

Notes

LEGAL REPRESENTATION FOR INDIGENT CRIMINAL DEFENDANTS IN SOUTH AFRICA: POSSIBILITIES UNDER THE 1994 CONSTITUTION

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.¹

[R]eason and reflection require us to recognize that in [an] adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.²

I. INTRODUCTION

Each year, over a million South Africans attempt to defend themselves against criminal charges without the assistance of a lawyer. Most of them are poor, black, and young; many of them are illiterate or uneducated, and a vast number of them are attempting to decipher court proceedings conducted in an unfamiliar language. In the past decade, the plight of these unrepresented criminal defendants has been the subject of much attention both in legal academic circles and

1. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (Sutherland, J.).

2. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (Black, J.).

in courtrooms.³ This increased attention was part of a renewed focus on civil rights and human rights generally in South Africa, made possible in large part by the 1989 replacement of State President Botha by Frederik W. deKlerk, deKlerk's subsequent sharing of power with the African National Congress (ANC), led by now-President Nelson Mandela, and their joint efforts in creating a new, multi-racial government.⁴ The indigent accused were winning some battles but losing the war until South Africa's new constitution, implemented in the spring of 1994, confirmed the right of the poor to have legal counsel provided by the State.⁵ The inclusion of this right in the new constitution was a major theoretical victory for indigent defendants, but the issue is far from settled. Since the new right is worded in less than absolute terms, courts must determine its parameters. Courts must determine how many, and which, of the mass of indigent defendants will actually benefit in concrete terms from the right's existence. It is as yet unclear whether the most important factor in determining the scope of the right will be the ideals of equality and justice that symbolize the new South Africa, or the practical fact that the current legal system is not structured to support such lofty ideals.

This Note traces the theoretical groundwork for the indigent's right to be provided with counsel and discusses the changes in the South African legal system that will be necessary in order for the theory behind that right to overcome the formidable obstacles that threaten to prevent it from having any tangible effect. Part II discusses the South African legal foundation for the right to be provided with counsel, including statutory provisions, relevant caselaw, and the 1994 Constitution. Part III interprets the new constitutional right to counsel. Part IV suggests ways in which the South African legal system can implement this new right.

3. See, e.g., *S v. Radebe*; *S v. Mbonani*, 1988 (1) SA 191 (Transvaal Provincial Div.); *S v. Khanyile and Another*, 1988 (3) SA 795 (Natal Provincial Div.); Evadne Grant, *The Right to Counsel: Recent Developments in South Africa*, 2 S. AFR. J. CRIM. JUST. 47 (1989); Nico Steytler, *Equality Before the Law and the Right to Legal Representation*, 2 S. AFR. J. CRIM. JUST., 66 (1989).

4. David Stephen King Culhane, *No Easy Talk: South Africa and the Suppression of Political Speech*, 17 FORDHAM INT'L L.J. 896, 902 & n.17 (1994). There was some focus on human rights before this time, but "earnest efforts to reconstitute the South African state have occurred only in the last four years . . ." *Id.* at 902.

5. S. AFR. CONST. (Constitution Act No. 200 of 1993) ch. 3, § 25(3)(e). For a copy of the South African Constitution, see 28 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1 (Albert P. Blaustein & Gisbert H. Flanz, eds., 1994).

II. LEGAL FOUNDATION FOR AN INDIGENT'S RIGHT TO BE PROVIDED WITH COUNSEL

A. Statutory Law

Commentators, along with some judges, have argued that the legal basis for publicly provided criminal defense representation has been in existence in South African statutory law in the form of basic rights and principles. The arguments rest primarily on two established legal principles: the right to legal representation and the principle of equality under the law.

Some form of a right to legal representation has been recognized in South African statutes since very early in this century. The Criminal Procedure and Evidence Act 31 of 1917 contained references to a defendant's right to legal assistance in two separate sections.⁶ Referring to pretrial proceedings, section 97 provided that: "(1) The . . . legal advisers of an accused person shall have access to him," and "(2) An accused person while the preparatory examination is being held is entitled to the assistance of his legal advisers."⁷ Referring to trial proceedings, section 218 provided that

[e]very person charged with an offense is entitled to make his defense at his trial and to have the witnesses examined or cross-examined by his counsel, if the trial is before a superior court, or by his counsel (if any), or his attorney or law agent, if the trial is before an inferior court.⁸

Prior to the enactment of the 1994 Constitution, the most recent statutory embodiment of the right to counsel was adopted in 1977. It provides that: "[A]n accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question."⁹ Neither the 1917 statute nor the 1977 statute provides for the right to counsel in absolute terms. Neither statute addresses the question of whether or not the legal adviser referred to must be hired

6. Criminal Procedure and Evidence Act 31 of 1917, §§ 97, 218, *reprinted in* STATUTES OF THE UNION OF SOUTH AFRICA 228, 300 (Cape Times Ltd. 1917).

7. *Id.* § 97, at 228.

8. *Id.* § 218, at 300.

9. Criminal Procedure Act 51 of 1977, § 73(2), *reprinted in* 8 STATUTES OF THE REPUBLIC OF SOUTH AFRICA 1017 (Butterworth Publishers, Ltd.) [hereinafter *Crim. Pro. Act 51 of 1977*].

by the accused. However, the statutes are sufficient to establish the existence of a right, individual to each accused, to obtain legal advice and representation.

The principle of "equality before the law" in South African common law is derived from both its Roman-Dutch and English legal traditions.¹⁰ Prior to the new provisional constitution, the most recent codification of the principle was in the 1983 Constitution, which stated that one of the Republic's national goals was to "uphold the independence of the judiciary and the equality of all under the law."¹¹ While the statutory version of the principle does not elaborate on the meaning of equality, or specify what factors are encompassed by it, economic status has generally been thought to be included in the understanding of equality. For example, Professor Nico Steytler has interpreted the principle of equality, in the context of criminal law, to mean that "access to rights should not be dependent upon the race, sex or *class* of an accused person."¹² Similarly, A. Chaskalson, a criminal lawyer in South Africa, has argued that "if the concept of equality before the law is to be given any meaningful content, it must mean, at the very least, that a person should not be denied effective access to the courts because of poverty."¹³ The existence of this principle of equality has led to comparisons with American caselaw, in which the right of an indigent accused to be provided access to a fair trial grew out of concerns about equality.¹⁴

Both Steytler and Chaskalson have concluded that the combination of the statutory right to counsel and the principle of equality before the law support the corollary that an accused can not be denied access to legal representation simply because he or she can not afford it.¹⁵ Steytler argues that the adversarial structure of South African court proceedings makes access to the legal system and the enforcement of legal rights dependent on the help of a lawyer.¹⁶ Following from this premise, the principle of equality before the law

10. See Steytler, *supra* note 3, at 67.

11. S. AFR. CONST. (Constitution Act No. 110 of 1983) pmbl.

12. Steytler, *supra* note 3, at 68 (emphasis added).

13. S v. Rudman and Another; S v. Mthwana, 1992 (1) SA 343, 347 (App. Div.) (A. Chaskalson, Heads of Argument for Appellants) [hereinafter Chaskalson, Heads of Argument for Appellants].

14. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975).

15. See Chaskalson, Heads of Argument for Appellants, *supra* note 13, at 346-47; Steytler, *supra* note 3, at 69.

16. Steytler, *supra* note 3, at 68.

requires that the right to legal assistance be equally accessible to all accused persons. Equal accessibility, in turn, requires the appointment of counsel for indigent defendants who otherwise would have no legal assistance.¹⁷ The ultimate conclusion is that because legal representation is a necessity in modern court proceedings, denying indigent accused the same access to a defense as that enjoyed by a wealthy person violates the principle of equality before the law.¹⁸ Until very recently, however, South African courts were inclined to disagree with this proposition.

B. Caselaw

Traditionally, South African courts have interpreted the right to legal representation as a negative right: a court cannot place obstacles in the way of a criminal defendant seeking legal representation, but a court need not remove obstacles that are not of its own creation.¹⁹ The prevailing idea that judicial officers have no authority to impede, but no duty to facilitate, the exercise of the right is well illustrated by dicta in the 1978 case of *S v. Baloyi*.²⁰ In that case, the lower court denied an accused's request for more time to find counsel. The judge considered whether there were grounds to set aside a sentence when the lower court denies that request. The reviewing judge commented that where an accused does not seek counsel and no court problem prevented access to counsel, there are no grounds for overturning a sentence.²¹ One commentator has observed: "In practice this often means that the right to legal representation is qualified by two provisos: first, that the accused knows that he or she may request an opportunity to obtain legal advice; and secondly, that he or she can afford it."²² In the decade prior to the adoption of the new provisional constitution, several decisions indicated a trend towards injecting affirmative content into the right to legal representation. These cases made substantial progress in eradicating the first proviso, that the accused at least knows he or she may request legal counsel, but took only illusory steps towards eradicating the second proviso, guaranteeing legal counsel to the indigent.

