

**Equal Access to Justice**  
**Reform on Legal Aid in Mauritius**

**GREEN PAPER**

**Prepared**

**By**

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*What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons ...”*

**Professor D. Venice**

## **A Thought Provoking Point of Departure**

**The 'right to be heard' is useless if we do not have the right to be heard through a counsel, and that right we cannot enjoy unless we are able to pay to the lawyer. Without a lawyer at his back, a person may be put on trial evidence irrelevant to the issue or otherwise inadmissible. He needs the guiding hand of a lawyer on every step in the proceedings against him because he does not know how to establish his innocence. The resulting injustice may be intolerable for him and he may turn violent.**

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# Background

## 1. Terms of Reference

In November 2007, a project to submit a Green Paper on **Equal Access to justice: Reform on Legal Aid in Mauritius** was sanctioned by the Attorney General's Office following a Cabinet Decision.

Unlike a legal revolution, the Green Paper is not intended to displace the Legal Aid Act, but it will merely attempt to update certain substantive and procedural aspects of the Act so as to give it the dimension it needs for its purposeful existence in years to come.

## 2. The broad aims of the Green Paper are:

- (i) To prepare a strategic plan for Legal Aid Reform in Mauritius.
- (ii) To discuss the salient features of the Legal Aid Act 1973, and identify the strengths and drawbacks of the present legal aid support delivery.
- (iii) To make recommendations for a revised Legal Aid Act so as to ensure an efficient and improved access to justice in Mauritius.
- (iv) To propose and motivate for the establishment of a Legal Aid Board that would implement a variety of interventions, and be a leading provider of quality legal services, ensuring effective access to justice for the indigents and vulnerable in an independent manner.

## 3. Procedure

A brainstorming session was held on 14 December 2007 to discuss general aspects of Legal aid in Mauritius with a view to prepare a Concept Paper which would serve as a working document for the forthcoming seminar. Issues that were raised were:-

### **3.1. The right to Legal Representation**

- Common Law principles of procedural justice
- Constitutional guarantees (Entrenching procedural justice)
- Legal Aid Act
- Meaning of ‘substantial injustice’ if deprived of the right to legal representation.
- Meaning of equality and justice in the modern context.
- Proposals to improve the present legal aid system.

### **3.2. Determination and Qualifications for legal aid**

- Meaning of ‘indigence’
- Means test calculation
- Proof of Qualification
- Fraud by legal aid applicants/recipients
- The complexity of the case in fact and in law
- The personal equipment of an accused to fend for himself
- The gravity of the case, the nature of the offence alleged, and the possible consequences for the accused, if convicted.

### **3.3. Legal Aid Priorities, Inclusions and Exclusions**

- Criminal matters (Common law offences and statutory offences)
- Civil matters

- Labour matters
- Divorce cases and family law matters
- Landlord and tenant matters
- Company law matters (Insolvency)

#### **3.4. Operation of the Legal Aid Scheme**

- Evaluation of Application
- Completion of document
- Confidential nature of information
- Means test calculation (Assessment of eligibility)
- Discretion of the ‘Deciding Authority’
- Appeal against refusal of legal aid

#### **3.5. Functions of Legal Aid Officer**

- Determination of the requirements of legal aid
- Counseling
- Referral to other institutions for assistance
- Assisting the completion of application form and verification of correctness and competences)
- Application of prescribed means test
- Referring applicant to a legal practitioner (choice of legal representative)
- Completion and safekeeping of documents

- Maintenance of Registers, statistics and returns.

### **3.6. The Legal Practitioner**

- Choice of a legal practitioner and agreement with the Legal Aid Officer
- Notice that Legal aid is being rendered.
- Circumstances for withdrawal from the case
- Disqualification of the legal practitioner
- Rapport with the indigent client
- Remuneration of legal practitioner

### **3.7. Creation of a Legal Aid Board**

- The drawbacks of the present system
- The efficiency and effectiveness of a centralized system under the Legal Aid Board
- Objects and General Powers of the Board
- Constitution of the Board
- Finances of the Board

### **3.8. Accessing Legal Aid to All**

- Open justice centers in different regions of the country as primary
- Creation of Legal Aid Clinic at the University of Mauritius
- Judicare system

- Salaried lawyers
- Paralegal and Community advice officers (NGOs)

After the brainstorming session the Concept Paper was prepared for circulation to various stakeholders who were representatives from the State Law Office, Law Society, Law Reform Commission, Bar Council, University of Mauritius, Trade Unions and Ministry of Social Security.

After the circulation of the Concept Paper a seminar was held on 23 April 2008 at the Human Rights Centre to discuss-

- (i) the new concept of Legal Aid
- (ii) Application of Legal Aid
- (iii) The eligibility test
- (iv) Expanding and extending legal services
- (v) Establishment of a Legal Aid Board
- (vi) Corporate social responsibility

A final report is the outcome of the deliberations during the seminar.

## Acknowledgments

I wish to express any appreciation and thanks to Honourable Rama Valayden, Attorney General, for giving me the opportunity to research on a project aimed at reviewing the present Legal Aid Act with a view to bringing reform to some of the anomalies that have emerged through the course of time.

The project would not have been completed without the consistent support and assistance from Mr. D.B. Madhub, the Ag. Assistant Solicitor-General, and his team members drawn from Attorney-General's Office. His timely advice has been of immense value in the compilation of this report. I owe him a special thanks, along with his team members.

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May the Lord Bless them all.

**Professor Ved Prukash Torul**

**Chairman**

**Legal Aid Reform Project**

# Executive Summary

The objective of producing a **Green Paper on Equal Access to Justice: Reform on Legal Aid in Mauritius**, is to develop a new Socio-economic productive process which will meet the recurrent challenges of providing a better security and social justice to indigents who cannot afford to have equal access to justice. This study is engaged in contextualising the Legal Aid Act within the Mauritian rapidly changing social and economic climate which is at its dynamic and developmental stage. There is now, therefore, a greater urgency to be sensitized of the realities that the present Legal Aid Act responds to, how inadequate and wanting it is, and finally, the need to reform it.

The Green Paper has highlighted the following points:-

1. **Right to legal aid as a basic human right**

Legal aid or access to justice as a human right is implicit in Article 7, 8 and 10 of the Universal Declarations of Human rights. It is also provided in Clause 3(d) of Article 14 of the International Covenant on Civil and Political Rights. Section 10(2) (d) of the Constitution of the Republic of Mauritius in its chapter on protection of Fundamental Rights and Freedom of the individual, has also provided for the right to a legal representative. Section 4 of the Legal Aid Act 1973 has made provisions for “any person who wishes to obtain legal aid and to be party to civil and criminal proceedings”.

## **2. Shortcomings of the Legal Aid Act**

### **2.1 Means Test**

One of the most important problem that it featured in the Legal Aid Act is the question of a financial ceiling. The unfairness of the present system lies firstly, in the fact that there are many people in the middle-income group who are by no means wealthy but whose disposable income exceeds the maximum figure. Secondly, that many people are not prepared to embark on litigation because the financial risk is too uncertain.

### **2.2 Appeal against refusal to Legal Aid**

There are no appeals against refusal to grant legal aid. The decision of the Authority is final.

### **2.3 Choice of Attorney or Barrister**

A situation can cause some problem is the fact that the assisted person is not allowed to choose his own attorney or barrister. This is done for him by the Authority. The assisted person should be allowed to choose from a panel of solicitors who are willing to accept cases under the schemes.

