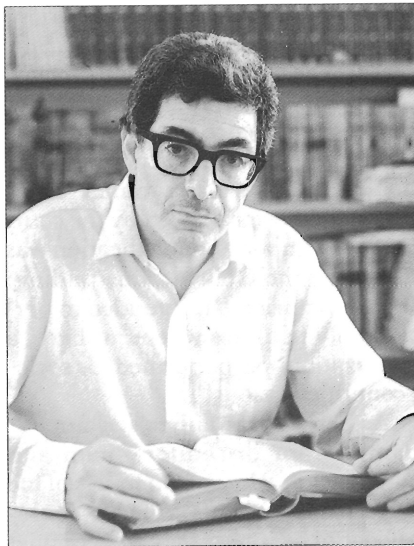


The Unrepresented Accused

A Chaskalson SC

For over twenty years Justice Black championed the cause of the indigent accused within the Supreme Court of the United States of America. In 1941 in his dissent in *Betts v Brady*¹, quoting from an 1859 judgment of the Supreme Court of Wisconsin in *Carpenter v Dane County*², he asserted that the guarantee of a full and fair trial to a pauper was 'a little like mockery' if at the same time the pauper is told 'that he must employ his own counsel, who could alone render these guarantees of any real permanent value to him.' In 1963 he finally persuaded the Supreme Court to accept his view. Writing for what was now a unanimous court in *Gideon v Wainwright*³ he overruled *Betts v Brady*⁴ saying:

... reason and reflection require us to recognise that, in our adversary system of criminal justice, any person haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. . . . Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can to prepare and present their defences. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the



Speech delivered by A Chaskalson SC, National Director of the Legal Resources Centre and member of the Johannesburg Bar, at the Conference of the Society of University Teachers of Law: University of Natal, Pietermaritzburg, on 10 July 1990.

widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential

to fair trials in some countries, but it is in ours.⁵

Momentous judgment

After this momentous judgment, Gideon wrote to Abe Fortas, the attorney who had been appointed by the court to argue the appeal on his behalf. In his letter he said:

I have no illusions about the law and courts or the people who are involved in them. I have read the complete history of the law ever since the Romans first started writing them down. . . . I believe that each era finds an improvement in law; each year brings something new for the benefit of mankind. Maybe this will be one of those small steps forward.⁶

Gideon was subsequently placed on trial again for the same offence. At his first trial when he had been convicted he had been sentenced to five years imprisonment; at his second trial he was legally represented and this time he was acquitted. Certainly a step forward for him.

Gideon v Wainwright was of course much more than a small step forward. It was a crucial part of a process that had been under way in the United States of America for over a hundred years, and which has since been taken further, so that today a person unable to afford the services

of a lawyer may not be imprisoned in that country, unless a lawyer whose performance meets a minimum professional standard, has been assigned to and has represented such accused at his or her trial.

The same process has begun in South Africa. The conflicting decisions in *Khanyile*⁷, *Rudman*⁸, *Dauids*⁹, and *Mthwana*¹⁰ are well known. All recognise the importance of being represented by counsel at a criminal trial. Some say, however, that the absence of such representation is in itself not a ground for challenging the fairness of a trial; others say that depending on the complexity of the case, it may be.

Best solution

I do not intend to address that particular issue today; I hope to be able to do so at a different time and in a different place. Instead, I want to examine the reasons why it has been said that legal representation is of such importance, and what can be done to provide such representation to people who cannot afford to pay for lawyers to defend them. In doing this I will address some of the practical problems that have been raised in response to the call for legal representation to be provided to poor people facing criminal charges, and suggest that the best solution involves the setting up of a public defender's system linked to the training of young lawyers. What I have to say is not new. It has been said by others before; it is also an issue that I myself addressed some years ago at a conference on legal training in Johannesburg. But time has passed and it is possibly more propitious now than it was then for this proposal to be implemented; so let me address it once more, this time from a somewhat different perspective.

