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**LEGAL AID - A CONSTITUTIONAL RIGHT?**

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## **LEGAL AID: A CONSTITUTIONAL RIGHT?**

### **1.0 INTRODUCTION**

#### **1.1 “To no man shall we Deny Justice, to No Man Shall We Delay It”**

This was one of the fundamental provisions of the *Magna Carta* in the year 1215.

#### **1.2 Two Fundamental Elements in Legal aid from Magna Carta**

From this provision, we find the two fundamental and essential elements in Legal Aid:

- a. The right of access to court for justice, and
- b. The expeditious administration of justice.

We shall discuss these as we look at the Uganda Constitution. But let us first see what we understand Legal Aid to mean, Our Constitution does not define it and yet we may have different ideas about it.

#### **1.3 The Essence and Scope of Legal Aid**

Sir Thomas Lund says, regarding the essential requirements for

a legal aid and advice plan, it

“...must ensure that the services of the legal profession are made available to every one so as to secure that no one is deprived of the right to receive legal advice on any matter or where necessary, legal representation before

the courts or tribunals especially by reason of his or her lack of financial resources. Preferably, legal advice from a lawyer should be available at the outset of any difficulty, and legal aid should cover representation by a lawyer in ascertaining or disputing any claim in the civil courts and in the defence of all criminal charges”

(Secretary General, International Legal Aid Association, in his paper on **Legal Aid** at the Fourth Commonwealth Law Conference, New Delhi, 1971).

**We draw the following elements from the above**

- a. A Legal Aid and advice plan must not discriminate among those requiring and deserving having it.
- b. There should be no categories of legal matters where it is not available.
- c. The special criterion To determine who deserve being accorded legal aid and advice is lack of financial capacity to help oneself.
- d. Legal aid and advice should, to be meaningful, be available at the outset of the legal difficulty.
- e. Legal aid and advice should be available in both criminal and civil matters.

How far does our Constitution in providing for legal aid cover these elements, is one of the concerns of my presentation. Incidentally, it must be pointed out that the Constitution or the Poor Persons Defence Act, Cap 20, of the Laws of Uganda,

does not talk of legal advice. They talk of legal aid only. Can we assume that “aid” includes “advice”?

#### 1.4 **Legal Aid not Legalcare**

William Roland Buchner, writing on the **Role of A Law Society in Legal Aid**, said

“Great care must be taken to ensure that Legal Aid will not be regarded as “Legal care” in which every one has a right and entitlement to subsidized Counsel. Legal Aid is designed to help those who need to be helped” (At the same Fourth Commonwealth Law Conference above).

As we consider improving on the nature of our legal aid services, we must make the distinction Mr. Buchner points out here.

### **2.0 IS LEGAL AID A CONSTITUTIONAL RIGHT?**

2.1 The examination of the Constitution on the matter of legal aid, discloses two scenarios for the availability of legal aid. First where it is provided to be at the expense of the state and second, where it is at the expense of the accused. In the latter case, the accused would either meet the expenses from his or her own pocket or have them met by a private source on purely charitable grounds.

We thus have three different situations: first, where it is the state as provided, under Articles 28 (3) (e) of the Constitution, that is”

“in the case of any offence which carries a sentence of death or imprisonment for life, the (accused shall) be entitled to legal representation at her expense of the State “In this case, legal aid is a Constitutional right because the Constitution clearly says so. A “right” coexists with an “obligation” against another person to respect and not to violate that right. In this case, the State has an obligation to provide for that right under Article 28 (3) (e).

On the other hand, where the Constitution only provides for a lawyer at the expense of either the accused himself/herself or the expenses to be met by a private source, for example, the Uganda Law Society Legal Aid Scheme or FIDA, where possible,. Here it is not a constitutional right but a privilege. This is so because if the accused meets the expenses from his/her own pocket as under Article 28 (3) (d), the question of legal aid does not arise. Even where the accused is facilitated by a private source, the Constitution does not say so.

In conclusion, the right to legal aid is a constitutional right only where the Constitution unequivocally provides for it at the expense of the State under Article 28 (3) (e).

Furthermore, we must distinguish between the right to appear in court for trial and the right to have legal aid for that purpose. The issue of legal aid and as a constitutional right arises only

under Article 28 (3) (e) but in all other cases where the accused may have legal services it does not arise.

If I am required to justify further my distinction I have made above between the different situations of having legal services, I would point out what I believe was the intention of the law maker – that is, the Constituent Assembly.

The death penalty is the most serious punishment an accused convicted of those offences carrying that punishment can suffer. (Life is lost. Next to the death penalty, imprisonment for life, deprives one of his or her liberty for life (although in reality not actual physical life). The law maker, aware of the severity of these two types of punishments, as opposed to other less severe punishments, deemed it fit to avail legal aid as a means to help those who may not have the means to defend themselves in those offences carrying either of those two punishments, at the expense of the state. It I may go back to the Magna Carta, in this case if legal aid was not available justice would be denied because of one's poverty. It would not be justice.

