

LEGAL AID SERVICES IN MALAWI*

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The purpose of this paper is to acquaint the reader with the organization and operation of legal aid services in Malawi. The discussion of the programme will survey the history of the Legal Aid Programme, the constitutional frame-work and the practical running of the whole scheme, including the administration of the Legal Aid Department, staffing and recruiting of staff, the professional staff and the type of cases that the department deals with.

It has not been possible to inquire into every detail regarding the programme. This has been due to a number of factors, among which have been the availability of time, and in some cases the inaccessibility of desired information. The method used in researching has been by interviewing the personnel at the two stations from which the programme is operated and, where possible, a study of the records kept by the Legal Aid Department.

History of the Legal Aid Programme

Organized legal representation for the poor has been in operation in Malawi since the end of World War II. Very few of the African people knew of lawyers and their law at this time. For most of them the traditional modes of dispute settlement, tempered by western notions, were still actively practiced. The traditional courts, styled Native Courts, were by 1945 presided over by chiefs with appeals lying to the District Commissioner upwards to the High Court. The jurisdiction of these courts was, however, severely restricted.

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The earliest statute providing for an organized legal aid scheme was the Poor Prisoners' Defense Ordinance, 1945.¹ The aim and object of this Ordinance was to make provision for the defense of poor prisoners on trial before the High Court. This aid was to be furnished where it appeared desirable in the interests of justice that a prisoner should have free legal aid in the preparation and conduct of his defense at his trial before the High Court and where the prisoner's means were insufficient to enable him to obtain such aid. If the certifying authority, a judge of the High Court or the Registrar of the High Court, were satisfied by the two criteria, he would certify that the prisoner ought to have legal aid, and if it was possible to have the services of a pleader,² such pleaders would be made available to the prisoner.

The remuneration of the pleader so engaged was to be met out of the general revenue of the Protectorate and was not to be less than forty-two or more than one hundred twenty-six shillings in respect of each case or each prisoner. The judge could raise this amount where the case was of a complicated nature or likely to be of a long duration.³ In addition, where the pleader incurred special expenses he was allowed to submit a claim to the Register of the High Court who then decided whether or not to reimburse the pleader depending on whether such expenses were reasonably incurred. Any dispute arising out of this was to be referred to a Judge of the High Court whose decision was final.⁴

The operation of this Ordinance was limited to criminal trials before the High Court only. It did not extend to civil trials or to criminal trials before Magistrates' Courts. The revised Ordinance of 1957 extended the scope of legal aid to offences triable by Magistrates' Courts as well as to appeals before the Federal

¹No. 19 of 1945.

²id. S. 3.

³id. S. 4.

⁴id. S. 5.

Supreme Court.⁵ The revised law also provided that the government might pay to a legal practitioner any sum of money by way of retainer and other remuneration as it thought fit. Thus the legal aid scheme was officially organized and administered by the State. The scheme was, however, unsatisfactory in a number of respects. Firstly, there was no provision whereby a prisoner might, on his own motion, obtain the services of a legal practitioner at public expense. Even assuming, arguendo, that the prisoner could apply to the trial judge or Registrar for such aid, there was no appeal from the decision of the registrar or the trial judge. Secondly, it might have been wiser to make Resident Magistrates certifying authorities after legal aid had been extended to these courts. Thirdly, its limitation to criminal cases, while perhaps justified by the economic activity of the time, increasingly became out of date as more and more Africans began to engage in some small commercial activities. Lastly, the kinds of offenses in respect of which a certificate for legal aid might be given were not clear, but the principles on which it was given, namely, the interests of justice and the means of the prisoner, suggest that such aid was recommended only in serious criminal cases.

The Legal Aid Act - 1964 (Cap. 4:04)

The Poor Prisoners Defense Ordinance was in operation until 1964 when it was decided to replace it with a new comprehensive law. Under the old law, the successful administration and operation of the legal aid services required the co-operation of the Bar of Law Society to some extent, for although the Government made the choice of the legal practitioner to undertake this work, such practitioner had to be available. But with the small size of the bar this could easily be difficult, hence the power to retain legal practitioners for these services - a measure which provided some assurance that there would always be available a legal practitioner at any time within the agreed period of retainer.

⁵ Poor prisoners' Defense Ordinance, S. 3(a)(b) (1957 ed. of the Laws of Nyasaland). The Federal Supreme Court was the court established under S. 3 of the Federal Supreme Court Act, 1955 (No. 11 of 1955 of the Laws of the Federation of Rhodesia and Nyasaland). The Federation comprised Southern Rhodesia, Northern Rhodesia (now Zambia), and Nyasaland (now Malawi).

The decision to create a department for legal aid appears also to have been precipitated by a crisis of confidence between the legal profession and the public at large. It was decided to place responsibility for the administration of legal aid with the Government. The reasons for this were not clear but some of them may have been economic. The Department would be within the Ministry of Justice and responsible to the Minister. Secondly, the Bar (or Law Society) had not shown sufficient interest in the representation of the poorer section of the society. The profession had little communication with the population and had thus lost their confidence. The majority of the lawyers were expatriates and could not speak the language of the majority of the people; the result was distrust of the profession. The speech of His Excellency, the Life President, Dr. H. Kamuzu Banda (then Prime Minister) sums up the prevailing general opinion regarding the profession:

"Now we are in-charge in Zomba, I am not going to see or to have any of my boys made to plead guilty when they were not, in fact, guilty, by a lawyer who for his own reasons wants to get through with the case to draw his fees."⁹

The Minister undertook a trip overseas with a view to comparing the operation of legal services to the poor in a number of countries.¹⁰ All the counsel recruited to man the new Department were from outside Malawi¹¹ until at the end of 1965 when Malawi nationals completed their legal studies in Britain.

Organization of the Programme

The legal aid department is part of the Ministry of Justice. At the head of the constitutional structure is the Minister of

⁹ibid. 1164

¹⁰He went to U.K. and Jamaica. The first Chief Legal Aid Advocate to be recruited was a Jamaican.

¹¹The majority of them came from the West Indies and Nigeria, but there were also a few from U.S.A. from the ranks of Peace Volunteers.

Justice who is responsible for the overall working of the department as well as the whole Ministry of Justice. The Minister is a politician and is concerned mainly with the policy of the department. He is assisted by the Secretary for Justice, a civil servant who is charged with the execution of the whole policy direction.

From the time that it was formed the department of legal aid has received sums voted by Parliament for its running expenses. The sums of money voted do not include the salaries of Legal Aid Advocates or some of the clerical staff, but has included in some years salaries of stenographers and messengers. For the year 1964-1965 Parliament voted E2,120 which was spent thus:-

Transport and Travelling	E 330
Messengers' Uniform	10
Electricity and Water	50
Office Sundries	10
Postal Services	50
Counsels' Fees	1,000
Civil fees and costs	500
Salaries for Stenographer	100
Office Furniture	20
Library	50
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TOTAL	E2,120

The total sum voted was generally considered to be less than what the Government used to pay out to legal practitioners under a scheme of retainer. This seemed to be in line with the policy of the administration which wanted to effect some saving of Government expenditure by the establishment of the department. But as the Leader of the nominated members cautioned in Parliament during the debate of the bill¹² the figure has been rising steadily. In 1965-66 the vote rose to E4,350, but in 1967 it dropped to E1,005. This drop was because by this time, the strength of the department was increased in its professional staff, and some of the expenditure occasioned in the 1964-65 vote, notably counsels' fees, were either cut off or were directly controlled from the Headquarters of the Ministry of Justice. For example, counsel's fees alone accounted for E1,000 in 1964-65. In 1965-66 Counsel's fees and

¹²Legislative Assembly Proceedings, 76 (1963-1964), 1163.

