

Effective Criminal Legal Aid:
Comparison of England and Wales, Tanzania and South Africa

By

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LLM Human Rights Thesis

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Declaration

I, Kitokesya Fortunata, do hereby declare that this work is original and has never been presented in any other Academic or non-Academic institution. Any information used has been duly acknowledged in this dissertation. Therefore, I declare this work as originally mine.

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List of Abbreviations

ECOSOC	United Nations Economic and Social Council
UN	United Nations
ICCPR	International Covenant on Civil and Political Rights
ECHR	European Convention on Human Rights
CRC	Convention on the Right of a Child
OAU	Organization of Africa Union
ECtHR	European Court of Human Rights
ICTY	International Criminal Tribunal for Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
NGO	Non-Governmental Organisation
CSO	Civil Society Organisation
WLAC	Women Legal Aid Centre
TAWLA	Tanzania Women Lawyers Association
LSRP	Legal Sector Reform Programme
TLS	Tanganyika Law Society
NOLA	National Organisation for Legal Aid
GBV	Gender Based Violence
LSC	Legal Services Commission

CLS	Community Legal Services
CDS	Criminal Defence Service
QM	Quality Mark
DSCC	Defence Solicitor Call Centre
CC	Constitution Court

ABSTRACT

This thesis is going to focus on discussing effective criminal legal aid in criminal justice system. The thesis will engage in discussing the effective criminal legal by doing comparison analysis of three jurisdictions which are England and Wales, Tanzania and South Africa. There is an assertion that criminal legal aid is not offered in Tanzania, in practice criminal legal aid is limited to crimes of treason and murder. Therefore this thesis will comparatively discuss what it entails to be criminal legal aid and its importance in criminal justice system.

This thesis is divided in four chapters as described below;

The first chapter gives the overview of criminal legal aid, its definition, background and conceptual clarification of criminal legal aid. The conceptual clarification is described by looking at different literatures that have discussed criminal legal aid concept. The chapter also elaborates the methodology of the thesis and its hypothesis that is going to base upon.

Chapter two focuses on standards, practices, general comments, advisory opinions and case laws at international and regional levels. International laws analysed are International Covenant on Political and Civil rights, 1966; Convention on the Rights of a Child, 1989 then case laws and general comments. At regional level three areas are examined which are Council of Europe and its Convention on Human Rights, 1950, African Union and its Charter on Human and Peoples' Rights, 1981 and Organization of American States and its American Convention on Human Rights, 1969. After looking at the legal instruments of the three regions thereafter case law jurisprudence on criminal legal aid is dealt with.

The chapter also looks at established international tribunals on criminal matters. There is a number of tribunals established dealing with international crimes but this thesis will focus on three tribunals which are International Criminal Court, International Criminal Tribunal for

Yugoslavia and International Criminal Tribunal for Rwanda. Case laws on criminal legal aid are employed in the process of scrutinizing the three tribunals' statute.

Chapter three aims at comparing three jurisdictions which are Tanzania, England and Wales and South Africa. In every jurisdiction the thesis discusses the general practice on provision of free legal assistance particularly of criminal legal aid by looking at the law on legal aid if available, policy on legal aid and case laws. Thereafter, scope and eligibility of legal aid are discussed; methods of legal aid delivery and administration and financing of legal aid services are articulated as well. But the analysis of the three jurisdictions bases on comparative analysis through application of the international standards and practices set forth in chapter two.

Chapter four comes up with findings of the hypothesis of this thesis and the results can be positive or negative. If the hypothesis is proven then there will be recommendations on how to address the gaps found and rectify errors found in the practices.

1.0 CHAPTER ONE

OVERVIEW OF CRIMINAL LEGAL AID

1.1 Introduction

This chapter will address the overview of the criminal legal aid in general. Things that will be addresses are the meaning of criminal legal aid, the importance of criminal legal aid, why criminal legal aid matters in criminal justice, who are stakeholders of criminal justice and who should fund criminal legal aid. Thereafter the following will be conceptual clarification of effective criminal legal aid, methodology and hypothesis. Therefore this chapter mainly gives a general introduction of criminal legal aid.

1.2 The Meaning of Criminal Legal Aid

Criminal legal aid simply means a provision of free legal assistance to a person in conflict with criminal law by a qualified legal practitioner whether on *pro bono* basis or appointed by a state. *The Draft United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*¹ defines Criminal legal aid as a “combination of legal advice, assistance and representation for victims and for arrested, prosecuted and detained person in the criminal justice process and it is provided for free of charge for those without sufficient means”². The draft goes further to define legal aid in criminal process to include concept of legal awareness, alternative dispute resolution and restorative justice³. *The Lilongwe declaration*⁴ has similar definition of what it entails legal aid in criminal process. The

¹ Adopted by The UN Commission on Crime Prevention and Criminal Justice

² Para 8, p2

³ *ibid.*

⁴ The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, Adopted on 24 November 2004 Lilongwe Malawi by 128 delegates from 26 countries including 21 African countries met to discuss legal aid services in the criminal justice systems in Africa. The declaration is not binding but depends much on moral acceptance of the respective countries.

declaration has added the aspect of stakeholders involved “such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions”⁵.

1.3 The Importance of Criminal Legal Aid

Criminal legal aid is a crucial element of effective criminal justice to the accused person and it accomplishes the goals of fair trial in criminal procedure. This form of legal aid is said to be a “foundation for the enjoyment of the rights, which includes right to a fair trial and ensures fundamental fairness and public trust in the criminal justice process⁶”. A fair trial is complimented by other things like the requirement of adequate advice and representation for the defendant and in case a defendant has no financial capacity to hire a lawyer then the State should provide a lawyer⁷. Criminal Legal aid ought to be available to offenders because its availability is inviolable part of a Constitution settlement which ensures that no citizen can be convicted of a crime without a fair trial⁸. In a case of *Gideon v Wainwright*⁹, the Supreme Court of the United States of America held that the “defendant had a right to be represented by a court-appointed attorney,” the Court said that guarantee of counsel which is found in Sixth Amendment to the Constitution is a fundamental right, essential to a fair trial. Justice Black called it an "obvious truth" that a fair trial for a poor defendant could not be guaranteed without the assistance of counsel and lawyers in criminal courts are necessities, not luxuries.”

⁵ Para 1.

⁶ Draft United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, p.1.

⁷ Alastair Hudson, *Towards a Just Society: Law, Labour and Legal Aid*, London and New York, 1999`, p. 136.

⁸ Ibid.

⁹ 372 U.S. 335 (1963).

Other Constitutions that provides of legal aid in criminal process are Kenyan Constitution¹⁰ Section 50 paragraph(2) h, Malawian Constitution¹¹ section 42 paragraph(1) c and South Africa Constitution section¹² 35 paragraph(2) c.

Provision of criminal legal aid to the indigent defendant is to make the right to access to justice real and to promote the constitutional rights values. The lack of legal representation may lead to denial of effective defence to those who cannot afford it which compromise the most fundamental constitutional commitment.¹³ The right to legal aid is said to be important in every part of the trial and it also promotes right to be heard and right to personal freedoms and liberty¹⁴.

Lord Denning once stated that not everyone can defend himself which is very true. For the accused lay person who does not have a lawyer to represent him we do not expect to have a fair trial. His lordship said that:

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his favour or a weakness in the other side ...justice is to be done, he ought to have the help of someone to speak for him. ... Therefore, that when a man’s reputation or livelihood is at stake he

¹⁰ The Constitution of Kenya, 2010

¹¹ Constitution of The Republic of Malawi the People of Malawi

¹² Constitution of The Republic of South Africa
No. 108 of 1996

¹³ ABA COMMISSION ON NONLAWYER PRACTICE, 137, Rhode, Interest of Justice, 136-37, Rhode, Professionalism, 714-15.

¹⁴ Chris Maina, Peter, Human Rights in Tanzania: Selected Cases and Materials, Koln: Koppe, 1997, p. 334.

not only has a right to speak by his own mouth. He also has a right to speak by a counsel or solicitor”.¹⁵

Furthermore the Supreme Court of United States of America recognizes the importance of legal representation especially in criminal justice. The Court said that even the intelligent and educated layman has small and sometimes no skills 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 lacks the both the skills and knowledge adequately to prepare his defence even though he has the perfect one. He requires the guiding hand of counsel in every step in the proceedings against him.¹⁶

By looking at some references on importance of legal aid to the people who are criminally charged, legal representation in court of law is very crucial for fair hearing. It can only be obtained through a well designed system of legal aid provision, which includes well designed policy, legislation on legal aid, funds and a body that will be overseeing and implementing the law on legal aid. Ineffective legal aid system to the poor has showed a lot of disadvantages both to the suspect and government. Among of the symptoms of ineffective legal aid are “...increasing cost of criminal justice administration, high remand prison population, and minimal level of public confidence in the criminal system.”¹⁷

Lawyers have a role to play among other stakeholders in of provision of legal aid to the indigents for purpose of promoting justice both in criminal and civil. However, the State should be a leading stakeholder to guarantee justice for the indigents because it is its duty to

¹⁵ *Pett v. Greyhound Racing Association Ltd*, [1969] 1 Q.B. 125.

¹⁶ See *Powell v. Alabama* (1932) 287 US 45.

¹⁷ United Nations Office on Drugs and Crimes, *Handbook on Improving Access to Legal aid in Africa*, (Criminal Justice Handbook Series, United Nations), New York, 2011, p 7.

ensure that every individual enjoys his or her right to justice¹⁸. Van As proposes two approaches to handle legal aid. Firstly, “it is the duty of the lawyer to provide legal aid services free of charge for those who cannot afford to pay and lawyers should only carry part of the burden but the bulk of the burden should be carried by the State”¹⁹. Secondly, the state is under obligation to provide legal assistance to a person who “has no sufficient means to hire an attorney only if it is necessary in the interest of justice”²⁰. In African human rights context legal aid has been addressed to be crucial because of the “weak economy and poor income of most Africans.”²¹ Therefore, due to that situation many people are incapable of paying for legal services, without which it will be difficult for them to defend themselves.²²

United Nations Office on Drugs and Crimes’, *Handbook on Improving Access to Legal Aid in Africa*,²³ states that the purpose of legal aid is to assure rights of those who are in contact with law irrespective of social and economic means. Criminal Legal aid also assures the availability of services to all people despite their economy status. Also the handbook states that “a functional legal aid system becomes a source of system efficiency and equity, and plays a significant role in protecting the rights of all that come into contact with the law.”²⁴

¹⁸ N. Abromowitz, “Legal Aid in South Africa,” 77 *South African Law Journal*, 1967, p. 351.

¹⁹ Hennie Van As, “Legal Aid in South Africa: Making Justice Reality,” Volume 49 No. 1 *Journal of African Law*, 2005, pp. 54-72.

²⁰ *Source Book: Access to Justice in Central and Eastern Europe* (public interest law initiative, Interights, Bulgaria Helsinki Committee and Polish Helsinki Foundation For Human Rights 2003), p. 11.

²¹ Nsongurua J. Udombana, *Human Rights and Contemporary Issues in Africa*, Malthouse Press Limited, Lagos, 2003, p 169.

²² Ibid.

²³ United Nations Office on Drugs and Crimes, *Handbook on Improving Access to Legal aid in Africa*, op.cit. p. 7.

²⁴ Ibid.

1.4 Why Criminal Legal Aid Matters in Criminal Justice

Criminal Legal aid aims to ensure all people despite their financial, social and cultural status have a right to access justice. UNIDOC states that the concept of criminal legal aid services is broadly founded in a model of international and regional standards and not conceptualized in certain terms.²⁵ At domestic level criminal legal aid differs in models of delivery and narrowly defined to cover certain criminal cases and in some countries criminal legal aid is not provided in the chain of criminal justice process.²⁶ Criminal legal aid has a big impact in criminal justice as it serves the purpose of justice to the suspect if it is availed from the moment the suspect is arrested.

The Economic, Social and Cultural Council also recognize the importance of criminal legal aid in its resolution it once said that “providing legal aid to suspects and prisoners may reduce the length of time suspects are held at police stations and detention centres, in addition to reducing the prison population, prison overcrowding and congestion in the courts.”²⁷

Regardless of Criminal legal aid having broad recognition in many countries through ratification of international instruments and regional instruments on human rights still people with no sufficient means cannot access to effective legal representation when accused of crimes²⁸. “The denial of effective criminal legal aid results into vulnerability to arbitrary and

²⁵ United Nations Office on Drugs and crimes, Handbook on Improving Access to Legal Aid in Africa, op. cit. at p. 2.

²⁶ Ibid.

²⁷ This is also recognised by the ECOSOC Resolution 2007/24, International Cooperation for the Improvement of Access to Legal Aid in Criminal Justice Systems, Particularly in Africa.