Fundamental right

Our system of criminal law is premised on the assumption that all are equal before the law and all who are charged with criminal offences are entitled to a fair trial. It recognises the right to be legally represented at a trial as a fundamental right the denial of which will vitiate the trial. But every day hundreds of unrepresented accused persons pass through our courts. A criminal trial has a familiar pattern. The accused is usually black.

The judicial officer is invariably white; so too is the prosecutor. The proceedings are conducted in a language which the accused often does not understand, or understands only imperfectly. Not infrequently the accused is either illiterate or ill educated and an interpreter is required to act as intermediary between the accused and the court. The accused is usually not represented by a lawyer. The preparation for trial, cross-examination of witnesses and the presentation of his or her case by such an accused is usually ineffectual. Magistrates explain to accused persons what their rights are; sometimes this is done with sympathy, sometimes not. But the explanation is not of much value however it is given, for more often than not the accused has not the skill to cross-examine or to present his or her case adequately. This process occurs time after time. Thousands of undefended people pass through the courts in this way each year, and thousands are convicted and sent to gaol.

Where the sentences require that this be done the cases are then sent on review, and judges are asked to certify that the proceedings have been in accordance with justice. If this is justice, is it justice of which we can be proud?

Exercise in self-delusion

'It is the duty of the Court' said Mr Justice Centlivres in *R v Abdurahman*¹¹, 'to hold the scales evenly between the different classes of the community' – But how can that be done in criminal trials, when the ability of an accused person to offer a defence, so often depends on the extent of his or her means. In the *Khanyile* case Mr Justice Didcott examines the plight of the unrepresented accused and, I suggest, shows quite conclusively that, as he puts it, 'the odds are stacked against him, and stacked heavily'¹²; to those who would challenge his analysis and conclusions on this issue I would answer, by saying that there are very many cases in which the quotation from the article published in the *African Law Review*, and cited by Mr Justice Didcott in *Khanyile*, are true:

to think that at the end of the trial of an unrepresented accused there may be justice is an exercise in self-delusion.¹³

If you doubt this, spend a week sitting in a magistrate's court anywhere in the country, and watch undefended accused attempting to defend themselves.

In modern times the importance of legal representation is no longer seriously questioned anywhere in the civilised world. The Hoexter Commission treated as axiomatic the proposition that legal representation is a necessity and not a luxury. In a passage which has frequently been quoted, it said:

Any State that prides itself on a democratic way of life should not regard legal representation of parties before its courts as a pure luxury or a fortuitous benefaction of the Government, but as an essential service. Indispensable to the achievement of the democratic ideal in any modern state is access to the courts for all its inhabitants. As has been pointed out, however, access means more than a sophisticated legal system and an incorruptible judiciary. For any person who has to appear in court, whether as an accused in a criminal trial or as a litigant in a civil action, the excellence of his country's judicial system is small comfort and any claim by the State that the courts are open to all has a hollow ring. Modern administration of justice is intrinsically complex, and the best guarantee of proper adjudication is proper legal representation of the parties concerned.¹⁴

All the cases recognise the importance of legal representation. In *Rudman*, Mr Justice Cooper is at pains to point out that our courts have frequently stressed the importance of legal representation, and he concludes the part of his judgment dealing with the right to counsel, by saying:

this judgment should not be construed as questioning the importance of legal aid for indigent accused persons nor the ideal of *Gideon v Wainwright*, nor should this judgment be taken as a condonation of the State's regrettable failure to remedy the serious shortage of funds for legal aid, and I express the hope that the provision of adequate funds for legal aid will be given a high priority.¹⁵

In *Dauids*' case Mr Justice Nienaber in his dissent says:

of course it is unfair for a man to have to face a practised prosecutor all on his own¹⁶

but, pointing to the safeguards built into the system of criminal trials, concludes that the unfairness is not so elemental that the trial is distorted into a travesty of justice.