Government costs accounted for two thousand five hundred pounds, but this dropped to seven hundred fifty pounds in the year 1966-67. This drop in counsel's fees continued in 1968 to five hundred pounds and the over-all expenditure for that year was one thousands two hundred and eighty pounds. The 1969-70 vote was one thousand seven hundred and thirty, which was still less than the 1964-65 vote though slightly higher than the preceding year. The 1970-71 vote was K5,270 (two thousand six hundred thirty five pounds)¹³ which indeed was the largest expenditure since the 1964 vote. It should be emphasized that all these annual votes represent money devoted to the running of the department, e.g. paying legal practitioners' fees where the Chief Legal Aid Advocate decides to brief one, or on paying costs where costs have been awarded against an aided person, and on general expenditure of the department. All the salaries of the professional and administrative staff are paid direct from the Ministry headquarters.

The votes which are received are accounted in the votes' ledger kept by the department. All this money is somewhat misleadingly referred to as "Revenue Account," given specifically to be spent on the running of the department and related Government business. At the end of each year the books are audited by men from the Auditor General's department who make their report to the responsible Minister and thence to Parliament.

The department also maintains another account called a "Deposit Account," which should in fact be called a clients' account. The account consists of all money received by the Chief Legal Aid Advocate on behalf of clients. The money is later paid out to the client after the matter is settled or otherwise successfully disposed of. The method of banking and payment is elaborate and involves a lot of paper work, all set out by Treasury Instructions and designed to counter any malpractice. All the money received on behalf of the client is banked with the Reserve Bank of Malawi which must issue deposit receipts, one of which is deposited with the Treasury Cashier who later sends it to the Accountant General. When the money is paid to the client, a voucher in his name is prepared by the Department and the client takes it to the Treasury Cashier who issues a cheque to the client. The cheque is then cashed at the Reserve Bank.

¹³The country changed to decimal currency in that year. The principal currency is called the KWACHA and K2 = one pound sterling.

Where the other party pays damages and costs on one cheque to the Chief Legal Aid Advocate without distinguishing damages from costs, the department issues one receipt to that other party, but this receipt makes clear the amounts due to the client and to the Chief Legal Aid Advocate as his costs. This distinction is also reflected in the Bank when the money is deposited. The deduction of the costs is then done by the preparation of what is called a "journal transfer voucher" authorizing the department to recover costs for aid rendered in the case. All costs recovered in this way are Government revenue and must be accounted to the Government as such. There are ledger books kept in the department where all the money received is recorded with particulars of the case files, the names and addresses of the parties of the action (including the aided man), the nature of the case and the amounts received.

The Legal Aid programme, although an integral part of the Ministry of Justice, is administered from two stations which are in Blantyre and Lilongwe. Blantyre, apart from being the largest and most industrious city in the country, is the location of the Supreme Court, the High Courts. The city is also centrally placed in the Southern Region where the crime rate is higher than in the other two regions. Lilongwe is in the centre of the country and is increasing in importance with the move of the State Capital from Zomba to that place. The town is in the heart of a farming area.

The Legal Aid offices in Blantyre are located in the centre of the city and are easily accessible. The department occupies a whole 3rd floor of Adams Court. The offices are well equipped and the library is adequately stocked with law reports, mostly English reports with a number of African reports. There are rather few law journals in the library and also a few treatises on various aspects of the law and a set of the Malawi Laws. The proximity of the legal aid offices to the High Court library tends to alleviate most of the difficulties that legal aid counsel might otherwise face. But the High Court library is itself out of date and inadequately stocked for a library of its size in the country.

The Lilongwe offices of the legal aid programme are somewhat inconspicuously situated on the outskirts of the town. These offices are equipped with the same kind of furniture as the Blantyre offices, but the library is even less well stocked than the Blantyre library. There is no library of any size in which counsel there can do some research, although the State Advocate's Chambers are somewhat better stocked and can thus be of some help, albeit limited help.

All the lawyers in the department are full-time employees of the Ministry of Justice. There are no part-time legal aid advocates. The establishment provides for five legal aid advocates including the Chief Legal Aid Advocate. Four of the advocates are based in Blantyre and one is in Lilongwe. Up until 1971, almost all the Legal Aid Advocates were barristers trained in London, but since 1971, the University of Malawi has been turning out a small number of law graduates. These graduates have had two years of general university work followed by three years' study in law. After completing their degree work, they are admitted to practice straight away, i.e. they are not required to undergo any other form of so-called practical training.

Like any other branch of the civil service, recruitment of lawyers joining the Ministry of Justice, whether as Legal Aid Advocates or as State Advocates, is done through the Malawi Public Service Commission. A few years ago, most Malawi lawyers trained in Britain were on Government Scholarships and almost all of them joined the Government Legal Services on their completion. The graduates from the University of Malawi have displayed a tendency to join private practice or corporations on completion. The Ministry of Justice is, however, still short of lawyers, and a practice is growing whereby the Attorney-General or his appointee makes visits to the Law Faculty to talk about career opportunities in the Ministry to students. Most of the law graduates still join the Government for the reason that it still remains the biggest employer, and very few have been successful in joining private practices.

Under the present arrangement, except for the Chief Legal Aid Advocate, any Legal Aid Advocate is liable to be posted or transferred from the Legal Aid Department to Attorney-General's Chambers or the Magistracy at the discretion of the Secretary for Justice. The policy has been to employ counsel in one department and shift him to another within a relatively short time. The aim is to give the man an opportunity to acquaint himself with all aspects of the Ministry's activities. The practice has obvious disadvantages one of which is the break in the continuity of experience personnel in the department. In most cases it is the new recruits that are subjected to these transfers - and usually the transfers are due when the man is getting to know and to master his job. From the point of view of the client, these transfers damage the confidence that a client may be prepared to repose in counsel. A client with a matrimonial problem (which may take more than a year to settle) is already unwilling to confide in another person,

and he will be even less willing to confide in more than one person. The same applies to a criminal offender, and the result is that the applicant for aid does not give full co-operation.

The system of transfers has its merits, especially from the employee's point of view. A lawyer who spends most of his time in the Legal Aid Department will be a specialist of a sort, but he will have missed the art of prosecution and advising of Government departments. It is generally considered an advantage for opportunities for advancement within the service that a candidate for a senior post should be able to say that he has been in several departments within the Ministry. It is hoped that with the tempo of localization subsiding (and there are not very many posts unlocalized) the periods which individuals will spend in one capacity will be longer. But so long as one of the considerations for advancement is the number of positions previously held, the present practice will be more favoured by junior counsel as offering better chances of promotion.

