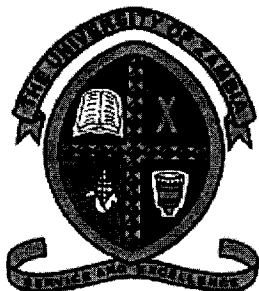




**THE UNIVERSITY OF ZAMBIA**



**SCHOOL OF LAW**

**LEGAL AID IN ZAMBIA: DOES IT GUARANTEE  
EQUALITY BEFORE THE LAW?**

**By**

**NKUMBIZA MUMBA**

**An obligatory essay submitted to the University of Zambia in  
partial fulfilment of the requirements for the award of the  
Degree of Bachelor of Laws (LLB).**

\_\_\_\_\_ November, 2004.

**THE UNIVERSITY OF ZAMBIA  
SCHOOL OF LAW**

**I recommend that the obligatory essay prepared under my supervision**

**By**

**NKUMBIZA MUMBA**

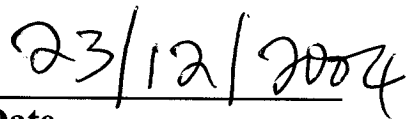
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## DECLARATION

I, NKUMBIZA MUMBA, (Computer number: 99546884), DO HEREBY declare that the contents of this Directed Research paper are entirely based on my own findings. The work used herein that is not my own, I have endeavoured to acknowledge the same.

I, THEREFORE, take full responsibility for the contents, errors, defects and omissions therein.

22/12/04

\_\_\_\_\_  
Date

*Nkumba*

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## DEDICATIONS

This work is dedicated to ALL THOSE WHO HAVE BEEN DENIED ACCESS TO THE LEGAL MACHINERY BECAUSE OF BEING POOR.

The work is also dedicated to my mum Mrs Rosemary Mumba, Aunty Medrine Mumba who has been like a mother to me, uncle Micheal Kaluba, Chilekwa, Kanyanta, Mwene and Mwaba and Mumba, Aunty Charity, Aunty Petty and baby Jeff. You were all always there for me when I needed you. You gave me support materially and strength to go through each day with courage knowing in my heart that I have your backing and love. Without your support it would have been impossible for me to come this far.

Everything that I have become and everything that I will become, I owe it all to you. For this reason, this is for you.

## ACKNOWLEDGMENTS

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This essay would not have been a success had it not been for my supervisor, Judge Kabazo Chanda for his continued support and patience in supervising and guiding the writing of this work, his suggestions and criticisms have made this work a success.

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To my family, thank you all for your love and encouragement. To mum, you have always believed in me and supported me through the years and taught me early in life the value of hard work. I will always be indebted to you for all the sacrifices you have made to enable me come this far. To aunt Medrine, I thank you from the bottom of my heart for supporting me in everything I do and for being a mother to me over the years. It would have been impossible for me to come this far without your help and support. What makes people special is not what they give someone but it is what they make someone become, you have contributed to the making of the person I am today.

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To the fourth year class of 2004, we made it through despite the storms. Thank you for the memorable moments that we shared and for helping me fit in.

*GOD BE WITH YOU ALL THE DAYS OF YOUR LIVES.*

## **ABSTRACT**

It is estimated that today, about 80 percent of all Zambians are living in abject poverty. This means that these cannot afford private legal representation before the courts of law. The paper therefore analyses the ability of the Zambian legal aid scheme to provide effective legal representation to the poor which representation can effectively equate that accorded by private legal practitioners. The paper highlight the importance of equality before the law and the need to ensure that all those who come before the law are accorded legal representation to help them prosecute or defend cases before courts of law.

The paper shows that while the legislation for the provision of legal aid in the country is comprehensive and adequate, its provisions have been rendered ineffective because of a number of problems that the Department of Legal Aid is facing in its effort to provide legal services to the poor. This situation has not been helped much by the participation of Non-governmental Organisations and the Law Association of Zambia despite the important role that these organisations are playing. The paper therefore calls for the need to reform the Legal Aid scheme in order to make it more effective and improve its ability to provide legal services to the poor which can equal the services provided by private legal practitioners. If this is not done then it will mean that the Zambian legal aid scheme does not guarantee equality before the law.

# CHAPTER 1

## 1:0 INTRODUCTION

It is estimated that 80 percent of Zambians live below the poverty datum line. This means that these cannot afford the basic necessities of life such as food, clothing and shelter. This state of affairs is a result of the liberalization program, which the government embarked on in 1991. The implementation of this program saw the privatization of state owned enterprises, the new owners of these enterprises embarked on restructuring measures which had the effect of leaving many Zambians jobless. The result of the foregoing was that there was a sharp increase in poverty levels in the country to the present estimated levels of 80 percent.

The above entails that these poor people cannot afford to pay for private legal representation when faced with the need to prosecute or defend cases before courts of law. Despite the large numbers of poor people however, the legal aid department and the Legal Aid Act has remained static. As a result of this the Act has become ineffective in its effort to provide for the means to address the provision of Legal Aid within the current social, economic and political dispensation. Further there has not been much increase in the number of Legal Aid personnel in the Legal Aid department despite the increase in numbers of the poor. This brings about the question whether or not the Department is providing adequate legal representation to the poor, which can equated with the representation by private legal practitioners.

The proposed undertaking is intended to provide an in depth investigation of the Legal Aid Scheme in Zambia and the extent to which the scheme has coped with the provision of Legal Services to the poor and whether the legal services provided

thorough this scheme guarantee equality before the law between those represented under the scheme and those represented by private legal practitioners. In achieving this, the paper will assess the impact of the liberalization of the economy on the provision of free legal services to the poor.

The paper will also assess whether the provision of legal aid guarantees equality before the law. The paper will also determine the extent to which Non-Governmental Organizations and the Law Association of Zambia are helping in the provision of Legal Aid. All this will be in an effort to determine the effectiveness of the Legal scheme in the current economic, social and political dispensation and whether there is need for reform.

The study is of great importance in that it will greatly highlight the plight of the poor Zambian citizens who are in need of professional legal services but cannot afford this. The study will also provide remedial measures which may help in the restructuring of the Legal Aid Scheme in the country to make it more efficient in the provision of Legal Services to the poor, who are not, it should be noted, poor by choice but because of the harsh economic environment they have found themselves in. This will ensure that they are treated equally before the law as those who can afford the services of private professional legal practitioners. The study will therefore lead to the promotion of the rights of the poor to receive equal treatment before the courts of law.

In the carrying out of the study, various forms of literature available on the subject were relied on to provide the theoretical and comparative framework of the study

undertaken. One of such sources is the book written by Pauline Lewis and others entitled **SOCIAL NEEDS AND LEGAL ACTION**.<sup>1</sup> In this publication, the authors try to link the sociology of law with the need for legal action in society. It brings out the theories of contemporary legal service provision and explains the role of law in society and the extent it can provide social control. It is based on an analysis of the British Legal Aid System and determines whether or not legal aid qualifies as a social need to be provided as a form of eligibility criteria to access legal aid services. This publication was used to draw comparisons between the Zambian and British Legal Aid System and will also help in attempting to assess whether there is need for the restructuring of the Zambian legal aid scheme in the light of economic and Political changes since 1991.

Another Publication is the book entitled **Legal Aid and World Poverty – a survey of Asia, Africa and Latin American**.<sup>2</sup> This book talks about the Development of the Legal Aid System in developed countries and its development in developing countries. It also talks about the theories justifying the provision of legal aid by the government. It also attempts to outline the primary goals of legal aid – which flow from the differences in the financial status of litigants or potential litigants. The book goes on to state that such a goal can be realised in part by restructuring legal institutions and procedures without extending and possibly contracting the system's need for professional services.

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<sup>1</sup> Morris, P. Et al. (1973)

<sup>2</sup> Mertzger, B. (ed.) (1974)

This book concludes that the problem of legal services in Africa is that of how to allocate the services of a tiny group of professionals in a society where the poor constitute the bulk of the population. This publication is of importance to the study at hand in that in addition to offering a comparison tool between the provision of legal services and the elimination of legal discrimination it will also help in determining whether the problem of legal aid in Zambia is related or caused by there being few professionals in the Legal field as compared to the population.

Another Publication of importance to the research which was used to help assess the lessons that can be learned from modern societies treating the provision of legal aid to the poor as a civil and political right to be protected by positive law. This book entitled **TOWARD EQUAL JUSTICE: A COMPERATIVE STUDY OF LEGAL AID IN MODERN SOCIETY.**<sup>3</sup>

This publication outlines the development of legal aid as a hybrid in some ways like a political right to which each human being is entitled and that the provision of legal aid has been placed in almost the same lines as the civil and political rights protected by positive law. Because of this the law should ensure that access to the law is effectively available to all citizens in the form of positive law.

