

## **GRANTING LEGAL AID IN CRIMINAL MATTERS: THE INTEREST OF JUSTICE TEST**

*Panel discussion paper prepared by Hon. Justice Lawrence Gidudu at the National Legal Aid Conference 27/10/2011*

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Art. 128(3) of the Constitution provides:-

“Every person who is charged with a criminal offence shall –

- (a) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the state.”

Legal representation is, therefore, a constitutional right guaranteed by the Bill of Rights (chapter four). This Right to legal representation has to be read together with other Rights under Art. 28 of the constitution, collectively referred to as the **Right to a fair Hearing**.

Legal Aid, in my view, is much broader than legal representation. The constitution only guarantees legal representation in criminal cases whose involves death or life imprisonment. For offences with lesser sentences, there is no Right to legal representation at state expense. The possible justification for this restriction to capital offences could be that such serious offences involve complicated procedures and substantive issues which require legal minds such as advocates and the other consideration is that the cost could be prohibitive if there was no restriction to the category of cases to be covered at state expense.

However, it is true that the majority of offences are those that are not charged with capital offences and they are as indulgent as the capital offenders. Legal Aid, is much broader, because it covers not only representation in court in criminal matters, but includes professional advice in civil matters, arbitration, mediation, counseling and other forms of empowerment in both civil and criminal cases.

**It is, therefore, true to state that there is no constitutional guarantee to legal Aid in the broader sense.**

It is also correct, in my view, to state that the Right to a fair hearing in as far as legal representation is concerned, is restricted to capital offences or serious offences.

**The interest of Justice test** would, in my view, demand that **Legal Aid** is Constitutionally guaranteed in a much broader sense and operationalised through Legislation by way of an Act of Parliament.

The current Legal Aid regime in Uganda is not well defined and the structures in which it operates are loose and scattered. Civil Society Organizations have done a tremendous job in filling gaps in the criminal justice system and to a very limited extent in the civil justice system. Further, the criteria for determining a person who qualifies for Legal representation in courts or Legal Aid in general is vague.

The terms Legal Aid, legal representation, state briefs and poor persons defence are used interchangeably quite often for lack of clear definitions and mandates.

Assuming that the law that operationalises Art. 28(3) (e) of the constitution is The poor persons Act (Cap.20), then we can say it only deals with a small fraction of the problem. It does not define who a poor person is and does not talk about **Legal representation** but provides for **Legal Aid** which in my view is a much broader term than legal representation.

Section 2 of cap. 20 provides:-

**“Where it appears for any reason that it is desirable, in the interests of Justice, that a prisoner should have legal aid in the preparation and conduct of his or her defence at his or her trial and that the means of the prisoner are insufficient to enable him or her to obtain such aid:-**

- (a) a certifying officer, upon the committal of the prisoner for trial or**
- (b) a certifying officer at any time after reading the summary of the case submitted at the committal proceedings,**

**may certify that the prisoner ought to have legal aid, and if any indictment is filed against the prisoner and it is possible to procure an advocate, the prisoner shall be entitled to have an advocate assigned to him or her.”**

The interests of justice are not defined, the poverty levels are not stated, legal aid is not defined and legal representation which is the term used in the constitution is not referred to. The contradiction here is that while the constitution provides for legal representation, Cap 20 provides for legal aid and yet it limits payment to only representation by its ceiling of 1000,000= in state brief fees.

In practice, the courts provide counsel who interviews the prisoner at the beginning of the criminal session and not at committal. In practice, courts do not ascertain the means of the prisoner before assigning counsel in what we call state briefs.

What Chief Magistrates and Registrars do is to assign counsel on state brief for each person on the cause list, sometimes, including to those who have private briefs. Is this legal aid as provided in section 2 of cap 20 or is it legal representation? A proper legal frame work has to sort out these contradictions by enacting a comprehensive law to provide Legal Aid.

The interest of justice test would demand that legal aid and not mere legal representation be provided in both capital and minor offences so that the accused prepares his or her defence adequately. This should cover expenses for counsel to travel to the scene and interview witnesses for the prisoner, verifying allegations in the indictment and summary of evidence etc.

The challenge though is that payment for counsel is restricted to a maximum of 50 currency points, which is equal to 1,000,000/= as per section 3(3) of the Act. It is clear that this money was meant for legal representation in the court room and not for preparation of the defence as a whole.

It is submitted here that, the **interest of justice test** should follow the **means test** in order to bring on board the majority of persons who appear in courts without legal representation just because their cases are not capital.

Legislation establishing a Legal Aid body should be enacted to deal with administrative issues of identifying who is poor or indigent. Trial Judges should not engage in this. A national body responsible for Legal Aid with nationwide structures should be the one to identify persons who qualify for Legal Aid. Issues such as their income, asset base, land, dependants etc. may be taken into account.

Presently, the practice used by the courts is that all cases on the cause list are assigned counsel on state brief. In some cases even those with private briefs a “beefed” up with state brief counsel. There is therefore no criteria, to test if the

person has no means to pay an advocate or not. Provided the charges are capital, an accused is given counsel at state expense no matter what the quality of representation may be in most cases.

The Legal Aid body should have the legal capacity to enter co-operation agreements with other bodies and organizations that offer various forms of Legal Aid in order to minimize duplication of presence and roles in given areas. In this regard, the Law Society, LDC clinic, PAS, Public defenders, FIDA, FHRI, LASPNET etc would sign cooperation agreements to provide specific legal aid and in designated areas.

Justice is a balancing act. The state with all its resources both human and financial investigates, arrests, charges and adduces evidence against a prisoner. The interest of justice test should demand that an indigent prisoner is accorded facilities to either admit his/her crime or defend him or herself.

The need for a Legal Aid Act is more compelling at the moment. The current justice centers and other legal aid providers can be absorbed by either co-operation agreements or actual take-over.

Before I wrote these notes, I had not seen the proposed Legislation, but I now know it exists in draft and hopefully, stakeholders will discuss it to give it a good finish to enable it deal with the current vacuum created by absence of Government interventions to provide legal services to the poor.