The tenure of a legal aid advocate depends on the nature of his service. If he is on contract, his terms of contract are regulated by the contract, but if he is a local man his job is usually of a permanent nature and subject to the Malawi Public Service Regulations. He will have a secure job, enjoy equal protection in common with all other civil servants and be entitled to a pension and gratuity after an honourable retirement.

The Department has its own administrative staff. The Blantyre office has three clerical staff, one stenographer/typist and three messengers. The Lilongwe office has two clerks and one messenger. The clerks perform a variety of duties including typing the necessary papers, filling all court documents and keeping all books of accounts. There is a higher clerical officer who is responsible for keeping all accounts and preparing annual reports. In most cases, a client first sees the clerks before he sees the Chief Legal Aid Advocate, and if the client consents or the Chief Legal Aid Advocate directs, the clerks also record statements from clients. Like the professional staff, these administrative staff are paid out of funds voted for the Ministry of Justice as a whole, although most temporary employees are paid by the department itself.

There are no other non-legal employees in the department. But the Chief Legal Aid Advocate works closely with the Ministry

In 1964 the Africans had control of the Government and one of the early laws to be changed was that relating to legal services for the poor. During the introduction of the Legal Aid Bill in parliament, the then Minister of Justice explained that the aim of the new law was to provide for legal representation to poor persons and to extend legal aid to the Malawi Supreme Court and to the courts of Resident Magistrates "where the interest of justice require we are going to be the judges of the interest of justice under this Bill."⁶ The bill also extended the category of cases in respect of which legal aid would be given to criminal and civil causes and aimed at setting up a Department of Legal Aid which would discharge more efficiently the responsibilities of the Government to the community. The contract of retainer which the Government had with a firm of lawyers was to be determined and the duties transferred to the new Department. The new Department was to part of the Ministry of Justice under the general direction of the Minister, but it would be headed by a Chief Legal Aid Advocate.⁷ The Chief Legal Aid Advocate was given power under the bill of brief legal practitioners when he or his staff were unable to handle all the work. During the negotiations between the Ministry of Justice and the Law Society, the latter had shown some apprehension over the possible effect of the new law on their practices. In Parliament, however, the leader of the opposition (himself a lawyer) welcomed the bill and expressed the hope that the Law Society would co-operate and "adopt a reasonable attitude in regard to fees."⁸

⁶ Per O.E. Chirwa, Esq. M.P. and then Minister of Justice and Attorney-General, Legislative Assembly Proceedings, 76th Session (1963-64), 1162.

⁷ Legal Aid Advocate used to be known as Legal Aid. Counsel, but this was changed by the General Interpretation (change of Title of Public Office) (No. 2) Order 1972 - Government Notice No. 183 of 22nd December 1972.

⁸ Legislative Assembly Proceedings, 76th Session (1963-64) 1163 per M.H. Blackwood, Esq. M.P. at p. 1163.

of Labour¹⁴ and the Ministry of Community Development and Social Welfare. The interest in the Ministry of Labour is in labour disputes and industrial injuries claims raised by victims of such injuries. Most of the cases relating to labour are handled by that department, but the Chief Legal Aid Advocate usually handles cases which are likely to raise some difficult points of law or are likely to be litigated or involve amounts which exceed claims computed under the Workmen's Compensation Act. The Ministry of Social Welfare usually seeks legal advice over problems of adoption of small children. The department of legal aid also works in close co-operation with District Commissioners who serve as proper channels through which the legal aid programme can be made known to rural residents as well as being a means whereby the department can contact clients in remote areas.

Mechanism of the Act

Under the new Act, which has been amended twice since 1964, the Chief Legal Aid Advocate is responsible for the provision of legal aid to the poor. He is a public officer and is subject to the Minister's general direction. He is assisted by such Legal Aid Advocates as the Minister may appoint in the discharge of his duties.¹⁵ As stated above legal aid may be granted in respect of both criminal and civil causes, but the rules regulating the granting of legal aid in respect of each differ slightly and it is proposed to deal with each category separately.

(a) Aid in Criminal Cases

The Act provides that when a person accused of a criminal offense is being committed to the High Court by a Magistrate, such committing magistrate shall certify to the Chief Legal Aid Advocate that it is in the interest of justice that the accused should have legal aid, and that his means are insufficient to enable him to

¹⁴ S. 8 of the Legal Aid Act requires that where a labour officer commences to act for a party under the Labour Legislation (Miscellaneous Provisions) Act (Cap. 56: 01) he should inform the Chief Legal Aid Advocate and should at all times be subject to the control of him. (CLAA).

¹⁵ Legal Aid Act, S. 3 (Cap. 4:01)

obtain a legal practitioner to represent him.¹⁶ The Chief Legal Aid Advocate is then obliged to undertake the defense of the accused as if he were a legal practitioner instructed by him (accused). The Chief Legal Aid Advocate (or some other Legal Aid Advocate instructed by him) then takes charge of the case and must receive his instructions only from the accused person. He (the Chief Legal Aid Advocate) is in fact and in law independent of the Minister in respect of his professional conduct of the case i.e. in relation to the preparation and conduct of the whole defense.¹⁷ This means that he has free and unhindered access to the accused person at any time. His responsibility to the Minister is in relation to the general policy of the department including staffing, postings and, of course, the type of cases in respect of which legal aid may be given. It should be noted that once a committing magistrate has certified the need for the accused to be legally represented in the High Court, the Chief Legal Aid Advocate must undertake the defense. He cannot refuse or in any manner question the magistrate's certificate. An application for legal aid is ordinarily made by the accused himself orally in Court.¹⁸

The committing magistrate is required to inquire into the means of the accused and if in the course of such inquiry it appears to the magistrate "that such person has sufficient means to enable him reasonably to make a contribution towards the costs of the subsequent proceedings in the matter", he should order the person to make a contribution,¹⁹ and an applicant with any income is deemed to have means reasonably to enable him to make a contribution.²⁰ An order for contribution becomes a debt in favour of the C.L.A.A. and can be enforced like a judgement debt.

¹⁶ id. S. 4(1).

¹⁷ The writer was Legal Aid Counsel from August 1968 to May 1969 and vouchsafes this from personal experience.

¹⁸ Legal Aid Regulations, r. 4; G. N. 46/1967.

¹⁹ Legal Aid Act, S. 4(2).

²⁰ id. Reg. 5. This regulation has a schedule guiding calculation as to the amount payable.

Appeal from the order of a magistrate for contribution lies to the High Court. The appeal is required to be lodged orally in court by the accused within fourteen days of the order, whence the magistrate must notify the other party of the appeal and the Registrar of the High Court in writing. The Registrar may discuss the appeal, or revoke the order for contribution or reduce or increase the amount thereof.²¹ Legal Aid is thus granted in all criminal cases prosecuted in the High Court irrespective of the type of offence committed, the overriding considerations being the interests of justice that the accused should be represented and the means of the accused person to enable him to engage a legal practitioner.

The position in Magistrates' Courts is different. In the first place, legal aid in respect of offenses of "an offence of a class which has been specified by the Minister by notice published in the Gazette". Secondly, the offence must be one triable by a Resident Magistrate.²² This has the effect that a case fortuitously brought before a first or second grade magistrate would, prima facie, disentitle the accused from applying for legal aid, and a study of the schedule of offences in respect of which legal aid may be granted shows that some of them are triable in both the Resident Magistrates' Courts.²³ But the Minister may, by notice in the Gazette, extend the provision of legal aid to courts other than the Resident Magistrates.²⁴ The two requirements of means of the accused person and the interests of justice are also applicable in determining whether or not aid should be granted, and the certifying authority is the magistrate. The application is usually made before the substantive proceedings have begun.