17. *Id.* at 67, 69.

18. Chaskalon, Heads of Argument for Appellants, *supra* note 13, at 346-47.

19. *See, e.g.*, *S. v. Mkize* 1978 (3) SA 1065; *S. v. Baloyi* 1978 (3) SA 290 (Transvaal Provincial Div.).

20. 1978 (3) SA 290 (Transvaal Provincial Div.)

21. *Id.* at 293.

22. Grant, *supra* note 3, at 49.

1. *Duty to Inform.* The first judicial steps towards expanding the right to representation were taken in the direction of recognizing a judicial duty to inform an accused of his right to obtain counsel. In 1988, in *S v. Radebe; S v. Mbonani*, the Transvaal Provincial Division²³ set aside the convictions and sentences of two defendants who had been convicted without having been informed that it was their right to seek legal representation if they so desired.²⁴ The first defendant, Radebe, a nineteen-year-old first-time offender, had been convicted of theft of a motor vehicle and sentenced to four years in prison. He had not been informed prior to trial that he had the right to be represented by counsel.²⁵ During the trial, the defendant presented evidence in his own defense and rested his case, and was then asked by the magistrate conducting the trial if he wished to add anything further.²⁶ The defendant responded that he wished to obtain counsel.²⁷ The magistrate refused his request, explaining that it had been voiced too late, and that the defendant had had ample time to obtain representation earlier in the proceedings.²⁸

The second defendant, Mbonani, was identified by the appellate court judge as one of a "mob of . . . youngsters" (his exact age is not indicated) accused of throwing stones at pedestrians and automobiles.²⁹ At the beginning of his trial, he was asked by the magistrate if he intended to hire an attorney.³⁰ Mbonani was confused by the question. Nonetheless, the magistrate did not attempt to clarify the

23. The Transvaal Provincial Division is one of six provincial divisions of the Supreme Court of South Africa. The divisions of the supreme court have original jurisdiction within their boundaries and may hear appeals from lower courts. Albertine Renee van Buuren, *Insufficient Legal Representation for the Indigent Defendant in the Criminal Courts of South Africa*, 17 BROOKLYN J. INT'L L. 381, 389 n. 42 (1991). The Appellate Division of the Supreme Court of South Africa is South Africa's final judicial tribunal. It has appellate jurisdiction over the divisions of the supreme court. *Id.* at 389 n. 44. The lower courts consist of six regional courts, dealing exclusively with criminal matters, and hundreds of magistrates courts. The magistrates courts have jurisdiction over all criminal matters except for rape, treason, murder, and most civil matters. *Id.* at 388 nn. 37-38. Decisions of the lower courts are reviewable by the Provincial Divisions of the Supreme Court. *Id.* at 389.

24. *S v. Radebe; S v. Mbonani*, 1988 (1) SA 191 (Transvaal Provincial Div.).

25. *Id.* at 197.

26. Grant, *supra* note 3, at 49 (summarizing in English a portion of trial transcript reprinted in Afrikaans in *Radebe*, 1988 (1) SA at 197.)

27. *Id.*

28. *Id.*

29. *Radebe*, 1988 (1) SA at 198.

30. Grant, *supra* note 3, at 49 (summarizing in English a portion of trial transcript reprinted in Afrikaans in *Radebe*, 1988 (1) SA at 198-99).

question, but instead only asked the defendant whether he intended to handle his own defense. Mbonani answered in the affirmative.³¹ He was convicted of public violence and sentenced to ten years in prison, with two of the years suspended,³² a sentence characterized by the reviewing judge as "extremely severe."³³ In his opinion for the Transvaal Provincial Division, Judge Goldstone commended the magistrate in Mbonani's case for introducing the subject of legal representation, but criticized him for being too quickly satisfied that the defendant was prepared to proceed without it, given the defendant's apparent confusion.³⁴

Judge Goldstone discussed the prominent role played by a judge or magistrate in facilitating criminal proceedings, particularly for an unrepresented defendant, and made the following conclusions:

If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction.³⁵

Elaborating, Judge Goldstone said that an accused should be encouraged to exercise the right to counsel, be given sufficient time to engage counsel, and, where appropriate, be told that he may be able to receive legal help from the Legal Aid Board.³⁶ Finally, the judge found that "[a] failure on the part of the judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice."³⁷ Judge Goldstone emphasized that in the two cases before him the charges were serious, that there were some fairly complicated evidentiary issues, and that the defendants had conducted neither thorough nor effective defenses. The judge determined that in each

31. *Id.*

32. *Radebe*, 1988 (1) SA at 198.

33. *Id.* at 200.

34. *Id.* at 199-200.

35. *Id.* at 196.

36. See *supra* text accompanying notes 117-27 for a discussion of the Legal Aid Board.

37. *Radebe*, 1988 (1) SA at 196.

case there had been a fatal failure of justice, requiring that the sentences be set aside.³⁸

The following year, in *S v. Mabaso and Another*, the Appellate Division largely approved Judge Goldstone's reasoning and conclusion, recognizing that a judicial officer has a "general duty" to inform a defendant of his right to be represented by counsel.³⁹ However, the Appellate Division focused on Goldstone's caveat that a failure to do so would not necessarily result in an unfair trial. The court refused to set aside a conviction⁴⁰ obtained largely as a result of a guilty plea made at a pretrial proceeding in which the defendant was neither represented by counsel nor informed that he had a right to be represented.⁴¹ The defendant was informed after the plea proceedings that he had a right to be represented at trial, and he did obtain trial counsel.⁴² Assuming for the sake of argument that the defendant would have entered a plea of not guilty had he been advised by counsel at the pretrial proceeding, the court nonetheless did not find that the admission of the guilty plea at trial was unjust:

[T]here is no unfairness in admitting a man's statements not otherwise inadmissible against him. When he is called upon to plead, the facts alleged in the charge are peculiarly within his own knowledge, and if his election to plead guilty results in the loss of the tactical advantage which a denial might have brought him, that is not an unfairness which the law can recognise.⁴³

Thus, although the Appellate Division recognized the existence of a general duty to inform an accused of his right to obtain legal representation, the court's opinion illustrated that the effects of a failure to fulfill such a duty would rarely be deemed extreme enough to be considered a failure of justice.

Without the substantial threat of convictions being set aside, lower court judges will have little incentive to fulfill the duty to inform, especially in light of the fact that providing such information to an accused is likely to delay proceedings. Absent some concrete steps towards enforcement, the Appellate Division's affirmation of the judicial duty to inform may have little more effect than the declara-

38. *Id.* at 200.

39. 1990 (3) SA 185, 204 (App. Div.).

40. *Id.* at 209-10.

41. *Id.* at 196-99.

42. *Id.* at 194.

43. *Id.* at 209.

tion of the South African Department of Justice, in 1982, that it would request that prosecutors and magistrates advise undefended accused of the existence of the Legal Aid Board.⁴⁴ It is apparent from the records that, although their cases were all heard after the Department's declaration, neither Radebe, Mbonani, nor Mabaso were given this advice by the prosecutor or magistrate and there is no apparent reason to think that their cases are not representative of general procedure.

2. *Duty to Provide Counsel.* The most far-reaching judicial decision interpreting and expanding the right to counsel was the 1988 landmark decision of the Natal Provincial Division, *S v. Khanyile and Another*.⁴⁵ The case was the combined appeal of two defendants' convictions for housebreaking with intent to steal, resulting in a sentence of one year imprisonment for each defendant.⁴⁶ The defendants had both pleaded not guilty.⁴⁷ The evidence against them consisted solely of fingerprint matches of the defendants' fingerprints with fingerprint impressions taken from the crime scene, presented at trial through the testimony given by two policemen who had obtained the prints and an expert who had made the comparisons.⁴⁸ Unrepresented by counsel, the defendants conducted no cross-examination of the two policemen, and only a "perfunctory, superficial, and aimless" cross-examination of the fingerprint expert.⁴⁹ The defendants relied exclusively on alibis for their defense. The prosecution rebutted these alibis only indirectly, via the fingerprint evidence.⁵⁰

In his opinion for the Natal Provincial Division, Judge Didcott first pointed out that the trial magistrate had failed to inform the defendants that they were entitled to legal representation.⁵¹ However, the judge did not simply focus on the failure to inform, because that information, without more, would have been unlikely to make any difference to the two defendants:

44. D.J. McQuoid-Mason, *The Right to Legal Representation: Implementing Khanyile's case*, 2 S. AFR. J. CRIM. JUST. 57, 58 (1989) [hereinafter McQuoid-Mason, *Implementing Khanyile*] (noting that it is not clear whether this request was ever implemented to any great extent).