### **2.4 Procedures in Civil Cases**

The Legal Aid Act does not lay down procedure for a civil appeal to the Supreme Court. The Act is also silent on this question: “Can a person ask for

order for execution of the judgement though the other party is trying to seek legal aid to appeal?”

## **2.5 Appeals to the Privy Council**

No appeal to the Privy Council is provided in the Act.

## **2.6 Professional Fees**

Opinions have been voiced that the fees paid to the solicitors and barristers are not adequate.

## **3. Proposals for Reform**

### **3.1 The new concept of Legal Aid**

The concept of legal aid should not be restricted to meaning “legal representative in court proceedings” through lawyer at state expense in court proceedings. It has now a wider connotation, including service like legal advice, awareness, legal mobilization, strategic and preventive services, and research and development.

### **3.2 ‘Means test’ to be reviewed in favour of ‘Merit test’**

It is suggested that all financial limits should be abolished, and it should be left to the certifying Authority to decide on the merit of each case based on all circumstances, specially his income, his means and the approximate cost of the proceedings.

### **3.3 Provision for the Legal Aid for civil appeal to Supreme Court.**

As in the case of an appeal to the Supreme Court for Criminal Appeal, the same provision should apply for cases on Civil Appeal.

### **3.4 Legal Aid rates payable to lawyers**

It is necessary to review and upgrade the rates payable to lawyers.

## **4. Services to be provided**

### **4.1 Legal Services / Legal Advice**

‘Advice’ is not covered by the Legal aid Act. The Act only covers “proceedings”. The Citizens’ Advice Bureaus, the Law Society and Bar council may find it possible to set up advice desks/bureaus for people with difficult legal problems.

### **4.2 Conciliation**

An informal system to be set up at District Court level or the Citizens’ Advice Bureaus to provide conciliation services in which both parties to the dispute may go to a conciliator (e.g. Law Society, Bar Council or a Professional body).

### **4.3 Standard of service provided**

- An entry lawyer should have a professional responsibility to provide legal services to those who are unable to pay.

- The lawyer may be required to render **a number of hours of public legal services per year.**
- The lawyer may also be required to provide legal services to religious, civil, community, government and education organisations.

## **5. The Creation of a Legal Aid Board**

The strongest motivation for the establishment of a centralized Legal Aid Board is not the cost of legal aid service but relates to greater quality control, more client oriented and expanded services. This relates to greater ability and commitment to implement quality programmes. It is also about a stronger commitment to being more responsive to the client need, to placing the client at the center of delivery, and to empowering the client to make informal choices from options available to them.

### **5.1 Objectives**

Among many, it is to provide legal services more economically, efficiently and effectively.

### **5.2 Status and Administration**

The Legal Aid Board will be an autonomous statutory body under the aegis of the Attorney General's Office consisting of a Board to be governed by a Board of non- executive members. It will be funded from the national budget and accountable to the Attorney General.

6. **Other legal infrastructures under the aegis of the Legal Aid Board**

The Legal Aid Board should also be able to reach out to the Community through various legal infrastructures such as:

- the judiciaire system
- Salaried lawyers
- Legal Aid Bureaus
- University of Mauritius Legal Aid Clinic
- Paralegal and Community Advice Centres (NGVs)

# 1. Equal Access to Justice

## Reform on Legal Aid in Mauritius

### Introduction

Legal aid means providing legal services for persons who are unable to pay fees for such services. Its object is to make it impossible for any person to be denied the equal protection of the law simply on account of poverty. This is not only an essential part of the administration of justice of any democratic state, including Mauritius, but it is also an internationally recognized practice which was agreed during the third United Nations Conventions on the Prevention of Crime and Treatment of offender at Stockholm in 1965. It states:-

“... the need to provide legal assistance to arrested or accused persons and to those convicted of crime who may wish to appeal...”

This implies that no persons should on account of poverty or lack of means suffer an injustice for redress of which remedy is provided by the courts of law or by Administrative Tribunals.

In the past, legal aid was provided by attorneys to the indigent people as a contribution on their part towards the charitable service of the community. They were not obliged to assist poor people but did it due to their charitable conscience. This was called pro bono publico. **Pro bono publico** (often shortened to “pro bono”) is a phrase derived from Latin meaning “for the public good”. It is used **to designate legal or other professional work undertaken voluntarily and without payment, as a public service**. The European Council in its Legal Aid Affairs Resolution (78) has indicated

that the provision of legal aid should no longer be regarded as a charity to indigent persons but as an obligation of the community as a whole. In some cases pro bono counsel may assist an individual or a group on a legal case, in filing government applications or petitions or on appeal.

Most liberal democracies consider that it is necessary to provide some level of legal aid to persons otherwise unable to afford legal representation. Failing to do so would deprive such persons access to the court system. Alternately, they would be at a disadvantage in situations in which the state or a wealthy individual took them to court. This would violate the principles of equality before the law and due process under the rule of law.

The development of an affordable and fair provision of legal aid is a matter of evolution and as far as possible should be available to **those who are genuinely unable to pay for legal services and representation.**

Whilst in the past legal aid was provided by legal practitioners, as some sort of charitable service to the society, it is now being more and more recognized, at the international level, that the State in fact has an obligation to provide legal aid.

## 2. Right to Legal Aid as a Basic Human Right

Legal aid or access to justice as human right, is implicit in Article 7, 8 and 10 of the Universal Declaration of Human Rights. It particularly flows clearly from clause 3 (d) of Article 14 of the International Covenant on Civil and Political Rights. It states:

*In the determination of any criminal charge against him, everyone shall be entitled in full equality to defend himself in person or through legal assistance of his own choosing, to be informed if he does not have legal assistance of this right and to have legal assistance to him in any case where the interest of justice so requires and without payment by him any such case if he does not have sufficient money to pay for it.*

Section 10 (2) (d) of the Constitution of Mauritius in its Chapter on Protection of Fundamental Rights and Freedoms of the Individual, has provided for the right to a legal representative. It states:-

“Every person who is charged with a criminal offence...shall be permitted to defend himself in person or, at his own expense by a legal representative of his own choice or, where so prescribed by a legal representative provided at the public expense.”

The right to a legal representative is, therefore, a constitutionally enshrined safeguard that has assumed the notoriety of a trite law. These provisions are recognized as express positive rights exercised by those who are poor.

### **3. A Historical Perspective of Legal Aid in Mauritius**

The right of poor persons to sue in forma pauperis dates a long way back. There was not a single text, but different ordinances provided Legal aid in civil and criminal matters before the Legal Aid Act 1973 was enacted.

Going down the history lane the Mauritian Civil Procedure Ordinance Cap 192 allowed an action in forma pauperis when the suit was a matter of Public Order. The conditions that a person had to satisfy before getting legal aid were found in the District Court Rule of 1860. In the Criminal Procedure Ordinance of 1853 where a person being bound or committed to be tried at Court of Assizes desired counsel, the said court or any Judge thereof were authorized and required immediately upon his or their petition to assign to such person such counsel who had free access to such person at all reasonable hours. The Supreme Court Rules of 1903 provided that any person could be admitted to sue or defend as a pauper or prove that he was not worth Rs50.00, his wearing apparels and the subject matter of the case or matter only excepted. The Industrial Court Rule of 1944 states the party requesting for legal aid and could not possess one hundred rupees save of his wearing apparel. In the Criminal Appeal (Poor Person) Ordinance 1946 it was provided that any person who had not sufficient means to pay the expenses thereof could appeal in criminal matters. In the Criminal Appeal Ordinance 1954 the Court of Criminal Appeal at any time would assign to an appellant an Attorney and Counsel or Counsel only in any appeal or proceeding preliminary or incidental to an appeal in which in the opinion of the court, it appeared in the interest of justice that the appellant should have legal aid, and he had sufficient means to enable him to obtain that aid.

