital offence and who successfully defended himself without an advocate? Yes / No

- In your opinion, is the criticism valid that an accused who is defended pro Deo, suffers prejudice by being represented by young and inexperienced counsel? Yes / No

- In your opinion, which of the following should be assigned to defend an accused pro Deo?

(a) a young and inexperienced advocate who has sufficient time to prepare a defence ☐

(b) an older and experienced advocate whose normal case-load afford him relatively little time to prepare a defence ☐

(c) neither (a) nor (b) ☐

- Where you do have experience with the pro-Deo system, in your opinion:
  (a) does counsel usually receive instructions in time? Yes ☐ No ☐

  (b) does counsel usually have sufficient time for pre-trial conference with the accused? Yes ☐ No ☐

- Have you ever accepted an assignment to act pro Deo, but had to cancel it later? Yes ☐ No ☐

  If YES, was this because:
  (a) you had other pressing commitments? Yes ☐ No ☐
  (b) you could not take proper instructions from the accused? Yes ☐ No ☐
  (c) any other reason(s)?_____

- Would you say that eagerness to accept pro-Deo cases, is greater among the younger members of the Bar? Yes ☐ No ☐

- Should the legal profession prescribe the minimum standards of competence which legal practitioners should comply with when representing clients in pro-Deo cases?

	Yes	No	Opinion
Practicable			
Desirable			

- In pro Deo cases where the amount of preparation needed for a case is beyond counsel's physical resources (e.g. where accused's history has to be investigated, or where witnesses have to be traced) should:
  (a) attorneys be appointed to act pro Deo together with counsel? Yes ☐ No ☐

  (b) private investigators be engaged at State expense to assist with the pre-trial investigation? Yes ☐ No ☐

  (c) law students from the local university(ies) be engaged to conduct such necessary pre-trial investigation in exchange for recognized, academic credit? Yes ☐ No ☐

- Where an accused person raises the defence of mental/emotional disturbance, have you ever been able to acquire the free services of a psychiatrist/doctor?

with difficulty	
not at all	
easily	

- Have you ever appeared in a case in which an attorney was appointed to assist you in a pro-Deo matter?

Yes	No

- Do you believe that attorneys should be permitted to appear in pro-Deo cases?

Yes	No

- Should the pro-Deo system be incorporated into the Legal Aid scheme?

Yes	No

- In one or two words, how would you best characterize (a) your own attitude (b) the general attitude at the Bar towards the pro-Deo system?

(a) own attitude_ _

(b) general attitude of the Bar_ _

- Would you like to make any reservations, observations or suggestions pertinent to the pro-Deo topic?

_ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _

- Of the total number of Legal Aid clients you had in 1979, approximately what percentage were: White?__ __ __ _%
  Black?__ __ __ _%
  Coloured?__ __ __ _%
  Indian?__ __ __ %

- If you did not handle any Legal Aid matters, is this because:
  (a) you were not instructed in any Legal Aid matters? Yes | No
  (b) you do not handle Legal Aid cases? Yes | No
  (c) Legal Aid cases are not sufficiently remunerative? Yes | No
  (d) the Legal Aid recipient referred to you disappeared and never turned up? Yes | No
  (e) you are opposed to Legal Aid? Yes | No
  (f) other reasons? (please specify)__ __ __ __ __ __ __ __ __ __ __
  __

- Should the present financial income ceiling for receiving Legal Aid (R170 per month for a single person; R340 per month for a married couple, to which R30 is added for each child) be: (a) left as it is? ☐
  (b) raised? ☐
  (c) lowered? ☐

- Should the composition of the Legal Aid Board:
  (a) be left as it is? Yes | No
  (b) reflect greater lay participation? Yes | No
  (c) reflect greater participation by advocates and attorneys? Yes | No

- Should the administration of the Legal Aid scheme be:
  (a) left as it is? Yes | No
  (b) entrusted entirely to the legal profession? Yes | No
  (c) entrusted to the individual courts? Yes | No
  (d) other? (please specify)__ __ __ __ __ __ __ __ __ __ __ __ __
  __

- Regardless of the merits of the applicant's case, should Legal Aid be available to all indigent persons in all criminal trials before superior courts? Yes | No

- Subject to the financial and the merit test being met, should Legal Aid be available to:

(a) persons involved in any civil suit? Yes | No

(b) persons involved in any civil suit provided the opponent is legally represented? Yes | No

(c) any person who is exposed to any sentence of imprisonment? Yes | No

(d) any person exposed to a sentence in excess of 6 months? Yes | No

(e) a prisoner desirous of instituting or defending civil actions brought on his behalf, including actions for personal injury to themselves? Yes | No

