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Legal Aid Services in Malawi

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LEGAL AID SERVICES IN MALAWI*

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This Article will acquaint the reader with the organization and operation of legal aid services in Malawi. The discussion of the program will survey the economic, social, and legal context within which the program operates, the constitutional framework and the practical operation of the whole scheme, including the administration of the Legal Aid Department, the recruitment and functioning of the professional staff, and the kind of cases with which the Department deals.

I. MALAWI

A. *The Land and the People*

Malawi, formerly known as the British protectorate of Nyasaland, is an independent country in east central Africa and is formed of a long strip of land on the western shores of Lake Malawi. It lies between 10 and 17 degrees south of the equator and 33 to 36 degrees east of the meridian and is bordered by Tanzania, Mozambique, and Zambia. It is about 560 miles long, varies from 50 to 100 miles in width, and covers a land area of 45,747 square miles and 12,000 square miles of fresh lake water.

The country is divided into three regions, southern, central, and northern. Of these, the southern is the most developed and populated. There are three main urban centers in the country—Blantyre City in the southern, Lilongwe in the central, and Mzuzu in the northern region.[1]

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It has not been possible to inquire into every detail of the program. This limitation has been due to a number of factors, among which have been limitations of time and, in some cases, inaccessibility of desired information. The methods used in this research have included interviews with the personnel of the two stations where the program is operated, and, where possible, a study of the records kept by the Legal Aid Department.

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1. The latest census figures are not available, but the 1966 census estimated the

In addition, there is the present capital, Zomba, in the south, which, being the seat of Government, is an important center.

The country's population was estimated at 4.5 million in the early 1970's,[2] with 52 percent concentrated in the southern region, 36 percent in the central, and the remaining 12 percent in the northern region. As noted above, the southern region is the most developed; there are tea, tobacco, cotton, and sugar estates and a number of light industries around Blantyre City. The region also has excellent communication facilities, including rail connections with the ports of Beira and Nacala on the Mozambique coast, road connections with both Mozambique and Southern Rhodesia, and the country's only international airport, at Blantyre. All of these factors make the southern region's economic development relatively the most advanced in the country.

The majority of the people in Malawi are Africans, who comprise well over 95 percent of the population. It has been estimated that 92 percent of the total population live in traditional villages in rural areas,[3] and the remaining 8 percent, although described as living in urban centers, often have close ties with the rural areas. The majority of the African urban population expect to go back to rural areas after they have retired from their jobs in the towns.

Most of the rural population is engaged in agriculture, growing crops for sale and home consumption. Much of this agricultural activity is of a subsistence nature, aimed at the conquest of the seasonal food shortage rather than large scale commercial production. With the advent of independence, the Government mounted a campaign designed to educate the rural peasantry about modern methods of farming and encourage large scale farming, not only of staple crops, but also of cash crops such as tobacco, tea, and coffee.

The percentage of the population employed in nonagricultural jobs is small. Most wage earners are employed either in industry or by government or quasi-government corporations. There is no mining activity of

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population of Blantyre City at 110,000, and that of Lilongwe at 22,000. These cities have grown tremendously in recent years, especially Lilongwe, which is to be the new seat of Government and to which a number of Ministries have already moved. *See* DEPARTMENT OF INFORMATION, MALAWI 1972 (1972).

2. DEPARTMENT OF INFORMATION, MALAWI 1970, at 8 (1972).

3. *Id.*

any consequence and no minerals worth exploiting have been discovered. The country is, therefore, heavily dependent on agriculture.

The economic condition of the people varies from the regular wage-earner to the farmer, whose income from the sale of crops is seasonal. It is not clear how well the economists' figures of per capita income relate to the actual conditions of life for the majority of the people. The conditions of poverty are so different from those in the developed countries that there is no truly accurate basis for comparison. Nevertheless, the country's national per capita income is estimated at 70 Kwacha (K) per annum.[4] It should be noted, however, that for the majority of people in rural areas, the earning period is the harvest season, after which they are engaged in the buying and selling of agricultural produce. It is extremely difficult to assess the legal problems of the farm labor force because of the seasonal nature of the work.

Though most of the population is African, there are also important minority groups. The largest of the minority races are the Asians, mainly the descendants of Indian or Pakistani immigrants. Most of these people are either Indian, Pakistani, or British citizens. They are engaged in commerce and in the import and export business and thus form an important stratum in the economy of the country. There are also a few artisans, lawyers, and doctors in this group; until independence, they formed an economic middle class. They are to be found in almost every part of the country, although the majority are in the southern and central regions, the areas of the greatest economic activity. The majority of the Asian class have little need for legal aid services since they can afford to hire lawyers in private practice.

In addition to the Asian minority, there are the whites, who are commonly referred to as "European" regardless of their country of origin. The majority are from Europe, especially Britain, and almost all are noncitizens. Most are businessmen, but a considerable number are experts employed on contract in government services or semi-government agencies. Together with the Asian minority, this group still controls most of the economy in the private sector. Members of this group, too, have no need for legal aid services, except in unusual cases.

Mention also should be made of a third minority group, people commonly referred to as "coloureds." These are people of mixed parentage,

4. Department of Information, The Economic Development of Malawi Since Independence 6 (unpublished briefing). At the times referred to in this Article, K 1 equalled approximately U.S. $1.25. *See* note 67 *infra.*

such as white and African parents, or Asian and African parents. It is not accurate to treat this group as separate from the Africans, and for all practical puposes its members are now treated as Africans.[5] Most members of this group, having spent all their lives in urban areas, have little affinity with rural Malawi. A substantial number of these people make use of the services of legal aid.

B. *The Legal System*

There is a dual judicial system in Malawi, with two parallel court systems administering substantially the same laws. One of these court systems, styled on the English model, consists of the various grades of the Magistrates' Courts, the High Court, and the Supreme Court of Appeal. These courts administer the law that was received in 1902 under Article 15 of the British Central Africa Order in Council, as modified and developed through the years. These laws consist mainly of the principles of the common law (as distinguished from the civil or any other system of law), the statutes of Malawi,[6] and the doctrines of equity. The structure, procedures, rules of evidence, and practice of these courts is generally similar to those elements of the English system, although there are a number of differences that have been necessitated by local circumstances. The jurisdiction of these courts extends over all persons and to all causes and matters except that the jurisdiction of the Magistrates' Courts in both civil and criminal causes is limited in the amount or value of the claims that can be heard and the severity of sentences that can be imposed. All legal practitioners have the right to appear as counsel for either party.

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5. The interpretation section of the Traditional Courts Act, MALAWI LAWS ch. 3:03, § 2 (1968) defines "African" thus:

> In this Act, unless the context otherwise requires—"African" means
> (a) any member of an indigenous race of Africa; and
> (b) any person who resides in Malawi as a member of such.

It would appear that any person of mixed parentage would be treated as an African, provided one of his parents is a Malawi African.

6. It is not clear how far English statutes of general application still pertain in Malawi. This extension has been made possible by Article 15 of the 1902 British Central Africa Order in Council, [1948] 8 STAT. R. & O. 222, 226 (No. 603), which left it to the colonial judges to determine what statutes were of general application. The recent trend in legislation, however, has been for the Malawi Parliament to enact either local statutes of similar nature, *e.g.*, The Sale of Goods Act, MALAWI LAWS ch. 48:01 (1968), or legislation expressly forbidding resort to English statutes and providing alternate remedies instead, *e.g.*, Statute Law (Miscellaneous Provision) Act, MALAWI LAWS ch. 5:01 (1968), or simply incorporate an English statute, *e.g.*, Companies Act, MALAWI LAWS ch. 46:03 (1968).