45. 1988 (3) SA 795 (Natal Provincial Div.).

46. *Id.* at 796-97.

47. *Id.* at 797.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 799.

My assumption . . . is that they would not have succeeded in getting a lawyer, keen though each was on doing so, since they were too poor to employ any personally and no legal aid was forthcoming. The spotlight then shifts, moving from the right to a representation that is obtainable and falling instead on a right to be provided with representation once it is wanted but otherwise out of reach.⁵²

Judge Didcott had chosen wisely the case in which to make this spotlight shift. The odds were already stacked against Khanyile and his fellow defendant⁵³ and their lack of legal assistance only worsened their situation. First, the burglary that the two were accused of committing took place seven years before the trial making the defendants' reliance on alibis a poor tactical decision.⁵⁴ There are probably few people who can plausibly remember their whereabouts on a particular day seven years prior; further, these defendants did not even attempt to pinpoint the crucial day, each vaguely testifying merely that he had been in other parts of the country for the entire year in which the burglary took place.⁵⁵

Secondly, and most importantly, the prosecution's entire case rested on the evidence analyzed and presented by the fingerprint expert. In fact, the trial magistrate specifically held that the fingerprint evidence itself proved the falsity of the defendants' alibis.⁵⁶ The expert witness displayed photographs of the various fingerprint impressions, pointing out the comparisons and explaining his conclusions.⁵⁷ The best that the defendants could do to rebut this testimony was to insist that the expert must be wrong.⁵⁸ According to Judge Didcott's opinion, the trial magistrate "acknowledged . . . how badly [the defendants'] ignorance had handicapped them in their endeavours to cross-examine the expert and rebut his testimony."⁵⁹ Judge Didcott went on to note: "To do battle with an expert is seldom easy, even for a skilled litigator. The men were quite at sea, the record shows, and far beyond their depth."⁶⁰

52. *Id.* at 800.

53. As noted by Chaskalson, the State invests a great deal of resources in the detection, prosecution, and punishment of crime, so that from the beginning, the scales are tipped toward the prosecution. Chaskalson, *Heads of Argument for Appellants*, *supra* note 13, at 348.

54. *Khanyile*, 1988 (3) SA at 797.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 798.

60. *Id.*

Using the plight of Khanyile and his fellow defendant as a springboard, the judge followed two main lines of argument to conclude that both the existing right to counsel in South Africa and the crisis of the undefended accused required the provision of counsel to indigent criminal defendants. The first line of argument involved a comparison of South Africa's right to counsel with the development of the right to counsel in the United States. Drawing attention to the similarity of language between the Sixth Amendment to the U.S. Constitution⁶¹ and section 73(2) of the South African Criminal Procedure Act 51 of 1977,⁶² the judge noted that both had initially been interpreted as providing a negative right, guaranteeing counsel only to those who could afford it.⁶³ Citing a long line of U.S. legal precedent, Judge Didcott then concluded that the American expansion of the Sixth Amendment right to counsel to include the provision of counsel for all indigents facing the possibility of imprisonment was the result of a natural interpretation of the Due Process Clause of the Fourteenth Amendment⁶⁴ to the U.S. Constitution.⁶⁵ Noting that the Due Process Clause has many different functions in American jurisprudence, he concluded that in the area of criminal justice, the Due Process Clause is equivalent to the South African common law right to a fair trial.⁶⁶ Thus, in the same way that the Sixth Amendment, shaped by due process principles, supported an American indigent accused's right to be provided with counsel, the language of section 73(2), shaped by fair trial principles, could support a South African indigent accused's right to the same.

Judge Didcott dismissed the "stock response in [South African] legal circles . . . to any talk of American cases"⁶⁷ that South Africa has no bill of rights and thus the South African courts are not in a position similar to that of the American courts with respect to

61. The Sixth Amendment reads, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

62. Section 73(2) reads, in relevant part: "[a]n accused shall be entitled to be represented by his legal adviser at criminal proceedings . . ." Crim. Pro. Act 51 of 1977, *supra* note 9.

63. *Khanyile*, 1988 (3) SA at 809.

64. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits the deprivation of life, liberty, or property without due process of law. U.S. CONST. amend. XIV.

65. *Khanyile*, 1988 (3) SA at 802-07, 809, *citing* *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Carmley v. Cochran*, 369 U.S. 506 (1962); *Betts v. Brady*, 316 U.S. 455 (1941); *Johnson v. Zerbst*, 304 U.S. 458 (1937); *Powell v. Alabama*, 287 U.S. 45 (1932).

66. *Khanyile*, 1988 (3) SA at 809.

67. *Id.* at 808.

protecting the rights of citizens against the legislature.⁶⁸ He pointed out that the right to counsel cases in the United States did not involve the exercise of the judiciary's authority to overrule statutory law that contravened the U.S. Constitution.⁶⁹ No U.S. law existed which *prevented* the provision of counsel to an indigent accused.⁷⁰ Similarly, the South African Parliament had not spoken on the issue; thus recognition of an expanded right by the courts would not involve a contradiction of Parliament.⁷¹

The second line of argument was a logical one—the existing right to counsel was deemed essential to a fair trial, and a denial of that right, at least to a defendant who had expressed a desire to exercise it, would inevitably result in a conviction being overturned.⁷² Given this, Judge Didcott then argued:

[I]f a lawyer's participation is deemed essential to the fair trial of somebody who has one either at hand or in mind, why should it be thought inessential to the fair trial of a man with nobody to whom to turn because he cannot afford the expense? The result of no lawyer is the same in both situations, after all, the layman being left to defend himself. And his handicap then is just the same, whether he is a wealthy layman denied an opportunity that he wanted to employ a lawyer whom he could have found or a poor one who never sought the opportunity because it was doomed from the start to prove futile.⁷³

Despite his sweeping arguments, Judge Didcott's actual conclusion was much more limited than the parallel in American jurisprudence—the requirement of publicly provided counsel for all indigent defendants facing possible prison terms.⁷⁴ Noting that principle and policy, without more, would have led him to the *Gideon* conclusion,

68. See generally § 59 of the Constitution Act 32 of 1961 (establishing that "[n]o court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by parliament . . ." quoted in van Buuren, *supra* note 23, at 390).

69. *Khanyile*, 1988 (3) SA at 808.

70. *Id.*

71. *Id.*

72. *Id.* at 810.

73. *Id.*

74. *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Johnson v. Zerbst*, 304 U.S. 458 (1937), had previously established that the Sixth Amendment required the provision of counsel to criminal defendants who could not afford it in federal court. *Gideon*, 372 U.S. at 340. The question in *Gideon* was whether the right to have counsel provided was fundamental and essential to a fair trial, such that the Due Process Clause made the right obligatory on the states as well. *Id.* at 342.

he conceded that practical considerations, primarily a lack of resources, prohibited South Africa from immediately following that course. Instead, he settled temporarily on an intermediate solution based on the U.S. Supreme Court case which *Gideon* had overruled, *Betts v. Brady*.⁷⁵ *Betts* held that the Due Process Clause required counsel to be provided for an indigent defendant in state courts only when the trial judge felt that the deprivation of counsel would be "shocking to the universal sense of justice."⁷⁶

Attempting to define more particularly the class of cases in which the lack of counsel would prevent a fair trial, Judge Didcott initially ruled out the least serious cases—which he defined as "those so petty that the average person involved in them who was able to afford a lawyer would in all probability seek none"—and the most serious cases—defined as cases tried in the Appellate Division of the Supreme Court of South African, for which *pro deo* counsel was already made available.⁷⁷ For the set of cases in between, the judge outlined three factors to help identify those cases in which the lack of representation would have the most egregious results: (1) the legal and factual complexity of the case, (2) the accused's ability to defend himself, and (3) the gravity of the charge and its consequences.⁷⁸

The judge proposed that, in every case in which a defendant is determined to be too poor to pay for a lawyer, the trial judge should elicit as much information as possible in order to assess the three factors and to determine "whether their cumulative effect is such that the man would be placed at a disadvantage palpable and gross, that the trial would be palpably and grossly unfair, were it to go ahead without a lawyer for the defence."⁷⁹ If the trial judge allowed the trial to go on without defense counsel and the defendant was convicted, Judge Didcott proposed that the reviewing court consider the three factors anew in order to determine whether the trial had

75. *Khanyile*, 1988 (3) SA at 814, citing *Betts v. Brady*, 316 U.S. 455 (1941).

