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NOTE

INSUFFICIENT LEGAL REPRESENTATION FOR THE INDIGENT DEFENDANT IN THE CRIMINAL COURTS OF SOUTH AFRICA*

I. INTRODUCTION

There is a sense of unfairness and injustice when criminal defendants stand trial without legal representation solely because of their indigency. The picture becomes bleaker when there is no jury and defendants are likely to be illiterate, unsophisticated, not versed in the official languages of South Africa,¹ and of a non-white racial² and cultural background.³ In South

* Special thanks to Anton Trichardt, an advocate and member of the South African Bar, for his invaluable assistance.

1. The official languages in South Africa are English and Afrikaans. Constitution Act, No. 32 §§ 108, 118 (S. Afr. 1961). 5 H. HAHLO & E. KAHN, *THE BRITISH COMMONWEALTH, THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION, THE UNION OF SOUTH AFRICA* 625 (G. Keeton ed. 1960) [hereinafter 5 H. HAHLO & E. KAHN]. There are nine main tribal languages: Zulu, Xhosa, Tswana, Sotho, Pedi, Swazi, Venda, Bushman and Hot-tentot. There are also a number of different dialects such as Ndebele and Tsonga. K. KATZNER, *THE LANGUAGES OF THE WORLD* 354 (1986); N. VAN WARMELO, *LANGUAGE MAP OF SOUTH AFRICA* 1-4 (1952).

If a defendant or witness speaks neither official language, an interpreter is provided. Magistrate's Court Act, No. 32 § 6(2) (S. Afr. 1944); *State v. Mzo*, 1 S. Afr. L. Rep. 538, 539 (Cape Provincial Division, 1980) (it is the magistrate's responsibility to decide how to explain the accused's rights and their implications; it is an irregularity if this responsibility is delegated to the interpreter); *State v. Mafu*, 1 S. Afr. L. Rep. 454, 457-59 (Cape Provincial Division, 1978) (it is per se irregular if the court fails to provide competent interpreters, warranting the setting aside of the conviction and sentence). See also N. STEYTLER, *THE UNDEFENDED ACCUSED ON TRIAL* 76 (1988) [hereinafter N. STEYTLER].

2. Under South Africa's apartheid system, all South Africans are required to be designated to a racial group. Population Registration Act, No. 30 (S. Afr. 1950). The term "blacks" is used through out this Note as a legal term of art of the South African legal system. That term, as well as the terms "whites," "coloreds," and "asians," carries legal consequences because specific laws apply to South Africans who fit the description of each of these groups. See Berat, *Legal Aid and the Indigent Accused in South Africa: A Proposal for Reform* 18 GA. J. INT'L & COMP. L. 239 n.2 (1988); Ream, 18 UCLA L. REV. 335 n.1 (1970); Seltzer, 8 GA. J. INT'L. & COMP. L. 176 n.3 (1978). South African Presi-

Africa during 1987, eighty percent of all criminal defendants were unrepresented.⁴ In addition, because South Africa's judicial system is adversarial, it depends on lawyers to champion the parties' causes by presenting the main issues.⁵ If the defendant lacks effective assistance of counsel the attainment of a fair trial becomes more difficult. Moreover, when the state, represented by a prosecutor, tries an unrepresented defendant, a fair trial is

dent F.W. de Klerk is, however, in the process of eliminating the Population Registration Act. Wall St. J., Feb. 4, 1991, at A8, col. 1.

The total population of South Africa at June 30 this year was estimated to be 30.1 million, according to the Central Statistical Service. There were 21.1 million blacks, 4.9 million whites, 3.1 million coloureds and 941 thousand asians. The annual rate of growth in the population between 1980 and 1989 for whites was 1%, coloureds 1.8%, asians 1.74% and blacks 2.3%. Annual increase in the white population over the past four years amounted to only 0.65% because of the relatively high emigration and the relatively low immigration since about the middle of 1985.

The Star, November 24, 1989, at 1, col. 1 [hereinafter The Star].

3. The South African courts have taken judicial notice of this predicament:

[n]or am I done yet with all the tribulations undergone by people defending themselves. Additional and grave hardships are suffered in this land by those who happen to be Black, as the great majority do indeed. Many are illiterate or barely literate. Few speak or understand either official language, or cope well enough to hold their own in a tongue that remains foreign to them. What is said in our courtrooms to each of the rest, what he in turn says there, must therefore be interpreted, word by word. But still he is not orientated. For much of our jurisprudence is alien to the culture and traditions of the society from which he springs. So are some of our procedures. Entangled in the workings of a legal machinery that bewilders him, he has the most to gain from a lawyer's help and the most to lose from the lack of it. Yet the barrier of poverty stands highest in his very case.

State v. Khanyile, 3 S. Afr. L. Rep. 795, 812-13 (Natal Provincial Division, 1988).

The Appellate Division of the Supreme Court became South Africa's highest court in 1961 and hereinafter in case citations to this court this will be abbreviated as A. Originally, there were seven provincial divisions of the Supreme Court; the Natal (N.), Transvaal (T.), Orange Free State (O.), Cape (C.), Northern Cape (N.C.), Eastern Cape (E.C.) and South West Africa (S.W.) provincial divisions (South West Africa was originally a mandated territory under the trusteeship of South Africa. In March 1990 South West Africa gained its independence and is known today as Namibia.) There are three local divisions of the provincial divisions: Witwatersrand (W.L.), Durban and Coast (D.C.L.), and South Eastern Cape (S.E.C.L.). See *infra* notes 35, 42 and accompanying texts on the Appellate and provincial divisions of the Supreme Court.

4. N. STEYTLER, *supra* note 1, at viii (quoting the Natal Mercury, Oct. 13, 1987). Natal is one of South Africa's provinces. Others provinces include: Transvaal, Orange Free State and the Cape province. In this Note, the self-governing territories and the independent homelands of Bophuthatswana, Ciskei, Gaznkulu, Kangwane, Kwandebele, Kwazulu, Lebowa, Qwaqwa, Transkei, and Venda are not included in the references to South Africa unless specifically stated.

5. See *infra* note 21 and accompanying text on the adversarial and inquisitorial legal systems.

virtually impossible to achieve.⁶

Many countries have created various forms of legal assistance to balance the inequity of being an unrepresented defendant.⁷ South Africa has taken an unsatisfactory approach. While it has created a Legal Aid office,⁸ it does not fund it adequately to provide legal assistance to all who request assistance.⁹ South Africa's statutory safeguards are few, insufficient, and vague.¹⁰ The courts have tried to define these safeguards through various decisions and to increase the protection afforded to the unrepresented defendant.¹¹ However, this has led to a dual system, with

6. The South African courts recognize this inequality in their judicial system: [b]ut the State for its part would never dream of dispensing with professional prosecutors . . . Its massive resources are mustered and brought to bear on the task, rightly since no amateur can competently perform that. Rank inequality is then witnessed, once the person charged is an amateur too, an inequality hitting no outlaw . . . but lying between a prosecutor who has still to prove his allegations and a man presumed, till the Court finds him guilty, to be quite as innocent as the one in the street.

Khanyile, 3 S. Afr. L. Rep. at 811.

7. Some solutions include legal aid, public defenders offices or an inquisitorial rather than adversarial legal system. For example, Great Britain uses a legal aid system, with matters referred to barristers. However, unlike South African lawyers, British lawyers have sufficient interest in giving legal aid and sufficient numbers of barristers to undertake the case load. M. Partington, *Great Britain* in PERSPECTIVES ON LEGAL AID 158-76 (F. Zemans ed. 1979). See generally E. MOERAN, LEGAL AID SUMMARY (1978). The United States uses a public defender system, funded by the government. The prestige of being a public defender has been used as a stepping stone for lawyers in attaining political positions, thus making these positions attractive. Handler, *United States of America* in PERSPECTIVES ON LEGAL AID, 318-45 (F. Zemans ed. 1979) [hereinafter PERSPECTIVES ON LEGAL AID].

The inquisitorial system, used in Germany and France, relies on a judge to arrive at the truth of the situation. The attorneys are not adversaries, but aid the judge in the search for the truth. The prosecutor's primary job is not to put the defendant in jail but to ascertain the truth. It is the court's duty to take into consideration the defendant's defense whether it is pleaded or not. See generally PERSPECTIVES ON LEGAL AID 134-57. See *infra* note 21 and accompanying text for a discussion of the inquisitorial system.

8. Legal Aid Act, No. 22 (S. Afr. 1969). See *infra* notes 78-96, 125-40, 280-86 and accompanying text.

9. N. STEYTLER, *supra* note 1, at 21-22, 53; see also G. Hoexter, COMMISSION OF INQUIRY INTO THE STRUCTURE AND FUNCTIONING OF THE COURTS (1983) [hereinafter Hoexter Commission]. The Hoexter Commission was a government-commissioned team of lawyers and legal scholars asked to reassess the South African legal system and to present recommendations for fundamental changes in the administration of justice.

10. The statutory right to counsel exists. Criminal Procedure Act, No. 51, ch. 11, § 3(1) (S. Afr. 1977). The right to representation exists only at trial and if a defendant can afford it. E. DU TOIT, COMMENTARY ON THE CRIMINAL PROCEDURE ACT 11-1 (1989). However, there may be an automatic review of cases with sentences greater than three to six months if the accused was unrepresented at trial. Criminal Procedure Act, No. 51, ch. 30 § 302 (S. Afr. 1977). See *infra* note 68 and accompanying text on automatic review.

11. *State v. Blooms*, 4 S. Afr. L. Rep. 417 (C. 1966) (the trial which had at first been

one set of judicial duties for defendants with counsel and another for unrepresented defendants. For example, procedural and evidentiary standards are relaxed for unrepresented defendants, but strict standards are maintained for defendants with counsel.¹² Ironically, this dual standard could make a defendant choose to be unrepresented rather than to be represented by a mediocre lawyer. This is contrary to the essence of the adversarial legal system.¹³ It also avoids the heart of the matter: the need for legal representation for all criminal defendants.

This Note describes the South African legal system, focusing on its criminal provisions and the statutory and common-law safeguards that attempt to protect the unrepresented defendant. It also explores the causes of the existing problems of underrepresentation. This Note then analyzes the current case law, as well as the solutions presented by the academic legal community. Finally, this Note concludes that South Africa's government should increase funding for legal aid, educate its populace about the existence of this program, and create incentives for legal practitioners and law students to offer legal assistance to indigent defendants.¹⁴

postponed was suddenly advanced and the defendant had permitted the trial to proceed because he was disconcerted and uncertain of his rights or how to deal with the situation. Upon review the conviction was set aside because, but for the irregularity, the defendant would have been represented); *State v. Wessels*, 4 S. Afr. L. Rep. 89 (C. 1966) (the failure to allow audience through a legal practitioner to a person who objects to giving evidence in a criminal trial is a gross irregularity); and *Regina v. Mati*, 1 S. Afr. L. Rep. 304 (A. 1960) (while there is no statutory requirement that a defendant be represented when charged with capital offenses, it is a salutary practice of the courts).

12. N. STEYTLER, *supra* note 1, at 58-62. Another example is that only the defendant's counsel may cross examine and call witnesses. With an unrepresented defendant, the judge is obliged to explain the importance of cross examination and to help the defendant to cross examine witnesses without actually acting on his behalf. This is a very difficult balance to strike. *Id.* See also *State v. Rudman*, 3 S. Afr. L. Rep. 368 (E.C. 1989); *State v. Johnson*, 3 S. Afr. L. Rep. 368, 377-79 (E.C. 1989).

13. See *infra* note 21 and accompanying text on adversarial legal system.

14. This Note will focus on the unrepresented defendant in criminal matters only. It will not discuss the effects of the current state-of-emergency legislation on the legal system. Internal Security Act, No. 74 (S. Afr. 1982). While it is clear that the lack of interest in extending legal aid to all defendants is partially based on the political and racial problems faced by South Africa, these issues are beyond the scope of this Note.

II. SOUTH AFRICA'S LEGAL SYSTEM AND THE SAFEGUARDS CREATED FOR THE UNREPRESENTED DEFENDANT

A. South Africa's Legal System

1. History

South Africa's legal system is primarily based on customary law, with large areas re-enacted by statutory law.¹⁵ The customary law is Roman-Dutch, introduced by the Dutch in the mid-seventeenth century.¹⁶ The law has developed over time so that South Africa is the only place in the world where a truly uncoded system of civil law exists.¹⁷ Thus, its legal system is considered to be a hybrid of both civil and common law. During the period of Dutch rule, the legal system was inquisitorial.¹⁸ At this early stage, the system acknowledged the need to help the defendant charged with capital crimes who did not have the means of procuring legal representation by providing *pro deo* services.¹⁹

With the advent of British rule,²⁰ the adversary system re-

15. Duggard, *The South African Constitution 1910-1980*, in OUR LEGAL HERITAGE 105 (1982) [hereinafter Duggard].

16. Roman-Dutch law is a civil law system. Presently, South Africa is in the unusual position of basing its common law on a civil law system. 5 H. HAHLO & E. KAHN, *supra* note 1, at 35-38, 41-42.

17. Duggard, *supra* note 15, at viii, 105.

18. See *infra* note 21 and accompanying text on the inquisitorial system.

19. *Pro deo* is the representation by advocates of the indigent defendant. This duty was acknowledged by the legal profession as early as 1813. N. STEYTLER, *supra* note 1, at 26. This duty exists only for capital offenses. 5 H. HAHLO & E. KAHN, *supra* note 1, at 290. This representation is not a legislated right but a rule of practice of the Supreme Court. *Regina v. Mati*, 1 S. Afr. L. Rep. 304, 306-07 (A. 1960); Lansdown, ANN SURV. S. AFR. L. 348 (1960). Usually junior advocates are required to serve on *pro deo* cases. Carey-Miller, *Some Aspects of Legal Aid in Criminal Proceedings*, 89 S. AFR. L.J. 71, 72 (1972) [hereinafter Carey-Miller]. See also N. STEYTLER, *supra* note 1, at 16. See *infra* notes 52 and 100 and accompanying text on junior advocates and capital cases.