Another work that has been considered is a student obligatory essay by Elijah C. Banda whose title is **EIGHTEEN YEARS of LEGAL AID: An exposition of the**

**provision of Legal services to the poor in Zambia.**<sup>4</sup> This work the Zambian legal aid scheme where he highlights the successes of legal aid in Zambia and its failures since the enactment of the Legal Aid Act in 1967 to 1985. He makes some interesting recommendations in areas that need reform and also found that the Legal Aid Scheme was necessary in a country like Zambia. However, this study was done when the political, social and economic ideology was socialistic so the difference between that study and the research now being undertaken is that the study now being undertaken focuses on the provision of legal aid in a capitalist type of economic and political ideology and its effects on Zambia's social and economic climate.

This comes about as a result of the high levels of unemployment, which have resulted in the majority of Zambians being poor. This work is used in the paper to provide a comparison with regard to the effects of political and economic conditions in a country like Zambia, which has embraced market, based type of economic policies. In addition to the above, the paper also relied on various other documentary sources like journals, periodical and Reports in addition to electronic data to help in the assessment of the Zambian legal aid scheme.

The conceptual framework used in this research is to develop recommendations on the provision of legal aid services in Zambia based on research that is designed to make the domestic legal framework more effective and consisted with international norms.

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<sup>3</sup> Cappelletti, M. (ed.) (1981).

## 1:1 RESEARCH ARRANGEMENT

In chapter one the paper will give the gist of what the research paper is all about. It will briefly outline the problems faced by Zambians in accessing legal services and will give the evolution and the theories justifying the provision of legal services to the poor. Chapter two will look at legal aid in view of Human Rights norms and the institutions, which are involved in the provision of legal services to the poor.

In achieving this, the paper will access the Constitutional basis of the provision of legal aid to the poor in Zambia. It will also consider the extent to which legal aid in Zambia conforms to international Human Rights norms dealing with the issue of equality before the law such as the Universal Declaration of Human Rights and the International Covenant on civil and Political Right.

Chapter three will give an analysis of the evolution of the Zambian Legal Aid Legislation and the Legislative gaps that exist in the law as it stands and its effectiveness in view of the shift in the social, economic and political situation in the country. This chapter also looks at the problems that the Zambian legal aid scheme is facing especially those relating to the Legal Aid Department. Chapter four analyses the role that Non- governmental Organizations and the Law Association of Zambia in the provision of legal services to the poor.

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<sup>4</sup> Banda, E. C. (1985)

The chapter specifically looks at the Legal Resources Foundation of Zambia and the Law Association of Zambia National Legal Aid Clinic for Women. Chapter five gives the Conclusions and Recommendations. This chapter will summarize what has been discussed in the paper and will provide recommendations based on the problems highlighted in the previous chapters and how best the government can formulate policies that will ensure equality before the law of all litigants, poor or rich.

## **1:2 EQUALITY BEFORE THE LAW AND LEGAL AID**

The modern legal process is highly complex. This arises from the fact that it consists of rules of procedure and practice that cannot be understood by persons who are non-professionals in the legal field. This state of affairs affects both the educated and the uneducated alike. The foregoing was aptly stated by Justice Sutherland in Powell v. Alabama<sup>5</sup> where he states;

*“Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime he is incapable of determining whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence or irrelevant to the issue or otherwise inadmissible. He lacks both skill and knowledge adequately to prepare his defence, even though he has a perfect one he requires the guiding hand of counsel at every step of the proceedings against him.”*

From the above it is clear that for a party to litigation to succeed before a court of law there is need for professional legal representation. Further, the above implies that if

one party to litigation is legally represented, while the other party is not so represented, it means that the unrepresented party will not receive a fair hearing. This means also that if one party cannot afford to hire a lawyer, then such a party should be provided a lawyer at public expense.

The need for professional legal representation is all the more important in an adversarial system of law. In this kind of legal system, for proceedings to be meaningful, it is common knowledge that justice demands that parties should be at par in terms of their access to legal advice or guidance. This is because if one party is represented by counsel and the other is not, the unrepresented party will be disadvantaged or handicapped in effectively prosecuting or defending his case<sup>6</sup>. The above mentioned disparity between litigants was acknowledged in the case of Powell v. Alabama<sup>7</sup> where Justice Black stated that;

*“In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us the obvious truth.”*

The above statement underscores the importance of litigants being at par in their access to legal representation. Therefore, it is important that in each case where one of the parties is represented by counsel, then the other party also needs to be represented by counsel. The need to ensure that parties to litigation are at par has been endorsed and accepted by all mature legal systems. Because of the need for equality before the law, most Governments the world over including Zambia have schemes to provide

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<sup>5</sup> (1932) U.S.275

<sup>6</sup> Banda, E. Op. Cit.

<sup>7</sup> Op. cit.

legal aid to the poor “*whose means are inadequate to enable them to engage practitioners to represent them.*”<sup>8</sup>

### **1:3 EVOLUTION AND THEORIES JUSTIFYING THE PROVISION OF LEGAL AID TO THE POOR**

Legal aid has been defined as “the organised rendering of legal services by advocates and or attorneys in civil or criminal matters either in the nature of representation in the courts or before administration tribunals to persons unable engage legal representation through indigency.”<sup>9</sup> From the definition, for legal services to qualify as legal aid they must be rendered through an organised system or framework. This has been achieved through a gradual process that has grown into what is now referred to as legal aid.

The modern idea of legal aid to the poor can be traced from the ancient Roman world. Under Roman law the most prominent form of legal aid to the poor was through a system called *clientele*. Under this system the weak and the impoverished attached themselves to a powerful man called *patronus*. The *patronus* assisted the weak party in different problems especially in litigation, this help was in return for certain services and political support. The assistance by the *patroni* included all extra-legal assistance needed to prosecute a case against a powerful opponent in a Roman court<sup>10</sup>.

During the medieval period, legal aid was seen as a form of charity. It was given by the Church and Christian men as a pious work. Later the Church and temporal rulers

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<sup>8</sup> As provided in the Preamble to the Legal Aid Act No. 30 of 1967.

<sup>9</sup> Legal Aid in South Africa. University of Natal publication

produced two organised forms of assistance. The first of these involved an official created by canon law that was employed by the Church and paid to represent the poor in ecclesiastical courts. The second form involved the commanding of magistrates to forgive the court fees of poor litigants and sometimes assign a private lawyer to help them gratuitously.<sup>11</sup> The charitable justification for the provision of legal aid to the poor drew its strength from the Christian religious belief, which emphasised that charity was instrumental to man's salvation<sup>12</sup>.

During the *laissez-faire* period, the new political theory was based on the natural law schools. Under this new theory, the state was viewed as a contract between the people and their Government in which the government was bound to preserve the natural rights of the former. These rights were to belong to all the governed equally without distinctions being made on the basis of wealth, rank or privilege. Here “justice was seen as a process by means of which the state preserved each citizens rights from encroachment by the government or his fellow citizen.”<sup>13</sup>

In view of the foregoing, the securing of justice demanded that courts of law be equally accessible to all. The need for equal access to the courts of law received attention in both the American Bill of Rights and the French Declaration of the Rights of Man. To this end the American constitution guarantees the right to counsel under the sixth Amendment.

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<sup>10</sup> Cappelletti, M. Op. cit. P.8

<sup>11</sup> *ibid* p.13

<sup>12</sup> *ibid*. P.17

<sup>13</sup> *ibid*. P.23.

The above meant that charitable justifications of aid to the poor were replaced by concrete legislative and administrative planning which defined the kind of aid to be given and the class of people to receive such aid. In so doing legal aid to the poor was made into a "legal rather than a mere moral obligation."<sup>14</sup> The implication of this is that the poor were brought under positive law and were no longer receiving charity.

One of the contemporary rationale for the provision of legal aid to the poor is two fold; the first is that effective legal services to the poor is essential to the proper functioning of the machinery of justice; and the second is that legal services are demanded for humanitarian and charitable considerations<sup>15</sup>. Another justification for the provision of legal services to the poor is that it will lead to the "elimination of legal discrimination resulting from the impecuniousness of litigants."<sup>16</sup> Other justifications are that programs for the provision of legal services to the poor can contribute to; Firstly, the creation of a unified national legal system. Secondly, it can lead to more effective implementation of existing social welfare and regulatory legislation intended to benefit the poor. Thirdly, it will lead to greater public accountability of the government particularly the bureaucracy and to greater public participation in the governmental process. Finally the provision of legal services to the poor will lead to the strengthening of the legal profession.<sup>17</sup>

From the foregoing it is worth noting that today the principle justification for the provision of legal aid to the poor is that all citizens have equal access to professional legal services. This assumption is based on the ground that where there is no equal

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<sup>14</sup> Metzger, B. Op. cit. P.12.

