

Considering the Benefits of Legal Aid and Legal Representation at State Expense for Certain Meritorious Family Institutions and their Members: South African and International Demands*

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1 INTRODUCTION

One of the fundamental objectives of any legal system is to ensure that the system is inherently fair and accessible. Many legal systems in the world today are criticised for their lack of fairness, accessibility and, ultimately, legitimacy. A legal system can only be legitimate when it is effective and when justice, fairness and the protection of fundamental rights are provided. Some commentators believe that this ideal legal environment can only be achieved through the provision of proper legal aid and legal representation.¹ Many modern states provide for legal aid and legal representation, even at state expense, in both criminal and civil legal matters. However, the extent of such legal aid and representation differs from country to country, and also in respect of the people and groups qualifying for such aid.

At the outset of this article, it is important to distinguish between the concepts of legal aid (“regshulp”) and legal representation (“regsvrteenwoordiging”). In essence, legal aid includes the provision of legal support or assistance to someone, which assistance could include financial assistance.² Commentators have defined legal aid as “the gratuitous provision of legal assistance to persons who cannot afford to employ [the] services of legal practitioners”.³ The aforementioned definition seems to indicate that the provision of legal aid should generally

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1 See, for example, Olivier *et al Social Security: A Legal Analysis* (2003) 211ff. See also Bekker “The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa” 2004 *CILSA* 173. Bekker points out that it is often argued that there is a practical and logical connection between legal representation and the concept of a fair trial. See also *S v Gora* 2010 1 SACR 159 (WCC) where it was held that justice is dispensed through the mechanism of a fair trial.

2 See the definition of “aid” in the *Collins Concise Dictionary* 21st century ed (2004) 27.

3 McQuoid-Mason “Legal Aid” in Joubert (ed) *LAWSA* (2004) 207 209.

include both legal advice and legal representation in both criminal and civil matters. Legal representation on the other hand, essentially refers to the right that a person has to obtain the assistance of a lawyer in a legal matter. According to the formal definition, representation is an act of representing, or an instance where one person acts on behalf of another person in a particular (ie. legal) capacity.⁴ When contrasting the two concepts, it seems that the concept of legal aid is regarded as a much wider term, and that it includes aspects such as legal advice, legal education, financial aid and legal training. Therefore, legal aid can be described as a system where assistance by legal experts or even financial aid is provided in court trials, with the aim of achieving equality and fairness. The purpose of legal aid is thus to use public funds in order to cover the legal costs and expenses of those people in a particular society who are unable to pay for such costs themselves.⁵ It is submitted that by providing legal aid, social equality is promoted and disparities that exist because of the lack of financial means, are removed. The ultimate advantage is that equal protection by and before the law is enhanced, which is an essential element of the administration of justice in a democratic state. The view has also been expressed that legal aid should not be regarded as charity to the indigent, as was the position in the past, but should be seen as a positive obligation of any democratic community or state.⁶ This view seems to be supported in international law, which is referred to below in this article.⁷

In South African legal history, the provision and development of legal aid has been both controversial and interesting. Initially it was only provided in criminal matters, but later legal aid was also extended to civil matters, albeit in a limited fashion. It is generally accepted that legal proceedings are both complex in nature and intimidating in practice. This reality is exacerbated in the current South African legal system where the judiciary is confronted with indigent, illiterate and vulnerable groups in complex legal cases on a daily basis. Lawyers inevitably play an indispensable role in such a system, and the provision of legal aid and legal representation to those who cannot afford such services is a fundamental element of ensuring a just and fair legal system.⁸ In view of the aforementioned, the aim of this article is to investigate the South African legal position regarding the provision and scope of legal aid and legal representation at state expense for certain persons and meritorious institutions such as indigent family units. Some of the important requirements of international law will be highlighted and a few interesting advantages for poor family units will be emphasised.

2 THE SOUTH AFRICAN HISTORICAL DEVELOPMENT OF LEGAL AID AND STATE-FUNDED LEGAL ASSISTANCE

The concept and provision of legal aid in South African law has its origins in Roman law and, later, Roman-Dutch law. Roman law provided very few rules pertaining to legal aid, but in some cases counsel was assigned to minors, physically

4 See the definition of "representation" in the *Collins Concise Dictionary* 1272.

5 Olivier *et al Social Security* 212.

6 *Ibid.*

7 See part 4 below.

8 In *S v Mabaso* 1990 3 SA 185 (A) 216C–D Milne JA held (in a minority decision) that public policy requires that an accused should be fully advised of his or her right to remain silent even in preliminary proceedings, and that the proper person to give such advice is a legal adviser.

and mentally disabled and handicapped persons.⁹ Under Roman law, the provision for the appointment of legal counsel mostly applied to civil cases. If a party was unable to obtain counsel because of an opponent's influence or superior expertise, the court would normally appoint someone to act on behalf of that person. The Roman rules were later received into Roman-Dutch law, and the element of poverty emerged as a criterion for assistance. At the same time, the practice of securing counsel of equal weight or expertise was abrogated.¹⁰

From the limited sources available, it is clear that the South African common law indeed recognises an individual's right to legal advice and representation. Notwithstanding the initial lack of a direct common-law right to counsel in civil matters, the importance of legal assistance in both civil and criminal matters was recognised over time. With the development of the legal system, the need for a more comprehensive legal aid system, including such aid in civil matters involving indigent parties, was recognised as a common-law provision and was also later included under various statutory provisions.¹¹

3 LEGAL AID AND THE SOUTH AFRICAN LEGAL DISPENSATION

3.1 Introduction

It was mentioned above that South African common law recognised a basic form of legal aid and legal representation only in the latter stages of its development. In early South African law no uniform legal aid scheme was in place and the system was characterised by several loose statutory and judicially created provisions. English law also did not enhance the provisions regarding legal aid although some *pro Deo* and *in forma pauperis* provisions were allowed.

In general, the South African legal development regarding the provision of legal aid and legal representation can be divided into two distinct eras. The first era refers to the legal order before 1994. The second era refers to the legal order after 1994 when a new supreme constitutional dispensation commenced.

3.2 Legal aid in South Africa pre-1994

Prior to 1994, the granting of legal aid and representation in South Africa was largely dependent and based on the common-law right to legal representation (ie. the right to counsel). According to case law at the time, the right to representation had its origin in the common law as mentioned above.¹² In many instances,

9 McQuoid-Mason in Joubert (ed) *LAWSA* 209 where reference is made to *Digesta* 1 16 95, 3 1 1 4 and Voet *Commentarius* 3.1.11.

10 McQuoid-Mason in Joubert (ed) *LAWSA* 212–213. According to Roman law, if counsel refused to provide assistance after having been appointed by the court, he could be disbarred. In Roman-Dutch law advocates and attorneys were bound to act *pro Deo* if appointed. The cause of the client was regarded as paramount and cases could not be abandoned without good and lawful reasons. Indigent clients had to be assisted to obtain legal aid.

11 See also *S v Wessels* 1966 4 SA 89 (C). See, for example, the Magistrate's Court Act 32 of 1944, Supreme Court Act 59 of 1959 and Legal Aid Act 22 of 1969.

12 Cf. *Brink v Commissioner of Police* 1960 3 SA 65 (T); *S v Wessels* and *S v Heyman* 1966 4 SA 598 (A). In *Brink* 67B–C and 68A–69H the court stated that it is the fundamental right of every South African citizen, upon apprehension or arrest, to obtain legal advice and to consult with his or her legal advisers. This right is so fundamental that in normal circumstances it has never been challenged.

the right to counsel was confirmed by statute and entrenched in criminal codes. Originally, the right was negatively formulated: every person had the right not to be deprived of legal representation but no one had the right to demand such representation directly.