76. *Khanyile*, 1988 (3) SA at 806, citing *Betts*, 316 U.S. at 462.

77. *Khanyile*, 1988 (3) SA at 814-15. The *pro deo* system is an Appellate Division of the Supreme Court practice, not required by law, of providing counsel to indigent defendants facing a capital charge. See *R v. Mati and Others*, 1960 (1) SA 304, 306-07 (Appellate Div.). Approximately 90% of these defendants tried in the Appellate Division of the Supreme Court are represented. However, the Appellate Division only hears a small percentage of criminal trials, and the *pro deo* system has never been extended to lower courts. N. C. STEYTLER, *THE UNDEFENDED ACCUSED ON TRIAL 20* (Juta & Co. Ltd. 1988) [hereinafter *UNDEFENDED ACCUSED*].

78. See *Khanyile*, 1988 (3) SA at 815.

79. *Id.* at 816.

actually been palpably and grossly unfair, in which case the conviction should be set aside.⁸⁰ Acknowledging that this approach was not entirely satisfactory, the judge concluded that South Africa's present lack of resources would not allow a more comprehensive solution.⁸¹

Despite the case's relatively conservative holding, the Appellate Division of the Supreme Court overruled *Khanyile* four years later in *S v. Rudman and Another; S v. Mithwana*.⁸² In his opinion for the Appellate Division, Judge Nicholas rejected Judge Didcott's reasoning in *Khanyile* for two basic reasons. First, Judge Nicholas denied that the common law principle of a right to a fair trial had the broad reach that Judge Didcott had ascribed to it. Instead, he argued, the concept of a fair trial is fundamentally procedural:

The Court of Appeal does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice." . . . The enquiry is whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.⁸³

The second reason was a corollary to the first: given the procedural slant of the fair trial principle, the appropriate question was whether there was an existing procedural rule which required a defendant who could not afford legal representation to have representation provided at state expense.⁸⁴ Surveying the existing statutes and the caselaw prior to *Khanyile*, Judge Nicholas concluded that such a rule had never been recognized in South African law.⁸⁵

The judge did, however, recognize that the regulation of criminal procedure, including the formulation of procedural rules, was within the power of the Appellate Division of the Supreme Court; thus, it was arguably within the court's power to "create" a right for indigent accused to be provided with counsel.⁸⁶ He declined to do so for two reasons, "one of principle, the other of feasibility."⁸⁷ The reason "of principle" involved the fact that this particular procedural rule would

80. *Id.*

81. *See id.*

82. 1992 (1) SA 343 (Appellate Div.).

83. *Id.* at 377.

84. *Id.* at 378.

85. *Id.* at 380.

86. *See id.* at 381.

87. *Id.* at 386.

place an enormous burden on the government, which, the judge concluded, would be overstepping the boundaries of the court's authority.⁸⁸ As for feasibility, the Judge Nicholas concluded that, although he did not have sufficient information on which to base a judgement regarding long-term possibilities, it was clear that at the time, the resources to implement the rule were simply not available.⁸⁹

C. 1994 Constitution⁹⁰

South Africa's 1994 provisional constitution explicitly provides for a right to counsel for indigent defendants, thus eradicating the need for the South African Supreme Court to require the government to provide legal aid. This addresses Judge Nicholas' reason "of principle" for not forcing the government to provide counsel to the indigent accused. Chapter 3 of the 1994 Constitution states that:

Every accused person shall have the right to a fair trial, which shall include the right . . . to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights⁹¹

The question of feasibility cannot be disposed of so easily; yet it is unclear what weight is to be attributed to this issue. Now that the right is defined in concrete terms, it may not be a sound constitutional

88. See *id.* (stating that "[t]he Supreme Court has no power to issue a *mandamus* on the Government to provide legal aid, and it should not adopt a rule the tendency of which would be to oblige the Government to do so.")

89. See *id.* at 388-89.

90. The present constitution was drafted during constitutional negotiations in November 1993 involving representatives of both the then-existing South African government and the ANC, and was ratified by Parliament in December 1993. Culhane, *supra* note 4, at 902-03. It came into effect on April 26, 1994 with the raising of the new South African flag and the commencement of South Africa's first all-race national elections. The new national government, consisting of a 400-seat National Assembly and a 90-seat Senate, is planning to draft a permanent constitution, but the provisional one is in effect until this takes place. See *Mandela and ANC Claim Victory in South Africa's First All-Race Elections*, Facts on File World News Digest, May 5, 1994, at 313 A1, available in LEXIS, NEXIS Library, CURNWS File [hereinafter *Mandela and ANC Claim Victory*]. The permanent constitution is likely to resemble the provisional constitution. The same groups involved in drafting the provisional constitution, the National Party and the ANC, are the two dominant groups in the new legislature. Approval of the new constitution requires a two-thirds vote, which means that the two parties must cooperate in drafting the permanent constitution. See Culhane, *supra* note 4, at 897 & nn. 2-3, 936 n. 248.

91. S. AFR. CONST. ch. 3 § 25(3)(e). Chapter 3 of the 1994 constitution is titled "Fundamental Rights" but is also commonly referred to as the bill of rights.

practice to allow the right to be limited by considerations of feasibility. Perhaps the right should be defined according to principles of justice, and the practical considerations should be worked out secondarily.

III. INTERPRETING THE NEW RIGHT TO BE PROVIDED WITH COUNSEL

The first question that arises in this area under the new constitution is how broadly the right to counsel will be interpreted. It is as yet undetermined what position the bill of rights will occupy in South African jurisprudence. The language of the new constitution clearly emphasizes that constitutional principles are to be supreme, with such declarations as: "[T]his Constitution shall be the supreme law of the Republic," and "[t]his Constitution shall bind all legislative, executive, and judicial organs of state at all levels of government."⁹² Chapter 3 of the constitution enumerates certain "fundamental" rights, and gives the courts the power to grant relief for any infringements upon these rights.⁹³ All of these provisions echo the American system, making Judge Didcott's analogy in *Khanyile* far less strained.⁹⁴ The new constitution's embodiment of the principle of equality before the law is even supplemented by a guarantee of "equal protection of the law,"⁹⁵ mirroring the language of the Fourteenth Amendment to the U.S. Constitution.⁹⁶ The emphatic language and the American parallels seem to be inconsistent with allowing constitutional rights to be limited by practical considerations.

On the other hand, the right to have counsel provided is described in terms that are not absolute: legal representation is to be provided at state expense only in situations "where substantial injustice would otherwise result."⁹⁷ It will be up to the courts to

92. *Id.* ch. 1, §§ 4(1), 4(2); *cf.* note 68 and accompanying text (discussing the subordinate role of the South African courts in relation to the legislature prior to the enactment of the new bill of rights).

93. S. AFR. CONST. ch. 3, § 7(4)(a) (providing that "[w]hen an infringement of or threat to any right entrenched in this Chapter is alleged, any person . . . shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.").

94. *See supra* text accompanying notes 55-62.

95. S. AFR. CONST. ch. 3, § 8(1).

96. The Fourteenth Amendment reads, in relevant part: "No State shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

97. S. AFR. CONST. ch. 3, § 25(3)(e).

determine where that line should be drawn.⁹⁸ As Judge Nicholas' opinion in *Rudman* illustrates, South African courts are accustomed to operating within the confines of feasibility.⁹⁹ However, the courts, like the rest of the nation, are *not* accustomed to dealing with fundamental constitutional rights. As one observer of the legal education system has noted, "[h]uman rights, the new catch phrase in South Africa, has yet to infiltrate the collective subconscious of the citizenry."¹⁰⁰ Some theorists are even more negative, suggesting that there is legitimate skepticism regarding constitutionally-entrenched rights, based on historical factors both within South Africa and worldwide. One author points out that in the past, due to continual power struggles between colonial powers and nationalist groups, "African political systems have not produced any respectable forms of constitutionalism, nor have they developed any culture for the respect of human rights."¹⁰¹ Another emphasizes that the concept of human rights has not been closely connected to people of color.¹⁰² The shift from a system in which the main function of the courts was to carry out the letter of the law handed down by Parliament to one in which the courts are the designated protectors of human rights on an individual basis will not likely be a transformation that can occur overnight. Out of their element, South African courts will be searching for guidance to interpret the provisions of their new bill of rights.