In 1973 all the existing provisions on legal aid were repealed and replaced by a Consolidated Act. It was stated that **“The grant of legal aid is under the existing law**

**limited to very specific cases which are outlined in the enactments to be repealed by clause 15 of the Bill.** Legal Aid was only granted in cases where the litigant was not worth more than Rs300, and in the case of criminal appeals not worth more than Rs400.” The Explanatory Memorandum of the Legal Aid Bill read as follows: “The object of this Bill is to make fresh provision for the grant of legal aid to indigent litigants.” In the Legal Aid Act of 1973, a change was therefore brought whereby capital limit was put to Rs500 and income limit to Rs400 for every case.

In 1979 with an amendment to the Legal Aid Act eligibility requirements were indicated by increasing the income limit to Rs.750. for Civil and Criminal proceedings. The Act also added that excluding the wearing apparel and tools of trade and subject matter of the proceedings, the appellant could not be worth Rs.10,000. The income figure was again changed in the Legal Aid Act 1982. It was increased to Rs.3, 600 whereas the Capital limit increased to Rs.50, 000. Presently, the Act provides for Rs.75, 000 as the worth of the applicant, and earnings remain as at Rs.5, 000. The Legal Aid Act 1982, however, remains the main enactment that is in force to-day.

## **4. The Legal Aid Act 1973 (as amended):** **An Analysis**

Section 4 of the Legal Aid Act 1982 has made provisions for “ **any person who wishes to obtain legal aid and to be a party to civil and criminal proceedings**”. The Act therefore sets out to ensure access to a justice system where there is the protection of human rights by offering quality services in the form of a legal practitioner assigned at state expense to vulnerable groups in both Civil and Criminal matters.

### **4.1 Civil and Criminal Proceedings**

“Civil proceedings is defined as including “proceedings in extra-judicial matters”. Legal aid is thus available both at first instance and on appeal in civil matters. It is noted that most of the applications for legal aid in Mauritius, are in respect of family law matters (i.e. divorce, alimony, rights of visit, custody of children).

**Table 1**

**Legal Aid Applications Granted at Supreme Court**

<b>Type of Cases</b>	<b>Year 2000</b>	<b>Year 2001</b>	<b>Year 2002</b>	<b>Year 2003</b>	<b>Year 2004</b>	<b>Year 2005</b>
Matrimonial	2,321	2,231	1,712	1,969	2,183	2,340
Civil	99	12	125	154	120	241
Criminal					9	9
<b><i>Total</i></b>	2,420	2,243	1,837		2,322	2,590

Table II and Table III illustrate applications granted and amount paid in respect of legal aid in Mauritius.

**Table II**

**Legal Aid Applications Granted at Supreme Court**

Type of Cases	Year 2000	Year 2001	Year 2002	Year 2003	Year 2004	Year 2005
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Civil	99	12	125	154	120	241
Criminal					9	9
<b><u>Total</u></b>	2,420	2,243	1,837		2,322	2,590

Source: Supreme Court

**Table III**

**Amount paid with respect to Legal Aid in the various courts of the State of Mauritius**

	Year 2000	Year 2001	Year 2002	Year 2003	Year 2004	Year 2005
<b>Amount in Rupees</b>	1,344,790	1,323,305	1,516,800	1,840,660	1,508,656	1,385,428

As far as Criminal proceedings are concerned Section 3 of the Act explicitly provides that it does not apply in respect of Criminal proceedings at first instance, **except for proceedings under the enactments and offences listed in the schedule of the Act.**

Section 5 (1) (a) provides:

Any person who has a right of appeal against a conviction or order of and the Industrial Court Act, and who is unable to exercise that right owing to poverty, may on the day of judgment – apply through the Magistrate for the grant of Legal Aid.

It is to be noted that the Act gives jurisdiction only to those courts specified in Section 2 **excluding tribunals and courts established under a disciplinary law.** Those courts are competent to hear all civil proceedings, and with regard to criminal proceedings, the Act allows them **to hear only those proceedings under an enactment as for an offence listed in the schedule of the Act with the exception of proceedings at first instance.**

By **Section 3 of the Legal Aid Act, the Act only applies in respect of criminal proceedings at first instance, to proceedings under an enactment or for an offence, listed in the Schedule.** The enactment and offences listed in the Schedule are as follows:-

The following Sections of the Criminal Code:-

Sect. 50-79	Various offences against the State and offences of abuse of authority by public officer
Sect. 82	Conspiracy by public officers to flout the law
Sect.83	Public Officer resigning with intent to paralyse public service
Sect.86	Violence by public officer
Sect.88-91	Public Officer ordering use of force to prevent operation of law
Sect.100 (1)	Counterfeiting seal of Mauritius or securities issued by the Accountant General
Sect.101	Counterfeiting Court seal
Sect.102	Unlawful use of seal
Sect.104	Altering government mark
Sect.122-131	Embezzlement and larceny by public officer or notary, embezzlement and larceny of deed by public officer, extortion by public officers, and various bribery offences by public officer

Sect.215-223	Murder, manslaughter and infanticide
Sect.228 (3) and 4	Wounds & blows causing death without intention to kill
Sect.234	Castration
Sect. 235	Abortion
Sect.236 (1) and 2	Administration of noxious substance to endanger life or inflict grievous bodily harm etc.
Sect. 239 (1)	Involuntary homicide by imprudence
Sect. 249 (1) and 4	Rape and sexual intercourse with a female under the age of 16
Sect. 251	Debauching youth
Sect. 259	Unlawful arrest
Sect.276 to 281	Perjury offences committed before the Supreme Court where the offence is committed before the Supreme Court
Sect. 283	Sedition
Sect.284	Inciting to disobedience or resistance to law
Sect.291	Criminal Intimidation
Sect. 346	Arson
Sect.347	Arson causing death

Attempts at or complicity is an offence listed at (1) above.

Offences which are:-

- (a) Punishable by death or penal servitude
- (b) Excluded from the jurisdiction of a District Magistrate

The offences listed in the schedule are in fact offences which are excluded from the jurisdiction of the District Court by virtue of Sect. 115 of the Courts Act.

**Accordingly legal aid is virtually inexistent in criminal cases at District Court level. Even at Intermediate Court level, legal aid is only available in relation to the offences listed above.**

Legal aid is however available in appeals in criminal cases, and the procedure is provided for in sections 5 to 9 of the Legal Aid Act.

### **Civil Cases**

No schedules have been provided by virtue of Section 3 which lists down the types of civil cases that the Legal Aid applies. **By implication it means that the Legal Aid Act is broad enough to encompass every civil case.**

#### **4.2 Procedure for Application of Legal Aid**

By virtue of Section 4 of the Act, the Applicant for Legal aid must make a written application to the Authority, stating his cause of action or ground of defense or appeal, or the nature of the extra judicial matter in respect of the application made.

