Criminal justice administration and the question of legal assistance in Nigeria

I. Introduction

Legal aid entails the provision of free or subsidised legal services to the indigent ant the under-priviledged litigants. The history of legal aid is traceable to Maquires' account on the arraignment of a litigant called Alice. The account shows that upon arraignment, Alice requested for assistance thus: "Alice can get no justice at all, seeing that she is poor and this Thomas is rich."
Her further plea was " for God's sake, Sir, Justice, think of me, for I have none to help me save God and you."[1]

Expectedly, there were responses to this problem by the people of the earlier ages. For instance, the Roman Law provided for *LEGIS ACTIO* which was the corrective procedure put in place. However, with time, the arrangement proved to be more useful in defeating justice rather than upholding it[2], as the procedure was totally cumbersome. Access to legal services has attained a growing importance the world over. It suffices to say, that the legal aid scheme is one of the devices aimed at ensuring easy access to legal services.

The object of this paper is to examine the scope of legal aid in the administration of criminal justice in Nigeria. To this end, we shall firstly consider the content of criminal justice before proceeding to the issue of legal aid.

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1. See Maquire: ' Poverty and Civil Litigation'. 36 *HARV. L. REV.* 361 at 365 - (1923).

2. See Mauru Cappelletti: *Towards Equal Justice*, 1975 edition pp. 6-16 for more discussion of the earner responses to the problem of Legal Aid.

Criminal justice administration

According to George E. Rush,[3] criminal justice in its broad sense connotes the machinery, procedures, personnel, and purposes which have to do with the content of the criminal law. It covers the arrest, trial, conviction and disposition of offenders. Consequently, Rush perceives the administration of the system as involving the police, the prosecutor's office, the courts, penal institutions, probation, parole and the officials charged with administering their defined duties.

This definition, as fascinating and comprehensive as it may seem, becomes defective when tested against the backdrop of the guidelines formulated by the United States National Advisory Commision on Criminal Justice. This is so because the definition merely covers what has been summed up under criminal justice system by the body. This obviously excludes that described as criminal justice system II which includes 'many public and private agencies and citizens outside of police, courts, and corrections that are or ought to be involved in reducing and preventing crime'[4], which is the primary goal of any criminal justice administration.

For the above reason, therefore, criminal justice must be seen as that encompassing the two categories of people and institutions analysed above. Thus, if Administration is conceived as the management of affairs,[5] then criminal justice Administration is the management of the affairs of criminal justice by the law enforcement agents, the courts, the correctional homes and the members of the community dealing with issues relating to crime detection and prevention with the procedural laws serving as their tools.

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3. *Dictionary of Criminal Justice*, Holbrouk Press Inc. Boston, 1977 edition p. 36.

4. See *Criminal Justice System* 1973, publication of the body. Cf. p. 2 of *Criminal Justice in America - The System, The process, The People*. 1976 edition by Vetter & Simonsen.

5. William Morris, *The American Heritage Dictionary of the English Language*, Boston: Houghton Mifflin, American Heritage. (1971).

However, before proceeding further, it will be apt to consider briefly the controversy as to whether in fact the criminal justice can be regarded as a system or not. In Shanahan's view,[6] adopting most standards of measurement discloses that criminal justice is a system. This view is butressed by the California Board of Corrections in its consideration of the issue of correction in criminal justice. The board observed as follows;

> It is crucial that corrections in California be viewed as a system, however vast and complex, with its parts so interrelated that the malfunctioning of any component part has distruptive reverberations throughout the whole system. In short, if one thread breaks, the whole card is weakened.[7]

There is no doubt that the above observation depicts the theory of systems which is an arrangement of components designed to accomplish a particular objective according to plan.[8] This, of course, captures the workings of the criminal justices system, as the whole people and/or institutions involved are processed towards achieving the desired goal of justice. On the contrary, however, is Hans Mattick[9] who once opined that, to regard criminal justice as a system is a fallacy.

In his further remark, he said; " A system is artificially created out of no system. What we have is a case- disposition system."[9a]

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6. The Administration of Justice System - *An introduction*, 1977 edition, Holbrook Press Inc., p. 6...

7. See California Correctional System Study: The System (Sacraments: California state printing office, 1971, p. 5 Deferred to by: WILLIN J. DAWSON: *The Criminal Justice Administration* - p. 8.

8. Richard A. Bohnson, Premot E. Kast and James E. Rosenweig, *The Theory and Managemment of Systems*. 2nd edition, New York: McGrawhill 1963, at p. 113.