A. The *Khanyile* Framework

Because it is well known and easily accessible, courts may be tempted to resort to an implementation of the framework established by Judge Didcott in his *Khanyile* opinion, conducting a fact-specific

98. Although the current constitution is a provisional one, interpretations of the right as it appears now are likely to continue to be relevant to interpreting the parallel provisions in the permanent constitution, which will probably be substantively similar. See *supra* note 90.

99. See generally D. M. Davis, *An Impoverished Jurisprudence: When is a Right not a Right?*, 8 S. AFR. J. HUM. RTS. 90, 94 (1992) (noting that "the judgement in Rudman's case appears to be based less on a rigorous jurisprudence and more on the pragmatism of economic priorities.").

100. Joanne Fedler, *Legal Education in South Africa*, 72 OR. L. REV. 999, 1005 (1993).

101. Welshman Ncube, *Constitutionalism and Human Rights: Challenges of Democracy*, in THE INSTITUTIONALISATION OF HUMAN RIGHTS IN SOUTHERN AFRICA 1, 1 (Pearson Nherere & Marina d'Engelbronner-Kolff eds., 1993).

102. Kempton Makamure, *Introductory Remarks: Human Rights and Democracy in the African Context Today: A Historical Setting*, in THE INSTITUTIONALISATION OF HUMAN RIGHTS IN SOUTHERN AFRICA, *supra* note 101, at v.

inquiry in each case in order to determine whether or not counsel should be appointed. However, such a solution would probably prove unsatisfactory for two reasons. First, the framework relies too heavily on judicial discretion, which, given the large number of judges involved, does not lend itself to uniformity or equality. *Khanyile* places the burden on the trial judge or magistrate to analyze the three factors in order to determine the accused's potential ability to handle his own defense effectively.¹⁰³ While a number of judges may make a good faith effort to conduct a thorough inquiry, at least some lower court judges have proven willing to provide an accused the absolute minimum assistance required by law, as evidenced by several of the cases discussed above.¹⁰⁴ This amount of individual judicial discretion seems more dangerous when one considers the setting in which it is taking place: a country which until a little more than one year ago embraced an official policy of racial inequality,¹⁰⁵ and in which the vast majority of the legal power structure is white and the vast majority of criminal defendants is black.¹⁰⁶

Second, the nature of the *Khanyile* factors requires inquiry into information about the accused which is not ordinarily before a court prior to trial. The first factor, the legal and factual complexity of the case, can be fully revealed only through the arguments and testimony presented at trial. Pre-trial attempts to evaluate complexity under the current system will yield rough estimates at best, and attempts to improve the accuracy of those estimates could require inquiry into details so extensive as to make the trial itself redundant. Similarly, the second factor, the intelligence, competence, and sophistication of the accused, requires inquiry into details of the accused's personal qualities, experience, and background which are not ordinarily before the court at any time. The third factor, the gravity and consequences of a charge, may be somewhat more susceptible to estimation, but still cannot be precisely evaluated until the judge has determined what

103. *Khanyile*, 1988 (3) SA at 815.

104. See *supra* notes 21-24, 40-41 and accompanying text.

105. See generally STEPHEN ELLMANN, IN A TIME OF TROUBLE (1949) (discussing legal structure of racial inequality and role of courts in the South African legal system). South Africa ended its official policy of racial inequality on December 22, 1993, when the Parliament approved the country's first non-racial constitution. This end was cemented by the victory of the ANC in South Africa's open elections in April 1994. Culhane, *supra* note 4, at 896.

106. Steytler estimates that over 90% of criminal defendants in South African courts are black. UNDEFENDED ACCUSED, *supra* note 77, at 19. Justice Department statistics from 1990 indicate that there were no black magistrates and only 28 of the 988 prosecutors were black. Van Buuren, *supra* note 23, at 401 n.144.

weight to assign to any aggravating or mitigating evidence presented at trial. Gathering this information will require a great deal of individualized attention from judges, and probably an extraordinary amount of cooperation from prosecutors.¹⁰⁷ This degree of participation is simply incompatible with an adversarial system in which the judge is supposed to remain neutral while the prosecution is supposed to be advocating its own side.¹⁰⁸ It is unlikely that prosecutors will be enthusiastic about providing information that could compromise their own interests. Even if this type of inquiry from the court was forthcoming, it would be costly and time-consuming. In all likelihood, any attempt to go this route would lead courts to conclude that the money and time a judicial inquiry consumes would be better spent locating legal assistance for the accused. In the long run, a more concrete, administratively simpler rule will probably prove more cost-effective, even if that rule requires counsel to be provided in a greater number of cases.

B. International Law

Fortunately, South African courts are not restricted to internal sources for assistance in interpreting their country's bill of rights. In the *Khanyile* opinion, Judge Didcott refers to two international covenants whose provisions dealing with the right to legal assistance are also couched in less than absolute terms.¹⁰⁹ Both contemplate the appointment of counsel, free of charge, to criminal defendants who cannot afford it, when "the interests of justice so require."¹¹⁰

107. See McQuoid-Mason, *Implementing Khanyile*, *supra* note 44, at 61 (noting that "prosecutors will have to play an important role in assisting magistrates in deciding whether or not an accused should be represented.").

108. Judge Didcott himself recognized the incompatibility of excessive judicial participation in an adversarial system, quoting from an 1826 edition of the *Edinburgh Review*: "Of all false and foolish *dicta*, the most trite and absurd is that which asserts that the Judge is counsel for the prisoner. . . . The Judge cannot be counsel for the prisoner, ought not to be counsel for the prisoner, never is counsel for the prisoner." *Khanyile*, 1988 (3) SA at 798.

109. Judge Didcott refers to article 14 of the International Covenant on Civil and Political Rights, which states that everyone accused of a crime should be entitled "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," International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, para. 3(d), 999 U.N.T.S. 171, 177, and to article 6 of the European Convention on Human Rights, which states that the minimum rights of each accused person should include the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require," European Convention on Human Rights, Nov. 4, 1950, art. 6, § 3(c). *Khanyile*, 1988 (3) SA at 801.

110. See *supra* note 109.

While this language is similar to that used in the South African Bill of Rights, and while both formulations of the right are highly subjective, the international covenants may require the appointment of counsel in a greater number of cases on the margin, as they contain no requirement that the injustice which would otherwise result be "substantial."¹¹¹ The existence of such covenants may help to broaden the scope of the right in South Africa, as the new constitution specifically provides for reference to applicable international law for assistance in interpreting the provisions of the bill of rights.¹¹²

The constitution admits the possibility of reference to foreign caselaw.¹¹³ As discussed above, the U.S. Supreme Court, albeit using slightly different language, decided that substantial injustice would result every time an indigent accused faced a potential prison sentence without appointed counsel.¹¹⁴ Given the numerous parallels between the 1994 South African Constitution and the U.S. Constitution, if the South African drafters had intended for the right to counsel to sweep as broadly as the American right, such scope could have been easily conveyed. It is conceivable that the more cautious language was used in order to allow courts, at least in the short-term, to weigh considerations of feasibility. If this is the case, the fate of many South African indigent criminal defendants may depend on the implementation and the success of programs designed to increase the quantity of legal aid funding and the number of legal practitioners whose services are available to them.

IV. IMPLEMENTING THE NEW RIGHT TO BE PROVIDED WITH COUNSEL

In the past, commentators have been skeptical about the possibility of providing widespread legal assistance to indigent criminal defendants in South Africa. For example, citing doubts about the possibility of the adequate expansion of the legal profession and about the probability of increased government funding for legal

111. See *supra* note 97; see also S. AFR. CONST. ch. 3, § 25(3)(e).

112. S. AFR. CONST. ch. 3 § 35(1) provides:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter and may have regard to comparable foreign caselaw.