The judges of the superior courts (the High Court and the Supreme Court of Appeal) are all trained lawyers. The subordinate courts (as the Magistrates' Courts are sometimes called) are in four grades. The Courts of the Resident Magistrate are presided over by lawyers. There are also the Courts of the First, Second, and Third Grade Magistrates, which are inferior to the Resident Magistrates' Courts. These courts are presided over by laymen who have had at least nine months of legal training in the substantive and procedural laws of the country; this training exposes them to the basic concepts of Malawian law and its administration. Most of the lay magistrates have held their jobs for a number of years and have acquired considerable experience.

The other judicial system consists of the Traditional Courts. These courts were created in 1903 and were known as Native Courts during the British colonial administration and as Local Courts at the time of independence. They were given their present name in 1969.[7] Traditional Courts have their own hierarchical order: the Grades A and B Traditional Courts, the District Traditional Appeal Courts, the Urban and Grade AI Traditional Courts, the Regional Traditional Courts, and the National Traditional Appeal Court. The system of appeal may be summarized thus: appeals from Grades A and B Traditional Courts lie to the District Traditional Appeal Court of the District, then to the National Traditional Appeal Court; appeals from the Urban and Grade AI Traditional Courts go directly to the National Traditional Appeal Court. The Regional Traditional Courts, which are courts of first instance, have criminal jurisdiction only. There is one such court in each of the three regions of the country. Appeals from these courts lie to the National Traditional Appeal Court, which is the court of final jurisdiction in both civil and criminal causes under the system. There is thus a complete break between the two judicial systems. This break was effected by amendment of section 34 of Traditional Courts Act in 1970.[8] Until this amendment, appeals from the District Traditional Appeal Courts or the Urban Traditional Courts went to the High Court and thence to Supreme Court of Appeal.

The jurisdiction of the Traditional Courts extends to both criminal and civil matters except that, as noted above, the Regional Traditional Courts have criminal jurisdiction only. The limit of the jurisdiction of each of the grades of these courts is defined in the warrant of each court,

7. Acts Concerning Local Courts, [1969] Nos. 1, 31.

8. Act Concerning Traditional Courts, § 34, [1970] No. 38.

but it should be noted that, in the exercise of its jurisdiction, a Traditional Court can pass any sentence authorized by law, including death, provided it is empowered to do so in its warrant. These courts have jurisdiction over persons when both parties are Africans or when the accused is an African and the alleged offense is one within the jurisdiction of the court. There is, however, a statutory provision under which the responsible Minister may extend the jurisdiction to non-Africans in both civil and criminal cases.[9] In addition, there is a provision by which a Traditional Court can exercise jurisdiction over a non-African who has voluntarily acquired an interest in subject matter that would have been subject to customary law had the parties been Africans.[10]

Generally speaking, lawyers have no right to appear in Traditional Courts,[11] although in certain cases the responsible Minister may allow them to appear before a named Traditional Court when the matter to be determined does not involve a question of customary law.[12] Neither the state nor the accused has an automatic right to representation by counsel. All prosecutions are conducted by police prosecutors, regardless of the gravity of the offense. Since a 1970 amendment of the law, most criminal prosecutions, including homicides and sexual offenses, are prosecuted in Traditional Courts. In view of the number and seriousness of the cases they hear, the importance of these courts cannot be underestimated. The Regional Traditional Courts handle practically all the serious offenses under the Penal Code in which the accused is an African, but, as yet, lawyers are not permitted to appear before these courts. Therefore, legal aid services are of little relevance to persons charged before these courts.

The Urban Traditional Courts and the Grades AI, A, and B Traditional Courts are presided over by lay chairmen who may be authorized to sit with assessors appointed by the Minister. These chairmen have studied at the Staff Training College for three months to acquaint them-

9. MALAWI LAWS ch. 3:03, § 10 (1968).

10. *Id.*

11. *Id.* § 24.

12. The Traditional Courts (Appearance by Legal Practioners) Orders provide that lawyers may appear in those Urban Traditional Courts and Grade AI Traditional Courts specified in Traditional Courts (Terms and Conditions of Service) Rules, sched. III & IV, except when the matter involves customary law. Order No. 3 sets out a number of courts in which lawyers appear in criminal matters only. Under Order No. 4, lawyers may appear in Traditional Appeal Courts (presumably District Traditional Appeal Courts).

selves with the laws of the country. Judges of the Regional Traditional Courts consist of three lay, traditional chiefs, a resident magistrate, and a chairman of an Urban or Grade AI Traditional Court. The Chairmen of the Regional Traditional Courts are chiefs, and almost all the precedure that applies to the National Traditional Appeal Court applies equally to these courts.

There are five judges on the National Traditional Appeal Court. Three are lay traditional chiefs (two of whom are drawn from the rank of chiefs sitting on Regional Traditional Courts, while the other Chief is the permanent chairman of the court); one is a Resident Magistrate, who is a qualified lawyer, and one is a layman, who is ordinarily a chairman of an Urban or a Grade AI Traditional Court. The Chairman has, in most cases, attended the three month course at the Training College where he will have been exposed to the substantive laws and procedure of the Traditional Courts.[13] It is not clear whether the court reaches its decisions by majority vote or by consensus. So far, no dissenting opinions have been publicly expressed in court, but some members have been known to refuse to sign judgments that did not reflect their opinions. Since the court is still new, it would not be accurate to attempt to spell out any rules by which the court regulates itself.

Within this dual judicial system the predominant legal traditions are the African customary laws and the common law derived from the English common law. The two systems of law together with the statutory laws are administered side by side in the two systems of courts outlined above, with the customary laws applied in the Traditional Courts.[14] The system of litigation remains essentially adversary, but this feature is more pronounced in the High Court and the Magistrates' Courts. In the Traditional Courts, however, the emphasis is on achieving substantial justice without undue regard to technicality, and, although the system is closer to the adversary system than the inquisitorial system, the litigant does not have to guide his witness. More often than not, the court merely will call upon the witness to say what he has to say; indeed, it is required that on a plea of not guilty

13. Procedure in Traditional Courts is governed by the Traditional Courts (Procedure) Rules, as amended.

14. The civil jurisdiction of all Traditional Courts (other than the Regional Traditional Courts) is unlimited in matters to be determined according to customary law. In all other matters, it is limited to cases in which the subject matter in dispute does not exceed K 150 (U.S. $187.50).

> each witness, after being sworn or affirmed . . . shall state what he knows about the case and shall answer any relevant questions put to him, by the complainant, which the court considers proper.[15]

Surely the effect, and probably the aim, of this provision is that the witness should state all that he knows about the case; that is, rather than being a witness of the party who calls him, he is a witness *in the case*, unaffected and uninfluenced by the subtle yet effective psychological pressures working on witnesses in more sophisticated courts. Needless to say, under this provision witness testimony is unfettered by the rule against hearsay evidence. It is in the Traditional Courts that the majority of country folk prosecute their claims or are proceeded against in criminal cases, and, for the most part, legal representation is not available.

C. *The Legal Profession*

The legal profession consists of both public and private practitioners and a few law teachers from the law faculty of the University of Malawi. Lawyers in the public service are State Advocates,[16] Legal Aid Advocates, or Magistrates. Although the profession reflects the English tradition in a number of respects, the traditional division of barristers and solicitors has not been followed; the only criterion of membership in the profession is a recognized legal qualification, by whatever name designated.[17]

The Malawi Law Society is the body responsible for the discipline and welfare of lawyers. It was established by the Legal Education and Legal Practitioners Act[18] to succeed the Nyasaland Law Society. All private practitioners are members of the Society; practitioners in the public service are members "during such time as they hold their office or appointment."[19] At present, there are about twenty lawyers in private practice, distributed among six law firms. Of these practitioners, only two are

15. Traditional Courts (Procedure) Rule 29(c).

16. The term "State Advocate" is used loosely to include lawyers employed in the Registrar General's Department, the Lands Department, and any other ministry or department of government, but does not include those employed by public corporations such as the Malawi Development Corporation.

