

THE MODERN VIEW OF LEGAL AID

By F. N. KENTRIDGE

HOW far is it the duty of society to provide legal aid for criminals charged in its courts?

America has recently decided the question by stating that all persons accused of serious crimes should be defended. The problem is of concern in South Africa because of the scale on which, at the present time, people are being tried on political charges. Even without this immediate relevance, however, the need for defence in criminal courts is one which should be recognised by a community.

In "Gideon's Trumpet", Anthony Lewis, a Pulitzer Prize winner and "New York Times" reporter, has dealt primarily with a particular case in which the American decision was made but, in doing so, he discusses American attitudes as a whole to the problem and the judicial process through which it was finally resolved.

In 1963, in the United States of America, a man named Gideon, aged 51, who had been convicted in a Florida State Court of housebreaking and been given a five-year jail sentence, successfully appealed to the Supreme Court to have his trial set aside on the grounds that he had not been given a trial according to "due process of law." The Supreme Court held that legal representation was an essential element in a fair trial: Gideon had not been able to afford legal representation and the State had refused to appoint counsel to assist him.

The decision of the Supreme Court was based upon the interpretation it placed on the Fourteenth Amendment to the United States Constitution. This amendment provides that —

"No State shall . . . deprive any person of life, liberty or property without due process of law."

The conclusion of the court, was, therefore, one based on the written Constitution of the United States.

In South Africa there are no written provisions of this nature, but American law and South African law are alike in that their criminal procedure involves the presence of a prosecutor who is a trained lawyer, who presents the case for the state, a judge who is a trained lawyer to decide upon the issues, and in certain circumstances, a defender who is a trained lawyer, to present the case for the accused. In both countries anyone

charged with any crime has always been entitled to pay a professional lawyer to defend him.

Pressure

In America over the past 20 years there has been increasing pressure from the legal profession as a whole (judges, academic lawyers, lawyers in private practice and those in Government service) to take this right to a defence to a further point where it is recognised as an essential element to a fair trial, and therefore an element which cannot be dependent upon the means of an accused person.

It is felt that in every criminal trial of a serious nature there is as great a need for the defence to be conducted professionally as for the prosecution to be in the hands of a professional.

From this it becomes apparent that where the accused, through poverty, is unable to provide himself with skilled assistance, it is the duty of the state to provide such assistance for him.

This principle was finally accepted in Gideon's case. Gideon had been convicted of breaking and entering a billiards room. He was given the maximum sentence permissible because of his history of previous convictions.

Ran away

In a biographical piece which he was asked to prepare by the lawyer who eventually appeared for him, Mr. Abe Fortas (now himself a judge of

the United States Supreme Court) Gideon set out his previous history. "You will understand that owing to my limited education, and also to the utter folly and hopelessness of parts of my life, it will be doubtful if I can put it down on paper with any reasonable comprehension. I will not be proud of my biography; it will be no cause of pride."

Indeed it is a record of misery and crime. At the age of 14, Gideon ran away from home; by the time he was 16, he had served a year in a reformatory for stealing clothing from a store. Thereafter he was in and out of jail throughout his life, on charges of burglary, larceny and gambling. He developed TB. His children were for the great part dependent on welfare organisations.

In his original application to the Supreme Court for his appeal to be heard (an application which, of course, was drafted by Gideon himself) he wrote:

"When at the time of the petitioner's trial he asked the lower court for the aid of counsel, the court refused this aid. The petitioner told the court that this Court made decisions to the effect that all citizens tried for a felony crime should have the aid of counsel. The lower court ignored this plea."

Gideon was wrong in saying that the Supreme Court had, in the past, made a decision that all citizens tried for a felony should have the aid of counsel. But he had raised the issue which the Supreme Court not only was prepared to hear but was anxious to have decided. Should it make a decision to the effect that all citizens tried for a felony crime have the aid of counsel?

'Due process'

In the past the Supreme Court had decided each case where an appeal was based on the denial of "due process" on the special circumstances of the trial. It had paid regard to factors such as the colour, mental capabilities, age and education of the accused. Gideon made no special plea that his ignorance or his lack of education had precluded him from being able to defend himself properly. He raised the absolute issue of the right to counsel irrespective of the qualities and capabilities of the accused. He was a man who could be assumed to have knowledge of court procedure: he had in fact cross-examined the state witnesses at the trial and argued on his own behalf. Therefore, a finding that he had not had a fair trial through lack of legal assistance would amount to a finding that no trial could be said to have been conducted with due process of law in the absence of defending counsel.

Delivering the judgment of the court, Mr. Justice Black said:—

"Not only these precedents but also 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. This seems to us to be an obvious truth. Government, both State and Federal, quite properly spend vast sums of money to try defendants accused of crime. 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 get to prepare and present their defences. That the Government hires lawyers to prosecute, and defendants, who have the money, hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

The Supreme Court, when it appointed Mr. Fortas to argue Gideon's appeal, specifically directed him that it wished to hear argument on the proper interpretation of the due process amendment. In addition to the argument prepared by Mr. Fortas, and quite independent of him, 23 attorneys-general from other states within the United States filed a brief *amicus curiae* in support of the proposition that due process necessarily involved legal assistance for the accused.

Majority

The decision of the Supreme Court was a legal interpretation of a written constitution, but it was also an expression of the view of the great majority of American lawyers as to what constitutes a fair trial.

Apart from the services of legal aid bureaux which exist in some towns, which by their nature are not equipped to handle long, intricate or controversial cases, there is in South Africa a system of legal aid dependent upon state money, whereby persons charged with capital crimes are assisted by counsel who appear for them *pro deo*. This system does not extend to the defence of persons charged with serious offences which do not carry or are not expected to carry the death sentence even though there is a real prospect of conviction, carrying with it life imprisonment, or a very long term of imprisonment, a person can be defended only if he pays for the defence himself or some other wellwisher pays for it. It is difficult to see the logic on which to justify such

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discrimination. As Mr. Justice Clark said in Gideon's case:

"The Fourteenth Amendment requires due process of law for the deprivation of 'liberty' just as for deprivation of 'life', and there cannot constitutionally be a difference in quality of process based merely upon a supposed difference in the sanction involved."

There is no reason why South Africa should accept a lower standard than the United States in the conduct of its criminal courts. Recently the Minister of Justice has suggested that the various Bar Councils are the proper bodies through which moneys intended for legal aid should be administered. This suggestion is to be commended but the time has surely arrived when the necessary funds should be provided by the state and not through private charity. Only in this way is it possible to ensure that proper legal representation is available for every person charged with a serious criminal offence.

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AT A BLACK SASH PROTEST

(in Johannesburg opposite the University)

By ELAINE KATZ

No concrete corpse. Another freedom shuttered
And obscured in negative. The obituary
Banner swelled, taunting those doped
By gold's narcotic into apathy.
No students joined the mourners, even paused
Their sauntering steps; blinds were opening
In lecture halls. You motorists enlocked
In funeral queue, where were your wreaths of
smiling?

"You scum!" The lorry driver's hooter pealed
Such splendid anthem. Momentarily
The miasma of indifference lifted, focussed
The security camera lens with clarity
On thirty women sentinels black-sashed
Each shutter click to blot out liberty.