## **2.2 The Constitution and the Poor Persons Defence Act**

At the risk of labouring this above distinction further, I would like to discuss the difference between the Constitutional provision for legal aid under Article 28 (3) (e) and under the Poor Persons Defence Act, Section 2

The Constitution says'

**Article 28**

(3) Every person who is charged with a criminal offence shall

- a. -----
- b. -----
- c. -----
- d. -----
- e. 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”

On the other hand, the Poor Persons Defence Act, Section 2 says

“2. Provision of Legal Aid

Where it appears for any reason, that it is desirable, in the interest 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 an indictment is filed against the prisoner and if it is possible to procure an advocate the prisoner shall be entitled to have an advocate assigned to him or her”.

The Constitution is clear and specific on legal aid (legal representation)  
at the expense of the state being available only where the offence

“carries a sentence of death or imprisonment for life”.

But under the Poor Persons Defence Act, there is no such clarity and certainty. “Where it appears for any reason that it is desirable, in the interests of justice”, opens the door to legal aid in all criminal offences. Secondly, when the Act says, “and if it is possible to procure an advocate, the prisoner shall be entitled to have an advocate assigned to him or her”, it may not be possible to have an advocate. There is therefore no absolute right, as in the case of the Constitution. There is no constitutional right to legal aid under the Act.

The Constitution is the basic law of the land. If the law maker had wanted to open the door to legal aid in all cases of criminal offences at the expense of the state, they would have said so but they opened it for only

offences punishable with a sentence of death or life imprisonment

### **2.3 Pro bono Legal Services**

The Advocates Act, as amended by the Advocates (amendment) Act,

No. 27 of 2002, under section 16 A, provides as follows”

#### **i. 16 A Pro bono Legal Services**

Every advocate shall provide pro bono services where required by the

Law Council or pay a fee prescribed by regulations made by Law

Council in lieu of such services.

ii. Where any advocate does not comply with subsection (i), the Law Council shall refuse to issue or renew a practicing certificate to that advocate under Section 12 (i).

iii. In this Section, “pro bono services” means professional services of an advocate given for the public good to indigent persons without charge”

Here again, it is my opinion that there is no absolute duty for members of the Uganda Law Society, to actually provide legal aid. It follows therefore that indigent persons cannot as a matter of right, demand legal aid from the advocates. Further more the Law Council cannot, in equity, compel an advocate to specifically perform the rendering of pro bono services.

I even wonder whether forcing an advocate to perform under the threat of being refused a practicing certificate, would not be challenged in court. It is perhaps for these reasons that the law, subsection (i) above, provides a way' out by requiring an advocate, who is not willing to give pro bono services, to pay a fee.

There is thus no constitutional right to legal aid available to indigent persons at the expense of the Uganda Law Society through the Law Council.

Even if it was advanced that the right to legal aid from the Law Council is constitutional, it would mean that it would apply to all criminal offences, as it is under the Poor Persons Defence Act. This would be contrary to the provisions under Article 28 (3) (e) and it would be incapable of implementation. ***Equity does nothing in vain*** (It may be interesting to mention what one senior member of the Uganda Bar said some two years ago. We were talking about defending Kony and his top commanders. He categorically said, " I would not defend him myself".

#### 2.4 **Sskaana Musa's Commentary**

In his book, **Criminal Procedure and Practice in Uganda, (2010)** Ssekaana, makes a comment on the right to legal representation under Article 28 (3) (d) and under Article 28 (3) (e). He concludes that, legal aid and in my view, as I have

laboured above, the right is mandatory only under the latter provision. Thus being a mandatory provision, makes the right there a constitutional one.

## **2.5 Comparison between the Constitutions of 1966 and 1967 and the current Constitution.**

I have been driven by the desire to see whether the provision under Article 28 (3) (e) existed under the 1966 Constitution (the Pigeon-hall Constitution, as described in learned circles to indicate the manner in which it was made and given to Hon. Members of Parliament), and the 1967 Constitution, which was repealed by the current Constitution.

In the 1966 Constitution, the corresponding Chapter on the Protection of Fundamental Rights and Freedoms of the Individual. Chapter 111, Articles 17 – 33, particularly, Article 24, which is substantially the same as Article 28 (3) of the current Constitution, does not have any provision similar or nearly similar to the present Article 28 (3) (e).

Similarly, under the 1967 Constitution, Chapter 111, Articles 8 – 23 on Protection of Fundamental Rights and Freedoms of the Individual, particularly Article 15, which is substantially the same as the current Article 28 (3), does not have any provision similar or nearly similar to the present Article 28 (3) (e).

The conclusion is that the framers of the current Constitution, in their wisdom, deemed it fit to improve on the previous bill of

rights by providing, as they did, under Article 28 (3) (e), a specific constitutional right to legal aid and only under the circumstances therein mentioned.