Legal aid may also be granted, in rare circumstances, by the Chief Legal Aid Advocate himself without the magistrate's certificate in respect of criminal cases in both the High Court and

²¹id. Reg. 6.

²²Legal Aid Act, S. 5.

²³Specified Offences Notice, G. N. 74/1964 (N).

²⁴The power, however, does not appear to have been invoked.

Magistrates' Courts.²⁵ He may grant such aid if he is satisfied that for special reasons it is in the interest of justice to grant aid and that the person has insufficient means to enable him to engage a legal practitioner. It is not clear in what situations such special reasons would arise, but presumably the section envisages a situation where the accused is charged with an offence in respect of which legal aid would not be given ordinarily i.e. an offence not specified in the schedule. Again the limit within the Chief Legal Aid Counsel may exercise his discretion is not clear; for example it is not clear whether he would undertake the defence of a person accused of breach of the Exchange Control Regulations. But it is probable that he could grant aid where a magistrate has refused to grant a certificate of legal aid either because he (the magistrate) thought it is not in the interests of justice (which is unimaginable!) or because he thought the accused has sufficient means to enable him to engage a legal practitioner.

(b) Aid in Civil Cases

Legal aid in civil cases, which now form the bulk of the work of the department, is the responsibility solely of the Chief Legal Aid Advocate and the pauper. The Act provides:-

"7. (1) Any party or prospective party to a civil cause or matter instituted or intended to be instituted in the High Court or in a Resident Magistrates' Court may apply to the Chief Legal Aid Advocate for him to undertake legal representation of the party concerned in respect of such cause or matter."

(2) The Chief Legal Aid Advocate upon receiving an application under sub-section (1) may, if satisfied that -

(a) the applicant has reasonable grounds for instituting or defending the proceedings to which the application relates;

²⁵id. S. 6.

(b) it is in the interests of justice that the applicant should have legal aid; and

(c) the applicant has insufficient means to enable him to obtain the services of a legal practitioner to represent him,"

undertake the representation of the applicant as if he were a legal practitioner, instructed by the applicant. Again, the Minister has power to extend the application of this section to courts other than the High Court or Magistrates' Courts; but cases or matters within the jurisdiction of a Traditional Court are not within the scope of this section.²⁶ This limitation is presumably designed to take out causes and matters falling to be determined according to customary law. Notice the additional requirement in civil applications for legal aid, viz., "reasonable grounds for instituting or defending the proceedings." It is the Chief Legal Aid Advocate himself who has to decide whether there are reasonable grounds for instituting the proceedings. No guidance is to be obtained from the statute or case law as to what constitutes reasonable grounds for this purpose, but it is submitted that any action is reasonable if it has a reasonable chance of success and is not merely frivolous, or vexatious or intended to delay and frustrate the ends of justice. It is immaterial that the action turns out to be unsuccessful, or that it may involve considerable expenditure, much less that it will involve a lot of legal research. The decision is a judicial one and it is hoped that successive Chief Legal Aid Advocates do apply their minds to this factor.

(c) Aid in Appeals, Orders for Contribution and Appeals against Such Orders

Under section 9 of the Act, any person who wishes to appeal from a conviction or sentence imposed by any court in a criminal case or from any final judgement or order in any civil cause or is a respondent in an appeal in a civil cause may apply to the Chief Legal Aid Advocate for legal representation in respect of the appeal. In considering the application the Chief Legal Aid Advocate has to decide whether the applicant satisfies the three

²⁶ id. s. 7(4).

requirements, i.e. whether there are reasonable grounds for instituting or defending the appeal, whether the interest of justice so require, and whether the applicant has insufficient means to enable him to engage a legal practitioner.

Where the Chief Legal Aid Advocate, in granting legal aid in cases where there are special reasons under section 6 or in civil cases under section 7 or on appeal under section 9, is satisfied that the applicant has sufficient means to enable him to make a reasonable contribution towards the costs of proceedings, he may make an order for such contribution.²⁷ But the amount of contribution should not be excessive. The Chief Legal Aid Advocate has a right of appeal to the Registrar of the High Court against an order of a magistrate in respect of criminal cases relating to both the High Court and magistrates'. It is not clear whether the right relates to the fact that excessive contribution has been ordered (or that none should have been ordered) or to the fact that insufficient contribution has been ordered. It may be that the right relates to both situations. The aided person has a similar right to appeal against the decision of either the magistrate or the Chief Legal Aid Advocate for an order of contribution or the amount thereof to Registrar of the High Court in criminal cases. An appeal against the Chief Legal Aid Advocate's decision requiring contribution must be made in writing to the Chief Legal Aid Advocate within fourteen days. The Chief Legal Aid Advocate then notify the Registrar in writing of the appeal with a copy of the applicant's statement of income and the grounds for refusing to undertake legal representation. The Registrar may then either dismiss the appeal, or revoke the requirement for contribution or reduce the amount thereof, or merely direct that a certificate for such aid be issued and contribution be made as appears just.²⁸ It would appear that when the Registrar makes his decision he does not have the parties before him. He decides purely on the facts as shown on papers before him.

In cases where there has been an amicable agreement or settlement or where damages have been awarded in favour of the aided person, "there shall be a first charge on such property, damagesfor the payment of any contribution due from such person in respect of such proceedings and for the payment of the

²⁷S. 10(1).

²⁸Legal Aid Regulations, r. 7.

amount by which such contribution is exceeded by the net liability for costs incurred on behalf of such person."²⁹ This means that if say, the amount of contribution required is \$100 and the net liability for costs incurred in respect of the proceedings is \$200, and the total damages awarded in favour of the aided person is \$500, there will be the first charge for the payment of \$100 contribution and another payment of \$100 being the amount by which the net liability has been exceeded. This sum is payable to the Chief Legal Aid Counsel who has to issue proper receipts and account for it to the Government as revenue. The court should make an order for the taxation of the aided person's costs, unless the parties to the action have reached an agreement. The costs of an aided person are taxed according to the usual rules as if the aided person had agreed with the Chief Legal Aid Counsel to pay reasonable costs etc. to which a private practitioner would be entitled.³⁰

Where the Court has ordered that an aided person should recover costs from the other party, the amount of costs to be recovered are not limited to his liability to make a contribution to legal aid, but they are taxed as stated above and are deemed to have been incurred by the aided person; and in assessing the costs, any costs which are attributed to work done by the Legal Aid Advocate is deemed to have been paid or payable by the aided person.³¹ But, on the other hand, where there is an order for costs made against a legally aided person, his liability shall not exceed what is reasonable for him to pay having regard to all the circumstances, and to this end the court may direct an inquiry as to what is a reasonable sum that the person should pay. If the person is such that he cannot reasonably be expected to pay any amount of costs, no such order should be made. But where the Chief Legal Aid Advocate has received any money by way of contribution from the aided person, such money is first applied towards the payment of the costs ordered. Where the net liability in the proceedings is less than the amount of contribution ordered or required, the excess is paid back to the aided person. The Act also requires a truthful and honest disclosure by the aided person of his means on

²⁹id. S. 10(4).

