

## THE ZAMBIAN LEGAL AID SYSTEM: HOPE FOR JUSTICE

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### Introduction

The basic principle behind the establishment of legal aid in almost all countries where the scheme operates is the provision of legal services for the poor and helpless, the disadvantaged members of the society: to enable them to defend themselves in both criminal and civil matters, or institute actions against offending parties. In other words to bring them, at least in theory, on par with other members of the society as far as availability of legal services is concerned. We shall see if in fact this idea is realised by the present system obtaining in Zambia, after we have examined the history of legal aid in Zambia, its present operations and determining its inadequacies, if any.

### Historical Background

2. It has always been in the discretion of the High Court or a committing court to assign a lawyer to defend a person who was to be tried before the High Court on a criminal charge if such a person was unable to provide a lawyer at his own expense. An Ordinance of 1945 extended the exercise of this discretion to cases triable in the subordinate courts.

3. Then came the Poor Persons Defence Ordinance of 1957 which made it mandatory, where the means of the applicant were not such as to enable him to provide himself with a lawyer for legal aid to be provided at the expense of the State, if such a person was committed for trial in the High Court upon a charge of the following species of offences:

- treasonable offences;
- offences against morality;
- murder;
- manslaughter;
- forgery and similar offences.

4. Legal aid was also discretionary in appeals and other offences triable in the High Court and subordinate courts.

5. Notwithstanding the above, legal aid was only provided where it was mandatory to do so where the offence charged was punishable by death—principally due to meagre financial resources to meet the increased demand of its services. Before the passing of the Legal Aid Act 1967, however, no provision had ever existed for legal aid in civil cases or for the granting of a defence certificate as of right in cases other than those triable in the High Court. Thus the Legal Aid Act of 1967 revolutionised the entire system.

### The Legal Aid Act 1967

6. In 1965 a Cabinet sub-committee was appointed under the Chairmanship of the then Minister of Justice, to consider the introduction of a scheme for legal aid in both civil and criminal matters.

7. The recommendation of the sub-committee was for the establishment of a Department of Legal Aid and the provision of legal services by salaried officials in the full time employment of the Government to such persons as qualified for legal aid. This scheme was approved in principle by the Cabinet and a Director of Legal Aid was appointed in October, 1966.

8. There was, as expected, some initial criticism of the proposed arrangements mainly from the society representing the legal profession. This criticism was based mainly on the doctrinaire concept that the employment of defenders and prosecutors by a 'common master' was objectionable in principle, and on arguments advanced that the provision of legal aid services under a scheme operated by private practitioners but financed by the State would better meet the requirements of the persons who would benefit by legal aid.

9. The provision of the Act, however, went a long way in allaying any fears that there might be any improper interference with the operation of the legal aid services. There was also ample scope for private practitioners to participate in providing the services contemplated under the Act.

10. One other feature of the proposed legal aid scheme which had received some criticism was the use which was proposed to be made of 'unqualified' persons that is to say persons who were not trained lawyers. It was felt that by affording such persons a limited right of audience in the courts for the purpose of the legal representation of accused persons, the standard of legal aid provided to accused persons and litigants would be lower than that available to persons who had the means to provide such services at their own expense. This provision of the Act was in the main intended to facilitate the extension of legal aid to a wide range of cases triable in the subordinate courts which was not for the time being feasible if representation in those countries was confined to fully qualified practitioners having regard to the limited number of practitioners in the country. This matter was, however, cautiously approached from the very beginning and when the Legal Aid Bill was introduced into Parliament the then Vice-President gave the House an assurance that the use of "unqualified" persons to do any legal work was a purely temporary measure and would be abandoned as soon as fully qualified Zambian lawyers were available. In the event no extensive use has been made of these "unqualified" Legal Aid Assistants and this aspect of the scheme as originally contemplated has been phased out.