20. The British first controlled and influenced the Cape Province from 1795-1803 and again in 1806 until it was formally ceded in 1814. Natal was annexed in 1843 and became a Crown Colony in 1856. 5 H. HAHLO & E. KAHN, *supra* note 1, at 7. The Orange Free State and the South African Republic (later Transvaal) represented the Boer Republic until the Anglo-Boer War of 1899-1902, after which they became British Colonies. The Union of South Africa was not proclaimed until 1910 when, under the British South Africa Act of 1909, a unitary constitution was created. Sovereign independence from Great Britain was granted in 1931 by the Statute of Westminster, declaring the Union as a self-governing dominion of the British Commonwealth of Nations. In 1961 the South African Parliament passed the Constitution Act, severing the last ties with Great Britain and converting the state from a monarchy into a republic. C. KENYON, *SOUTH AFRICA: LAW OF CRIMINAL PROCEDURE* 2-3 (1982). See also J. DUGGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 267-68 (1978).

placed the Dutch inquisitorial system.²¹ The British also incorporated a dual-lawyer system in South Africa,²² consisting of advocates, who specialized in court practice, and attorneys, who functioned primarily as counselors and drafters of documents.²³ Furthermore, the British introduced legal concepts such as precedent, trial by jury, and equal and impartial justice.²⁴ The principle of impartial justice was not regularly applied, however, be-

21. The main difference between these two systems is the manner in which the "truth" is ascertained. In the inquisitorial system, the judge and legal counsel play an active role in an attempt to establish the truth. Snyman, *The Accusatorial and Inquisitorial Approaches to Criminal Procedure: Some Points of Comparison between the South African and Continental Systems*, 8 COMP. & INT'L L.J. S. AFR. 100, 103 (1975) [hereinafter Snyman]. Police files are open documents, the court calls and examines witnesses, and the accused may also be questioned. *Id.* at 104-05, 109-11. See Brouwer, *Inquisitorial and Adversary Procedures — a Comparative Analysis*, 55 AUSTR. L.J. 207, 209, 212-14 (1981) [hereinafter Brouwer]. The defense lawyer and prosecutor may suggest further questions and evidence, but there is no onus on either party to prove the innocence or guilt of the accused since it is the court's duty to establish the "truth." Snyman, *supra*, at 103-04, 106-07; Brouwer, *supra*, at 212-14.

On the other hand, the adversary system is party-based and depends on the vigorous argument of two partisan and skilled lawyers to arrive at the truth. The litigants must advance the issues by selecting the evidence most favorable to their case. The issues this evidence presents is for a decision by an impartial and passive judge, and depends on the skill of the lawyers. Certoma, *The Accusatory System v. the Inquisitorial System: Procedural Truth v. Fact?*, 56 AUSTR. L.J. 288 (1982) [hereinafter Certoma]. See also S. LANDSMAN, *THE ADVERSARY SYSTEM* 1-2, 4 (1984) [hereinafter S. LANDSMAN]. In the adversary system, the litigants generally are responsible for "investigating and presenting the facts from a partisan perspective." Zeidler, *Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure*, 55 AUSTR. L.J. 390, 395 (1981). The facts thereby delineate the issues. Certoma, *supra*, at 288. The litigants further refine the issues through plea bargaining and admissions. N. STEYTLER, *supra* note 1, at 4. Usually, the accused cannot be compelled to testify under the adversarial system. Zeidler, *supra*, at 395; Certoma, *supra*, at 291. The credibility of the testimony presented must be tested by the opposing litigants. Zeidler, *supra*, at 397. The judge may determine the admissibility of evidence and compliance of the parties to the rules of court. Snyman, *supra*, at 110. Otherwise, the judge is passive and makes a decision based solely on the evidence presented by the parties. S. LANDSMAN, *supra*, at 3; Snyman, *supra*, at 103; Zeidler, *supra*, at 395. Thus, in an adversary system, the unrepresented defendant is afforded little protection due to the passive role taken by the judge and the onus on the litigants to raise the important issues. Brouwer, *supra*, at 208.

22. 5 H. HAHLO & E. KAHN, *supra* note 1, at 42.

23. Advocates are given exclusive control of litigation in the Supreme Courts (each province has at least one provincial division of the Supreme Court), while attorneys have exclusive rights to draft contracts and other documents. See *infra* notes 42, 52 and accompanying texts on the different provincial divisions of the Supreme Court and on advocates and attorneys, respectively.

24. The Roman-Dutch law recognized the principle of equality before the law. 5 H. HAHLO & E. KAHN, *supra* note 1, at 794. However, the principle was first directly accepted in the Cape Colony when the Cape was brought under British rule. N. STEYTLER, *supra* note 1, at 12, 25-34.

cause the legal system had separate courts for blacks.²⁵ These courts were abolished in 1984-85.²⁶ In 1969, the South African Government abolished the jury system because it was too costly and time-consuming.²⁷

The present South African Government incorporates certain fundamental principles into its legal system: (1) equality before the law;²⁸ (2) a presumption of innocence until proven guilty;²⁹ (3) a requirement that guilt must be proved beyond a reasonable doubt in criminal matters;³⁰ (4) the right to legal representation;³¹ (5) the right against self-incrimination;³² (6) the right to remain silent;³³ and (7) the right to place one's case before the court.³⁴ The South African legal system also uses the rules of

25. For a discussion of the racial designations of South Africans see *supra* note 2 and accompanying text.

26. "Black Laws" and "Courts of Chiefs and Headmen" still exist, however. While it seems alien to have a split judicial system in the same country, especially a division based on race, these tribal courts do serve a practical function: they are an indigenous cultural institution, supported by blacks and by experts in black customary law. They also tend to be in rural black areas not serviced by other courts. See Hoexter Commission, *supra* note 9, at part I, para. 3.4.3.8.

27. Abolition of Juries Act, No. 34 (S. Afr. 1969). There is more chance for bias with a non-jury system, not only because the defendant does not benefit from a jury verdict concerning issues of witnesses' credibility and the facts, but because personal prejudices of the presiding judicial officer can go unchecked. 5 H. HAHLO & E. KAHN, *supra* note 1, at 260-64.

28. This principle is proclaimed in the preamble of the Constitution Act, No. 110 (S. Afr. 1983). It states as one of the national goals "[t]o uphold the independence of the judiciary and the equality of all under the law." *Id.* This goal has been tempered, however, by the "Judiciary [taking] cognisance of social relations in [South Africa]. It permits discrimination between different races — but it must not lead to substantial inequality." 5 H. HAHLO & E. KAHN, *supra* note 1, at 135, 813.

29. *Rex v. Ndhlovu*, App. Div. Rep. 369 (A. 1945). See also 5 H. HAHLO & E. KAHN, *supra* note 1, at 307. Some statutes do put the burden of proof on the accused but these tend to be political crimes. *Id.*

30. *Rex v. Bolen*, App. Div. Rep. 345 (A. 1941). See also 5 H. HAHLO & E. KAHN, *supra* note 1, at 308.

31. Criminal Procedure Act, *supra* note 10, at § 73(2). The right to representation is available to those that can afford it. See *supra* note 10.

32. *State v. Assel*, 1 S. Afr. L. Rep. 402 (C. 1984) (the defendant has the right to refuse to give evidence and the decision to remain silent or to testify is the prerogative of the defendant); *State v. Mdoana*, 4 S. Afr. L. Rep. 46 (E.C. 1978) (the criminal defendant has the right to close without leading any evidence).

33. Criminal Procedure Act, *supra* note 10, at § 151(1)(b). *State v. Evans*, 4 S. Afr. L. Rep. 52 (C. 1981), (confirmed, *State v. Daniels*, 3 S. Afr. L. Rep. 275 (A. 1983)); *Assel*, 1 S. Afr. L. Rep. 402.

34. *State v. Mabote*, 1 S. Afr. L. Rep. 745 (O. 1983) (the defendant has the right to address the court before judgment on the merits and the opportunity to do so must be afforded him regardless of his prospects of success); *State v. Hlongwane*, 4 S. Afr. L. Rep. 321 (N. 1982) (the right for unrepresented defendants to subpoena witnesses is part of

precedence including stare decisis, as well as binding and persuasive decisions.³⁵ Today, however, the rules of procedure have become more complicated, making it especially difficult for a person not schooled in the law to participate in adversarial proceedings.³⁸

2. Court Structure and Officials

The court structure in South Africa consists of lower and superior courts. The lower courts are the Magistrates' courts,³⁷ the Regional courts,³⁸ and the Black courts.³⁹ The lower courts

their right to put their case forward). See also N. STEYTLER, *supra* note 1, at 156-57, 168-72.

35. van S d'Oliveira, *The Administration of Justice in South Africa* in OUR LEGAL HERITAGE, at 145, 154 [hereinafter van S d'Oliveira]. The Appellate Division's decisions bind all divisions of the Supreme Court and the lower courts. It regards itself as bound by its own decisions unless a decision "has been arrived at on some manifest oversight or misunderstanding" or its attention "was not drawn in the previous decisions to relevant authorities." W. HOSTEN, A. EDWARDS, C. NATHAN & F. BOSMAN, *INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY* 230 (1983) [hereinafter W. HOSTEN]. The Provincial Divisions, Local Divisions and lower courts do not regard themselves bound by precedents of other divisions. However, courts are bound by decisions from higher courts in their immediate hierarchical line. Furthermore, a single judge court is bound by a decision of a full court (meaning two or more judges) within its division. *Id.* See generally W. HOSTEN, *supra*, at 230-45.

36. This difficulty has been expressed by the Natal Provincial Division court: [t]he odds are stacked against [the unrepresented defendant]. He knows nothing about the rules of evidence, rules mastered only through training and experience, rules that no tips he receives from the trial Court can equip him to understand fully or apply effectively. He knows nothing of the criminal law's subtleties . . . he has no real grasp of what counts in law and what does not. *State v. Khanyile*, 3 S. Afr. L. Rep. 795, 811-12 (N. 1988).

37. These courts are divided into Magisterial districts with 325 magistrates' offices throughout South Africa. These courts fall under the magistrates' section of the Department of Justice. Their jurisdiction is determined by the Magistrates Act, No. 32 (S. Afr. 1944). These courts have jurisdiction over all criminal cases in their district except treason, murder and rape. Penalties that may be imposed are limited to 12 months imprisonment, a fine not exceeding 1000 rand and corporal punishments with a cane only. These courts also have civil jurisdiction over persons resident, employed or carrying on business within its district, or where the entire cause of action arose within its district. The court does not have jurisdiction over matters which exceed 1500 or sometimes 3000 rand unless the parties have agreed to this in writing. The Act specifically excludes cases concerning marriage, wills and the mental capacity of a person. van S d'Oliveira, *supra* note 35, at 145-46. For the fourth quarter of 1990 the South African rand averaged 2.5325 rand to the dollar. INT'L FIN. STATISTICS, INT'L MONETARY FUND, March, 1991.

38. The Regional courts have increased penal jurisdiction and were established in 1952. There are six regional courts. These are exclusively criminal courts with jurisdiction over all criminal matters except treason and murder. Penalties that may be imposed are limited to 10 years imprisonment, a fine not exceeding 10,000 rand, and corporal punishment with a cane only. van S d'Oliveira, *supra* note 35, at 146. See *supra* note 37

submit their appeals and cases under automatic review⁴⁰ to their respective Provincial Divisions.⁴¹

The superior courts include the Supreme Courts,⁴² special courts,⁴³ and the Appellate Division.⁴⁴ The Appellate Division, situated in Bloemfontein,⁴⁵ is the highest court of South Af-

for valuation of the South African rand.

39. These courts were created because a conflict arose between South African law and native or tribal law. These courts deal solely with the adjudication of issues between blacks in terms of indigenous law and custom so long as these issues do not conflict with "civilized" legal norms. These courts include the Homeland courts existing in the self governing territories and the independent homelands of Transkei, Bophuthatswana, Ciskei, and Venda. van S d'Oliveira, *supra* note 35, at 146, 149-50. See also Hoexter Commission, *supra* note 9, at part I, paras. 3.4.3.1-3.4.3.7. These courts have their own hierarchy: Courts of Chiefs and Headmen, and commissioners' courts with right of appeal to appeals court for commissioners' courts and, under special circumstances, to the Appellate Division. W. HOSTEN, *supra* note 35, at 229 n.64.

40. For a discussion of automatic review see *infra* note 68 and accompanying text.

41. The Criminal Procedure Act, No. 51, ch. 28, § 294 (S. Afr. 1977). See also *infra* note 42 on provincial divisions.

42. Presently, there are six provincial divisions of the Supreme Court: the Natal, Transvaal, Orange Free State, Cape, Northern Cape, and Eastern Cape provincial divisions. See *supra* note 3. There are three local divisions: Witwatersrand, Durban and Coast, and South Eastern Cape division. These have concurrent jurisdiction with their provincial division counterparts. Judges of the provincial divisions preside over the courts of the local divisions. The Supreme Court has original and unlimited jurisdiction within its provincial boundaries. It is also empowered to hear appeals from lower courts and to review the proceedings of lower courts and administrative bodies. Murder, treason and very serious cases may only be brought before the Supreme Court. Penalties that may be imposed are generally unlimited, including life imprisonment and the death penalty. van S d'Oliveira, *supra* note 35, at 150-51. See *infra* note 57 regarding "serious cases."

43. Special courts include the Water Courts (established in 1912 to hear any matter connected with use of water from a public stream or underground water), Special Income Tax Court (established in 1914 to hear all appeals from the rulings of the Commissioner of Internal Revenue), Special Court of Maintenance and Promotion of Competition Act (hearing appeals from the decisions of the minister and actions against persons who have applied restrictive commercial practices), Court of the Commissioner of Patents, and Court of the Registrar of Trade Marks. van S d'Oliveira, *supra* note 35, at 151-53.