17. The Legal Education and Legal Practitioners Act, MALAWI LAWS ch. 3:04 (1968), sets out in its first Schedule those countries whose legal qualifications entitle the holder to apply for admission to practice as a legal practitioner in Malawi.

18. MALAWI LAWS ch. 3:04, §§ 26, 36-37 (1968).

19. *Id.* § 29(1).

Malawi Africans,[20] the rest being of either Asian or European descent. The majority of the African lawyers are employed in the public service. The Society's register shows that there are about sixty-two members;[21] twenty-eight are Malawi Africans who studied law after 1964, when the country became independent and the Government decided to train African lawyers.[22] It is not surprising that most of the Africans are in the public service, for the country's established law firms have been reluctant to recruit and engage African lawyers.

The legal practice is competitive; with such a small bar, however, serious competition is kept at a minimum. Most business from public or private corporations is shared among a few of the long-established firms. Lawyers make a more than adequate living. It would not be correct to say that the country has a surplus of lawyers. The present output of the Law School in the University of Malawi averages about five graduates a year, a figure that puts the legal profession several years behind national development. There are, however, some lawyers who have expressed alarm at the "flooding of the legal profession" with lawyers without jobs. These fears are unfounded. No lawyer is without a job at present, and, despite the reluctance of private law firms to hire new graduates (a circumstance that is extremely unfortunate), the public sector, including the statutory corporations, has shown a marked interest in employing new lawyers.

Apart from the lawyers, there is no other body of persons entitled to represent clients in the courts. Under the Traditional Courts Act, however, a husband, wife, guardian, servant, or master of a plaintiff or defendant may be permitted by the court to appear or act for the plaintiff or defendant.[23]

II. THE LEGAL AID PROGRAM

A. *History of the Program*

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

20. One of the two Africans is employed by a law firm, and the other set up his own private practice on April 5th, 1972. LAW SOCIETY, ANNUAL REPORT (1972).

21. This does not include the judges of the High Court, who are not members of the Society.

22. At the time the country achieved self-government in 1962, there was only one African lawyer, who became Minister of Justice and Attorney-General at independence in 1964.

23. MALAWI LAWS ch. 3:03, § 24(2) (1968).

knew of lawyers and noncustomary law at that time. For most of them, the traditional modes of dispute settlement, tempered by Western notions, were still actively practiced. By 1945 the traditional courts, styled Native Courts, were presided over by chiefs, with appeals lying to the District Commissioner, and from there to the High Court. The jurisdiction of these courts, however, was severely restricted.

The earliest statute providing for an organized legal aid scheme was the Act Concerning Poor Prisoners' Defense of 1945.[24] The purpose of the Ordinance was to provide for the representation of poor prisoners before the High Court. Aid was to be furnished when it appeared to be in the interests of justice that a prisoner should have free legal aid in the preparation and conduct of his defense. A further requirement was that the prisoner's means be insufficient to enable him to obtain legal representation by himself. If the certifying authority were satisfied that the two criteria were met, he would certify that the prisoner ought to have legal aid; if it were possible, the services of a pleader would be made available to the prisoner.[25] The certifying authority was a judge of the High Court or the Registrar of the High Court.

The remuneration of the pleader was paid out of the general revenue of the Protectorate. Pay was not less than forty-two nor more than one hundred twenty-six shillings for each case or each prisoner, but the judge could raise the amount when the case was of a complicated nature or was likely to be of a long duration.[26] In addition, if the pleader incurred special expense, he was allowed to submit a claim to the Registrar of the High Court, who then decided whether or not to reimburse the pleader, depending on whether such expenses were reasonably incurred. Any dispute was referred to a Judge of the High Court, whose decision was final.[27]

The operation of the Ordinance was limited to criminal trials before the High Court and 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 offenses triable by Magistrates' Courts as well as to appeals before the Federal Supreme Court.[28] The revised law also

24. Act Concerning Poor Prisoners' Defense, [1945] No. 19 (repealed 1964).
25. *Id.* § 3.
26. *Id.* § 4.
27. *Id.* § 5.
28. Poor Prisoners' Defense Ordinance, *codified at* NYASALAND LAWS § 3(a-b) (1957). The Federal Supreme Court was established under the Act Concerning the Supreme Court, § 3, [1955] No. 11 (Federation of Rhodesia & Nyasaland). The Federa-

provided that the Government might pay a legal practitioner any sum of money as a retainer and other remuneration, as it thought fit.

The scheme was unsatisfactory in a number of respects. First, there was no provision under which a prisoner could, 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 aid, there was no appeal from the decision of either. Secondly, it might have been wiser to make Resident Magistrates certifying authorities after legal aid had been extended to those courts. Thirdly, the limitation of aid to criminal cases, which may have been justified by the economic conditions of 1957, became obsolete as more and more Africans began to engage in small commercial activities. Fourthly, the kinds of offenses for which a certificate for legal aid might be given were not clear, and 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. Lastly, the successful administration and operation of the legal aid services needed the cooperation of the bar or Law Society; although the government made the choice of the legal practitioner to undertake this work, the practitioner had to be available. Given the small size of the bar, it was often difficult to obtain a lawyer.

B. *The Legal Aid Act of 1964*

The Poor Prisoners' Defense Ordinance was in operation until 1964, when it was decided that it should be replaced with a new, comprehensive law. In 1964 the Africans had control of the government, and among the early laws to be changed was the one relating to legal services for the poor. During the introduction of the Legal Aid Bill in Parliament, the 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 parties appearing before the Malawi Supreme Court and the courts of Resident Magistrates "where the interest of justice require[s] and we are going to be the judges of the interest of justice under this Bill."[29] The bill also extended legal aid to civil, as well as criminal cases and established a Department of Legal Aid to discharge more efficiently the government's responsibilities to the community. The contracts of retainer

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tion comprised Southern Rhodesia, Northern Rhodesia (now Zambia), and The Protectorate of Nyasaland (now Malawi).

29. Legislative Assembly Proceedings, 76th Sess. 1162 (1963-1964) (remarks of O.E. Chirwa, M.P., Minister of Justice, and Attorney General).

that the government had with lawyers were to be terminated and the duty of representation transferred to the new Department. The Department was to be part of the Ministry of Justice, under the general direction of the Minister, but it would be headed by a Chief Legal Aid Advocate.[30] The Chief Legal Aid Advocate was given power under the bill to retain lawyers when he and 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 about 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 cooperate and "adopt a reasonable attitude in regard to fees."[31]

The decision to create a Department of Legal Aid appears also to have been precipitated by a crisis of public confidence in the legal profession. Parliament decided to place responsibility for the administration of legal aid in the government. The reasons for this were not clear, but some of them may have been economic. The Department was to be within the Ministry of Justice and responsible to the Minister. Secondly, the Law Society had not shown sufficient interest in the representation of the poorer stratum of society. The profession had little communication with the people and had thus lost their confidence. This may be explained by the fact that the majority of the lawyers were not Africans and could not speak the language of most 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) summed 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.[32]

The Minister of Justice took a trip overseas to study the operation of legal services to the poor in a number of countries. All the counsel initially recruited to staff the Department were from outside Malawi,[33] a con-

30. Legal Aid Advocates used to be known as Legal Aid Counsel; this was changed by Change of Title of Public Office, General Interpretation Order No. 2 G.N. 183 (1972).

31. Legislative Assembly Proceedings, 76th Sess. 1163 (1963-1964) (remarks of M. H. Blackwood, M.P.).

32. *Id.* at 1164.