Some sources report that the South African legal system did not formally recognise the right to demand representation by a legal representative until 1819. This position stood in contrast to the position under Roman-Dutch law which, as mentioned earlier, did recognise a right to legal representation.¹³ Since that time the right to legal advice and representation has been recognised in various legal precedents.¹⁴ It must be pointed out, however, that there are two approaches to the right to legal aid and legal representation. In terms of the so-called “narrow approach”, an accused is merely entitled to be legally represented if he or she so chooses and can afford such representation. The opposite approach, the so-called “broad or progressive approach”, entails that an accused has to be provided with legal aid and legal representation if he or she cannot afford his or her own legal representation. Initially the South African courts followed the narrow approach and accepted the view that the right to legal representation in criminal cases did not impose direct or positive duties on the state to provide such representation. The state, and consequently the courts, only had a negative duty not to deny an accused the right to legal representation.¹⁵

In 1988, some judicial authorities in the country decided to embark on a new approach. In *S v Radebe; S v Mbonani*¹⁶ the court held per Goldstone J that there was a general duty on judicial officers to ensure that an unrepresented accused was informed of his or her procedural rights which, according to the court, included the right to apply for legal aid and representation. Any failure to inform such an accused of his or her rights to legal aid and representation could, depending on the circumstances of the case, result in an unfair trial. This decision opened the door for South African courts to develop the existing right to legal aid and representation properly. It thus came as no surprise that some courts jumped at the opportunity in the latter part of 1988 with the groundbreaking decision of *S v Khanyile*.¹⁷ In the *Khanyile* case, Didcott J adopted a more flexible approach with regard to legal representation of an unrepresented accused. The court held that each case had to be determined on its own merits but that three major factors had to be considered. The three factors were: (a) the complexity of the case; (b) the personal capability of the accused to fend for himself or herself; and (c) the gravity, nature and possible consequences of being

13 See Bekker 2004 *CILSA* 174–175 where the author refers to Roman-Dutch writers who stated that: “[E]ven the devil has the right to be heard”. See also *S v Wessels* 92 where reference is made to Lord Somerset’s proclamation of 1819 in terms of which an accused obtained the right to appoint legal representation.

14 See, for example, *R v Slabbert* 1956 4 SA 18 (T), *Mandela v Minister of Prisons* 1983 1 SA 938 (A) and *S v Mabaso* 1990 3 SA 185 (A).

15 Cowling “Whither *Khanyile*? The remnants of the right to legal representation in criminal cases” 1994 *THRHR* 19 and 25. In *S v Rudman; S v Mthwana* 1992 1 SA 343 (A) the court held that an accused had no positive right to legal representation under South African criminal law and that the failure to provide legal representation at state expense to an accused who could not afford his or her own representation was not necessarily a failure of justice.

16 1988 1 SA 191 (T).

17 1988 3 SA 795 (N).

convicted of the crime.¹⁸ The most important outcome of the court's decision was that in serious cases where an accused is indigent or incapable of defending himself or herself, he or she is entitled to legal representation at state expense failing which the trial would not be fair.¹⁹ However, this positive development was short-lived. As soon as 1992 the Appellate Division in *S v Rudman; S v Mithwana*²⁰ overruled *Khanyile*. The court held that there was no principle or rule in South African law which provided that an indigent accused had a right to legal representation at state expense.²¹ The court further held that it (ie. the court) could not force the state into providing legal aid and that such a rule would not be feasible since the state had limited financial and human resources.²²

The above discussion briefly explains the somewhat see-saw legal position under South African law prior to 1994 regarding the provision of legal aid and legal representation in civil and criminal cases. With the commencement of a new constitutional dispensation in 1994, the position changed fundamentally.²³ Before the constitutional provisions are discussed it is necessary to reflect on the statutory provisions which were in place before the new constitutional dispensation commenced. Many of these statutory provisions are not only important in respect of the right to legal aid and legal representation, but are still in force and must be interpreted in conjunction with the new supreme law of the state.²⁴

3.3 The right to legal aid and legal representation under South African law

Apart from the South African Constitution, there are in essence five national legislative enactments which have a direct impact on and are of importance for the right to legal aid and legal representation. These Acts are: the Legal Aid Act, Criminal Procedure Act,²⁵ Divorce Act,²⁶ Children's Act²⁷ and Child Justice

18 *Khanyile* 815C–F.

19 In *S v Radebe and Mbonani* 1988 1 SA 191 (T) it was held that judicial officers have a duty to inform unrepresented accused of their rights, including the right to representation. In later cases such as *S v Hlantlala* 1999 2 SACR 541 (SCA) the court even held that an accused not only had the right to be informed of his or her rights, but had to be encouraged to exercise such rights. See also *S v Visser* 2001 1 SACR 391 (C).

20 1992 1 SA 343 (A).

21 It is important to distinguish between the right to legal representation and the right to legal representation at state expense. The common law acknowledges the former, whilst the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") confirms the latter.

22 *Mithwana* 386H and 388C–E. See also McQuoid-Mason in Joubert (ed) *LAWSA* 211. For more on the pros and cons of the *Khanyile* case, see Cowling 1994 *THRHR* 25–29. *Khanyile* is regarded as the first case in South African legal history where the idea of state-funded legal representation was purposively advanced.

23 Notwithstanding the new constitutional dispensation, the former common-law provisions as well as former legal precedents are still of importance. In *S v Vermaas* 1995 3 SA 292 (CC) the Constitutional Court, albeit in an *obiter dictum*, indicated that the criteria mentioned in the *Khanyile* case had to be considered in order to determine whether substantial injustice would result if an unrepresented accused was refused legal representation.

24 According to item 2 of Schedule 6 of the Constitution, all law (including old order statutes and the common law) that was in force when the Constitution took effect continues in force subject to amendment or repeal and consistency with the Constitution.

25 Act 51 of 1977.

26 Act 70 of 1979.

27 Act 38 of 2005.

Act.²⁸ In view of the supreme status of the Constitution, all other laws must comply with and base their authority on the constitutional provisions and framework. In the following paragraphs the basic constitutional provisions regarding legal aid and representation will be highlighted, whereafter the other statutory requirements will be discussed briefly.

3 3 1 *Legal aid and legal representation under the Constitution of the Republic of South Africa, 1996*

It is well known that South Africa's legal system has changed drastically since 1994. The former system of parliamentary sovereignty changed to a system of constitutional supremacy. Under the new supreme constitutional dispensation provision is made for various important aspects that are relevant to the recognition and protection of the right to legal aid and legal representation. In general the Constitution confirms that the South African legal order is founded on, *inter alia*, the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms.²⁹ Other universally accepted principles such as democracy, separation of powers, constitutionalism and an independent judiciary are also constitutionally entrenched.³⁰

With particular reference to the central theme of this article, the Bill of Rights in the Constitution is of significance. In brief, the Bill of Rights confirms itself as a cornerstone of democracy in South Africa in that it enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. The state is specifically obligated to respect, protect, promote and fulfil the rights set out in the Bill of Rights.³¹ Notwithstanding this positive obligation on the state, the rights in the Bill of Rights are not absolute and are subject to the limitations permitted by s 36 or set out elsewhere in the Bill of Rights.³² The Bill of Rights further confirms that it applies to all law, that it binds the state and natural or juristic persons in certain circumstances and that when its provisions are applied, a court must apply or develop the common law in order to give effect to a right in the Bill of Rights.³³ Finally, the Bill of Rights allows for a wide approach to enforcing its rights,³⁴ and also confirms that when it is interpreted, a court, tribunal or forum must promote the values that underlie an open

28 Act 75 of 2008.

29 Section 1(a) of the Constitution. Note that the provisions of the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) are basically the same as the provisions for legal aid or representation in the 1996 Constitution. It should further be noted that the right to life (s 11) and human dignity (s 10) are also important with regard to the right to legal aid and representation. Often such rights are not properly protected when legal aid and representation are not secured.

30 See for example, the preamble, s 1, ch 2 and s 165 of the Constitution.

31 See s 7(1)–(2) of the Constitution.

32 Sections 7(3) and 36 of the Constitution respectively. The Bill of Rights clearly provides for a general limitations evaluation and for internal limitations. Internal limitations refer to situations where a particular right itself limits its application. For example, s 28 is only applicable to every child, thus excluding people older than 18 years of age (s 28(3)). The purview of this article however does not allow for a more detailed discussion of the limitation of rights. For a detailed discussion of the limitation clause, see Woolman *et al* (eds) *Constitutional Law of South Africa* 2 ed (2005) ch 34 and Currie and De Waal *The Bill of Rights Handbook* 5 ed (2005) ch 7.