44. Prior to 1950, Appellate Division decisions were reviewable by the Privy Council in Britain. Thereafter the Appellate Division of the Supreme Court of South Africa became the final judicial tribunal subject to Parliament's legislation. The Appellate Division consists of the Chief Justice of South Africa and 13 judges of appeal (this number is determined by the State President and has varied in the past). It is solely a court of appeal from the divisions of the Supreme Court only upon leave from the lower court judges. Its decisions are binding on all courts in South Africa. Generally, appeals of both criminal and civil cases are heard by three judges, while constitutional questions require eleven judges. van S d'Oliveira, *supra* note 35, at 153-54.

45. Bloemfontein is the capital of the Orange Free State and the seat of the Judiciary. Both Pretoria (the capital of the Transvaal province) and Cape Town (the capital of the Cape province) share the seat of Government, which moves back and forth every six months.

rica.⁴⁶ The Appellate Division, as well as all other courts, lack the power to contravene the laws passed by the South African Parliament.⁴⁷ The courts' only role is to interpret the laws.

Presiding officers of the courts include the Chief Justice,⁴⁸ judges,⁴⁹ acting judges,⁵⁰ and magistrates.⁵¹ Court officers include legal practitioners (advocates and attorneys),⁵² attorneys-

46. W. HOSTEN, *supra* note 35, at 227. *See supra* note 44.

47. The South African Constitution establishes the supremacy of Parliament: (1) Parliament shall be the sovereign legislative authority in and over the Republic, and shall have power to make laws for the peace, order and good government of the Republic.

(2) No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by parliament, other than an Act which repeals or amends or purports to appeal or amend the provision of section one hundred and eight and one hundred and eighteen.

Constitution Act, No. 32, § 59 (S. Afr. 1961).

48. This person is the Chief Justice of the Appellate Division and is selected by the Governor-General from among the judges. 5 H. HAHLO & E. KAHN, *supra* note 1, at 264.

49. Technically, judges for all superior courts may be chosen with the sole qualification of being a "fit and proper person." 5 H. HAHLO & E. KAHN, *supra* note 1, at 264. In practice, however, judges are chosen from the ranks of senior advocates (a title obtained after 15 years of work at the Bar and upon application to the Minister of Justice). A judge may be removed from office only by the State President on the grounds of misconduct or incompetence. "A judge's salary may not be reduced while he holds office." van S d'Oliveira, *supra* note 35, at 155. There is compulsory retirement for judges at the age of seventy. 5 H. HAHLO & E. KAHN, *supra* note 1, at 264.

50. Acting judges are appointed for six-month terms by the Minister of Justice, mainly to the lower and special courts. van S d'Oliveira, *supra* note 35, at 154-55.

51. Magistrates and regional magistrates are public service officials under the Department of Justice, although they are independent and unfettered in their judicial functions. They are appointed by the Minister of Justice. The minimum academic qualification is the diploma juris (a legal degree of lower quality than that required for attorneys and advocates) for a Magistrate and the LLB or diploma legum for regional magistrate. The magistrate also has many administrative duties to perform. van S d'Oliveira, *supra* note 35, at 155-56; 5 H. HAHLO & E. KAHN, *supra* note 1, at 273-75.

52. As in Great Britain, South Africa has a dual-bar system; advocates (members of the bar) and attorneys (members of the side-bar). Although both are admitted to practice by the Supreme Court, their admission requirements differ. Advocates must have an LLB degree, complete a four to six month pupillage under an advocate with five years experience, and pass an exam on, inter alia, ethics, criminal procedure and evidence, motion court practice, preparation and conduct of civil trials, and legal writing. Attorneys may have a LLB or a B Proc degree, serve two years under articles of clerkship bearing the title of candidate attorney (1989 amendments to Act No. 23 of 1923) in a law firm and pass a national exam. van Dijkhorst & Mellet, *Legal Practitioners*, in 14 THE LAW OF SOUTH AFRICA 213-56 (W. Joubert ed. 1981).

Advocates may argue issues in all the Supreme and lower courts. Judges are chosen from their ranks. Advocates are organized in societies of advocates — one for each Division of the Supreme Court. The societies impose discipline to safeguard ethical standards as well as dictating a fee floor for services rendered. Advocates receive work from attorneys by being "briefed" on the issues or from the Bar (*pro deo* cases). Advocates may not decline to take on a case unless they are appearing in court on the same day as the

general (prosecutors),⁵³ and administrative officers.⁵⁴ Other officials include the State Attorney, State Law Adviser, Master of the Supreme Court, Registrar of Deeds, and other Registrars.⁵⁵

B. Safeguards For the Unrepresented Defendant

Statutory safeguards in the Criminal Procedure Act create the right to counsel⁵⁶ and the automatic review of serious cases⁵⁷ when a defendant is unrepresented at trial. Also, the Legal Aid Act⁵⁸ was passed in 1969 to create a national system for the delivery of legal aid.⁵⁹ This Act established the Legal Aid Board

proffered case. Advocates may not solicit business from these sources and this is so strictly enforced that they will not visit the attorneys at their firms; rather the attorney must visit them at their chambers. *Id.*

Attorneys draft all contracts and advise clients. Attorneys may not advertise their services but they are allowed to solicit business and they are responsible for the client relationship. They may choose which advocate to "brief." "Briefing" entails researching the legal issues, presenting them in a memo for consideration by the advocate and then discussing the strategy of how to present the case in court. Attorneys may argue issues in the District and Regional courts but may not argue in the Supreme courts. The attorney must pay the advocate's fees regardless of whether the client pays the attorney. *Id.* at 256-433.

This highly rigid, split-duty system means that a defendant who is only given an attorney cannot be represented in the Supreme Court, while the defendant with only an advocate will not benefit from the legal research normally done by the attorney.

53. Attorneys-general are under the jurisdiction of the Department of Justice and are subject to the control and instructions of the Minister of Justice. The State President appoints the attorney-general for each provincial division. The office has been non-political since the Union of South Africa was formed. The office is held by a public servant concerned solely with prosecutions. This position's duties are determined by the Criminal Procedure Act. Although the attorney-general may appear personally before any court, his power is delegated to his personnel of state advocates (for superior courts) and public prosecutors (in the lower courts). *van S d'Oliveira, supra* note 35, at 158.

54. Administrative officers include the registrar (Supreme courts) and clerk of the court (Magistrate's courts). *van S d'Oliveira, supra* note 35, at 160-61.

55. Additional registrars include the Registrars of Companies, Patents, and Trade Marks. *van S d'Oliveira, supra* note 35, at 161-64.

56. Criminal Procedure Act, No. 51, ch. 11, § 73 (S. Afr. 1977).

57. Serious cases are those cases where the defendant received a prison term of three months or a fine exceeding 500 rand from a Magistrate with less than seven years experience, or a prison term of six months or a fine exceeding 1000 rand from a Magistrate with more than seven years experience. Criminal Procedure Act, No. 51, ch. 11, § 302 (S. Afr. 1977). *See supra* note 37 for the United States dollar equivalent of a South African rand. *See infra* note 68 and accompanying text regarding the automatic review of cases.

58. Legal Aid Act, No. 22 (S. Afr. 69).

59. McQuoid-Mason, *Legal Aid*, in 14 THE LAW OF SOUTH AFRICA 181-82 (W. Joubert ed. 1981) [hereinafter McQuoid-Mason, *Legal Aid*]. Prior to the Legal Aid Act, a number of private and partially state-funded organizations provided legal aid services. However, they were based on charity and this explains why legal practitioners tended to

(Board) and the funds to support the legal aid services for those who require legal advice and representation.⁶⁰ Other safeguards, including the *pro deo* and *pro amico* systems, are found in the common law.⁶¹

1. Statutory Safeguards

a) Criminal Procedure Act, No. 51 of 1977

The Criminal Procedure Act codifies some of the defendants' rights including: (1) the right to call and cross-examine witnesses;⁶² (2) the right to be present during the trial;⁶³ (3) the automatic review of serious cases;⁶⁴ and (4) the right to have legal representation.⁶⁵ While the Criminal Procedure Act specifically included the right to counsel,⁶⁶ no provisions were made for

lose interest in them. Also, during the 1960s, a fund was instituted to provide legal aid for political defendants but the organization was declared to be unlawful and was closed down on the pretext of wanting to provide a national system of legal aid. D. McQUOID-MASON, AN OUTLINE OF LEGAL AID IN SOUTH AFRICA 3 (1982) [hereinafter D. McQUOID-MASON, OUTLINE]; Cook, *History of Legal Aid in South Africa*, in LEGAL AID IN SOUTH AFRICA at 32-33 (1974).

60. Applicants had to meet the "indigence" test. LEGAL AID BOARD, THE LEGAL AID GUIDE, para. 2.4.1, Annexure D (1989) [hereinafter GUIDE]. See *infra* note 86 and accompanying text.

61. The *pro deo* system is a well established practice observed by the courts that all accused in jeopardy of the death penalty shall be appointed an advocate at little or no cost to the defendant. The *pro amico* system permits legal practitioners to decide to take on a case for less than the required fees. D. McQUOID-MASON, OUTLINE, *supra* note 59, at 11-13. See *supra* note 19 and *infra* notes 97, 109 and accompanying text.

62. Criminal Procedure Act, No. 51, ch. 22, § 166 (S. Afr. 1977).

63. *Id.* at § 158.

64. *Id.* at § 302. See *supra* note 57 and *infra* note 68 and accompanying texts on serious cases and automatic review.

65. Criminal Procedure Act, No. 51, ch. 11, § 73 (S. Afr. 1977). See *infra* note 66 on the right to legal representation.

66. Section 73 of the Criminal Procedure Act sets out the rights of a criminal defendant to legal advice after arrest:

73. ACCUSED ENTITLED TO ASSISTANCE AFTER ARREST AND AT CRIMINAL PROCEEDINGS. — (1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.

(2) An 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.

(3) An accused who is under the age of eighteen years may be assisted by his parent or guardian at criminal proceedings, and any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.

Criminal Procedure Act, No. 51, ch. 11, § 73 (S. Afr. 1977).

defendants who could not afford legal representation.⁶⁷

The Criminal Procedure Act also codifies the automatic review system for criminal defendants.⁶⁸ While automatic review gives the unrepresented defendant some protection, its primary function is to maintain control over the lower courts.⁶⁹ The reviewing judge may only inquire whether the proceedings have been conducted in accordance with justice and whether the defendant has been prejudiced by a gross irregularity in the proceedings.⁷⁰ The reviewing judge may not retry the case based on the record, as this would be tantamount to an appeal.⁷¹ Only the appellate judge may overrule a lower court's decision if the lower court judge misapplied the law to the facts.⁷² The reviewing judge may, however, amend or change the defendant's conviction,⁷³ thereby giving the defendant some protection from injustice.

Regional court sentencing is not automatically reviewable.⁷⁴ Many cases decided in the lower courts are sent to the regional courts for sentencing.⁷⁵ Therefore the sentencing judge must sentence the defendant based on a trial record over which the judge did not preside.⁷⁶ The lack of automatic review of sentencing decisions presents a large gap in safeguarding the unrepresented defendants' legal rights.⁷⁷

67. It cannot be maintained that the *pro deo* system takes the place of statutory incorporation of the problem of legal representation for indigent defendants. Although the *pro deo* system is judicially upheld, it is not dictated by legislation. N. STEYTLER, *supra* note 1, at 16. See also *supra* notes 11, 19, 61 and accompanying texts on the *pro deo* system.

68. Automatic review is afforded to any conviction carrying a penalty of three months imprisonment or 500 rand if the sentence was proclaimed by a magistrate of the district courts with less than seven years service. All convictions carrying a penalty of six months imprisonment or 1000 rand are reviewable if proclaimed by a district court magistrate with over seven years experience. For any conviction carrying a penalty of a whipping for an adult over 21 years of age, the punishment is subject to automatic review regardless of the magistrate's experience. The Criminal Procedure Act, No. 51, chs. 28, 30, §§ 294, 302 (S. Afr. 1977). See *supra* note 37 for the United States dollar equivalent of the South African rand.

69. W. HOSTEN, *supra* note 35, at 809-10.

70. W. HOSTEN, *supra* note 35, at 810.

71. W. HOSTEN, *supra* note 35, at 810.

72. W. HOSTEN, *supra* note 35, at 810.

73. W. HOSTEN, *supra* note 35, at 809-10.

74. W. HOSTEN, *supra* note 35, at 810; N. STEYTLER, *supra* note 1, at 14-15.

75. The regional courts have higher sentencing jurisdiction than the district courts. See *supra* notes 37 and 38 and accompanying text.

76. See *supra* note 38 and accompanying text.

77. W. HOSTEN, *supra* note 35, at 810.

b) Legal Aid Act No. 22 of 1969

In 1969 the Legal Aid Act was passed.⁷⁸ Its charter established the Legal Aid Board.⁷⁹ Since the Act did not dictate the structure of the legal aid system, the Board was free to create its own system for delivering legal aid.⁸⁰ The Board is a corporate body and sets its own rules which are not subject to direct review or change by the South African Government.⁸¹ The Board is funded annually by the Government but may accept funds from any source.⁸² Legal aid is not regarded as a right but as a privilege.⁸³ Legal aid is available not only for criminal cases but also for all cases in which the assistance of a legal practitioner is normally required.⁸⁴ The Act's object is to "render or make available legal aid to indigent persons."⁸⁵ Because the Act did not specifically define "indigence," it was left to the Board to create a definition. The *Legal Aid Guide*⁸⁶ states the criteria for indigence, the funds to be contributed by the defendant, the fees to be paid to counsel, and the type of services that may be rendered. The Board also established a bureaucratic hierarchy of

However, with the increase in the substantive and sentencing jurisdiction of the regional courts to include offenses as rape, and sentences up to 10 years imprisonment, many cases which were previously tried in the Supreme court with the assistance of pro deo counsel, are now heard in the regional courts with the defendant unrepresented.