9. Co-Director of the Centre for Studies in Criminal Justice at the University of Chicago Law School.

9a. See CAP 11, p.43 of *Criminal justice-Introduction: Cases and Materials*, by John Keplan, 2nd edition. See also pp.8&9 The Criminal Justice System by Willin J. Dawson (Supra).

Whatever the above writer meant by the phrase 'case-deposition system', the fact remains that he recognises that the concept is a system. With that acknowledgement therefore, it is our view that such system presupposes the existence of the following threee significant points:

(a) the existence of a purpose or objective which the system is designed to perform;

(b) the design or an established arrangement of the components; and

(c) inputs of information, energy and materials in consonance with the plan.

The purpose or objective entails the philosophies underlying the criminal law, which according to Cohn/Undolf are:

(a) To provide a deterrent to potential offenders

(b) To protect the public from unjustified risks to persons and property, i.e to make the streets safe

(c) To deter others who might become offenders, if not for seing others punished.

(d) To provide public redress of grievances and thereby eliminate the possibility of private vendettas.

(e) To reform and rehabilitate offenders and convert them into good citizens.

(f) Because it is good for public morality to punish offenders.

These goals have been criticised on the ground that they are mutually inconsistent. For instance, it is said that it is psychologically impossible to punish an offender and reform him simultaneously, especially where the punishment is not proportional to the offence. This naturally is responsible for the resentments and recidivism cases that we experience.

Be that as it may, the objective of the criminal justice system should be seen firstly as that aimed at :

(a) preventing behaviours that most people perceive to be clearly anti-social;

(b) secondly, preventing behaviours that antagonise the statutory regulations;

(c) thirdly, preventing behaviours that are violative of the legislative's pronouncement of moral standards, for example, drug abuse.[10] These goals are of universal nature.

The established arrangement in Nigeria involves, as initially indicated, the police, the prosecutor's office, the courts, the penal and correctional homes, the defence counsels including the legal aid lawyers and the private organisations whose ideals pertain, affect or relate to the criminal justice.

The inputs of information, energy or materials are those which border on the adminisration. Hence, it is the constant evolution of this, and the prompt response to it's demand, that makes up for a successful criminal justice administration. However, in this exercise, we shall consider mainly the right of an indigent accused person to counsel under the criminal justice system. The scope, adequacy and inadequacies of the scheme are the central issues in this paper. But first, the justification for legal representations are examined.

Justification for legal representations

Generally speaking, the importance of the right to counsel under an adversary system cannot be over- emphasised. According to Oputa, J.S.C.; We operate the adversary system. The major feature of this system is the passive and inactive role of judges in the prosecution of cases in court. The system emphasises the active role of counsel for the prosecution and for the defence.[11]

Several reasons have been advanced for the dire need of the accused person being represented by a counsel.For instance, the fact that prosecution are usually conducted at the High and Appellate Courts by State Counsels, the fact of the accused persons being untrained in the science of law, and even where he is trained, he is considered not to be the best to conduct his defence.[12]

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10. See generally: William J. Dawson - *Criminal Justice System* pp. 15 & 16 (supra).

11. See Taiwo Osipitan: "Issues in Nigeria's Law of Evidence", in *Due Process of Law*, ed. by A. O. Obilade & G. J. Braxton 1994 p. 87 at p. 112.

12. See Taiwo Osipitan: (Supra) p. 87 at pp. 111-113

In Nigeria, this right is constitutionally recognised at the trial level. The constitution provides that: "Every person who is charged with a criminal offence shall be entitled to defend himself in person or by a legal practitioner of his choice."[13]

Unfortunately, however, while it may be presumed and implied that the constitutionally guaranteed right to silence at the interrogation level necessarily includes the right to counsel, the ignorance of the accused persons and unhealthy or unconducive intimidating atmosphere at the police stations or their equivalents negates or frustrates the exercise of this right.[14] Thus, while the exercise of the right to counsel at the trial stage may be unfettered, same cannot be said of at the interrogation level.

Quite apart from the foregoing, however, whether at the pre-trial, or at the trial stages, the right of an indigent accused person to a counsel is more imaginary than real. Several reasons account for the non-realisation of the right to counsel under the Nigerian criminal process.

II. The rationale/basis for development of legal aid in Nigeria

Firstly, the financial barrier has been recognised in all jurisdictions as the central impediment to access to legal services. Indigent persons find it difficult to pay court fees. They are also unable to pay legal practitioner's fees. According to Frederick Zeamans[15] there is yet to be any country that has socialised the legal profession to the extent that money constitutes no obstacle again. Hence, this continues to be a clog to the access to legal services, and thus, the need for legal aid. Happily the payment of court fees is unnecessary under the legal aid scheme. Nevertheless, the indigent litigant may, because of lack of financial resourses, be denied the guiding hands of counsel.