<sup>15</sup> *ibid*

<sup>16</sup> *ibid*

<sup>17</sup> *ibid*

access to the law in a legal system, such a system's integrity is compromised. To this end the provision of legal services to the poor is seen as a means of ameliorating the problem of ineffective access to the law among the poor<sup>18</sup>. As a result of the above the provision of legal aid services to the poor has come to be regarded as a human rights issue deserving to be guaranteed and incorporated into ‘the modern complex of social and political rights’ and thus need to be protected by positive law which calls for affirmative state action which must “effectively, rather than formally, guarantee the right.”<sup>19</sup> Therefore, because equality before the law is very important, Governments spend public funds for its provision through legal aid schemes provided for under an organised system, which is legally based.

#### **1:4 LEGAL AID IN ZAMBIA**

Zambia has realised the importance of equality of litigants before courts of law, and has thus put in place measures to ensure that persons who cannot afford private legal representation are accorded representation by a public funded lawyer. This assistance is given through the legal aid scheme. The legal basis for the provision of legal services to the poor is the Legal Aid Act No. 30 of 1967. The Act provides in its preamble that it is an Act to “provide for the granting of legal aid in civil and criminal matters and causes to persons whose means are inadequate to enable them engage practitioners to represent.”

Legal services under the scheme are offered through the Legal Aid Department, which is under the Ministry of Justice. Legislation for the provision of organised legal

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<sup>18</sup> *ibid* p.4

<sup>19</sup> Cappelletti. *Op.cit.*

aid has been in existence since 1945 when the Poor Prisoners Defence Ordinance was enacted. Section 3 of the Ordinance provided that legal aid was to be accorded “where it appears that it is desirable in the interests of justice that a prisoner should have legal aid in the preparation of his defence at his trial before the High Court or before the Magistrate Court.” For a person to qualify under this provision, a magistrate’ registrar or judge of the High Court had discretionary powers to certify that such a person be accorded aid “where it appears that his means are insufficient to enable him obtain such aid.”<sup>20</sup>

In 1957, the Poor Persons Defence Ordinance was enacted<sup>21</sup>. This Ordinance according to the Attorney General Mr. Doyle<sup>22</sup> was enacted to “consolidate and improve” the Poor Prisoners Defence Ordinance. The Ordinance provided for legal aid to persons charged with any crime or appealing from conviction or sentence. This legislation continued in force until the enactment of the Legal Aid Act No. 30 of 1967. The 1967 Act provides for the provision of legal aid in both civil and criminal matters. Therefore, section 8(1) of the Act provides inter alia that legal aid should be provided in all cases triable in the High Court. In civil cases, legal aid is granted when “in the opinion of the Director” an applicant “is in need of the service or would benefit from the services of a practitioner and he has insufficient means to enable him engage the services of a practitioner.

## **1:5 THE NEED FOR LEGAL AID IN ZAMBIA TODAY**

It is estimated today that about 80 percent of Zambians live below the datum poverty line. This implies that they are unable to meet the basic necessities of life namely;

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<sup>20</sup> Section 3 of the Ordinance

<sup>21</sup> No. 56 of 1957

clothing, food and shelter. These poverty levels have mostly been brought about by the liberalisation of the economy from 1991 when the Movement for Multiparty Democracy (MMD) came into power and embarked on a privatisation program. This program led to a number of closures of companies and massive restructuring in both private and the remaining para-statal companies. The result of the above is that most Zambians are unemployed. The few people employed in the formal sector get very low salaries, which fall short of being a living wage. In line with the above, most Zambians such as Teachers and Civil servants get less than K500,000 per month.<sup>23</sup>

These salaries are very low in view of the fact that at the start of 2004 the Basic Needs Basket topped K1,065,900 per month for a family of six. This estimate did not include things like health, education and transport costs<sup>24</sup>. The implication of the foregoing is that if a person fails to afford the basic needs of life then it is practically impossible for such person to afford private legal representation, which is very expensive. For example according to the Legal Practitioners (Costs) Order, 2001<sup>25</sup>, costs for instituting legal proceedings such as preparing, issuing, filing and service of writ of summons, endorsed with a statement of claim costs in the range of K200,000 to K540,000 per hour depending on a practitioners standing experience of legal executive.<sup>26</sup>

The above means that it is practically impossible for about 80 percent of Zambians to access private legal representation. This brings to the fore the need for Government to spend public funds to fund the provision of quality legal services to all Zambians who

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<sup>22</sup> Northern Rhodesia Legislative Council Debates 1957.

<sup>23</sup> The Challenge 2004 vol. 6 No. 1 "Church's Social Teaching and Wages" Pg 22, 23.

<sup>24</sup> *ibid*

<sup>25</sup> Statutory Instrument No.9 of2001

appear before courts of law. This is necessary in order to ensure justice and equality before the law for all. Therefore, today more than ever, legal aid is very much needed in Zambia. From the above analysis therefore, it is the aim of this work to establish whether the mere fact Zambia has an organised legal aid scheme mean that there is equality of litigants before courts of law. The work will therefore endeavour to assess the effectiveness of the Zambian Legal Aid Scheme and provide suggestions and recommendations for its improvement.

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<sup>26</sup> See Part II OF THE SCHEDULE.

## CHAPTER TWO

### 2:0                    IMPORTANCE OF LEGAL AID AS A HUMAN RIGHT

#### 2:1 LEGAL AID AS A HUMAN RIGHT-LEGAL BASIS

According to Cappelletti<sup>27</sup> the provision of legal aid services to the poor has come to be regarded as a human rights issue to be included in the “*modern complex of social and political rights.*” Cappelletti goes on to state that this modern right has been linked to the political right of equal access to the courts. To this end, today one of the assumptions upon which legal systems are structured is that all citizens have equal access to the law in the form of access to expert legal advice. If this was not achieved, then such a legal system’s integrity is compromised.

The above arises from the fact that our conception of equality is permeated by the idea of uniform standards impartially applied to all.<sup>28</sup> It is only when uniform standards are impartially applied to all that justice can be said to be achieved. Since justice is a very important attribute of a good legal system, it follows that each and every legal system should strive to achieve it. To this end, justice requires the equal treatment of equal persons in equal or essentially similar circumstances.<sup>29</sup> By so doing, justice is the endeavour to render to everyone that to which he is entitled. This definition of justice equates justice with equality. So what this implies is that justice in a legal system can only be achieved where there is equality.<sup>30</sup>

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<sup>27</sup> In Towards equal justice: A comparative study of legal aid in a modern society. 1981. p87

<sup>28</sup> ibid. p88

<sup>29</sup> Bodenheimer, E. Jurisprudence: The philosophy and method of the law. 1962. p 193.

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#### 2:1 LEGAL AID AS A HUMAN RIGHT-LEGAL BASIS

According to Cappelletti<sup>27</sup> the provision of legal aid services to the poor has come to be regarded as a human rights issue to be included in the “*modern complex of social and political rights.*” Cappelletti goes on to state that this modern right has been linked to the political right of equal access to the courts. To this end, today one of the assumptions upon which legal systems are structured is that all citizens have equal access to the law in the form of access to expert legal advice. If this was not achieved, then such a legal system’s integrity is compromised.

The above arises from the fact that our conception of equality is permeated by the idea of uniform standards impartially applied to all.<sup>28</sup> It is only when uniform standards are impartially applied to all that justice can be said to be achieved. Since justice is a very important attribute of a good legal system, it follows that each and every legal system should strive to achieve it. To this end, justice requires the equal treatment of equal persons in equal or essentially similar circumstances.<sup>29</sup> By so doing, justice is the endeavour to render to everyone that to which he is entitled. This definition of justice equates justice with equality. So what this implies is that justice in a legal system can only be achieved where there is equality.<sup>30</sup>

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<sup>27</sup> In Towards equal justice: A comparative study of legal aid in a modern society. 1981. p87

<sup>28</sup> ibid. p88

<sup>29</sup> Bodenheimer, E. Jurisprudence: The philosophy and method of the law. 1962. p 193.

As a right therefore, legal aid should be provided in the sense of providing uniform standards, which should be impartially applied to all that qualify through positive law. The emphasis on uniformity and impartiality in the provision of legal services to the poor implies that the program of according such services is prevented from making decisions on a flexible ad hoc basis. This should be the case even when doing so would be in the interest of efficiency.<sup>31</sup>

In order to achieve the foregoing, the program for the provision of legal services to the poor should be structured in such a way that it enables individuals to redress their legal rights. In so doing legal aid comes to be viewed as some armoury which the poor are equipped with before trial.<sup>32</sup> This is in an effort to accord them the same type of armoury, which is naturally possessed by the rich, or those who can easily afford private legal representation.