²⁸ Concept Note: A High-Level Breakfast Meeting on Access to Legal Aid in Criminal Justice Systems <http://theilf.org/BreakfastMeeting.pdf>, p. 3.

excessive pre-trial detention, torture, coerced confessions, false convictions, and other abuses.”²⁹

Availability of criminal legal aid ensures equality of all persons before the law and promote rule of law.³⁰ United Nations defines rule of law among other things to include “equality before the law, fairness in the application of the law, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”³¹ Recognition of criminal legal aid is said to be an essential component “a fair, humane and efficient criminal justice system that is based on the rule of law”.³²

1.5 Who are Stakeholders of Criminal Legal Aid?

Looking at Lilongwe Declaration the State has a primary responsibility to provide legal aid to people in conflict with criminal law in their respective countries³³. The Declaration requires States to adopt measures and allocate budget for legal aid for effective and transparency legal aid delivery to the poor and vulnerable groups in the society³⁴. Legal aid in criminal process has multiple stakeholders; in principle state cannot accomplish everything without a support of other stakeholders. In accomplishing a goal of free criminal legal aid the following stakeholders can be involved university law clinics, civil society organisations, paralegals, street law clinics, private law firms and intern students. The Lilongwe Declaration provides for the diversity of legal aid delivery, it urges government to employ other method for example

²⁹ Ibid.

³⁰ Ibid.

³¹ By (S/2004/616) Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, <http://www.un.org/en/ruleoflaw/>

³² The United Nations Commission on Crime Prevention and Criminal Justice (the UN Crime Commission) adopted the first international instrument on legal aid on April 27, 2012.

³³ Para 1.

³⁴ Ibid.

“public defenders offices, judicare programmes, justice centres, law clinic, as well as partnering with civil society and faith based organisations”³⁵. Different countries have employed different models of criminal legal aid delivery; some have tried to involve all stakeholders for the effectiveness of the free criminal legal aid in their respective countries. For example South Africa has several methods of delivering criminal legal aid to the public, e.g. justice centres, independent university law clinics, public defenders, judicare, intern students, paralegals and private firms³⁶.

The Lilongwe Declaration provides that in criminal justice fairness will be developed and maintained if governmental officials for example police and prison administrators, judges, lawyers and prosecutor, are aware of the importance of legal aid³⁷. Those officers mentioned above are urged by the Declaration to fully ensure implementation of legal aid and should “allow legal aid to be provided at police stations, pre-trial detention facilities, in courts and prisons”³⁸.

1.6 Who Should Financially Support Legal Services in Criminal Process?

Criminal legal aid is a right to every offender who qualifies for it without any kind discrimination in terms of social or economic status in the society and it is a primary responsibility of the State to provide for it. In International Law the *UN Basic Principles on the Role of Lawyer* provides that it is the duty of government to provide adequate funding and

³⁵ Para 6.

³⁶ It is more elaborated in chapter 3 of this thesis, on how those methods mentioned above work in South Africa.

³⁷ Para 2.

³⁸ Ibid.

other resources for legal aid for the indigents and other underprivileged groups in the society³⁹.

The African Charter of Human and Peoples' Rights, 1981 does not clearly provide for who should support legal aid. However the Lilongwe Declaration on Accessing Legal Aid in Africa provides that governments have primary responsibility to support access to legal aid in criminal justice system. Furthermore the governments are encouraged by the Declaration to adopt methods and distribute funds for effective and transparent means of delivering legal aid to the indigents and defenceless persons⁴⁰. The American Convention on Human Rights, 1969 does not provide who should support funding in legal aid system⁴¹.

1.7 Conceptual Clarification

The purpose of this thesis is to establish the standards or normative framework of acceptable internationally and apply them to three jurisdictions which are Tanzania, South Africa and England and Wales. There are standards of criminal legal aid which are found through international law and case law at international level. Not all jurisdiction fulfil the acceptable standards in provision of legal aid in criminal procedures, some jurisdiction are very backward or far behind to implement the laws on criminal legal aid. For example some jurisdictions do not have policies or laws to guide provision of criminal legal aid which results into violation of right to legal aid in criminal justice system.

According to the United Nations Office on Drugs and Crimes, criminal legal aid philosophy and its conceptualization are outcome of the regional and international principles, theorized

³⁹ Principle 3 of the UN Basic Principle on the role of lawyers.

⁴⁰ Lilongwe Declaration, para 1.

⁴¹ Open Society Justice Initiative, *Improving Pre-trial Justice: The Role of the Lawyer and Paralegal*, Open Society Foundations, 2012, p. 26.

roughly and not in definite terms, at State level are narrowed to certain types of crimes and incomplete in practice and it is not provided in all stages of criminal justice process. Generally accessible types of State-aided legal aid take the structure of legal advice throughout trial in court⁴². The Supreme Court of United States also stated that the rights of the accused person starts from the moment he is apprehended by policemen by being told his rights and rights to choose attorney of his own choice and if he cannot afford attorney one will be appointed for him, Chief Justice Earl Warren went further to state that the person in custody must, prior to interrogation among other rights must be clearly notified that he has the right to seek advice from a lawyer. Furthermore to have the lawyer with him during questioning, and that, if he has no financially capacity, a lawyer will be selected to represent him.⁴³

Criminal Legal aid promotes other important rights like right to a fair trial and equality before the law in the criminal justice system. Those rights are enshrined both at international and regional instruments. These include the International Covenant on Civil and Political Rights, 1966⁴⁴ and Universal Declaration Human Rights, 1948⁴⁵ which provide for fair hearing in all criminal matters without discrimination and every person is entitled to a fair trial by a competent court or tribunal. ICCPR⁴⁶ goes further by stating that legal assistance should be

⁴² United Nations office on Drugs and Crimes, Handbook on Improving Access to Legal Aid in Africa, op. cit at p. 2.

⁴³ The Supreme Court of the United States of America in *Miranda v. Arizona*, 384 U.S 436 (1966).

⁴⁴ Article 14(1) ICCPR, "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ... "

⁴⁵ Article 10, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

⁴⁶ Article 14 (3) (d) "To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right;

availed to persons who cannot afford to pay for themselves when it comes to employ a lawyer. The aim of legal aid is to bring equality in the society where even poor can access quality legal services. Governments are obliged to ensure equal access to lawyers is provided to all people without any kind of distinction which included economic status of a person; that is to say people who suffer economically should be enabled by their respective government to access lawyers⁴⁷.

The European Convention on Human Rights, 1950⁴⁸ also provides for equality and fair hearing in criminal justice that legal assistance must be provided to a person who cannot afford to pay a lawyer for the interest of justice. The African Charter on Human and People's Right⁴⁹ does not provide for legal aid explicitly but it provide for everyone's right to choice of his own defence to ensure fair hearing.

1.8 Methodology

The methodology to be applied is comparative analysis of three jurisdictions Tanzania, United Kingdom and South Africa. The comparison will be based on looking upon international standards on criminal legal aid and test them in three jurisdictions.

and to have legal assistance assigned to him, 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".

⁴⁷ *UN Basic Principles on the Role of Lawyers*, principle 2.

⁴⁸ ECHR, Article 6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law and 6(3)(C) "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

⁴⁹ Article 7(1) (c) the right to defence, including the right to be defended by counsel of his choice.

1.9 Hypothesis

This thesis is seeking to prove that international standards on provision of criminal legal are not fully incorporated in Tanzania if compared to other jurisdictions which are England and Wales and South Africa.

2.0 CHAPTER TWO

INTERNATIONAL STANDARDS OF CRIMINAL LEGAL AID

2.1 Introduction

The legal and normative framework of the criminal legal aid includes binding and non-legally binding soft laws and best practices through case laws, recommendations, general comments and advisory opinions. Criminal legal aid is a right and also recognized at international and regional human right system levels and its foundation in the criminal justice system is built in the commonly conventional standard of fair hearing.⁵⁰ As it is enshrined in number of human rights instruments, criminal legal aid is important to accomplish the purpose of protecting human rights particularly to poor people in conflict with criminal law.

This part aims at discussing the guarantees and scope of free criminal legal aid, eligibility criteria, when does criminal legal aid need arise, effectiveness of free criminal legal aid, procedure of applying for legal aid and appointment of lawyers for legal aid, funds for criminal legal aid. The discussion will be based on international and regional human rights instruments but it will go further to look at other soft laws both at international and regional. Additionally from international instruments the thesis will look at cases laws and established international tribunals on criminal matters. The lengthy of discussion will differ from one part to another depending on the richness of jurisprudence on criminal legal aid of a particular region or instrument.

The international instruments on human rights are binding on States that have ratified them. The instruments chosen are ICCPR, ACHPR and ECHR which bind the three jurisdictions that will be discussed in this thesis. England and Wales, Tanzania and South Africa are bound by ICCPR, and their respective regional instruments. Therefore the legal framework and best

⁵⁰United Nations Office on Drugs and Crimes, *Handbook on Improving Access to Legal Aid in Africa*, United Nations, New York, 2011.

practices established by those instruments are binding to the three jurisdictions serve for the soft laws that do not bind any State they rather depend on moral acceptance.

PART ONE

International Instruments

2.2 International Covenant on Civil and Political Rights (ICCPR), 1966

Article 14(3) provides that everyone with criminal charges against him has the following minimum rights in full equality. They are stipulated under paragraph (d) to include “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, 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”. This provision is clear that legal aid is a right and not a privilege and therefore anyone facing criminal charges has a right to legal assistance if he does not have sufficient means to hire a lawyer the interest of justice so require.

2.2.1 Scope and Eligibility for Legal Aid in ICCPR

a. Interest of Justice

In the case of *Lindon v. Australia*⁵¹, the author's complaint about a violation of his right to a legal aid lawyer was found inadmissible because he failed to substantiate his claim that the interests of justice required the assignment of legal aid. The Committee recognized the author's claim that he has suffered a violation of Article 14, paragraph 3(d) because "as he was denied a legal aid lawyer of his own choosing at the proceedings before the Full Court. But the Committee observed that the proceedings concerned the author's interlocutory applications regarding his defence against a trespassing charge the penalty was a fine only". In that situation he failed to prove that his interest of justice was at stake because the penalty was only a fine and not a sentence at interlocutory proceeding.

In the case of *Frank Robinson v. Jamaica*⁵², the Committee asked itself whether it is necessary for the State to provide effective legal assistance in capital offence cases. The Committee held that "the interest of justice test is met in every case concerning a capital offence, thus it is axiomatic that legal assistance be available in capital offence cases. This is so even if the unavailability of a private lawyer is to a certain extent attributable to the accused himself or herself and even if the provision of legal assistance would entail an adjournment of proceedings". The Committee observed that the absence of effective legal assistance amount to unfair trial.

In relation to capital punishment the Committee held in the case of *Conroy Levy v. Jamaica*⁵³ "that legal assistance must be available to an accused charged with a capital crime. This applies not only to the trial and relevant appeals, but also to any preliminary hearings relating

⁵¹ CCPR/64/D/646/1995(1998).

⁵² CCPR/C/35/D/223/1987(1989).

⁵³ CCPR/C/64/D/719/1996(1998).

to the case, the Committee stated further that Article 14(3) (d) ICCPR is violated even if the author did not apply for legal aid assistance”.

b. Legal Aid in Different Stages of Proceedings

The Committee has underlined in various cases the importance of availability of legal aid in different stages of criminal proceedings. The Committee held in *Clive Johnson v. Jamaica*⁵⁴ that lack of legal representation at the preliminary hearing of capital crime comprise violation of Article 14.3.d. of ICCPR i.e. in capital cases legal assistance must be available at the preliminary hearings of the case. The Committee viewed that it was incumbent for an investigation magistrate to inform the author about his rights to legal representation which it did not happen. Also In the case of *Maurice Thomas v. Jamaica*⁵⁵ the Committee held that denial of legal aid to the author which contributed to the further delay in the author's application for leave to appeal to the Privy Council is a violation of Article 14, paragraph 3(d). Furthermore in the case of *Gridin v. Russian Federation* the Committee found violation of Article 14 paragraph 3(d). In this case the author was not availed a lawyer for the first days after he was put under custody despite his request to see a lawyer after his detention and during interrogation was not availed the benefit of consulting a lawyer after he constantly demanded such a consultation⁵⁶.

c. Effective Legal Representation

The Committee also has held that legal representation must be effective and that it is the duty of the State to ensure this effectiveness. In the case of *Borisenco v. Hungary*⁵⁷, the Committee held that even when the “State appointed a lawyer to the author and a lawyer failed to show

⁵⁴ CCPR/C/64/D/592/1994 (1998).

⁵⁵ CCPR/C/61//D/532/1993 (1997).

⁵⁶ *Gridin v. Russian Federation*, CCPR/C/69/D/770/1997 (1997).