33 Section 8(1)–(3) of the Constitution.

34 Section 38(a)–(e) of the Constitution.

and democratic society, must consider international law and may consider foreign law. When any legislation is interpreted and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.³⁵

Apart from its more general provisions, the Bill of Rights contains four important provisions which are directly relevant to the evaluation and enforcement of legal aid and legal representation. The first of these provisions is the right to equality. In conjunction with the preamble and the founding values set out in s 1 of the Constitution, the Bill of Rights states in s 9 that:

“9. (1) Everyone is equal before the law and [everyone] has the right to equal protection and benefit of the law.

(2) Equality [further] includes the full and equal enjoyment of all rights and freedoms.”

The concept of equality is much more comprehensive than mentioned in the quotation above, but a full and detailed discussion of the right is beyond the scope of this article. Equality and equal protection and benefit of the law are important when legal aid and legal representation are considered. One must remember that the founding aim of legal aid and representation has its genesis in the philosophy that people, irrespective of their wealth and standing, should be treated fairly and equally before and by the law. Indigent people who cannot afford legal aid and representation from their own means should be assisted to acquire such aid and services, which in turn would allow them “equal” protection and benefit of the law in comparison with people who can afford their own legal aid and representation.³⁶ It is however submitted that although the right to equality has important consequences for the right to legal aid and legal representation, absolute or perfect equality is not practically attainable in this context. Wealthy members of society will always have an advantage within a particular legal system since they can afford the best and most expensive legal advice and representation. However, the right to equality provides more meaningful content regarding the right to legal aid and subsequent protection under the law and access to justice.³⁷

The second important provision in the South African Constitution relating to legal aid and legal representation is s 28 which refers to and is applicable to children. Section 28 states *inter alia*:³⁸

“Every child has the right . . . to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.”

35 See ss 38 and 39(1)–(2) of the Constitution respectively. The obligation to consider international law is of significance and should not be overlooked. Important international-law requirements relating to legal aid and legal representation will be discussed in part 4 below.

36 At this point it is perhaps appropriate to refer to the Aristotelian concept of substantive equality which, in essence, requires that different people should be treated differently in order to achieve equality.

37 There is an old saying that access to the courts or justice should not be subject to wealth or the lack thereof. In *Betts v Brady* [1941] 316 US 455 476 the court stated that there can be no justice where a trial depends on the amount of money that a person has.

38 Section 28(1)(h). According to some writers the term substantial injustice is an elastic concept which the courts will have to develop (Bekker 2004 *CILSA* 191).

Section 28 also allows all children (persons under the age of 18 years) the right to family or parental care, social services and particular conditions if they are detained. The section further specifically states that a child's best interests are of paramount importance in every matter concerning the child.³⁹

The obvious significance of s 28 is that it directly manifests and extends the right to legal assistance and representation by the state and at state expense in civil proceedings which would affect the child if substantial injustice would result without such assistance. Section 28 thus ensures the child a right to participate through a representative in matters affecting him or her and gives effect to art 12 of the United Nations Convention on the Rights of the Child (hereafter "UNCRC").⁴⁰

What would be regarded as matters which would affect the child and which circumstances would result in substantial injustice if legal aid were not provided are open questions. The answer would most probably depend on the facts of each case.⁴¹ It is submitted that various scenarios can arise where the lack of legal aid would affect the child, create substantial injustice and generally not be in a child's best interests. Two scenarios of particular relevance for this article are envisaged.

First, there are many instances where children themselves directly need to enforce and protect particular legal rights. Many children regularly need to enforce and pursue personal civil claims such as delictual claims, contractual entitlements or even commercial matters. It seems that s 28(1)(h) of the Constitution affords them the right to legal representation by the state and at state expense to pursue and enforce such civil entitlements if they or their parents or guardians lack the financial means to do so. It seems logical to argue that lack of legal aid and representation for indigent children who could have claimed personal financial settlements in civil matters creates injustice and is not in the children's best interests. In such cases, legal aid at state expense should be provided. The only possible bone of contention in such cases would be whether the amount claimed would be relevant in determining whether substantial injustice would result if the

39 Compare s 28(1)(b), (c), (g), (2) and (3) of the Constitution. For a comprehensive discussion of the concept of the best interests of the child, see Cronjé and Heaton *South African Family Law* 2 ed (2004) 261 and Bekink and Bekink "Defining the standard of the best interest of the child: modern South African perspectives" 2004 *De Jure* 21–40.

40 See part 4.3 for a discussion of art 12 of the UNCRC. See, for example, also *Lubbe v Du Plessis* 2001 4 SA 57 (C); *R v H* 2005 6 SA 535 (C) 539; *J v J* 2008 6 SA 30 (C) and *De Groot v De Groot* (1408/2009) [2009] ZACPEHC 48 (10-09-2009) where specific attention was given to art 12 of the UNCRC.

41 For more on this point, see Bekink and Brand "Constitutional Protection of Children" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 169–193, Du Toit "Legal Representation of Children" in Boezaart (ed) *Child Law in South Africa* (2009) 93 and Davel "The Child's Rights to Legal Representation in Divorce Proceedings" in Nagel (ed) *Gedenkbundel vir JMT Labuschagne* (2006) 20. See, for example, also *Soller v G* 2003 5 SA 430 (W); *Rosen v Havenga* 2005 JOL 15235 (C); *F v F* 2006 3 SA 42 (SCA) and *Legal Aid Board v R* 2009 2 SA 262 (D). See also "Legal Aid Guide (LAG)" 11 ed (2009) para 4.18.1 <http://www.legal-aid.co.za/index.php/Legal-Aid-Board-Guide.html> (accessed 05-01-2010) for criteria pertaining to "substantial injustice" in deciding if a child has a legal right to state-aided legal presentation in civil cases. The criteria include the seriousness of the issue for the child, the complexity of the law and whether the child is at a substantial disadvantage compared to the other parties.

child did not have a legal representative.⁴² It is submitted that in the absence of any statutory guideline on this issue, the courts will have to balance the interests of children on the one hand and the interests of the state or public purse on the other. Whether it is acceptable and affordable for the state to provide legal aid and representation for indigent children in all civil matters, irrespective of the possible monetary benefit, is a difficult question and would have to be answered after considering various factors.⁴³

Section 28(1)(h) of the Constitution also seems to afford the right to legal representation by the state and at state expense to children in proceedings affecting them, such as divorce, maintenance, custody (care) and access (contact) disputes, if failure to do so would otherwise result in substantial injustice. In these instances, legal representation and legal assistance are provided not to enforce or pursue a civil claim, but to ensure that a child's voice is heard in matters affecting him or her.⁴⁴ It should, however, be noted that this provision does not confer an absolute right to state-aided legal representation, as the state will only pay for a legal representative if failure to do so would otherwise result in substantial injustice.⁴⁵

The right embodied in s 28(1)(h) has also been extended to unaccompanied foreign minors. In *Centre for Child Law v Minister of Home Affairs* the court ordered that legal representation at state expense should be afforded to unaccompanied foreign minors if substantial injustice would otherwise result. In addition the court held that, whilst the primary duty of meeting a child's socio-economic needs rests on the child's parents or family, the state has an active duty to provide foreign unaccompanied children with the rights and protection embodied in s 28 of the Constitution.⁴⁶ This *dictum* suggests that children who do not have parental or family care may have a direct and immediate claim to the realisation of such rights. It raises the important but contentious question of whether unaccompanied children lacking parental or family care find themselves in a more favourable position to obtain legal representation than children of indigent families do. Should the answer be in the affirmative, this position may be regarded as unequal protection and benefit of the law. Furthermore, s 9(3) of the Constitution states that the state may not discriminate unfairly, directly or indirectly, against anyone on one or more grounds, including ethnic or social origin. To differentiate between accompanied and unaccompanied children in respect of the provision of legal representation may be regarded as inconsistent with s 9(3). By giving easier access to legal representation to unaccompanied children than to children who are

42 In other words, would substantial injustice occur in any civil claim or matter, irrespective of the amount of the claim, or would substantial injustice occur only when a minimum threshold amount of, for example, R50 000 or R100 000 has been reached or exceeded? See, for example, LAG 4.18.8 which indicates that legal aid may be granted to a child for a monetary claim that exceeds the jurisdiction of the small claims court by more than 50%, if legal aid is needed to protect the best interests of a child and substantial injustice would otherwise result. Note that where the child is a respondent or defendant in a civil matter he or she is entitled to legal aid irrespective of the merits of the case (LAG 4.18.4).