### **Sworn Statement**

Section 4 (b) of the Act also provides that any person who wishes to obtain Legal aid must make a sworn statement that:

- (i) excluding his wearing apparel and tools of trade and the subject matter of the proceedings, he is not worth Rs75,000 rupees, and
- (ii) his monthly earnings are less than 5,000 rupees.

#### **4.3 Who is eligible for legal aid?**

In Section 4 of the Legal Aid Act states:  
“any person who wishes to obtain Legal aid”. The Act does not give a definition to the word ‘person’. In the Legal Jargon a ‘person’ does not necessarily mean only an

individual. In the Interpretation and General Clauses Act it is stated that the word “person” applies to a person or individual, shall apply to and include a group of persons whether corporate or unincorporated.

This interpretation seems to widen the definition of the word ‘person’. But Section 4 (b) of the Act mentions that “a person must make a sworn statement that excluding apparel and tools of trade ...” when applying for legal aid. It seems obvious that the Act envisages an individual and not a body corporate. The British Legal Aid Act 1988, in its interpretation of the word **‘person’ does not include a body of persons corporate or incorporate which is not conceived as** a representative, judiciary or official capacity, so as to authorize advice, assistance or representation to be granted to such a body “The South African Legal Aid Act No.22 of 1969 as amended restricts availability of Legal aid to individuals, and not to close corporations or companies (except those registered in terms of Section 21 of the Companies Act No.61 of 1973 as amended).

#### **4.3.1 The Means Test**

The Authority will require the Social Security Officer to make an assessment of the means of the person. The Social Security Officer will do this by enquiring if the applicant is married or not, have any children, any immovable or movable property, and to see whether the earnings of the applicant satisfies the income limit. To satisfy the means test, Social Security Officer will take into account both the income and capital of the applicant. The officer will then send a report of his enquiry to the Authority.

If the applicant is found not to satisfy section 4 (b) the Act, the case stops there and the applicant is informed that legal aid is refused to him as he does not satisfy the means test. But if the person satisfies the conditions of section 4 (b), the Authority will then refer the applicant to a counsel (barrister or solicitor or both) to determine the apparent

merits of the applicant's cause of action or ground of defense. In practice, the applicant is referred both to an attorney and a barrister.

Concerning a District Court, the Magistrate after being satisfied with the means of the applicant, will as of right assign to the latter a barrister or an attorney without seeking their opinion as to the merit or demerit of the case.

#### **4.3.2 The Merits Test**

The attorney and the barrister will both see whether the applicant has got any merits in his case. If the applicant is a private client of a solicitor or barrister, he would be advised to take or defend the action. If the applicant has good grounds, the attorney and barrister will then inform the Authority. It must be noted that sometimes they may have different opinions as to the apparent merits of the case. It will then be for the Authority to decide.

#### **On Appeals**

The procedure for appeals in Civil Cases is unfortunately not provided in the Act. This was clearly stated in the case of **Muktar Ali v/s Government of Mauritius SCJ 457**.

The Court observed that “while there is detailed provision regarding the procedure seeking legal aid to appeal to the Supreme Court against a conviction or other order by a District Court or the Intermediate Court in Criminal Cases, the law does not lay down the procedure for a civil appeal to the Supreme Court.”

What happens then if someone wants to appear in forma pauperis? In practice, if a person is dissatisfied with a judgment of a District Court, he will have to lodge in writing

a notice of appeal together with a security. After having done this, he can then apply to a Judge in Chambers for legal aid.

#### **4.4 Application for Legal Aid in Criminal Cases**

##### **(i) At First Instance**

The indigent person must apply under Section 4 of the Act. He must satisfy the “means” and the “merits” test. If that person receives legal aid and the case goes on appeal, it seems that he will continue to benefit from legal aid.

But if at first instance, he did not apply for legal aid and it happens that he has to appeal against the decision of the Court this is provided for by section 5 of the Act.

##### **(ii) On Appeals**

Under Section 5 any person who has a right of appeal against a conviction or order of a Magistrate under the District and Intermediate Court (Criminal Jurisdiction) Act or the Industrial Court Act and who is unable to exercise that right owing to poverty, may on the day of the judgment inform the Magistrate orally or in writing of his intention to appeal and apply through the Magistrate for the grant of legal aid. The Magistrate shall on receipt of the application order that execution of judgment be stayed pending a decision on the application for legal aid and may, depending on the circumstances of the case, by order either remand the applicant or release him on parole with or without a requirement that he reports to a police station at specified intervals.

Where after enquiry made by him (this is usually conducted by the police) the Magistrate is satisfied that the applicant meets the requirement of section 4 (b), he shall transmit the record of the case to the Authority.

It will be for the Authority to decide whether the applicant has any grounds of appeal. If such is the case, the Authority will appoint a barrister to represent the applicant.

But if the applicant is not qualified for legal aid or he fails to comply with any order, the magistrate may then issue execution.

### **(iii) Appeals to Privy Council**

The Legal Aid Act does not provide for any procedure for appeal to the Privy Council. In the case of **Rassool and Mukhtar Ali V the Government of Mauritius**, after their appeals were dismissed by the Court of Criminal Appeal a petition was sent by their counsel to the Privy Council to hear their appeal in forma pauperis. This was done according to rules 3 to 7 of the Judicial Committee Rules 1957 which was incorporated in the Laws of Mauritius by a G.N. 32 of 1958. The Privy Council in its ruling stated that it was for the Government of Mauritius to provide for legal aid in cases where the verdict of a court of Criminal Appeal is maintained. But as already stated, the Legal Aid Act does not provide for appeal to the Privy Council. The applicants thus entered proceedings for constitutional redress under Section 17 of the Constitution.

They averred that:

- (i) the Legal Aid Act fails to provide for appeals to her Majesty in Council and such a failure is contrary to section 10 (2) (d) of the constitution which states that **where so provided a person is entitled to a legal representative at public expense.**

(ii) In failing to ensure that legal aid shall extend to appeal to the High Court of the land, the defendant has failed to comply with the obligations which Mauritius has assumed under article 14 (3) (d) of the International Covenant on Civil and Political Rights.

But the court held in the first place that it is in no breach of section 10 (2) (d) of the Constitution. That provision, as does the whole of section 10 (1) (2) (4) (5) (6) (7), refers to the trial of a person charged with an offence. Section 10 (3) on the other hand entitled a person tried for an offence to obtain after trial, a copy of the proceedings and no more.

The reference to the Covenant is also misconceived. Article 14 (3) (d) refers to legal assistance at trials. Paragraph 5 and 6 and of the same article, however, refer to appeals and in particular of the right to have one's conviction or sentence reviewed by a higher tribunal according to law. The Human Rights Committee established under the Covenant has held that the ' the right under article 14.3 (c) to be tried without undue delay should be applied in conjunction with the right under article 14.5 to review by a higher tribunal and that consequently, there was in this case a violation of those provisions taken together. It follows that in an appropriate case the Committee would presumably find by analogy that where a convicted person exercises his right of appeal as provided for in article 14.5 a state would be in breach of the Covenant.

The Court here held that it had no jurisdiction in application for redress under section 17 to sanction the state for alleged breaches of the Covenant, as the said Covenant has not yet been incorporated in our laws by Parliament.