⁵⁷ Mr. Rostislav Borisenko v. Hungary, Communication No. 852/1999, U.N. Doc. CCPR/C/75/D/852/1999 (2002).

up at interrogation or at the detention hearing it is incumbent upon the State party to ensure that legal representation provided is effective”. Furthermore the Committee recalled its previous jurisprudence on availability of criminal legal aid in all States of the criminal proceedings. But in the case of *Beresford Whyte v. Jamaica*⁵⁸, the State was not held liable for allegation of not providing effective legal representation to the author. The author claims based on the doubt of expertise of junior counsel who failed to follow his directions and committed errors in presentation of the defence. The Committee ruled out the author’s claim basing on its jurisprudence that the “State party cannot be held responsible for alleged mistake made by a defence lawyer, unless it was manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice”. In another case the Committee held that the State party violated its responsibility to grant effective legal representation of the author in the appeal proceeding because the case was of a capital offence penalty then “the defence counsel failed to challenge the confessional evidence, and the court did not provide for an opportunity for the author to instruct his lawyer on appeal”⁵⁹.

When the errors committed by a lawyer in the process of defence the court have held that the errors are not attributable to the State in case of effectiveness of legal representation. But the committee has explained further that State can be held liable for errors committed by a lawyer if it was caused by the State. The Committee held in *Junior Smith and Stewart v. Jamaica*⁶⁰ that “State cannot be held accountable for lack of preparation or alleged errors made by defence lawyer” but the State can be held accountable unless “it has denied the author and his counsel time to prepare the defence or unless it should have been manifest to the court that

⁵⁸ Beresford Whyte v. Jamaica, Communication No. 732/1997, U.N. Doc. CCPR/C/63/D/732/1997 (1998).

⁵⁹ Glenford Campbell v. Jamaica, Communication No. 248/1987,; Jamaica, 04/07/1992.

⁶⁰ CCPR/C/65/D/564/1993 (1998).

lawyers conduct was incompatible with interest of justice”. Therefore, there was no violation of Article 14 paragraph 3 (d) as claimed by the author for inadequacy of legal assistance.

2.2.2 General Comment No. 32 of Article 14 ICCPR

General Comment⁶¹ describes Article 14 paragraph 3(d) of ICCPR that it is important to be represented by a lawyer even if an accused has a right to defend himself but this right remain to be absolute. In some specific cases the interest of justice require an appointment of a lawyer even if the accused deny to be represented his wishes will be turned down. But any restriction of accused to defend him must have objective and adequately purpose which will not go against the interest of justice. The General Comment urges State parties to make sure that “domestic law avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel”.⁶² The General Comment provides that, Article 14 paragraph 3 (d) guarantees the right to have legal assistance whenever the interest of justice so require without payment by them if they do not have sufficient means to pay for it. The General Comment states that interest of justice should be weighed by looking at the gravity of offence. For example, cases involving capital punishment need effective legal representation in all stages of proceedings. The State would be held liable of violating of Article 14.3.d “unless it was manifest to the judge that the behaviour of lawyer was incompatible with the interests of justice”⁶³. “There is also a violation of this provision if the

⁶¹ paragraph 37.

⁶² Referred by General Comment from Communication No. 1298/2004, *Becerra Barney v. Colombia*, para.7.2.

⁶³ Communications No. 705/1996, *Taylor v. Jamaica*, para. 6.2 ; No. 913/2000, *Chan v. Guyana*, para. 6.2; No. 980/2001, *Hussain v. Mauritius*, para. 6.3. as quoted in General Comment No. 32.

court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively”⁶⁴.

2.2.3 Convention on the Right of the Child

The CRC recognises the right of a child who is deprived of his right to liberty to be guaranteed legal assistance. Through legal assistance a child will be able to challenge the legality of his deprivation of liberty. Article 37(d) provides for the State to ensure that:

“Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”.

The CRC again in Article 40(2) (b) (ii) provides that State members must ensure that every child who has infringed penal law must be guaranteed suitable assistance in the preparation and presentation of his or her defence.

The General Comment also elaborates more on the Article 40(2) (b) (ii) and gives more mandates to the States to deal with the situation by leaving discretion to the States parties to establish how this legal assistance should be provided but it should be free of charge.

The Committee make more recommendation to State parties that lawyers must be trained adequately for legal assistance, for example expert lawyers or paralegal professionals. Therefore personnel involved in the process of juvenile justice must be trained and have sufficient knowledge of legal aspect to work with children in conflict with the law and the

⁶⁴ Communication No. 917/2000, *Arutyunyan v. Uzbekistan*, para. 6.3. as quoted in general Comment No. 32.

assistance must be in stages of preparing and presenting his defence but the discretion is left to the State parties and assistance must be free⁶⁵.

2.2.4 Other UN Related Instruments

The *UN Basic Principles on the Role of the Lawyers*⁶⁶ emphasise and remind the member States of the UN to adhere to the agreement of promoting and protecting human rights without any kind of distinction⁶⁷. The principles oblige government and lawyers to be responsible for the realization of access to justice of people who are not capable of affording legal fees⁶⁸. Government is obliged to provide funds to enable legal assistance to the poor goes smoothly. The legal assistance is insisted to start from the beginning of the criminal proceedings to ensure criminal justice is achieved to the suspect, Paragraph 1 of the *Basic Principles on the Role of Lawyers*, states that;

“All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings”.

⁶⁵ COMMITTEE ON THE RIGHTS OF THE CHILD Forty-fourth session Geneva, 15 January-2 February 2007, General Comment No. 10 (2007) Children’s rights in juvenile justice, Para, 49.

⁶⁶ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba on 27th August to 7th September, 1990.

⁶⁷ UN Basic Principles on the Role of Lawyers, 1990 First paragraph of the preamble “Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion.”

⁶⁸ UN Basic Principles on the Role of Lawyers, 1990. Para 4, “Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.”

*The United Nations Body Of Principles For The Protection All Persons Under Any Form of Detention Of Imprisonment*⁶⁹ states that a incarcerated person has a right to have assistance of legal counsel the legal assistance and if the detainee has no a legal counsel of his own then he should availed assistance for free if he does not have sufficient means of payment where the interest of justice so require. The *United Nations Standard Minimum Rules for the Treatment of Prisoners*⁷⁰ provides that the untried prisoners should be availed free legal assistance for the defence of the case but the assistance is by application if such service is available⁷¹.

The same have been provided in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*.⁷² Paragraph 15.1 states that:

“Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country”.

The same is found in *The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*⁷³ paragraph 18 provides that “(a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications ...”

⁶⁹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by General Assembly Resolution 43/173 of 9 December, 1988, Principle 17(1&2).

⁷⁰ Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May, 1977.

⁷¹ Para 93.

⁷² United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") adopted by General Assembly resolution 40/33 of 29 November 1985.

⁷³ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

*The Kiev Declaration on the Right to Legal Aid*⁷⁴ on its first paragraph also recognises legal aid as right and obliges the government to implement sustainable, quality and controlled legal aid system without discrimination, the attention should be paid to vulnerable groups. The second paragraph provides that legal must include “legal advice and assistance at all stages in criminal, civil and administrative process”. Paragraph six provides that legal aid should be used as means to redress violation of human rights including violation by any organ of the States without any discrimination.

*Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice by the State members of the United Nations*⁷⁵ it is a proclamation of political will and commitment that has set to achieve aspiration declared in this declaration. In one of the aspirations and objectives set is also to call upon member States of the United Nations to take steps in promoting access to justice and consideration of legal aid to those in need in accordance to their domestic laws and “to enable the effective assertion of their rights in the criminal justice system”⁷⁶.

⁷⁴ The declaration was adopted during a Conference on the Protection and Promotion of Human Rights through Provision of Legal Services Best Practices from Africa, Asia and Eastern Europe Kyiv, Ukraine 27-30 March 2007 “....was adopted by consensus at the conclusion of the conference, with a request that it be forwarded to national governments, to legal aid bodies and organisations, public and private, at national level, and to relevant national and multilateral bodies engaged in developing or implementing policies and programmes addressing legal aid, access to justice and rule of law.”

⁷⁵ At the Eleventh United Nations Congress on Crime Prevention and Criminal Justice in Bangkok from 18 to 25 April 2005 to decide to take more effective concerted action, in a spirit of cooperation, to combat crime and seek justice, paragraph 18 of the declaration.

⁷⁶ Para 18

PART TWO

REGIONAL INSTRUMENTS AND CASE LAWS

2.3 The African Human Right System on the Criminal Legal Aid

2.3.1 The African Charter on Human and People's Rights

*The African Charter on Human and People's Rights*⁷⁷ in Article 7.1. c ⁷⁸ provides for the right to fair hearing and standards for the fair hearing among others is the legal assistance. However the African Charter does not elaborate to include legal aid to the persons who do not have sufficient means to pay for the legal assistance.

The African Commission on Human and Peoples' Rights which is established by the Charter⁷⁹ stipulated standards of fair trial in its *Resolution on the Right to Recourse and Fair Trial*⁸⁰ and later elaborated more in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*⁸¹. The principles provide that the legal aid should be availed where the interests of justice so require in criminal proceedings.

First it gives obligation to the States to make sure that it establishes the effective procedure and mechanism for everyone to have equal access to legal services without any kind of

⁷⁷ African Charter on Human and Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21st October, 1986.

⁷⁸ Every individual shall have the right to have his cause heard. This comprises: (c) the right to defence, including the right to be defended by counsel of his choice.

⁷⁹ Article 30 of the African Charter on Human and Peoples' Rights, 1981.

⁸⁰ Adopted by the African Commission at its 11th Ordinary Session held from 2nd to 9th March 1992 in Tunis, Tunisia

⁸¹ Adopted by the African Commission at its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger. The mandate of adopting principles and guidelines is elaborated in the first paragraph of the preamble of Principles and Guidelines which states that "Recalling its mandate under Article 45(c) of the African Charter on Human and Peoples' Rights (the Charter) "to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African States may base their legislation."

distinction⁸². One of the types of status mentioned is economic status which is much related to legal aid as a person whose economic status is poor cannot afford fees to pay to a lawyer.

Secondly the Guidelines go further by stating that the accused has rights to have legal assistance if the interest of justice so require if she/he does not have sufficient means of to pay for it⁸³. The Guidelines states that legal aid for criminal proceedings should be considered by looking at “seriousness of the offence and severity of the sentence”.⁸⁴

The African Commission on Human and Peoples Rights had decided cases on right to legal assistance in criminal process, but most of its decisions do not stipulate clearly free legal assistance, it talks generally of access to a lawyer but with reference to Principle and Guidelines. In the case of *Zegveld and Another v. Eritrea*⁸⁵ the Commission held that “individuals alleged of committing any crime must be without delay charged with lawful criminal offences and the State should initiate legal proceedings that should comply with fair trial standards as stipulated by the African Commission in its *Resolution on the Right to Recourse and Fair Trial* and elaborated upon in its *Guidelines on the Right to Fair Trial and Legal Assistance in Africa*”. The Commission elaborated that every person detained must have prompt access to a lawyer. How to access a lawyer is more referred to Principles and Guidelines which among others stipulate free legal assistance if the interest of justice so

⁸² principle G(a) “States shall ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, gender, language, religion, political, or other opinion, national or social origin, property, disability, birth, economic or other status.”

⁸³ Guideline H(a) The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.

⁸⁴ Guideline H(b) The interests of justice should be determined by considering: (i) in criminal matters: (1) the seriousness of the offence; (2) the severity of the sentence.

⁸⁵ Liesbeth Zegveld and Messie Ephrem v. Eritrea, African Commission on Human and Peoples' Rights, Comm. No. 250/2002 (2003)

require and if a person has no sufficient means. In case of *Avocats Sans Frontières (on behalf of Bwampaye) v. Burundi*⁸⁶ the Commission found violation of article 7.1.c when the complainant who was sentenced to death was not availed legal assistance. The commission held that “right to legal assistance is a fundamental element of the right to fair trial moreover where the interests of justice demand it....considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case.”

2.3.2 The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women, 2003

The African Charter on Human and Peoples’ Rights, 1981 is supplemented by a protocol that addresses the rights of women specifically. In this Protocol there are provisions relating to access to justice particular legal assistance and free legal aid when the interest of justice so require.

*The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women, 2003*⁸⁷ guarantee access to justice and equal protection of the law to women. The protocol imposes obligation on the States to ensure access to justice to women by ensuring that there is “effective access by women to judicial and legal services, including legal aid,⁸⁸” and not only that but to States must support all national organisations which provide “women access to legal services including legal aid”.⁸⁹

⁸⁶ *Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi*, African Commission on Human and Peoples' Rights , Comm. No. 231/99 (2000)

⁸⁷ The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted in Maputo by African Union Summit on 11th July, 2003.