11. Now, however, under arrangements with the Law Practice Institute of the Council of Legal Education, newly qualified Zambian law graduates

acquire practical experience by serving part-time as Legal Aid Assistants under the supervision of experienced lawyers. This has proved to be beneficial to both the students and the Department of Legal Aid. One may venture to say that the Law Association of Zambia, through its members, can assist in alleviating the problem of the unqualified lawyers by accepting some briefs from the Legal Aid Department free of charge. In some countries where there is no Department of Legal Aid, free legal service for the poor is undertaken almost entirely by the country's Law Association.

### **Present system in operation**

#### *(a) Administration and representation*

12. The Legal Aid Act, 1967, provides for the appointment of a Director of Legal Aid and other professionally qualified officers whose function it is to grant legal aid under the terms provided for in the Act in civil and criminal cases and to provide the services of a practitioner in all such cases, a discretion being reserved to the Director to engage the services of a private practitioner to undertake the representation of any person who has been granted legal aid, in which event the practitioner would be entitled to payment of appropriate prescribed professional fees.

13. It is expressly provided by s.3 of the Act that the fact that assistance is by way of legal aid does not affect the relationship between, or the rights of, practitioner and client or any privilege arising out of such relationship. Therefore, the Director of Legal Aid and Legal Aid Counsel are in precisely the same position as regards the provision of services to the client as if they were private practitioners, the only distinction being that they look to the State and not the litigant to pay them for services rendered, which is by way of salaries rather than by way of fees.

14. As a further guarantee of the exercise of independent judgment and discretion both in the administration of the Act and in the provision of professional services, the Act further provides in s.4(3) that in the exercise of his functions the Director shall not be subject to the direction or control of any person or authority.

15. This provision of unfettered discretion has contributed to a great extent in the fair administration of justice in this country. For example, legal aid has been granted by the Director to litigants in cases of preventive detention and unlawful imprisonment and arrest by law officers of the State. Further, a person who is a party in any civil proceedings to which the State is also a party, may under s.13 apply to the Court for a special aid certificate which will entitle him to representation by a practitioner appointed by the court whether or not application has been made to, or has been refused by, the Director of Legal Aid. In granting such an application the court takes into account two considerations, namely whether or not the applicant satisfies the conditions under which legal aid may be granted, and secondly that it is in the interests of justice that

the applicant should be represented by a practitioner than the Director. In the ordinary run of the mill cases where the State is vicariously liable in civil proceedings applicants have applied for legal aid and have received legal representation in the ordinary way.

#### *(b) Criminal matters*

16. The Legal Aid Act provides:

- (a) legal aid in respect of all offences triable in the High Court, which provision is mandatory;
- (b) legal aid in all specified (considered the more serious) offences triable in the subordinate courts, which provision is also mandatory; and
- (c) legal aid in all other offences triable in the subordinate courts, which provision is discretionary, each application being considered on its merits.

17. Where a person is charged with an offence for which the provision of legal aid is mandatory, and it appears to the court after enquiry that the means of that person are insufficient to enable him to employ a lawyer on his own account, the court shall issue a legal aid certificate which entitles the accused person to the provision of legal services by the Director of Legal Aid. Where the provision of legal aid is not mandatory the court may in its discretion issue a certificate or the applicant may apply to the Director of Legal Aid, who may, in his discretion, grant legal aid to the applicant.

#### *(c) Appeals*

18. The Director grants legal aid in appeals to the High Court and to the Supreme Court whenever it appears that there are arguable grounds for such appeals. On appeal either in the High Court or in the Supreme Court, the court may, if it considers that a point of law of public importance is likely to rise, issue a legal aid certificate to an unrepresented appellant. The Director has then no option but to grant legal aid to such appellant.

19. It is the duty of legal aid counsel to give advice on appeal to any applicant who is applying for legal aid and to prosecute any appeal against conviction in any such case and also in any case where a legal aid counsel has represented an accused person at his trial, where in the opinion of counsel there are reasonable grounds for appealing.

