

Legal Representation for Asylum-Seekers and Refugees: Much Needed yet Sparse

Written by Caroline Nalule

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CAROLINE NALULE, JUN 5 2020

The onset of the Covid-19 pandemic and the lockdown measures taken by many governments worldwide in order to contain its spread have exacerbated the pitiful and dire state of our diverse societies' most disadvantaged – not least asylum-seekers and refugees. Normally, asylum-seekers in most countries often face tremendous challenges trying to get recognised as refugees. Yet some manage to navigate the bureaucratic maze and apparently complex system with the aid of legal aid service providers, most of whom are established Non-Governmental Organisations (NGOs). Many an asylum-seeker, particularly in countries with highly individualised and legalised refugee recognition systems, have only gotten recognised as refugees after legal and/or (quasi-)judicial intervention, the latter of which is usually accessible through legal representation. In the present novel circumstances, refugee status determination processes have been suspended in most countries, and yet in some, they may continue to operate with minimal functionality or services. Therefore, those that need their services are more or less locked out depending on how each country has adapted to the situation.

This article was prompted by a news story in which lawyers of an asylum-seeker were mounting a legal challenge against the UK Home Office for failing to support asylum-seekers. While countries were quick to announce lockdown measures, they were not well thought through in order to shield the most vulnerable and marginalised members of societies from adverse consequential and knock-on effects. The story mentioned above clearly illustrates that without the intervention of lawyers, the clearly destitute family would be left in a considerably helpless and hopeless situation. Yet this story serves as an exemplar of the plight of asylum seekers and refugees who often need legal representation and assistance, but the service is hardly accessible nor available. I turn my attention to the situation in Africa which hosts about 33.5% and 17.5% of the world's refugees and asylum-seekers, respectively.

The guarantee of legal aid and representation is not a right under the African Charter on Human and Peoples' Rights which virtually all African states have ratified. However, the African Commission on Human and Peoples' Rights that monitors the implementation of the Charter has read into it, specifically within the right to be heard, *the obligation of states to provide legal aid or assistance to an accused person or a party to a civil case where the interests of justice so require*. This obligation is not contained in any binding instrument but rather in non-binding guiding principles. Yet, soft as the language of the principles may be, they touch upon a critical issue not only for the many disadvantaged and disempowered sections of society but especially for such as refugees and asylum-seekers. For the latter group, lack of legal assistance may be a matter of life and death, especially where they risk of *refoulement* is high.

In most African countries, governments provided legal aid services are not mandatory, save in cases of serious criminal matters, where governments undertake to provide lawyers for the accused person in order to ensure the right to a fair trial. Civil matters, where most refugee-related cases would fall, tend not to benefit from any government-provided legal aid schemes. Consequently, there are mainly four available options that asylum-seekers and refugees may utilise in order to get any legal assistance or representation, if need be.

The first option is where lawyers, mainly through their national associations, make provisions within their constitutions and regulations for members to offer legal aid or *pro bono* services. It would be an ideal option, short of

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any legally binding obligation or action by the government, if lawyers can mobilise themselves and ensure that a proportion of their time is dedicated to *pro bono* services, including to asylum-seekers and refugees who need them. However, most lawyers in Africa are not familiar with refugee law and tend to be spatially removed from that particular clientele. The majority of asylum-seekers and refugees are hesitant, if not outright afraid, to approach lawyers mainly because of the fear of the potential costs, and secondly, lawyers' offices tend to be in urban and affluent locations, rendering themselves largely inaccessible. Thirdly, the very fact of 'foreignness' and newness in the country, and often new legal system, coupled with the vulnerability of the asylum-seekers deters them from approaching lawyers, even where the latter could be in a position to offer free legal services.

The situation of asylum-seekers and refugees, therefore, is one whereby lawyers need to reach out to this specific community. Some law societies, such as the Uganda Law Society has a dedicated legal aid service programme, which once in a while goes out into communities to provide free legal advice and any other appropriate services. Hence, it is a model worth replicating.