33. The majority of them came from the West Indies and Nigeria, but there were also a few Americans from the ranks of Peace Corps volunteers.

dition that persisted until the end of 1965 when the first Malawi nationals completed their legal studies in Britain.

C. *Survey of the Act*

Under the Legal Aid Act of 1964,[34] 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 assisted in the discharge of his duties by such Legal Aid Advocates as the Minister of Justice may appoint.[35] As stated above, legal aid may be granted in both criminal and civil cases, but the rules regulating the granting of legal aid in each differ slightly. Each category will be treated separately.

1. *Aid in Criminal Cases*

The Act provides that when a person accused of a criminal offense is committed to the High Court by a Magistrate, the committing Magistrate shall certify whether "it is in the interest of justice" that the accused should have legal aid and whether his means are insufficient to permit him to retain a lawyer to represent him.[36] If the Magistrate so certifies, the Chief Legal Aid Advocate is obliged to defend the accused as if he were a lawyer privately employed by the accused. Upon taking charge of the case, the Chief Legal Aid Advocate (or some other Legal Aid Advocate selected by him) must receive his instructions only from the accused person. The Chief Legal Aid Advocate is in fact and in law independent of the Minister in his professional conduct of the case.[37] His responsibility to the Minister is in matters of general policy of the department, including staffing, postings, and, of course, the kind of cases in 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 orally in court by the accused himself.[38]

The committing Magistrate is required to inquire into the means of

34. MALAWI LAWS ch. 4:01 (1970) [hereinafter cited as Act].

35. *Id.* § 3(1).

36. *Id.* § 4(1).

37. The writer was a Legal Aid Counsel from August 1968 to May 1969, and bases this assertion upon personal experience.

38. Legal Aid Regs. No. 4, G.N. 46 (1967) [hereinafter cited as Regs.].

the accused. If, in the course of this 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 shall order the person to make a contribution";[39] an applicant with any significant income is deemed to have the means to make a contribution.[40] An order for contribution becomes a debt to the Chief Legal Aid Advocate and can be enforced as a judgment debt.

Appeal from the order of a Magistrate for contribution lies to the High Court. The appeal generally is made in writing within fourteen days of entry of the order, after which the Magistrate must notify in writing "the other party to the appeal and the Registrar of the High Court." The Registrar may "dismiss the appeal, revoke the order for contribution or reduce or increase" the amount thereof.[41] Legal aid is granted through the above procedure in criminal cases prosecuted in the High Court, irrespective of the type of offense committed.

The situtation in Magistrates' Courts is different. In the first place, legal aid in prosecutions before these courts can be granted only for "an offense of a class which has been specified by the Minister by notice published in the *Gazette*." Secondly, the offense must be one triable by a Resident Magistrate.[42] Thus, if a case is brought fortuitously before a First or Second Grade Magistrate the accused would be prima facie disentitled from applying for legal aid. A study of the schedule of offenses for which legal aid may be granted shows, however, that some of them are triable in the lesser magistrates' courts.[43] The Minister may, therefore, extend the provision of legal aid to courts other than the Resident Magistrates' by publishing notice in the *Gazette*.[44] The two requirements of the interests of justice and lack of means of the accused persons are also applicable in determining whether or not aid should be granted; 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 criminal cases before both the High Court and Magistrates' Courts. He

39. Act § 4(2).

40. Regs. No. 5. This regulation has a schedule guiding calculation of the amount payable.

41. Regs. No. 6.

42. Act § 5(1).

43. Specified Offenses Notice, G.N. 74 (1964)(N).

44. Act § 5(2). The power, however, does not appear to have been invoked.

may grant aid if he is satisfied that "for special reasons it is in the interests of justice" to grant aid and the person has insufficient means to engage a private lawyer.[45] It is not clear in what situations such special reasons would arise; presumably the section envisages a situation in which the accused is charged with an offense for which legal aid ordinarily would not be given, such as an offense not specified in the schedule. Again, the limits within which the Chief Legal Aid Advocate may exercise his discretion is unclear; for example, it is not evident whether he could undertake the defense of a person accused of breach of the Exchange Control Regulations. It is probable that he could grant aid when a Magistrate has refused to grant a certificate because the Magistrate thought either that it was not in the interests of justice (which is extremely unlikely) or that the accused had sufficient means to enable him to engage a lawyer.

2. *Aid in Civil Cases*

Arranging 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 client. Section 7 of the Act provides:

> (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 Magistrate's Court may apply to the Chief Legal Aid Counsel for him to undertake the legal representation of the party concerned in respect of such cause or matter.
>
> (2) The Chief Legal Aid Counsel, upon receiving an application under subsection (1), may if he is satisfied that—
>
> (a) the applicant has reasonable grounds for instituting or for defending the procedings to which the application relates;
>
> (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 in respect of such proceedings,
>
> undertake the legal representation of the applicant in respect of such proceedings as if he were a legal practitioner instructed by the applicant.

Again, the Minister has the power to extend the application of this section to courts other than the High Court or Magistrates' Courts; but "causes or matters within the jurisdiction of a Traditional Court" are not

45. Act § 6.

within the scope of section (7).[46] This limitation presumably is designed to take out causes and matters determined according to customary law. It is important to emphasize the section's requirement that the Chief Legal Aid Advocate determine whether there are "reasonable grounds for instituting or defending the proceedings." No guidance can be obtained from the statute or case law about what constitutes "reasonable grounds," but it is submitted that any action is reasonable if it has a reasonable chance of success and is not merely frivolous, vexatious, or intended to delay and frustrate justice. It is immaterial that the action turns out to be unsuccessful or that it may involve considerable expenditure of time and money. The standard is a judicial one, and it is hoped that Chief Legal Aid Advocates will be liberal.

3. *Aid in Appeals, Orders for Contribution, and Appeals from Contribution Orders*

Under section 9 of the Act, any person who wishes to appeal from a conviction imposed by any court in a criminal case or from final judgment or order in any civil case, or who is a respondent in a civil appeal, may apply to the Chief Legal Aid Advocate for representation on the appeal. In considering the application, the Chief Legal Aid Advocate must decide whether the applicant satisfies three requirements: whether there are reasonable grounds for instituting or defending the appeal, whether the interests of justice require aid, and whether the applicant has insufficient means to retain a lawyer.

When, in granting legal aid in cases in which there are special reasons under section 6(a), in civil cases under section 7, or in appeals under section 9, the Chief Legal Aid Advocate is satisfied that the applicant has the means to make a contribution towards the costs of proceedings, he may order such contribution.[47] The amount of contribution should not be excessive. The Chief Legal Aid Advocate may appeal a contribution order in a criminal case to the Registrar of the High Court. It is not clear whether the right to appeal applies to allegations that excessive contribution has been ordered, that none should have been ordered, or that insufficient contribution has been ordered. It may be that the right relates to all three situations. In criminal cases, the aided person has a similar right to appeal to the Registrar of the High Court the decision of

46. *Id.* § 7(4).
47. *Id.* § 10(1).

either the Magistrate or the Chief Legal Aid Advocate ordering contribution, or the amount thereof. An appeal from 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 must notify the Registrar in writing of the appeal with a copy of the applicant's statement of income and the grounds for requiring contribution. The Registar may then dismiss the appeal, revoke the requirement for contribution, reduce the amount thereof, or merely direct that a certificate for aid be issued and contribution be made "as appears just."[48] The Registrar does not have the parties before him when he makes his decision; he decides purely on the facts as shown on the papers before him.

