

- The developmental state has been explained as a state “that was determined to influence the direction and pace of economic development by directly intervening in the development process, rather than relying on the uncoordinated influence of market forces to allocate resources. The developmental state took it upon itself the task of establishing substantive social and economic goals with which to guide the process of development and social mobilization” or “one that has been able to manage the delicate balance between growth and social development”.^{xviii}
- Translated for the South African context this concept means that “Sen's concept of removing poverty and tyranny is key, expanding economic opportunities and fighting social deprivation is critical and providing public facilities and services to the poor is paramount.”

Implications for legal-aid

- The provision of legal services to the poor is critical to building both the pillars of a developmental state
 - Firstly it is necessary in the response to poverty and ensuring that poverty does not lead to social deprivation ie the peoples' inability to afford legal services should not exclude them from accessing justice and
 - Secondly an effective public defender and legal aid system is key to making the criminal justice system and the legal justice system work which boosts investor confidence in the country resulting in expanded economic growth.
- For these reasons the ability of poor persons to access legal services straddles both the pillars of the developmental state.

3.3.4 State Medium Term Expenditure Framework (MTEF) 2007-2010

In his Medium Term Budget Policy Framework the Minister of Finance outlines the policy priorities of the state's MTEF for the 2007-2010 period as the following

- Firstly - economic growth
- Secondly to bring the second economy into the mainstream of economic life
- Thirdly – social security, health care and human development including income support to vulnerable people
- Fourthly - Improving the capacity of the state including improved public administration, Governance and administration
- Fifthly - International relations.

In line with the Minister's Policy Framework, expenditure plans for the MTEF period ahead included changes to baseline allocations for schools, clinics, hospitals, augmentation of social development and welfare services, investment in the built environment, education, science and technology. It also included R5,4billion for courts, police and improved access to justice services. Very little of this, only R20million, was allocated to legal-aid. This was for the provision of

additional capacity to deal with children's matters and additional capacity in courts.

Implications for legal-aid

- Government has not fully embraced the significant role that the provision of legal aid can play in its response as a developmental state.
- With a greater emphasis on convictions the funds earmarked for the justice cluster are prioritised for prosecution and the courts. This document should also assist in motivating to government for increased budget baseline allocations for legal-aid.

3.4 Constitutional and Legislative Provisions

3.4.1 Section 28 and 35 rights

3.4.1.1 The Constitution of RSA (1996) affords detained, accused and sentenced persons certain rights :

Section 35(2) *"Everyone who is detained, including every sentenced prisoner, has the right –*

...
to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; ..."

Section 35(3) *"Every accused person has a right to a fair trial, which includes the right –*

...
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; ..."

3.4.1.2 The Constitution of SA also accords certain rights to children :

Section 28(1) *"Every child has the right,*

...
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; ..."

3.4.2 Access to courts and access to justice

Section 34 of the Constitution further guarantees the right to access the courts,

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

3.4.3 Socio economic rights

3.4.3.1 The Bill of Rights espouses to transform South African Society by affording all citizens the right to human dignity, equality and freedom together with a range of socio economic rights including inter alia education, housing, healthcare, food and social security.

3.4.3.2 Whilst it is understood that the rights afforded to accused and detained persons are non-derogable, a transformed society in which all citizens share the same levels of equality, dignity and freedom will not become a reality unless the socio-economic rights of those marginalized members of society are defended.