We may further find a comparison with the Kenya Constitution, 2010,

It provides, under Article 50 “ (2) Every accused person has the right to a fair trial which includes the right:

a. -----

b. -----

c. -----

d. -----

e. -----

f. -----

g. To choose and be represented by an advocate and to be informed of this right promptly.

h. To have an advocate assigned to the accused person by the state and at state expense, if substantial injury would otherwise result and to be informed of this promptly.

The crucial difference between the above two provisions is that where the expenses in the trial would be met by the State, the right is mandatory and must be availed to the accused. It is thus a constitutional right.

### **3.0 BASIC STANDARDS IN EVALUATING A DEFENDER SYSTEM**

Legal Aid is a universal practice that criminal justice demands. There is always room and indeed a necessity for improvement in any service. It is for these reasons, as we consider emerging issues and the way forward, that I bring in the issues of basic standards for evaluating our legal aid services.

In its report entitled **Equal Justice for the Accused**, A special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association (1957) recommended the following as basic standards which are of primary significance in evaluating defender systems.

1. The system should provide counsel for every indigent person who faces the possibility of the deprivation of his liberty or other serious criminal sanction.
2. The system should afford representation which is experienced, competent and zealous.
3. The system should provide the investigatory and other facilities necessary for a complete defence.
4. The system should come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect and should continue through appeal.
5. The system should assure undivided loyalty by defence Counsel to the indigent defendant.
6. The system should enlist community participation and responsibility.

My analysis of these recommendations is carried into my own recommendations here below:

#### 4.0 RECOMMENDATIONS

1. The Constitution and the Poor Persons Defence Act are principally concerned with legal aid in criminal offences. With the economic drive going on and the liberalization of business activities we are experiencing a wide gap between the haves and the have – nots, the commercial goods suppliers and the consumers, Under this state of affairs, the have – nots and the consumers are exploited by the former, both out of ignorance and the weaker position they are in. Land disputes are rampant, and death or serious injuries occur.

**Legal Aid services should be given more attention in civil disputes.**

2. Legal Aid services should not be taken as a means of helping inexperienced, especially the newly admitted advocates, to make a living by giving them state briefs. Capacity, competence and commitment on individual merit should be considered.

3. The remuneration for legal aid is unreasonably low. It does not attract senior advocates generally. Although the law allows the trial judge to certify a higher fee depending on the complexity of the case, the provided maximum should, in light of the increasing cost of living, be lifted up Under the 1951 Poor Persons Defence Act (PPD), the maximum for a state brief was shs. 300/- per prisoner, under the present P.P.D Act, it is 50 currency points (shs. 1,000,000/-).

4. The Legal aid services lead some sections of society to look at those providing them as collaborators with criminals to the extent of branding the criminal practitioners as criminals. This is very unfortunate. It discourages some advocates away from rendering the services. Intensive public publicity of the values and necessity of the legal aid services must be mounted and constantly continued.

5. The legal aid scheme needs to be community owned through the participation of the public whenever and to the extent possible. This would in the long run, help in rehabilitation, of offenders and prevent or at least minimize the phenomenon of public taking the law in their own hands. This would protect and improve public respect and confidence in the judiciary and promote community policing.

6. The legal aid services, being a necessary aspect of the promotion of law and order - the Rule of Law, justifies an establishment of an independent agency, as a statutory body to coordinate all players in legal aid services including the police and the judiciary, deal with policy matters, for example screening deserving indigents and recommending for improvements in the services.

## **CONCLUSION**

I have not touched on the issue of whether and how the Bench – Magistrates, and Judges, in court can engage in legal aid where either the parties have no legal representation or their advocates do not, as officers of the court, present their clients' cases properly. This is a very important and relevant matter in view of the level of ignorance of the law, illiteracy, cultural aspects, including our variety of vernacular languages in the administration of justice.

The practice by the Bench of judicial activism is also not too far fetched. For the same reasons it should be considered.

### **6.0 A FEW QUOTATIONS TO PONDER ON**

1. "Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person, haled (?) into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him ... Governments, both State and Federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime ... Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defences. That government hires lawyers to prosecute and defendants, who have the money to hire lawyers to defend, are

the strongest indications of the widespread belief that lawyers in criminal courts are necessities and not luxuries”

Per Black, J. – **Gideon v Wainwright (1963) 372 US, 335,344 9 L.ed**

2. “Ye who plead for the poor and take money at their hands,  
ye lawyers, ye advocates, be sure of this,  
When ye draw near to death, and pray for pardon,  
Your pardon at your parting hence will be but small.  
Saint Mathew bids me tell you this and if I lie, blame him”.

Lang-lang, Piers Plowman: God’s Bull of Pardon

3. “For the Sake of God, I will help you (Pro Deo te adjuvabo)  
St. Ives (the Patron saints of Lawyers)

All three above quotations taken from: 2000 Famous Legal Quotations by M. Frances Mc. Namara (1967)

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