⁸⁸ Article 8(a).

⁸⁹ Article 8(b) “support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid.”

2.3.3 The African Charter on the Rights and Welfare of the Child, 1990

*The African Charter on the Rights and Welfare of the Child, 1990*⁹⁰ also guarantees for the protection of juveniles when in conflict with the law. Under Article 17(2) (c) (iii) States are obliged by the Charter to make sure that children are ensured justice by affording “legal and other appropriate assistance in the preparation and presentation of their defence”.

2.3.4 The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa

The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa adopted in Lilongwe Malawi during the conference to “discuss legal aid in the criminal justice system in Africa where 128 delegates from 26 countries including 21 African countries met between 22-24 November, 2004”.⁹¹ The preamble of declaration recognized the right to fair hearing, due process and legal representation. It goes further to recognize the poor people who have no resources and protection of their rights. The coverage of the Declaration are analysed below:

a. Cost for the Free Criminal Legal Aid

Article 1⁹² of the declaration provides that government are responsible to support and recognise human rights which includes provision and access to legal aid for persons in

⁹⁰ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

⁹¹ Penal reform international, Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa Lilongwe, Malawi November 22-24, 2004.

⁹² Recognising and supporting the right to legal aid in criminal justice “All governments have the primary responsibility to recognise and support basic human rights, including the provision of and access to legal aid for persons in the criminal justice system. As part of this responsibility, governments are encouraged to adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable, especially women and children, and in so doing empower them to access justice. Legal aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.”

criminal justice. They are thus encouraged to adopt measure and allocate funding to ensure effective legal aid services especially to marginalized groups like women and children.

b. Legal Aid in Different Stages of Proceedings

Article 3⁹³ of the Declaration provides and recognizes the importance of the legal aid in all stages of criminal proceedings. The legal assistance should start when the suspect is arrested, since anything that can be said when arrested can be used against him or her. Therefore, legal assistance should start from that point. Article 8⁹⁴ of the Declaration reminds lawyers that they are officials of the court and their duty to protect justice and see it operates fairly and equitably.

2.3.5 Dakar Declaration and Recommendations, 1999

Dakar Declaration and Recommendations adopted 1999 also provide for the legal aid to the people who do not have sufficient mean to pay for legal fees. The Declaration expresses the importance of legal aid to the accused person in access to justice particularly right to fair trial. It recognises the poor status of accused persons' economically and hence obligates State to provide legal assistance to indigent for effective fair trial.⁹⁵

2.4 The European Human Right System on the Criminal Legal Aid

2.4.1 European Convention on Human Rights

The relevant Article in ECHR is Article 6.3.c which provides for free legal assistance to the accused person. The sub-article provides that “every person charged with criminal offence has the right to defend himself in person or through legal aid of a lawyer of his own choice and if he does not have sufficient means to pay for legal assistance he must be availed

⁹³ Article 3 of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa.

⁹⁴ Article 8 of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa.

⁹⁵ Paragraph 8 of the Dakar Declaration and Recommendations adopted 1999.

assistance free of charge if the interest of justice so require.”⁹⁶. “The European Convention of Human Rights requires State parties to provide free legal assistance to criminal defendants who meet certain eligibility requirement.”⁹⁷ It is important that the “defendant establish insufficiency of means to afford representation and interest of justice”⁹⁸. “The European Court of Human Rights⁹⁹ may hold a State liable if it determines that the State has failed to provide legal aid to defendant who has demonstrated financial need and fulfils one more or more of the interest of justice criteria.”¹⁰⁰

The scope of free legal assistance of ECHR has much been elaborated by the European Court of Human Rights through different cases. The court is rich in jurisprudence of the right to legal aid both civil and criminal. This thesis will concentrate on legal aid in criminal cases looking at the jurisprudence of the court.

a. Scope and Eligibility for Legal Aid

Right to legal aid in criminal proceeding in the jurisprudence of court goes together with right to fair trial which is provided in Article 6. The structure of Article 6 emphasizes the vital connection between legal assistance and fair trial guarantee; it is interpreted by providing

⁹⁶ SOURCE BOOK Access to justice in central and eastern Europe (public interest law initiative, Interights, Bulgaria Helsinki Committee and Polish Helsinki Foundation For Human Rights 2003), p 10.

⁹⁷ Ibid., at p. 12.

⁹⁸ Ibid. at p. 13. In *Artico v. Italy* of 13th May, 1980 the ECtHR ruled that State parties are required to take steps measure to ensure that defendant enjoy effectively the right to free legal assistance. See also the case of *Benham v. U.K.*, decision of 10th June, 1996-III where it was indicated that deprivation of liberty is at stake, the interest of justice mandate legal representation. A potential sentence of three months imprisonment, along with the relative legal complexity of the case, triggers the right to free legal assistance.”

⁹⁹ For purpose of this part the European court of human rights will be referred as “court.”

¹⁰⁰ Source Book, *Access to Justice in Central and Eastern Europe*, Public Interest Law Initiative, op. cit at p. 12.

general requirement for equality of arms between parties in the case¹⁰¹. Legal aid is important in some cases which its absence will make equality of arms illusory in the proceedings¹⁰². In the case of *Artico v. Italy*¹⁰³ the court has ruled that legal aid is not fulfilled by merely an appointment of a lawyer but legal aid effectiveness is of paramount importance in the process and the State must take positive action to ensure that the applicant effectively enjoys legal assistance. Further the court ruled that the shortcoming on the part of a lawyer appointed for Legal Aid State cannot be held liable for that but the State is compelled to take actions that guarantee the applicant enjoyed the right to legal assistance to the fullest.

b. Free Legal Assistance in Criminal Cases

First then court has its own interpretation of what amounts to a criminal case. In *Engel and others v. Netherlands*¹⁰⁴ the court said that the matter is criminal if the appropriate domestic law categorises "it as such or if the court concludes it is according to its own independent analysis of the nature of the offences and additionally the nature, duration or manner of execution of the penalty that may be imposed".

Article 6.3.c contains the provision of the right of poor defendants to free legal assistance. In order to qualify for such assistance the defendant must demonstrate two things; "that he or she lacks sufficient means to pay for legal services and the interest of justice requires that free legal assistance be provided". The discretion is left to the State parties to "define the financial threshold triggering the right to free legal assistance" and to determine income of the accused¹⁰⁵. The court insists on implementing the law when assessing financial eligibility and

¹⁰¹ Open Society Justice Initiative and the public interest law institute "Public Interest Law Institute Making Legal Aid A Reality, A Resource Book for Policy Makers and Civil Societies," 2009, p. 207.

¹⁰² Ibid, p. 208.

¹⁰³ Series A, No. 37, 1980.

¹⁰⁴ Serie A, No. 22, 1979.

¹⁰⁵ Open Society Justice Initiative and the public interest law institute supra, Page 209

should not be done in arbitrary manner. In the case of *Pakelli v. Germany*¹⁰⁶, the court held that the a violation of “article 6.3.c does not require that a defendant lack sufficient means to pay for legal assistance beyond all doubt” but the test should be satisfied if there are indication that a defendant is an indigent and no clear indication to contrary. In the case *Twalib v. Greece*¹⁰⁷ the court found violation of Article 6.3.c because the applicant had shown sufficient indicators of inability to pay for legal assistance. However, the court has ruled in *Croissant*¹⁰⁸ that a burden of proof lies on the defendant to prove his indigence by showing that he lacks sufficient means to pay for legal assistance.

For the one to get free legal assistance on the ground of interest of justice the court developed three test in the case of *Quaranta v. Switzerland*¹⁰⁹, that the court must consider the gravity of the offence, the complication of the case, and the capacity of the accused to afford his or her own presentation. In the same case the defendant was accused of drug use and trafficking which its penalty is three years sentence or a fine, the court found that “the free legal assistance should have been granted because “so much was at stake” since the accused was “young adult of foreign origin from an underprivileged back ground and without any occupational training”. Similarly in the case of *Perks and Others v. United Kingdom*¹¹⁰, the court had found violation of Article 6.3.c noting that the defendant did not have capacity to pay for the legal representation and assistance before the magistrate’s court, the court considered the harshness of the impending sentence and the complication of the a domestic

¹⁰⁶ Series A, no. 64, 1983.

¹⁰⁷ Application no. 24294/94.1998

¹⁰⁸ Series A, no. 237-B, 1992

¹⁰⁹ Serie A, No. 205, 1991.

law to be applied. Further the court found that the interest of justice required free of charge counsel to represent the applicants before the Magistrate.

The court elaborates more the standard of the seriousness of offense which include “an assessment of severity of potential sentence for example length of deprivation of liberty”¹¹¹. In the case of *Benham v. United Kingdom*¹¹², the court extended its decision in *Quaranta* where the court held that “where the deprivation of liberty is at stake, the interest of justice in principle call for legal representation”. Therefore in the case of *Padalov v. Bulgaria*¹¹³, the court found violation of *Article 6.3.c* in combination with Article 6.1 by holding that severity of the sentence the defendant faced and “the complexity of the applicable law, the interest of justice demanded that the applicant should have been provided with free legal representation in order to receive a fair hearing”.

The court has extended the interpretation of interest of justice principle to “indicate that free legal assistance be available for vulnerable groups such as minor, mentally ill, foreigners, refugees, and asylum seekers”¹¹⁴. The court ruled in the case of *Biba v. Greece*¹¹⁵, that there was violation of Article 6.3.c and 6.1 where defendant was an illegal immigrant, unemployed and had no financial capacity to maintain a counsel before the court of cassation and was not availed a counsel. In this case the defendant could not afford to prepare his defence without lawyer’s assistance and the court’s holding considered the severity of the charges that the defendant faced.

¹¹⁰ Application nos.25277/94, 25279/95, 25280/94, 25282/94, 25285/94, 28048/9528192/95 and 28456/95, 1999.

¹¹¹ Open Society Justice Initiative and the Public Interest Law Institute. P 210.

¹¹² Application No. 19380/92, 1996.

¹¹³ Application No. 54784/00, 2006.

¹¹⁴ Open Society Justice Initiative and the Public Interest Law Institute. P 210

¹¹⁵ Application No. 33170/96, 2000

Free legal assistance does not give absolute right an indigent to choose his lawyer of his choice but the discretion is left to the State parties¹¹⁶. In *croissant*, the court found that the “right of an accused to be defended by counsel of his own choosing is not absolute”. The right is subject to limitation and it depends on the court opinion that the interest of justice requires that. The State parties have right to standardize the appearance of the lawyers in the courts and in certain circumstance to prohibit appearance of certain individuals in court¹¹⁷, for example in the case of *Mayzit v. Russia*¹¹⁸, where the court found no violation of Article 6.3.c where the defendant’s request to be defended by his mother and sister was denied hence the court accepted the argument of the State to appoint a professional lawyer rather than laypersons thus served the interest of justice.

c. Legal aid in Different Stage of Proceedings

In the European system the legal aid in criminal proceedings is said to apply in all stages of proceeding but it depends on the exceptional description taken in their totality and on the role of appellate or cassation court, therefore the right is not absolute available in all stages of proceedings.¹¹⁹ The refusal of legal assistance at particular stages of proceeding may be acceptable if it will not cause any adverse effects in further stages and the main question that the court asks itself is whether the limitation in the light of entirety of criminal proceedings has underprivileged the defendant a fair hearing¹²⁰. The same was held in the case of *Imbrioscia v. Switzerland*¹²¹, that Article 6 “applies to pre-trial proceedings, finding that the application of Article 6.1 and 6.3.c. during the preliminary investigation depends on the

¹¹⁶ Open Society Justice Initiative and the Public Interest Law Institute. P 211

¹¹⁷ Parkelli Case, *supra*

¹¹⁸ application no. 63378/00,2005

¹¹⁹ Open Society Justice Initiative and the Public Interest Law Institute. P 215

¹²⁰ *ibid*

¹²¹ Serie A, No. 275, 1993

special features of the proceedings involved and on the circumstances of the case, the court will look to the entirety of the domestic proceedings conducted the matter”. The court applying the *Imbrioscia* in the case of *Murray v. United Kingdom*¹²², found violation of Article 6.3.c and Article 6.1 because the applicant was denied right to use to legal counsel for forty eight hours after his arrest, in the same case the court held that Article 6.1 and 6.3.c ensure the right of an accused to have lawyer, the access of a lawyer is vital even at the preliminary police investigation though it may be subjected to limitation.

The court looking at the matter of fairness in proceedings states that it is vital that the legal assistance should be availed to the accused at initial stages of investigation. The court stated this in the case of *Magee v. United Kingdom*¹²³, where it found the violation of *Article 6.1 and 6.3.c* “when the applicant was denied access to attorney for over forty eight hours while being interrogated for extended periods of time and kept in solitary confinement in a detention centre”.

