

LEGAL AID TO OFFENDERS AND VICTIMS IN THE CRIMINAL JUSTICE SYSTEM OF THE MALDIVES

*Hussain Nashid**

I. INTRODUCTION

The right to criminal defence is a fundamental right recognized internationally. It entitles anyone being investigated for or charged with a criminal offence to legal advice, assistance and representation.¹ The provision of legal aid, as such, is regarded as a vital element in ensuring the right to criminal defence as well as in securing justice as a basic human right altogether. In that regard, the legal systems of many countries have adopted a mechanism to provide legal aid on a gratuitous basis and is usually provided from the State budget. The Maldives, although its legal system has remained greatly underdeveloped for decades, have also recognized the provision of legal aid in its criminal justice system.

This paper, therefore, aims to explore the right to legal counsel enshrined in the Constitution of the Maldives as well as to assess the legal aid framework and the challenges faced by the Maldivian government in fulfilling its constitutional obligations to provide legal aid in criminal cases.

II. LEGAL AID FRAMEWORK

A. Legal Aid to Offenders

The provision of legal aid in the Maldives evolved following the promulgation of the new Constitution in 2008. The new Constitution enshrines the key principles of equality before the law, the presumption of innocence, the right to fair and transparent hearings, along with all the guarantees necessary for the defence of anyone charged with a criminal offence.² In securing the right to criminal defence in the justice system, the new Constitution enumerates the right to legal counsel to offenders in different stages of the criminal justice process. As such, Article 48(b) of the Constitution stipulates the right of persons being arrested or detained to retain or instruct legal counsel, while Article 51(e) stipulates the right of persons charged with an offence to instruct and communicate with legal counsel of their own choosing. Similarly, Article 53 of the Constitution further enumerates the general right to legal counsel, and with regard to State-funded legal representation, Article 53(b) extends the responsibility upon the government to fund legal representation for serious crimes when the accused do not have the means to pay for it themselves. Therefore, the right to legal representation, with respect to criminal matters is provided to all criminal defendants regardless of the nature of the offence. However, state-funded legal representation is available only in those cases that meet the criteria mentioned in Article 53(b) of the Constitution.

The obligation of the State to provide legal aid to offenders is further detailed in the following statutes: Law Number 12/2016 (Criminal Procedure Act); Law Number 18/2019 (Juvenile Justice Act).

1. Legal Aid under the Criminal Procedure Code

Although the Constitution obligates the government to fund legal representation in serious criminal cases, it does not enumerate the type of offences that fall into the category of "serious criminal offence". The Criminal Procedure Act, which came into force in 2017 now lists a number of crimes that are deemed

* Assistant Public Prosecutor, Drug Unit / Public Prosecution, Prosecutor General Office, Maldives.

¹ United Nations, Model Law on Legal Aid in Criminal Justice Systems with Commentaries (2017).

² Constitution of the Republic of Maldives 2008, Arts. 20, 42, 48 and 51.

serious, namely the following:³

- (a) Murder;
- (b) Rape;
- (c) Child Sexual Abuse;
- (d) Terrorism and financing terrorism;
- (e) Money-laundering;
- (f) Human trafficking;
- (g) Drug trafficking;
- (h) Theft-related crimes (involving amounts with a value over MVR 100,000);
- (i) Corruption and bribery (involving amounts with a value over MVR 100,000);
- (j) Tax Evasion (Involving amounts with a value over MVR 500,000);
- (k) Engaging in assault using sharp objects or weapons resulting grievous bodily harm;
- (l) Rioting, *coup d'état* related crimes and recruiting mercenaries;
- (m) Offences graded Class 1 and 2 felonies under the Penal Code and any offence with a sentence of more than 10-years' imprisonment.

The Act goes on to describe the right to legal aid to offenders, both during the investigation and the trial process of their case. As such, S.51 of the Act mentions the general right to legal counsel during the investigation process. According to this section, if an accused who has been arrested or detained by the police for questioning without it amounting to an arrest, requests his right to legal counsel, the police must give him the chance to appoint a lawyer, and must only question him in the presence of his lawyer. If the detainee is accused of a serious offence and lacks the financial means to hire legal counsel, the section mandates the State to appoint a public defender for them as per established regulations.

The right to legal counsel during the trial process is specified in S.114 of the Act. Under this section, the defendant shall be informed of his right to legal counsel during the preliminary hearing. If the defendant demands legal counsel, the court shall allow him 10 days to do so and order him to answer the charges only with his legal counsel present. If the defendant is charged of a serious criminal offence and lacks the financial means to hire a lawyer, the court must allow him to appoint a lawyer from the State.

2. Legal Aid under the Juvenile Justice Act

Following the commencement of the Juvenile Justice Act in 2020, the government is also required to provide state-funded legal aid to children who have been detained or arrested on suspicion of committing a criminal offence and are unable to engage a lawyer for any reason.⁴ Unlike, Article 53(b) of the Constitution, the Juvenile Justice Act imposes no coverage restriction on the provision of state-funded legal aid. If legal counsel cannot be arranged for a child accused of committing a crime who is arrested or detained, S.50(b) of the Act now mandates the State to provide legal counsel.

3. State-Funded Legal Aid

Since 2009, the Constitutional responsibility of the government to provide state-funded legal aid has been administered by the Attorney General's Office (AGO).⁵ Since then, the AGO has been providing legal aid to people who meet the criteria mentioned in Article 53(b) of the Constitution. Furthermore, the AGO has also been fulfilling the State's obligation to provide state-funded legal aid for cases that fall under the regime of S.50(b) of the Juvenile Justice Act.