In response to the need to equip people with armoury before trial, and in so doing achieve the equal treatment of litigants before the law, most international human rights instruments have recognised and provided for the attainment of equality of all people before the law. To this end, the Universal Declaration of Human Rights (UDHR) expressly provides under Article 8 that “*all are equal before the law and entitled to the equal protection of the law without discrimination.*” This declaration is made by all states parties to the declaration and is an affirmation of the states’ commitment to provide the minimum standards for its achievement.

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<sup>30</sup> Ibid. p195

<sup>31</sup> Cappelletti. et al. op. cit p88

<sup>32</sup> ibid

But since the UDHR is not binding upon states parties, the above provision is amplified in the International Covenant on Civil and Political Rights (ICCPR) which instrument being a covenant has a binding force upon member states.<sup>33</sup> Under Article 14, the covenant provides that *“all persons shall be equal before the courts and tribunals in the determination of any criminal charge against him or if his rights and obligations in a suit at law.”* Article 14 (3)(b) and (d) further provides that in the determination of any criminal charge against a person, that person will be entitled in full equality to some minimum guarantees vis: to have adequate time and facilities for the preparation of his defence and to be *“tried in his presence, and to defend himself in person or through legal assistance...in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it.”* Article 14(3) (d) clearly provides for the granting of legal aid to persons with no sufficient means to hire private legal representation.

Further, the African Charter on Human and Peoples Rights provides that all individuals shall be equal before the law under Article 3. The foregoing implies that the provision of legal services to the poor is recognised by almost all international human rights instruments as a human right. This underscores the importance of equality before the law and thus the need for a country to have a structured system to ensure its achievement.

## **2:2 LEGAL AID AS A HUMAN RIGHTS ISSUE IN ZAMBIA- CONSTITUTIONAL BASIS**

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<sup>33</sup> Donnelly, J. And R.E. Howard. International Handbook of Human Rights. London: (1987) p.9.

As a signatory to the above stated human rights instruments, Zambia should endeavour to provide the minimum guarantees for the right to equality before the law and in so doing bring the provision of legal aid to the poor as a human right . This is so because as stated in the introductory chapter, 80 percent of Zambians cannot afford to pay for private legal representation and can thus not be equal before courts of law with those who have private legal representation. So in order to ensure that the poor get the same treatment before courts of law as the rich, they need the guiding hand of the services of expert legal representation in the form of legal aid.

To this end the Zambian constitution provides in Article 18(2) the constitutional basis for the provision of legal services to the poor. Under this Article the constitution expressly provides that every person who is charged with a criminal offence;

*“Shall unless legal aid is granted to him in accordance with the law enacted by Parliament for such purpose be permitted to defend himself before the court in person, or at his own expense by a legal representative of his own choice”*

As can be noted from the above, Article 18(2) (d) does not directly provide for the granting of legal aid to those who cannot afford private legal representation but it highlights the importance of equality before the law and thus the need to grant legal aid. It can be stated that this provision envisaged the enactment of a law to provide for the granting of legal aid to the poor. This law as already stated exists in the form of the legal Aid Act. It should also be noted that when the drafters of the constitution did not by this constitutional provision leave the government open to widespread claims for free legal representation. This fact can be deduced by the inclusion of the words

“*at his expense*” were added so as to leave no doubt about who is responsible for lawyer’s fees.<sup>34</sup>

Therefore, while the basis for the granting of legal aid is provided for, the primary responsibility for the settling of legal fees arising from legal representation rests on the person accorded such representation. But it is important to emphasize that despite this qualification, the basic principle of the right to legal representation was laid down. The constitutional provision was later enhanced by the enactment of the Legal Aid Act to deal with the actual provision of legal aid to the poor.

By legally bringing the provision of legal aid to the poor in the constitution, and the Legal Aid Act, Zambia has put in place the minimum measures required by international human rights instruments aimed at achieving the concept of equality before the law. It should be noted however, that the fact these measures are in place does not mean that the right is being enjoyed. For the right to legal aid to be enjoyed there is need to put in place measures to ensure the enforcement of this right. It is only when this is done will it have meaning.

In view of the above, it is clear that legal representation before courts of law is a human right which should be guaranteed by positive law. This positive law should provide the minimum standards for the attainment and enjoyment of the right by all litigants before courts of law and tribunals. If these standards are not met then there should be some form of sanctions upon the state. In the area of the right to legal representation, the traditional approach to protecting this right has been essentially legalistic and individual. This approach involves the promulgation of legal standards,

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<sup>34</sup>Cappelletti. et al. op. cit. p4

obligations are not met.<sup>35</sup>

In order to achieve the foregoing, there is need to assign each individual his rights and responsibilities and to provide the means to ensure their attainment. This can be done by providing objective legal standards and to ensure their impartial application.<sup>36</sup> Further an important principle in human rights law is that of the duty of the states to put into force the rights contained in an instrument or law.<sup>37</sup> This implies that the people should be educated about their rights and so that they can easily recognise when their rights are violated by so doing, people will take remedial measures. In the same vain, legal aid programmes should be implemented in such a way that it entrusts the poor with a fairly wide measure of individual responsibilities for recognising their problems and thereby bringing them to the attention of the programme.

It is clear from the above analysis that one of the most important ways to ensure the protection of rights is to provide minimum legal standards in the form of positive law. It follows therefore that Zambia has recognised the right to equality before the law and has acknowledged the importance of providing legal aid to those who cannot afford private legal representation. This has been done because of the need to ensure that all litigants are accorded equal treatment before courts of law. Having recognised the right to legal representation under Article 18 (2)(d) of the Constitutions,

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<sup>35</sup>ibid p 86

<sup>36</sup>ibid.

<sup>37</sup> Article 26 of the Vienna Convention on treaties states that all treaties should be performed in good faith. This means that if a states party to a treaty does not perform or put into force the provisions of the treaty in good faith. Such a states party will be liable under international law and will be subject to sanctions.

The legislators have gone further and promulgated a comprehensive legal aid Act that defines the obligations of the state in its efforts to ensure equality before the law of all litigants who appear before courts and tribunals. This aid is provided or is supposed to be provided to all indigent litigants as long as it is proved that such a litigant has “*insufficient means to prosecute or defend his case before a court of law.*” It can then be stated that as far as providing the minimum standards of protection of the right to legal representation is concerned, Zambia has achieved that.

The above does not however, imply that Zambia has achieved or sufficiently managed to ensure equality before the law. The next chapter will show that despite the fact that there is a legal regime governing the provision of legal aid to the poor, there is still much that needs to be done to ensure that people benefit from the legal structure so provided. This arises from the fact that while the law provides for the provision of legal aid, it can still be argued that there are a lot of factors have undermined the provision of legal aid services that ensure equality of all litigants before the law.

The foregoing does not imply that there should be absolute equality. This is because “*absolute equality hardly ever exists in nature or human social life.*”<sup>38</sup> This is so because no two situations are completely alike. Therefore, what is meant by equality in this work is what Bodenheimer calls approximate equality. This is the type of equality, which although not absolute, is to such an extent that when there is some existing difference between two things, that difference is deemed to be “*insignificant*

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<sup>38</sup> Bodenheimer, E. op. cit at p197

*and inessential.*”<sup>39</sup> The next chapter will therefore analyse the legislative gaps in the legal aid legislation and the problems that the scheme or department is faced with.

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<sup>39</sup> *ibid*

## CHAPTER 3

### 3:0 EFFECTIVENESS OF THE ZAMBIAN LEGAL AID

#### LEGISLATION

##### 3:1 HISTORY OF ZAMBIAN LEGAL AID LEGISLATION

As was stated in the introductory chapter, organised legal aid has been in existence since 1945 when the Poor Prisoners Defence Ordinance was enacted. The Ordinance was aimed at according legal aid to persons with insufficient means in their preparation of their defence at trials before the magistrate court and the High court<sup>40</sup>. The grant of such aid was discretionary and could only be granted upon satisfying that it was in the interest of justice, that the accused could not pay for legal representation. It was also necessary to satisfy that it was practicable in that case to procure the services of a solicitor.<sup>41</sup>

The Poor Prisoners Defence Ordinance was in existence until 1957 when the Poor Persons Defence Ordinance was Enacted in order to “consolidate and improve” on the existing Poor Prisoners Defence Ordinance.<sup>42</sup> Under this Ordinance the test to be satisfied for one to be granted aid was the same as that under the 1945 Ordinance. Under section 4(1), the Ordinance provided for the grant of legal aid to persons committed to the High Court by the Subordinate Courts. To this effect, it was mandatory to grant aid in the following cases:

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<sup>40</sup> See 3 of the Ordinance

<sup>41</sup>Banda, E. Eighteen years of Legal Aid An Exposition of the Provision of Legal Aid to the Poor in Zambia. Student obligatory essay. (1985) p.15.