Laissez faire

All the cases now hold that an accused person must be told of his or her right to apply for legal aid and afforded every reasonable opportunity to obtain legal representation. But if legal aid is denied, then according to *Rudman and Mthwana* the case must proceed. And even *Khanyile* accepts that it is only in the more complex cases that it will be irregular to try an unrepresented accused. The situation, then, in which we find ourselves is this. It is irregular to deny a person who is able to pay for a lawyer the opportunity of retaining a lawyer to handle his or her defence; and if a lawyer is retained and does not turn up at the trial it is irregular to require the accused against his or her will to conduct the defence in person. It is also irregular to commence a trial of an indigent accused without inviting the accused to apply for legal aid. But it is not irregular, save possibly in complex cases, to try an unrepresented accused if legal aid is not granted; yet very few accused people are given legal aid. Why we may ask, as the judge in *Carpenter v Dane County*¹⁷ did, 'Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?' The answer always given is a utilitarian one. There are inadequate resources. There are not enough lawyers to perform the task, and in any event it will cost too much. And so we still remain locked into the laissez faire attitudes of the late eighteenth, nineteenth and early twentieth centuries, described trenchantly by Cappelletti and Garth in these words:

Relieving 'legal poverty' – the incapacity of many people to make full use of the law and its institutions – was not the concern of the state. Justice, like other commodities in the laissez faire system, could be purchased only by those who could afford its costs, and those who could not were considered the only ones responsible for their fate. Formal, not effective access to justice – formal, not effective, equality – was all that was sought.¹⁸

Attitudes changed

Attitudes have changed since the days of laissez faire. Everywhere it is now recognised that legal representation is an ingredient of a fair trial. In countries like the United States of America¹⁹ and India²⁰ the courts have taken the lead in insisting that legal representation be provided to

poor people facing criminal charges. In Europe this right is recognised by the European Convention on Human Rights²¹ which stipulates that where the interests of justice so require, people with insufficient means to pay for legal representation must be given it free; and this right has been upheld and enforced in a series of cases by the European Court of Human Rights.²² There is a similar provision in the International Covenant on Civil and Political Rights.²³ Most countries in Europe have extensive legal aid schemes, and as a matter of practice accused persons are always represented at criminal trials which might lead to a gaol sentence.²⁴ The same is true in Canada²⁵ and Australia.

The requirement that an indigent accused should be provided with legal assistance without payment by him where the interests of justice so require is a norm to which countries throughout the world now aspire.

Utilitarian arguments

I do not disregard the utilitarian arguments that have been advanced in answer to the increasing demand for more extensive legal representation in our courts. The question we must ask ourselves, however, is whether enough is being done, and whether the time has not come for the State and the legal profession to act more resolutely to translate the aspiration – for it is at present no more than an aspiration – of equal justice into a reality. A criminal trial is part of the process of securing and maintaining law and order. The larger process of which it is part involves the establishment and maintenance of a police force and a prison service, and the employment of judges, magistrates, prosecutors, interpreters and other court officials. It is an expensive process. The budget for 1990-1991 provides for expenditure of R3 027 million on the police force; R878 million on the prison service and R430 million on the department of justice.²⁶ That was before the recent increases in the estimates to make provision for higher salaries and other expenditure. This means that during the current year the state plans to spend over R4 000 million on police, prosecutions and prisons. I leave out of account the defence budget of over R10 000 million, which indirectly is also a contribution to law and order.

National goals

The 1983 Constitution of the Republic of South Africa records in its preamble a series of national goals²⁷ which include on the one hand the maintenance of law and order, and on the other the equality of all under the law. In the budget provision is made, as I have said, for the expenditure of approximately R4 000 million for the maintenance of law and order; but for legal aid, the budget provides only R17 million.²⁸ Now it may be said that it is not only the expenditure on legal aid, but other expenditure of the department of justice as well that is directed to maintaining equality under the law. And that is so, because the budget of the justice department will include the salaries of judicial officers and other expenditure needed to maintain our court system. But the R17 million is all that is available during the current year to provide the infrastructure for the Legal Aid Board, and the civil and criminal legal services that it offers to the public. This is hopelessly inadequate, and it is not surprising that the overwhelming majority of people who are convicted and sent to gaol have gone through their trials unrepresented.