In promoting fairness the court is aware of the danger of the accused to self incriminate when interrogated by a Police without any legal aid. For example in the case of *Ocalan v. Turkey*¹²⁴, the court found violation of Article 6 where the applicant was refused access to a lawyer during seven days period where the applicant committed several self-incriminating statements. However it was different in the case of *Yuttas v. Turkey*¹²⁵, the court found Article 6 was not violated where the applicant was under custody for eleven days without a provision of legal

¹²² Application No. 18731/91. 1996

¹²³ application No. 28135/95, 2000.

¹²⁴ Application No. 46221/99, 2005.

¹²⁵ Application Nos. 25143/94 and 27098/95, 2004.

aid “because the applicant was not questioned by the Police so he did not make any statement that could subsequently have been used against him in criminal proceedings”.

At appellate stage the court also recognise importance of criminal legal aid by stating that where the court of appeal or cassation exist in members States, the State must ensure that persons enjoy the guarantee of Article 6 which include legal aid in Article 6.3.c.¹²⁶ In the case of *Monnell and Morris v. United Kingdom*¹²⁷, the court reiterated the special relation of Article 6.1 and Article 6.3.c and it went further to hold that “interest of justice do not automatically require free legal assistance whenever a convicted person, with no objective likelihood of success, at appeal stage the right to free legal assistance on the appeal depend upon the legal grounds for the appeal and if then interest of justice require that free legal assistance should be provided”.

d. Effectiveness of Free Legal Assistance.

The right to free legal assistance should not be done in a manner that will arbitrarily violate rights to fair hearing of the accused indigent. The court in the case of *Artico v. Italy*¹²⁸, found that the right to free legal assistance guaranteed in *Article 6.3.c.* is not accomplished by mere official assignment of a lawyer if the lawyer is not effective in criminal proceedings by not acting in professional manner. It went further by stating that State must take affirmative action to ensure that the indigents effectively enjoy the right to the fullest. *Article 6.3.c* is also violated if the State has not provided adequate “time and facilities for an officially appointed lawyer to prepare the case”¹²⁹, the court also stated that it is not necessary to prove that the interest of the applicant was harmed to find violation of the *Article 6.3.c.* when the State

¹²⁶ Delcourt v. Belgium, Series A, no. 11 1970.

¹²⁷ *series A, no.115, 1987.*

¹²⁸ Series A, No. 37, 1980.

¹²⁹ Goddi v. Italy, series A, no. 76, 1984.

authorities fails to act accordingly on the ineffectiveness of the legal aid counsel which brought to their attention or manifested to them, the court has found violation of Article 6.3.c in the case of *Goddi*¹³⁰, (*supra*). Likewise the court found violation of Article 6.1 in conjunction with Article 6.3.c in the case of *Daud v. Portugal*¹³¹ where the court found officially appointed lawyer's ineffectiveness was so evident that the authorities were required to interfere. The applicant's first legal aid lawyer did not show up in proceedings and pulled back from the case at an early stage and the second lawyer was assigned the case at late stages and did not have sufficient time to prepare for the case and it resulted into court declaring the case is inadmissible in the Supreme Court.

The error committed by the appointed lawyer or attorney always does not implicate the State into liability. However, in the case of *Czekalla v. Portugal*¹³², the court held State responsible where the defence attorney failed to comply with legal requirement for filing the applicant's appeal which led to a ruling that the appeal was not admissible. The court held that the applicant was deprived practical effective defence and his attorneys' non compliance practice in this case was evident errors which require affirmative steps to be taken by the competent authorities. On the other hand the accused or applicant has a duty to help the State by reporting the errors committed to the relevant authorities and he must show that he has taken enough steps to bring the case to the authorities' attention¹³³. In the case of *Imbrioscia supra*, the court held that the applicant did not obtain sufficient support but the relevant authorities could hardly be expected to interfere on the errors of the appointed attorneys as the applicant did not expose the shortcomings of his attorney to the relevant authorities.

¹³⁰ Ibid

¹³¹ Application No. 22600/93, 1998.

¹³² Application No. 38830/97, 2002.

¹³³ Open Society Justice Initiative and the public interest law institute. P 218

The State cannot be held responsible for every errors committed by appointed counsel and is strong-minded on the independence of legal professional that requires State to intervene only on matters “where ineffective representation is manifest of sufficiently brought to their attention”¹³⁴. It is not always arbitrary when the State refuses the replacement of attorney appointed and the one the applicant chooses. In the case *Erdem v. Germany*¹³⁵, the court found applicant’s complaint on violation of right to free legal assistance is ill founded. The court held that the domestic court’s rejection to substitute assigned counsel with one of the applicant’s choice was not arbitrary since the decision was based on the fact that the Counsel appointed had understanding of the proceeding from the beginning and he was qualified to handle the matter. Furthermore the court in the case *Freixas v. Spain*¹³⁶ found that the complaint of the applicant on violation of Article 6.3.c for being assigned a labour lawyer to defend him in criminal matters to be ill founded. It went further to hold that Article 6.3.c does not give absolute right to the defendant to choose which lawyer should be assigned to him/her by the court must but he/she must show plausible evidence that the lawyer is incompetent.

2.5 The Organization of American States

The American Convention on Human Rights under Article 8(2) (e)¹³⁷ on “fair trial” provides for the legal assistance to the person who is under criminal charges. The conventions states that the right to be assisted by counsel is inalienable right provided by the State. *The Inter-*

¹³⁴ Kamasinski v. Austria, series A, No.168,1989

¹³⁵ Application No. 38321/97.

¹³⁶ Admissibility decision of 21 November 2000(in admissible)

¹³⁷ The American Convention on Human Rights,1969 Article 8(2) e. the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

Americana Commission on Human Rights established a rule on legal assistance¹³⁸ which includes legal aid to the people who cannot pay the fee. A person in need of legal aid must make application by swearing an affidavit to prove that he or she cannot afford to pay legal fees¹³⁹. But the legal assistance that is in these rules is applicable to victims who have cases before the commission. The Inter-American Commission on Human Rights values the importance of lawyer's presence to avoid self incrimination of the accused in the criminal proceedings¹⁴⁰ and like other international standards it provides for the importance of legal assistance from the moment a suspect is interrogated by the police¹⁴¹.

In the case of *Minors in detention v. Honduras*¹⁴² where juveniles were incarcerated the Commission had found that Honduras violated Article 8.2.e of the convention and international obligation by not providing juveniles with a court-appointed attorney. It went further to state that it is the duty of the State in accordance to Article 1(1) to ensure the enjoyment of the rights recognized in the Convention. Therefore the commission obliges State

¹³⁸ Rules of the Inter-American Commission on Human Rights on the Legal Assistance Fund of the Inter-American Human Rights System as established by the Inter-American Commission on Human Rights entered into force on March 2011

¹³⁹ Article 5, "Any applicant to the legal assistance benefit shall demonstrate, by an affidavit and other pertinent methods of proof, that he or she lacks sufficient means to cover the expenses described in Article 4 of the present Rules, and shall specify the expenses to which the resources of the Fund will be applied, as well as its relation to the petition or case"

¹⁴⁰ Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, EA Ser.L/V/11.62, doc. 10, rev. 3, 1983, at p. 100. As quoted by Open Society Justice Initiative, "Improving Pre-trial Justice: The Roles of Lawyers and Paralegals" 2012 p. 26.

¹⁴¹ Annual Report of the Inter-American Commission, 1985–1986, OEA/Ser.L/V/II.68, doc. 8, rev. 1, 1986, p. 154. See further Association for the Prevention of Torture Legal Briefing, Legal Safeguards to Prevent Torture: The Right of Access to Lawyers for Persons Deprived of Liberty (APT, March 2010), available via http://www.apr.ch/index.php?option=com_docman&Itemid=260&lang=en. As quoted by Open Society Justice Initiative, "Improving Pre-trial Justice: The Roles of Lawyers and Paralegals" 2012 p26

¹⁴² Case 11.491, Report No. 41/99, 10 March 1999

to appoint attorney in cases involving juveniles if they do not have private attorney to represents.

The Inter-American Court of Human Rights in its advisory opinion¹⁴³ gave more explanation on Article 8 (2) e. The Article provides that right to a legal counsel is alienable and State has to pay in accordance to their domestic laws but it does not stipulate in which situation the legal counsel is required. Therefore the Court gave its opinion that Article 8(2) e must be read to require legal counsel only when that is necessary for a fair hearing which is missing in the Article.

PART THREE

INTERNATIONAL CRIMINAL TRIBUNALS' STATUTES

2.6 International Criminal Court Statute

*The International Criminal Court Statute*¹⁴⁴ is an independent organ from UN which provides for the legal assistance where the interest of justice so requires in its criminal procedures. The provision of legal aid is necessary to a person who has no sufficient means to pay fee for legal assistance even at International Criminal Court. The Statute establishing the Court stipulates for right to free legal assistance in two categories.

Firstly, is right to free legal assistance during an investigation, Article 55(2) (c) of the statute provides for “legal assistance of the person's choosing, or if the person does not have legal assistance, to have legal assistance assigned to him or her”. The Article provides for the scope and eligibility of free legal assistance which includes “where the interests of justice so require,

¹⁴³ Advisory Opinion OC-11/90, August 10, 1990.

¹⁴⁴ Refereed as Rome Statute of the International Criminal Court - Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

and without payment by the person in any such case if the person does not have sufficient means to pay for it”.

Secondly right to free legal assistance is provided in the process of determining charges against the accused, it is provided in Article 67.1.d. In ensuring fair hearing of the accused, the Article guarantees the legal assistance to the accused and if the accused does not have sufficient means and the interest of justice so require the court is obliged to assign him or her free legal assistance.

2.6.1 Statute of the International Criminal Tribunal for Rwanda¹⁴⁵ and Statute of the International Tribunal for the Former Yugoslavia¹⁴⁶

Article 20.4.d of the Statute establishing the International Criminal Tribunal for Rwanda and Article 21.4.d of Statute establishing the International Criminal Tribunal for Yugoslavia stipulate the right of the accused in the process of determining his or her charges. The accused is entitled among other rights to be defended through free legal assistance if he or she does not have financial capacity to pay for it. In both statutes the suspect has minimum guarantees during investigation. The suspect is to be “assigned legal assistance without payment if he/she does not have sufficient means to pay for it”¹⁴⁷.

¹⁴⁵ Adopted by Resolution 955 (1994) 8 November 1994 for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

¹⁴⁶ ADOPTED 25 MAY 1993 by Resolution 827 to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991

¹⁴⁷ Rule 42, of the rules of procedure and evidence, ICTY – (UN Doc. IT/32/REV.37 (1997) Adopted 11 February 1994 and (ICTR- UN Doc. ITR/3/REV.1 (1995) adopted on 29th June 1995

2.7 Conclusion

The aim of this chapter was looking at the normative framework of criminal legal aid. The chapter has proven that Criminal legal aid is not illusory but is founded both in international and regional human rights laws. Going through International and regional legal framework on criminal legal aid they all come up with two test for a suspect to establish that he/she qualifies for criminal legal aid. ICCPR and ECHR establish that if a person charged with crime is qualified for criminal legal aid if only has no sufficient means and interest of justice so require that he/she should be legally assisted. Therefore these phrases “no sufficient means” and “interest of justice so require” must go together for one to be given free criminal legal assistance.

The two tests seem to be universally accepted as it has been reiterated in other international, regional soft laws and laws establishing international criminal tribunals but in the African Charter on Human and people’s rights are not illustrated. In the American Conventions of Human Rights article 8.2.e does not stipulate well under what situation a person should be given free legal assistance in criminal process¹⁴⁸.

Both international and regional levels have positively contributed on legal and normative framework of criminal legal aid regarding;

- Who has primary responsibility to provide criminal legal aid
- At what stages criminal legal should be available to suspect
- What it entails effective criminal legal aid
- Who should fund criminal legal aid activities

¹⁴⁸ For African Charter on Human and Peoples Rights has “*Principles and Guidelines on The Right to A Fair Trial and Legal Assistance in Africa*” which stipulates more on provision of criminal legal aid.

- Scope and eligibility of criminal legal aid.

The above framework has been well discussed by the Committee of ICCPR and European Court of Human Rights. There is little jurisprudence in African Charter on Human and Peoples Rights and American Convention on Human rights in comparison to the ECtHR and Committee of ICCPR.