**Thus the doors of the Majesty's council are closed unless an amendment is made to the Legal Aid Act.**

#### **4.5 Grant of Legal Aid**

Though the results of the enquiry under section 6 of the Act shows that Legal Aid is needed, the ultimate decision of granting Legal Aid rest on the Authority. It will be for the latter to see whether the application is well founded. If such is the case, the Authority will then inform the applicant and will assign a barrister or an attorney to him.

#### **4.6 Assignment of Barrister and Attorney**

In practice, an exemption is afforded to barristers and attorneys who have more than ten years experience. The cases are mainly given to young barristers and attorneys who have just entered the profession and it is done on a roster system.

In practice what happens is that it is the same barrister or attorney who was in charge of the enquiry into the merits of the application who will be allowed to take up the case. This is so because they already had an interview with the applicant and they are aware of the facts of the case.

A barrister or an attorney assigned shall not refuse his assistance unless he satisfies the Chief-Justice of some good reason for refusing. If he accepts the case, he will then receive from the consolidated fund sum as may be determined by the Chief Justice and he will not be bound to make any disbursement out of his own money. Nor any fees shall be paid to a barrister or attorney by a person to whom legal aid has been granted. Payment is effected after disposal of the case by the court.

#### **4.7 What are the duties of the Attorney and Barrister**

Unfortunately the Legal Aid Act does not provide for any guidance as to what these duties may be, but they are guided by the code of ethics of the profession. In England case law has given some guidance on the subject. Lord Denning MR has stated: *“the principle is clear that a solicitor is under a duty not only of his own client who is legally aided but also also the unassisted party who is not legally aided. If the solicitor fails in that duty, the unassisted party is at liberty to call him before the court whereupon the court can make an order that he is to make good any loss or expense caused to the unassisted party by any breach of it”*.

After a review of the cases establishing this principle, Lord Denning continued. *“these are then the duties of solicitors who act for legally aided clients. They must inquire carefully into the claim made by their own legally aided client so as to see that it is well founded so much so that they would have advised him to bring it on his own if he had enough means to do so with all the risks that failure would entail. They must consider also the position of the other side.*

*They must not take any advantage of the fact that their own client is legally aided and so not able to pay any costs. They must not use legal aid as a means to extort a settlement from the other side. They must remember the position of the defendant and that he is bound to incur a lot of costs to fight the case. If a reasonable payment is made into court if a reasonable offer is made they must advise its acceptance. They must proceed with the case with the chance of getting more. All this is not only in regard to solicitors but also to counsel as well’.*

It is also to be mentioned in the Law Practitioners Act 1985 that *‘ Any person who is aggrieved by an act done by a law practitioner in the exercise of his profession may report the matter to the Attorney General who may then on receipt of this complaint enquire into any act done by a law practitioner’*.

#### **4.8 Exemption from Taxes and Fees**

When the Authority has approved the grant of legal aid, the applicant shall not in the proceedings to which his application relates, be liable to pay any sum payable under any enactment relating to stamps duty, registration dues, user's fees, witness's fees or court fees.

It is to be noted that only those cost mentioned above that will be paid by the consolidated fund. Any other costs incurred by the applicant for the purpose of his case will not be refunded for example in a case of divorce, the cost of any publication in a newspaper will not be refunded; similarly the cost of medical experts must be borne by the applicant himself.

Furthermore no indication is given as to how the word '**proceedings**' in section 8 of the Act is to be interpreted. However, the case of **Littaur & Steggles v Palmeer (1986)** '**AER780**' gives clearer explanation.

The Court of Appeal held that the Legal (General) Regulation 1980 (which restricts the payment for work done in any proceedings in connection with which a legal aid certificate has been granted to such payment as may be made out of the legal aid fund) has a narrow meaning which reflects the fact that legal aid may be and is often granted to deal **with an issue arising out of an action as a whole** and, therefore, **refers only to the specific proceedings for which legal aid was granted even though this proceedings might only be incidental to the whole action.**

## 4.9 Costs

By virtue of section 12 of the Legal Aid Act, if the assisted person is successful, he may expect to receive costs from his opponent. These costs are “paid direct to the consolidated fund unless otherwise decided by the Court”.

Similarly, in section 12 (2) of the Act, the court may make an order for costs against an assisted person subject to such conditions as it thinks fits and to impose any cost allowed to be paid out of the Consolidated Fund.

According to this section, it seems that an unassisted party may claim an order for cost against an assisted party. But the question arises, **how is this cost to be calculated and whether any unassisted party can receive cost, as it is said that the court may make an order subject to such conditions as it thinks fit?**

Owing to the lack of detailed provisions one may have recourse to English case law to enlighten us on this matter.

In **Hanning v. Maitland (2) 1970 IAER 812**, Lord Denning MR said that “where a legally aided party lost the case it would be **just and equitable that the Legal Aid Fund should pay the costs**”, and Salmon J said that the words ‘just and equitable’ should be interpreted broadly to mean just what they say.

**In Kelly v London Transport Executive 1982 AER B 42** Acner LJ held that: *‘To my mind it is essential when considering a potential claim of financial hardship, to ascertain what are the likely consequences to the unassisted person of the Legal Aid Fund not bearing his costs. If they bear heavily on the unassisted person be he an individual or a company then a possible claim for hardship may be made out. Whether or not such financial hardship is severe must be essentially a question of fact and degree in the particular circumstances of the case’.*

Finally in **Adams & Ors v Reley 1988 1 AER 89** it was held that where a successful unassisted party established that he would suffer severe financial hardship unless his costs were paid from the Legal Aid Fund he was not necessarily entitled payment of the whole of his costs, but only to payment of that amount which would cause such hardship.

## 5. Shortcomings of the Legal Aid Act

### 5.1 Means Test

One of the most important problems in the Legal Aid Act is the question of financial ceiling. A question that must be faced sooner or later is whether it is necessary to have any financial ceiling to the legal aid scheme. The scheme was originally for any person whose disposable income did not exceed Rs400. In an amendment in 1979, it was raised to Rs750, and by a government notice again raised to Rs1,200. It was pushed up further from time to time. Now, as it stands the applicant must not be worth Rs75, 000. and his total earnings less than Rs5,000. The unfairness of the present system lies firstly, in the fact that **there are many people in the middle income group who are by no means wealthy but whose disposable income exceeds the maximum figure. Secondly, that many people are not prepared to embark upon litigation because the financial risk is too uncertain.**

The rigid method even in a modified form is based on too primitive an assessment of a man's needs and requirements. To be able to judge what sacrifice a man can be expected to bring for the purpose of taking an action into Court, one must know more about him than just what his income is. A man with a sick wife who is in the constant need of treatment needs more money than a man whose wife is healthy. A man of 20 years of age can do with less than a man of 65. A man whose wife is expecting a child is financially worse off than a man whose wife has never had children and is not expected to have any in the near future. A man who is burdened by debt is in a very different position from a man who has none. In short the varieties of life are so manifold that it is a hopeless undertaking to cover them within the limits of one or two rigid or semi-rigid rule which will subsequently result in substantial injustice.

## **5.2 Appeal against refusal to grant legal aid**

There are no appeals against refusal to grant legal aid. The decision of the Authority is final. An appeal against the decision of the Authority must be made possible if it can be shown that great injustice will be done to the applicant if legal aid is not granted to him.