43 Such factors could include the number of anticipated cases, the possible benefits achieved and the financial capacity available to government.

44 See *J v J; De Groot v De Groot; R v H; Soller v G* and *Legal Aid Board v R*.

45 *Legal Aid Board* 269D–H.

46 *Centre for Child Law* para 17.

living with their parents or family, the state may be infringing on the right of the latter group of children as their right to legal representation is not fully realised.⁴⁷

A second potential scenario is where the parents, guardians or caregivers of children within a family relationship are in need of legal aid and representation to enforce their own personal civil rights or entitlements. Although not directly applicable, the provision of legal aid to such indigent parents could also have an impact on the other dependent members of the family, such as children or spouses. Whether South African courts will afford a right to “indirect legal aid” to children under s 28 is doubtful. Notwithstanding that the provisions of s 28 are directly enforceable and are not subject to progressive realisation or subjected to reasonable legislative measures by the state within its available resources, judicial precedents suggest that the extension of the provisions of s 28 to allow for an indirect right to legal aid would not be allowed.⁴⁸

The third fundamental right under the Constitution which has a significant impact on the concept of legal aid and legal representation is s 34. Section 34 states, under the heading “access to courts”, that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. It is often argued, and accepted by various commentators, that the so-called “right of access to courts” provides an important impetus for the right to legal aid and legal representation. If indigent people (be they citizens or non-citizens) are denied the right to have a legal dispute adjudicated because of a lack of funds and consequent lack of legal aid and legal representation, their right of access to courts is limited. Whether such limitation will be justifiable under the limitation criteria set out in s 36 will depend on the circumstances of each case. In view of the extension of the right of access to courts to “everyone” it is arguable that, in principle, both citizens and non-citizens can rely on this right in order to obtain legal aid and legal representation in certain circumstances.⁴⁹ However, it must be pointed out that s 34 does not specifically refer to a right to legal aid and that if such aid is indeed provided under its provisions, it would seem applicable only to criminal matters.⁵⁰

47 For further discussion on the approach of the Constitutional Court in interpreting and limiting the socio-economic rights of children under parental care as well as possible interpretational approaches see Stewart “Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others” 2008 *SAJHR* 472–494.

48 See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC). The court confirmed that the rights under s 26 are not immediately realisable and that s 28(1)(c) does not create rights for children and their parents that are independent and separate from those created by ss 26 and 27 of the Constitution (para 78).

49 See *Khosa v Minister of Social Development* 2004 6 SA 505 (CC). The court held, *inter alia*, that social assistance should be available to non-citizens too. This position could easily be extended to the provision of legal aid and legal representation. Both ss 9 and 35 of the Constitution refer to the term “everyone” and are not reserved for citizens only. See also *Centre for Child Law v Minister of Home Affairs*.

50 Apart from s 28, the Constitution does not envisage a direct right to legal aid and representation in civil matters. It thus seems acceptable to argue that any legal aid allowed under s 34 will only apply to criminal matters. Other statutory requirements or, if applicable, the provisions of the common law will have to be relied upon to secure such aid and representation in civil matters.

In the fourth and final instance, the Constitution also protects and entrenches various rights of arrested, detained and accused persons. These rights have an important impact on the right to legal aid and legal representation. Section 35(2) of the Constitution states *inter alia* that:

“Everyone who is detained, including every sentenced prisoner, has the right— . . .
(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and [also] to be informed of this right promptly.”

Section 35(3)(f)–(g) then goes on to state that:

“Every accused person has a right to a fair trial, which includes the right— . . .
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

The scope and importance of the provisions of s 35 of the Constitution for the development of the South African legal system have been enormous. The purview of this article does not allow for a comprehensive discussion and analysis of the section. Only a few interesting aspects are highlighted.

For the first time in South African legal history, s 35 entrenches the right to legal representation at state expense within the broader fundamental right to a fair trial. At the beginning of this article it was argued that the failure to recognise a right to representation offends the principle of substantial fairness and equality before the law. Although s 35 distinguishes between persons who have been arrested, have been detained and are accused, and apparently only affords the right to legal aid and legal representation to people who have been detained or are accused in a criminal matter, some legal commentators submit that a suspect or person who has been arrested should be afforded the same protection.⁵¹ This argument is supported, since arrest has significant implications for the liberty, equality, dignity and freedom of the arrested person. Arrest should therefore be strictly monitored. Since arrest is immediately followed by detention in a wide sense, the right to legal aid and legal representation should also be afforded to arrested persons.⁵²

A second important point is that the right to legal representation at state expense is not an absolute right, and that it is curtailed by various internal and general limitations. An internal limitation is the fact that s 35 is only applicable to criminal matters and does not extend to civil matters. Furthermore, state-aided

51 McQuoid-Mason in Joubert (ed) *LAWSA* 214–215.

52 It is self-evident that the moment that a person is arrested by any appropriate authority, that person immediately becomes a detainee, be that in a police van, a jail or any other holding facility. A strict distinction between the terms “arrested” and “detained person” is therefore superfluous. It is submitted that a person’s arrest presupposes that he or she becomes a detainee. It is also submitted that when a person is arrested he or she is accused of having committed a crime. That is, after all, the only legitimate reason for such an arrest. If a person is arrested without any legal foundation, such arrest is automatically unlawful and thus unconstitutional, and the arrested person is entitled to legal or constitutional remedies or entitlements. To deny an arrested person the right to legal representation thus seems absurd. There are many instances where people have been awaiting arrest and have been taken into custody in the presence of their legal representatives.

legal representation is only applicable if substantial injustice would otherwise result.⁵³ What is and should be regarded as substantial injustice is unclear. In the absence of clear statutory guidelines, it is the role of the judiciary to look at all the relevant circumstances of each case and then to determine whether substantial injustice exists. Various factors and criteria should be used by the court to reach its value judgment in each case.⁵⁴ Apart from the internal limitations, a person who has been denied the right to legal aid and legal representation at state expense can also argue that such denial is contrary to the Constitution in general. If a *prima facie* limitation has been established, the onus will fall on the respondent to justify the limitation before a court in accordance with the requirements set out in s 36 of the Constitution.⁵⁵

With reference to s 35, the following interesting case should be considered: In *Hlantlalala v Dyantyi*⁵⁶ the court mentioned that a clear distinction should be made between the right of an accused to be informed of his or her entitlement to legal representation⁵⁷ and the right to obtain legal assistance at state expense. Whereas the right to be informed of the entitlement to legal representation is a common-law right (now a statutory right), the right to obtain legal assistance at state expense is a constitutional right. The court further held that there is a duty upon judicial officers to inform unrepresented accused of their common-law right to legal representation. Such duty is even more important where the charge against the accused is a serious one. The accused should not only be told of his or her right, but should be encouraged to exercise it, be given reasonable time to obtain legal representation, and in appropriate cases be told that he or she is also entitled to apply to the Legal Aid Board (hereafter "LAB")⁵⁸ for assistance.⁵⁹ If a judicial officer has failed to advise an unrepresented accused of his or her right to legal representation, an irregularity may occur which could result in an unfair trial. Such irregularity would result in circumstances where there has been actual or substantial prejudice to the accused.⁶⁰

In *S v Cornelius*⁶¹ it was stated that the right to legal representation has three separate and distinct forms, namely, (a) the right to a legal practitioner of one's choice; (b) the right to a legal practitioner assigned to one at state expense; and (c) the right to a legal practitioner assigned by the LAB. According to the court, the first two forms are recognised and entrenched in the Constitution.⁶² The third

53 Sections 35(2)(c) and 35(3)(g) of the Constitution.

54 Some commentators have suggested that the criteria set out in the *Khanyile* case could be a useful tool (McQuoid-Mason in Joubert (ed) *LAWSA* 215–217).

55 Section 36 of the Constitution is the general limitation clause. It should be noted that a competent court is not bound by the means test of the LAB. A court has a discretion to determine whether or not an accused is able to afford a lawyer (*Msila v Government of the RSA* 1996 3 BCLR 362 (E)). When a court grants legal aid, the legal aid officer must issue a legal aid instruction.