3.0 CHAPTER THREE

OUTLINE OF CRIMINAL LEGAL AID IN THREE JURISDCITION

3.1 Introduction

This chapter is going to discuss the practice of criminal legal aid in three jurisdiction England and Wales, South Africa and Tanzania. Things that will be looked upon are historical background of legal aid system focusing on criminal legal aid, models of delivery, funding, eligibility and scope of criminal legal aid and conclusion. During the entire discussion there are some jurisdictions civil legal aid will be mentioned for purpose of comparison only or the fact that civil and criminal legal in some jurisdiction are overseen by one board. For the case of Tanzania Civil legal aid will be inevitable not to be mentioned due to the practice on the ground. Civil legal aid seems to be given priority than criminal legal aid i.e. criminal legal aid is minimally provided therefore even its data will be more relying onto civil legal aid. The same to South Africa where criminal and civil legal aid are both overseen by one body therefore most of data given depend on each other.

PART ONE

3.1 England and Wales

3.1.1 Introduction

Legal aid in England and Wales is comprehensive and extensively established if compared to other countries both in civil and criminal cases¹⁴⁹. The legal aid scheme which is administered by Law Society in England and Wales was established by legislation Legal Aid Board and Advice 1949¹⁵⁰. After that the Legal Aid Board was established in 1988 and replaced administration of the scheme, there after Access to Justice Act 1999 replaced the Legal Aid

¹⁴⁹ Roger Smith, Legal aid in England and Wales: Current issues and lesson "Making legal aid a reality: a resource book for policy makers and civil society" 2009, Public Interest Law Institute.

¹⁵⁰ *ibid*

Board with a new body namely Legal Services Commission (LSC).¹⁵¹ The Legal Service Commission includes Community Legal Services (CLS) and Criminal Defence Service (CDS) which oversee budget resources for civil legal aid and criminal legal aid in that order and LSC is overseen by the Ministry of Justice¹⁵². Sticking to the theme of this thesis CDS will be given focus to bring forth the aim of this thesis.

3.1.2 Scope and Eligibility of Criminal Legal Aid

Criminal legal aid in England and Wales is available both at police station level and criminal courts but it is not absolute as the suspect/accused must meet certain qualifications. At police station criminal “legal aid is available from a solicitor on duty during interrogation but the free legal aid is available to serious cases without a means test”¹⁵³. Free legal aid in criminal courts is available by employing a merit test whereby a case is evaluated whether is in the interest of justice¹⁵⁴. Access to justice Act provides guiding principles which should be applied by the criminal courts to determine cases that qualify interest of justice test and the test is said to be broader if compared to the European Court of Human Rights¹⁵⁵. Criteria to be granted a right to legal representation in accordance to interest of justice test among others are 1) an individual likelihood of losing his liberty or livelihood or suffer damage to his reputation; 2) consideration of a substantial question of law; and 3) capability of an individual to understand proceeding or to state his own case¹⁵⁶.

The scope of criminal legal aid also includes assurance of quality by its providers; this is ensured by CLS where it has developed its “Quality Mark” though is for both civil and

¹⁵¹ <http://www.appg-legalaid.org>

¹⁵² <http://www.appg-legalaid.org>

¹⁵³ Roger Smith, p 39

¹⁵⁴ *ibid*

¹⁵⁵ *ibid*

¹⁵⁶ Access to Justice Act, Schedule 3, para 5

criminal legal aid services since April 2002¹⁵⁷. CLS makes sure that every provider in “criminal legal aid system to have and maintain “Specialist” QM which is an assessment of the overall quality of a firm, evaluating its operations and management in a number of areas including staff experience, accreditations, performance, and evaluation procedures, the ability to provide seamless service, financial stability and controls, file management and review system, client satisfaction and complaint procedures”¹⁵⁸. This Quality Mark established by CLS can be compared to mechanism of making criminal legal aid effective and not a mere legal aid without any substance. With QM criminal legal aid is seen to be realistic and it quenches the need of the clients/indigents.

3.1.3 Funding of the Criminal Legal Aid Services

Criminal legal aid is funded by the government through Criminal Defence Service (CDS). Legal aid is granted to defendants in magistrates’ courts but to those potentially facing imprisonment however the defendant must pass financial means test for eligibility¹⁵⁹. Legal Services Commission (LSC) developed a means test calculator for eligibility designed to help criminal legal aid providers which can be found on their website. In England and Wales legal aid is provided from the police station when the suspect is interrogated therefore the determination of eligibility for criminal legal aid starts there. However request for publicly funded Police Station work are made through the Defence Solicitor Call Centre (DSCC) and “CDS Direct”¹⁶⁰ provides legal aid through telephone to the arrested person but the crimes are

¹⁵⁷ Roger Smith, 40

¹⁵⁸ Rogers 40

¹⁵⁹ Advocate for International Development: A4ID Legal Aid Guide , page 35

¹⁶⁰ It is well explained in footnotes in **A report by Dr Vicky Kemp “Transforming legal aid: Access to criminal defence services” Legal Services Research Centre, September 2010. P 101**

“the CDS Direct is a police station telephone-only legal advice service which was piloted by the LSC in 2005 and rolled out nationally in January 2008. Suspects referred to CDS Direct include those who have been detained for non-imprisonable offences, those arrested for failing to appear in court,

limited to crimes such as drink driving offences, non-imprisonable offences, breach of bail conditions and warrants¹⁶¹.

An accused person is eligible for criminal legal aid when he/she makes an application by filling form CDS 14 and/or CDS 15 and submitting it to the magistrates' court where his case is being heard¹⁶². For the client to be eligible, his form will be processed to determine if he fulfils the two tests which are interest of justice test and means test¹⁶³. The interest test is based on considering the merit of the case which might include client's previous conviction, nature of the offence and risk of custody and the means test is based on client's financial position which includes house hold income, capital and household outgoing. Furthermore, this test determines if the client will be liable of their defence cost¹⁶⁴. But there is a special category of people who automatically pass the test. For example persons under the age of 16, people aged 16 or 17 with no income and living with their parents or guardians and people under age of 18 and in full-time education. Also in this category are those on unemployment benefits and there is no financial means test for cases heard in the Crown and higher courts¹⁶⁵. However persons who are believed by the court to be able pay for their defence, the cost covered for them from the beginning will be recovered¹⁶⁶. That does not mean that legal aid provided was not for free but it means that the cost recovered will be the cost awarded by the court when concluding the case.

those detained in relation to a breach of bail conditions, and those arrested on suspicion of driving with excess alcohol"

¹⁶¹ http://www.legalservices.gov.uk/criminal/police_stations.asp

¹⁶² http://www.legalservices.gov.uk/criminal/criminal_legal_aid_eligibility.asp

¹⁶³ http://www.legalservices.gov.uk/criminal/criminal_legal_aid_eligibility.asp

¹⁶⁴ http://www.legalservices.gov.uk/criminal/criminal_legal_aid_eligibility.asp

¹⁶⁵ Advocate for International Development: A4ID Legal Aid Guide, p 35.

¹⁶⁶ Ibid

3.1.4 Conclusion

Despite of having a well established system in legal aid particularly criminal legal aid; there have been concerns on how this current model of legal aid operates in England and Wales.

There had been concerns raised on the system of criminal legal aid and its reform so as shy away from some weaknesses raised. There was some complains on the system of CDS Direct where a client does not meet his solicitor they only talk on the phone. Some Solicitors complained and annoyed of the introduction of CDS Direct as they claim that it denies clients their rights choose their own solicitors.

However some Solicitors found it convenient as some cases like excess alcohol need not their presence.¹⁶⁷. Furthermore Academics are critical of the CDS Direct because it denies a client his choice of Solicitor, breach of privacy and it limits client to have face to face meeting with his Solicitor¹⁶⁸. The main issues that are contested some Solicitors and Academics are the danger of CDS Direct potential to be used widely to other more serious offence¹⁶⁹. The good thing about CDS Direct is seen as cost effective because matters which are regarded minor are solved at police station¹⁷⁰.

But despite some criticism the system on criminal legal aid is well established, the criticism provided are just one way of improving the service by dealing with matters intended for the scheme.

¹⁶⁷ A report by Dr Vicky Kemp op.cit P 101

¹⁶⁸ Supra , P. 102

¹⁶⁹ *ibid*

¹⁷⁰ *ibid*

PART TWO

3.2 Criminal Legal Aid in South Africa

3.2.1 Introduction

Legal aid in South Africa is much far developed if compared to other countries in Africa despite the transition period it faced after the transition from apartheid to majority rule. Generally legal aid in South Africa was formerly established by the Legal Aid Act, 1996, since its establishment it was operation in a mode of judicare i.e. lawyers in private practice were hired by the State to represent those in need of legal aid¹⁷¹. Legal Aid Act provides for composition of Legal Aid Board is composed by prominent persons include “a judge of the Supreme Court of South Africa, one practising advocate and four practising attorneys, the Director-General: Justice, the State Attorney, a member appointed by the Minister by virtue of his knowledge and experience in the field of legal aid, no more than six members appointed by the President in consultation with the Cabinet”.¹⁷²

In 1997 the legal aid system moved to salaried legal practitioner and it established justice centres throughout the country providing legal aid¹⁷³. Under the new Constitution of 1994 the Legal Aid Board was given obligation to provide “legal aid in criminal cases where an accused person could not afford lawyers and a “substantial injustice would otherwise result” if they were not represented”¹⁷⁴. South Africa Legal Aid Board is the only national scheme to function autonomously and it is chaired by the Supreme Court’s judge and funded directly by

¹⁷¹ <http://www.legal-aid.co.za/index.php/The-Legal-Aid-Board-a-brief-history.html>

¹⁷² Section 4 (1) (a-g)

¹⁷³ Ibid

¹⁷⁴ David McQuoid – Mason, South African Legal Aid in Noncriminal Cases: lesson “Making legal aid a reality: a resource book for policy makers and civil society” 2009, Public Interest Law Institute, p 17

the Parliament where it sends its report¹⁷⁵. The Legal Aid Board is guided by rules found in the Legal Aid Guide which provides that legal aid is to be managed under direction of the Director of Legal Aid¹⁷⁶.

For the interest of justice the Justice Centres are near courts and they serves nearly 10 to 20 courts and through this system it is reported that 250000 people receives legal aid services each year¹⁷⁷ for both civil and criminal case. The Board works with different partners who are member of the “bench, advocates, attorneys, government department and independent expert on legal aid which include University Law Clinics, and paralegal movement”¹⁷⁸, Private practitioners supplement the national legal aid services so that they reach people easily in the country¹⁷⁹.

The responsibility given to the Board by the Interim Constitution on providing legal aid to criminal cases brought challenges. The main challenge was the back log of cases to the board, judicare system was breaking down and the expenditure on private lawyers began to soar out of control which leads to the contemplation of other alternatives¹⁸⁰.

3.2.2 Scope and Eligibility to Criminal Legal Aid in South Africa

The scope and eligibility criteria for legal aid in criminal cases first should be examined in the current Constitution of 1996. The Constitution provides that “everyone who is detained, including every sentenced prisoner, has the right to have a legal practitioner assigned to the accused by the State, at State expense, if substantial injustice would otherwise result, and to

¹⁷⁵ United Nations Office on Drug and Crime, Access to Legal Aid in Criminal Justice Systems in Africa Survey Report, United Nations Newyork, 2011, p 10.

¹⁷⁶ United Nations Office on Drug and Crime, *supra* p. 20.

¹⁷⁷ <http://www.legal-aid.co.za/index.php/The-Legal-Aid-Board-a-brief-history.html>

¹⁷⁸ David McQuoid – Mason, *supra*

¹⁷⁹ United Nations on Drug and Crime, *supra* p 11.

¹⁸⁰ *Ibid*,

be informed of this right promptly¹⁸¹”. From this provision an accused person has absolute right to free legal aid “if substantial injustice would otherwise result” therefore this is one of the criteria for a person to qualify for free criminal legal aid. Having such provision in the Constitution raises the importance of the legal aid in criminal proceedings for the promotion of fair hearing. But apart from what the Constitution provides for one to qualify for legal aid in the cases of *S v. Vermaas and Du Plessis*¹⁸² the South African Constitutional Court said that eligibility can go beyond from what is provided in the Constitution by looking at “ramification of the case and complexity or simplicity of the case, accused’s aptitude or ineptitude to defend for him/herself and gravity of the potential consequences of a conviction, ought to be factors the court takes into account when evaluating an entitlement to legal representation at State expense”.