## **5.3 Choice of Attorney or Barrister**

A situation that can cause some problem is the fact that the assisted person is not allowed to choose his own attorney or barrister. This is done for him by the Authority. Now an assisted person may personally know a solicitor or barrister who is prepared to help him.

The assisted person should be allowed to choose his or her conducting solicitor provided the solicitor thus selected is on the panel of solicitors willing to accept cases under the scheme. The same right can be granted with regard to Counsel. A Solicitor chosen by the assisted person personally will always enjoy the confidence of his client to a higher degree than one appointed for him. Even when the client himself is in fact unable to select his adviser as is often the case, it is psychologically of great importance that he should have freedom of choice. To preserve the relationship of confidence between solicitor and clients it means the preservation of the most important moral asset that the legal profession possesses. Moreover, all the barristers and the solicitors on the panel will or may not get a case on the basis of rotation. In practice, it may happen that a lawyer knows someone who has been granted legal aid and the latter wants the lawyer to represent him. The lawyer may ask the Authority to let him have the case, but when his turn arrives on the list he will not get his case so as not to disadvantage other lawyers.

#### 5.4 Procedures in Civil Cases

With regard to appeal in Civil Cases as already stated the law does not lay down the procedure for a civil appeal to the Supreme Court. Any person who wants to appeal does not know how to proceed. Furthermore in the case of appeal no mention is made as to stay or execution of judgment. **Can a person ask for order for execution of the judgment though the other party is trying to seek legal aid to appeal?** The Act is silent on the matter.

#### 5.5 Appeals to the Privy Council

No appeal to the Privy Council is provided in the Act. If the petition under the Judicial Committee rules is rejected by the Privy Council the matter stops there, unless the applicant finds the means to appeal which is very costly.

#### 5.6 Professional fees

Concerning remuneration to solicitors and barristers, opinions have been voiced that the fees paid to them are not enough. There is no adequate incentives for professionals to prepare and study the case at the best of their abilities.

This reminds the words of Mr. D'Unienville intervening during the debates of the Legislative Assembly when the Legal Aid Act was being voted in 1973.

*“Il faut accorder des honoraires plus réalistes particulièrement aux jeunes qui commencent et à qui on a assigné des affaires surtout devant la cour suprême. Je considère que les honoraires qui sont consenties aux avocats qui sont nommés dans ces*

*affaires in forma pauperis sont absolument ridicules pour ne pas dire insultants parceque je considère que l'avocat qui se consacre à une affaire qu'elle que soit rend à la société un service au moins légal à celui du medecin qui travaille dans un hôpital."*

But it should also be added that legal aid must not be separated from the notion of public service and the notion of ethics. The fees are necessary but it should not be the sine-qua-non for a lawyer to help a needy person.

## **6. Proposals for Reform on Legal Aid in Mauritius**

### **6.1 Introduction**

In view of the several drawbacks and constraints envisaged in the present Legal Aid Act, it is essential that a suitable framework be devised whereby any bonafide party to a legal aid application may benefit from the scheme. Many proposals are formulated in order to make the entire process more scientific and regulated. For instance

- (i) means test has to be reviewed in favour of merit test;
- (ii) a shift from the concept of “poor persons” to “eligible persons”;
- (iii) a need to widen the assessment criteria based not only on monthly income but also on family responsibility.

### **6.2 The New Concept of Legal Aid**

With the passage of time, the concept of legal aid is no longer restricted to meaning “legal representation in Court proceedings” through a lawyer at state expense in court proceedings. It now has a wider connotation, including services like:

- **Legal advice**
- **Legal awareness**
- **Legal mobilization**
- **Law reform**
- **Strategic and preventive services**
- **Monitoring, research and development**

It is therefore in that modern international context, and in view of the evolving local needs that the **Act needs to be reviewed to cater for the demands of the needy people in society.**

Thus the purpose of legal aid should effectively be to empower people to overcome the barriers to equality and justice (the barriers being social, financial, and cultural as well as language and nationality). It effectively means that legal aid should go beyond the normal legal representation and legal advice, and address every issue which may give rise to substantial injustice.

Under the present system, the possibility of realizing the broader objectives is minimal. A new method of governance needs to be created that will develop a better structural and functional efficiency. As the immensity of this challenge cannot be overestimated, the administration of legal aid should adhere to a number of principles which may include.

- **promotion and maintenance of a high standard;**
- **effective, economical and efficient use of resources;**
- **provision of services in an impartial, fair and equitable manner and**
- **responding to people's needs within a minimum delay.**

To respond to these challenges, there is an urgent need to provide for an appropriate institutional framework, viz the Legal Aid Board, through which the exigencies of the legal aid service delivery can be met. Such an institution will have the potential of developing flexible systems and approaches. **It will coordinate the existence of multiple service delivery agencies, with manifold degrees of institutional independence, responsibility and accountability.** This may take place within a

common policy framework that will apply norms and standards, targets, outputs and outcomes. In terms of management, this may involve full managerial accountability and discretion over critical functions such as expenditure, procurement, staff appointments, salaries, service benefits and training.

### **6.3 Application of the means test:**

- 6.3.1.** More emphasis to be laid on the ‘merits test’ for applicants who do not qualify accordingly rather than the means test, and for those who may be considered as ‘borderline’ cases. It is suggested that all financial limits should be abolished, and that it should be left to the Certifying Authority to say whether in the individual case, the applicant should be provided with legal aid having regards to all circumstances, especially his income, his means and the approximate cost of the proceedings. **All the applicant’s household furniture is to be excluded from consideration of the means at the applicants disposal.**
- 6.3.2** Make the monthly income (the net after allowing for all necessary deductions) the basis for the grant of legal aid. The present system would allow a man with no dependant, legal aid on the same basis as a married man with several dependants.
- 6.3.3** A form should provide for the monthly income and then a list of the necessary deductions detailed so that the officer concerned with the assessment of legal aid would have before him on a single form the necessary information.
- 6.3.4** When an application is made for legal aid, the person responsible for grant or refusal should have discretion in a case where the disqualification depends only on the capital limit to consider whether it is reasonable for the applicant to finance the litigation out of his capital assets.

#### **6.4 Provision for legal aid for civil appeal to the Supreme Court**

The Supreme Court had the occasion to pronounce on Legal Aid and The Legal Aid Act in the case of *Gulam Rassol & Muktar Ali v. Government of Mauritius 1989 MR 22/1989 SCJ 457*. According to Glover CJ and Pillay J:

*Our legal aid Act would appear to require amendment in several areas which are none too clear. For example, while there is detailed provision regarding the procedure for seeking legal aid to appeal to the Supreme Court against a conviction or other order by a District Court of Intermediate Court in criminal cases, the law does not lay down the procedure for a civil appeal to the Supreme Court. Again, while Authority is defined in section 2 of the Act to include a court of Appeal presumably meaning Court of Civil Appeal or Court of Criminal Appeal, the text does not say any more on the procedure in such appeals.*

*It has been observed that legal aid was granted to the plaintiffs upon their trial before the Judge and upon their appeal to the Court of Criminal Appeal. It was, in our judgment, perfectly proper to do so under the Legal Aid Act.*

Indeed, the Constitution stipulates in its section 10 (2) (d) for right to a legal representative. This section enacts that a person:” **shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice or, where so prescribed, by a legal representative provided at the public expense**” but does it include civil proceedings as well? It is presumed that the Constitution must be constructed in a legalistic way coupled in its broad and purposive spirit especially with provisions which are concerned with the protection of human rights.