56 1999 2 SACR 541 (SCA).

57 Including the right to apply to the LAB for assistance and to be afforded an opportunity to seek such representation.

58 The LAB is now known as "Legal Aid South Africa". Throughout this article reference is made to the "Legal Aid Board" or "LAB".

59 *Hlantlalala* para 6.

60 Para 8.

61 2008 1 SACR 96 (C).

62 See s 35(3)(f) and (g) of the Constitution respectively.

form is based on common law. The court stated that after the commencement of the Constitution, no mechanisms were put in place to enable accused persons to invoke and assert their right to legal representation at state expense. Instead, the LAB was used as a vehicle for providing legal representation at state expense. This situation created a particular problem, since two distinct tests apply in determining whether a person is entitled to legal representation under the common law or at state expense. Under the common law there is a means test, and one must be indigent and comply with certain assessment criteria. There is, however, only one test for an accused person to qualify for legal representation at state expense: every accused person coming before a South African court is entitled to such legal representation if substantial injustice would otherwise occur. Legal representation under the Constitution is therefore unrelated to a person's poverty. Consequently it is completely wrong to apply the means test in such instances.⁶³ Since many accused persons misunderstand the system of free legal representation, judicial officers (especially magistrates) should investigate the reasons why an accused has declined legal representation in cases where the charges are serious. Failing to investigate the reasons for declining free legal representation might defeat the objects of the right to a fair trial.⁶⁴

In the case of *Mafongosi v Regional Magistrate, Mdantsane*,⁶⁵ the applicant's attorney who had been appointed by the LAB withdrew as the attorney of record. The magistrate decided not to allow the applicant (accused) an opportunity to engage the services of another legal representative and by doing so denied the applicant her constitutional right to be equally represented and to have a fair trial.⁶⁶ Similarly, in *S v Nkadimeng*⁶⁷ it was held that a judicial officer had a duty to ensure that an unrepresented accused was aware of the gravity of being found guilty on a charge which carried a minimum sentence. Such information would, *inter alia*, place the accused in a position to decide whether or not to obtain legal representation.⁶⁸ In *S v Tandwa*⁶⁹ an appellant (the accused in a criminal matter) appealed against his conviction of robbery on the merits and also on the basis that his right to a fair trial had been violated in that his counsel had been incompetent and had given him bad advice. The Supreme Court of Appeal held, *inter alia*, that the right to legal representation included representation that was competent and of a quality and nature that would ensure that the trial was fair. On proper consideration of the entire structure of s 35 of the Constitution, an

63 *Cornelius* paras 8–11.

64 Para 14.

65 2008 1 SACR 366 (Ck).

66 *Mafongosi* paras 18–19 and 30. See also *S v Nkosi* 2010 1 SACR 60 (GNP) where it was held that if a legal representative withdrew on ethical grounds, an accused would be entitled to another legal representative. Withholding such entitlement would lead to the unfairness of the trial.

67 2008 1 SACR 538 (T).

68 See paras 6–11. See also *S v Mbhense* 2009 1 SACR 640 (N) where it was held that a court must be satisfied that an appellant's right to legal representation has been properly explained to him. If the charges are serious and the consequences severe, an appellant (accused) should not only be apprised of his right to legal representation, but should also be encouraged to exercise such right. See also *S v Mabuza* 2009 2 SACR 435 (SCA) where it was stated that the trial of an unrepresented accused might be unfair if he or she was not properly informed of his or her rights. However, it does not follow that the failure to record the fact that an accused was informed about his or her rights, similarly renders the trial unfair.

69 2008 1 SACR 613 (SCA).

accused person has the right to represent himself or herself and where he or she is represented by a legal representative and is provided with inept advice which unfairly thwarts his or her rights, the accused's right to a fair trial is infringed.⁷⁰

3 3 2 Other important statutory provisions relating to legal aid and legal representation

Notwithstanding the interpretation and application difficulties inherent in s 35 of the Constitution, it is submitted that the Constitution has significantly elevated the right to legal aid and legal representation. Since 1994 legal aid and representation for indigent people at state expense have been constitutionally entrenched and protected. The right to legal aid and representation is enhanced further by its recognition in international law which the courts are obliged to consider when the Bill of Rights is interpreted.⁷¹

3 3 2 1 The Legal Aid Act⁷²

The Legal Aid Act (hereafter "LAA") came into operation on 26 March 1969 with the main aim to provide legal aid (and thereby also legal representation) for indigent persons, and for that purpose to establish a Legal Aid Board and to define its powers and functions.⁷³ Under s 2 of the LAA the LAB is established as a corporate body with the objects of rendering or making available legal aid to indigent persons and providing legal representation at state expense as contemplated in the Constitution.⁷⁴ Subject to the provisions of the LAA and in order to attain its

70 See paras 7–8. See also *S v Mafu* 2008 2 SACR 653 (W) where it was stated that the idea of being represented by a legal adviser does not merely mean having somebody standing next to an accused to speak on his or her behalf. Legal representation must be effective. This means that the legal adviser should act in the client's best interests and should put the client's best possible case before the court. Furthermore, it is implicit in the rights entrenched in s 35(3)(f) of the Constitution, that legal assistance to an accused must be real, proper and designed to protect the interests of the accused. Incompetency by a legal representative or adviser could constitute such a gross irregularity, and subsequent failure of justice, that an accused was not afforded a fair trial as required in s 35(3) of the Constitution. In *Moetjie v The State* 2009 1 SACR 95 (T) it was held that an accused who has limited education and insight into the proceedings should have been advised of his right to obtain legal representation. Since the magistrate had not explained the accused's rights to him, the proceedings had not been fair and the order was set aside.

71 *S v Harris* 1997 1 SACR 618 (C); *Bekker* 2004 *CILSA* 179. Since the main foundations of the right to legal aid and legal representation are set out in the Bill of Rights (ss 9, 28, 34 and 35 as discussed above) all courts, tribunals or forums must consider international law when the right to legal aid and representation is interpreted. See also s 39(1)(b) of the Constitution. Note also that legal aid or representation means competent aid or representation. Whether aid or representation is competent or complies with a minimum standard is a factual question (*S v Halgryn* 2002 2 SACR 211 (SCA)).

72 Act 22 of 1969.

73 See the long title of the LAA.

74 The LAB is an independent, impartial body aimed at enhancing justice, creating public confidence and ensuring access to the judicial system (<http://www.legal-aid.co.za/index.php/Legal-Aid-Board-Guide.html>. (accessed 05-01-2010)). The LAB has in recent times identified the following priorities:

- children in civil matters;
- detained/sentenced persons;
- landless people; and
- vulnerable groups such as women, refugees and the impoverished.

objects, the LAB must in consultation with the Minister of Justice include the particulars of the legal aid scheme in a guide called the Legal Aid Guide (hereafter “LAG”). The provisions of the LAG must be applied by the LAB when application is made for legal aid under the Constitution or otherwise, unless legal aid is directed by a court in criminal matters.⁷⁵ Section 3B of the LAA states that before a court in criminal proceedings directs that a person be provided with legal representation at state expense, the court must take the following factors into account: (a) the personal circumstances of the person; (b) the nature and gravity of the charge or conviction; (c) whether any other legal representation at state expense is available or has been provided; and (d) any other factor which in the opinion of the court should be taken into account.⁷⁶

As contemplated by the LAA, a LAG has been drawn up to determine how and when legal aid is to be provided.⁷⁷ The LAG confirms the establishment of the LAB with the objects of rendering legal aid to indigent persons as widely as possible within its financial means and providing legal representation at state expense as contemplated in the Constitution.⁷⁸ Owing to budgetary and resource constraints, legal aid can only be provided in terms of the LAA to truly indigent persons. According to the LAA a means test as set out in the LAG is applied to determine whether a person is indigent.⁷⁹ This position applies to criminal and civil matters, and if funds are available. Civil cases are further subject to a determination of whether there is a reasonable prospect of success in the particular matter.⁸⁰ In applying the means test in civil matters, the joint income and assets of the applicant and his or her spouse are taken into account and thus a “calculated income” is determined. The means test relates to the total financial situation of the parties. Only genuinely indigent people should benefit from legal aid. If the applicant has assets, such assets must be considered in calculating his or her financial means. The means test mentioned above applies *inter alia* to the following:⁸¹

- the joint income of spouses, except in divorce matters where only the income of the applicant is considered.
- the joint income of spouses if an application is made for legal aid for their dependent minor child.
- the income of a minor alone if he or she is self-supporting.