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13. Section 33(6)c of the 1979 Constitution as amended.

14. See generally, T. Osipitan (supra) pp. 87 at pp. 111-119.

15. *Perspective of Legal Aid - An International Survey,* Frances Pinter (Publishers) Ltd. 1979.

Secondly, there is the psychological barrier usually associated with the underprivileged. This generally results from their sense of fear, hopelessness and unfamiliarity with the legal system. This leads to their total avoidance of the process, be it in respect of claims or defence. Again, it is the legal aid scheme that can eliminate this feeling of frustration in this class of people, if properly and effectively implemented.

Thirdly, the prospective beneficiaries of the Legal Aid Scheme also lack the necessary information due to their ignorance of the entire process. For example, at the interrogation stage, the accused person does not know his right to remain silent, he is equally unaware of his right to counsel prior to interrogation. Thus, in most instances, due to ignorance their right to counsel are frequently compromised.

Fourthly, the language employed in drafting most of our laws is alien to substantial portion of the underprivileged. Consequently, their inability to comprehend whatever is the content of the laws. No wonder their constant violation of these laws. This obviously reveals the barrier of this class of people, and the need for an efficient legal aid scheme to cater for their interests.

Fifthly, in a country like ours with pluralistic form of legal system, the continued unification of the legal system is further alienating the underprivileged from it.

The practice has been that the received law regulates transactions unknown to customary law while the customary law governs the domestic affairs of the people. However, the drive towards modernisation and unification embarked upon by African leaders, both in terms of the substantive and procedural laws, has continued to distance this unfortunate class from the legal system. For instance, an accused person is not used to the rule of hearsay which nationally forms part of our evidential rules. The consequential effect of this is the deprivation of the accused person of his right where he cannot afford a counsel. In the circumstance of this nature, which appears to be a barrricade, the solution lies in an effective legal aid scheme.

The summary of all the foregoing is succintly captured by his Lordship, Idoko J. when he observes that:

> What is hearing worth to an accused person, who does not understand the language of the court, who does not know the rules of procedure and who therefore cannot properly present his case? The counsel is thus at the very root of, and is the necessary foundation for a fair hearing. The ordinary layman, even the intelligent educated man is not skilled in the science of law and he, therefore, needs the aid and advice of counsel.[16]

Similarly, in *Powell* v. *Alabama*,[16a] Justice Sutherland has this to say:

> The right to be heard would in many cases be of little avail, if it did not comprehend the right to be heard through a counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable generally of determining for himself, whether the indictment is good or bad. He is unfamiliar with the rules of evidence left without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible, ... he requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Apart from the adverse effect the lack of representation through a counsel has on an indigent accused person, the nation also suffers economic loss. This is because this category of people become disgruntled and frustrated. Hence, the discouragement to put in their best in the production process, thereby resulting in low output.[17] This possiby accounts for the recognition of legal aid by all goverments.[18]

From the totality of the foregoing discussion, it is obvious that the issues arising are very complex, and touch on many different aspects of the

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16. *Uzodima* v. *C. O. P.* (982) N. C. L. R. 325 at 327.

16a 287 U. S. p. 68 at 69.

17. See C.J. Dias: 'Research on Legal Services and Poverty. Its Relevance to the Design of Legal Services Programme in Developing Countries'. *Wash. Univ. Law. Quart.* 1975 pp. 7-15.

18. See Section 8(a) of the Legal Aid Act, cap. 205, Laws of the Federation 1990. See also Equal Justice Journal of United States Legal Services - the 'Unmet Promise', p. 1.

legal system, judicial organisation, and professional traditions as well as economic and social facets and attitudes. Thus, it will be myopic for anyone to perceive them from the negligible angle of poverty. Against the backdrop of the above-examined justification for legal representations under the criminal justice system, we now proceed to examine the legal aid scheme in Nigeria.

III. Legal assistance and administration of criminal justice in Nigeria

In Nigeria, legal aid scheme is in two phases. These are the government implemented legal aid, and the legal aid projects of the non-governmental organisations.

Government-controlled legal aid scheme is substantially codified in the Legal Aid Act,[19] which is an improvement on the 1976 Legal Aid Act and its subsequent amendments. The preamble to the said Act states:-

> An Act to provide for the said establishment of a Legal Aid Council which will be responsible for the operation of a scheme for the grant of free legal Aid in certain proceedings to *persons with inadequate means*.[20]

The above preamble creates the impression that legal aid scheme is designed only for the poor people. This is based on the faulty assumption that it is only poor people who lack access to the law. The preamble consequently would seem to equate poverty with income deficiency which is to large extent erroneous. Infact, poverty, in the context of legal aid, should rather be seen from the perspective of inequality as earlier on asserted.[21] It is the inability of the draftsman of the legislation to appreciate this fact that accounts for the exclusion of a larger percentage of the citizens that can be grouped as the underprivileged. Hence, without mincing words, the preamble to the Act from inception is self-defeating.