N. STEYTLER, *supra* note 1 at 14-15.

78. While the Legal Aid Act was passed in 1969, it was instituted in 1971. *See supra* note 8 and accompanying text. Legal Aid Act, No. 22 (S. Afr. 1969). *See* N. STEYTLER, *supra* note 1, at 17.

79. The Board consists of eleven members: one nominated by the Bar Council and appointed by the Minister of Justice, four nominated by the Association of Law Societies and appointed by the Minister of Justice, five civil servants, and a judge as Chairman. Legal Aid Act, No. 22, §§ 2, 4 (S. Afr. 69).

80. Legal Aid Act, No. 22, § 2 (S. Afr. 1969). GUIDE, *supra* note 60, at para. 1.4.

81. McQuoid-Mason, *supra* note 59, at 194-95; Legal Aid Act, No. 22, § 2 (S. Afr. 1969).

82. Legal Aid Act, No. 22, §§ 9(1), 9(3) (S. Afr. 1969). The Board currently does not receive funds from elsewhere, but the Legal Aid Act does not prohibit this. However, E. S. Sholtz agreed that no foreign government or organization is likely to contribute to a South African organization deemed to be under the direct control of a Government most foreigners believe to be invalid. Interview with E.S. Sholtz, Director of the Legal Aid Board in Pretoria, (Aug. 14th, 1989). [hereinafter Interview with E.S. Sholtz]

83. *See* van der Berg, *Legal Representation: Right or Privilege?*, 47 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 447, 452-54 (1984) [hereinafter van der Berg].

84. GUIDE, *supra* note 60, at para. 1.5.1.

85. Legal Aid Act, No. 22, § 3 (S. Afr. 1969).

86. GUIDE, *supra* note 60. The GUIDE contains all the directives of the board and a set of rules to enforce the terms of the Legal Aid Act with the force of delegated legislation. McQuoid-Mason, *supra* note 59, at 195.

legal aid officers⁸⁷ and adopted the British legal aid system of referring cases to attorneys in private practice and remunerating them at a set tariff.⁸⁸

A defendant qualifies for legal aid if he or she meets the Board's means test of "indigence."⁸⁹ This test sets out the maximum monthly income that a person can earn before becoming ineligible for legal aid.⁹⁰ Decisions to grant legal aid are made by the legal aid officers.⁹¹ There are also situations in which the defendant would be denied legal aid even if the means test was met.⁹²

The main problem faced by the Board is the acute inadequacy of its funding.⁹³ Even if adequate funds were available to pay for all requests for counsel, there are not enough legally trained practitioners available to do the work.⁹⁴ In addition, the number of criminal defendants eligible for legal aid is greater

87. Legal aid officers are usually civil servants, members of the same Public Service from which magistrates and prosecutors are chosen. This poses the problem of the officer not being considered impartial in the eyes of the defendant. Hoexter Commission, *supra* note 9, at part II, para. 6.4.4.8. Civil servants also undergo legal training but the scholarly degree obtained is of a lesser caliber than that obtained by advocates and attorneys. Sampson, *Legal Education*, in *OUR LEGAL HERITAGE* 167 at 175-76, *supra* note 15. See *supra* notes 51, 52 and accompanying text on legal training of court officers.

88. GUIDE, *supra* note 60, at Annexure E. A portion of this fee may be payable by the defendant, depending on his income. *Id.* at 2.5.1.

89. GUIDE, *supra* note 60, at para. 2.4, Annexure C.

90. GUIDE, *supra* note 60, at Annexure C. Currently, the cutoff point is 1000 rand per month for a married individual, with an additional amount earned of 150 rand allowed for each dependent. *Id.* See *supra* note 37 for the United States dollar equivalent of the South African rand.

91. GUIDE, *supra* note 60, at 4.1. Decisions are appealable to the Director of the Legal Aid Board. *Id.* at para. 4.12. The problem of the defendants' view of the legal aid officer not being impartial is especially relevant given the decision-making power the legal aid officer has in determining legal aid eligibility. See *supra* note 87 and accompanying text.

92. Many criminal cases are turned down: (1) if *pro deo* defense is available; (2) if the defendant admits guilt; (3) if the legal aid officer considers the offense or the defendant's defense to be so simple that it can be advanced by the defendant himself; (4) for any traffic offense; (5) in a preparatory examination (held where the "attorney-general is of the opinion that it is necessary for the more effective administration of justice." Criminal Procedure Act, No. 51, ch. 20, § 123 (S. Afr. 1977)); (6) for the institution of a private prosecution (this may be instituted in terms of Criminal Procedure Act, No. 51, § 13 (S. Afr. 1977)); (7) if the legal aid officer considers the defendant to be unemployed for no sound reason; or (8) if the legal aid officer believes that the defendant leads a criminal life (for example, applicants with previous convictions). GUIDE, *supra* note 60, at para. 3.1. See *supra* note 87 regarding the defendants' belief that legal aid officers are not impartial.

93. N. STEYTLER, *supra* note 1, at 18-22.

94. N. STEYTLER, *supra* note 1, at 21.

than the number that apply for legal aid, mainly because most South Africans are unaware that the Board exists.⁹⁵ Finally, the wide-spread belief that legal aid officers are not impartial and cannot be trusted is another factor explaining why so few eligible indigent defendants apply for legal aid.⁹⁶

2. Common Law Safeguards

a) *Pro Deo* System

The *pro deo* system⁹⁷ was instituted by the Supreme court⁹⁸ and is not under statutory rule. The Supreme court generally will request its district's bar association to appoint *pro deo* counsel⁹⁹ in all criminal cases where the defendant faces the possibility of capital punishment.¹⁰⁰ Defendants represented by *pro deo* counsel are not eligible for legal aid.¹⁰¹ The advocate¹⁰² is not paid according to the legal aid tariff, nor are any legal fees paid by the Board; legal fees are paid from state funds appropri-

95. N. STEYTLER, *supra* note 1, at 18-22.

96. Hoexter Commission, *supra* note 9, at part II, para. 6.4.4.3. See *supra* note 87.

97. See *supra* notes 19 and 61 and accompanying text.

98. See Regina v. Mati, 1 S. Afr. L. Rep. 304, 306-07 (A. 1960). Regina v. Chaane, 2 S. Afr. L. Rep. 891 (A. 1978) (holding that there is no statutory requirement for the appointment of *pro deo* counsel).

99. "In practice the appointment . . . is generally made by the bar on the instructions of the state, rather than by the court [S v. Gibson 1979 (4) SA 115 (D) 123]." D. McQUOID-MASON, OUTLINE, *supra* note 59, at 12. See also S v. Gibson, 4 S. Afr. L. Rep. 115, 123 (D.C.L. 1979).

100. Capital cases include murder, treason, kidnapping, rape, robbery, attempted robbery, housebreaking (housebreaking is a crime similar to that of burglary in the United States) or attempted housebreaking, where the court finds aggravating circumstances (for housebreaking or attempted housebreaking, the possession of a dangerous weapon or the commission of an assault or a threat to commit an assault; and for robbery or attempted robbery, the wielding of a firearm or any other dangerous weapon; the infliction of grievous bodily harm; or a threat to inflict grievous bodily harm by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence). Criminal Procedure Act, No. 51, ch. 28, § 277 (S. Afr. 1977). See also D. McQUOID-MASON, OUTLINE, *supra* note 59, at 12. Other capital offenses include the political offenses of sabotage (General Law Amendment Act, No. 76, § 21 (S. Afr. 1962)), and the encouragement by a South African resident abroad of violent change in South Africa, or the training of a South African resident abroad for "furthering the achievement of any of the objects of Communism" or of an unlawful organization, (Internal Security Act, No. 44, § 11 (S. Afr. 1967)) and, participation in "terrorist activities" (Terrorism Act, No. 83, § 2 (S. Afr. 1967)). *Id.* Most capital cases are heard in the superior courts. van S d'Oliveira, *supra* note 35, at 150-51.

101. GUIDE, *supra* note 60, at para. 3.1.1(a).

102. Usually, the defendant does not receive the assistance of an attorney, only an advocate. D. McQUOID-MASON, OUTLINE, *supra* note 59, at 12. See also *supra* note 52 and accompanying text discussing the significance of not having both counsel.

ated for the court.¹⁰³

The main problem of the *pro deo* system is that it is only available for capital offenses in the Supreme court.¹⁰⁴ Defendants who are tried in the Regional courts are not eligible for *pro deo* assistance, despite the fact that these courts have jurisdiction to hear capital offenses and to sentence the defendant for up to ten years imprisonment.¹⁰⁵ Moreover, the appointment of *pro deo* counsel automatically precludes the unrepresented defendant from any legal aid from the Board.¹⁰⁶ Thus, the defendant may only benefit from advocate assistance, but not assistance from an attorney.¹⁰⁷ In addition, most of the advocates assigned to *pro deo* cases are young and inexperienced.¹⁰⁸

b) *Pro Amico* Services

Pro amico services¹⁰⁹ are rendered by the legal practitioners to "deserving" cases.¹¹⁰ If a third party pays for the services normal rates are charged by the advocate, but if the defendant will pay for the services a lesser fee is permitted.¹¹¹ The main problem with these services is that it is up to the individual legal practitioner to offer them.¹¹² This practice has generally waned because practitioners feel that these services should be provided by the Board.¹¹³

III. CAUSES OF EXISTING PROBLEMS

There are four primary reasons why South Africa has such a large percentage of unrepresented criminal defendants. The first

103. *State v. Radebe*, 1 S. Afr. L. Rep. 191, 196 (T. 1988).

104. *See supra* note 100 on capital offenses.

105. *See supra* notes 77 and 100.

106. GUIDE, *supra* note 60, at para. 3.1.1(a). *See supra* note 92 and accompanying text.

107. *See supra* notes 52, 102 and accompanying text.

108. Carey-Miller, *supra* note 19, at 72.

109. *See supra* note 61 and accompanying text discussing the differences between *pro deo* and *pro amico*.

110. The criteria for "deserving" cases is based on the individual lawyer's feelings of moral obligation to render assistance free of charge to deserving and needy cases based on personal standards. W. HOSTEN, *supra* note 35, at 826.

111. D. McQUOID-MASON, OUTLINE, *supra* note 59, at 11. Advocates are required by their bar to charge minimum rates for services rendered, except for *pro amico* cases. *See also* van Dijkhorst & Mellet, *supra* note 52, at 248.

112. D. McQUOID-MASON, OUTLINE, *supra* note 59, at 11.

113. D. McQUOID-MASON, OUTLINE, *supra* note 59, at 11. *See supra* notes 78-96 regarding the Board.

is the rapidly growing number of indigent defendants, and the second is the scarcity of advocates and attorneys.¹¹⁴ The third is the lack of adequate financing of the Board,¹¹⁵ and fourth, the lack of public knowledge about rights of defendants to legal counsel and of the existence of the Board.¹¹⁶

South Africa's economy has been declining recently because of a recession and international sanctions.¹¹⁷ This has increased unemployment among the lower paid laborers¹¹⁸ and also has contributed to the increase in South Africa's crime rate.¹¹⁹ Ninety percent of the criminal defendants are black and indigent.¹²⁰ The predicament of under-representation becomes apparently critical with the increase in the number of criminal cases coupled with a shortage of lawyers.

In 1989, there were 6829 attorneys and 1006 advocates¹²¹ representing 30.1 million people.¹²² Civil matters compose ninety percent of the work done by attorneys and advocates.¹²³ This is not only because the majority of cases in the courts are civil, but also because civil matters generally pay better than criminal

114. See *supra* note 94 and accompanying text.

115. See *supra* note 93 and accompanying text.

116. See *supra* note 95 and accompanying text.

117. See generally Dube, *Bearing Pain of Sanctions; Blacks Hurt But See Need*, World Times Inc., Sept. 1989, at 6 [hereinafter Dube].

118. *Id.*

119. *South African Crime Rate: One Murder Every 46 Minutes*, United Press International, Mar. 13, 1990; *South Africa Unveils Crime Rate*, United Press International, May 30, 1989; *South Africa Plans to Double Its Police Force*, The Reuter Library Report, Oct. 19, 1989.

South Africa's crime rate has traditionally been very high as has the number of blacks executed. In *South Africa, Hangings are Routine Justice*, L.A. Times, Apr. 17, 1988, at 1, col. 3. The reasons are generally due to the apartheid system and the lack of sufficient education of black South Africans. The lack of education, and, therefore, the lack of many skills, contributes to the high unemployment. *Id.* See also Bruck, *On Death Row in Pretoria Central: Capital Punishment in South Africa*, THE NEW REPUBLIC, July 13, 1987, at 18, and Dube, *supra* note 117, at 6.

120. N. STEYTLER, *supra* note 1, at 19. "The low level of education and youthfulness of a substantial portion of the accused are indicators of low occupational status, which would place legal services beyond their means . . . [I]t is apparent that more than 90% of [these indigent defendants] were black." *Id.*

121. Telephone interview with a representative of the Johannesburg Bar Association (Aug. 5, 1989). These figures do not include lawyers in the homelands. See *supra* note 4 on South Africa's provinces and homelands.

122. The Star, *supra* note 2, at 1, col. 1. The article quotes statistics from the South African Central Statistical Service. See *supra* note 2 for racial breakdown of South Africa's population.

123. N. STEYTLER, *supra* note 1, at 21.

cases, as most criminal defendants are indigent.¹²⁴ Even if all defendants were entitled to legal representation there would not be enough lawyers, let alone proficient criminal lawyers, to handle the case load.

The foregoing problems are exacerbated by the inadequacy of the Board's funding.¹²⁵ While the government has publicly stated it will not decrease funding,¹²⁶ it is clear that the Board is vastly under-funded.¹²⁷ The Board's 1987 budget was nine million rand,¹²⁸ most of which was used for civil cases.¹²⁹ Only 1,284,289 rand¹³⁰ was spent during 1987 for a total of approximately half a million¹³¹ criminal defendants, while 150 million rand is currently needed if all criminal defendants are to receive legal representation.¹³²

Finally, the lack of representation results from the fact that the majority of South Africans are unaware of their legal rights, especially the right to counsel.¹³³ Furthermore, most South Afri-

124. N. STEYTLER, *supra* note 1, at 18-21.

125. *State v. Khanyile*, 3 S. Afr. L. Rep. 795, 813 (N. 1988). See also N. STEYTLER, *supra* note 1, at 21-22.