In cases in which there has been a settlement or damages have been awarded in favor of the aided person,

> there shall be a first charge on such property, damages or other [award] for the payment of any contribution due from such person in respect of such proceedings and for the payment of the amount by which such contribution is exceeded by the net liability for costs incurred on behalf of such person.[49]

This means that if the contribution required is, say, K 100 and the net liability for costs incurred in the proceedings is K 200, and the total damages awarded in favor of the aided person is K 500, there will be the first charge for the payment of the K 100 contribution and another payment of K 100 for the amount by which the contribution has been exceeded. This sum is payable to the Chief Legal Aid Advocate, who must issue proper receipts and account to the Government for the sum as revenue. The court is required to order the taxation of the aided person's costs, unless the parties have reached a settlement agreement providing otherwise. 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 the reasonable costs . . . to which a private practitioner would be entitled. . . ."[50]

If the court has ordered that an aided person should recover costs from the other party, the amount is not limited to the liability of the former to make a contribution for legal aid. Rather, costs are taxed as stated above and are presumed to have been incurred by the legal aid

48. Regs. No. 7.
49. Act § 10(4).
50. Regs. No. 9(1)-(2).

client. Any assessed costs that may be attributed to the work of the Legal Aid Advocate are presumed to have been paid by the aided person.[51] On the other hand, if an order for costs is made *against* a legally aided person, section 10 of the Act requires that his liability not exceed what is reasonable for him to pay. If the person cannot reasonably be expected to pay any amount, no order should be made. But when the Chief Legal Aid Advocate has received any contribution from the aided person, the payment is first applied toward the costs ordered. If the net liability in the proceedings is less than the amount of contribution ordered, the excess is paid back to the aided person.[52] The Act also requires, on pain of fine, the aided person to make an honest disclosure of his means.[53]

If the Chief Legal Aid Advocate takes on a civil matter that does not require court proceedings, and if he has sought a contribution from the client, the latter may ask that the Advocate forward a bill of costs to the Registrar of the High Court for taxation according to the ordinary rules for determining a private lawyer's fees.[54] This privilege is applicable to cases in which the legally aided person thinks the costs that would be allowed on taxation would be less than the contribution he has been requested to pay. Only a very sophisticated poor person would be likely to take advantage of this provision. Most of the applicants who patronize the Department are too grateful and ignorant to voice their dissatisfaction. Perhaps the best practice would be to provide for the submission of a bill of costs to the Registrar for taxation in all appropriate cases.

The appeals procedure in cases of a disputed contribution order was discussed earlier. Similarly, when a Magistrate refuses to issue a certificate for legal aid in a criminal case, the accused may appeal by making an oral statement in court. The Magistrate must immediately inform the Registrar of the High Court and the Chief Legal Aid Advocate in writing of the appeal and give his reasons for denying aid. The Registrar, after consultation with the Chief Legal Aid Advocate, may dismiss the appeal, make an inquiry into the facts, or direct the issuance of a legal aid certificate.[55] A similar procedure applies to appeals from a refusal of the Chief Legal Aid Advocate to undertake representation on appeal of a criminal cause.[56] There is no appeal from a refusal of the Chief Legal

51. *Id.* § 9(4).
52. Act § 10(7).
53. Act § 10(8).
54. Regs. No. 9(6).
55. Act § 11(1).
56. Act § 11(3); Regs. No. 7(1)(b), (2)(b).

Aid Advocate to grant legal aid in civil matters. The need for a system of appeal 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 to refuse to provide legal representation of any person in any proceeding, whether or not covered by the Act. The Minister's decision is final, but there is no requirement that it be published or explained.

4. *Revocation and Withdrawal of Legal Aid*

Under Legal Aid Regulation 10, aid may be terminated by the Chief Legal Aid Advocate at any time in a variety of situations. Aid may be terminated (1) at the request of the legal aid client himself, (2) if contribution by the aided person is in arrears for more than twenty-one days, (3) if the controversy has been resolved, (4) if the client has forced the litigation to be conducted unreasonably so that unjustifiable expenses are incurred by the State, or (5) if the client unreasonably insists on the continuation of the proceedings because he is unwilling to settle. Before aid is ended, notice of the action must be given the aided person who must have a chance to say why the aid should not be terminated. Death of the aided person and entry of a receiving order against an aided person are also grounds for termination of aid.

Legal aid may also be terminated under Regulation 10 when the Chief Legal Aid Advocate determines that an aided person has knowingly misrepresented or failed to disclose relevant information before or after the grant of aid. Regulation 10(4) also provides that at any point during proceedings to which an aided person is a party, the Chief Legal Aid Advocate or any other party may ask the court to decide whether the aided person has wilfully withheld or misrepresented information. After hearing what the aid recipient has to say, the court may terminate legal aid. It is not clear what information is covered by this provision. If it is the information that must be given in court as direct evidence, it is difficult to see how it could be related to the grant of legal aid in such a way that it should be a ground for revocation of aid. The court has adequate sanctions for the problem of unscrupulous witnesses. If the information covered by this provision is the information declared to the Chief Legal Aid Advocate upon application for assistance, then Regulation 10(4) adds nothing new to the Act. The Chief Legal Aid Advocate has adequate power under Regulation 10(2)(d) and (3) to deal with untruth-

ful applicants or recipients of legal aid. More fundamentally, 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 information to which the aided person and the Chief Legal Aid Advocate are privy. This suggests that financial statements and documents given to the Chief Legal Aid Advocate by the applicant are public information. However commendable on other grounds, such a construction is contrary to the legal profession's fundamental norm of ethical practice that counsel should not indiscriminately disclose a communication made to him by his client. Although the public is entitled to know the means of legally aided persons, one would expect that this information would not be the subject of indiscriminate disclosure. Thus, another party to the proceedings should not have access to information that relates purely to the financial means of a legally aided person. Furthermore, a court should not initiate an inquiry under this regulation unless the party can show that the requested investigation is not only relevant, but also essential to the success of his claim or defense.

When the Chief Legal Aid Advocate revokes legal aid, he must give notice in writing to the aided person and his counsel. Similarly, if it is the court that revokes legal aid, it should notify the Chief Legal Aid Advocate of the action. The effect of termination of aid is that it is revoked for all purposes, except that all retained practitioners should be paid for their work to the time of termination. Costs as well as contribution remain recoverable, subject to taxation.

There is no provision for appeal from a decision of the Chief Legal Aid Advocate to revoke legal aid. Perhaps this is justified on the ground that requiring the Chief Legal Aid Advocate to undertake legal representation of a person whose trust he has lost would be very problematic, because mutual trust is necessary for the attorney-client relationship to function effectively.

D. *Scope of the Program*

Generally, legal aid is available to all people in all cases triable in the High Court; in subordinate courts, coverage extends to civil cases and serious offenses only. There is usually no restriction on the kinds of criminal defendants who may receive legal aid, although a person accused of motor manslaughter (death caused by the defendant's operation of a motor vehicle) may not receive legal aid.[57] The rationale is that

57. Motor Manslaughter Representation Order, 1964 G.N. 154 (1964) (N).

the victim of the accident or his relatives are likely to seek legal aid in a civil action, and public policy in this case favors legal aid for the plaintiff, not the defendant. Further, as a general practice, legal aid is not given to public servants accused of the offense of theft from the government. 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 reason, however, is less convincing if it is remembered that persons accused of equally serious offenses, such as murder or even treason, are entitled to legal aid if their case is tried before the High Court. This observation is not meant to suggest that legal aid should be denied to accused murderers and traitors.

