

Legal Aid Bill
Analytical Study

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Definition

Legal Aid is grounded on the principle that poverty should not hinder access to justice and equality before law. It is a concept well established in international conventions, national constitutions and laws and is related to the rule of law, fair trial, right to litigation, right to defense, and equality before law.

The Interim National Constitution, 2005, similar to other modern constitutions, provides for the principle of legal aid in the section on "Equality before Law". It is also provided for in previous constitutions. Article 68 of 1973 Constitution ensured the importance of assisting litigators to have access to fair trial by covering expenses of bringing witnesses to Court or any other expenses spent for that purpose. The State should bear this financial cost. Article 68 stipulates: "In all criminal trials, the accused shall have the right to be confronted with the witnesses giving testimonies against him/her. The accused shall also have the right that defense witnesses should be brought before the Court to give their statements and the State shall bear the costs of their transportation".

Similar rights are also provided for in the Legal Aid Draft Act¹. The Article 2 stipulates:

"Legal Aid shall mean herein provision of a better, fairer and a wider mechanism to have access to courts and all other bodies deciding on the rights and duties of Sudanese nationals and foreigners residing in Sudan. The Government of Sudan shall bear the costs of trials either wholly or partially subject to the financial situation and the circumstances that may hinder their enjoyment of the right to equal access to justice and equality before law taking into consideration that support given to them or their families should not be jeopardized".

This definition, however, is not specific and does not cover the grounding principles of legal aid. Moreover, it does not adhere to the terms included in the Constitutions, namely:

- **Rule of Law:** The definition as per Article 2 does not make any reference to the principle of legal aid.
- **Equality:** Article 2 does not mention the international right "equality before justice". This principle ensures equal treatment of people in terms of their rights and duties. Equality is the basis of all individuals' rights and freedoms. People enjoy equal rights, especially the right to litigation before competent judicial bodies. The importance of this right emanates from the fact that fair trial requires equality between parties in a criminal suit. It has also implications for the accused' right who would feel confidence in justice as long as he is granted fair trial. This right is provided for in human

¹ For the purpose of this study, Legal Aid Draft shall be referred to herein as "the Draft".

rights international conventions. The Sudanese law maker has also been keen to include it in the constitution's principles.

- **Right to defend oneself:** The definition as stated in Article 2 does not stick to Article 34/6 of the Constitution ensuring the right of the accused to legal aid for the purposes of defending himself/herself. The right of the accused to defend himself/herself is a well-established constitutional principle aiming at enabling the accused to respond to accusation and present evidences of his/her innocence. The public interest requires that the accused should enjoy his/her rights in a proper manner. It is the responsibility of the defense to acquaint the accused with his/her rights. The defense's role is also to make the accused avoid behaving in a manner that would harm him/her. The accused' ignorance, lack of confidence in the prosecution or justice, his/her fear that he/she would be liable to punishment could make him behave to the detriment of his interest.

Given its importance, this right is always at the heart of international conventions, constitutions and laws.

- **Non-discrimination:** Article 2 does not provide for the principle of "Non-discrimination", though it is deemed very important in legal aid. This is surprising especially that the spirit of legal aid is to provide equal opportunity before law. Article 31 of the Constitution states: "All persons are equal before the law and are entitled without discrimination, as to race, colour, sex, language, religious creed, political opinion, or ethnic origin, to the equal protection of the law". Although the principle of "non-discrimination" always goes in parallel with the principle of "equality", it has always been devoted an independent and special status in laws and constitutions out of its importance. This is why non-discrimination is always referred to in a specific manner "without discrimination, as to race, colour, sex, language, religious creed, political opinion, ethnic origin, wealth or social class". I believe that making specific reference to non-discrimination is of utmost importance especially in interim/transitional constitutions and in post-conflicts situations in as much as it contributes to building trust.

Second: Legal aid providing body

Article 26 of the Legal Aid Draft Act specifies that the body providing legal aid shall be named as "Legal Aid Office" and defines same as an "office belonging to the Government of Sudan".

More important is that this body should be independent and all justice bodies (the Judiciary, Advocacy, and the Prosecution Genera)l should be represented therein. Legal aid is financed from taxes, Zakat, and donations.