126. Interview with E.S. Scholtz, Director of the Legal Aid Board in Pretoria (Aug. 14, 1989).

127. See *supra* notes 93, 124 and accompanying text on the need for funds for the legal aid system.

128. Report of the Legal Aid Board for the Period 1987-1988, at 13 [hereinafter Legal Aid Board 1987-88 Report]. In 1987 the average exchange rate was 2.03496 South African rand to the United States dollar. INT'L MONETARY FUND, *supra* note 37.

129. Legal Aid Board 1987-88 Report, *supra* note 128. For the reasons why there are more civil than criminal cases see *supra* note 92. Many criminal defendants believe that because they are guilty of the crime, they should not be represented by legal counsel and forego applying for legal aid. The defendant, however, does not realize that if the prosecution cannot prove guilt beyond a reasonable doubt, the state should not be permitted to convict the defendant, regardless of culpability. N. STEYTLER, *supra* note 1, at 67.

130. During 1987, the Board only spent 2,365,800 million rand (32% of its budget used for the year in question) on criminal matters. Out of a total of 67,874 cases applying for legal aid, only 10,239 were criminal cases. Out of these criminal cases, only 7886 received legal aid, representing 77% of all criminal cases applying for legal aid. Legal Aid Board 1987-88 Report *supra* note 127, at 7, 14-15. See *supra* note 128 for the 1987 exchange rate of the South African rand.

131. In 1980, it was estimated that a total of 500,000 defendants stood trial in the lower courts. Using the GUIDE's criteria for indigence, most of the black, lower court defendants would qualify for legal aid. Most defendants before the Supreme courts obtain *pro deo* assistance (90% were provided with representation and a total of 2000 *pro deo* cases were recorded for 1980). In 1980 it cost the Board 300 rand per case, so that if all defendants were to be represented the Board would have needed 150 million rand. N. STEYTLER, *supra* note 1, at 18-22.

132. See *supra* note 129.

133. Hoexter Commission, *supra* note 9, at part II, paras. 6.6, 6.6.4-6.6.10, 7.14.

cans are unaware of the available legal aid sources.¹³⁴ While traditionally it was not necessary for the court to inform the defendant of the right to legal representation,¹³⁵ it was recently held¹³⁶ that the judicial officer must inform the unrepresented defendant of the legal right of representation and of the opportunity to apply for legal aid.¹³⁷

Even if the defendants know of the right to counsel, they do not necessarily know that legal aid is available through either the Board or through *pro amico* services. The Board is aware of this problem and has started to distribute information pamphlets in police stations and to inform school children of the Board's existence.¹³⁸ However, the funding received by the Board is insufficient for its legal work, let alone for advertising and other educational purposes.¹³⁹ In addition, the legislature rejected the recommendation of the latest commission reporting on the structure and functioning of the courts that more legal aid sub-offices be created to publicize the scheme more effectively.¹⁴⁰

The greatest obstacles to representation are the racial, social, cultural, economic, and political rifts between the unrepresented defendant and the judicial system as a whole.¹⁴¹ The vast

134. Hoexter Commission, *supra* note 9, at part I, para. 3.3.6(c) and part II, paras. 6.6, 6.6.4-6.6.10, 7.14.

135. *Wessels*, 4 S. Afr. L. Rep. 89, 91 (C. 1966); *State v. Baloyi*, 3 S. Afr. L. Rep. 290, 293-94 ((T. 1977) (approved, *Volschenk v. President*, 3 S. Afr. L. Rep. 124, 140 (A. 1985)) (because the defendant did not request legal representation, no error was committed merely because the defendant was unrepresented); *State v. Mthetwa*, 2 S. Afr. L. Rep. 773, 776 (N. 1978) (there is no obligation on the judicial officer to ask the defendants whether they desire to engage the services of a legal adviser).

136. *State v. Radebe*, 1 S. Afr. L. Rep. 191, 196 (T. 1987) and *see infra* notes 166-82 and accompanying text.

137. *Radebe*, 1 S. Afr. L. Rep. at 196. However, the court did not hold that failure to inform the unrepresented defendant of these rights would *per se* create an unfair trial and a complete failure of justice. Rather, the reviewing judge must apply a facts and circumstances test. *Id.*

138. *See infra* note 281 and accompanying text on the "street law" education program.

139. *See supra* notes 92, 124, and *infra* notes 302-08, and accompanying text on the insufficiency of funds in general and the proposal that advertising should receive separate government funding so that the Legal Aid Board can focus on delivering service.

140. *See Hoexter Commission, supra* note 9, at part II, para. 7.14.

141. N. STEYTLER, *supra* note 1, at 14-15. For example:

[O]n occasions, unsophisticated accused have shown a reluctance to enter the witness-box, although intent on testifying The accused supposed that his entering it would signify either a capitulation to the enemy or a weakening of his opposition [Also] there exists . . . among many unsophisticated Xhosa witnesses a genuine fear of going into the witness-box as they believe it

majority of unrepresented defendants are black, illiterate, and young.¹⁴² Often they are intimidated by the judicial proceedings,¹⁴³ not only because the vast majority of judges and prosecutors are white,¹⁴⁴ but also because the defendant is likely to be going through the proceedings with an interpreter.¹⁴⁵ Additionally, the defendant's illiteracy gives him little competence to try to defend himself in the court proceedings which involve many complicated rules of procedure.¹⁴⁶

IV. SOLUTIONS PRESENTED BY THE LEGAL COMMUNITY

A. Case Law

1. Historical Perspective

Prior to the codification¹⁴⁷ of the right to legal counsel, the judiciary first recognized this right under the common law¹⁴⁸ in a

to be bewitched.

Id. at 168. See also *supra* note 3 and accompanying text.

142. N. STEYTLER, *supra* note 1, at 18-19. See also *supra* note 3.

143. The intimidation felt by a criminal defendant has been described by the South African courts as follows:

The [defendant] labors throughout under the disadvantage of an environment that cows him, an atmosphere that chills him. It saps his self-confidence. It intensifies the anxiety he feels already about his fate. And any prospect he had of presenting his defence in a calm, clear and orderly way may well be ruined.

State v. Khanyile, 3 S. Afr. L. Rep. 795, 812 (N. 1988).

144. These statistics are for the Republic of South Africa only:

	Total	White	Black	Colored	Indian
Magistrates:	812*	787	0	3	11
Prosecutors:	988**	84	28	66	33
Male Mags	703	694	0	3	6
Pros:	608	04	27	60	17
Female Mags:	96	91	0	0	
Pros:	373	30	1	6	16

* = 11 vacancies ** = 7 vacancies

South African Department of Justice, January 1990. See also N. STEYTLER, *supra* note 1, at 15.

145. See *supra* note 3. See also *supra* note 1 discussing languages of South Africa.

146. N. STEYTLER, *supra* note 1, at 59. See also *supra* note 36 and accompanying text.

147. The right was codified in Criminal Procedure Act, No. 31, § 218 (S. Afr. 1917), re-enacted in Criminal Procedure Act, No. 56, § 158 (S. Afr. 1950) and presently codified in Criminal Procedure Act, No. 51, ch. 11, § 73(2) (S. Afr. 1977).

148. In criminal cases, a defendant, if he was also "present in person, . . . can by permission of the judge employ the services of an advocate or the aid of an attorney if perchance he is without skill in the business of courts." J. Voet, *TREATISE ON ROMAN LAW*, para. 3.3.15 (1968). This permission was generally granted. See van der Berg, *supra*

1906 case, *Li Kui Yu v. Superintendent of Laborers*.¹⁴⁹ This right was reinforced by subsequent cases.¹⁵⁰ The question of the right of indigent criminal defendants to legal counsel has only been indirectly discussed in *Regina v. Mati* in 1960.¹⁵¹

The *Mati* court set the tone for interpreting the right to counsel as a negative right — a right that may not be hindered by the courts, but a right that is not required by the courts.¹⁵² While *Mati* recognized the need for legal representation, the court was unwilling to require representation for indigent defendants even if they faced the death penalty.¹⁵³ The issue in *Mati* was whether an indigent defendant charged with a capital offense must be represented by counsel.¹⁵⁴ The court held that there was no rule of law requiring representation; there was only a well-established court practice of appointing *pro deo* counsel.¹⁵⁵ A number of cases since *Mati* have held that if the defendant requests legal representation, a court may not hamper the defendant's exercise of this right.¹⁵⁶ A court may not, how-

note 83, at 448.

149. TS 181 (T. 1906); D. McQUOID-MASON, OUTLINE, *supra* note 59, at 5.

150. *Rex v. Beukes*, E. Div. Local Rep. 112, 118 (E.C. 1939) (defendant's attorney requested a postponement so as to be adequately prepared for trial; the lower court refused the request, and the reviewing court set aside the conviction as a result); *Rex v. Zackey*, App. Div. Rep. 505, 509-10 (1945) (the refusal to accede to a request for a postponement of a criminal trial can amount to a gross irregularity and form the basis of review proceedings); *Regina v. Slabbert*, 4 S. Afr. L. Rep. 18 (T. 1956).

151. *Regina v. Mati*, 1 S. Afr. L. Rep. 304 (A. 1960). See also *supra* notes 97, 98 and accompanying text discussing *pro deo* counsel.

152. See *Mati*, 1 S. Afr. L. Rep. at 306-07. See also *State v. Mthwana*, 4 S. Afr. L. Rep. 361, 366, 371 (N. 1989).

153. *Mati*, 1 S. Afr. L. Rep. at 306-07. See also *supra* notes 11, 98 and accompanying text.

154. *Mati*, 1 S. Afr. L. Rep. at 306-07.

155. The state of the law has been described by the South African courts as: There is no rule of law that a person who is being tried for an offence [carrying the death sentence must] be defended by counsel. But it is a well-established and most salutary practice that whenever there is a risk that the death sentence may be imposed . . . the State should provide defence by counsel . . . It is disquieting to think that . . . [a person can] be sentenced to death after a trial in which by reason of his poverty he has had to conduct his own defence.

Mati, 1 S. Afr. L. Rep. at 306-07.

156. *State v. Seheri*, 1 S. Afr. L. Rep. 29 (A. 1964) (the defendant cannot be denied the opportunity of having legal representation at trial merely on the ground of his attorney's negligent failure to carry out his mandate; the court committed reversible error by denying the defendant a postponement); *State v. Wessels*, 4 S. Afr. L. Rep. 89; *State v. Blooms*, 4 S. Afr. L. Rep. 417 (C. 1966); *Ndonozone v. Nel*, 3 S. Afr. L. Rep. 217 (E.C. 1971) (lower court judge refused to allow the defense attorney to resume defense because the judge disliked the attorney's conduct; the refusal was held to be improper, and warranted the setting aside of the conviction); *State v. Nqula*, 1 S. Afr. L. Rep. 801 (E.C.

ever, force counsel on a defendant who makes an informed decision to forego representation;¹⁵⁷ that is, the defendant may waive this right of representation.¹⁵⁸

The right to legal representation was broadened by *State v. Heyman* in 1966.¹⁵⁹ In this case, the Appellate Division extended the right to legal representation to situations in which a person was summoned to be subjected to an inquiry under the Criminal Procedure Act.¹⁶⁰ The court admitted to a trend in the case law allowing for legal representation of any defendant in danger of being detained whether due to arrest or questioning.¹⁶¹ The cases cited by the court also suggest a growing practice of recognizing the claim that indigent defendants should be represented.¹⁶²

Until recently, case law stipulated that once a defendant requested legal representation, a court could not interfere and must afford every reasonable opportunity for obtaining legal assistance. The court held in *State v. Baloyi*,¹⁶³ that if the defendant does not request legal representation, there is no rule of law requiring a reviewing court to vitiate the proceedings merely because the presiding officer failed to inform the defendant of his or her legal rights.¹⁶⁴ This position has been changed by two

1973) (the court held that every defendant must be accorded the opportunity to present his or her case to the court; thus, there is a fundamental right to be represented at trial. Defendant's attorney was delayed and the court denied the defendant a postponement. The denial was held to be a fatal irregularity); *State v. Shabangu*, 3 S. Afr. L. Rep. 555 (A. 1976) (lower court committed a fatal irregularity by refusing defendant a second postponement where he had no excuse as to why he had not procured counsel after the first postponement); *State v. Mkhize*, 3 S. Afr. L. Rep. 1065 (T. 1978) (to insist that the defendant should plead after she had informed the court that she wished to consult a legal representative is a fatal irregularity as the defendant is fully entitled to refuse to make a statement and her legal advisor may answer on her behalf); *State v. Yelani*, 3 S. Afr. L. Rep. 802 (E.C. 1986) (the defendant was entitled to the postponement he had sought, and the magistrate erred by refusing because he did not accept that defendant's attorney was genuinely ill).

157. *State v. E*, 2 S. Afr. L. Rep. 370 (C. 1981) (once a defendant has elected to proceed with a criminal trial without the assistance of counsel, he cannot later reopen the case merely because the result is unexpectedly adverse); *State v. L*, 4 S. Afr. L. Rep. 757 (C. 1988) (legal assistance cannot be forced onto a defendant by the court merely because the defendant is a juvenile).

158. *State v. Khanyile*, 3 S. Afr. L. Rep. at 811 (N. 1988).

159. 4 S. Afr. L. Rep. 598 (A. 1966).

160. *Id.* at 602, 608.

161. *Id.* at 603.

162. *Id.*

163. *State v. Baloyi*, 1 S. Afr. L. Rep. 290, 293 (T. 1977).