113. *Id.*

114. See *supra* note 74.

aid in the foreseeable future, N.C. Steytler instead has advocated an extensive reform of court procedures in order to allow unrepresented accused to conduct their own defenses more effectively.¹¹⁵ However, Steytler has agreed that providing legal assistance to indigent defendants is the most desirable solution ultimately.¹¹⁶ Three possibilities now appear to undermine past fears that any attempt to follow Steytler's proposal would necessarily be quixotic. First, funds available for legal aid are likely to be increased in the near future. Second, improvements in cost-efficiency and changes in the structure of the bar could allow the existing legal profession to be of much more assistance to indigent criminal defendants than it currently is. Third, reforms in legal education may lead to a more rapid expansion of the legal profession, and to a legal profession better equipped to provide assistance in criminal trials.

A. Legal Aid Funding

1. *Existing Publicly Funded Legal Aid.* Providing legal services to a large number of indigent criminal defendants will undoubtedly require a great deal of money, as the existing legal aid structure is glaringly inadequate. The budget of the Legal Aid Board has been slowly but steadily increasing since the Board's creation.¹¹⁷ The Legal Aid Board was established by the Legal Aid Act 22 of 1969, and first implemented in 1971.¹¹⁸ Legal Aid offices are run not by lawyers but by civil servants who receive the individual applications for legal assistance and determine which are to be granted.¹¹⁹ Applicants must first meet a standard of indigence determined by

115. See UNDEFENDED ACCUSED, *supra* note 77, at 23-24. Another example of the trend among commentators to focus, somewhat despairingly, on alternative solutions is D.J. McQuoid-Mason's suggestion that magistrates should make more use of community service sentences in order to reduce the incidence of injustice in sending unrepresented indigent defendants to prison. McQuoid-Mason, *Implementing Khanyile*, *supra* note 44, at 61.

116. See UNDEFENDED ACCUSED, *supra* note 77, at 23.

117. Steytler noted that the Legal Aid Board budget was approximately R50,000 in 1969-70, and R2.9 million in 1983-84. UNDEFENDED ACCUSED, *supra* note 77, at 21. In 1989 D.J. McQuoid-Mason cited a promised budget of R12 million for 1988-89, 12.9 million for 1989-90, R17 million for 1990-91, and R22 million for 1991-92. McQuoid-Mason, *Implementing Khanyile*, *supra* note 44, at 62. Although the conversion rate varies, at the time of publication, one U.S. dollar equals approximately 3.5 rand. See *World Value of the Dollar*, WALL ST. J., Feb. 21, 1995, at C6.

118. UNDEFENDED ACCUSED, *supra* note 77, at 16-17.

119. van Buuren, *supra* note 23, at 395.

their monthly income.¹²⁰ Applicants who meet this standard are then evaluated on other factors. For example, applications from criminal defendants are generally not accepted if the accused admits guilt, is unemployed for no good reason, appears to lead a criminal life, or if the Board determines that the case is so simple that the accused should be able to handle it himself.¹²¹ Applications that are accepted are referred to attorneys in private practice, who are then reimbursed by the Legal Aid Board at an established fee.¹²² Applications from criminal defendants make up a very small percentage of the applications received by the Board,¹²³ possibly because of the rigorous standards for acceptance of those applications, a lack of awareness of the Board's existence, or the belief that the Board is not impartial.¹²⁴ Although the number of applications granted in criminal cases has been increasing, the vast majority of cases referred by the Legal Aid Board remain civil cases.¹²⁵

Funds also continue to be provided for the *pro deo* system in the Appellate Division of the Supreme Court.¹²⁶ However, the *pro deo* system and the Legal Aid Board, which together make up essentially the entire publicly funded legal aid system,¹²⁷ manage to provide counsel for only a very small number of indigent criminal defendants.

2. *Potential for Increased Funding for Legal Aid.* It is undeniably true that in the past,

120. *Id.*

121. *Id.* at 395 n.92.

122. *Id.* at 395. In the regional courts in 1990-91, the set rate was R600 per case. D.J. McQuoid-Mason, Rudman and the Right to Counsel: Is it Feasible to Implement Khanyile?, 8 S. AFR. J. HUM. RTS. 96, 99 (1992) [hereinafter McQuoid-Mason, *Is It Feasible*].

123. Steytler estimates that in 1983-84, criminal applications made up 11.5% of the applications received by the Board. UNDEFENDED ACCUSED, *supra* note 77, at 18. Jeremy Sarkin estimates that the number was 10.16% in 1988-89. Jeremy Sarkin, *Restructuring the Legal Profession and Access to Justice*, 9 S. AFR. J. HUM. RTS., 223, 224 (1993).

124. See van Buuren, *supra* note 23, at 396. Legal aid officers are drawn from the same branch of the civil service from which magistrate judges and prosecutors are drawn, potentially leading defendants to doubt their impartiality. *Id.* at 395 n.87.

125. McQuoid-Mason, *Is It Feasible*, *supra* note 122, at 109-10.

126. UNDEFENDED ACCUSED, *supra* note 77, at 22 n.99 (indicating that, in 1988, *pro deo* counsel received R120 per day per accused, plus R50 for consultation). Steytler estimates that only .1% of South African criminal cases are heard by the appellate division. *Id.* at 18. See also van Buuren, *supra* note 23, at 396-97 (noting that legal fees for *pro deo* counsel are paid not from the Legal Aid Board but from state funds appropriated for the appellate division).

127. Legal Resources Centres are another facet of publicly funded legal aid, but these centers focus on the civil legal rights of the poor and only take those criminal cases which affect the public interest. See McQuoid-Mason, *Implementing Khanyile*, *supra* note 44, at 65.

parliament has shown little concern for the position of the indigent accused and has exhibited reluctance to extend legal aid to all accused persons. Concern for increased spending on legal aid, particularly in criminal matters, is not a politically popular cause and major increases in funding may not be forthcoming in the foreseeable future.¹²⁸

It is also undeniably true, however, that the South African government has entered a new era, and that the new legislature, in the position of being subordinate to the constitution, will be obligated to show concern for the fundamental rights that the constitution has established. Human rights have become a central issue in South Africa and the new legislators are now accountable to an electorate that includes the segment of the population from which most of the indigent accused come.¹²⁹ Even that portion of the electorate which does not identify with the indigent accused has an interest in equal justice, both in theory and in practical terms, as "(N)o man is so violently anti-social as the man who believes he has not had a fair trial"¹³⁰ and much of the violence in South Africa has been attributed to the dissatisfaction of a large portion of the population with the government's disregard for human rights. The South African government thus has both an increased responsibility and the motivation to increase funding for services to represent indigent defendants.

In the past, the South African government, drawing from an increasingly impoverished nation, had very limited funds to allocate to criminal defense. International trade sanctions against the country contributed to the downswing of the country's economy¹³¹ because many foreign companies withdrew from the South African market. One source indicates that more than 200 American companies withdrew from operations in South Africa during the 1980s, largely due to pressure from state and local governments to comply with the African National Congress' campaign promoting economic pressure to force political and social change.¹³² However, many of those sanctions are being lifted now that the system of apartheid has been

128. UNDEFENDED ACCUSED, *supra* note 77, at 22.

129. *See supra* note 106.

130. A.J. van der Walt, *Equal Access to Free and Independent Courts*, 100 S. AFR. L.J. 681, 688 (1983).

131. van Buuren, *supra* note 23, at 398.

132. Barnaby J. Feder, *South African Deal Made by Food Processor Pillsbury*, N.Y. TIMES Sept. 29, 1994, at D1.

dismantled, and it is hoped that the restimulation of international trade will rapidly improve the economy.¹³³ Still, any economic effects from the lifting of sanctions may not be felt immediately, and the recovery of the economy is not inevitable.

Further, although the South African government has always been the Legal Aid Board's sole source of funding, the Legal Aid Act provides that the Board may accept funds from outside sources.¹³⁴ The lack of external sources of funding may be at least partially attributable to foreign nations' disapproval of apartheid;¹³⁵ therefore, foreign funding may also be more readily available since the dismantling of the apartheid system, which was completed by the 1994 elections. Since the elections, foreign nations such as the United States have proved eager to resume or to increase economic and diplomatic relations with South Africa, including providing humanitarian assistance.¹³⁶

B. Availability of Legal Services in South Africa

Increased funding will have only very limited effects without a corresponding increase in the number of legal practitioners available to provide legal assistance to indigent criminal defendants. Relative to its population, and relative to its vast number of indigent criminal defendants, South Africa's legal profession is minuscule: for approximately twenty-six million South Africans, there are approximately nine thousand practicing lawyers.¹³⁷ The legal profession seems to

133. See, e.g., Bill Keller, *Corporate Foe of Apartheid Finds Reward Elusive*, N.Y. TIMES, Dec. 9, 1994, at A4 (referring to Pepsi-Cola, which pulled out of South Africa in 1984 and reinstated a franchise there in 1994); Bill Keller, *Apartheid's Arms-Maker Finds Respectability*, N.Y. TIMES, Aug. 26, 1994, at A3 (noting that U.N. sanctions against South Africa were lifted in May 1993); Steven A. Holmes, *Mandela Looking for Free-Market Investors*, N.Y. TIMES, Oct. 3, 1993, § 1, at 15 (discussing a visit by Mr. Mandela to New York city and Washington, D.C. to encourage American investments in South Africa).