The Legal Aid Act provides for the criteria for a person to be eligible for criminal legal aid. The Act provides that in determining that a person should be granted legal representation for free by the State the court must satisfy itself on eligibility of the accused person. The court must look into the following, personal circumstances of the accused, the nature and gravity of the case that is about to be tried or convicted already, if any legal representation at State expense is available, and any factor that the court may deem fit to grant free legal representation¹⁸³. However to determine whether a person cannot afford to pay for his/her own legal representation there is a means test devised which help legal aid providers. The means test mainly look at the income of the applicant, considers both movable and immovable assets and the applicant must be natural not legal person¹⁸⁴. Therefore, if a person is found

¹⁸¹ Constitution of The Republic of South Africa No. 108 Of 1996, Article 35 (2) (C)

¹⁸² 1995 (3) SA 292 (CC)

¹⁸³ Section 3B (1) (a) (i – iv)

¹⁸⁴ <http://www.legal-aid.co.za/index.php/Who-qualifies-for-assistance-from-the-Legal-Aid-Board.html>

financially stable to exceed the amount laid down for the income legal aid will be refused and if the total of the assets are enough to cover the expected cost even if he does not have enough income legal aid will be also refused¹⁸⁵. Legal aid system in South Africa set out persons who can get free legal aid which includes natural persons although not clarified whether a person should be a citizen or any person residing in south Africa, asylum seeker are qualified to free legal representation in criminal cases and legal person do not qualify for the legal representation in criminal proceedings as long as registered “but companies registered in terms of Section 21 of the Companies Act of 1973 may qualify if they meet certain criteria”¹⁸⁶.

3.2.3 Methods of Criminal Legal Aid Delivery

a. University Law Clinics

One of the methods that are used effectively to represent indigents in criminal proceedings is the use of University law clinics and the provision is for free. Indigents are represented by qualified lawyers who work in clinics both in lower Courts and High court in criminal case as well as civil cases¹⁸⁷. Law clinics are funded by the government through Legal Aid Board¹⁸⁸. Law clinics “use supervised law graduate interns as public defenders in the district criminal courts, however the clinic have to employ a principal attorney with experience to supervise law graduate in the community service programme”¹⁸⁹. This has been proved to be cost effective and an efficient means of delivering legal aid services for the Board¹⁹⁰. For example at Witwatersrand School of Law, it is mandatory for undergraduate students to provide free

¹⁸⁵ *ibid*

¹⁸⁶ *ibid*

¹⁸⁷ United Nations on Drug and Crime, *supra* 29

¹⁸⁸ *Supra*, 30

¹⁸⁹ *ibid*

¹⁹⁰ *ibid*

legal aid within the law clinics at the campus in their final year. Final year students were enabled to appear before district criminal courts to represent indigents through “Students Practice Rule” 1985.¹⁹¹

b. Pro bono Criminal Legal Aid

This is where a legal professional provide legal services to the indigents, this is uncompensated Legal services. South Africa Legal Aid System started using pro bono services to the indigent during apartheid era in 1962, but it did not last long for lack of promotion, lack of dedication by the professionals and too much unwieldy red tape.¹⁹²

Pro bono service is not mandatory for South African lawyers but “in 2004 the Cape Law Society made mandatory for its members to perform pro bono work on an annual basis”¹⁹³. Furthermore the uniform rules of professional conduct states that “It is the duty of all counsel, so directed by the Bar Council, to undertake legal aid matters¹⁹⁴”. This rule significantly imposes a duty to lawyers to provide legal services to indigents for free which increase a wider room for criminal justice. Lawyers who provide legal aid are paid in accordance to the agreement entered between legal aid board and General Council of the Bar of South Africa¹⁹⁵.

c. Judicare

For the first twenty year of its existence the Legal Aid Board of South Africa was using judicare to provide legal aid to the indigents i.e. the private lawyers were employed on fixed

¹⁹¹ David McQuoid – Mason, supra Page 26

¹⁹² P.H. Gross, Legal Aid and its Management (1976) , 176 -77 as quoted by David McQuoid – Mason, supra, p 20

¹⁹³ David McQuoid – Mason, supra p 20

¹⁹⁴ Rule 6.3.1

¹⁹⁵ Rule 6.3.2

salary to represent those in need¹⁹⁶. It is said that from 1971 to 1999, the board referred 999, 707 legal aid cases to private lawyers and most of those cases were criminal cases and after the new Constitution came in 559,238 cases were referred between 1994 to 1995¹⁹⁷. The sharp rise of the number of clients after new Constitution lead to the introduction of new model of delivering legal aid services to those in need due to the caseload that the Legal Board faced¹⁹⁸. For the entire time judicare model worked effectively because there was adequate administrative structure which helped the model to run smoothly.¹⁹⁹

d. Justice Centres

This is one of the methods opted for after the judicare model was overwhelmed by a huge number of clients after the new Constitution was introduced. The Legal Aid Board established justice centres to supplement the legal aid system and to make it more effective and efficient. Justice centres work under direction of a National Access to Justice Director who makes sure that centres deliver access to justice appropriately to the poor who are in need of the services²⁰⁰.

These centres work in a model of law firm where qualified indigents can go for legal assistance²⁰¹. Justice centres are composed of a principal attorney as a head of Centre, professional assistants, candidate attorneys, and paralegals and provide legal assistance for particular criminal and civil matters²⁰². Justice centres are referred as one stop centres for legal aid clients and it integrate various schemes of legal aid under one supervision for

¹⁹⁶ <http://www.legal-aid.co.za/index.php/The-Legal-Aid-Board-a-brief-history.html>

¹⁹⁷ Legal Aid Board, "Legotla: Overview of the Board and Its Activities" (Unpublished, November 1998), 8. As quoted by David McQuoid – Mason, supra p 21

¹⁹⁸ David McQuoid – Mason, supra p 21

¹⁹⁹ *ibid*

²⁰⁰ United Nations on Drug and Crime, supra 20

²⁰¹ <http://www.legal-aid.co.za/index.php/How-does-the-Legal-Aid-Board-work.html>

²⁰² *ibid*

example competent public defenders, law clinics and interns²⁰³. The Legal Aid Board established these centres to work professionally as best as private lawyers work. However whenever centres are faced with the problem of expertise on certain cases the centres refers case to private lawyers who have competence.²⁰⁴

e. Cooperation Agreements

A Cooperation Agreement is defined by Legal Aid Guide as an agreement entered between Board and legal practitioners or group/ firm/ company of legal practitioner for the purpose of providing legal aid to the poor²⁰⁵. The Board enters into agreement with organizations that has proven a record of good work in public interest law, effective community service or organization which is at places that the Board cannot reach. The Legal Aid Board has established “cooperation agreements with specifically NGO, public-interest law firms, independently funded clinics and paralegal advice offices” which are capable of rendering legal aid to the poor²⁰⁶. Currently the Board has cooperation agreement with Universities which have law clinics. The Universities that are currently working with the Board are Potchefstroom University for Christian Higher Education, University of the Witwatersrand, University of Venda, Stellenbosch University and University of Port Elizabeth.²⁰⁷

f. Other Initiatives

South Africa Legal Aid system uses law interns to supplement legal aid services in the country. Under the Attorneys Act, 1979²⁰⁸, prospect attorneys “must engage in internship

²⁰³ United Nations on Drug and Crime, supra 20

²⁰⁴ *ibid*

²⁰⁵ Legal Aid Board , chapter 1 para .1 definitions

²⁰⁶ *ibid*

²⁰⁷ <http://www.legal-aid.co.za/index.php/How-does-the-Legal-Aid-Board-work.html>

²⁰⁸ The Attorneys Act 53 of 1979

outside of an attorney's office"²⁰⁹. The Act provides that prospect attorney must "perform community services approved by the society concerned in terms of a contract of service for uninterrupted period of at least one year to the satisfaction of that society"²¹⁰. The Board is using candidate attorney for legal aid as public defenders in district courts but under supervision the senior attorneys²¹¹. Additionally the Board has agreed with private lawyers in rural areas to employ law interns mainly to work on legal aid work and they are paid by the Board, most of cases handled by the law interns in rural area are criminal cases.²¹²

3.2.4 Funds for Legal Aid in South Africa

Legal aid in South Africa is funded by the government and the funds go to the Legal Aid Board. The budget of the legal aid Board is allocated by the Parliament in the Ministry of Justice Budget and the criminal legal uses more expenditure if compared to civil legal aid²¹³.

3.2.5 Conclusion

Despite being democratically young since it gained its independence South Africa has achieved greatly in area of criminal legal aid. The criminal legal aid has a good foundation from both constitutions the interim and new one for having a section which provides clearly for legal assistance to persons who face criminal charges with no sufficient means. This shows how much the State recognizes a right of fair trial in full equality of the rich and poor members of the society. The criminal legal aid in South Africa has opted diverse mode of delivering legal aid and it has stretched to remote areas which has been difficult for other countries.

²⁰⁹ David McQuoid – Mason, *supra* p 21

²¹⁰ section 2(1A) (b) as amended by section 2 of the Attorneys Amendment Act 115

²¹¹ David McQuoid – Mason, *supra* p 22

²¹² David McQuoid – Mason, *supra* p 24

²¹³ David McQuoid – Mason, *supra* p 18

PART Three

3.3 Tanzania

3.3.1 Introduction

Generally there is a negligible provision of free criminal legal aid services in Tanzania to indigents. The history of legal aid in general in Tanzania traces back its history in 1969 when it started at the Faculty of Law University of the Dar es salaam when the Legal Aid Committee was established. . Lately there are many non-governmental organisations that provide free legal aid. These include

- Legal and Human Right Centre,
- Women Legal Aid Centre,
- Tanzania Women Lawyers Association,
- National Organisation For Legal Assistance,
- Tanganyika Law Society and many others

The kind of legal aid provided to indigents includes legal advice, drafting of pleadings and other documents, court representation if the case is of public interest. Legal aid provided by Non Governmental Organizations is mostly provided to indigents with civil cases and very rare on criminal cases when they have a public interest element. Criminal legal aid is provided by government through the Legal Aid (Criminal Proceedings) Act, 1969. For criminal cases legal aid is very limited, it is only for crimes with capital punishment which are murder and treason. The reason why criminal legal aid is provided to cases with capital punishment is because of scarcity of resources. The State is unable to pay for every case that qualifies for criminal legal aid.

Currently there is no national policy or law on legal aid in Tanzania. The only key document on the provision of legal aid in Tanzania is the Constitution that deals with legal

representation in criminal cases (Article. 13(6) (a). The Court Fees Rules and the Court of Appeal Rules which exempt certain claimant from paying court fees²¹⁴, criminal legal aid in Tanzania is provided by law called the Criminal Proceedings Act, 1969. Section 3 of the Act provides for the eligibility criteria for legal aid and persons mandated to certify an accused to be granted legal aid. The Act indicates that State is responsible to pay the legal aid services provided by an Advocate assigned to help an accused²¹⁵. The Criminal Procedure Act²¹⁶ provides an accused rights to be defended but in criminal courts with exception of primary courts. However the right is subject to provision of rules provided by High Courts under the power conferred by Tanganyika Order in Council Article 26.

In case of proceedings in the High Court or any other court where the Chief Justice with special reason think that the case involves complexity in the proceedings he may authorize the payment of higher remuneration to an advocate helping an accused²¹⁷. Furthermore the judiciary has been active in promoting criminal legal aid, in a case of *Haruna Said v. Republic*²¹⁸ Judge Mwalusanya as he then was said that where the legal aid is unreasonably refused by the certifying authority or where the trial magistrate has omitted to send the proceedings to the certifying authority for consideration of legal aid, the trial will be held to be nullity. Again in the case of *Lekasi Mesawariki v. Republic* the Court of Appeal allowed

²¹⁴ Access to Justice and Legal Aid in East Africa, A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors, A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, December 2011, page 49

²¹⁵ Section 4(1) the remuneration of any advocate assigned to an accused under the provisions of section 3 shall be determined by the certifying authority and shall be payable from the general revenue of the United Republic.

²¹⁶ SECTION 310, R.E 2002

²¹⁷ Section 4(2)

²¹⁸ TLR 124 (HC) 1991

the appeal and quashed the conviction on the ground that the appellant did not get fair trial for lack of legal assistance.

Despite having an Act on criminal proceedings which provides for free legal aid to accused person in any proceedings i.e. any criminal case²¹⁹, the practice does not reflect the provision of the law. Most of criminal cases are not guaranteed to have legal aid, only two types of criminal cases in practice have guarantee on having legal are which are murder and treason. The legal aid that is seen to be done from the judiciary is waive of court fees to persons who has been granted legal aid under legal aid schemes of selected university clinics and Civil Society Organisations²²⁰.