According to statistics provided by the Department of Justice in its report for the year ended 30 June 1989, 2 000 criminal cases were heard that year by the Provincial and Local Divisions of the Supreme Court; 59 183 criminal cases were heard by the Regional Courts; and over 2 million criminal cases were heard by the District Courts.²⁹

Statistics provided by the Department of Prisons for the same period show that 152 492³⁰ people were sentenced to imprisonment during the course of the year. Of these, 108 563 were sentenced to six months imprisonment or less. We can see immediately that the great majority of cases handled by the courts are not serious cases. Only about 7% or 8% of them lead to gaol sentences, and of those two thirds are cases where the sentences are for six months or less. The problem of providing representation for indigent accused may not therefore be as large and as difficult as it is sometimes assumed to be.

Public defender scheme

Young doctors are required to spend a year after they have qualified,

working in state hospitals. This, despite the entry into the medical profession of increasing numbers of women doctors, is still known as housemanship. The period of housemanship is an important part of the training of the doctors; and it is an essential part of the provision of medical services to those who are unable to pay the fees of private practitioners. There is no reason why the same procedure should not be followed in the training of young lawyers; why they too should not be required to serve a period of internship. Approximately 1 000 law students graduate each year with an LLB awarded by one of the various South African universities; I disregard those who graduate with a BProc degree because many of them go on to do the LLB after obtaining their first degree. If the LLB graduates become candidate attorneys they are immediately entitled to appear in court. They have skills, and those skills can be used to provide part of the resources needed to mount an effective public defender scheme. If, instead of having to spend two years in articles as candidate attorneys, they were required to spend two years as interns working in law clinics, devoting say eighteen months to criminal defences, and six months to civil legal aid, there would be a resource of 2 000 young lawyers at any given time available to provide legal services to those who cannot afford them, of whom 1 500 would be available for criminal defences.

The statistics of the Department of Justice show that most criminal trials are fairly short. There were for instance 151 Regional Magistrates functioning in seven Regions of South Africa during 1988-1989.³¹ Between them they heard 59,183³² cases during the year. Some would have been defended. There are no statistics to show how many. But if we assume that 80%³³ were undefended, then approximately 48 000 people would have required defences in the regional courts in the course of that year. That could easily have been provided by 1 500 law graduates available for criminal legal aid. There would have been 10 lawyers per Regional Magistrate. Each would have had to handle about 32 cases a year – approximately three a month. If the case load were to have been doubled to six cases a month, an inroad could have been made into the District Courts as well.

Supervision

What this shows is that if there is the will there are resources to be harnessed. Of course there will be a need for more experienced lawyers to supervise the work of the young lawyers and to handle some of the more complex cases. If we take a ratio of one experienced lawyer for every ten young lawyers, approximately 150 experienced lawyers will be needed. If the more experienced lawyers become career lawyers in the same way as prosecutors do, with prospects of promotion to the magistracy, it should be possible to find the required staff.

Expense

Then there is the question of expense. The interns could be paid at the same rate as articulated clerks are; that would be on a par with what medical interns are paid. For 2 000 interns the cost would be in the region of R40 million.³⁴ Another R20 million would be needed for the career lawyers³⁵ and for overhead expenditure. For a total cost of about R60 million an effective legal aid system delivered through salaried lawyers could be established. That would call for an increase of approximately R40 million on the existing legal aid budget.

The value of a fair justice system cannot be measured in monetary terms. It promotes public confidence in the legal system, particularly by those who are likely to be most alienated from society's legal institutions, and should not be made the subject of a cost benefit analysis. But if one is going to look at costs, one should also look at savings. Working as I have done on the figure of 1 500 lawyers available each year for criminal cases and assuming that each lawyer handles six cases a month there will be over 100 000 defences provided each year. If 10% of those people who are now defended are kept out of gaol, there will be a saving on the costs of running the prisons. The Prison Department's statistics show that it costs R15 a day to keep a prisoner in gaol. Assuming that at least 10% of those defended, who would otherwise have served sentences of at least six months in prison, do not have to go to gaol, either because they are acquitted, or because proper evidence in mitigation is placed before the court, the saving to the state will be in excess of