We believe that inclusion of the Executive represented by the Ministry of Justice is a pitfall because the State in most cases is a party in litigation before courts

especially in serious crimes before the criminal courts (according to the requirements of Article 34/6 of the Constitution). To establish Legal Aid Office under the Ministry of Justice and Attorney General would cast doubt on Legal Aid Office independency since the Ministry of Justice and Attorney General represent the Government in all suits against natural and corporate personalities.

In accordance with 1974 Constitution and Advocacy Act 1983 (Articles 39, 40 and 41), Admission of Advocates Committee was the body providing legal aid. It was entrusted with approving legal aid applications. This Committee – its seat was at the premises of the Federal Supreme Court- was formed of two judges, two advocates and an advisor from the Attorney General Chamber as follows:

1. Head Sudanese Bar Association;
2. Judge of the Supreme Court (appointed by the Chief Justice);
3. Judge of Court of Appeal (appointed by Chief Justice);
4. Senior legal advisors (appointed by the Attorney General); and
5. An advocate whose experience in advocacy is not less than fifteen years (appointed by the Bar of Association).

This tri-partite Committee (Judiciary, Advocacy, and Prosecution General) looks into the applications submitted by individuals. Applications are restricted to civil suits and not criminal suits. The Committee shall verify fulfillment of legal aid requirements and decide on applications.

As for criminal suits, legal aid application should be submitted by a representative from the Attorney General Chamber or one of the criminal courts. The application is a request to nominate an advocate to defend the accused regardless of the gravity of the crime, its type or punishment. This provision is better than Article 34/6 of the Constitution which is limited to serious offenses. In case the Committee approves legal aid application, it will nominate an advocate and inform him/her of the nomination decision. The advocate may refuse the nomination decision on the basis of reasonable grounds acceptable for the Committee.

Third: Categories eligible for legal aid

Article 8 of Legal Aid Draft defines legal beneficiary as follows: “The existing natural person who utilizes the types of legal aid provided for in this Act”. Natural person means any “human being” regardless of sex or social class. This requirement overlooks some aspects envisaged by legal aid principle. Hereunder are three major points neglected by the Draft Act:

1. The right to litigation is enjoyed by all individuals in accordance with the Constitution. Acknowledging this right entails acknowledging existence of the person enjoying it regardless of whether this person is natural or corporation.
2. To be eligible for legal aid, a person should be financially incompetent. This would harm justice. Financial incompetence could be applied to both natural and corporate personalities.

3. The scope of rule of law could be expanded through expanding legal aid beneficiaries. Limiting legal aid beneficiaries to natural personalities could end up with narrowing the range of those benefiting from legal aid. Law maker could have rather ensured provision of this service to a wide range of beneficiaries. There exist corporate personalities who are financially incompetent and who are in need for legal aid. The latter category includes Elderly Homes, Juvenile Centres, Care Homes of Orphans or Children Born outside Marriage or other similar institutions.

Article 7 of the Draft Act is drafted in a manner to cover as many legal aid beneficiaries as possible. However, expanding the range of beneficiaries in the Draft Act is in conflict with Article 34/6 of the Constitution, 2005 which limits provision of legal aid to only serious criminal offenses. The approach envisaged in the Article of the Draft Act is commendable, though it goes in contradiction with the Constitution.

In this context, it is worth mentioning that the Constitution itself contains some conflicting provisions. Article 34/4 of the Constitution "Fair Equality" reads: "In all civil and criminal proceedings, every person shall be entitled to a fair and public hearing". The right to fair hearing should be ensured in criminal, civil family and administrative suits. A person meeting with a professional advocate (outside legal aid) would make a hearing unfair. Article 27 of Part Two of the Constitution requires the Government to abide by legal provisions enshrined in international conventions and instruments ratified by the Sudan. The national law maker, upon drafting Legal Aid Act, could expand the concept of "fair trial" and "equality before law" enshrined in the international instruments.

The Constitution should not have restricted provision of legal aid. It should have rather been more direct and specific and should have obliged the law maker to ensure legal aid for all without setting limitation that would violate the principle of equality or limitation as to the type of proceedings or gravity of offenses. Special attention should be given to the following categories:

- Women;
- Children;
- IDPs;
- Persons of Special Needs;
- Victims of armed conflicts;
- Victims of human rights violations, victims of violence, and children victims of sexual abuse;
- Victims of human trafficking (including women and children trafficking); and
- Victims of trafficking in human organs.