The granting of legal aid is the responsibility of the Chief Legal Aid Advocate, except when a certificate is issued by a Magistrate recommending that the person should receive legal aid. The Chief Legal Aid Advocate assigns particular cases to the individual Advocates on the staff. If he and the Advocates within the Department are too overburdened with work to take the case, a private practitioner may be retained at government expense. There is no specialization among the counsel within the Department; an individual counsel is likely to be assigned a variety of cases, ranging from domestic relations to criminal law. Theoretically, all Advocates, old and new, may be assigned to any case, but in practice a new man will usually be started with problems equal to his experience. He will begin by drafting advisory opinions, which the Chief Legal Aid Advocate may review before they are released. Further, the new man in the Department usually will be required to accompany the Chief Legal Aid Advocate or some other experienced Department counsel to court. Due to pressures of work and insufficient personnel, this period of supervision is short, and the new Advocate sets off on his own fairly quickly.

As has been stated above, the Chief Legal Aid Advocate may retain a private practitioner if the Department is unable to undertake representation. In all cases in which a private practitioner is retained, he is subject to the direction of the Chief Legal Aid Advocate.[58] There is no special procedure for the engagement of private lawyers; the decision depends on the personal choice of the Chief Legal Aid Advocate and the availability of the lawyer to whom he desires to assign the case. Nor does the

58. Act § 13.

Chief Legal Aid Advocate necessarily choose junior members of the bar; in most cases the assignment is made to a firm of lawyers (and all but two firms have more than one lawyer). The firm chooses the particular lawyer to undertake legal representation.

The proportion of cases assigned to outside lawyers is rather small[59] compared with the total volume of cases processed by the Department. Moreover, the frequency with which outside lawyers receive legal aid briefs is not great; indeed, these briefs do not form a significant proportion of their business. A reason for this limited use of private practitioners may be the desire to keep Department expenditures to a minimum, especially since one of the purposes of establishing the Department was to reduce public expenditures. 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 counsel.

There is a cordial relationship between the Department and the bench. Not infrequently, unrepresented litigants have been referred by the court to the Department to apply for legal representation. The private bar is equally well disposed to the Department, perhaps because the Department deals with cases of no financial consequence to them. The initial disquiet with which the legal aid program was received by the Law Society died down as the program failed to produce any unsettling effects on established law practices.

The Department handles many types of cases. In criminal matters prosecuted in the High Court, it appears that there is no limit to the types of cases for which aid may be granted. The position in Magistrates' Courts is different because in these courts the Minister has specified the kinds of criminal cases in which legal aid may be given.[60] The Minister, however, may authorize legal representation in any case in which complicated legal questions or the interests of justice make representation desirable.

It has not been possible to determine the average caseload per Department lawyer or the number of litigated cases per lawyer over a given period. One difficulty is that the lawyers, except for the Chief Legal Aid Advocate, have been subject to transfers after relatively short periods in the Department. It is not uncommon for a new lawyer to be assigned cases that have been handled by one or two predecessors. A lawyer leav-

59. Comparative figures are unavailable.

60. Specified Offenses Notice, G.N. 74 (1964) (N).

ing the Department will usually have his cases distributed among his remaining colleagues, and not merely to his replacement alone, if one is available. The Department is understaffed and often has been unable to fill all its established posts.

In recent years most of the Department's cases have been civil matters. The Department's *Summary of the Annual Report* for 1970 shows that 171 applicants filed 175 applications for legal aid in criminal matters. Of these, 161 were granted and fourteen were refused. The reasons for the refusals were not available. From the 175 applications, 146 litigated criminal cases developed, of which 130 were completed and nine were pending at the end of 1970.[61] Figures on the year-end status of seven cases were unavailable. The *Summary of the Annual Report* for the same period shows that there were 785 applicants and applications for legal aid in civil matters, of which 751 were granted and 34 refused. Of 543 cases eventually registered, 278 were completed or otherwise disposed of during the year and 265 were pending at the end of the year. It is not clear what happened to the remaining 208 applications; it is possible that aid may have been withdrawn or otherwise revoked in some of these cases. A detailed breakdown of the applications shows the diversity

61. TABLE I
LEGAL AID IN CRIMINAL CASES—1970

Number of Applicants	Nature of Legal Problem	Number of Cases
94	Murder	70
19	Manslaughter	18
16	Defilement	16
6	Attempted defilement	6
5	Giving false information	5
5	Theft	5
4	Forgery	4
3	Road traffic	3
2	Malicious damage	2
2	Perjury	2
2	Receiving stolen property	2
2	Unlawful wounding	2
1	Accessory to the fact after murder	1
1	Communicating secret document	1
1	Conspiracy	1
1	Fraudulent false accounting	1
1	Illegal manufacture of firearms	1
1	Infanticide	1
1	Obtaining by false pretenses	1
1	Rape	1
1	Trial by ordeal	1
2	Miscellaneous	2
171	Total	146

SOURCE: LEGAL AID DEPARTMENT, SUMMARY OF THE ANNUAL REPORT (1970).

of the problems faced by the applicants.[62]

A comprehensive report for 1971 was not available at the time of this writing, but partial figures were obtained through inspection of the registers in the Blantyre offices and through interviews with the Legal Aid Clerks at the Lilongwe offices. Of 156 applications for aid in civil matters filed at the Lilongwe offices by 184 applicants, 100 were granted and six were refused; another 50 were still awaiting the decision of the Chief Legal Aid Advocate, or were otherwise undetermined, at the end of the year.[63] An inspection of the Blantyre civil register shows that there

62. TABLE II
LEGAL AID IN CIVIL CASES—1970*

Number of Applicants	Nature of Legal Problem	Number of Cases
265	Motor accident**	265
239	Nonpayment of wages	63
69	Judgment debt	69
53	Workmen's compensation	53
43	Contract	1
16	Legal advice sought	16
11	Divorce	11
11	Maintenance	11
8	Claim for property	8
7	Affiliation	7
7	Probate	7
5	Damage to property	5
4	Adoption	4
2	Custody of children	2
2	Land	2
2	Libel	2
2	Separation	2
2	Wrongful dismissal	2
1	Share in business	1
36	Miscellaneous	12
785	Total	543

Source: LEGAL AID DEPARTMENT, SUMMARY OF THE ANNUAL REPORT (1970).
*These figures relate to both the Blantyre and Lilongwe offices. The *Report* states neither the age of the various applicants nor their sex. The *Report* does not make clear which cases were litigated and which were settled out of court, nor does it state which were successfully litigated and which were not.
**These cases usually are settled out of court with insurance companies.

63. TABLE III
APPLICATIONS FILED IN LILONGWE OFFICES
FOR LEGAL AID IN CIVIL CASES—1971

Nature of Legal Problem	Number of Applicants
Motor accident	74
Contract	48
Domestic relations	8
Miscellaneous*	54
Total	184

*Includes cases still pending decision of the Chief Legal Aid Advocate at the end of the year.

were 173 applications filed in 1971 by 189 applicants. The register also shows that, of 102 cases, 52 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 20 cases. In six cases the results were unknown. A direction to take no further action may be made on a number of grounds. For example, the applicant may have failed to supply vital information relevant to the case or otherwise indicated disinterest in the matter. The result is that the application lapses. As in the previous year, the cases covered a broad range of subjects. There were 119 adult male applicants and 27 female applicants; the rest were applications on behalf of deceased persons' estates. The addresses of the various applicants revealed that they were from all parts of the country. This does not mean that all the applicants made journeys from the different parts of the country to Blantyre seeking legal aid. It is likely that more than half of the applicants resided within Blantyre or the surrounding districts. The register information may be misleading because an applicant's village address, district, and chief are recorded in the register, but information about the applicant's *working* address is recorded only on the application form, which is filed separately.