164. "[W]here he does not seek it, and where no irregularity occurs by which he is deprived of it, there is no principle or rule of practice . . . which vitiates the proceed-

very recent cases: *State v. Radebe*¹⁶⁵ and *State v. Khanyile*.¹⁶⁶

2. Major Developments in the Case Law: Radebe and Khanyile

In *Radebe*, decided in 1987,¹⁶⁷ the Transvaal Provisional Division held for the first time that the court has a duty to inform unrepresented defendants of their legal rights, including their right to legal representation.¹⁶⁸ The defendant should be encouraged to exercise these rights.¹⁶⁹ Further, the judge should inform the defendants of the seriousness of the charge and the possible consequences if convicted.¹⁷⁰ If appropriate, the judge should inform the defendants that they are entitled to apply for legal aid.¹⁷¹ Depending on the facts and circumstances of the case, failure to do the above may be considered an irregularity or a failure of justice warranting setting aside the conviction.¹⁷²

The *Radebe* decision reviewed two lower court cases.¹⁷³ The first case concerned Radebe who was charged with car theft, and sentenced to four years imprisonment.¹⁷⁴ After the close of the state's case, the defendant asked for legal counsel and the court refused.¹⁷⁵ While the reviewing court could have held that the

ings." *Id.* at 293-94. The court went on to say that:

[t]here are cases where, because of the gravity of the charge or the complexity of the matter, the accused ought, in the interests of justice to be represented, even though he cannot afford it. In such cases, if a *pro deo* defence is not provided, it would be the duty of the Court to refer the matter to one of the legal aid bodies or to invoke the assistance of one or other of the professional bodies to appoint a legal adviser to act without remuneration.

Id. at 294. This holding was used in the *Radebe* and *Khanyile* decisions to point out the evolution of the right to legal representation. See *infra* notes 181, 205 and accompanying text.

165. *State v. Radebe*, 1 S. Afr. L. Rep. 191 (T. 1987).

166. *State v. Khanyile*, 3 S. Afr. L. Rep. 795 (N. 1988).

167. *Radebe*, 1 S. Afr. L. Rep. 191.

168. *Id.* at 196.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* However, the court did not hold that failure to do so whenever there was an unrepresented criminal defendant would be an irregularity *per se* or a failure of justice. *Id.*

173. *Id.* at 192. The first case concerned defendant Radebe and the other, defendant Mbonani. These two cases were decided together because the appeals were "relate[d] to the circumstances in which [the defendants] found themselves without legal representation." *Id.*

174. *Id.* at 197.

175. *Id.*

court's refusal was an irregularity, the court went even further and held that, because the magistrate failed to inform the defendant of his right to counsel at the trial's commencement, the conviction must be set aside.¹⁷⁶

In the second case, Mbonani was charged with public violence and sentenced to ten years imprisonment.¹⁷⁷ The trial was held a day after the incident.¹⁷⁸ The reviewing court could have held that the speed with which the trial commenced deprived the defendant of the right to be adequately prepared for trial.¹⁷⁹ While the reviewing court commended the magistrate for inquiring whether the defendant wished to obtain counsel, it set aside the verdict because the magistrate should have explained the seriousness of the charge to the defendant and also should have explained the "advisability of obtaining legal assistance."¹⁸⁰

Radebe, a landmark decision,¹⁸¹ is significant because it established that the right to legal representation included the duty to inform the defendant of this right.¹⁸² Of greater significance is the court's recognition that an evolutionary process broadening the right of legal representation exists in South African case law.¹⁸³

The *Radebe* decision, however, lacked concrete guidelines for implementation of the right to counsel. The facts and circumstances that require a judge to inform the defendant of these rights are unclear. Judges do not know when they are required to inform the defendant of this right and when the failure to inform constitutes an irregularity and a failure of justice, obligating the reviewing court to set aside the verdict.¹⁸⁴

Three months after *Radebe*, a Natal Provincial Division de-

176. *Id.* at 197-98.

177. *Id.* at 198. Two years of the sentence were conditionally suspended. *Id.*

178. *Id.*

179. See *supra* notes 34, 149 and accompanying text on the right to be prepared for trial so as to put one's case before the court.

180. *State v. Radebe*, 1 S. Afr. L. Rep. at 198-200. The court felt that this was especially warranted because the defendant said that he did not understand the usefulness of obtaining legal counsel. *Id.*

181. Steytler, *S v Radebe; S v Mbonani 1988 (1) SA 191 (T) Making Accessible the Right to Legal Representation*, 2 S. Afr. CRIM. J. 324, 326 (1988).

182. The proposition that judicial officers should inform unrepresented defendants of their legal rights has appeared in many cases in the form of dicta. *State v. Mthetwa*, 2 S. Afr. L. Rep. 773, 776 (N. 1978); *State v. Baloyi*, 3 S. Afr. L. Rep. 290, 293-94 (T. 1977); *State v. Hlongwane*, 4 S. Afr. L. Rep. 321, 323 (N. 1982).

183. *Radebe*, 1 S. Afr. L. Rep. at 192. This holding was used by the court in *Khanyile* to broaden the right still further. See *infra* note 205 and accompanying text.

184. Steytler, *supra* note 181, at 328-30.

cision, *Khanyile*, extended the right of legal representation to include free legal representation for indigent defendants facing heavy charges. The *Khanyile*¹⁸⁵ decision held that a judge should refuse to proceed to try an unrepresented criminal defendant when based on equality before the law: (1) it is a complex case with regard to either the facts or the law; (2) the defendant lacks the maturity, sophistication, intelligence, or articulation to adequately defend himself; or (3) the gravity of the offense and the possible consequences are high.¹⁸⁶ The court stated that when these factors exist, unrepresented defendants cannot effectively participate in defending themselves, thus rendering the trial "palpably and grossly unfair."¹⁸⁷

The unrepresented defendant in *Khanyile* was convicted of housebreaking with intent to steal and theft and sentenced to imprisonment for a year.¹⁸⁸ The only issue at trial was whether the defendant had committed the crime.¹⁸⁹ The state's sole evidence was the defendant's fingerprints which were found inside the house; there was no other evidence to link the defendant to the crime.¹⁹⁰

At trial, the defendant was not informed of his right to counsel nor afforded an opportunity to obtain it.¹⁹¹ The court could have decided the case on these grounds alone by following *Radebe*.¹⁹² Instead, the court went further and held that, in addition to the duty to inform defendants of their legal rights,¹⁹³ the judge also has a duty to evaluate whether the indigent defendant needs counsel to prevent the proceedings from being "palpably and grossly unfair."¹⁹⁴ The court found that counsel was warranted because there was no effective cross-examination of an expert witness to adequately test the state's key evidence,

185. 3 S. Afr. L. Rep. 795 (N. 1988). The appeal was brought on automatic review. *Id.* at 797.

186. *Id.* at 815. The opinion did not specifically state how these factors were to be weighed nor against what standard. It left the decision up to the presiding judge based on the facts and circumstances of the case. *Id.* at 815-16.

187. *Id.* at 816, 818.

188. *Id.* at 796-97.

189. *Id.* at 797.

190. The court believed it was critical that the defendant should have the opportunity to properly cross-examine the fingerprint expert to establish the accuracy of the match of the defendant's fingerprints to those found in the house. *Id.* at 798, 800, 812.

191. *Id.* at 799.

192. *Id.* at 800.

193. *Id.*

194. *Id.* at 815-16. See also *supra* note 185 and accompanying text.

which was critical to the defense.¹⁹⁵

The *Khanyile* decision is the first case to interpret the right to legal representation to be a fundamental right¹⁹⁶ rather than a negative right.¹⁹⁷ The court stated it would have demanded that all indigent criminal defendants be represented¹⁹⁸ but did not do so because of the lack of both lawyers¹⁹⁹ and sufficient funding of the legal aid system.²⁰⁰ The court also recognized that such a holding would create an immense backlog of trial court cases because cases would have to be suspended until representation had been obtained.²⁰¹ Therefore, the court settled for the less desirable but more practical path of having the trial judge decide the need for legal representation based on a case by case basis.²⁰²

Nonetheless, the *Khanyile* decision still presents a number of practical problems. There are too few lawyers and inadequate legal aid funding to fulfill the requirement that only certain cases require legal representation.²⁰³ While the strength of the *Khanyile* test is its flexibility, its chief weakness is its wide range of interpretations.²⁰⁴ The decision has also been criticized as being too radical,²⁰⁵ not only because of the practical problems, but also because the court analogized South Africa's situation with that of the United States.²⁰⁶

195. *State v. Khanyile*, 3 S. Afr. L. Rep. 795, 800, 818 (N. 1988). See also *supra* note 189.

196. *Khanyile*, 3 S. Afr. L. Rep. at 810-11. See Steytler, *Equality Before the Law and the Right to Legal Representation*, 2 S. Afr. J. CRIM. JUST. 66, 67-68, 75 (1989) [hereinafter Steytler].

197. *Khanyile*, 3 S. Afr. L. Rep. at 817-18. See also *supra* note 152 and accompanying text.

198. *Khanyile*, 3 S. Afr. L. Rep. at 814.

199. *Id.*

200. *Id.* at 813.

201. *Id.* at 814. In addition, statistics show that defended cases take up more trial court time. On the other hand, represented defendants' cases are not subject to automatic review and therefore would not take up additional court time. Criminal Procedure Act, No. 51, ch. 30, § 302 (S. Afr. 1977). See also *supra* note 68 and accompanying text on automatic review.

202. *Khanyile*, 3 S. Afr. L. Rep. at 814-16.

203. McQuoid-Mason, *The Right to Legal Representation: Implementing Khanyile's Case* 2 S. Afr. J. CRIM. JUST. 57, 61-66 (1989) [hereinafter McQuoid-Mason].

204. Grant, *The Right to Counsel: Recent Developments in South Africa* 2 S. Afr. J. CRIM. JUST. 48, 51 (1989).

205. McQuoid-Mason, *supra* note 203, at 57-58.

206. In arriving at the holding, the court reviewed international and North American standards concerning the requirements for legal representation of the indigent criminal defendant. *Khanyile*, 3 S. Afr. L. Rep. at 801-10. The court based its test on the *Betts v. Brady* decision. 316 U.S. 455 (1942); *Khanyile*, 3 S. Afr. L. Rep. at 802, 805-06, 809, 814. The decision also discussed the similarities of the due process clause with the

3. Current Position of the Law

The judicial duties established by *Radebe*²⁰⁷ have been approved by the Appellate Division²⁰⁸ in the decision of *State v. Mabaso*.²⁰⁹ Natal's *Khanyile* test,²¹⁰ which provides some unrepresented criminal defendants with counsel, has been overruled by *State v. Mthwana*.²¹¹

In *Mabaso* the Appellate Division approved the judgment in *Radebe*, thereby recognizing that the right to counsel is one of the defendant's legal rights of which he ought to be informed.²¹² As was held in *Radebe*, failure by a judicial officer to inform the defendant of this right may, in appropriate cases, constitute an irregularity which would vitiate the proceedings.²¹³ In this case, Mabaso and his co-appellant were convicted of attempted robbery with aggravating circumstances and the unlawful possession of firearms and ammunition.²¹⁴ Mabaso was also convicted of murder for which he was sentenced to death.²¹⁵ While both appellants had pleaded guilty at the pleading proceedings, the magistrate held that the defendants had not adequately admitted all the charges and therefore entered a plea of not guilty for both defendants.²¹⁶ At trial the appellants were represented by counsel and each defendant testified that the admissions had been extracted as a result of police violence and threats.²¹⁷ The trial judge found that the defendants' testimony was not credible and sustained the convictions and sentences imposed.²¹⁸

South African common law principle of equality before the law. *Id.* at 809-10. The court used the South African principle as the basis for extending the right to counsel to require the state to provide counsel for indigent criminal defendants. *Id.* Critics of the *Khanyile* decision believe that the South African legal system is so different from American law that analogizing to it distorts South African law. See also *infra* notes 244, 294 and accompanying text.

207. *State v. Radebe*, 1 S. Afr. L. Rep. 191 (T. 1987).

208. The Appellate Division is the highest court of South Africa and its decisions are binding on all courts. See *supra* note 44.

209. 3 S. Afr. L. Rep. 185 (A. 1990).

210. *Khanyile* test, *supra* notes 184-85 and accompanying text.

211. 4 S. Afr. L. Rep. 361 (N. 1989). This unanimous full bench decision directly overruled *Khanyile* because *Khanyile* was a single judge decision in the same court. *Id.* at 369.

212. *State v. Mabaso*, 3 S. Afr. L. Rep. 185, 203 (A. 1990).

213. *Id.*

214. *Id.* at 189.

215. *Id.*

216. *Id.* at 191, 193.

217. *Id.* at 194-97.

218. *Id.* at 198.

On appeal, the appellants claimed that when they appeared before the magistrate to plead in terms of the charges, they were not informed of their right to legal representation.²¹⁹ The defendants claimed that "the nonobservance of this duty represented a gross irregularity vitiating the entire plea proceedings . . . with the consequence that the trial Court had erred in failing to 'set aside' the plea proceedings . . . [and the admissions made] . . . by the appellants."²²⁰ The majority opinion held that the judge's failure to fulfill his duty does not automatically create an irregularity in the proceedings.²²¹ Assuming that there had been an irregularity in the judicial proceedings, the real question becomes whether, by reason of the magistrate's irregular omission to inform the defendants of their right to legal representation, the trial court committed an irregularity in permitting cross-examination of the defendants regarding the admissions made during the pleading proceedings and in relying on this evidence as proof of the guilt of the defendants.²²² First, the majority held that the trial judge has no power to set aside the plea proceedings.²²³ Second, the majority held that "there is no unfairness in admitting a man's statements not otherwise inadmissible against him . . . 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."²²⁴ The minority opinion specifically disagreed with this last holding. In their view, the pleading proceedings were improperly allowed in evidence at the trial and this constituted a fatal irregularity.²²⁵

The court specifically declined to decide whether, in addition to informing the defendant of his right to counsel, the judge must "take steps towards securing such representation for an indigent accused."²²⁶ The Appellate Division therefore missed a valuable opportunity to hold that indigent criminal defendants should be represented, which would remove one of the causes of

219. *Id.* at 199.