3.4.4 Legislative Provisions

Legislation which provides for legal assistance at state expense includes:

- **Children:** Section 8A of the Child Care Act 74 of 1983, after amendment by the Child Care Amendment Act 96 of 1996, and the Adoption Matters Amendment Act 56 of 1998
- **Legal representation of children:** Clause 55 of the Children's Bill 70 of 2003
- **Labour:** Section 149 of the Labour Relations Act 66 of 1995:
- **Mental healthcare users:** Section 15 of the Mental Healthcare Act 17 of 2000
- **Land reform:** Section 22 of the Restitution of Land Rights Act 22 of 1994
- **Housing:** Section 4(5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
- **Court rules** also recognize the need for legal aid. For example, Rule 3 of the Divorce Court Rules

Implications for legal-aid

- The Constitution explicitly provides for legal assistance to be made available to arrested, accused, detained persons and children at state expense if "substantial justice would otherwise result".
- The Constitution also guarantees socio-economic rights, which will also require state assistance to protect, defend and fulfill such rights.
- Various laws require the state to provide legal assistance to persons in various circumstances. These legislative provisions also have to be complied with.
- There is an increasing trend for the legislature to approve new laws which commit the state to providing legal assistance in various circumstances without making the budgetary provision for this.
- All these impact directly on the continuing need for legal aid.

3.5 Legal – Justice System - transformation matters

3.5.1 Criminal Justice System Review initiated by government

This review has been initiated by the government and will report within a year on how to bring about a more “efficient, effective and an appropriate criminal justice system whose performance is capable of being measured and tracked, supported by a sophisticated and modern system of data collection.”^{xix} The implications of this review for legal aid in the next two decades are unclear at this stage.

Implications for legal-aid

- The LAB will endeavour to highlight that the inadequacy of resources for legal aid impacts on the efficient functioning of the criminal justice system ie by not having sufficient public defender capacity to match the prosecution capacity causes delays and blockages at courts.
- Insufficient resources for legal-aid impacts on the quality of legal-aid services provided to poor people. This will also contribute to a negative perception of justice system.
- These factors will contribute to a lack of confidence on the part of the public in the effectiveness of the criminal justice system.

3.5.2 Transformation of the legal sector – Legal Sector Charter

No details available on this

3.5.3 Clementi report impact on issues of access to justice^{xx}

- The report reviewed the regulatory framework of legal services delivery in England and Wales. It makes recommendations for the legal profession in terms of regulation, complaints systems, governance and legal business practices.
- The report argues for legal services to be made more accessible and in this regard alludes to working with NGOs and the Legal Services Commission. The report recommends that those lawyers operating in the not-for-profit sector, including the Legal Services Commission should fall under the oversight of the regulator.

Implications for legal-aid

- This report has implications for the Board as an employer of legal professionals rather than on the need for legal aid over the next 20 year.

3.6 Legal Sector Trends

3.6.1 Impact of crime levels and policing patterns on the number of matters before courts

3.6.1.1 Integrated Justice System

- The Legal Aid Board forms a critical part of the integrated legal justice system. The legal justice system included the following stakeholders, the South African Police Service (SAPS), National Prosecuting Authority (NPA), Department of Justice, Department of Correctional Services (DCS), the Department of Social Development, other providers of legal services and the Judiciary and Magistracy. As South Africa's public defender, the Legal Aid Board forms part of this complex system and is co-dependant on the SAPS, NPA, DCS, the Courts and the Judiciary for the efficient and effective handling of cases of accused person and the other civil matters pursued by citizens.
- Research^{xxi} found that the increase in criminal justice personnel in general, and police personnel in particular, was positively correlated with the number of arrests made. It was further established that since the rate of increase in arrests far exceeded the rate of increase in police numbers, it could be concluded that the adoption of new strategies and tactics – the National Crime Combating Strategy, kicked off by Operation Crackdown was launched in 2000 – had also led to increases in the number of arrests being made.
- It was established that the growth in the number of police officers, had not been matched by growing capacity in the rest of the Criminal Justice System (CJS) and that this disproportionate growth pattern may be contributing to a growing gap between the number of cases referred to Court by the Police and the number of cases finalised as well as to the length of time spent awaiting trial.
- The research also asserted that mandatory minimum sentencing legislation, which requires that some cases from the lower courts must go to the high courts for final sentencing, may also be contributing to a growing gap between the number of cases referred to Court by the Police and the number of cases finalised.
- In summary, it was established that the primary inputs into the criminal justice system (arrests) have increased, largely due to an increase in police numbers and a refocusing of police strategies, without the commensurate increase in the factors required to process the charges and to bring the cases to finality in court, resulting in the throughput of the entire system slowing down