There was a large drop in the number of criminal cases handled by the Department in 1971. In both the Blantyre and Lilongwe offices there were only eighteen applications for legal aid. Of these, four were dealt with at the Lilongwe offices: one case of theft by servants who were tried and found guilty by the High Court; one of forgery in which the defendant was found guilty by a Magistrates' Court; one of rape in which the defendant was acquitted by a Magistrate; and one of defamation of character in which the result was not certain at the time of this writing. The remaining fourteen matters, handled in Blantyre, concerned defilement, infanticide, rape, malicious damage, motor accident, trial by ordeal, theft, assault, and false pretenses. The explanation for the decrease of applicants for legal aid in criminal matters is that most cases, which were formerly tried in the High Court and the Magistrates' Court, are now brought and tried in the Traditional Courts, notably the Regional Traditional Courts. As has already been noted, no counsel is, as yet, permitted to appear before these courts. The bulk of legal aid work in criminal cases in the past consisted of defending poor persons in the High Court. The transfer of criminal jurisdiction to the Traditional Courts has had great effect on this aspect of the Department's work.

It is noteworthy that the *Summary of the Annual Report* for 1972 shows that there was a slight increase in the applications for legal aid in both civil and criminal cases. Thirty-two applicants filed thirty-four applications in criminal matters, and all were granted aid. At the time the report was published all the cases except three had been processed through the courts, but the results in the individual cases were not reported. The pattern of legal problems revealed that there were very few serious offenses of the kind defended in 1970.[64]

In 1972 there were 501 applications for legal aid in civil matters; 489 were granted; only twelve were refused. The number of civil cases that were eventually filed was 384, of which only 127 were completed during the year and 243 remained pending at year's end. Figures on the status of the remaining fourteen cases were unavailable.[65]

64. TABLE IV
LEGAL AID IN CRIMINAL CASES—1972

Nature of Legal Problem	Number of Applicants & Cases
Theft	11
Forgery	6
Uttering false documents	3
Conspiracy	2
Indecent assault	2
Malicious damage & arson	2
Rape	2
Defamation	1
Defilement	1
Illegal possession of property	1
Road traffic	1
Total	32

Source: LEGAL AID DEPARTMENT, SUMMARY OF THE ANNUAL REPORT (1972).

65. TABLE V
LEGAL AID IN CIVIL CASES—1972

	Number of:			
Nature of Legal Problem	Applicants	Cases	Cases Completed	Cases Not Completed
Non-payment of wages	136	19	6	13
Fatal motor accident	131	131	35	96
Contract	51	51	24	27
Judgment debt	36	36	16	20
Divorce	28	28	9	19
Workmen's compensation	27	27	14	13
Claim for property	13	13	3	10
Libel	9	9	6	3
Maintenance	9	9	4	5
Legal advice sought	8	8	3	5
Probate	8	8	0	8
Damage to property	7	7	1	6
Affiliation	6	6	1	3

In general, the Department serves the poorer members of the community, the majority of whom are Africans. In criminal cases, most of the applicants are ordinary villagers who engage in subsistence agriculture. They are unsophisticated, and indeed most of them can speak and understand only Chichewa, the vernacular language of the majority of the population. The Department is thus of particular importance to these people because almost all of its lawyers are local men who can speak and understand Chichewa and the other vernacular languages, as well as English. The clients can communicate freely with these lawyers, and often an understanding of points of view is therefore quickly achieved. This is not the case with the predominately English-speaking private practitioners, who generally cannot, despite their long stay in the country, construct a simple sentence in a vernacular language.

The Department has a growing clientele, especially in civil applications, which consists not only of poor persons who cannot afford any contribution, but also of wage earners and small businessmen. Depending on the circumstances of the case, the latter group is also given legal aid, especially when their cases are meritorious and directed against large and well-established businesses. These clients are usually willing and able to make a reasonable contribution toward the cost of the proceedings. They thus obtain the satisfaction of being able to discuss their problems directly with the lawyer without an interpreter. Nevertheless, legal aid remains a program for the poor, for whom it was primarily established. Although the results are sometimes unfortunate, legal aid has been given only to one of the parties to an action. There is no reason, however, why aid should not be given to both parties if both are deserving. The Chief Legal Aid Advocate could represent one party and instruct a private practitioner to represent the other. Otherwise, the Chief Legal Aid Advocate must decide which of the two is the most deserving of assistance.

Adoption	4	4	1	3
Land	3	3	2	1
Separation	2	2	1	1
Child custody	2	2	0	2
Matrimonial matters	1	1	0	1
Share in business	1	1	0	1
Wrongful dismissal	1	1	0	1
Miscellaneous	18	6	1	5
Total	501	384	127	243*

Source: LEGAL AID DEPARTMENT, SUMMARY OF THE ANNUAL REPORT (1972).

* Status of fourteen cases unavailable.

III. Operation of the Program

As previously indicated, the Legal Aid Department is part of the Ministry of Justice. At the head of the constitutional structure is the Minister of Justice, who is responsible for the overall working of not only the Department but also the entire Ministry. 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 policy set by the Minister.

From the time it was formed, the Department of Legal Aid has received appropriations voted by Parliament for operating expenses. The appropriations do not include the salaries of Legal Aid Advocates or part of the clerical staff, but have included, in some years, salaries of stenographers and messengers. For the year 1964-65, Parliament appropriated £2,120, which was spent as follows:

Counsel fees	1,000
Civil fees and costs	500
Transport and travelling	330
Salaries for stenographer	100
Electricity and water	50
Library	50
Postal services	50
Office furniture	20
Messengers' uniforms	10
Office sundries	10
Total	£2,120

At that time, £1 equaled approximately U.S. $2.50. The sum appropriated was less than what the Government had paid to legal practitioners under the former retainer scheme—and, of course, this reduction was in line with the policy of the administration to effect some saving by establishing the Department. Nevertheless, as was warned in Parliament during the debate of the bill,[66] the figures increased in several subsequent years. In 1965-66, the appropriation rose to £4,350, but in 1966-67 it dropped to £1,005. The appropriation decreased because, by then the strength of the Department's professional staff had increased, and some of the expenditure occasioned in 1964-65, notably private counsel fees, was either cut off or directly controlled by the Ministry of Justice. For example, counsel fees alone accounted for £1,000 in 1964-65. In

66. Legislative Assembly Proceedings, 76th Sess. 1163 (1963-1964).

1965-66, counsel fees and Government costs accounted for £2,500, but this dropped to £750 in the year 1966-67. This drop in counsel fees continued in the following year to £500. The overall expenditure for that year was £1,200. The 1969-70 appropriation was £1,730. The 1970-71 appropriation was K 5,270 (£2,635).[67] It should be emphasized that all of the annual appropriations represent money devoted to the operations of the Department, such as payment of the fees of retained private practitioners, payment of any costs awarded against an aided person, and general expenditures of the Department. All the salaries of the professional and administrative staff are paid directly by the Ministry.

All the lawyers in the Department are full-time employees of the Ministry of Justice. There are no part-time Legal Aid Advocates. The budget 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. 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, some of whom have worked for the Department. 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 without having to undergo any other form of practical training.

The Chief Legal Aid Advocate works closely with the Ministry of Labor[68] and the Ministry of Community Development and Social Welfare. The Ministry of Labor is involved in the labor disputes and industrial injury claims. Most of the cases relating to labor are handled by the Labor Ministry, but the Chief Legal Aid Advocate usually takes the cases that are likely to raise difficult points of law, be litigated, or involve amounts that exceed claims computed under the Workmen's Compensation Act. The Ministry of Social Welfare commonly seeks legal advice on problems of adoption of small children. The Department of Legal Aid also works in cooperation with District Commissioners, who serve as channels through which the legal aid program can be made known to the country folk and contact can be maintained with clients in remote areas.

67. The country changed to decimal currency in that year. The new currency was called the kwacha and at that time K 2 equaled £ 1, or approximately U.S. $2.50.