R27 million. If through legal representation more awaiting trial prisoners are able to obtain bail, there will be another substantial saving. Other savings are possible. Young men are presently required to undergo military training. There are societal values which can be defended in ways other than taking up arms or being trained to do so. Equal justice is such a value. Young lawyers can serve their country well by defending this value. If service under legal internship takes the place of the service that some young lawyers would otherwise be required to do in military camps, this would have many benefits. Legal services will become more freely available to those who need them, and our justice system will become more equitable. The internship could be structured so as to provide some of the practical training that is presently given during the service of articles by candidate attorneys, and the service of pupillage by young advocates. The period required for articles could be reduced from two years to one year; alternatively, supplemented by lectures, it could possibly become an alternative to articles and provide a route into the attorneys profession for those people who are presently unable to find places as candidate attorneys because none are available to them. The cost of the military service that the young lawyers would otherwise be required to undergo, could be set off against the cost of the internship. And some young people who leave South Africa because of their opposition to military service might be saved for the country.

Pilot scheme

Now I know that the response of some people may be to say that this cannot be done. It would be wrong, they will say, to have a public defender system built around inexperienced lawyers, and if we attempt to follow that route, we will attract the criticism that we are providing the poor with inadequate services. Let me say immediately that I do not accept that young lawyers will not do their job properly. Over the past eleven years I have seen law students and young law graduates at work in law clinics and at the Legal Resources Centre. There are exceptions, but on the whole, they bring considerable enthusiasm and idealism to their

work and take their responsibilities seriously. I have no doubt that legal interns, like medical interns, eager to obtain practical experience, and having no other more lucrative avenues open to them, will work hard and do a good job. They will need guidance, and that is why the scheme requires a leavening of experienced lawyers to work with the interns. There is a steep learning curve for interns, and they acquire skills rapidly. If the internship covers a period of two years, then in addition to the experienced career lawyers, there will always be a nucleus of lawyers who will have had at least one year's practical experience. The more complicated cases can be allocated to those with more experience, and where necessary, the scheme can draw on the services of the private profession. Six years ago the Hoexter Commission supported a proposal by the General Council of the Bar and the Association of Law Societies that law students be required to undergo a period of internship in law clinics.³⁶ More recently a pilot scheme along lines similar to those which I have suggested in this paper, has won the approval of the Lord Chancellor's Office in England, and is about to be implemented in Birmingham.³⁷

We can no longer shelter behind a lack of resources. The resources are there and it is financially feasible to set up a viable public defenders system. There are various ways in which the scheme could be implemented, and discussions between the Universities, the Attorneys and Advocates professions, the Legal Aid Board, and the Department of Justice will be necessary to work out the best structure. It will take time to do this, and in the meantime the Legal Aid Board, or the legal profession itself, could launch a pilot scheme, using salaried lawyers and candidate attorneys assigned by the profession as public defenders in a particular court or courts, to work through the practical difficulties that are likely to be encountered in running a comprehensive scheme.

Propitious time

We are meeting at a propitious time. Last week the Minister of Justice asked the Legal Aid Board to investigate the feasibility of setting up a Public Defender Scheme. Now is the time for the bench and the profession – and so that there should be no misunderstanding on this, I include law teachers within the profession – to provide the impetus that will be

necessary to find the best way of addressing this issue. If we want to have pride in our legal system, and respect for our professions, it is vital that this be done. There is always an occasion when something is done for the first time. We need to approach the task of setting up a public defenders system on the assumption that it can be done. I hope that this conference will give the direction and harness the energy that is needed to achieve that goal.

□ See also the first editorial – Ed.