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19. CAP 205, Laws of the Federation 1990.

20. Italics mine (for emphasis).

21. See Barbara Brudno: *Of Poverty, Equality and the Law: Cases, Commentary, Analysis.* American Casebook Series, 1976 edition, p. 4

Section 1 of the Act establishes the Legal Aid Council which is charged with the responsibility of regulating legal aid activities in Nigeria. The Act further provides for the composition of the council in a manner suggestive of fair representation across board.[22] A careful perusal of the Council's composition, however, reveals the exclusion of potential beneficiaries of the legal aid scheme. For instance, one would have expected special position to be reserved for some members of the underprivileged class whose interest the Council is to serve and protect. Both in America and Britain,[23] the various boards of the legal advice and assistance councils reserve sizeable seats for the prospective beneficiaries whose interest are to be protected. This is important for two reasons: Firstly, it makes it people oriented, thereby generating the required confidence for the patronage. Secondly, it facilitates the process of determining the eligible people as well as reflecting fairness in the application of the set criteria.

Section 3 of the Act deals with the appointment and renumeration of the Director-General and other staff of the Council that may be employed. In furtherance of this, the Act provides for their services with the Council to be pensionable under the Pensions Act.[24] Section 5 of the Act provides for the establishment of the council branches in states as may be directed by the Council of Ministers. In Nigeria today, branches of the Legal Aid Council can be located only in the state capitals. This practice is retrogressive, as it inhibits the accessibility of the prospective beneficiaries. Further implication of this shall be discussed later.

Further, the determination of the location of the branches by the Council of Ministers in a scheme of this nature is self-contradictory. The ministers who are so distant from the prospective beneficiaries, can never be the best judges of the location of the branches of the Council.

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22. Section 2 of the Act.

23. Equal Justice Journal: America's Legal Services Program, p.4. See Also Elaine Kempson: *Legal Advice and Assistance,* Policy Studies series.

24. Section 4 of the Act.

In Britain, legal advice and assistance centres are controlled by the local authorities in the various areas.[25] Similarly, the American Neighbourhood Law firm system is annexed to the neighbourhood.[26] Thus, the legal aid scheme need be localised also, instead of leaving it to the dictates of the ministers who are politicians, or appointed for political reasons.

For the same reason, section 6 of the Act, which empowers the Council of Ministers to make policy guidelines for the Council is also objectionable.

The scope of the legal aid to be given in respect of both criminal and civil matters are as specified in the second schedule.[27] In relation to our discussion, the schedule covers:

A. (i) Murder of any degree under the Criminal Code and culpable homicide punishable with death under the Penal Code.

(ii) Manslaughter under the Criminal Code, and culpable homicide not punishable with death under the Penal Code.

(iii) Maliciously or wilfully wounding or inflicting grievous bodily harm under the Criminal Code, and grievous hurt under the Penal Code.

(iv) Assault occassioning actual bodily harm under the Criminal Code, and criminal force occassioning actual bodily hurt under the Penal Code.

(v) Common assault.

(vi) Affray.

(vii) Stealing

(viii) Rape

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25. Elaine Kempson (Supra), page 79.

26. Bryant Garth, *Neighbourhood Law Firms for the Poor*, Frances Pinter publication, 1979 edition, p. 15.

27. See Section 7 of the Act as amended by Decree No. 22 of 1994.

B. Aiding and Abetting, or Counselling or procuring the commission of, or being an accessory before or after the fact, to or attempting or conspiring to commit, any of the offences listed in paragraph A of this schedule.

The first deduction from the section is that for any offence outside the foregoing, an accused person is not entitled to legal assistance except where the Council of Ministers approves such. Our first observation is that prior to the amendment introduced in 1994,[28] the scope of legal aid in relation to criminal justice administration left much to be desired. However, with the improvement resulting from the introduction of offences such as common asssault, affray, stealing and rape after the said amendment, the scope is presently commendable. However, anything worth doing at all, is worth doing well. Hence, it is suggested that offences such as treason, sedition, armed robbery, obtaining by false pretence and such other newly decree-created offences under the present Nigerian environment might need inclusion. Infact, it may be better to just permit legal aid in all cases bordering on criminality. Undoubtedly, this is inescapable in view of the harsh economic situation in Nigeria today. Thus the scope of the legal aid as it presently stands is still unsatisfactory. It is advocated, therefore, that if the total restraint cannot be removed, serious offences of the nature highlighted above should be included in the schedule to make the Act more meaningful.