Implications for legal-aid

- The more people that are arrested, the greater the need for legal aid;

- The additional people needing legal advice, assistance and defence will make the management of LAB lawyers' diaries more difficult;
- Unless LAB capacity increases, in some cases it will be the non-availability of LAB lawyers that will lead to the postponement of trials;
- Increases in postponement will mean that more people will spend more time awaiting trial – often behind bars – leading to a perverse situation; and
- Uncoordinated growth within the CJS will lead to bottlenecks causing court rolls getting fuller and growing pressure being felt by court managers, magistrates and prosecutors which may result in increased withdrawal rates and the undermining of the commitment to justice.

3.6.2 Crime

- It has been established that since 1994/95 the recorded levels of crime peaked from about 2 million cases to around 2.7 million in 2002/03 and reduced to 2.4 million by 2004/05.
- Serious crime has increased by 23% since 1994/95 having important implications for those components of the CJS, including the LAB, whose work is driven by the level of recorded crime. The decreasing trend in recorded crime since 2002/03 does not necessarily imply a decrease in the workload of the components of the CJS. In fact, it has been found that the proportion of cases referred to Court by the police has increased.
- Although the rate of reported crime has fallen, the number of people arrested in police holding cells has increased by 62% over the past six years.
- This trend is repeated by the NPA, which recorded that between 1999 and 2003, the number of cases coming to court doubled from 560,000 to 1,100,000. Although the withdrawal of cases by prosecutors rose by nearly 60% over that period, the number of cases either prosecuted or pending rose by nearly 130%.

Implications for legal-aid

- the rates of arrest are increasing;
- the rate of referral of cases to Court by the police has improved steadily;
- the number of cases referred to Court by the prosecution has increased substantially;
- the high rate of under-reporting of crime can be reversed over time;
- all of these factors imply an increased need for public defender capacity to manage the legal aid needs of arrested persons and of accused persons being brought to court ie an increase in the demand for legal aid.

3.6.3 Awaiting Trial prisoners and overcrowding in prisons^{xxii}

- The conditions of South Africa's prisons remain deplorable mainly due to overcrowding.
- The countries 240 prisons were oversubscribed by 65%. As at 31 January 2005, the prisons which were built to accommodate 113,825 prisoners had 187,446 inmates.
- The ten most overcrowded prisons as at 31 January 2005 were overcrowded by 250% up to 380%.
- 52,326 (28%) of the 187,446 prisoners were awaiting trial prisoners (ATPs). The Judicial Inspectorate of Prisons (JIP) contends that there are at least 30,000 too many inmates awaiting trial. The number of awaiting trial prisoners peaked in 2000 at 63,964. From this point a steady marginal decline is evident. The JIP target figure for awaiting trial prisoners is 20,000. Unless drastic measures are implemented this target will not be achieved in the short term.
- Awaiting trial prisoners in custody for longer than 3 months (January 2005)

Months	3-6	6-9	9-12	12-15	15-18	18-24	>24	Total
Total	9,438	4,729	2,671	1,920	1,231	1,431	1,424	22,934

- Factors impacting on the number of awaiting trial prisoners :
 - At least 18,000 unnecessary arrests are made each month
 - At least 14,000 inmates find bail amounts unaffordable
 - Court delays increase the amount of time awaiting the conclusion of a trial

Implications for legal-aid

- A great percentage of ATPs will require LAB assistance
- LAB will have to intervene in those cases experiencing court delays
- LAB has a role to play in defending the rights of an accused to a speedy trial
- The ATP population is not likely to decrease drastically in the next 5 years.

3.6.4 Automatic Reviews

- The number of automatic reviews in the various divisions of the high court is indicative of the number accused persons who go to trial in the lower courts unrepresented.
- For the period 1 April 2005-31 December 2005, 13,892 automatic reviews were heard (an average of 1,544 per month).