FOOTNOTES

- 1 316 US 455 (1941) 476.
- 2 9 Wisc. 274 276.
- 3 372 US 335 (1963).
- 4 316 US 455 (1941).
- 5 372 US 335 (1963) 344.
- 6 Cited by Andrew Scherer in (23) *Harvard Civil Rights – Civil Liberties Law Review* 557 (1988).
- 7 1988 3 SA 795 (N).
- 8 1989 3 SA 368 (E).
- 9 1989 4 SA 172 (N).
- 10 1989 4 SA 316 (N).
- 11 1950 3 SA 136 (A) 145C.
- 12 1988 3 SA 795 (N) 811J.
- 13 (1987) *African Law Review* (Vol. 1 No 4) 14-16.
- 14 Fifth and Final Report of the Commission of Enquiry into the Structure and Functioning of the Courts (RP 78/1983) Part II Par 6.4.1.
- 15 1989 3 SA 368 (E) 381.
- 16 1989 4 SA 172 (N) 199-200.
- 17 9 Wisc. 274 277.
- 18 *Access to Justice*, edited by M Cappelletti and B Garth, Sijthoff and Noordhoff, 1978, Vol 1 7.
- 19 *Gideon v Wainwright* 372 US 335 (1963); *Argersinger v Hamlin* 407 US 25 (1972). This includes the right to compulsory process to obtain witnesses (*Washington v Texas* 388 US 14 (1967)); the right to obtain transcripts of proceedings (*Mayer v Chicago* 404 US 189 (1971)). The right is not observed where the counsel provided is grossly incompetent (*Powell v Alabama* 287 US 45 (1932); *Williams v Twomey* 510 F2d 634 (1975)). The right to counsel does not, however, extend to cases where jail sentences are not imposed (*Scott v Illinois* 440 US 467 (1979)).
- 20 *Hoskot v State of Maharashtra* (1979) 1 SCR 192; *Hussainara Khatoon v Home Secretary, State of Bihar, Patna* (1979) 3 SCR 760.
- 21 Article 6(3)(C).
- 22 *Artico v Italy* (1980) 3 EHRR 1; *Pakelli v Germany* (1983) 6 EHRR 1; *Goddi v Italy* (ECHR, 9 April 1984); *Granger v United Kingdom* (ECHR, 28 March 1990).
- 23 As at 31 December 1989 89 countries had ratified or acceded to this convention. Another 4 countries had signed the convention but not ratified or acceded to it. See: *Amnesty International Report for 1990, appendix VI.*
- 24 See: *International Directory Legal Aid*, (1985), Sweet & Maxwell Ltd, and the judgments cited in note 22 above.
- 25 *Re Ewing and Kearney and the Queen* 49 DLR (3d) 619 627.
- 26 The budget figures are those for which provision was made in the Appropriation Act 93 of 1990.
- 27 Act 110 of 1983.
- 28 As provided for in Schedule 1 to the Appropriation Act 93 of 1990.
- 29 Directorate of Justice, report for the year 1 July 1988 to 30 June 1989, pages 78-79.
- 30 Report of the SA Prisons Service for the year 1 July 1988 to 30 June 1989, Table 11, 86.
- 31 Directorate of Justice, report for the year 1 July 1988 to 30 June 1989, at page 79.
- 32 Op cit.
- 33 There seem to be no accurate statistics of the number of undefended accused. The figure of 80% is given by DJ McQuoid Mason, in *An Outline of Legal Aid in South Africa* Hayne and Gibson (1982) 96-100 and is generally assumed to be an accurate estimate. In a speech made to the Law Society of the Cape of Good Hope, reported in the Daily Despatch of 14 September 1989, the Judge President of the Eastern Cape Division, Kannemeyer JP, estimated that 100 000 accused persons, convicted and sentenced to imprisonment of 3 months or more, had been unrepresented.
- 34 Although salaries vary from region to region and within regions, first year articulated clerks in the Johannesburg area are presently being paid on average between R1 500 and R2 000 per month. As I have assumed a two year period of internship, I have worked on an average cost of R2 000 per month per intern.
- 35 This is a rough estimate and will depend upon the experience of the particular lawyers who are employed. I have assumed that 200 career lawyers will be employed, and that on average, the costs of employing a lawyer will be R70 000 per year. That accounts for R14 million of the R20 million. The balance of R6 million makes provision for administrative assistance. If the costs of experts are to come out of the same budget, then the figure may have to be revised.
- 36 Fifth and Final Report of the Commission of Enquiry into the Structure and Functioning of the Courts (RP 78/1983) Part II, Par 6.4.4.10.
- 37 *Commonwealth Law Bulletin*, January 1989, 238-239.