Appendix 'A' provides the details of the jurisdiction and functions while Appendices 'B' and 'C' show the volume of work handled for the year ending December, 1978.

#### *(d) Civil Litigation*

20. Legal aid is provided for in all civil cases whenever it appears that the applicant would benefit from the services of a practitioner in any such case or matter affecting him and being a party to such proceedings and it is otherwise in the interests of justice that the applicant should be represented. Application for legal aid is made either to the Director or to a District legal aid committee. Legal aid is available on a means qualification, the applicant receiving either free legal aid or legal aid

supplies on the payment of a contribution towards the cost of the proceedings, according to his means.

21. In order to protect the rights of a person who might otherwise be deprived of assistance because of ignorance, and in the absence of an extensive machinery for the diversification of the services throughout the country, the Director is enabled by virtue of the provisions of s.12(3) of the Act, on his own motion to invite any person to apply for legal aid.

22. A bulk of the cases which are handled in this respect are usually actions arising out of the Fatal Accidents Acts. Widows and bereaved parents are assisted in recovering damages after their husbands, breadwinners, or children have died. Divorces and other matrimonial causes are also handled by the Directorate.

#### (e) *The Local Courts*

23. A legal practitioner is not as a rule allowed to appear in local courts, which principally exercise jurisdiction in African customary laws of the country.

24. The otherwise wide scope of legal aid in this country has therefore been restricted by the exclusion of the local courts from the operation of the Legal Aid Act. Legal aid is thus confined to matters and causes in the High Court, the Supreme Court, the subordinate courts and Tribunals before which a lawyer may represent a client. The extension of the legal aid scheme to local courts is rendered unnecessary by virtue of the very summary nature in which proceedings are conducted in those courts, and secondly because, by and large, the legal practitioners in the country are not necessarily qualified in customary laws. However, there is admittedly a need for reform to assimilate aspects of customary law to the inherited common law. This is particularly evidenced in the field of family law and related fields where a wide measure of relief at present available in the subordinate courts and the superior courts, is unavailable to the mass of the population because of the exclusion of the customary law has not kept pace with the growth and transformation of our society. The scope of legal aid activity in this field will go hand in hand with the movement for the reform of the law in this direction.

#### **Legal aid in operation**

25. The legal aid scheme commenced operation with a nucleus professional staff consisting of the Director and two other professional officers. This staff has grown progressively to a present establishment of eleven professional officers including the Director.

26. A legal aid office was opened in Lusaka in July, 1967 and a regional office in Ndola in August, 1967, while in January, 1971 Livingstone and Kitwe offices were opened, though the latter was closed in 1972. The expansion programme of the Department has been blocked by initial and recurrent under staffing and by inability to recruit suitable personnel for professional posts, mainly because of competition for recruits and the attractions offered by private practice.

27. The provision of legal aid by virtue of the mandatory provisions of the Act proved sufficient to tax the limited resources of the Department and in 1968, just about a year after the Act was brought into operation, the services provided in the criminal field had to be curtailed by the reduction of the categories of specified offences. The difficulties arose mainly from the geographical isolation of many of the towns and districts for which coverage was necessary. The reduction of the categories of specified offences was a step which was taken with reluctance and Government had agreed to review the position as soon as qualified Zambian lawyers were available to facilitate the opening of sub-stations throughout the country.

28. In order to meet in part the difficulties presented by the geographical isolation of many areas of the country a practice has developed whereby special days are set apart for the hearing of legal aid cases at provincial centres and legal aid counsel now make regular periodic visits to these centres to represent persons who have been granted legal aid in the subordinate courts. This practice has now become established by the issue of a judicial circular at the instance of the Chief Justice.

#### **Advice to clients**

29. Application for legal aid may result in advice to the applicant without subsequent court action. This is particularly relevant in cases before the Local Court, where the appearance of counsel, is barred by law. In such a case, the applicant, be it in a criminal or in civil case, is advised orally and sometimes in writing and this may be with or without contribution, depending on the means of the applicant. Similarly, applicants in matters before subordinate courts, the High Court and the Supreme Court may also be advised accordingly.