220. *Id.*

221. *Id.* at 204. "Whether or not an irregularity has been committed will always hinge upon the peculiar facts of the case." *Id.*

222. *Id.* at 205.

223. *Id.*

224. *Id.* at 209.

225. *Id.* at 210, 215.

226. *Id.* at 203.

injustice in the South African courts.²²⁷ Commentators feel that the Appellate Division opinion is disappointing not only because it did not state that a failure to inform defendants of their right to counsel is an irregularity of the judicial proceedings in all cases, but also because it declined to reinstate the *Khanyile* test.²²⁸

Khanyile was overruled in the unanimous full bench Natal Provincial Division decision of *State v. Mthwana*.²²⁹ In addition to the Natal Division's rejection of *Khanyile*, two other provincial decisions specifically rejected *Khanyile*.²³⁰

In *State v. Rudman*²³¹ the court rejected *Khanyile* because there was no statute that sanctioned the *Khanyile* holding and because the court interpreted prior Appellate Division cases²³² to preempt the *Khanyile* court from deciding the issue differently.²³³ Furthermore, the court criticized the reasoning used in the *Khanyile* decision because it analogized the predicament of the unrepresented defendant in South Africa with that of the United States in 1945.²³⁴

In *Nakani v. Attorney General*,²³⁵ the judge stated that the right to legal representation is an inherent right that cannot be subject to the discretion of the lower court judges.²³⁶ The court further stated that legal representation was a right that was in no way dependent on the facts and circumstances of the case,²³⁷ and therefore rejected *Khanyile*. While the *Nakani* decision could be considered an expansion of *Khanyile* requiring representation of all indigent defendants, the court merely held that there is a duty on the lower court judges to inform defendants of

227. Grant, *Criminal Procedure — Strafprosedreg*, 3 S. Afr. CRIM. J. 354 (1990).

228. *Id.* at 359-60.

229. *State v. Mthwana*, 4 S. Afr. L. Rep. 361 (N. 1989).

230. *State v. Rudman*, 3 S. Afr. L. Rep. 368, 382-84 (E.C. 1989) and *Nakani v. Attorney General*, 3 S. Afr. L. Rep. 655 (Ciskei 1989). See *supra* notes 12, 207.

231. *Rudman*, 3 S. Afr. L. Rep. at 368.

232. *Rudman*, 3 S. Afr. L. Rep. at 382-84. *Regina v. Mati*, 1 S. Afr. L. Rep. 304 (A. 1960); *Regina v. Chaane*, 2 S. Afr. L. Rep. 891 (A. 1978) are the prior cases.

233. *Rudman*, 3 S. Afr. L. Rep. at 382-84.

234. *Khanyile* based its holding on the finding that the United States due process clause incorporates the same standards as those that are fundamental and essential to a fair trial, a requirement of South African's common law. *State v. Khanyile*, 3 S. Afr. L. Rep. 795, 808-11 (N. 1988). *Rudman* held that South African courts cannot analogize to U.S. decisions based on the United States bill of rights because South African law does not have similar guarantees. *Rudman*, 3 S. Afr. L. Rep. at 372-74.

235. *Nakani v. Attorney General*, 3 S. Afr. L. Rep. 655 (Ciskei 1989).

236. *Id.* at 662.

237. *Id.*

their legal right to representation and about the availability of free legal counsel.²³⁸

Conversely, in *State v. Davids*,²³⁹ the Natal Provincial Division²⁴⁰ followed *Khanyile* and responded to criticisms in the decisions made by the *Rudman* and *Nakani* courts. The first criticism is that the *Khanyile* test was unworkable in practice.²⁴¹ The *Davids* court reiterated that the *Khanyile* test was a compromise that took into consideration the insufficient number of legal practitioners available.²⁴²

Secondly, in determining whether the defendant should have counsel, the court would have to preview the entire case. This would require the defendant to plead his defense prior to the state's representation of its case.²⁴³ The *Davids* court responded that the *Khanyile* test did not require a full preview of the case. Instead, the court held that only a cursory review was needed and that, ideally, the prosecutor should assist.²⁴⁴ Furthermore, if the lower court determined that a defendant was unrepresented, the trial should be postponed until the defendant could obtain legal counsel.²⁴⁵ If no counsel was forthcoming, the judicial officer must proceed, leaving the trial decision to the Supreme Court on appeal, through either automatic or special review²⁴⁶ to decide whether the trial was "intolerably unfair."²⁴⁷ Finally, the court stated that once the reviewing court decides the conviction should be set aside, the prosecutor has the option to indict the defendant again because the reviewing decision

238. *Id.* at 664.

239. 4 S. Afr. L. Rep. 172 (N. 1989). This case reviewed two lower court decisions. *Id.* at 173.

240. This opinion, a Natal provincial division, full bench decision with one of the three judges dissenting, was written by the same judge that decided *Khanyile*.

241. *State v. Rudman*, 3 S. Afr. L. Rep. 368, 384 (E.C. 1989).

242. *Davids*, 4 S. Afr. L. Rep. at 184. The court said that:

[a] compromise was deemed necessary, one reached between the principle that the representation of accused persons was vital to the fairness of all trials in which it was wanted . . . and the stark reality that our current resources could never cope with the load they would have to bear if the principle were put into immediate and universal practice.

Id.

243. *Nakani v. Attorney General*, 3 S. Afr. L. Rep. 655, 662-63 (Ciskei 1989).

244. *Davids*, 4 S. Afr. L. Rep. at 188-89.

245. *Id.* at 190. The *Davids* court never stated how long a court should wait in order to allow the defendant to be provided with a lawyer.

246. *Id.* A magistrate can always request that his decision be reviewed under special review. Criminal Procedure Act, No. 51, ch. 30, § 304A (S. Afr. 1977).

247. *Davids*, 4 S. Afr. L. Rep. at 190.

would be based on procedural grounds and not on the merits.²⁴⁸ The court would not be required to "remit the case for trial *de novo*."²⁴⁹

A third criticism is that the *Khanyile* decision was decided wrongly because there is no statutory duty to provide counsel. There is only a duty not to hamper the defendant from seeking counsel.²⁵⁰ The *Dauids* court held, however, that the judge is required by statute to conduct trials that comply with fairness and justice.²⁵¹ In addition, the court found that to achieve a fair and just trial it follows from this duty that counsel must be provided for the indigent defendant.²⁵² Finally, the court acknowledged the criticism that the *Khanyile* rule will create delays.²⁵³ The court held, however, that such delays are necessary for the sake of justice and that it is the defendant's choice to either opt for legal representation or a speedy trial.²⁵⁴

The court in *Mthwana*²⁵⁵ ignored the discussion in the *Dauids* decision and held in contrast that *Khanyile* was wrongly decided.²⁵⁶ The court gave three reasons for its holding. The first was that *Khanyile*'s reasoning was based on the false premise that a denial of the right to representation necessarily results in an unfair trial.²⁵⁷ Second, the court held that *Khanyile* incorrectly interpreted two Appellate Division decisions, *Mati* and *Chaane*,²⁵⁸ to hold that the denial of the right to procure representation made the trial *per se* unfair.²⁵⁹ Last, the court held that *Mati* and *Chaane*²⁶⁰ precluded the court in *Khanyile* from holding that there is a judicial duty to procure legal representation for indigent defendants.²⁶¹ While recognizing that a lower

248. *Id.* at 190-91.

249. *Id.* at 191.

250. *See* State v. Rudman, 3 S. Afr. L. Rep. 368, 382 (E.C. 1989).

251. *Dauids*, 4 S. Afr. L. Rep. at 176, 182.

252. *Id.* at 176, 180-82.

253. *Rudman*, 3 S. Afr. L. Rep. at 384.

254. *Id.*

255. State v. Mthwana, 4 S. Afr. L. Rep. 361 (N. 1989).

256. *Id.* at 368.

257. *Id.* at 369.

258. Regina v. Mati, 1 S. Afr. L. Rep. 304 (A. 1960); Regina v. Chaane, 2 S. Afr. L. Rep. 891 (A. 1978).

259. *Mthwana*, 4 S. Afr. L. Rep. at 366-67. The *Mthwana* court held that what *Mati* and *Chaane* really stood for was the proposition that it was irregular to deny the accused the right to legal representation. Moreover, if that irregularity was so fundamental, then it *per se* vitiated the trial. *Mthwana*, *supra* note 151, at 366-67.

260. *Mati*, 1 S. Afr. L. Rep. 304; *Chaane*, 2 S. Afr. L. Rep. 891.

261. *Mthwana*, 4 S. Afr. L. Rep. at 367.

court judge has the duty to inform the defendant of his right to counsel, the *Mthwana* court held that there was no further duty on the court to halt the trial until counsel was provided.²⁶² The court specifically overruled the *Khanyile* and *Dauids* decisions so that the *Khanyile* test is no longer the law in South Africa today.²⁶³

B. Academic Legal Community's Proposed Solutions

The solutions to the problems of underrepresentation proposed by the academic legal community are to: (1) increase the judge's involvement in aiding the unrepresented defendant; (2) increase funding of the Board; (3) use law clinics, student lawyers and lawyers fulfilling their national service requirements to represent indigent defendants; and (4) educate the populace of the Board's existence.

The first proposal places additional duties²⁶⁴ on judges to help unrepresented defendants during trial.²⁶⁵ This solution does not tackle the problem of the need for legal representation of indigent defendants. It also does not recognize the difficulty and undesirability of a judge acting as an advocate for the defendant as well as an impartial decision-maker, as required by the adversarial legal system. Furthermore, it has been suggested that the prosecutor should also assist the judge in protecting the rights of the unrepresented defendant.²⁶⁶ This solution also seems impractical. Both of these suggestions would make the current South African adversarial legal system take on characteristics typical of an inquisitorial legal system.²⁶⁷

The second solution suggested by the academic legal com-

262. *Mthwana*, 4 S. Afr. L. Rep. at 368-70.

263. *Id.*

264. Some of these additional duties include informing and assisting the defendant to exercise the right to consider his position before pleading; to participate in the remand and bail proceedings; to prepare for trial; to recall witnesses; to apply for a discharge at the end of the State's case; to subpoena witnesses; to subpoena material witnesses free of charge if the defendant is indigent; and the rights relating to appeal and review. N. STEYTLER, *supra* note 1, at 222-23.

265. This proposal is advocated by Professor Nico Steytler of the University of Natal. See generally N. STEYTLER, *supra* note 1.

266. van der Berg, *The Right to be Provided with Counsel*, 1 S. Afr. L.J. 462, 470 (1988). See also *Nakani v. Attorney General*, 3 S. Afr. L. Rep. 655, 665 (Ciskei 1989); *State v. Dauids*, 4 S. Afr. L. Rep. 172, 189 (N. 1989).

267. *Nakani*, 3 S. Afr. L. Rep. at 663-64; *State v. Khanyile*, 3 S. Afr. L. Rep. 795, 799 (N. 1988).

munity is additional funding²⁶⁸ for the Board, coupled with a reassessment of the way that the Board uses its funds.²⁶⁹ Instead, the South African Parliament has chosen to ignore the problem of the unrepresented defendant.²⁷⁰ Even if the funds are not forthcoming, one leading commentator²⁷¹ suggests that the Board could use its current funds more effectively by hiring public defenders instead of legal aid officers, who, in turn, refer cases to legal practitioners.²⁷² Generally, public defenders can process three times more cases than are currently being processed by the legal aid system, because most practicing lawyers do not specialize in the typical criminal cases faced by an indigent defendant.²⁷³

A number of interim solutions have been proposed to solve the problems of the scarcity of lawyers relative to the number of unrepresented defendants. Allowing law students to work through a university's legal aid clinic to assist unrepresented defendants can indirectly increase the amount of legal assistance available to unrepresented defendants.²⁷⁴ The students would be responsible for preparing a defense or even for representing defendants, with supervision, in the lower courts.²⁷⁵ Additional manpower can also be generated by allowing candidate attorneys to appear for the defendant in Regional courts.²⁷⁶ Finally, lawyers who are fulfilling their National Service requirement could

268. See *supra* notes 82, 124-32 and accompanying text on Legal Aid Board's source of funding.

269. This proposal is advocated by Professor David McQuoid-Mason of the University of Natal. Professor McQuoid-Mason is the foremost legal scholar in the field of South Africa's legal aid system. See generally McQuoid-Mason, *Legal Aid*, *supra* note 59; D. McQUOID-MASON, *OUTLINE*, *supra* note 59; and McQuoid-Mason, *supra* note 202.

270. It has been written that:

Parliament has shown little concern for the position of the indigent accused and has exhibited a 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.

N. STEYTLER, *supra* note 1, at 22. A number of Commissions assigned the task to review the problems of the South African legal system have recommended ways in which the system can assist the unrepresented defendant, most of which the South African Government has chosen not to implement. See generally N. STEYTLER, *supra* note 1, at 42-53.

271. See *supra* note 280.

272. D. McQUOID-MASON, *OUTLINE*, *supra* note 59, at 122.

273. D. McQUOID-MASON, *OUTLINE*, *supra* note 59, at 122.

274. See D. McQUOID-MASON, *OUTLINE*, *supra* note 59, at 169-71.

275. See D. McQUOID-MASON, *OUTLINE*, *supra* note 59, at 139-63.

276. See *infra* note 299 and accompanying text. Candidate attorneys are second-year articulated clerks or advocates under pupillage. N. STEYTLER, *supra* note 1, at 15.

be employed by the Board as temporary public defenders.²⁷⁷

A long term solution would be educating South Africans about the Board's existence. For a number of years the legal community has noted the lack of public awareness of the Board's existence, therefore showing the need for more public education.²⁷⁸ As a result, both the Board and the legal community are working to educate South Africans about their legal rights and the services available to them.²⁷⁹ Pamphlets describing these legal rights and services are distributed in police precincts and by legal practitioners.²⁸⁰

V. ANALYSIS OF REFORM

There are two main avenues for reform: the courts and Parliament. Although the Natal Provincial Division overruled the *Khanyile* decision,²⁸¹ that holding could be reinstituted in a future case in any or all of the provincial divisions.²⁸² Unless Parliament decides to enact legislation to the contrary, such a court ruling could prompt the appropriation of additional funds for legal aid. Unfortunately, because *Khanyile* was overruled and Parliament has shown a lack of interest in ameliorating the plight of the indigent criminal defendant,²⁸³ this seems very unlikely. In the meantime, the proposed solutions presented by the

277. While their numbers are few, these lawyers could process an estimated 2000 cases a year. McQuoid-Mason, *supra* note 59, at 63.