## **6.5 Legal Aid Rates payable to lawyers**

Legal Aid rates payable to lawyers are scarcely adequate to cover the services they are required to render in return for the payment. It may be necessary to review and upgrade these figures. The matter may be dealt with the Master of the Supreme Court when revising the figures to be allowed in taxation.

## **6.6 Services to be provided**

### **6.6.1 Legal services/legal advice**

- ‘Advice’ is not covered by the Legal Aid Act 1973, the Act only covers “proceedings”.
- Even Attorneys may give advice as they are directly involved in legal aid (specially family matters)
- Set up a legal advice at the level of the Citizens’ Advice Bureau run by volunteers.
- Set up a database written by experts to deal with legal situations arising from the common problems that confront one in day to-day life in Mauritius.
- An adequate training in the principles of law to be given to volunteers.
- The legal profession (Law Society, Bar Council.) may find it possible to come up with a service linked to these advice desks/bureau for people with especially difficult legal problems.

### **6.6.2 Conciliation**

- At the level of the District Court, a new and effective system for disposing of small claims should be set up.
- The Citizens’ Advice Bureau should also provide for conciliation in which both parties to the dispute would be able to go to a conciliator (viz Law Society/Bar Council or a professional body).
- The conciliator could listen to the parties, express their positions orally. He could listen to any witness, either of them, have and he may accompany him/her to any relevant scene.

- Only if an agreement is reached between the parties, a written document setting out the agreement should be prepared and signed on a form which should state:-
  - f The identity of the parties
  - f The essential points that had been in dispute between them
  - f What the parties had agreed; and
  - f The name of the conciliator with the date of the agreement
- The form should be signed by both parties and the conciliator, and issued in three originals using self duplicating paper, one for each party and one for the conciliator who should file it with the local office of the citizens bureau.
- This agreement would be a mere private agreement between parties.
- The qualities required for the conciliator would be a person with pleasant manner, an interest in dispute resolution and a good local reputation.
- The appointment could be voluntary and made by the local management of the Citizens' Advice Bureau
- This informal system is suggested as an option parallel to the procedure we have suggested for small claims, without involving the court.

### **6.6.3 Standard of service provided**

**6.6.3.1** The standard of service which the lawyers are to provide when handling a case on legal aid should not be lesser than the standard service they would provide to a client not funded by the legal aid scheme.

**6.6.3.2** When a lawyer has been appointed to take a legal aid case, generally he/she should have the responsibility of taking it himself.

**6.6.3.3** Voluntary Probono Public (service based on American Bar Association)

According to this policy, entry lawyer should have a professional responsibility to provide legal services to those unable to pay. **The lawyer may be required to render a number of hours of probono publico legal services per year.**

The lawyer may also be required to **provide legal services to religious, civic, community, governmental and educational organizations** in matters which are designed primarily to address the needs of persons of limited means.

### **6.7 Legal aid for labour law related matters**

Depending on the circumstances, an employer or an employee may claim legal aid for labour law related matters. However an employee may claim for the following reasons:

**6.7.1** In cases of redundancies where the employer needs to justify its decision, employees concerned should be given legal aid as a support to question and have the opportunity before a Tribunal to claim for compensation and civil damages.

**6.7.2** Where an employee has been injured due to negligence of the employer, the employee should benefit from legal aid to claim civil damages and same where occupational illness need to be proved before a Court.

It is also believed that medical expertise should be given free of charge in case of civil claim for damages.

**6.7.3** Where an employer omits/refuses to pay compensation to an employee resulting from Court judgment, the employee should benefit from legal aid to sue the employer on civil grounds.

## **7. The creation of a Legal Aid Board**

### **7.1 The Rationale for the establishment of a Legal Aid Board**

The strongest motivation for the establishment of a centralized Legal Aid Board/Authority is not the cost of legal aid service **but relates to greater quality control, more client-oriented and expanded services**. This relates to a greater ability and commitment to implement quality programs and actively monitor and improve on quality. It is also about a stronger commitment to being **more responsive to the client need, to placing the client at the center of delivery, and to empowering the client to make informed choices from options available to them**. In this regard the centralized Legal Aid Board will implement a variety of interventions to improve the quality of the legal services. It will deliver such services to its clients which may include:

- **Consultation with clients and preparation for trials**
- **Verifying attorney checklist**
- **Research support to legal practitioner**
- **Supervising and administration of applications**
- **Providing support services**
- **Legal training and development**

With a centralized system and a strong focus on human capital development and people development, there is every possibility that the Legal Aid Board will cater for an improved access to justice, and it will foster higher performance in its core delivery areas.

## **7.2 The Objectives**

- To make available legal aid to indigent persons as widely as possible within its financial means;
- To provide legal services economically, efficiently and effectively;
- To implement its commitment to a circuit focused approach and execute various client relationship programs;
- To carry out joint programs on training and co operation in participation with the Legal Aid Clinic, justice centers, NGO's and advice bureaus.

## **7.3 Status and Composition**

The Legal Aid Board will operate under the aegis of the Attorney General's Office. It will consist of a Board to be governed by a Board of non executive members commonly to be known as Board of Directors. The Board of the Legal Aid Board will comprise 5 non-executive directors to be appointed by the Attorney General.

These members will be drawn from diverse background and will bring a wide range of knowledge, experience and professional skills to the Board. They may be representatives of the State Law office, Bar Council, Law Society, a member of public and non-governmental organization. There may also be a secretary to the Board with a proficiency in law.

## **7.4 CEO**

A Barrister or Magistrate/Judge.

## 7.5 **Administration**

The Legal Aid Board will be an autonomous statutory body to be established under the Legal Aid Act so as to make available legal representation to indigent persons at state expense, and provide every citizen access to justice.

The Legal Aid Board will be funded from the national budget and will be accountable to the Attorney General, and ultimately to Parliament for service delivery and for the efficient and effective use of its budget allocation.

## 7.6 **The other advantages of a centralized Legal Aid Board are:-**

- There will be a central supervision, regulation and control to make for economy and efficiency.
- There will be specialized personnel with more experience and wider outlook.
- The institution will be subject to the control of a more vocal and intelligent public opinion.
- There will be a better drive for consistency and unity in the execution of policies.
- With the swift means of modern communication, the Board will ensure easy accessibility to stakeholders. It will establish a uniform procedure that will ensure that the legal aid scheme is accessible to all, and is client sensitive.
- There will be a closer monitoring of the quality of the legal service that will be offered.
- It will foster productive relationships with the relevant legal professional bodies and other stakeholders.
- It will ensure that the legal aid scheme is lawful, sustainable and responsive to the needs of the client.

## **8. Accessing Legal Aid to All**

### **Other Legal Infrastructures under the aegis of Legal Aid Board**

The concept of legal aid cannot be interpreted in its narrow confines in the fast developing world. Today, legal aid should not only mean representation through lawyer at state expense, in court proceedings, but should also include legal advice, legal awareness, legal mobilization, law reform and a variety of strategic and preventive services. This may be termed as reaching-out-to-the community program which seeks to promote democratic practice through various legal infrastructures to meet the community needs and aspirations.