Chapter 4 of the LAG makes provision for legal aid in terms of s 35 of the Constitution. Constitutionally, the LAB is empowered to provide legal representation at state expense where substantial injustice would otherwise result.⁸²

75 See ss 3A and 3B of the LAA.

76 Section 3B(1)(a)(i)–(iv) of the LAA.

77 For purposes of this article the 11th edition of the LAG (2009) has been consulted.

78 See para 1.1 of ch 1 of the LAG. Although the LAA does not define an indigent person, the LAG defines an indigent person as a natural person who qualifies for legal aid in terms of the means test set out in the LAG, a natural person who is unable to afford the cost of his or her own legal representation in circumstances where substantial injustice would otherwise result or a person other than a natural person where it is decided to be in the interests of the administration of justice that such legal subject be granted legal aid.

79 See ch 5 of the LAG for a more detailed description of the means test.

80 See para 4.1 of ch 2 the LAG.

81 See ch 5 of the LAG.

82 Item 4.1 of ch 4 of the LAG read in conjunction with s 35 of the Constitution.

The LAB is consequently regularly required to determine whether substantial injustice would otherwise result. Such injustice would result if an accused was not provided with legal representation at state expense in the following circumstances:

- he or she cannot afford legal representation; and
- would be imprisoned or might be sentenced to direct imprisonment of more than three months without legal presentation
- or, if given the option of a fine, the fine is or would remain unpaid for two weeks after the date of sentence.⁸³

For purposes of legal aid to a child under s 28(1)(h) of the Constitution, the means test is similar except that:

- where the child is not assisted by his or her parents or guardians the child's means are considered;
- where the child is assisted by his or her parents or guardians their means are considered;
- if the child is assisted by his or her parents or guardians who do not qualify in terms of the means test and can afford to provide legal presentation for the child but refuse and/or neglect to do so, legal aid is provided to the child if substantial injustice would otherwise result.

In the third scenario the LAB may institute proceedings against the parents or guardians to recover such costs.⁸⁴ The LAG also sets out guidelines for legal representation in terms of the Children's Act and lists numerous types of matters in the Act where legal representation can be ordered, such as parental responsibilities and rights agreements, assignment of guardianship, adoption orders and child abduction provisions in terms of the Hague Convention.⁸⁵

3 3 2 2 The Criminal Procedure Act⁸⁶

A second important piece of legislation which impacts on the right to legal aid and representation is the Criminal Procedure Act (hereafter "CPA"). The Act came into operation in July 1977. Its main aim is to make provision for procedures and related matters in criminal proceedings. According to s 73 of the CPA, an accused who is arrested is entitled to the assistance of his or her legal adviser from the time of arrest. Every accused person must further be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice, and his or her right to apply for legal aid if he or she cannot afford legal representation. The accused must further be informed of the institutions which he or she may approach for legal assistance. Every accused person

⁸³ See ch 4 of the LAG. In the definition section of the LAG, the term "substantial injustice" is also defined to refer to cases where an accused is unable to afford the cost of his or her own legal representation and is likely if convicted to be sentenced, with or without the option of a fine, for a period of imprisonment of three months or more. Substantial injustice could also occur where a sentenced or detained person is without legal representation or consultation because of a lack of resources. The position would be similar in relation to a child who is unable to afford the cost of his or her own legal representation in civil proceedings affecting him or her.

⁸⁴ See para 4.18.3 of ch 4 of LAG.

⁸⁵ See paras 4.18.5–4.18.6 of ch 4 of the LAG.

⁸⁶ Act 51 of 1977.

must be given a reasonable opportunity to obtain legal assistance. If an accused refuses or fails to appoint a legal adviser, the trial may proceed without legal representation, unless the court is of the opinion that substantial injustice would result, in which event the court may, subject to the LAA, order that a legal adviser be assigned to the accused at state expense.⁸⁷

3 3 2 3 The Divorce Act

Section 6 of the Divorce Act specifically regulates the position of children in divorce proceedings. In terms of s 6, a court may not grant a decree of divorce unless it is satisfied that the arrangements that have been made for the welfare of the child or children are satisfactory or the best that can be effected in the circumstances. It also affords the court the right to appoint legal representation for the child or children in that s 6(4) provides that:

“For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.”

This power is, however, rarely exercised by the courts, presumably because of the expense that would result to one or both of the parties. Section 6(4) is therefore apparently only available to the children of wealthy parents. Furthermore, this section affords the court with a discretion to appoint a legal practitioner and does not provide the child with a right thereto.⁸⁸ In comparison, the Constitution confers a right to legal representation at state expense on children.⁸⁹ Legal representation of children should not depend on their parents’ ability to afford it but rather on whether the court considers legal representation in the best interests of the child and necessary to avoid substantial injustice.

3 3 2 4 The Children’s Act

With the enactment and commencement of the Children’s Act (hereafter “CA”), the right of children to insist on their constitutional right to legal representation has been significantly boosted. Apart from the provisions set out in the Constitution, Divorce Act, LAA and Child Justice Act, the CA provides that every child who is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and that views expressed by the child must be given due consideration.⁹⁰ The CA also regulates access to courts in that every child has the right to bring and to be assisted to bring a matter to court, provided that the matter falls within the jurisdiction of that court.⁹¹ Furthermore, a person who is a party

87 See s 73(2A)–(2C) of the CPA. The court may order that the costs of such representation be recovered from the accused. It is also specifically provided that an accused shall not be compelled to appoint a legal adviser if he or she prefers to conduct his or her own defence.

88 Davel in Nagel (ed) *Gedenkbundel vir JMT Labuschagne* 26-27. See also Kassan “The voice of the child in family proceedings” 2003 *De Jure* 169–171, 177 for a discussion and criticism of s 6(4).

89 See s 28(1)(h) of the Constitution.

90 See s 10 of the CA. However, this right is limited in that the child must be of an age and maturity to be able to form and express his or her views whereas s 28(1)(h) affords the right to every child irrespective of age and maturity.

91 See s 14 of the CA. See also s 15 of the CA on the enforcement of the rights in the Bill of Rights or the CA. The phrase “to bring and be assisted” in s 14 leaves it uncertain whether such assistance should be by the state and at state expense.

in a matter before a children's court is entitled to appoint a legal practitioner of his or her choice at own expense. The court may also (subject to s 55) appoint a legal practitioner to represent a child and order that the parties to the matter be held responsible for payment of the legal costs involved in such representation.⁹² Where an unrepresented child is involved in a matter before a children's court and the court is of the opinion that it would be in the child's best interests to have a legal representative, the court must refer the matter to the LAB,⁹³ which must deal with the matter according to its procedures and determine if legal aid and representation should be provided.⁹⁴

3 3 2 5 The Child Justice Act

The Child Justice Act (hereafter "CJA"), which creates a separate criminal justice system for children, came into operation on 1 April 2010. Sections 80–83 of the Act in particular regulate a child's right to legal representation.⁹⁵ Section 80 sets out the requirements with which legal representatives must comply. It furthermore ensures that efficient legal representation is provided by allowing for remedial actions and sanctions if the required representation is lacking.⁹⁶ In addition, s 81 allows for children to be represented at a preliminary enquiry whilst ensuring that they are afforded legal representation at state expense when appearing before a child justice court. This rule is subject to the children meeting certain criteria. Lastly, s 83 ensures that children who choose to waive their right to legal representation are still protected in that a legal representative must still be appointed by the LAB to assist the court in the prescribed manner. Such representation serves the purpose of safeguarding the child's interests, albeit not at the instructions of the child. The Act therefore, *inter alia*, aims to give effect to s 35 of the Constitution by providing children who come into conflict with the law with proper representation.