The second option, and perhaps the most common, is through the agency of NGOs. NGOs may be specifically focussed on refugees or may be providing legal services on a wider thematic area. Depending on the capacity of NGOs, they may operate along with either of two models. The first model is where they provide a range of legal services themselves, from legal advice to legal representation during litigation. The other model is where NGOs link up clients that may require legal assistance to a network of lawyers that provide *pro bono* services. Countries such as South Africa and Kenya that have a high number of asylum-seekers and refugees, with many of them living in urban areas, tend to have a number of refugee-focussed NGOs that offer a range of services. In South Africa, for instance, which has got the highest rate of refugee-related litigation on the continent, a number of NGOs offer legal services. These include Lawyers for Human Rights, Legal Resources Centre, Scalabrini Centre, among others. While NGOs are close, more accessible and usually reach out to their refugee clientele, they mainly face resource constraints that limit the number of cases that they can take on in any given period.

As financial resources shrink and taking on individual cases becomes unviable, NGOs tend to prefer cases that they consider as strategic or representative. In the former case, the case will usually focus on an overarching policy or legal issue, while in the latter, the case will involve a considerable number of individuals that may have the same or similar legal issue(s). Nonetheless, NGOs still provide crucial legal interventions that may not necessarily culminate into court action. Moreover, yet another challenge is the retention of qualified and experienced staff. The staff turnover which tends to be high adversely affects both the quality and quantity of services provided. Hence, while NGOs tend to be the most popular avenue for asylum-seekers and refugees who require legal services, they are usually not able to satisfy the demand.

The third option, and perhaps the least common, is through legal clinics usually set up in law schools. This is most prevalent in South Africa. Most of the law clinics will be handling a number of cases, but some may have a dedicated refugees unit. The establishment of such a unit will usually be dictated by the law school's course offerings which would include a standalone refugee law course unit. The clinic enables students to get hands-on experience while enabling asylum-seekers and refugees to obtain free legal assistance. Some law clinics may have attorneys and advocates to handle any litigation, while others may refer the matter to NGOs or willing lawyers. Besides being a less common occurrence, law clinics tend to be housed in universities which may be intimidating and hard to access for any potential clients. Their outreach capacity, too, seems to be rather limited.

Furthermore, since students form the core of case-handlers, they are only available for the duration of the course. Therefore, some clients usually get frustrated and may abandon their cases because of the inconsistency and frequent change of case-handlers. Any law clinic assisting refugees, specifically asylum-seekers that need help with their application for refugee status, needs to have a minimum number of dedicated key personnel that will follow up on all the cases. Yet the more pressing challenge seems to be related to funding. For as long as the law clinic can rely on external donors, funding is perhaps not necessarily as critical as where the clinic is dependent solely on its university to sustain it. A refugee law unit manager at one of the universities in South Africa admitted in an interview that once the university ceases its support for the clinic, for whatever reason, the entire project collapses.

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Rarer still, the fourth and last option involves refugee-agency. This involves self-mobilisation where refugees are fairly organised. Some refugee communities, usually mobilised on the basis of nationality, will fundraise and negotiate for legal representation for community members in need or where the entire community feels threatened by any proposed or implemented government action or policy that may affect their rights as refugees. They may be lucky and get a lawyer who will only charge for operational or administrative costs but no professional fees. There are a number of cases in Kenya and South Africa where refugees have used their own resources in litigation. However, asylum-seekers especially are hardly well-mobilised to raise any legal action, and even then their cases usually tend to be varied and individual, making any collective action unfeasible. Self-mobilisation has been employed where it affects refugees as a collective rather than individuals. Admittedly, in some countries where the refugees' freedom of association is largely curtailed, self-mobilisation as an option for obtaining legal services may become even more challenging.

In times when states institute emergency measures such as the Covid-19 lockdowns they often greatly restrict individual rights and freedoms, but the marginalised, vulnerable and disadvantaged members of the society will be more hard-hit than any other. Refugees and asylum-seekers whose status may be precarious, more so when the relevant offices that should process their applications are barely operating, the effects on their lives, and legal status will be adversely profound. It is, indeed, at times like these that lawyers and legal services providers need to reach out to asylum-seekers and refugees to ensure that their rights and dignity are respected and protected.

About the author:

Dr Caroline Nalule is a postdoctoral research officer fellow currently working on a European Research Council Funded project titled 'Refugees are Migrants: Refugee Mobility, Recognition and Rights' (RefMig) based at Refugee Studies Centre, University of Oxford. She holds a PhD in law from the University of the Witwatersrand, South Africa, where her thesis examined the migration rights of citizens in the East African Community. She is an advocate of the High Court of Uganda and Superior Courts.