278. N. STEYTLE, *supra* note 1, at 55; D. McQUOID-MASON, OUTLINE, *supra* note 59, at 115.

279. High school students are being introduced to the legal system to try to dispel the distrust and lack of understanding that exists today. Publications are made available to teachers but it is up to them to use the materials. *See generally* D. McQUOID-MASON, STREET LAW: PRACTICAL LAW FOR SOUTH AFRICAN STUDENTS (1987).

280. Interview with Director of Legal Aid Board, *supra* note 82.

281. *See supra* notes 267, 273, 274, and accompanying text.

282. A number of legal scholars have heralded the *Khanyile* test as both a challenge to the legal community and a landmark decision. They have argued that it is workable in practice if the legal profession, as a whole, supports the test by devoting a portion of its time to this type of case and if the community at large realizes the importance of further funding the Legal Aid Board. These scholars have also applauded the reasoning used by the *Khanyile* court as having gone beyond the tendency of not applying the reasoning used in United States cases merely because South Africa has no Bill of Rights. *Khanyile* looked at the fundamental basis for the United States decision and, realizing that the same principles and standards are to be found in South Africa's common law, applied the United States court's reasoning. Furthermore, these scholars have professed that the Appellate Division would be likely to uphold *Khanyile* upon review. *See generally* Grant, *supra* note 204; McQuoid-Mason, *supra* note 203; Steytler, *supra* note 196.

283. *See supra* note 270 and accompanying text.

academic legal community should be instituted.²⁸⁴ The two tiers of judicial duty would be an effective interim step to protect the rights of unrepresented defendants. The suggestion of having public defenders instead of legal aid officers should be implemented as soon as possible to use the Board's funds more effectively. Moreover, the increased use of law students and lawyers fulfilling their National Service duties would also help alleviate the shortage of lawyers in the immediate future.

While requiring representation of all indigent criminal defendants is the ideal long-term solution, there are a number of other steps that should be taken by Parliament, the Board, the universities, and the legal system as a whole to improve the situation. Parliament should pass legislation requiring the police to inform defendants of their various legal rights at the time of arrest. Ideally, the police would immediately inform persons held for questioning or on charges of all their legal rights. Not only should defendants be told of the right to counsel and of legal aid, but also of the right to remain silent, the right against self-incrimination, and of the right to have legal representation at the police questioning stage. To ensure enforcement, failure to comply with these requirements by the police would be grounds for acquittal.²⁸⁵ While the current duties imposed by the *Radebe* decision²⁸⁶ are clearly an important safeguard against the possibility that the defendant has not been informed of these rights,

284. See *supra* notes 264-81 and accompanying text.

285. The Judges' Rules, which do not have the force of law but are administrative directions designed for the guidance of the police, provide for a cautionary statement to be made to those that the police wish to question in connection with a crime.

The wording of a statement to someone to be questioned is suggested as being: "I am a police officer. I am making inquiries (into so and so) and I want to know anything you can tell me about it. It is a serious matter and I must warn you to be careful what you say."

The wording of a statement to someone in custody and who has been formally charged is suggested as being: "Do you wish to say anything in answer to the charge? You are not obliged to do so but whatever you say will be taken down in writing and may be used in evidence."

The wording of a statement to someone in custody and who has not yet been formally charged is suggested as being: "Before you say anything (or, if he has already commenced his statement, 'anything further'), I must tell you that you are not obliged to do so, but whatever you say will be taken down in writing and may be given in evidence."

The evidence obtained without such a cautionary statement is necessarily considered admissible evidence. Judges' Rules in GARDENER & LANSDOWN, 1 SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE at 613-14 (Sixth ed. 1978). See also 5 H. HAHLO & E. KAHN, *supra* note 1, at 613-15.

286. *State v. Radebe*, 1 S. Afr. L. Rep. 191, 196 (T. 1987).

this information should be given at the time of arrest or detainment.

Given the dearth of qualified advocates currently willing to undertake legal aid cases, greater participation by both lawyers and law students will be necessary in supplying legal aid.²⁸⁷ Therefore, Parliament should enact legislation creating various incentives to induce legal practitioners and students to offer their assistance to indigent defendants. Such incentives could include tax deductions for firms and practitioners for fees not recoverable for these services. Another incentive could be to allow attorneys in their second year of articulated clerkship as well as advocates during their pupillage to take on these cases.²⁸⁸

In addition, the Bar and Side-Bar can reinforce the governmental incentives by instituting mandatory *pro amico* undertakings for a specified amount of time per year.²⁸⁹ This could be considered as an interim situation until current student lawyers are trained and ready to take on the full-time positions of public defenders. This personal sacrifice can be justified, not only in that justice is being served, but also because the legal system as a whole will be elevated to a more trustworthy position in the eyes of South Africans.²⁹⁰

An under-utilized source of legal assistance can be found in South Africa's university legal aid clinics. The main problem with using the university legal aid clinics as a source of legal representation is that most students are not interested in participating and offering these services. If Parliament created incentives such as academic credit, a preference for legal aid clinic participants when selecting students for public defender positions, and perhaps scholarships, this large source of manpower could be tapped. In response to the lack of public awareness of the Board's existence, Parliament should increase its funding for legal aid so that there are additional funds available for advertising and educating the public. In addition, Parliament should enact legislation to teach South Africans about their legal rights during school.

287. Editorial, *Mr. Justice Didcott's Challenge*, DE REBUS, Sept., 1988 at 559.

288. In the 1989 Amendment to Act 32 of 1944, this suggestion has been implemented, not solely for the purpose of assisting indigent defendants, but for all cases. Magistrate's Court Act, No. 32 (S. Afr. 1944) (amended 1989).

289. See *supra* notes 61, 97, 110 on *pro amico* and *pro deo*. See also *supra* note 52 on Bar and Side-Bar.

290. See *Nakani v. Attorney General*, 3 S. Afr. L. Rep. 655, 664-65 (Ciskei 1989).

To insure proper legal representation, the Board should prioritize its spending for criminal cases, improve its current form of operation, use its funds more effectively, and solicit additional funds from other sources. Instituting a public defenders office as the method of rendering legal aid would resolve many of the Board's present problems. Not only should the Board switch to this system of legal aid,²⁹¹ but also it should limit or prioritize its resources for criminal matters only. More efficient use of funds,²⁹² would enable additional lawyers to be hired. The creation of these jobs would entice more students to study law and to specialize in criminal defense. Salaries would have to be competitive with the private sector to make the public defender positions equally attractive. If that is not possible, making the positions more prestigious would also motivate students to choose the public defender's office. This could be accomplished by having the government and the Minister of Justice give preference to public defenders in their selection of magistrates, prosecutors, or other political positions. The Board would be able to service more applicants because the new system would be more efficient.²⁹³ With the increase in services rendered to unrepresented defendants in criminal trials, many cultural prejudices²⁹⁴ against the legal system could be lessened. The distrust of the legal system based on the perceived lack of impartiality would disappear through positive personal experiences with the system.

To help the Board solicit additional funds from other sources, Parliament should declare the Board to be a totally autonomous organization. This could be achieved by having the Board controlled by the legal community. The new Board should not adhere to any political policies supported by the government and the composition of the Board membership should be changed to reflect this new allegiance to the legal community.²⁹⁵

291. The Legal Aid Act does not specifically call for legal aid to be rendered in the manner presently chosen by the Board. Therefore, the Act cannot prohibit this subsequent change. Legal Aid Act, No. 22, § 3 (S. Afr. 1969); GUIDE, *supra* note 60, at para. 1.4. See *supra* note 284 and accompanying text on instituting the public defenders system. In April 1991 a pilot project instituting a public defenders system started in the Johannesburg Magistrate's Court. Interview with A. Trichardt, advocate with the Johannesburg Bar (April 3, 1991).

292. Salaried lawyers are more cost-effective than using the referral method. D. McQUOID-MASON, OUTLINE, *supra* note 59, at 122.

293. See *supra* note 284 and accompanying text on efficiency of public defenders.

294. N. STEYTLER, *supra* note 1, 14-15. See *supra* notes 87, 96 and accompanying text on the perceived lack of impartiality of legal aid officers.

295. The Board should contain fewer governmental ministers and a greater number

Even though the Board relies on the government for funding, Parliament should clarify that these funds are not dependent on the Board following political policies.²⁹⁶ Both local and foreign funding sources are more likely to be granted to such an independent organization.²⁹⁷

Ideally, changes made in the legal system must include the institution of a bill of rights protected by the judiciary which would give the judiciary the power to strike down "unconstitutional" legislation. While this change may be forthcoming,²⁹⁸ it cannot realistically be expected to occur soon. In the meantime, the changes listed below would improve the situation and should be instituted.

Changes in the selection of the lower court presiding officers would greatly improve the image of the impartiality of these positions. The magistrates for the District and Regional courts are presently chosen from the ranks of civil servants.²⁹⁹ This is the same pool from which prosecutors and government bureaucrats are chosen. This causes a great deal of distrust of the legal system's impartiality by the majority of South Africans.³⁰⁰ Instead, Magistrates should be chosen from the ranks of criminal advocates and public defenders. In this way, defendants will feel that

of representatives from the Bar and the Side-Bar. See *supra* note 79 and accompanying text on current Board membership. See also *supra* note 52 and accompanying text on Bar and Side-Bar.

296. While there is no direct link between the Government's policies and those of the Board, in practice it is evident that the Board does take these policies into consideration, given the fact that no political cases have been undertaken by the Legal Aid Board to date. Interview with E.S. Scholtz, *supra* note 82.

297. The Board presently receives no outside funding. *Supra* note 82. Presently, foreign contributions are made to the Legal Resources Center, which is run by the legal community and generally defends test cases. D. McQUOID-MASON, *OUTLINE*, *supra* note 59, at 126-27.

298. In August 1989, the South African Law Commission prepared a draft a bill of rights to be incorporated into the South African Constitution. See SOUTH AFRICAN LAW COMMISSION, PROJECT 58: GROUP AND HUMAN RIGHTS (Working Paper No. 25, 1989) [hereinafter SOUTH AFRICAN LAW COMMISSION]. During July 1989, the Lawyers for Human Rights informally met with the African National Congress (known as the ANC, at that time an outlawed South African political organization, but presently one of the two main black political organizations in South Africa) to discuss its response to the Working Paper. While the ANC would not give an official opinion, it stated, off the record, that it approved of 80% of the Bill of Rights portion of the document. Whether this new constitution will be instituted "as is" will depend entirely on the political climate in the near future. Presentation by Barry Jammy, partner of Edward, Nathan & Friedland and member of the Lawyers for Human Rights, who met with the ANC (Aug. 1989).

299. van S d'Oliveira, *supra* note 35 at 155-56.

300. Hoexter Commission, *supra* note 9, at part II, paras. 1.4.1-1.4.2, 4.3.1, 4.3.3.2.

there is a greater likelihood that the magistrates are impartial or, at least, do not favor the government. This will also add prestige to the position of a public defender and may induce advocates to choose this position over the better-paying private sector positions. Finally, the professional caliber of the magistrate would be increased because the education required for advocates (and, presumably, public defenders) is higher than that of civil servants.³⁰¹

A practical consequence of instituting legal representation for indigent criminal defendants will be the drastic decrease in the number of cases requiring automatic review. This is because only unrepresented defendants convicted of serious charges³⁰² are entitled to automatic review.³⁰³ In addition, criminal cases with represented defendants usually have a much higher acquittal rate, thereby alleviating the state of the costs of incarceration.³⁰⁴ Both of these factors will save the state time and money, which can be used to support the increase in legal costs and court time that it takes to try a defended case.³⁰⁵

VI. CONCLUSION

Confidence in South Africa's legal system will continue to decline because of the growing number of unrepresented defendants in the criminal courts.³⁰⁶ The statutory and administrative safeguards at present are inadequate.³⁰⁷ Justice cannot be done while the current situation continues to degenerate due to the unique social, racial and economic conditions prevalent in South Africa today.³⁰⁸

As long as this situation continues, South Africa must institute more drastic measures to protect the unrepresented defendant. If the courts and the government recognize that all criminal defendants should be represented, confidence in the legal system will improve.³⁰⁹ Funds will have to be appropriated, but some

301. See *supra* notes 51, 52 and accompanying text.

302. See *supra* note 57 and accompanying text on serious cases.

303. See *supra* note 68 and accompanying text on automatic review.

304. D. McQUOID-MASON, *OUTLINE*, *supra* note 59, at 121-22.

305. *State v. Davids*, 4 S. Afr. L. Rep. 172, 187 (N. 1989); *State v. Rudman*, 3 S. Afr. L. Rep. 368, 384 (E.C. 1989). See also *supra* note 200 and accompanying text.

306. N. STEYTLER, *supra* note 1, at 14-15.

307. See *supra* note 10 and accompanying text.

308. See *supra* notes 140-45 and accompanying text.

309. "No man is so violently anti-social as the man who believes he has not had a fair trial." Note, 100 S. Afr. L.J. 681, 689, (1983).

savings will be achieved by the decrease in the number of cases on automatic review and the higher acquittal rate.³¹⁰ Also, the additional jobs created by an improved legal system will entice students to enter the legal profession, thus alleviating the shortage of lawyers in the long run. In sum, the improvement of the legal system requires the participation of the Board, the universities, the police, governmental agencies, as well as the involvement of the private sector.

Albertine Renée van Buuren

310. See *supra* notes 302-305 and accompanying text.