Implications for legal-aid

- The LAB has to ensure that the number of unrepresented person through the courts is reduced in accordance with the provisions of the Constitution and to ensure that substantial injustice does not result.

3.7 Community need for legal assistance from State

- The demand for legal-aid is clear from the increasing numbers of new legal matters that are being taken on by the LAB. In the period ending March 2005 the LAB handled 306,000 new legal matters.
- From the discussion above the need for legal aid to Awaiting Trial Prisoners, unrepresented accused in Automatic Reviews is also clear;
- The need for legal assistance to poor persons in rural areas is also clear from the research by the Nkuzi Development Association and the SA Human Rights Commission.
- The need for legal assistance in civil matters is clear from the number of persons that are turned away by the Legal Aid Board due to financial constraints; This is also supported by the ongoing complaint and criticism by all stakeholders to the Legal Aid Board about lack of support in civil legal matters;
- There are also persons that the LAB is not able to assist in criminal matters because of financial constraints and therefore has excluded assistance for certain categories of matters eg those matters that could result in a prison sentence of less than 3 months. It is argued that a lack of professional legal assistance in these types of matters could impact negatively on the future lives of such individuals.
- The LAB is also not able to assist persons above a threshold income. This limit also implies that many persons earning just above the income limit are unable to access justice for affordability reasons.
- It is unlikely that improved economic growth will reduce this demand for legal aid. This is evident from the experience of developed countries, which have a high economic performance and low unemployment and poverty and yet have an increasing demand for legal aid.

Implications for legal-aid

- The demand for legal-aid from communities is clear.
- The state has to decide to what extent it can respond to this need and thus honour its commitments as per the Bill of Rights in our Constitution;
- The state also has to decide to what extent it is able to respond to this demand and withstand public and civil society pressure as well as the pressure from the courts that rule in favour of awarding legal assistance to persons at state expense.

3.8 Supply of legal-aid services to meet needs of the poor

3.8.1 High costs of private legal representation

The cost of private legal representation could cost anywhere between R400 per hour and R8,000 per day, with a single day's court appearance lasting about four hours, costing R1,600 per day at the lowest tariff. More serious and high profile cases have been reported to cost up to R40,000 per day. A legal matter usually involves numerous court appearances and at the current rates of charge, even the person of middle-income means would find themselves out of pocket before long. The cost of private legal representation remains unaffordable to many South Africans.

3.8.2 Poorly developed pro bono system

The pro bono system is underdeveloped in South Africa. At this stage the provision of pro bono legal services is largely voluntary save in the three provinces of the Cape district where pro bono services have been made mandatory. It is unlikely that pro bono legal assistance will be able to augment the supply of legal services at the required scale in the short to medium term.

3.8.3 University law clinics

University law clinics and NGOs may be the only other provider of legal services to the poor. The not-for-profit sector has however suffered the negative impact of the shrinkage of available donor funding leaving it unlikely to provide legal services en masse, even in the long term.

3.8.4 Complexity of Legal System

The current legal system in South Africa is formal and growing in complexity. This excludes lay persons and ordinary citizens from accessing the system without legal representation.

3.8.5 Impact of Technology on Access to Justice

Whilst technology offers innovative options for access to justice though general legal advice, it cannot replace the role of the professional legal representative in the provision of a fair trial. Limited literacy and access to communications-technology in South Africa are barriers to the provision of computer-aided legal advice.

3.8.6 Delivery record of the Legal Aid Board

The Legal Aid Board was established in 1969. Up until 2001, the Legal Aid Board provided legal assistance through an agency system whereby independent practicing attorneys would be instructed to provide a service on behalf of the Board and paid in terms of an approved scale of tariffs. During 2000, the Board introduced its Justice Centre model whereby salaried legal professionals were employed to provide legal services from the organisations national infrastructure of 58 Justice Centres and 38 Satellite Offices. Presently, the Legal Aid Board provides 75% of its services using the Justice Centre model,

20% by outsourcing to private lawyers and 5% through Co-operation Partner agreements.