4 THE RIGHT TO LEGAL AID AND LEGAL REPRESENTATION UNDER INTERNATIONAL LAW

According to Dugard the rules of international law are found in agreements between states, better known as treaties, and also in international custom.⁹⁷ In view of the fact that very few international customary rules exist regarding the right to legal aid and legal representation, the main thrust of international legal

92 Section 29. This section echoes s 6(4) of the Divorce Act.

93 Section 55 specifically states that the court must refer the matter to the LAB as the responsible forum which must provide a child with legal representation in terms of the LAA if such representation is lacking. See also *Soller v G* and *Legal Aid Board v R*.

94 See ss 54 and 55 of the CA. See also s 279 of the CA which states that a legal representative must represent a child, subject to s 55, in all applications in terms of the Hague Convention on International Child Abduction. It should be noted that although ss 54 and 55 address the legal presentation of children quite thoroughly, these sections are, regrettably, only applicable to matters before a children's court. It is also problematic that s 55 confers the discretion to appoint a legal representative on the presiding officer. The Act gives no guidelines as to how such discretion should be exercised, which may lead to disparities in the exercise of the discretion amongst presiding officers.

95 Section 73 of the CPA has been amended by the substitution of subsec (3) of Schedule 4 of the CJA and will no longer be applicable to children under the CJA.

96 See s 80(1) and (2).

97 Dugard *International Law: A South African Perspective* 2 ed (2000) 3.

rules on such issues are incorporated into international conventions (treaties). A brief summary of the relevant provisions of such international instruments is therefore required:

4 1 The Universal Declaration of Human Rights (hereafter “UDHR”)⁹⁸

Under the provisions of the UDHR various basic human rights are recognised, such as the rights to dignity, equality, equal protection of the law, an effective remedy by a competent tribunal, a fair trial, and the recognition that the family is the natural and fundamental group unit of society.⁹⁹ It should be pointed out that the UDHR does not provide for a direct right to legal aid and representation. It refers only to certain rights that are indirectly linked to the right to legal aid or representation.¹⁰⁰

4 2 The Covenant on Civil and Political Rights (hereafter “CCPR”)¹⁰¹

Although the CCPR also recognises basic human rights such as the rights to equality, dignity, equal protection of the law and the rights of children and the family unit,¹⁰² the right to a fair trial contained in art 14 of the CCPR states the following:

“1. All persons shall be equal before the courts and tribunals.

...

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . .

(d) [t]o be tried in his presence, and to defend himself in person or through legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”¹⁰³

Article 14 of the CCPR thus contains a direct commitment to the right to legal assistance or legal representation in criminal matters as well as a commitment to provide this right without payment if a person does not have sufficient means to pay for legal assistance. Upon evaluation, art 14 is very similar to s 35 of the South African Constitution. A notable difference, however, is that s 35 allows for legal representation at state expense only if “substantial injustice would otherwise result”. In contrast, art 14 states that the right should be afforded free of charge if the person does not have sufficient means to pay. In view of this distinction, it is submitted that art 14 of the CCPR allows for a more relaxed approach to the right to legal assistance or representation and does not require a complex subjective evaluation to determine whether the refusal of legal representation at state expense would result in substantial injustice.¹⁰⁴

98 1948. Although the UDHR is not a treaty but a recommendatory resolution, it is argued that in modern times the Declaration forms part of customary international law (Dugard *International Law* 240–241).

99 See the preamble and arts 1–25 of the UDHR. See also Mtshaulana *et al* (eds) *Documents on International Law* (1996) 172–176.

100 The rights to equality, human dignity and a fair trial (arts 1, 7 and 10 respectively).

101 1967.

102 See arts 3, 10, 23, 24 and 26 of the CCPR respectively.

103 See Mtshaulana *et al Documents on International Law* 180–181.

104 An interesting question on this point is whether international law or South African constitutional law will prevail in local cases relating to the right to legal representation. In

continued on next page

4.3 The UNCRC¹⁰⁵

The UNCRC specifically protects children¹⁰⁶ and recognises various basic human rights such as the right to life, the right to a child's name and nationality, the right to freedom of expression, and the right to freedom of thought, conscience and religion.¹⁰⁷ The Convention further stipulates that the best interests of the child shall be a primary consideration in all actions concerning children.¹⁰⁸ Apart from these rights, art 12 of the UNCRC also recognises a child's right to express his or her opinion freely and to participate in all matters affecting him or her. It also places an obligation on states parties to ensure that this right is fulfilled.¹⁰⁹ The importance of art 12 has been highlighted by commentators who state that this article recognises the autonomy of children, their need for separate representation and the fact that children's interests do not always correlate with those of their parents.¹¹⁰ In terms of the Convention, children have the right to express their views freely, either directly or through representation.¹¹¹ The procedural rules of states parties should therefore make provision for a child to be allowed to be heard directly without an intermediary (*viz.* to express his or her opinion and to become a party to legal actions or proceedings). These rules should also allow children to instruct attorneys, to seek legal advice or to be represented through an appropriate body such as the Office of the Family Advocate or the LAB.¹¹² Article 12(1) of the UNCRC has been incorporated into

view of the fact that s 2 of the South African Constitution proclaims its supremacy in the Republic and states that any law (including international law) or conduct inconsistent with the Constitution is invalid, it would seem that the Constitution would prevail. Note s 233 of the Constitution. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any interpretation that is inconsistent with international law.

105 1989. Ratification by South Africa took place on 16 June 1995. For more detail on the status of international children's rights instruments in South Africa see Olivier "The Status of International Children's Rights Instruments in South Africa" in Davel (ed) *Introduction to Child Law in South Africa* (2000) ch 10.

106 A child means every human being below the age of 18 years (art 1 of the UNCRC).

107 Articles 6, 7, 13 and 14 of the UNCRC.

108 Article 3 of the UNCRC.

109 Article 12(1): "State parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." See also Committee on the Rights of the Child General Comment no 12 (2009) "The Right of the Child to be Heard" CRC/C/GC/12 01-07-2009.

110 See, for example, De Villiers "The rights of children in international law: guidelines for South Africa" 1993 *Stell LR* 289 298 and Sloth-Nielson "Ratification of the United Nations Convention on the Rights of the Child: some implications for South African law" 1995 *SAJHR* 401 403-406, 410-411. See also *J v J; De Groot v De Groot*.

111 Article 12(2): "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

112 See Davel "General Principles" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 2-12-2-14 for a more detailed discussion on art 12. Note also art 4(2) of the African Charter on the Rights of the Welfare of the Child (hereafter "ACRWC") that resembles art 12 of the UNCRC and also entrenches the right of the child to be heard. The purview of this article does not permit a more detailed discussion of the ACRWC. See Davel in Davel and Skelton (eds) *Commentary on the*

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South African domestic law by way of s 10 of the CA, thereby complying with South Africa's obligations under the UNCRC.

Upon an evaluation of international law, it would seem as if art 14 of the CCPR and art 12 of the UNCRC are the only direct commitments to the right to legal aid and legal representation. Other international instruments and also regional instruments, with the exception of art 4(2) of the ACRWC, only provide for rights that are indirectly linked to or supportive of a general right to legal aid and representation.¹¹³

5 EVALUATING SOME OF THE BENEFITS OF INDIVIDUAL PERSONS AND PRIVATE INSTITUTIONS SUCH AS FAMILY UNITS HAVING A RIGHT TO LEGAL AID AND LEGAL REPRESENTATION

In consideration of the fact that the right to legal aid and legal representation is entrenched in both international law and many domestic legal systems, it is interesting to investigate some of the general benefits of this right. Such benefits should be evaluated not only from an historical perspective but also in the context of the many demands of modern-day societies and legal orders. One must also recognise that the benefits of legal aid and legal representation are not focused only on the individual *per se*, but that legal aid and legal representation also have important advantages for smaller groups such as a family unit or collective interest group. It is of particular importance for this article to look at some of the advantages of the right to legal aid and representation within the context of the indigent family. The following advantages are particularly important:

- legal aid and representation provide indigent people with the means to enforce and protect their legal rights so that they are on an equal footing, at least in basic terms, with the more wealthy members of society;
- by providing basic legal aid and representation, meritorious members of society or groups in society are afforded the opportunity to enhance their lives by enforcing their legal entitlements;
- children are afforded the right to participate in matters affecting them by means of their own representatives;
- recognition is given to the fact that children's interests do not always correlate with those of their parents;
- legal aid and assistance ensure that the overall legal system is regarded as just and equitable and that basic fundamental rights such as equality, human dignity and freedom are respected, protected and fulfilled;
- legal aid and representation ensure that each person who is accused in a criminal matter is provided with the basic means to ensure a fair trial;

Children's Act 2-14 and Davel in Nagel (ed) *Gedenkbundel vir JMT Labuschagne* 19–21 for more on art 4(2) of ACRWC.