68. The Legal Aid Act § 8, MALAWI LAWS ch. 4:01, § 8 (1970), requires that where a labor officer begins an action for a party under the Labor Legislation (Miscellaneous Provisions) Act, MALAWI LAWS ch. 56:01 (1968), he must inform the Chief Legal Aid Advocate and accept the latter's supervision.

IV. Evaluation of the Legal Aid Program

It is clear from the foregoing outline that the legal aid program is expanding its operations in civil cases, although its involvement in criminal cases has been reduced by the broadening of the jurisdiction of the Traditional Courts. The effect of the Traditional Courts cannot be overemphasized. These courts are, indeed, an important part of the legal system, and so long as the two systems remain separate, they will affect legal representation, and legal aid in particular. The question, therefore, may be posed whether the Legal Aid Department continues to serve the purpose for which it was established.

It may be argued that a legal system that seeks to provide free or subsidized legal aid should do so first in the sphere of criminal liability, where the liberty or life of an individual may be in jeopardy. Even the colonial administration recognized this necessity by providing legal assistance in criminal cases in the High Court and Magistrate's Courts under the Act Concerning Poor Prisoners' Defense.[69] Furthermore, under the present legislation, the authority certifying need of legal aid in criminal cases are the Magistrates, with an appeal to the High Court Registrar. The spirit of this legislation shows that the underlying policy of the lawmakers has been to provide legal aid in criminal cases, or at least in serious criminal cases. Indeed, the twin necessities of the right to defend oneself and the right to equal representation of the parties before a court of law are crucial in criminal proceedings. These considerations, among others, were the reasons the program was revised and brought up to date, so that what was conceived to be justice in criminal cases could be brought within the reach of a majority of poor people. The decrease in applications for legal aid in criminal cases may reflect a corresponding disenchantment with former values. It is not clear how greatly the number of criminal trials in the High Court has been affected;[70] it is clear, however, that the majority of civil cases in the Republic are heard by the various Traditional Courts.[71] Nevertheless, the Department continues to serve a large proportion of the population. Poor persons are still eligible for legal aid for almost all offenses in the High Court and a number of offenses in Magis-

69. [1945] No. 19 (repealed 1964); *see* notes 24-34 *supra* and accompanying text.

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

71. It is estimated that in 1970, Traditional Courts alone tried 113,761 civil cases throughout the country. Department of Information, *supra* note 2, at 29.

trates' Courts. Even if the criminal side of the Department's functions is not fully used, the civil side of the Department's activity remains fully engaged. The 1972 criminal figures show that the public is taking a revived interest in the Department for most cases tried in Magistrates' Courts. As the Department becomes better known, it will be able to serve the public more efficiently.

We have already seen that the field of greatest litigation is motor accident cases. The 1972 civil cases *Annual Report* shows also that there was an increase in domestic relations, breach of contract, and judgment-debtor cases. It can be safely predicted that divorce cases will continue to increase because of social change. There is also a potential area of litigation in which the Department could be of great service—the field of landlord-tenant relations,[72] especially in the so-called traditional or semi-traditional urban housing matters. So far, neither the Department nor the public seems to have realized that the hand of justice extends to these areas. With the rapid growth of urban population, the Department can help in advising or conducting tenant's defenses in cases of unlawful eviction. The Department might even seek to reconcile the tenant and landlord without necessarily taking a stand on behalf of either. The Department could also advise poor and ignorant landlords or purchasers who deal with municipal corporations or land allocation committees.

A second factor to be considered in evaluating the usefulness of the Department is the expense of running it. As already noted, when the Department was being established, it was generally thought that public expenditures for legal aid would be reduced. As we have seen, though, the cost of operating the Department has not been much below what had been spent under contracts of retainer,[73] especially if it is appreciated that the appropriations cited above do not include the salaries of the

72. Neither the High Court nor the Magistrates' Courts have jurisdiction in land matters, which are to be taken to the Traditional Court of the area in which the property is situated. Traditional Courts Act § 8, MALAWI LAWS ch. 3:03, § 8 (1968). The High Court has held, however, that it has jurisdiction over questions relating to occupancy, as distinguished from title to land.

73. It is estimated that before 1964 the Government spent about $3,000 annually on retainers. The average expenditure of the Department since 1964 is as follows:

1964	£ 3,120
1965-1966	£ 4,350
1966-1967	£ 1,005
1967-1968	£ 1,280
1968-1969	figures not available
1969-1970	£ 1,993
1970-1971	K 4,900 (£ 2,450)
1971-1972	K 5,270 (£ 2,635)

professional and administrative staff. It must be understood, however, that the Department engages in a much wider field of legal action than was the case when private practitioners were retained only for criminal cases. In fact, the bulk of the Department's activity today is in civil cases, the scope of which should expand with the growth of economic activity in the country. Furthermore, the Department does advisory work in both criminal and civil cases.

There is also the human and psychological factor. Only two of the twenty or so private practitioners are Africans, whereas all Legal Aid Advocates are Malawians. The lingiual and cultural identity that these lawyers have with the majority of legal aid applicants helps reassure the public that the law and its lawyers are available and approachable. It is also important that, in addition to the useful work it does for the community, the Department collects revenue for the State in the form of contributions, costs, and legal fees. Even disregarding this ancillary revenue, though, the very concept of a legal aid program involves some expenditure without material returns.

Policy considerations must not be forgotten. The program is too well-established to be eliminated altogether from Malawi's legal structure. The question then is: on whose shoulders should the program be placed? The Law Society's? The present number of the lawyers at the bar in private practice is so small that it is questionable that sufficient numbers would be willing to undertake the responsibilities. The Society appears, to say the least, to be ill-equiped to handle such an adventurous program. There would seem to be no justification for placing responsibility for legal assistance with the bar, at least in the foreseeable future.

One more question may be posed: whether the program is fulfilling its purpose. It cannot be pretended that the program reaches a significant part of the population. The majority of the people still remain unaffected by the activities of the Department because they are ignorant of its existence. For the majority, a Traditional Court is the best forum for their problems, which often involve customary law. The program is, however, relatively well known in the urban and surrounding areas. It is people in these areas who use legal aid most. The few people from rural areas who seek legal aid usually have heard of the program either in a town or from someone who has had contact with urban dwellers. It may be that it is unnecessary to advertise the program widely since the nearest courts in most rural areas are the Traditional Courts in which legal representation is rarely permitted.

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 new problem. This is particularly welcome given the many novel types of disputes arising in a changing society. The criminal side, however, could be made to work on a broader range of cases than it does at present. Advantage could be taken of cases coming before Magistrate's Courts. The 1972 *Annual Report* shows that very serious cases are still being brought before these courts.

V. Conclusion

This Article has been a short account of the history and operation of the Legal Aid program in Malawi. The program was and is intended to produce 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 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 Africans.

The program is unique among Commonwealth countries in that it is a part of the Ministry of Justice and in its provision of all the services of a law firm. Alternatives to the present structure of the Department include having it deal with specified kinds of common legal problems, such as matrimonial cases, as was the case of Jamaica in 1964; having 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 simply having an ombundsman, as in New Zealand. The English system is the most similar to the present Malawi practice except that it requires a large and established bar. The Malawi legal aid program provides a permanent and comprehensive system of legal aid in all civil litigation and in a number of criminal prosecutions. As part of the civil service, the lawyers also have job security and regular income.

There is no doubt that the program is a noble venture that has worked well so far. The effect of the Traditional Courts Act of removing criminal cases from courts where legal aid is available should be seen as part of a continuing search for a settled and satisfactory legal system that will respond to the local circumstances rather than as an attack upon the legal aid program. Like many novel programs, legal aid in Malawi will have to stand the tests of time and change. It certainly does not accord with reason that law should exist without lawyers. The Department, therefore, should expand in both size and the kind of cases it will handle.