- (a) Treasonable offences
- (b) Offences against the morality
- (c) Murder
- (d) Forgery and similar offences.

It should be noted however that this Ordinance did not provide for the provision of legal aid in civil cases<sup>43</sup>.

### **3:2 THE 1967 LEGAL AID ACT**

As already pointed out, the legal aid scheme is today regulated by the legal aid Act Chapter 34 of the laws of Zambia enacted in 1967. This piece of legislation is more comprehensive than its predecessor, the Poor Person's Defence Ordinance. This piece of legislation was a delivery upon the campaign promise made by the United National Independence Party (UNIP) in its Manifesto where it promised that free legal aid was to be extended to civil cases<sup>44</sup>.

### **3:3 SALIENT FEATURES OF THE ACT**

In its preamble, the Act provides that Legal aid is to be provided in both civil and criminal cases. To achieve this, the Act establishes the office of the Director of Legal Aid and "*such legal aid Counsel and Legal Aid Assistants as shall be necessary for the proper administration of this Act.*"<sup>45</sup> The Director also has power under section 6

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<sup>42</sup>Per Doyle, Attorney General, Northern Rhodesia Legislative Council Debates. 1957.

<sup>43</sup> Banda, E. op. Cit.

<sup>44</sup>Declaration 5 of the UNIP Manifesto entitled When UNIP Becomes Government. Cited from Banda, E. ibid.

<sup>45</sup>See section 4(1) of the Act

to engage the services of a private practitioner to undertake the representation of any person granted legal aid.

Section 3(2) provides a guarantee that despite people receiving legal aid, such aid will not affect the relationship between client and practitioner arising out of the relationship. This provision provides the guarantee that clients and legal aid Counsel enjoy the same professional relationship as that enjoyed between private Counsel and *his client*. The Act also provides independence to the Director in the exercise of his power. This independence is provided under section 4(2), which states that the Director shall not be subject to the direction of any person or authority in the exercise of his functions.

Section 8(1) provides that legal aid in all cases triable in the High Court is mandatory. In cases where legal aid is mandatory, the Court acts in its discretion to grant legal aid certificates. Under this section, whenever a person is committed for trial before the High Court, and such person has insufficient means to enable him engage a practitioner to represent him, a legal aid certificate shall be granted to him. The High Court may also issue a legal aid certificate to an unrepresented person before it, if the Court is of the opinion that there is insufficient cause why the accused should not be granted legal aid. Section 10 of the Act makes it mandatory for the Director to grant legal aid to any person in respect of whom a legal aid certificate has been granted.

In civil cases the Director upon the receipt of an application may grant legal aid by a person seeking such aid or upon the recommendation by a legal aid Committee or by the grant of a legal aid certificate. Under the 1994 regulations, the director is given the power to limit the grant of legal aid in civil cases to legal advice only or to any one or

more steps to assert or dispute a claim.<sup>46</sup> In practice magistrates today rarely grant legal aid certificates in civil matters. A Magistrate from Chingola interviewed over this confirmed that he has never granted a legal aid certificate in a civil matter ever since he became a Magistrate. Another Magistrate from Mpika said he very rarely grants legal aid certificates in civil causes. This they stated is because the Department of Legal Aid is very much under-staffed.

*Thus today much emphasis is placed on the provision of legal aid in criminal cases. This emphasis is mainly brought about because in all cases triable in the High Court, legal aid is mandatory.*<sup>47</sup> To this end, if an accused has been granted legal aid and a legal aid Counsel is not available, trial cannot proceed.<sup>48</sup> This makes it reasonable that where legal aid is insufficient it be reserved for criminal cases. Therefore, since 90 percent of criminal cases in the High Court are defended by legal aid Counsel,<sup>49</sup> the importance given to the provision of legal aid in criminal cases is justified.

Legal aid is also granted for appeals in both civil and criminal cases. The grant of such aid is provided under section 14 of the Act. Under this section, an application for legal aid may be made either to the Director or to a Legal Aid Committee by any person who;

- (a) Intends to appeal against his conviction or sentence or against any judgement or order affecting him, which was made in any criminal cause or matter.

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<sup>46</sup> The Legal Aid (General) Regulations. Regulations by the Minister. Statutory Instrument 264 of 1967. Act no. 13 of 1994.

<sup>47</sup>Section 2 of the Criminal Procedure Code CAP 88 of the Laws of Zambia as read with section 8 of the Legal Aid Act CAP 34 of the Laws of Zambia.

<sup>48</sup>Report of the Special Committee on Delays in the Administration of Justice and Delivery of Judgement in Zambia. P.15.

<sup>49</sup>ibid.

- (b) Becomes a respondent in any appeal in a criminal cause or matter.
- (c) Intends to appeal against any final judgement or order in a court in any civil cause or matter.
- (d) Becomes a respondent in an appeal in a civil cause or matter.

Section 15 provides for the qualifications that an applicant for such aid must fulfil. Under this provision the Director has to be satisfied that the applicant has insufficient means to hire private legal representation in the appeal and that the applicant has reasonable grounds for instituting or defending such case on appeal and that it is in the interests of justice that such applicant be represented on appeal. In practice however, legal aid under this section is also mostly restricted to criminal cases because of the reasons outlined above; namely lack of Legal Aid Department.

### **3:4 PROCEDURE FOR THE APPLICATION FOR LEGAL AID**

The Legal Aid (General) Regulation<sup>50</sup> provides for the application procedure for the grant of legal aid. Regulation number 5 provides that an application for legal aid may be made to any member of an appropriate Legal Aid Committee, the Regulation goes further to provide that “nothing in these regulations shall be deemed to prohibit any person, and in particular, any practitioner, from recommending to the Director any applicant or prospective applicant, who appears to such person to be in need of legal aid.”<sup>51</sup> This provision seems to suggest that other than the affected party applying for the grant of legal aid, any person such as a private legal practitioner can recommend to the Director that such person who appears before him be granted legal aid. The

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<sup>50</sup>Act No. 13 of 1994.

<sup>51</sup>See Regulation 7(1)

*Regulation leaves the judgement of whether or not such person needs legal aid to the discretion of the person before whom the poor person appears. Despite this provision however it is doubtful if legal aid can also be granted in civil cases in view of the reduced emphasis on the provision of legal aid in civil cases.*

An application for legal aid should be in writing and should provide information and documents which may be needed by the Committee in their assessing the means of applicants, such information should be detailed such that it should help the Director to *determine the nature of the aid sought by an applicant, and the circumstances under which aid is sought.* This will help the Director to decide whether or not the aid sought is granted and the applicant's means and contributions, which such applicant may make towards his or her representation.<sup>52</sup> Regulation 8(3) goes on to provide that the Director or Secretary of a Legal Aid Committee may require that the applicant attend oral interviews in order to clarify information submitted in the documents as provided under Regulation 8(1). This is in line with section 17 of the Legal Aid Act that provides that recipients of legal aid should contribute towards legal aid so granted. Section 18 goes on to provide the means for ascertaining the means of any person who applies for legal aid.

### **3:5 THE RESPONSE OF THE LEGAL AID ACT TO CHANGES IN THE ECONOMIC SITUATION IN THE COUNTRY**

Having analysed the provisions of the legal aid scheme, the question still remains whether the fact that there is a comprehensive piece of legislation governing the provision of legal aid mean that litigants represented by the Legal Aid Department

receive equal treatment before the law with those privately represented. In answering this question, this section will analyse the type of aid provided by the Department and the problems that the Department is going through. This will in effect provide the basis for assessing the quality of aid given under the Zambian legal aid scheme.

While the Act is quite comprehensive, there is still need for it to be effective in reality. This arises from the fact that while the Legal Aid Act provides the procedures and qualifications for a comprehensive legal aid scheme, the provisions provided therein will be useless if they are not adequately put into effect by the Department charged with the responsibility to grant aid. So the Legal Aid Department as an important institution in the administration of justice and the promotion of human rights relating to fair trial that is guaranteed under Article 18 of the Constitution needs to run effectively for it to achieve its mandate. In practice however, the Department is facing a lot of challenging problems that is making it almost impossible to provide effective legal aid to the poor and in effect to equal treatment before the law.