(f) a prisoner charged with violating prison discipline where the penalty carried could lead to loss of remission of sentence? Yes | No

(g) persons legally contesting the validity of subordinate legislation? Yes | No

(h) an accused at a hearing in terms of Section 115 of the Criminal Procedure Act, No. 51 of 1977? Yes | No

(i) an accused at a hearing in terms of Section 119 of the Criminal Procedure Act, No. 51 of 1977? Yes | No

(j) persons prosecuting at the private instance? Yes | No

(k) persons engaged in proceedings before all administrative tribunals? Yes | No

(l) a person wishing to appeal provided Legal Aid was granted to the same person for the same action in the court below? Yes | No

(m) judicial persons (e.g. Trustees; partnerships; companies) if the funds necessary to cover the costs of litigation cannot be raised by the parties in interest themselves and where failure to institute or to defend an action would be contrary to the public interest? Yes | No

- Should the legal profession set up monitoring Boards to ensure that Legal Aid cases are not negligently or incompetently handled?

	Yes	No	Opinion
Practicable			
Desirable			

- Where a person is indigent but still does not qualify for Legal Aid and where it is likely that the pending action will either go by default or will be poorly contested by the person himself, should the legal profession's right to monopoly of audience before courts of law be relaxed in favour of allowing:

  (a) a relative or a friend to represent the litigant where, owing to feeble-mindedness, illiteracy, nervousness or speech defects, the litigant would be incapable of pleading his own cause effectively? Yes | No

  (b) members of other professions (e.g. architects, land surveyors or accountants) to represent litigants where subject matter relates wholly to matters within the competence of that profession? Yes | No

  (c) qualified social workers to represent clients in actions with crucial social elements e.g. social welfare, pension or housing matters? Yes | No

- Where you do have experience with the Legal Aid scheme, would you say that in Legal Aid cases the briefs received from attorneys are:

  (a) usually well prepared? Yes | No

  (b) submitted in good time? Yes | No

  Does counsel usually have sufficient time to consult with the legal aid client? Yes | No

- Should the fees presently payable to counsel in Legal Aid cases (2/3 of the certified fees) be:

  (a) left as they are? ___

  (b) raised? ___

  (c) lowered? ___

- Any reservations, comments, criticisms or suggestions you would like to advance on the topic of Legal Aid?

_ _ _ _

EXTRA-JUDICIAL LEGAL ADVICE

- Do you participate voluntarily in public legal counselling services for indigent persons (e.g. Student Legal Clinics, Black Sash advice office etc.)? Yes ☐ No ☐

  If YES, which one(s)? (please name)_____

  Approximately how many hours per month do you set aside for this voluntary work?_____

  If you do not participate in such counselling services, is it because: (please note that more than one answer is possible)
  (a) no such facility exists in your city? ☐
  (b) you have not been approached to participate? ☐
  (c) you are carrying a heavy work-load? ☐
  (d) you do not perceive the need for such services? ☐
  (e) you are not keen on working for charity? ☐
  (f) you are opposed, in principle, to such services? ☐
  (g) you have had unpleasant experiences with such services? ☐
  (please specify)_____
  (h) other reasons? (please specify)_____

- When asked, would you be willing to participate in public legal counselling services: (a) free of charge? ☐
  (b) subject to remuneration? ☐

- Would you be willing to participate in a state-subsidized legal counselling service for indigent persons in which advocates and attorneys would give advice on an hourly basis? Yes ☐ No ☐

  If YES, how many hours per week would you be prepared to set aside for such a scheme?_____

- Any comments, criticisms or suggestion you would like to make concerning legal counselling services for the underprivileged?

  _____
  _____

GENERAL

	Yes	No
- Where an advocate is a specialist should he be allowed to refer to himself as a specialist in referral lists and other documents?		
- Should advocates be allowed, subject to control by the Bar Council, to give detailed information about themselves and their professional specialization so as to facilitate the attorney's selection of counsel?		
- Do you feel that some attorneys take on more criminal cases than they can handle effectively?		
If YES, would you ascribe this to the fact that only few legal firms handle criminal cases?		
- In all criminal trials before Superior Courts, should the categories of persons eligible to serve as assessors be extended to include acknowledged, responsible and competend lay persons from the same population group as the accused?		
- Should a person who is acquitted on a criminal charge be entitled to indemnification of all reasonable expenses he incurred in establishing his innocence?		

Thank you.

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Author Fernandez Lovell Derek
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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