By the establishment of the Legal Aid Board, the following infrastructures can be put into place under its aegis to provide legal aid:

- Judicare system
- Salaried lawyer
- Justice Centers/Legal Aid Bureaus
- University of Mauritius Legal Aid clinic
- Paralegal and Community Advice Centers (NGO's)
- Other forms of legal assistance

### **8.1 Judicare System**

**8.1.1** This system which seems to be the system of legal aid practiced globally which involves referring successful legal aid applicants to practitioners in private practice. This must essentially be administered by the Legal Aid Board.

Alternatively, write up a Code of Ethics, and allow it to be administered by the Bar Council or the Law Society.

**8.1.2** Generally, private practitioners have the discretion to assist indigent clients who have a deserving case, and who cannot afford to pay legal fees on a pro amico (for a friend) basis. The agreement between the attorney and the client would be that if the client succeeds in his case, the attorney would be entitled to receive the cost recovered. Strictly speaking, **such a person should be a real friend, and not just somebody for whom the attorney has sympathy.** This pro amico system ensures that not only the indigent has access to this form of legal aid, but the condition is that the client must be a friend of the attorney.

**8.1.3** There is also another option where private attorneys and advocates provide people who have no means of paying legal fees and have deserving case with legal assistance gratuitously. This is called **pro deo (for God)** assistance. Such practitioners may provide the necessary legal services to successful applicants and they can in turn be remunerated by the legal aid system in terms of a fixed tariffs laid down by the system and agreed to by legal profession. These practitioners have to provide the legal services in accordance with the rules and regulations laid down by the system from time to time. Indigent persons are thus assisted by this form of community service offered by the legal practitioners, who make available their expertise, time and experience to such indigent persons.

This system, however, is not without its shortcomings. It may impose major administrative and financial burdens on the system. There may be no contact between the organization actually rendering the legal aid and the clients receiving the legal aid.

It may be of limited application in the community and may possibly be out of touch with the requirements of the community. It may be argued that it may not be profitable to do so.

## **8.2 Salaried Lawyers**

It is found that the indigent persons who are charged with serious offences, are not often legally represented. Sometimes the accused are sentenced to prison without the option of a fine. This is so because they are not represented in court, either because they do not understand the present system of state legal representation or they do not trust the lawyer that is assigned to them (most probably they do not trust the state appointed legal representative), and therefore end up arguing their own cases.

**It is against this background that a Legal Aid Board should be established which should introduce the system of salaried employees. By this system, qualified, admitted attorneys and advocates can be employed by the Legal Aid Board and be paid a monthly salary.** The possibility of part-time employment can also be looked into.

The advantages of a salaried lawyers' system is that it is cost effective and there is closer client-lawyer relationship.

This system may, however, be criticized by private attorneys in that it may affect private practices. But it should be borne in mind that this system should be operated to ensure access to justice for individuals rather than uphold private interests. **There is a need here to assume corporate social responsibility.**

### **8.3 Justice Centers/Legal Aid Bureaus**

The Legal Aid Board may set up justice centers or Legal Aid Bureaus as an effective way of extending greater access to the legal process to indigent accused and litigants. This is a more cost effective way of fulfilling the Board's functions and responsibilities. These centers/bureaus may offer inter alia:

- **counseling advice and reference**
- **access to social services and state bureaucracy**
- **community development initiatives**
- **case work and research**
- **negotiation and mediation**
- **human rights education and**
- **representation of clients**

In this system the Legal Aid Board may employ attorneys to provide legal services in **both criminal and civil matters and in certain instances assist clients in divorce cases, maintenance matters, family violence matters. It may provide legal representation in any court of law or a tribunal.**

### **8.4 University of Mauritius Legal Aid Clinic**

Operating under the aegis of the Legal Aid Board, the University of Mauritius Legal Aid Clinic may be set up to provide consultations and legal advice. This independent institution will be a complement to the Legal Aid Board by providing such legal services as liaison, negotiation, correspondence with various institutions such as government departments, the Consumer Council, tribunals, local government, business and financial institutions.

The clinic may operate with a Director or a senior academic with proficiency in law as head and candidates preparing for bar examinations and law students (under supervision).

The advantages of setting up of the University Legal Aid Clinic are:

- Providing free legal services to indigent people
- Granting legal facilities to a person who is not an indigent, but who has a deserving case and does not have the financial resources to pay legal fees.
- Acting as a clearing house for the national legal aid scheme
- May operate outside normal working hours, even on Saturdays when the state legal offices are closed.
- May set up outreach programs such as providing legal education and training at various schools and community centers. It may also reach out to educate and inform the public about the law and the legal procedures.
- Providing opportunities for the training of law students, and those doing their pupillage.

### **8.5 Paralegal and Community Advice Centers and NGO's**

Recommendation can also be made to assist the Non-Governmental Organisations in Mauritius to be empowered to address identified concerns (legal as well as social) so that they are able to provide assistance to indigent people.

In line with the NGO's, paralegals (ordinary citizens with practical training and advice) may be identified to provide paralegal service. They may be unorganized workers, trade unions and law students. There will be a need here to formally recognize

paralegal practitioners as legal practitioners. They may not appear in a court of law, but may have the right of appearance before Boards, Commissions and tribunals.

The paralegals as well as the NGOs will be able to perform community service by litigating in matters of public interest such as:

- making legal services available to people in rural and disadvantaged areas;
- performing a community service by initiating litigation in matters of public interest on behalf of persons who are unable to afford the services of private counsel;
- supervising community advice bureaus and clinics;
- running paralegal training, workshops and seminars; and
- producing publications dealing with legal and social issues.

The NGO's may be involved in the following programs:

- establishing a network predominantly rural; practitioners to provide legal assistance to rural dwellers;
- mobile legal clinic to provide aid service in the rural areas;
- arrange workshops in schools and communities;
- distribute legal materials and train communities and individual on various aspects of law.

## **8.6 Other Forms of Legal Assistance**

Legal aid should, therefore, **go beyond the normal legal representation and legal advice** and address every issue which may give rise to **substantial injustice** if there is a denial of such services.

It is vital that the legal and social welfare services are accessible to all corners of Mauritius. For example the following assistance can be made available to the people in need of legal aid support:

**(a) Telephonic Assistance**

Under the present system it is not possible to make available legal practitioners for consultation. It is against this background that the Legal Aid Board **can introduce a multilingual twenty four hours per day and seven days a week Red line phone in legal advice service for persons arrested or detained and in need of legal advice.**

**This telephone number should be conspicuously displayed at all police stations and prisons, and the authorities would have to allow detainees' access to this toll-free number.** Such persons would be entitled to telephonic consultation with a legal practitioner, employed by the Board Authority, or other authorized person or institutions. Arrangements could also be made for such person to be consulted at his/her place of detention. In this instance a Legal Aid Board Authority staff member would issue telephonic instructions to a private practitioner or legal service provider to consult with the detainee at his place of detention. The fees and travel expenses will be covered by the state.

This telephone system will imply that people, who are presently excluded from legal aid because they either fall into marginalized group or are in the rural or inaccessible areas, will have access to such legal assistance.

(b) **Compulsory Community Service**

In terms of new proposed legislation, all law graduates may be compelled to do compulsory community service at any service provider, as an admission requirement.

This system would ensure the availability of more legal representatives which would assist a greater number of not only indigent people, but also those falling within the marginalized group. These law graduates may be attached to the University Law Clinic.