³⁰Reg. 9(1) and (2).

³¹id. Reg. 9(4).

pain of fine.

Similarly where the Chief Legal Aid Advocate undertakes work of a civil nature which does not result in court proceedings and has required the aided person to make contribution, the person may request the Chief Legal Aid Advocate to submit a bill of costs to the Registrar of the High Court to be taxed according to the ordinary rules. This privilege is allowed in cases where the legally aided person thinks that the costs which would be allowed on taxation would be less than the contribution which he has been required to pay. It needs a very sophisticated poor person to take advantage of this provision. Most of the applicants who patronize the department would be too grateful and ignorant to voice their dissatisfaction. Perhaps the easiest and safest solution would be to make provision for automatic submission of a bill of costs to the Registrar for taxation. Where there has been a judgement in favour of the aided person, or an agreement by the parties and property or damages are ordered or agreed to be recovered, the Chief Legal Aid Advocate retains out of such property on behalf of the Government any costs ordered or agreed in favour of the aided person, and a sum equal to the contribution required and any other costs incurred in enforcing the court's order.³² This would be applicable where contribution has been paid or not paid in full or where the costs incurred in the proceedings have exceeded the amount of contribution required.

We have already dealt with the procedure relating to appeals in certain cases. The general rule is that where a magistrate refuses to issue a certificate for legal aid, the accused may appeal against such refusal by stating so in court, whereupon the magistrate must immediately inform the Registrar of the High Court and the Chief Legal Aid Advocate in writing, and his reasons for such refusal.³³ The Registrar then after consulting with the Chief Legal Aid Advocate may dismiss the appeal, or make an inquiry or direct the issue of the legal aid certificate. In the same manner an applicant for legal aid may appeal against the refusal of the Chief Legal Aid Advocate to undertake representation on appeal in a criminal cause. There is not appeal against the decision of the Chief Legal Aid Advocate refusing to grant legal aid in civil mat-

³² Reg. 9(8).

³³ id. S. 11(1).

ters. The only appeals relate to decision of Chief Legal Aid Advocate requiring contribution. The need for an appeal system to a judge of the High Court cannot be over-emphasized. A judge's decision would tend to be reported and would carry more weight than a Registrar's. The Minister may, however, instruct the Chief Legal Aid Advocate to undertake or not to undertake legal representation of any person in respect of any proceedings whether or not covered by the Act.³⁴ The Minister's decision is final, but there is no requirement that such decision should be published or that reasons should be given for the decision.

(d) Revocation and Withdrawal of Legal Aid

Under the Legal Aid Regulation, Reg. 10, legal aid may be terminated at any time in a variety of situations. It may be terminated at the request of the aided person himself, or where contribution by the aided person is in arrears for more than twenty-one days, or if the proceedings have been disposed of, or where the aided person has required the proceedings to be unreasonably conducted so as to incur unjustifiable expense to the State, or unreasonably insists on the continuation of the proceedings. The last case may occur where an aided person is not willing to settle but insists on continuing with the proceedings. But before aid is terminated notice of the intention to terminate should be sent to the aided person who should be given a chance to say why it should not. Death of the aided person or a receiving order made against an aided person is also a ground for termination of aid.

Legal aid may also be terminated where the Chief Legal Aid Advocate is satisfied that an aided person has wilfully failed to disclose all relevant information required prior to the grant of aid or after the granting of it, if wilful non-disclosure or misrepresentation occurs after the grant. The regulation also provides that at any time during the hearing of the proceedings to which an aided person is a party the Chief Legal Aid Advocate or any other party to the proceedings may apply to the court for its consideration whether the aided person has wilfully failed to comply with any provision relating to information to be supplied, or has knowingly made a false representation. The court may then make an order revoking the grant or terminating legal aid after hearing what the aided person has to say. It is not clear what

³⁴id. S. 12.

information is aimed at by this provision. If the information is the information required to be given in court in the course of the proceedings, it is hard to see how such information should be related to the grant of legal aid to the extent that it should be a ground for revocation of aid. It is submitted that the court has adequate sanctions against such unscrupulous witnesses. If the information alluded to in this provision relates to information required to be declared to the Chief Legal Aid Advocate (and the reference to the Chief Legal Aid Advocate suggests it is), then the sub-regulation adds nothing new to the Act. The Chief Legal Aid Advocate has more than adequate power under sub-regulations 10(3) and 10(4) to deal with untruthful applicants or recipients of legal aid. But more fundamental is the fact that if the other party to the proceedings is to succeed in his allegations against the aided person, he would have to know most of the inside story between the aided person and the Chief Legal Aid Advocate. This would suggest that documents or information relating to application of legal aid, statements as to means, income or property etc., of the aided person made to the Chief Legal Aid Advocate is public information and available to the public generally. Such a situation, however commendable on other grounds, runs counter to one of the most fundamental norms of etiquette of the legal profession i.e. that counsel (including the C.L.A.A. for that purpose) should not indiscriminately disclose communication made to him by his clients. Although the public are entitled to know the means of legally aided persons, one would expect that such person's means should not be the subject of indiscriminate disclosure. It is submitted that another party to the proceedings should not have access to information which relates purely to the financial means of a legally aided person; and further that a court should not entertain any application under this sub-regulation unless that other party can show that the application is not only relevant as touching on the case generally, but is also essential to the success of his claim or defense.

Where the Chief Legal Aid Advocate revokes legal aid, he is required to issue notice and send a copy of the same to the aided person or his counsel, if any. Similarly, where it is the court that revokes legal aid it should notify the Chief Legal Aid Advocate of this revocation. The effect of termination of aid is that it is revoked for all purposes, except that all retained practitioners, where applicable, should be paid for their work up to the time of termination, costs as well as contribution remain recoverable subject to taxation.

There is no provision for appeal against the decision of the Chief Legal Aid Advocate revoking legal aid. Perhaps this is justified on the only ground that to require the Chief Legal Aid Advocate to undertake legal representation of a person whose trust he has lost would be most inconvenient to him, in view of the personal nature of the relationship which calls for mutual trust.

Operation of the Act

Generally, legal aid is available to all people in respect of all cases triable in the High Court and in respect of civil cases and serious offenses only in subordinate courts. There is no restriction as to what type of cases may not receive legal aid in criminal cases, but a person accused of motor manslaughter, i.e., the causing of death arising out of the driving of a motor vehicle, may not be in receipt of legal aid.³⁵ This is because the victim of the accident or his relatives are likely to seek legal aid in a civil action; and the public policy is that the latter and not the former should receive legal aid. Further, as a general practice, legal aid is not given to persons accused of the offense of theft by public servant, i.e., theft by persons employed in the public services. The rationale underlying this policy may be that persons accused of stealing or misappropriating public funds or property should not have the added benefit of receiving legal advice at public expense. The logic of the reason, however, is less convincing if it is remembered that people accused of equally serious offenses e.g. murder or even treason are entitled to legal aid if their case is tried before the High Court. (Note that I am not suggesting that the benefit should be taken anyway.)