134. van Buuren, *supra* note 23, at 394, citing Legal Aid Act, No. 22, §§ 9(1), 9(3) (S. Afr. 1969).

135. van Buuren, *supra* note 23, at 394 n.82 (citing an interview by the author with E.S. Sholtz, then Director of the Legal Aid Board in Pretoria).

136. For example, on April 25, 1994, the day before the elections began, U.S. Commerce Secretary Ronald H. Brown announced U.S. plans to increase financial aid to South Africa from \$80 million per year to more than \$140 million per year, with a great deal of the aid earmarked for humanitarian issues. See Bill Keller, *The South African Vote: The Overview; More Bombings Rattle South Africans*, N.Y. TIMES, Apr. 26, 1994, at A1.

137. Steytler estimated the population of South Africa at twenty-six million in 1983. UNDEFENDED ACCUSED, *supra* note 77, at 21. For 1991, McQuoid-Mason estimated the number of lawyers to be 8,748, with only 1,021 of them being advocates. McQuoid-Mason, *Is It Feasible*, *supra* note 122, at 102. South Africa has approximately 34.6 lawyers per 100,000 people. In

be poised for rapid growth, however, as an estimated fifteen hundred students graduate with a law degree each year.¹³⁸ Despite the limited number of available lawyers, changes in the way legal aid is delivered could allow the existing legal profession to make a substantial contribution to the free representation of indigent criminal defendants. Changes in the paths of entry into the profession could better utilize the skills of rising lawyers and changes in the legal education system could not only increase the number of potential lawyers, but also produce law graduates who are better equipped to meet the legal needs of the population.

1. *Using Existing Legal Service Providers More Efficiently.* The Legal Aid Board's current system of referring cases to lawyers in private practice is simply not cost-effective for criminal cases. Very few of the private lawyers in South Africa specialize in criminal law.¹³⁹ Consequently, most of the lawyers to whom criminal cases are referred must go through the necessarily time-consuming process of familiarizing themselves with the issues and the procedures from nearly ground zero. Dr. D.J. McQuoid-Mason has conducted extensive studies on the feasibility of a salaried public defender program and has estimated that full-time public defenders, paid an adequate salary by the government,¹⁴⁰ could handle from 2.2 to 3 times as many cases as referral lawyers currently do, for the same cost.¹⁴¹ McQuoid-Mason's figures are based on the estimate that

comparison, in the United States there are 312 lawyers per 100,000 people; West Germany has 190 lawyers per 100,000 people; and Chile has 104.9 lawyers per 100,000 people. *The Rule of Lawyers*, *ECONOMIST*, July 18, 1992, at 3.

138. See Sarkin, *supra* note 123, at 228.

139. McQuoid-Mason cites an estimate that only 10% of South African lawyers "engage" in criminal practice. McQuoid-Mason, *Is It Feasible*, *supra* note 122, at 102.

140. McQuoid-Mason makes his calculations based on a salary of R50,000 per year. *Id.* at 107. In contrast, in the Johannesburg public defender office in 1991, senior public defenders were paid R100,000 per year, and the other public defenders were paid between R45,000 and R75,000 per year, rates that Jeremy Sarkin predicts will have a cost-inhibiting effect on the program. Sarkin, *supra* note 123, at 233 n.61. For comparison, South African law professors earn between R83,000 and R96,000 per year while law lecturers earn between R39,000 and R74,000 per year, salaries described as "meager" compared to those earned by lawyers in private practice. Fedler, *supra* note 100, at 1003 n.10. On the other hand, articulated clerks earn far less, roughly between R9600 and R19,200 per year. Sarkin, *supra* note 123, at 233 n.59.

141. In a 1992 article, McQuoid-Mason estimated that salaried public defenders could handle between 2.2 and 2.8 times as many cases as referral lawyers for the same cost. McQuoid-Mason, *Is It Feasible*, *supra* note 122, at 112; cf. McQuoid-Mason, *Implementing Khanyile*, *supra* note 44, at 63 (estimating, in 1989, that salaried public defenders could handle three times as many cases).

these public defenders would be able to handle at least 200 criminal defenses per month.¹⁴² Full-time public defenders would become familiar with the criminal court procedures and would build up an expertise in issues common to poor defendants, thereby decreasing the need for new research and allowing them to handle each case more quickly and more adeptly.

An experimental public defender program, consisting of ten full-time salaried public defenders, was set up in Johannesburg in 1991.¹⁴³ This pilot program should be expanded to more jurisdictions as soon as possible; given the success of the Johannesburg program, this is not unlikely in the near future. The public defenders could remain a part of the Legal Aid Board structure, with their salaries paid from the Legal Aid Board budget. A portion of the cost would be covered by the funds currently spent by the Board for criminal referrals, while the remainder would depend on a sizeable budget increase.¹⁴⁴ Integrating the public defenders into the existing system would reduce start-up costs, because, depending on the locations and sizes of Legal Aid offices, they could potentially utilize existing Legal Aid office facilities. Although the public defenders would be independently hired, rather than selected from the same ranks of civil service as prosecutors, there is some possibility that integration into the Legal Aid system may subject the public defenders to the same perceptions of partiality that currently plague the legal aid officers.¹⁴⁵ However, at least initially, the financial savings that could result from one integrated system will be the more pressing concern.

Locating lawyers to fill these public defender positions should not be difficult because there are young lawyers who need the experience in order to fulfill their articles of clerkship requirement. The South African legal profession currently operates under a dual-bar system similar to that of Great Britain, with attorneys corresponding to British solicitors and advocates corresponding to British barristers.¹⁴⁶

142. McQuoid-Mason, *Is It Feasible*, *supra* note 122, at 103. McQuoid-Mason notes, however, that these cost comparisons are based on salaries alone, and do not include the start up costs of implementing a new program. *Id.* at 107.

143. *Id.* at 107-08.

144. McQuoid-Mason notes, interestingly, that once a substantial portion of defendants have legal representation, a portion of the increased budget could come from the reduction in expenses necessary to operate prisons that will probably result from fewer criminal defendants receiving jail sentences. *Id.* at 109.

145. *See supra* note 124 and accompanying text.

146. *See van Buuren, supra* note 23, at 390 n.52.

Attorneys have the initial client contact and conduct the necessary research for a case, while advocates generally argue the cases in court.¹⁴⁷

Due to the regulation of South African legal practitioners, the current system of articles of clerkship¹⁴⁸ seems to thwart many law graduates in their search for employment in the legal market, resulting in a large pool of qualified but unemployed potential lawyers.¹⁴⁹ However, a recent amendment to the Attorneys Act allows graduates to substitute public service for the traditional two years of articles. The articles requirement is now satisfied by either two years of community service under the Legal Aid Board or at an approved law clinic, or one year of such service plus a four-month training course.¹⁵⁰ Graduates seeking to become advocates could complete their four to six month pupillage¹⁵¹ under the senior public defenders. Although both of these sources of staffing would involve a high turnover rate, the stream of manpower would be steady and the utilization of graduates who intend to serve for only a short time would allow a significant reduction in cost as the graduates' salaries could be kept very low.¹⁵² Obviously, some senior public defenders would have to be retained over long periods of time to provide stability and guidance; otherwise most of the advantages over the referral system would be lost. The high turnover rate would thus cause some problems but would probably not be fatal to the program; American public defender offices currently survive with high turnover rates.¹⁵³

147. *Id.*

148. The articles of clerkship (commonly referred to as "articles") is a two-year internship with a law firm or with a private or state attorney that law school graduates must complete before being able to practice as an attorney. See Attorneys Act No. 53 of 1979, ch. 1, reprinted in STATUTES OF THE REPUBLIC OF SOUTH AFRICA, *supra* note 9, at 457.

149. Estimates of the percentage of law graduates unable to secure articles range from 60% to 67%. See Sarkin, *supra* note 123, at 225; Fedler, *supra* note 100, at 1008. It is unclear what percentage of law graduates actually seek articles.