113 See arts 10–13 of the International Covenant on Economic, Social and Cultural Rights; arts 3 and 37 of the UNCRC and regional instruments such as the African Charter on Human and People's Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights. All these instruments protect the rights to equality, human dignity, a fair trial and access to justice (courts).

- legal aid and representation ensure that even the most vulnerable members of society are respected as equals before the law and that they are afforded with equal protection and benefit under the law, irrespective of their means;
- legal aid and representation establish a society based on democratic values, social justice and fundamental rights and freedoms;
- foundations are laid for a democratic and open society where the government is based on the will of the people and all citizens are equally protected by law;
- effect is given to the international obligations imposed on the state in the relevant conventions pertaining to the right to legal representation and/or assistance;
- the quality of life of all citizens is improved and the potential of each person is freed.

6 CONCLUDING REMARKS

In conclusion, it is submitted that the right to legal aid and legal representation is an essential (fundamental) right in any legal system that prides itself on being equitable, fair and democratic. There should be no doubt that the provision of legal aid and representation is to be regarded as a necessity rather than a luxury. If an accused in a criminal matter or a vulnerable member of society in a civil matter is unable to enforce and protect his or her legal rights because he or she lacks financial means, the right to legal aid and representation becomes even more significant.¹¹⁴ Over the years many commentators have argued that all democratic states should regard legal aid and legal representation as an essential service, indispensable to the achievement of the overall democratic ideal. The aim of a democratic government is to ensure access to courts for all its inhabitants, including the most vulnerable members of society, such as women, children and the indigent.¹¹⁵

Many modern so-called “liberal democracies” acknowledge that it is necessary to provide a certain level of legal aid and legal representation. Whenever such aid is not provided, people are deprived of justice, equality before the law and due process under the rule of law. In South Africa, the right to legal aid and representation is now constitutionally recognised and the state is obliged to protect, fulfil and enhance this right.¹¹⁶ Although legal aid is mostly provided in criminal matters, there seems to be a strong drive to extend such aid to deserving civil cases. Some sources report that approximately 80% of the annual legal aid budget is spent on criminal matters in South Africa.¹¹⁷ Traditionally, legal aid and legal representation were regarded as first generation rights which bestowed no positive entitlements. Nowadays these rights are seen as second generation rights which must be provided by the state depending on its available resources.¹¹⁸ The interpretation and categorisation of the right to legal aid and legal representation is, however, misleading and superfluous. First, the state is

114 See *S v Tyebele* 1989 2 SA 22 (A).

115 See Hoexter *Commission of Inquiry into the Structure and Functioning of the Courts* (1983) part II para 6.4.1. See also Cowling 1994 *THRHR* 181 and Bekker 2004 *CILSA* 194.

116 See ss 7, 28, 34 and 35 of the Constitution.

117 McQuoid-Mason in Joubert (ed) *LAWSA* 233–234.

118 Olivier *et al Social Security* 214.

constitutionally required to respect, promote, protect and fulfil all the rights set out in the Bill of Rights.¹¹⁹ This constitutional imperative obviously has direct financial consequences for the state and imposes both positive and negative obligations on the state, irrespective of the classification of the right as a civil and political right or a socio-economic right. Secondly, there appears to be support for the view that socio-economic rights are rights concerned with the “material dimensions of human welfare”. Socio-economic rights are thus regarded as fundamental rights and include the right to food, water, shelter, health care, education and social security, without which human beings will not be able to survive, live with dignity or develop their full potential.¹²⁰ In view of this definition, the constitutional right to legal aid and legal representation would probably be regarded as a first generation or civil and political right which is not directly required to sustain human welfare and human existence.¹²¹

Notwithstanding the importance of the right to legal aid and representation, its realisation is not without problems and challenges. The provision of legal aid and representation has long been regarded as an evolutionary process. Each legal system has to determine the best model for providing legal aid and representation according to its own circumstances and developmental status. The extent or monetary value of legal aid which each state should provide annually, the categories of beneficiaries of such aid and whether aid should be substantially broadened in relation to civil matters are difficult questions which can only be addressed locally and with due regard to financial and economic circumstances. It is submitted that a uniform model is not possible. Each state should progressively and continuously investigate ways to enhance its legal aid provisions. What is obvious is that states should allocate sufficient funds to provide effective legal aid and legal representation. States should also explore other mechanisms to enhance provision of legal aid and representation. Such mechanisms could include the creation of a public defender system or legal aid bureaux.¹²²

119 Section 7 of the Constitution.

120 Liebenberg “The Interpretation of Socio-Economic Rights” in Woolman *et al* (eds) *Constitutional Law of South Africa* (2009) 33-1 and 33-6.

121 Also see Brand “Introduction to the Socio-Economic Rights in the South African Constitution” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 3ff.

122 In South Africa a legal aid bureau was already established in Johannesburg in 1937. Other institutions or mechanisms that have been established are the Legal Resources Centre and university legal aid clinics. Legal aid can also be provided through non-governmental organisations, by the legal profession on the basis of contingency fee agreements, or on the basis of *pro amico*, *pro Deo* or *in forma pauperis* procedures. *Pro amico* legal aid is provided by the legal profession in certain deserving cases. *Pro Deo* aid in turn refers to statutory permission in civil matters for an indigent person to sue or defend his or her case as a *pro Deo* litigant. See eg. rule 53 under the Magistrate Courts Act 32 of 1944. Both *pro Deo* and *pro amico* aid have diminished because of the general right of a person to legal aid (McQuoid-Mason in Joubert (ed) *LAWSA* 218–219). *In forma pauperis* is also possible under the Supreme Court Act 59 of 1959 s 43 and rule 40. Other examples of delivery models for legal aid are: (a) the staff-attorney model in terms of which lawyers are employed on salary solely to provide legal aid; (b) the judicare model where private lawyers are paid to handle cases for indigent people alongside cases from fee-paying clients; and (c) community legal clinic models where non-profit organisations serve the community in respect of many legal aspects. In South Africa the various legal aid clinics specifically fulfil this role. Such clinics are non-profit institutions which provide free legal services to indigent people on a wide range of matters whilst simultaneously training law students in the practical application of the law.

Apart from the overall responsibility on the state to provide and enhance the right to legal aid and legal representation at state expense, the courts are often also called upon to ensure that the right is effectively provided. In many developing countries, such as South Africa, legal aid and representation are denied to the indigent and vulnerable groups in society. Furthermore, because of a lack of funds and proactive steps by government, the majority of the population, which includes the working poor and middle-class citizens, is excluded from obtaining legal aid. This is the reality even though the right to legal aid and representation is entrenched in the law and its importance is recognised in most civilised societies.¹²³ Where the state fails to act appropriately, the courts are the last port of call to ensure that legal aid and representation are provided. Perhaps it is befitting to end with a quote from *Zgili v McCleod*¹²⁴ where Lord De Villiers stated: "It is the primary aim of the courts to protect the rights of individuals which may be infringed and it makes no difference whether the individual occupies a palace or a hut." Wealthy people will always be in a superior position to hire the best legal assistance that money can buy, but if the indigent and most vulnerable members of society are denied legal aid and legal representation, the legal system itself is placed at risk and fundamental principles such as justice, fairness and equality before and under the law become but a dream for millions of people.¹²⁵

123 See *S v Seberi* 1964 1 SA 29 (A) and *S v Heyman* 1966 4 SA 598 (A).

124 (1904) 21 SC 150 152.

125 See also *Hurley v Minister of Law and Order* 1985 4 SA 709 (D) where the court stated that it is an important duty of the court to administer justice to those who seek it, whether they are rich or poor.