30. This is also particularly relevant where the applicant elects so to do or where he wishes to save money, that is to say, if he is qualified for contribution at all. This category of applicants is, however, rare.

#### **Financial aspects of legal aid**

31. The running of the Department of Legal Aid is wholly financed by the Government and its funds are boosted only to a small extent by contributions and costs awarded in civil proceedings.

32. The original purpose of legal aid is to provide legal services to those who would otherwise not be able to get them. But where an applicant is in a position to contribute to the cost of the aid, he is required to do so in accordance with the Act and the Legal Aid Regulations.

33. The system of contribution is based on a means test. It may also be mentioned that the scheme extends to both citizen and non-citizen alike, provided that the non-citizen is resident in Zambia.

#### **Inadequacies of the scheme**

34. It must again be stressed that the Department of Legal Aid is at present operating under severe pressure occasioned principally by the shortage of pro-

fessional staff and lack of sufficient financial means to expand. Some of the constraints have been lack of transport, the brain drain from the Legal Aid Department to private practice and the limited number of legal aid offices in the country.

35. This situation is the greatest setback in the Legal Aid Department where, like a public house, people come and go as it pleases them. However, the Government is aware of these problems and is considering introducing improvements.

#### **Final reflections**

36. The legal aid scheme is no doubt unique and bold attempt to provide justice for all in Zambia. It is therefore an institution to be proud of and credit goes to the party and Government of Zambia for being among the very first in Africa to introduce the system.

37. It aims at the gradual elimination of the disparity between the availability of a lawyer for the well-to-do and the indigent.

38. In the context of the manpower resources which existed at the inception of the scheme, it was an ambitious undertaking but a logical step in the development of Zambian institutions. The basis of a workable system has been laid.

39. Expansion has been delayed for reasons which have been indicated in this paper.

40. At present no person is unrepresented in a trial before the High Court and with very few exceptions in trials before that court the accused persons are legally aided. Criminal appeals in the High Court and the Supreme Court are pursued by legal aid counsel in all appropriate cases.

41. In criminal trials in the subordinate courts the future expansion of legal aid activity appears to lie in

the establishment of a system of duty counsel who will be available to the Court whenever it appears that the services of counsel will in any way advance the administration of justice, and in the more extensive use of the discretion to grant legal aid in these courts.

42. The provision of legal aid in civil matters was regarded as particularly pressing because of the demonstrable extent of under-privilege in this area which existed before the passing of the Legal Aid Act.

43. The operation of the legal aid scheme has had the salutary side effect of educating the citizenry regarding their right to seek redress whenever actionable wrongs have been done to them. Before the introduction of the scheme actionable wrongs went unpunished because of pervasive ignorance of the existence of that right.

44. The process of rapid modernisation and industrial expansion has brought, and is bringing, an increasing number of people into relationships regulated not by customary law but by statute and the inherited common law. It is in connection with these relationships that the application of legal aid is most discernible.

45. Under the philosophy of Humanism, the Government is encouraging the growth of the principle of equality among the people. One of the guiding precepts of this philosophy is to provide maximum social services which promote people's welfare. I hope that this discussion has adequately shown that Legal Aid is one of the most important professional services a government can provide to all citizens without discrimination. After all, justice should be for all the people. A comprehensive legal aid system ensures that the largest number of persons benefit from its services.