In view of the foregoing, the Special Committee on Delays in the Administration of Justice and Delivery of Judgements in Zambia<sup>53</sup> heard evidence from a number of Judges who complained about the non-attendance of Legal Aid Counsel in Court. This failure to attend is caused by a number of factors, which lead to the weakening of the legal aid scheme in Zambia. In her comment about the effectiveness of the Legal Aid Department, the former Director of Legal Aid Mrs Justice Irene Mambilima, had this to say to the Committee;

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<sup>52</sup>Regulation 8(2)

<sup>53</sup>March 1993 Report op.cit.

*“Legal Aid is the worst. There is no leadership, Counsel do not attend to cases. Attendance by Counsel is erratic. Counsel change as and when the case comes. A bit more dedication and commitment is required. There is private practice within the legal aid Department”*<sup>54</sup>

The implication of the above is that apart from the common problem of funding affecting all government Departments today, there are many other problems the Department of Legal Aid is facing. In line with Mrs Mambilima’s statement, the report goes on to state that the Legal Aid Department has been a Cinderella Department of the Ministry of Legal Affairs for many years, this is because it was understaffed and underfunded. Understaffing is so serious that three years before 1993, the post of Director of Legal Aid was vacant.<sup>55</sup> This therefore means that there was a serious lack of leadership in the Department.

In addition to the above problem of lack of leadership, the understaffing problem is so critical that there is only a total of eight Legal Aid Counsel to handle all the cases coming before the Department. For example, only one lawyer mans the Kitwe office of the Department. The lone lawyer in the office not only handles cases reported to the Kitwe office but also handles cases on the Copperbelt, NorthWestern province and Western province. This is a daunting task to be handled by one person, it is not practically possible for one such single lawyer to reasonably be expected to do thorough research before taking a cases to court because most of the time is spent on the road to go and attend to cases. This state of affairs brings into question the ability of the Legal Aid Department to render quality legal services that would amount to the

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<sup>54</sup> *ibid.* p.15

<sup>55</sup> *ibid.*

rendering of equality before the law between litigants who are privately represented and those represented by the Department.

Another problem the Department is seriously facing since its inception has been a serious lack of transport. The above-cited report cited lack of transportation as the main reason why Legal Aid Counsel failed to attend to court. The problem of lack of transportation is so serious that Legal Aid Counsel are forced to walk to court which sometimes leads to their arriving at court late only to find that their cases have been adjourned. This problem can also be cited as a factor, which has contributed to the problem of understaffing in the Department. The foregoing is because it is the dream of every young law graduate to find a good job with a good salary and a good car.

This therefore means that when young graduates join the government and the Legal Aid Department in particular where there is a lot of work, such problems as walking to court may lead even those who would like to work in the interests of society are discouraged when they see their former classmates in private practice driving or being driven to court. The result of the foregoing is that graduates will only be using the Department as a training ground to acquire experience before moving on to greener pastures upon gaining the much needed experience.

The above means that the Department of Legal Aid has failed to adequately respond to the changing needs of society in that while the number of poor people in the country has drastically increased there has been no corresponding increase in the number of Legal Aid Counsel. This renders the comprehensive provisions under the Legal Aid Act to be ineffective. This need to provide adequate and effective Legal Aid in both criminal and civil cases is very important where about 80 percent of

people are living below the datum poverty line. The poor people need legal representation in both criminal and civil cases so the failure by the Department to provide adequate legal aid in civil cases defeats the purpose of the Legal Aid Act stated in the Act's preamble.

## **CHAPTER 4**

### **4:0 THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS AND THE LAW ASSOCIATION OF ZAMBIA IN THE PROVISION OF LEGAL AID**

Having outlined the problems being faced by the legal Aid Department in its effort to grant effective legal representation to the poor, this chapter looks at the role Non-governmental organisations (NGOs) are playing to try and provide legal services to the poor. In other words this chapter will in effect look at ways in which Non-governmental Organisations are trying to offer affordable legal services to the poor and by so doing enhance justice and equality before the law. The organisations that will be looked at are the Legal Resources Foundation (LRF) and the Law Association of Zambia National Legal Aid Clinic for Women.

#### **4:1 THE LEGAL RESOURCES FOUNDATION (LRF) OF ZAMBIA**

The Legal Resources Foundation of Zambia is a non-profit making foundation, providing legal aid, promoting human rights and litigating in the public interest<sup>56</sup>. The Foundation functions in areas, which directly affect disadvantaged sectors of society in relation to violations of their human rights and the enhancement of justice<sup>57</sup>. From the above it is clear that the main cases that the foundation deals with are those relating to violations of human rights and cases that are of a public interest. This is done in the interest of enhancing justice. In carrying out this formidable task the

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<sup>56</sup> [www.irf.org.zm](http://www.irf.org.zm) Home page\_ downloaded on 11-10-04

<sup>57</sup> *ibid.*

foundation has legal advice centres in all the provincial centres of the country. The Lusaka office hosts the Foundation's secretariat which co-ordinates the foundation's activities. The foundation also runs the Legal Resources Foundation Chambers, which are the foundation's law firm and serves as the litigation unit of the organisation.<sup>58</sup>

The creation of the foundation was an initiative of Mr Robert Simeza who is also the foundation's chairman and Mr John Sangwa who is the vice-chairman. This initiative started during the period of Political change in 1991. The shift in the political situation in the country brought about the need to address or focus more on values such as the Rule of Law, Human Rights and good Governance.<sup>59</sup>

Therefore, in order to help the government in the attainment of these values, the two initiators thought it wise to come up with an institution "committed to the promotion of general civil awareness of the people and directly involved in the promotion of human rights awareness."<sup>60</sup> It was also felt that the creation of such an institution would help in the using of the law as a tool for social transformation needed to bring about "general civil awareness and promote a sound human rights culture in Zambia."<sup>61</sup> The two thus felt that the provision of legal representation to the poor would enhance their rights thereby making a contribution to society, which would ultimately lead to law reform in the country.

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<sup>58</sup> statement from the chairman Robert Simeza The LRF Annual Report 2001

<sup>59</sup> *ibid.*

<sup>60</sup> [www.lrf.org.zm](http://www.lrf.org.zm) op cit.

<sup>61</sup> *ibid.*

## 4:2 PROGRAMMES OF THE FOUNDATION

According to the 2001 Annual Report, the legal aid project constitutes the core component of the foundation's activities. This legal aid is mainly provided by the dispensation of legal services in the Legal advice centres which have been established in all the provinces in Zambia with Lusaka having seven other centres in addition to the one at the secretariat. These centres are manned by paralegals that are not lawyers but trained in the basics of Law. According to the report, these paralegals provide a link between the poor and legal experts.

Lawyers from the Legal Resources Foundation Chambers also routinely supervise these paralegals by providing instant legal opinions and guidance. Further, in cases where paralegals think they are not competent enough to give advice, they only do this after consulting a lawyer's opinion. It is important to note that all legal advice is given at no cost to the client.<sup>62</sup>

In deserving case and in particular human rights cases, and in those with a public interest element, the foundation offers legal representation in courts of law through the Legal Resources Foundation Chambers. The Chambers is registered with the Law Association of Zambia and operates in all provincial legal aid centres.<sup>63</sup> The lawyers under the Chambers currently number six practitioners<sup>64</sup>. These avail legal representation to clients in terms of the Legal Practitioners Act and are not paid on a case to case basis, but are paid on a fixed salary basis per month for their various

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<sup>62</sup> According to Mrs Mary Chisanga who is the project coordinator southern region in an interview held on the 13-10-2004.

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

appearances in court and their drafting of various relevant documents.<sup>65</sup> In addition to these there are currently four learner practitioners attached to the Chambers, these are doing their bar qualifying studies at the Zambia Institute for Advanced Legal Education (ZIALE)<sup>66</sup>. Further, the Chambers also host interns pursuing legal studies during their academic recess especially those from the University of Zambia. These help in areas of research prison visits and follow-up of cases emanating from Policed stations and also help in running legal advice centres.

Apart from cases of human rights and those of a public interest, the foundation also helps their clients through the giving of legal advice. Legal advice is given in cases such as labour disputes, matrimonial cases, drafting of wills and other different types of cases (see appendix 2 for information on the types of cases handled by the foundation.)

During the period 1999 –2000 the Foundation attended to 9,575 cases then in 2001 there was a 68 percent increase in this number of cases to 16,737. From this number, the Legal Resources Foundation Chambers dealt with 630 file queries, while 341 were commenced in Court. In 2003, the Foundation received a total of 25,945, this figure rose from 16,737 in the previous year.<sup>67</sup>

The above attests to the fact that the activities of the Foundation have become very popular with the underprivileged in society. This also shows that the organisation has come to be recognised as a very important organisation in the communities in which they operate especially in areas where Legal advice centres are located. To this end,

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<sup>65</sup>2001 Annual Report op. Cit.