Refugees, non-Sudanese residents and Legal Aid

Pursuant to Article 7 of the Draft Act, refugees enjoy the services provided by the Legal Aid Office. This approach is in line with the requirements of the International Humanitarian Law and the efforts to expand the scope of rule of law. Nevertheless, it is worth highlighting the following points:

1. One of the financial resources of legal aid is taxes collected from citizens. Governments argue that they are not obliged to spend from taxes collected from the citizens on refugees and non-Sudanese residents.
2. UN organizations and UNHCR, in coordination with the Governments and their institutions including Legal Aid Office, cover legal aid in favour of refugees with a view to protecting them and ensuring their rights.
3. Inclusion of refugees should be in line with the State policy regarding refugees. A State that does not encourage asylum will definitely be reluctant to be involved in asylum-related issue including legal aid.
4. Seeking refuge is a human issue. All States should cooperate to provide a conducive environment for refugees. Hence, having the status of a refugee should not be a reason to be deprived from having access to justice.

Forth: The Scope of Legal Aid

We may say that legal aid makes reference to legal advise, assistance and representation before law at no cost.

Law makers have organized the scope of legal aid in Chapter 2 (Article 4) of the Draft Act. This Article has attempted to widen the scope of legal aid by classifying services into primary legal services and secondary legal services as follows:

1. Primary legal aid includes:
 - a. General legal information;
 - b. Legal advise;
 - c. Preparing legal aid applications to be submitted to the administration or legal bodies exercising general powers.
 - d. Representation in administrative issues.
 - e. Legal aid in case of conflicts to be settled amicably through negotiations and good offices and other similar mechanisms outside the scope of courts.
2. Secondary legal aid includes:
 - a. Representation during the process of investigation;
 - b. Representation before courts and justice;
 - c. Legal aid related to amicable settlements of conflicts and trials before justice;
 - d. Preparing applications during trial.

Legal Aid in terms of substance

The principle of (serious criminal offenses)

Although Article 7 of the Draft Act expanded the scope of legal aid as explained above, the Interim National Constitution, 2005, limits provision of legal aid service to serious criminal crimes only: This means that civil and family issues are outside the scope of legal aid. This is an overt injustice that should be addressed by the law.

Article 34/3 of the Constitution reads: "In all civil and criminal proceedings, every person shall be entitled to a fair and public hearing...". Public hearing can not be realized in the absence of equality before law. Both parties should have equal opportunities to defend themselves. Apparently, the Constitutions provisions in this respect are conflicting.

Fifth: Verifying the financial competency of legal aid applicant

Article 21 of the Draft Act stipulates:

"The application form and all other ownership and income-related documents shall be submitted to the Ministry of Justice. Free access to information related to assets and properties shall be permitted...".

This Article is in contradiction with the principle of "privacy" that should be observed under all circumstances. Tracing a person's properties in the manner described in the Article above is only permissible in legal proceedings in case of insolvency, bankruptcy and judicial execution.

It should have been more appropriate to require a salary statement showing the standard of living of legal aid applicant and not to ask for information regarding his/her assets and liabilities because this ends up, in most cases, with being reluctant to request legal aid and will eventually complicate legal proceedings.

Conclusion

Drafting a law for legal aid falls within the efforts made to expand the umbrella of the rule of law. This Draft Act is deemed a step towards achieving equality before law. Studying the failures and success of legal aid system as enshrined in the previous constitutions would help make a new achievement in favour of justice and social categories that has long been deprived from fair trial due to poverty or ignorance.

Although what has been done by the law maker in terms of expanding the scope of legal aid is commendable, Article 34/6 of the Interim National Constitution, 2005 limited the scope of legal aid beneficiaries to those involved in "serious criminal offenses". This is against the standards of fair trial and does it help those who need legal aid.

It goes without saying that legal aid will be a real success in the context of a constitutional system applying human rights standards. Providing for the right to fair trial in isolation from the other rights would make this right inaccessible for people. Fundamental rights should first be ensured such as poverty eradication, promotion of education, society development, protection of children, women, elderly, people of special needs, and people affected by war and natural disasters. These fundamental rights should go hand in hand with the right to fair trial and equality before law.

A final word to say is that provision of legal aid service reflects the State keenness to realize social welfare of its citizens.

About the writer:

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