Section 8 of the Act is another important provision establishing the Legal Aid fund. There is no doubt that any legal aid project without fund is meaningless. The sources of fund under the provision are the Federal and State Government subventions; contributions in accordance with the Act and subject to section 11(2); and gifts under various forms it may assume. Although the sources are similar to those obtainable in other jurisdictions, the need to involve the various local government and community development associations in the funding might not be out of place. In Britain, the level of service in any area will depend on the philosophy and generosity of the individual council.

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28. Via Decree No. 22 1994: Legal Aid (Amendment) Decree 1994.

By virtue of section 9 of the Act, only person whose annual income does not exceed N1,500.00 are eligible to benefit from the scheme. However, by virtue of the recent amendment[29], to qualify for the fund the annual income must not exceed N5,000.00. This development, is really not worth its while. As far as we are concerned, nothing has really changed. If that amended provision is construed strictly, and it is adhered to, one can confidently assert that no person can be benefitting from the scheme except where there is fraudulent concealment. Consequently, the Legal Aid Council is hereby invited to review this statutory limit to that which will be functional. On this note, the Green Form system under the then Legal Advice and Assistance Scheme of 1973 in England should be adopted. It is a means - tested method designed as a measure through which the members of the public are encouraged to consult solicitors about their legal problems before they become too complex. In
spite of the introduction of the new Legal Aid Act in 1988 in England, the system is still retained.[30] In making this suggestion, we are not unmindful of the provision of sub-section 2 towards mitigating the stiffness of the limit. Unfortunately, however, this noble provision will be frustrated by the bureaucratic and administrative bottleneck usually associated with ministerial decisions.

Section 10 provides for mode of ascertaining the means of an applicant for legal aid. While not quarrelling with the guidelines, we suggest that factors outside the financial requirements be included. These factors as earlier discussed range from physical to psychological difficulties in defending a crime.[31] The acceptance of gift by the Council is permisible by the provision of section 11. However, such gifts acceptable upon trust must not be on conditions that will infringe the realisation of the objectives of the Act.

The need for accountability for the fund of the Council demands for the auditing of the account of the Council annually.[32] The Act in section 13,

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29. See Decree No. 22 1994: Legal Aid (Amendment) Decree 1994.

30. Elaine Kempson (supra), pp. 66-67.

31. Frederick Zeamana: *Perspective of Legal Aid*. (Supra), at p. 5.

32. Section 12 of the Act.

further requires the maintenance of a panel of legal practitioners. Any legal practitioner may apply, and the renumeration shall be in accordance with the prescribed manner. The section quickly forbids any legal practitioner engaged for a legal service from collecting any money from the beneficiary. Laudable as this provision may appear, the enabling environment for compliance is absent. Firstly, the fees payable to private legal practitioners engaged for legal aid left much to be desired as shall be revealed later. Secondly, a full time counsel with the Council may be required to travel for a case at his expense, after which he subsequently makes a claim which may not be paid over a long period. In a situation like this, where such a counsel is out of pocket, and he wishes to appear for the case, he may not have a choice other than to request for money from the beneficiary. One way of eliminating this ugly situation is to localise the scheme and in addition, make provision for advance payment to lawyers. Section 14 empowers the Council to utilise youth corp lawyers in its activities. Whilst this may be cost-saving, the Council should exercise restraint and caution in assigning this inexperienced class of legal practitioners to sensitive and serious cases like murder, manslaughter, etc. This will have averted the consequence of the trial in *Udofia* v. *State*[33] where the murder trial conducted by Youth Corp lawyers was set aside. The Supreme Court in doing this opined as follows:

> Mr Onu and Mr Igika both of NYSC appear for the accused. To do what? One will naturally ask: to conduct a murder case? What is the country turning into when members of the NYSC will be sent to defend a man on trial for his life.

At best, their role should be restricted to legal advice and appearance at the courts of summary jurisdiction alone. In addition, it is suggested that the Council should extend its requirement to law students which can go a long way in asssisting the Council as well as initiating these youths into free legal services before their call to bar.[34]

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33. (1988) 3 N. W. L. R. Pt. 84, p. 541.

34. See Louisiana Legal Services paper on providing access to justice delivered by Jacklin at Democracy for Africa Programme held at the University of Lagos Guest Houses on 4-13 April 1995.