**SCHEDULE OF OFFENCES FOR WHICH LEGAL AID IS MANDATORY  
CLASS OF OFFENCES FOR TRIAL BY HIGH COURT**

<b>Offence</b>	<b>Section of the Penal Code contravened</b>	<b>Offence</b>	<b>Section of the Penal Code contravened</b>
Concealment of treason	44	Preventing escape from wreck	225
Treason felony	45	Internationally endangering the safety of persons travelling by railway	226
Piracy	73	Attempting to injure by explosive substances	336
Attempt by any person to procure abortion to a woman	151	Maliciously administering poison with intent to harm	231
Attempt by woman with child to procure her own abortion	152	Causing death by reckless or dangerous driving	Cap.766,199(1)
Bigamy	166	Aggravated robbery	294
Manslaughter	199	Aggravated assault with intent to steal	295
Murder	200	Demanding property by written threats	296
Infanticide	203	Attempted extortion by threats or accusation	297
Attempted murder	215	Procuring execution, etc, of deeds or valuable securities by threats, violence, restraint or accusation	298
Attempted murder by a convict	216	False statements by company officials	325
Accessory after the fact to murder	217	Casting away vessels, etc	332
Conspiracy to murder	214	Attempts to cast away vessels	333
Aiding suicide	Cap.148,8(c)		
Child destruction	221		
Disabling in order to commit felony or misdemeanour	222		
Stupefying in order to commit felony or misdemeanour	223		
Any prescribed act intended to maim, disfigure, disable or to do grievous harm to any person, or done in resistance to, or prevention of the lawful arrest or detention of any person	224		

**SPECIFIED OFFENCES TRIABLE IN THE SUBORDINATE COURTS**

<b>Offences or Class of Offence</b>	<b>Section of the Penal Code defining Specified Offences</b>	<b>Offences or Class of Offence</b>	<b>Section of the Penal Code defining Specified Offences</b>
Offences in respect of seditious practices and publications	57	Attempts to commit or procure the commission of any of the foregoing offences is such attempts amount to felonies and if not already specified herein	390
Rioting after proclamation	79	Conspiracies to commit any of the foregoing offences if such conspiracies amount to felonies and if not already specified herein	394
Obstructing proclamation	80		
Rioters destroying buildings	81		
Perjury	104, 105,106		
Fabricating evidence	108		
Rape	132		
Offences against morality	132, 164		
Arson	328, 329,330, 331		
Forgery	348, 351		

**APPENDIX B**

**NEW APPLICATIONS FOR LEGAL AID IN CRIMINAL CASES  
FOR THE YEAR ENDING 31 DECEMBER 1978**

	Applications Received			Applications approved for legal representation at trial or hearing		
	Lusaka	Ndola	Livingstone	Lusaka	Ndola	Livingstone
High Court trials:						
Homicide	207	132	40	207	131	40
Other offences	106	121	21	106	121	21
Subordinate Court Trials:						
Specified Offences	71	124	12	71	123	12
Other Offences	340	48	10	283	43	8
Appeals to the High Court	572	513	79	252	5	10
Appeals to the Supreme Court	217	29	—	70	9	—
Sub Totals	1,513	967	162	989	432	91
Totals	2,642			1,512		

**APPENDIX C**

**NEW APPLICATIONS FOR LEGAL AID IN CIVIL CASES FOR THE YEAR ENDING  
31 DECEMBER 1978**

	New applications received			Investigations and advice			Under investigation withdrawal, abandoned or refused			Approved for proceeding		
	Lusaka	Ndola	L/stone	Lusaka	Ndola	L/stone	Lusaka	Ndola	L/stone	Lusaka	Ndola	L/stone
Fatal accidents	15	38	1	3	—	—	6	24	1	6	14	—
Personal injuries	17	18	1	1	—	1	9	11	—	7	7	—
Master and servant contract	48	28	8	4	—	—	43	25	8	1	3	—
Other contracts	62	20	9	1	—	—	43	16	7	18	4	2
Divorce maintenance and affiliation	50	31	16	2	—	—	10	8	11	38	23	5
Other civil Matters	124	43	28	9	—	1	82	32	24	33	11	3
Sub Totals	317	178	63	20	—	2	193	116	51	103	62	10
Totals	558			22			360			175		