The Legal Aid Board has a strong track record in that it has demonstrated its ability to increasingly provide legal representation in a growing number of cases. The full gearing benefit of the State's investment has been realised with the organisation being able to provide legal representation in more than 300,000 new cases per annum within its existing capacity. No other agency exists to provide legal services to the poor at this scale. The Legal Aid Board continuously seeks to implement innovative techniques to increase the range and scale of its service offering.

Implications for legal-aid

- o The cost of private legal services is prohibitive to all South Africans being able to access legal services;
- o The NGO sector's ability to provide legal services is diminishing;
- o The ability of the private legal profession to provide services to the poor through its pro-bono systems is minimal;
- o The complexity of the legal system renders it impossible for persons to represent themselves in legal matters;
- o The only provider of legal-aid services to the poor, at a scale that corresponds to the demand is the Legal Aid Board.

4 Concluding comments and recommendations to the Minister

The motivation for state-funded legal aid services in South Africa stems from the commitments we have made as a constitutional democracy in the Bill of Rights in our Constitution. These commitments relate to the upholding of our constitutional values of human dignity, equality and human rights. The rights enshrined in our Constitution have to be promoted, respected, protected, defended and fulfilled to ensure justice for all South Africans.

Poverty should not be a barrier to the people of South Africa progressively realising all the rights guaranteed in our Constitution. Furthermore, the inability to afford legal representation should never diminish a person's right to access justice. The rights conferred by the Bill of Rights are a means of achieving transformation to a society based on human dignity, equality and freedom. They are designed to enable people who are marginalized, discriminated against or powerless to assert and achieve their human dignity. One of the means by which people can achieve those rights is to assert and enforce them in courts and other tribunals and fora. Without the capacity to do so, for many people the rights (and the promised transformation) will simply be empty.

4.1 In addition to the above, the motivation for continuing support of legal aid provision by the state has been hinged on the socio-economic circumstances of poor persons continuing as a structural element of the

economic system that we operate in; This is corroborated by continued state intervention in providing income support to vulnerable persons.

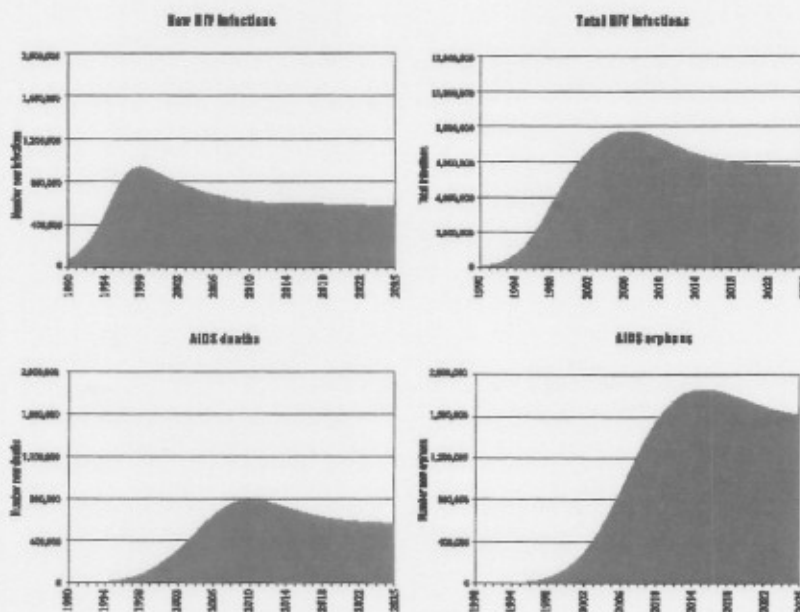
- 4.2 It is unlikely that improved economic growth will reduce this demand for legal aid. This is due to the reality that poverty and unemployment will remain even under improved economic circumstances. This is further evident from the experience of developed countries, which have a high economic performance and low unemployment and poverty and yet have an increasing demand for legal aid.
- 4.3 The state commitment to a rights based approach as per the Constitution of RSA, as well as specific provisions of the Constitution and other legislation also necessitates state funding for legal-aid.
- 4.4 The need for continuing legal-aid to fund an effective functioning public defender system is essential to an effectively functioning criminal justice system which is a critical pillar of a functioning democracy.
- 4.5 The need of communities for legal assistance is documented through various research projects and requires no further elaboration.
- 4.6 Finally, it is evident from an examination of the supply of legal-aid services that the only agency able to respond to the legal services needs of the poor at a scale that will match the demand, is the Legal Aid Board.