The granting of legal aid is the responsibility of the Chief Legal Aid Advocate, except where a certificate issue from a magistrate recommending that the person should have legal aid. It is also the Chief Legal Aid Advocate who assigns a particular case to the individual advocate on the staff. If he or any of the advocates or counsel within the department is unable, due to pressure of work, to deal with the case, he may brief a legal practitioner.

³⁵ Motor Manslaughter Representation Order - G. N. 154/1964(N).

There is no specialization among the counsel within the department, so that an individual counsel is liable to be assigned a variety of cases raising different legal problems, ranging from, say, divorce or adoption to criminal law. Theoretically too, all counsel, old and new, may be assigned any case to deal with, but in practice, a new man will usually be started with problems equal to his experience. He will start with giving advisory opinions which the Chief Legal Aid Advocate may wish to see before being sent out. Further the new man in the department will usually be required to accompany the Chief Legal Aid Advocate or some other experienced counsel in the department to court. Due to pressure of work and insufficient personnel, this period of supervision is somewhat short and the new man sets off on his own fairly quickly.

As has been observed above, the Chief Legal Aid Advocate may brief a private legal practitioner if he is himself unable to undertake representation, or even if he is himself appearing. The Act requires that in all cases where the Chief Legal Aid Advocate has engaged a private practitioner, such lawyer will be subject to the direction of the Chief Legal Aid Advocate.³⁶ There exists no panel of lawyers to which briefs may specially be sent. The whole decision depends on the personal choice of the Chief Legal Aid Advocate and the availability of the lawyer to whom he wants to assign the case. Nor indeed does the Chief Legal Aid Advocate necessarily choose the very junior members of the bar; in most cases the assignment is made to a firm of lawyers (and all the firms except two have more than one lawyer). It is the firm that makes available the appropriate lawyer to undertake legal representation.

The proportion of cases assigned to outside lawyers is rather small³⁷ compared to the total volume of cases processed through the department. Further, the frequency with which outside lawyers receive these briefs is not great, and indeed these briefs do not form a significant proportion of their business. Some of the firms do not receive any brief from the department for a whole year. One of the reasons for this may be the wish to keep expenditure of the department to a minimum, especially in view of the fact that one

³⁶ Legal Aid Act, S. 13.

³⁷ Comparative figures are unavailable

of the aims for setting up the department was to save public expenditure. Secondly, experience has shown that very few of the cases, especially civil cases, reach the High Court. Most of them are settled out of court after some correspondence between the department and the other party or their counsel.

There is a cordial relationship between the Department and the bench. Not infrequently, an unrepresented litigant or estate has been referred to the department to apply for legal representation. The private bar too is equally well disposed to the department, perhaps rather more for the reason that the department deals with cases of no financial consequence to them than from a desire to see that poverty is no bar to equality of representation before a court of law. The initial disquiet with which the legal aid programme was received by the Law Society has ironed itself out in the course of time as the programme has not produced any unsettling effects on established law practices (which indeed, were not intended).

The department considers so many types of cases, and in respect of criminal cases prosecuted in the High Court it would appear there is no limit as to the type of case in which aid may be granted. The position in Magistrates Courts is different, because in regard to these courts, the Minister has by order specified the type of criminal case in respect of which legal aid may be given.³⁸ But the Minister may authorize legal representation in any particular case where complicated legal questions or the interests of justice make such representation desirable.

It has not been possible to work out the average case load per lawyer employed in the department, and more so to analyze the number of litigated cases per lawyer through a given period. One difficulty in this regard is created by the fact that lawyers in the department, except for the Chief Legal Aid Advocate, have been subject to transfers within relatively short periods of stay in the department. It is not uncommon for a new lawyer to find himself assigned cases which have been through one or two predecessors. Again, a lawyer leaving the department will usually have his cases distributed among his remaining colleagues, and not merely to his replacement, if one is available. This situation makes it difficult to work out case load per year per lawyer. The department itself, is

³⁸ Specified Offenses Notice, G. N. 74/1964(N).

understaffed, and for well over six months it has been unable to fill all its established posts.

The type of legal problems handled by the department are varied. In recent years, most of these have been civil cases. The department issues annual reports of all the cases processed during a particular year. The Summary of Annual Reports for the year January - December 1970 shows that 147 criminal cases were registered in that year and of these 130 were completed and 9 still pending. There had been 175 applications for legal aid in criminal cases and 161 of these were granted and 14 were refused. The reasons for the refusal were not available. The Summary of Annual Report in respect of civil cases for the same period also shows that the department handled a variety of causes. There were 785 applications for legal aid made and out of these 751 applications were granted aid, and 34 were refused. The number of cases eventually registered in the register of civil causes is 543 and of these 278 were completed or otherwise disposed of during the year and 265 were still pending at the end of the year. It is not clear what happened to the 208 applicants out of the 751 who had been granted aid, but it is possible that aid may have been withdrawn or otherwise revoked in these cases. The report states neither the ages of the various applicants nor their sex. Further, the report does not make it clear which cases were successfully litigated and which were not, nor does it state which were litigated and which were settled out of court. Hence, much valuable information relating to legal aid is omitted.

A comprehensive departmental report for 1971 was not yet available at the time of writing this paper, but inspection of the registers in Blantyre offices and interviews with the legal aid clerk at their Lilongwe offices show that there were 156 applications for aid in civil cases at the Lilongwe offices. Of these applications 100 were granted legal aid, 7 were refused and a further 50 were still pending decision of the Chief Legal Aid Advocate, or were otherwise undetermined. An inspection of the Blantyre civil cases register shows that there were 173 applications made in 1971 that 52 of these cases were completed either through litigation in court or by settlement out of court. Legal aid was refused or withdrawn in 32 cases, and directions to take no further action were made in respect of 20 cases, and in 6 of the cases the results are unknown. A direction to take no further action may be made on a number of reasons some of which may be because the applicant, by his conduct, has indicated disinterest in the cause or failed to supply some vital information rele-

yant to the case or some other reason. The result, however, is that the application lapses. But like the previous year these cases range from contract, forgery, divorce and related claims. The register does, however, give the sex and address of every applicant. There were 119 male applicants of adult age (i.e. above the apparent age of 21) and 27 female applicants, and the rest were application on behalf of deceased persons' estates. The addresses of the various applicants show that they were from all over the country. But this does not mean that all the applicants made journeys from the different parts of the country to Blantyre seeking legal aid. It is more likely that more than half of the applicants were resident within Blantyre or the surrounding districts. The problem arises from the fact that an applicant for legal aid is usually asked to state his/her village address and the name of the Chief and district from which he/she comes, and this is the information recorded in the register. No information about the applicant's working address is shown in the register except on the application form which is filed separately.