Therefore, although the concept of legal aid is to provide legal advice, assistance and representation at no cost for those without sufficient means, state-funded legal aid administered by the AGO is only available in the following two areas:

- Persons accused of or charged with a serious criminal offence who are unable to afford to engage a lawyer pursuant to Article 53(b) of the Constitution and S.51(e) of the Criminal Procedure Act;

³ Criminal Procedure Act (law no: 12/2016), s.22.

⁴ Juvenile Justice Act (Law no: 18/2019) s.50(b).

⁵ UNDP Maldives Report, "Options for Legal Aid Programming in the Maldives", Working Paper Series, United Nations, 9.

- Children who have been detained or arrested on suspicion of committing a criminal offence and are unable to engage a lawyer for any reason pursuant to s.50(b) of the Juvenile Justice Act.

B. Legal Aid to Victims

While the Constitution provides state-funded legal aid for offenders charged with serious crimes, there is, unfortunately, no obligation on the State to provide such services for victims of such crimes. Following the commencement of Domestic Violence Act,⁶ the State is now responsible for the provision of legal assistance upon request to those victims of domestic violence without the financial means. In practice, however, there is no functional mechanism for legal aid delivery for victims by the State. Luckily though, there are at least a few NGOs providing legal aid services for domestic violence, sexual and other abuse.⁷ Among the few are the following NGOs:

- Advocacy and Legal Advice Centre: Established in 2012 to provide free legal advice to victims and witnesses of corruption. The Centre also provided services to vulnerable expats in the Maldives.⁸
- Family Legal Clinic: Founded in 2014 and registered as an Independent NGO in 2017 provides legal aid for victims of domestic violence and other forms of abuse.⁹

III. THE CHALLENGES IN ADMINISTERING LEGAL AID

While legal aid is a fundamental component of access to justice, like many other countries, the Maldives also face a number of challenges to accomplish this constitutional obligation. The Attorney General's Office, being the authority charged with procuring legal aid in the Maldives, have noted the main challenges they face to facilitate it. Below are some of these issues.¹⁰

A. Stigmatization

Often times defence lawyers are stigmatized within the society, discouraging them from representing individuals' charged with major crimes. It was reported by stakeholders that in 2011–2012, the Attorney General's Office was unable to find a lawyer in a total of six cases. The reasons provided by the Attorney General's Office for this lapse included the fact that lawyers did not want to defend persons accused of particularly heinous or unpopular crimes such as mothers killing their children and persons killing police officers.¹¹

B. Geographical Gap

Due to the physical setting of the country, many fundamental services were largely limited to the capital city, Malé. There were no law firms and a very small number of practicing lawyers in the islands. Although this reality has not changed much, there are a few registered law firms in some of the islands now.¹² Furthermore, in order to ensure continuity of essential judicial services during the Covid-19 pandemic, the Maldives successfully introduced remote judicial services in the Maldives, moving a step forward in closing the geographical gap.

C. Unable to Monitor the Service

The lack of a proper legislative provision on issues such as a Legal Aid Act has vastly contributed to the

⁶ Domestic Violence Act (law no: 3/2012), s.64.

⁷ Hassan Haneef, "Easy Access to Justice for all Including Vulnerable Persons in Maldives", United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, Resource Material Series No. 105 (168th International Senior Seminar, Participant Paper, September 2018) <https://www.unafei.or.jp/publications/pdf/RS_No105/No105_18_IP_Maldives.pdf> accessed 11 October 2022.

⁸ Marium Jabyn, "Advancing Justice Interests and Human Rights of Vulnerable Groups through clinical Legal Education" [2020] Jinda Global Law Review 272.

⁹ Ibid.

¹⁰ UNDP Maldives Report, "Options for Legal Aid Programming in the Maldives", Working Paper Series, United Nations, 9.

¹¹ Ibid.

¹² Bar Council of the Maldives < <https://maldivesbarcouncil.org/legal-practices-and-law-firms/>> accessed 11 October 2022.

failure of regulating and monitoring the legal aid service. At present, the Regulation on the Provision of Legal Counsel¹³ by the State is the only provision that covers the current regulatory measures on this area but it fails to address many imperative issues.

D. Lack of Competitive Fees

The monthly remuneration paid to the lawyers hired by the State for the purpose of legal aid is significantly low compared to what a defence lawyer charges per case. This has led most lawyers to choose to work in private practice, making it challenging for the State to recruit state-appointed lawyers for the eligible individuals.

E. Lack of Public Awareness about Legal Aid

In order for people to avail themselves of legal aid services, they must be fully aware of their right to a state-appointed lawyer. Particularly, the people living on small islands and vulnerable populations everywhere are known to be less aware of their rights. Although an accused's right to a lawyer is guaranteed during the investigation process and by the Courts, the lack of knowledge on how the legal aid system works is one of the major challenges faced by the State to provide legal aid services in the Maldives. In order for people to avail themselves of legal aid services, they must be fully aware of their right to a state-appointed lawyer.

IV. CONCLUSION

Undoubtedly, the legal aid frameworks and the Maldivian legal system in general have undergone notable transformations since 2008. In terms of the legal aid mechanism for instance, from not having a single statute that enumerates the type of offences that qualify for state-funded legal aid since 2009 to having at least a regulation that now provides guidance on the provision of state-funded legal aid. However, in order to further enhance the quality of legal aid services, it is important that a comprehensive Legal Aid Act that covers all the aspects of the legal aid service be enacted to ensure that both the legal aid providers as well as the recipient of it have a clear and comprehensive understanding of the system, thus, addressing the lack of public awareness of the legal aid system.

¹³ Regulation on the Provision of Legal Counsel by the State (Regulation no: 2021/R-4).