150. Attorneys Amendment Act 115 of 1993, reprinted in STATUTES OF THE REPUBLIC OF SOUTH AFRICA, *supra* note 9, at 559, 561; see also Fedler, *supra* note 100, at 1008.

151. Pupillage is an internship for advocates, lasting from four to six months, under an advocate with more than five years experience. See van Buuren, *supra* note 23, at 390 n. 52. Although not required by law, it is required for membership in the Society of Advocates. The majority of advocates complete a pupillage. See Jasodha H. Maharaj, *The Role of the Law Schools in Practical Legal Training*, 111 S. AFR. L.J. 328, 328 n. 2 (1994).

152. See *supra* note 140 regarding the salaries of articulated clerks. Aspiring attorneys taking the community service option could be compensated similarly.

153. Sarkin, *supra* note 123, at 229 n.44.

At present it is not clear whether the envisaged public defenders should be attorneys or advocates or some of both. Public defenders in less serious cases could be exclusively attorneys, as attorneys do have the right of appearance in lower courts. However, attorneys may not argue before the divisions of the supreme court, where the most serious criminal cases are tried.¹⁵⁴

A public defender system, as well as legal aid in general, would benefit from eradicating the distinction between attorneys and advocates. First, the attorney has become familiar with all of the facts of a case and all of the relevant legal issues. To have that person put the information into a form which can be easily accessed by a person unfamiliar with it is a waste of time and effort that could be avoided by simply having the already-familiar attorney argue the case. Second, it seems inevitable that some factual details or some nuances of the client's case, that perhaps do not seem important at the time, but which may be made relevant by unforeseen twists of the trial, will be lost in the transfer of information. Third, optimally, the attorney will have a relationship of trust with the client, which is not something easily transferred to an advocate with whom the client is not familiar. An integrated system would utilize time far more efficiently, allowing a greater number of cases to be handled by fewer lawyers.

2. *Increasing Available Manpower.* Other than Legal Aid Board referrals, the existing legal profession does not make a large contribution to the representation of indigent criminal defendants. At their own discretion, advocates may accept cases for less than the required fee, but there is some evidence that this practice, known as *pro amico* representation, has decreased since the creation of the Legal Aid Board.¹⁵⁵ One way to increase indigent representation by private counsel would be to promulgate legislation or bar regulations requiring each lawyer to contribute a certain number of hours of community service legal work per year.¹⁵⁶ However, such a system may prove incapable of meeting the vast need for criminal defense for several reasons. First, this practice would involve some of the same drawbacks as the referral system—a lawyer inexperienced

154. See van Buuren, *supra* note 23, at 390 n.52.

155. See *id.* at 397. In non *pro amico* cases, advocates are required by the bar to charge a minimum fee. *Id.* at 397 n.111.

156. Similar proposals are being considered by state bars in the United States. See, e.g., Ronald Sullivan, *Poverty Lawyers Swamped by Work*, N.Y. TIMES, July 24, 1989, at B3 (discussing proposed mandatory *pro bono* service for the New York Bar).

in criminal practice would take more time to prepare a case and would probably provide a less effective defense than would an experienced criminal lawyer. The distinction between attorneys and advocates would again aggravate the problem, requiring two volunteers rather than one for cases argued before the supreme court divisions. Second, if lawyers were permitted to allocate their public service hours to projects of their choosing, most would probably choose to handle the more familiar civil cases.¹⁵⁷

A more promising proposal is to entirely replace the system of articles with a mandatory public service requirement.¹⁵⁸ Two years, or even one, of continuous service would be far more useful than the equivalent number of hours spread over a legal career. In conjunction with a dissolution of the distinction between attorneys and advocates, all prospective lawyers could be subject to the same public service requirement before being admitted to the bar.¹⁵⁹ Because the majority of law graduates are likely to go into civil practice, public service time could be split between criminal defense work and civil work in a Legal Aid office, allowing the candidate lawyers to gain exposure to both types of practice. A public service requirement is not likely to be met with a great deal of legitimate resistance by South African law students because these students already expect to spend some period of time in a required internship, whether articles or pupillage.¹⁶⁰ In addition, their legal educations are heavily subsidized by the government, putting them in a position of indebtedness to the public.¹⁶¹

3. *Changing Legal Education.* In order for a public defender system utilizing new lawyers to be effective, South African law schools may have to make some changes in legal education. For example, in order to better prepare students for their public service requirements, law schools could increase emphasis on clinical training. Such

157. While there is, of course, a need for volunteers to assist with civil cases as well, this does not help to alleviate the problem of indigent criminal defendants.

158. Sarkin, *supra* note 123, at 224.

159. If the dual-bar system persists, as it is likely to, both attorneys and advocates could still be required to perform the public service internship, but duties could be assigned with respect to the candidate's career goal.

160. See Sarkin, *supra* note 123, at 229.

161. For example, in 1993, one year of an L.L.B. program at one South African university cost students an estimated R8210, with an approximated cost to the State of R90,000 per student for the entire program. Fedler, *supra* note 100, at 1004 n.13.

changes, as well as many other ideas for altering legal education that are beyond the scope of this Note, have already been suggested.¹⁶²

One potential reform of legal education that is particularly relevant to a potential public defender program, however, has been made possible by the new constitution. Currently, a student desiring admission to the bar must complete university level courses in English, Afrikaans, and Latin.¹⁶³ These language requirements, and the fact that law courses are conducted in English or Afrikaans, have proven to be a stumbling block for many black students, very few of whom speak either language as a first language.¹⁶⁴ Moreover, before the drafting of the 1994 Constitution, English and Afrikaans were South Africa's only official languages and court proceedings were generally conducted in one or the other with interpreters provided for those who were not sufficiently familiar with the language used.¹⁶⁵

The new provisional constitution specifies isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa, and isiZulu, as well as English and Afrikaans, as official languages.¹⁶⁶ It is not yet clear how the elevation of these languages to official status will affect the conduct of court proceedings, but the constitution allows provincial legislatures to designate any of the above languages as the official language for all or part of the province.¹⁶⁷ Presumably, regional or district court proceedings within a province that has designated an official language would be conducted in that official language. Amending bar requirements to allow an advocate who demonstrates proficiency in the official language of a province to be admitted to the bar for that province, without meeting the English, Afrikaans, and Latin requirements, could allow a more rapid increase in the number of capable advocates available to represent indigent defendants. In addition, law courses could be conducted in the primary language of the province in which the school is located, removing one of the disincentives to enroll in law school and allowing for the more rapid expansion of the legal profession. While one

162. See, e.g., Maharaj, *supra* note 152, at 328; Mauro Cappelletti, *The Future of Legal Education: A Comparative Perspective*, 8 S. AFR. J. HUM. RTS. 1 (1992).

163. Fedler, *supra* note 100, at 1002 n.7.

164. *Id.* at 1001-02.

165. See N.C. Steytler, *Implementing Language Rights in Court: The Role of the Court Interpreter*, 9 S. AFR. J. HUM. RTS. 205, 206 (1993).

166. S. AFR. CONST. ch. 1, § 3 (1).

167. *Id.* ch. 1 § 3(5).

might worry that removing the language requirements would lead to the creation of a Tower of Babel inside each courtroom, interpreters are already an entrenched feature of South African courts.¹⁶⁸ Although having one's lawyer rely on an interpreter to translate court proceedings may not be the optimal situation for a defendant, in almost all cases it would be preferable to having the lawyer altogether absent from the proceedings.

V. CONCLUSION

South Africa faces a long and arduous process of change in order to add substance to the skeleton of an indigent defendant's right to be provided with counsel at state expense. That process is not an impossible one. Whether or not it will be accomplished depends largely upon the value that the government and the legal profession are willing to place on protecting and ensuring the right to counsel for indigent defendants. The theoretical underpinnings of the new South Africa—equality and justice in particular—seem to demand immediate fulfillment of the needs of many parties, all of whom are contending for limited resources. Not only do equality and justice require the protection of the right to counsel, but they also require the immediate return of lands confiscated during apartheid, immediate integration of and equal funding for the previously segregated schools, and immediate access to equal and adequate health care. The indigent criminal accused are not the only group of South Africans waiting for the proclaimed new era to have some practical meaning in their individual lives and it is easily conceivable that their needs may not be a first priority. The existence of the right to be provided with counsel still represents a major victory, but the fruits of that victory may not be enjoyed by the victors for years to come.

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168. See Steytler, *supra* note 165, at 206.