There was a very big drop in the number of criminal cases handled by the department in 1971. In both the two offices at Blantyre and Lilongwe, there were only 18 applications for legal aid, and of these 4 were dealt with at the Lilongwe offices. These included one case of theft by servants involving 3 persons all of whom were tried and found guilty by the High Court, one of forgery tried and found guilty by the Magistrates' Court, one of rape where the defendant was acquitted by a magistrate, and one of defamation of character in which the result was not certain at the time of writing this paper. The remaining 14 cases, dealt with in Blantyre, ranged from defilement, infanticide, rape, malicious damage, motor accidents, trial by ordeal, thefts, assaults and false pretenses. The drop in the number of criminal applicants for legal aid is to be explained by the fact that most criminal case which used to be tried in the High Court and the Magistrates' Court are now brought and tried in the Traditional Courts - notably the Regional Traditional Courts. Since the amendment of the Traditional Courts Act in 1969³⁹, the practice has grown up that most of the serious offences which were triable by the High Court are now sent to the Regional Traditional Courts for trial provided the accused is an African. And as has already been noted, no counsel is, as yet, permitted to appear before these courts. The bulk of legal aid

39 Local Courts (Amendment) Act, 31 of 1969.

work in criminal cases consisted of defending poor persons in the High Court, and the amendment has had great effect in this aspect of the department's work.

The Annual Report for the year 1972 has been compiled and it is worthy of note that it shows there was a slight increase in the applications for legal aid in both civil and criminal causes. There were 34 applications in criminal causes in the whole department, and all of these were granted aid. At the time of publication of the report, all the cases except three had been processed through the courts, but the result of the individual cases is not shown. There were very few grave or serious offenses of the kind dealt with in 1970. The Summary Report of civil cases, however, shows that the public took a greater interest in the department than in 1971. There were 501 applications made in the year for legal aid and 489 were granted, with only 12 refused. But the number of cases that eventually were registered in the civil cause Register were 384, of which only 127 were completed during the year and 245 are still pending.

The department serves, in general, the poorer section of the community, the majority of whom are Africans. In criminal cases, the majority of the applicants are ordinary villagers who engage in subsistence agriculture. These are unsophisticated and indeed most of them can only speak and understand ChiChewa, which is the vernacular language understood by the majority of the people. The department is thus of particular importance to these people because almost all the lawyers employed are local men who can speak and understand ChiChewa and most of the other vernacular languages besides English. The clients feel much freer with these lawyers and an understanding of points of view is therefore achieved much earlier and more easily. This is not the case with most private practitioners most of whom speak English but cannot, despite their long stay in the country, so much as construct a sentence in a vernacular language.

There is, however, a growing clientele, especially in civil applications which consists not only of poor persons who cannot afford to pay any contribution, but also of men who are engaged in businesses of a sort, or are getting a regular income. Depending on the circumstances of the case such people are also given legal aid, especially where their cases are against giant and well established businesses and are deserving. These people are usually willing and able to make a fair or reasonable contribution towards the costs of the proceedings, while they have the satisfaction and confidence that they can discuss their problems direct

with the lawyer without the intermediary of an interpreter. Legal aid, however, still remains a programme for the poor for whom it was primarily established. Further, and this is sometime unfortunate, legal aid can only be given to one of the parties. There has not been a situation whereby aid has been given to both parties in the proceedings. There is no reason however, why aid should not be given to both parties where both of them are deserving. The Chief Legal Aid Advocate could then instruct a private practitioner to represent the one party, while he represents the other. Perhaps then the Chief Legal Aid Advocate would have to decide which of the two has reasonable grounds to deserve aid more than the other.

Evaluation Of The Programme

It is clear from the brief outline of the legal aid programme that the programme is expanding its function in civil cases although its effective contribution in criminal cases has been arrested by the increase in the jurisdiction of the Traditional Courts. But the effect of the Traditional Courts cannot be over-emphasized. These courts are, indeed, an important part of our legal system and so long as the two systems remain separate, they will affect legal representation and legal aid in particular. The question may, therefore, be posed whether the legal aid department continues to serve the purpose for which it was established.

Firstly, it may be argued that a legal system that seeks to provide free or subsidized legal aid to the community should do so first in the sphere of criminal liability where the very liberty, or even life, of an individual may be in jeopardy. This reasoning may be fortified by the fact that even the colonial administration realized this fact by the provision of legal assistance in criminal cases in the High Court and Magistrate's Courts under the Poor Prisoners Defense Ordinance.⁴⁰ Further, even under the present legislation, the certifying authority as to the need of legal aid in criminal cases are Magistrates with an appeal to the High Court Registrar. The spirit of these legislations may serve to show that the underlying policy of the law-makers has been to provide legal aid in criminal cases, at any rate in serious criminal cases. Indeed it is with respect to criminal proceedings that the twin necessities of the right to defend oneself

⁴⁰ S. 4 of the Ordinance of 1945.

and the right to equal representation of the parties before a court of law are most necessary. It was with respect to these considerations, among others, that the programme was revised and brought up-to-date, so that what was then conceived to be justice in criminal cases could be brought within the reach of a majority of the poor people, who were mostly tried in Magistrates' Courts and the High Court. The decrease in applications for legal aid in criminal cases may reflect a corresponding disenchantment with former values. Indeed it is not clear just how far the total criminal trials in the High Court have been affected,⁴¹ but it is clear, however, that the majority of civil cases in the Republic are heard by the various Traditional Courts.⁴²

These arguments would perhaps militate against the continued existence of the legal aid department. The reply would be firstly, that the department still continues to serve a large proportion of the population. Poor persons are still eligible for legal aid in respect of almost all offenses in the High Court and a number of offenses in Magistrates' Courts. Even if the criminal side of the department's functions are not fully utilized and may remain dormant for some time, the civil side of the department's activity still remains fully utilized. The 1972 criminal figures indeed show that the public are taking a revived interest in the department for most cases tried in Magistrates' Courts and as the department gets better known it will serve the public better and efficiently. We have already noted that the field of greatest litigation is with respect to running down cases. The 1972 civil cases annual report shows also that there is an increase in divorce and related cases and breach of contract and debtor summonses cases. It can indeed safely be predicted that divorce cases will continue to increase because of the upheavals of social change. But there is yet a potential area of litigation where the department would be of great service. This is in the area of landlord and tenant relation-

41

It has not been possible to compare the number of criminal cases tried in the High Court with those tried by the Traditional Courts (Regional) (which are courts of co-ordinate jurisdiction with the High Court in most criminal offenses).

42

It is estimated that in 1970, Traditional Courts alone tried 113,761 civil cases throughout the country - MALAWI, 1970, OFFICIAL HANDBOOK, 29.

ship,⁴³ especially in the so-called traditional or semi-traditional housing urban areas. So far neither the department nor the public seem to have realized that the hands of justice extends to these areas. With the rapid growth of urban populations, the department can help in advising or conducting tenants' defenses in cases of unlawful eviction. It could even be that the department could seek to reconcile the tenant and landlord without necessarily taking a partisan stand on behalf of either party. The department could also advise poor and ignorant landlords of purchasers who intend to deal with city corporations or some other land allocation committee.

A second factor to be considered in evaluating the usefulness of the department is the expense of running it. Again, as already noted, when the department was being set up, it was generally thought that this would reduce public expenditure in this regard. But as we have already seen, the cost of running the department has not been much under what used to be spent under a contract of retainer,⁴⁴ especially if it is appreciated that the

⁴³ Neither the High Court nor the Magistrates Court have jurisdiction in land matters such cases are to be taken to the Traditional Court of the area in which the property is situated, S. 8. Traditional Courts Act, but the High Court has held that it has jurisdiction over questions relating to occupancy as distinguished from title to land.