<sup>66</sup>ibid.

these communities try to involve the personnel from the centres in community activities. In line with this, this author while attached to the Mtendere legal advice Centre of the Legal Resources Foundation as an intern from December 2002 to February 2003 had an opportunity to be invited as an observer to a Kalingalinga community discussion on the evils of corruption in the community organised by a local Drama Club in conjunction with the Anti-Corruption Commission. This is a clear indication that Non- governmental organisations are rendering a very important service to the community and this has led to their improving people's access to the country's legal machinery and thus to justice

In addition to the foregoing, the large numbers of cases handled by the Foundation show that there are a lot of people in the country in need of legal representation but can not afford such representation from private legal representation. This therefore brings to the fore the need for the provision of legal aid services to the poor by both the Government and Non-governmental Organisations in order to ensure equality before the law.

#### **4:3 THE LAW ASSOCIATION OF ZAMBIA NATIONAL LEGAL AID CLINIC FOR WOMEN (NLACW)**

This is another very important organisation involved in the provision of legal services to the poor in Zambia. The organisation was established in 1990 as a project under the Women's Rights Committee of the Law Association of Zambia<sup>67</sup>. The creation of the

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<sup>67</sup>see appendix 2 for the details on the full statistics

<sup>68</sup>National Legal AID Clinic for Women Booklet

clinic derives its basis from section 4(g) of the Law Association of Zambia Act which provides as follows in relation to the functions of the Association;

*“To consider the legislation relating to legal aid other ways of securing representation for persons who for any reason are unable to secure it, ...and to establish machinery for the provision of legal aid in addition to that provided by the government.”*

This provision highlights the role that the Law Association of Zambia is mandated to perform to develop the law as an instrument of social justice and to encourage lawyers to serve the people and to deal with legal aid and to secure representation for the indigent. In order to therefore carry out this role the Law Association of Zambia established this project aimed at providing affordable legal aid to women and children.<sup>69</sup> The Clinic assists indigent women and children because these have been identified as coming from the marginalised sector of the society.

In line with this the clinic concentrates on cases dealing with women and children. This emphasis is amplified in the clinic’s mission statement which is that the clinic aims at the *“empowerment of communities, especially women and children through the provision of legal services.”*<sup>70</sup>

The empowerment by the clinic is achieved by facilitating that women and children have access to legal rights by way of legal representation, counselling and legal education. In line with this, the policy of the clinic is *“to uphold and protect the rights of the woman and the child through litigation, counselling, workshops and giving*

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<sup>69</sup>ibid.

<sup>70</sup>ibid.

*legal advice.*"<sup>71</sup> By so doing the National Legal Aid Clinic for Women enhances women's and children's full empowerment in society.

According to the Acting Director of the National Legal Aid Clinic for Women Miss Nkandu Priscilla Chikonde, professional staff headed by herself runs the clinic. She also stated that the National Legal Aid Clinic for Women has a total of eight advocates running the three offices run by the organisation. The Lusaka office has four advocates while the Ndola and Livingstone offices are run by two advocates respectively. In addition to these some lawyers from Law Association of Zambia help out in providing legal services to the poor on a *pro bono* basis to the clinic's clients. Further, according to Miss Chikonde, plans are underway to expand the operational areas of the Clinic.

#### **4:4 PROGRAMMES OF THE CLINIC**

The clinic mostly handles cases of a matrimonial nature (see appendix for the types of cases handled by the clinic.) According to Miss Chikonde, the clinic is basically a law firm and therefore the clinic's core activity is litigation. To this end, the clinic takes a lot of cases before courts of law every year. In line with this the clinic deals with an excess of 2,500 active cases in courts of law. As can be seen from the foregoing, the clinic receives a lot of cases per year. For example, during the period from January to June 2004, there were a total of 2,477 cases opened. (See appendix 3 a tabulated breakdown of the cases during this period.)

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<sup>71</sup>ibid.

In addition to litigation, the clinic offers counselling services to its clients. A qualified counsellor offers this counselling. Further, the clinic staff have been trained to effectively offer counselling services. This service is provided as a better alternative to litigation. The foregoing is important because the clinic attempts to settle matters “*excuria*”.<sup>72</sup>

In order to ensure that the communities in which the clinic operates know their rights, the clinic provides a legal education programme. This programme is aimed at school going children and youths through workshops in various communities. By teaching these children and the youth, it is expected that these beneficiaries of such education will later teach their peers on the rights of children and related topics.<sup>73</sup>

The foregoing shows that the National Legal Aid Clinic for Women has been instrumental in the achievement of equality before the law by according free and affordable legal services to the poor in society. However sometimes clients are asked to pay a fee of K10,000 as contribution fee. This fee is still very insignificant when compared to what these clients would be required to pay when they go to private legal practitioners who charge their fees on an hourly basis. Therefore in response to the increasing numbers of the poor who cannot afford private legal representation, the Law Association of Zambia through the National Legal Aid Clinic for Women took up the initiative to offer quality and friendly legal services to the poor. Further, upon the realisation that women and children were the most affected by the increasing poverty levels in the country the clinic focuses on this marginalised sector of society for the provision of quality and affordable legal services.

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<sup>72</sup>ibid.

<sup>73</sup>Children’s Legal News January to June 2004.

The services of the clinic are very much appreciated by the people who have accessed their services. The people who have been helped by the clinic praise the clinic personnel for being friendly and approachable than those under the legal aid Department run by the government. One woman (who asked to remain anonymous) who has accessed the services of the clinic in a property grabbing case stated that she received prompt and friendly assistance in her case. She stated that she resorted to the National Legal Aid Clinic for Women because of her inability to be attended to by the authorities under the government funded Legal Aid Department. The above is just one example of the importance of the services the clinic is rendering to society and the poor in particular.

The analysis of the two Non-governmental Organisations given above shows that Non-governmental Organisations are providing a valuable service to the community despite the many problems these organisations are facing especially in the area of funding. Despite these problems the organisations under review are determined to ensure that the poor in society receive equal treatment before courts of law and by so doing are contributing to the enhancement of justice to all by providing legal services free of charge. The provision of free legal services to the poor that the Legal Resources Foundation and the Law Association of Zambia National Legal Aid Clinic for Women are rendering to the public is highly commended as it complements the services of the overburdened but under-staffed government run Legal Aid Department.

## **5:0 CHAPTER 5**

### **5:1 CONCLUSION**

The paper has provided an in-depth investigation of the Zambian legal aid scheme. The paper has also shown that liberalisation of the economy has had a negative impact on the provision of legal aid to the poor in the country. This has arisen from the fact that liberalisation has led to massive job losses which has led to very high poverty levels to the extent that about 80 percent of Zambians are living below the datum poverty line.

The above makes it impossible for these Zambians to have access to private legal representation where charges are too high for the ordinary Zambian to afford. This implies that the only chance ordinary Zambians have to accessing legal representation is through legal aid. As the previous chapters have shown, the government-run Legal Aid Department and Non-governmental Organisations provide legal aid in Zambia.

Although it was impossible to obtain statistics from the Legal Aid Department on the actual number of cases the Department deals with in a year, it can be inferred from the cases that the Non-governmental Organisations considered in this paper that there has been yearly increases in the numbers of people in need of legal aid. Despite the increase in the numbers of people in need of legal aid, there has been no corresponding increase in the numbers of Lawyers in the Legal Aid Department.

The effect of the foregoing is that although there is a comprehensive legal aid scheme in the country it has failed to provide adequate legal aid to the poor in the country. Further, although there is a comprehensive Legal Aid Act this has been made ineffective by the problems that the Zambian legal Aid Department is facing. This therefore means that the Zambian Legal Aid Act has failed to respond to the economic changes in the country.

An example of the inability of the Zambian Legal Aid legislation to respond to the changing economic situation in the country can be seen from the fact that while the Act provides for the provision of legal aid in both criminal and civil cases, in practice legal aid is currently only being offered in criminal cases. This emphasis on the provision of legal aid in criminal cases is a result of the fact that 90 percent of all criminal cases in the High Court are defended by legal aid Counsel. This has placed a lot of pressure on the meagre resources in the Department.

In chapter one, the paper gave an analysis of the importance of legal aid and the theories justifying the provision of legal aid to the poor. The chapter concluded that legal aid is necessary for the achievement of equality before the law and in the promotion of fair trial guaranteed by Article 18(2)(d). As it was shown this arises from the fact that in an adversary system of justice, it is almost impossible for an unrepresented litigant to receive equal access to the law as a represented litigant. This was shown by the American case of Powell v. Alabama,<sup>74</sup> the modern legal process is very complex and has a lot of rules of procedure which a person with no legal knowledge will find it very difficult to comprehend.