It is clear from this that there should little doubt as to the continuing need for legal assistance to poor persons. If this is not forthcoming from the state, the people of the country will lose faith in the justice system and their ability to obtain a fair trial and obtain redress for the violation of their rights. Overall this will mean that the rights enshrined in our Constitution will remain meaningless for the poor people of our country.



Endnotes

- ⁱ *Budget Speech 2006* by Minister of Finance Trevor A Manuel 15 February 2006
- ⁱⁱ *Budget Speech 2006* by Minister of Finance Trevor A Manuel 15 February 2006
- ⁱⁱⁱ *Budget Speech 2006* by Minister of Finance Trevor A Manuel 15 February 2006
- ^{iv} *Budget Speech 2006* by Minister of Finance Trevor A Manuel 15 February 2006
- ^v *Census 2001, LAB-NCP*
- ^{vi} *Statistics South Africa & World Bank*
- ^{vii} Address by Minister of Finance Trevor A Manuel, MP, to the National Assembly on *tabling the 2005 Medium Term Budget Policy Statement and the 2005/06 Adjustments Appropriation Bill*, 25 October 2005
- ^{viii} *Budget Speech 2006* by Minister of Finance Trevor A Manuel 15 February 2006
- ^{ix} *Budget Speech 2006* by Minister of Finance Trevor A Manuel 15 February 2006
- ^x *State of the Nation Address* of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament 3 February 2006
- ^{xi} *HIV/AIDS Profile in the provinces of South Africa* : Dorrington, Bradshaw & Budlender : Centre for Actuarial Research – UCT



The waves of the AIDS epidemic (no change scenario)

xii

^{xiii} *National Evictions Survey* - Nkuzi Development Association and Social Surveys, 30 August 2005

^{xiv} Statistics provided by the Department of Home Affairs at the UNHCR Annual Planning Meeting, Pretoria, 14-15 February 2005

^{xv} *Patterns of Migration, Settlement and Dynamics of HIV/AIDs in South Africa* by Gayatri Singh, Forced Migration Studies Programme : University of Witwatersrand : 2005

^{xvi} Address by Minister of Finance Trevor A Manuel, MP, to the National Assembly on tabling the 2005 Medium Term Budget Policy Statement and the 2005/06 Adjustments Appropriation Bill, 25 October 2005

^{xvii} ANC Today Vol 3, No. 7, 21 February 2003

^{xviii} *Budgeting Challenges In The Developmental State* - Speech By The Minister Of Finance, Trevor Manuel, At Senior Management Service Conference, Cape Town, 20 September 2004 -

^{xix} *Review of the Criminal Justice System, Project Initiation Framework*, Department of Justice and Constitutional Development, RSA, November 2005.

^{xx} *Review of Regulatory Framework for legal services in England and Wales*, Sir David Clementi – December 2004

^{xxi} Legal Aid Board (September 2005), *Research report into external factors which are likely to impact on the work of the Legal Aid Board in the short-, medium- and long term conducted in order to inform the Legal Aid Board's 2006/09 Strategic Planning Process*. Prepared by Anthony Altbeker, Institute of Security Studies.

^{xxii} Judicial Inspectorate of Prisons - *Annual Report 2004/2005*