⁴⁴ It is estimated that the Government used to spend about three thousand pounds annually on retainer. The average expenditure of the department since 1964 is as follows:-

1964	three thousand, one hundred and twenty pounds.
1965-66	four thousands, three hundred and fifty pounds;
1966-67	one thousand and five pounds;
1967-68	one thousand two hundred and eighty pounds;
1968-68	not available;
1969-70	one thousand nine hundred ninety three pounds, one shilling and four pence.
1970-71	K4, 900 (two thousand, four hundred fifty pounds);
1971-72	K5, 270 (two thousand, six hundred and thrity-five pounds).

votes shown do not include the salaries of the professional and

SUBSIDIARY LEGISLATION

SPECIFIED OFFENSES NOTICE

under S. 5

The Minister has specified the offenses set forth in the Schedule as being offenses for the purposes of section 5(1) of the Act.

SCHEDULE

Offense	Penal	Code
	Section	
Seditious offenses		51 (i)
Riot	"	71
Rioting after proclamation	"	76
Riotously demolishing buildings, etc.	"	78
Riotously preventing the sailing of ship	"	80
Proposing violence at assemblies	"	87
Intimidation	"	88
Conspiracy to defeat justice and interference with witnesses	"	109
Rape	"	132
Attempted rape	"	134
Indecent assault on female	"	137 (i)
Unnatural offenses	"	153
Indecent assault on boys under fourteen	"	155
Indecent practices between males	"	156
Incest by males	"	157
Incest by females	"	158
Libel	"	200
Robbery	"	300
Attempted robbery	"	302
Obtaining goods, etc., by false pretenses	"	319
Obtaining execution of a security by false pretenses	"	320
Obtaining credit, etc., by false pretenses	"	322
Forgery	"	356
Forgery of wills	"	357
Forgery of judicial or official documents	"	358

administrative staff. It must be noted, however, that the depart-

Forgery, etc., of stamps	"	359
Uttering false documents	"	360
Uttering cancelled or exhausted documents	"	361
Procuring execution of documents by false pretenses	"	362
Obliterating crossings on cheques	"	363
Making documents without authority	"	364
Demanding property upon forged testamentary instruments	"	365
Importing or purchasing forged notes	"	366
Falsifying warrants for money payable under public authority	"	367
Falsification of register	"	368
Conspiracy to commit a felony	"	404
Conspiracy to commit a misdemeanour	"	405
Other conspiracies	"	406
Accessories after the fact to any offenses set forth in this Schedule	"	408
	"	409

MOTOR MANSLAUGHTER REPRESENTATION

ORDER

under S. 12 (1)

The Minister has ordered that Legal Aid Counsel shall not undertake legal representation of any person charged with manslaughter contrary to section 208 of the Penal Code where that charge arises out of the driving a motor vehicle, unless the Minister specifically authorizes such legal representation in any particular case where complicated legal questions or the interests of justice make such representation desirable.

ment engages in a far much wider field than used to be the case with the retained lawyers who were confined to criminal cases. In fact, the bulk of the department's activity today is in relation to civil cases, the scope of which, one hopes, will expand with the growth of economic activity in the country. Further, the department also does some advisory work in both criminal and civil cases.

There is also the human and psychological factor which has already been touched upon. Only two of the twenty or so private practitioners are Africans, whereas all legal aid advocates in the department are Malawians. The language and cultural identity which these lawyers have with the majority of legal aid seekers helps to reassure the public that the law and its lawyers are available and approachable. It is also important to bear in mind that in addition to the useful work the department does for the community, it also collects revenue for the State in the form of contributions, costs and legal fees where the case has been successfully negotiated on behalf of the aided person. But even without this ancillary revenue, the very concept of a legal aid programme involves some expenditure without material returns.

Mention may also be made of the fact that policy considerations cannot be divorced. The programme is too well-founded to be wiped out of our legal structure altogether. The question to be asked then would be: On whose shoulder would the programme be placed? That of the Law Society? The present number of the lawyers at the bar in private practice is so small that it is questionable if sufficient numbers would be willing to undertake these responsibilities. To say the least, the Society impresses one as being not yet ready to handle such an adventurous programme. There would thus seem to be no justification for a change of policy to place responsibility with the bar at least for the foreseeable future.

Enough apology has been said for the retention of the programme and for its being administered under State supervision. One more question may be asked, i.e. whether the programme is fulfilling its functions. It cannot be pretended that the programme reaches a significant part of the population. The majority of the people still remain unaffected by the activities of the department. In fact, the area of greatest activity in the department is with respect to motor accidents claims. This has been made possible because of the practice that has grown up where by police stations inform the department of every, or most, fatal road accidents. The department then invites deceased's relatives to take advantage of its services. The District Commissioners

have acted in similar fashion with respect to a number of cases affecting rural folks. The majority of the people, however, still remain ignorant of the existence of the department. Further, for the majority of them, the Traditional Court would be the best venue because of the nature of their problems, which often involve customary law.

The programme is, however, relatively well-known in the urban and surrounding areas. It is people in these areas that make most use of legal aid, and the few people from rural areas coming to seek legal aid will have heard of the programme either in a town or through someone who has had contact with urban people. It may be that it is not necessary to advertise the programme so widely in view of the fact that the nearest courts in most rural areas are the Traditional Courts where legal representation is mostly not yet available.

The breadth of legal problems dealt with by the department is unlimited in civil cases, and in this respect the department has been ready to handle any problem. This is particularly welcome in view of the many novel causes of dispute arising in a changing society. The criminal side, however, could be made to work at a higher rate than the present. Much advantage could be made to work at a higher rate than the present. Much advantage could be taken of cases coming before Magistrates Courts. The 1972 annual report shows that very serious cases are still being brought before these courts.

Conclusion

This has been a short account of the history and operation of the Legal Aid programme in the country. The programme was intended, as still it is, to bring about equality of legal representation before the law regardless of race or economic situation. The overriding considerations are the interests of justice and the insufficient means of the applicant to enable him to hire a lawyer. The department is open to all poor persons living in Malawi without regard to race or nationality, but as might be expected, the greatest number of applicants are the Africans.

The programme is unique in its being part of the Ministry of Justice and in providing all the services of a law firm except criminal prosecution. The question is between having the department deal with particular types of popular legal problems such as matrimonial case as was the case of Jamaica in 1964 or have a system of crown briefs with legal aid provided by members

of the private bar paid out of a fund administered by the Law Society as in England, or even simply have an ombudsman as in New Zealand. The English system would have been much nearer our practice except that it requires an established and large bar. The Malawi practice combines the permanent and comprehensive system of legal aid in respect of all civil litigation and in a number of criminal offenses. In being part of the civil service, the lawyers employed also have the assurance of the job and regular income.

There is no doubt that the programme is a noble venture and that it has so far worked well. The effect of the Traditional Courts in taking away most of the criminal cases, and thus reducing the need for aid in these cases, should be seen rather as part of a continuing search for a settled and satisfactory legal system that will answer to the local circumstances than as a slight on the legal aid programme. Like so many novel institutions, this too will have to stand the test of time, and change. It certainly does not accord with reason that law should exist without lawyers. The department ought, therefore, to see expansion in both its size and the type of cases it will deal with in future.