This chapter also highlighted the plight of an unrepresented litigant in Zambia. The chapter also concluded that the provision of legal services to the poor is now theoretically justified on the ground that representation will lead to the elimination of legal discrimination between the rich and the poor. This it is contended will lead to the strengthening of the legal system in general and the legal profession in particular. The foregoing will also lead to the ameliorating of the problems of ineffective access to the law among the poor.

In chapter two, the paper gave an analysis of the importance of legal aid as a human right requirement. The chapter showed that provision of legal aid has come to be viewed as a human rights issue, which qualifies to be included in the modern complex of social and political rights. The chapter showed that the treatment of legal aid as a human right arises from the common human right of equality before the law. This is an accepted principle of the rule of law which right has come to be included in all major human rights instruments.

The chapter has also shown that in Zambia, the human rights basis of the provision of legal aid is Article 18(2)(d) of the Republican Constitution. This Article highlights the importance of equality before the law. To this end, it was deemed necessary to put in place minimum measures for its attainment including the putting into place of positive law in the form of the Legal Aid Act.

Chapter three looked at the effectiveness of the Zambian legal aid legislation and concluded that despite having a comprehensive legal aid legislation, the Act has proved ineffective. This is because the Department of Legal Aid is facing a lot of

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<sup>74</sup> Op.cit

problems, which has a negative effect on the quality of services the Department offers. As the chapter showed the foregoing is caused by lack of leadership, transport facilities, inadequate Legal Aid Counsel and general funding by the government.

The chapter also noted that the critical lack of adequate Counsel has led to a situation where very few lawyers are handling a lot of cases. This in effect means that it is practically impossible to do adequate research before taking a case to court, which ultimately means that the services rendered by the department can not be equal to those offered by private legal practitioners and thus cannot be said to guarantee equality before the law.

In chapter four, the paper showed the impact on the Zambian legal aid scheme of the services being offered by Non-governmental Organisations and the Law Association of Zambia in the provision of legal services to the poor in Zambia. The chapter showed that the services offered by these Organisations have become popular and very much appreciated by the public. The paper gave examples of the extent to which the people who have accessed their services have appreciated the organisations reviewed.

It is in view of the foregoing that it can be stated that while the legal aid scheme is well structured and there is a comprehensive piece of legislation regulating the provision of legal aid, its enforcement has been rendered ineffective due to poor government funding. As was shown in chapter three, the Department of Legal Aid in particular is undergoing a lot of problems ranging from inadequate funding, inadequate Legal Aid Counsel and lack of transport facilities. These problems have

had a negative impact on the provision of legal aid despite the contributions to the scheme by Non-governmental Organisations and the Law Association of Zambia.

This brings to light the fact that Legal Aid in Zambia can not reasonably be said to guarantee equality before the law. This state of affairs is especially seen from the lack of adequate Counsel in the Department of Legal Aid while at the same time the Department has to deal with a very large number of cases. This therefore means that the research done by these Counsel in preparations before taking cases to court is very inadequate and cannot match with that rendered by private legal practitioners.

This leads to the conclusion that legal aid in Zambia does not guarantee equality before the law even where this equality is not absolute but approximate. That is to say that, when there is some existing difference between two things, that difference is deemed insignificant and inessential. But as the paper has shown, the difference between those who receive private legal representation and those who receive legal aid are too significant and essential that it cannot be at par in such a way as to guarantee equality before the law.

The situation has not very much been helped by the participation of Non-governmental Organisations and the Law Association of Zambia because these also have very few lawyers to attend to the massive numbers of cases that come before them. Indicative of this is the fact that the two organisations considered in this paper the Legal Resources Foundation of Zambia and the Law Association of Zambia National Legal Clinic for Women only have a total of twelve lawyers who handle thousands of cases each year.

## **5:1 RECOMMENDATIONS**

### **(a) FUNDING**

It is a notorious fact that any organisation cannot run effectively without adequate funding, this also applies to the Department of Legal Aid whose problems can directly be traced to inadequate funding by the government. This was clearly stated by Mrs Irene Mambilima to be one of the major causes of the Legal Aid Department's failure to attract experienced staff including the Director three years before 1993. Therefore, in order to improve the operations of the legal aid scheme in the country there is need for increased and timely funding to the Department.

### **(b) TRANSPORT FACILITIES**

The Special Committee on Delays in the Administration of Justice and Delivery of Judgements in Zambia findings outlined in chapter three of the paper cited lack of transport facilities as one of the major causes of the failure by Legal Aid Counsel to attend to cases. This has forced committed Counsel to walk to Court a situation which has a very negative impact on the morale of Legal Aid Counsel and the capacity of the Legal Aid Department's ability to attract well experienced staff.

This means that in most cases the Lawyers being employed by the Department are mostly fresh graduates. The result of this is that since just like good wine, a lawyer's arguments and research skills are sharpened by long standing in the legal profession,

the inability to attract experienced lawyers means that the services being offered by the Zambian Legal Aid Department are sub-standard. Therefore, it is strongly recommended that the government should ensure that there are adequate transport facilities that Counsel can use to go to court. This will not only motivate the lawyers in the Department but will also mean that justice will be dispensed on time as there will be less adjournments of cases arising from non attendance by Legal Aid Counsel.

### **(c) USE OF UNIVERSITY LAW STUDENTS IN THE DEPARTMENT**

In order to improve the staff problems in the Department of Legal Aid, the Legal Aid Department should take advantage of the University of Zambia law students who are in need of experience and a feel of the legal profession in practice. These students can help in areas of research and other duties that they can manage. Law students are used by the Legal Resources Foundation in its internship programmes during times these are on vacation; these are used in the rendering of legal advice and in carrying out research for the lawyers in the Legal Resources Foundation Chambers.

The services being rendered by these students have had a positive impact on the quality of legal aid being offered by the Legal resources Foundation. The use of law students will in addition to the improving of the services by the Department will also lead to the fostering of interest in these students to join the Legal Aid Department upon completion of their studies.

#### **(d) ESTABLISHMENT OF ADVICE CENTRES**

In addition to the legal advice services offered by the Legal Resources Foundation and the Law Association of Zambia National Legal Aid Clinic for Women, the Department of Legal Aid should establish advice centres which will be accessible to the public who want only to find out their legal positions and not to sue or defend a case in court. In short the Department should establish legal advice centres which are not necessarily concerned with litigation but concerned with general legal advice.

## **BIBLIOGRAPHY**

### **BOOKS**

Bodenheimer, E. Jurisprudence: **The Philosophy and Method of the Law.** Cambridge:Harvard University Press. 1962.

Cappelletti, M. Et. Al. **Towards Equal Justice: A Comparative Study of Legal Aid in Modern Societies.** New York: Oceana Publications. 1981

Donnelly, J. and R. E. Howard. **International Handbook of Human Rights.** New York: Greenwood Press. 1987.

Metzger, **B. Legal Aid and World Poverty:A Survey of Asia, Africa and Latin America.** New York: Praeger Publishers.1974.

Morris, L. Et. Al. **Social Needs and Legal Action.** London: Martin Robertson and Company. 1973.

### **STUDENT OBLIGATORY ESSAYS**

Banda, E.C. Eighteen Years of Legal Aid An Exposition of the Provisions of Legal Services to the Poor in Zambia. Lusaka: University of Zambia. 1985.

Mwenechanya, S.K. Legal Aid in Zambia: A Description and Evaluation of the 1967 Legal Aid Act. Lusaka. University of Zambia. 1979/80.

### **STATUTES AND STATUTORY INSTRUMENTS**

The Constitution of Zambia. Chapter 1 of the Laws of Zambia. Government Printers. Lusaka.

The Legal Aid Act. Chapter 34 of the Laws of Zambia. Government Printers. Lusaka.

The Law Association of Zambia Act

Poor Prisoners Defence Ordinance. 1945.

Poor Persons Defence Ordinance. 1957.

The Legal Practitioners (Costs) Order, 2001. Statutory Instrument No. 9 of 2001.

## **INTERNATIONAL INSTRUMENTS**

The Universal Declaration of Human Rights. The United Nations.

The International Covenant on Civil and Political Rights. The United Nations

## **REPORTS**

Report of the Special Committee on Delays in the Administration of Justice and Delivery of Judgement in Zambia. March 1993.

Legal Resources Foundation of Zambia Annual Report.2001.

## **PERIODICALS AND LEAFLETS**

Henriot, P. "Churches Social Teaching and Wages". The Challenge Margazine. Volume 6. No. 1. 2004. Ndola: Mission Press.

Children's Legal News. Issue No.001. January- June 2004. LAZ NLACW