Most of cases that are handled with legal aid providers in Tanzania are civil cases more that criminal cases. Civil cases include labour cases; land disputes cases, matrimonial cases, child custody cases and probate cases. Few legal aid providers deal with criminal cases. For example Women Legal Aid Centre (WLAC) sometimes receives application for legal aid in criminal cases especially on domestic violence involving women and children. However the Legal Aid Committee of the School of Law of the University of Dar es Salaam does not provide legal aid in criminal cases. The reason why most of legal aid providers do not entertain criminal cases for legal aid is because it is thought that criminal legal aid is sole duty

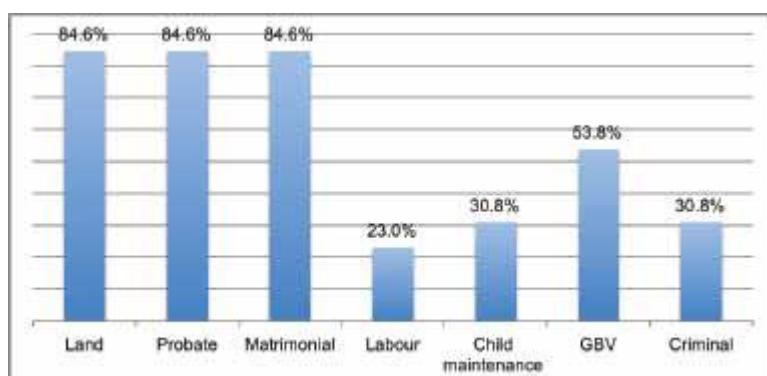
²¹⁹ Section 2 defines “proceeding” to mean any proceeding in any court where a person is being tried for a criminal offence and includes an appeal but exempt any proceeding in primary court.

²²⁰ Court Fees Rules [GN No. 308 of 1964], Rule 8(5) “No fees shall be payable by a person who has been granted legal aid under the Legal Aid scheme of either the Faculty of Law, University of Dar es Salaam, the Tanganyika Law Society, the Tanzania Women Lawyer’s Association (TAWLA) or the Women Legal Aid Center or the Legal and Human Rights Centre in respect of proceedings instituted by or against such person except if he is successful in the proceedings the court shall direct him to pay up the necessary court fees.”

of the State. Most of legal aid providers are supported by donors and donors are mostly interested in civil cases²²¹.

Below is a chart of cases that are received frequently in various legal aid provider centres. The figure shows the percentages of cases received and in the figure legal in criminal legal aid is seen to be overtaken with civil cases shown in the figure.

Figure 1.



Source: Legal Services Facility.²²²

The figure above is a result of a survey conducted by Legal Service Facility to legal aid providers NGOs. The survey results base on the 13 NGOs that were interviewed on type of the legal aid service they provide to the indigents. 11 NGOs reported to handle land disputes, probate and matrimonial cases (84.6%), 7 NGOs reported to handle GBV cases (53.8%), 4 NGOs reported to handle criminal and child maintenance cases (30.8%) and 3 NGOs reported to handle labour cases (23%). Despite that fact that in practice, LAPs do not carry out criminal cases, all LAPs in Zanzibar and NOLA in Tanzania mainland mentioned to provide legal

²²¹ Legal Services Facility Baseline Survey on Tanzania Mainland and Zanzibar for Legal Services Facility, prepared by the ST Associates – Process Consultants and Facilitators March 2012 p 42.

²²² Legal Service Facility supra, p41.

assistance in such cases²²³. Looking at the figure above it shows that criminal legal is not given much weight as civil legal aid, but it is the same reason that criminal legal is a responsibility of the State.

3.3.2 Method of Legal Aid Delivery in Tanzania including Criminal Legal Aid

The methods that have been provided below are the one that works in practice but most of them have been prioritizing civil legal aid that criminal legal aid. However despite that they focus much in civil legal aid, these methods at minimal percentage do provide criminal legal aid but there is a lack of uniformity as there is no policy or law for guidance.

a. Civil Society Organisations

Civil Society Organisations have contributed considerably in promoting access to justice in Tanzania. Access to justice for the poor especially legal aid services have been pioneered by non-governmental organisations with a support of funds from foreign donors and partly by government through Legal Sector Reform Programme (LSRP). Civil Society Organisations provide free legal aid to indigents on different matters like land dispute, family matters, child maintenance, child custody, Labour disputes, Insurance claims, Inheritance, and domestic violence cases. CSOs are not much involved with criminal legal aid unless a case is of public interest, however CSOs through other arrangement like legal aid day which is a LSRP program they provide legal aid to prisoners but it is done once a year.

Indigents either pay no fees at all or pay a very little amount for filing opening with NGO which does not amount to \$1.4²²⁴. Legal aid is mainly provided by lawyers and occasionally

²²³ *ibid*

²²⁴ Access to Justice and Legal Aid in East Africa; A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors “The legal aid services offered by lawyers in Tanzania mainland are free of charge, and all incidental costs are covered by the legal profession. Some civil society organisation that employ lawyers, such as the

with paralegals in some places where lawyers are hard to be found. Most NGOs are located in urban and not in rural areas and this makes its availability limited for those indigents who are living in rural areas. Indigents from rural areas travel long distance to the city or towns or to locations that have services of legal aid²²⁵. Some organisation have branches in regions²²⁶ and some have paralegals that are trained on certain issues like land dispute matters, family disputes and human rights. There are some organisation have gone much further by training paralegals continuously like Zanzibar Legal Aid Centre which in turn are useful when it comes to provision of legal aid.

b. Bar Association

Tanganyika Law Society, the Bar association of Tanzania Mainland, also uses its members to provide legal aid to indigents both on criminal and civil cases on pro bono basis. The provision of free legal aid by the Bar is not required by law or regulation, but is provided as a matter of social responsibility and not as a requirement for a lawyer to receive a practising certificate. The Bar association of Tanzania “Tanganyika Law Society” provide free legal aid services to the indigent, with a membership of about 2000 advocates, runs a pro bono scheme for criminal defence and sometimes civil cases when there a big possibility of client to win or on merit²²⁷. “The problem is that the scheme is not properly organized and the services rendered fall below the required standards”²²⁸.

LHRC, charge a small fee (2,000 TSH – approximately 1.4 USD) to cover administration costs” page 86

²²⁵ for example at Legal Aid Committee there is a good number of clients who come out of Dar es salaam regions for legal aid services so that is to say for people who cannot afford fare to Dar es salaam they lose their rights

²²⁶ Region is a political territorial division of Tanzania

²²⁷ Handbook on improving access to legal aid in Africa; CRIMINAL JUSTICE HANDBOOK SERIES, UNITED NATIONS New York, 2011, P 28, emphasis, the services rendered fall under the required standard as there is no law or regulation which put mandatory requirement for lawyers to volunteer for legal aid

c. University Law Clinics

Historically legal aid started to be provided to the indigents in law clinics in Tanzania. As mentioned above legal aid stated at the Legal Aid Committee of School of Law of the University of Dar Es Salaam. There are other law clinics providing legal aid to the indigents but the problem is they mainly handle civil cases and not in criminal matters unless the case has element of public interests or for interest of justice. Generally there is no guideline for the provision of criminal legal aid therefore every law clinic can establish its own standards to help an indigent. However students are not fully involved in the process of provision of legal aid. For example Legal Aid Committee of School of Law of the University of Dar es salaam does not involve students but uses academic staffs and volunteers provide legal aid.

d. Government Involvement

The government of Tanzania through the Ministry of Constitutional Affairs and Justice promotes access to justice of the poor through its programme called the Legal Sector Reform Programme (LSRP))²²⁹. Through LSRP government provides funds to Civil Society Organisations which provide free legal aid services to indigents, the project of access to justice is coordinated by Tanganyika Law Society²³⁰. The funds are for running activities for legal aid annually. The applications for funds are sent to Tanganyika Law Society who runs the project to access to justice of the poor and the same is applicable to report the financial

²²⁸ibid.

²²⁹ "The Government of the United Republic of Tanzania through the Ministry of Constitutional Affairs and Justice is implementing the Legal Sector Reform Program (LSRP) with the support of three bilateral donors: the Royal Danish Government through DANIDA, the Government of Sweden through Swedish International Development Agency (SIDA), the Government of Canada through Canadian International Development Agency (CIDA), and two multilateral donors, the World Bank (WB) and the United Nations Development Program (UNDP) all together under a basket funding arrangement". <http://www.tls.or.tz/otherpages/lsrc.asp>

²³⁰ The funds from LSRP to CSOs for legal aid services is not specifically targeting civil or criminal cases, but it is generally for legal aid activities, it may include criminal cases if the NGO is working on criminal cases.

uses. Therefore there is no specification on the use of funds as long as it is for legal aid it does not matter whether is civil or criminal legal aid.

e. Paralegals

Paralegals in Tanzania are used by many Civil Society Organisations in provision of legal aid due to few numbers of lawyers and the fact that most of lawyers are residing in urban areas. But even in other towns it is reported that paralegal services are mainly found in towns, meaning that indigents have to walk miles to the centres in towns²³¹. There is neither legal recognition of paralegals nor any policy on paralegals in Tanzania. Paralegals are product of efforts by Civil Society Organisations without government involvement. And there is no particular institute for paralegal training, and every NGO trains its paralegals according to the goal they want to fulfil e.g. paralegals can be trained on election monitoring, human rights, land rights, and domestic violence.

3.3.3 Funds for Legal Aid

Funding of legal aid scheme in Tanzania is not left to the government only, there are various other ways of funding the scheme which include the brief system administered by the judiciary, membership subscription TLS and funding from the LSRP and international donors for the legal aid²³².

3.3.4 Scope and Eligibility for Free Legal Assistance in Criminal Cases.

There is scope and eligibility for criminal legal aid in Tanzania is defined in the Legal Aid (Criminal Proceedings) Act, 1969. In practice a person is qualified to receive legal aid in

²³¹Access to Justice and Legal Aid in East Africa, supra p 90

“All of the 21 regions of Tanzania mainland are served by paralegal centres. Yet, these centres tend to be based in the main regional town, which may in some cases result that the rural population needs to travel several hundred kilometres to reach a paralegal. In Zanzibar, all the 50 constituencies have a paralegal physically present”.

²³² Supra, p 50.

criminal matter only if he/she has committed either of the two crimes namely murder and treason. The Act provides for criteria for eligibility which are interest of justice and insufficient means. It states that for the purpose of an accused to have legal representation in the preparation and conduct of his defence or appeal, legal aid will be granted to him if the certifying authority satisfy itself that it is for the interest of justice or the accused has no sufficient means to pay for legal assistance.²³³

Legal aid providers in their capacities have devised their own eligibility criteria for provision of legal aid both in both criminal and civil cases. For example Legal Aid Committee of School of Law of the University of Dar es Salaam has its own means test for indigents to qualify for legal aid; the Committee looks at the income of that person per month. It is not necessary that an indigent must employed, i.e. a person might not be employed but he might be having other means of earning for living, indigents must show that he earns below US \$ 150. The Committee also uses the “subject matter” test which guides the Committee to concentrate on civil matters only. According to Legal Service Facility’s Baseline Survey it says that 92.3% of the legal aid providers have developed three criteria for eligibility “financial/economic status, gender and geographical coverage/area of operation”²³⁴. The survey gives example of NOLA which has its additional factors for legal aid eligibility, “Means test to determine financial capacity, Merit test to determine violation of right, cases with public interest or strategic cases, vulnerability of the client, Subject matter of the case,

²³³ Legal Aid (Criminal Proceedings) Act [Cap 21 RE 2002] Section 3, which provides that

“Where in any proceeding it appears to the certifying authority that it is desirable, in the interests of justice, that an accused should have legal aid in the preparation and conduct of his defence or appeal, as the case may be, and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have such legal aid and upon such certificate being issued the Registrar shall, where it is practicable so to do, assign to the accused an advocate for the purpose of the preparation and conduct of his defence or appeal, as the case may be.”

²³⁴ P 42.

i.e. land, matrimonial, inheritance or probate, Gender Based Violence (GBV), and civil claims”.²³⁵

3.3.5 Conclusion

From the discussion above one can say that criminal legal aid is neglected in Tanzania when compared to South Africa and England and Wales. The government of Tanzania has blindfolded its eyes on criminal legal aid so do other stakeholders. The mode of delivery mentioned above partially cover criminal legal aid, furthermore the absence of the law on criminal legal aid or absence of clear provision on criminal legal aid in the Constitution worsens the situation.

²³⁵ Ibid

CHAPTER FOUR

4.0 OBSERVATION AND RECOMMENDATIONS

4.1 Findings

This thesis is based on comparison analysis of the three jurisdictions which includes countries of Tanzania, South Africa and England and Wales. The aim was to compare these three jurisdictions in provision of legal aid in criminal process and look at the legal aid system in criminal process in each respective country. Before looking at each jurisdiction's practice in criminal legal aid, the thesis examined international and regional standard established on criminal. What were examined at international and regional level are international conventions, regional instruments on human rights protection, general comments and case law plus other recommendations. In every country the history of the legal aid, method of delivery, scope and eligibility of legal aid was examined. The hypothesis of this work based on the assumption that the legal aid in criminal process in Tanzania is not effective and backward when compared to other two jurisdictions.

The hypothesis has proven to be true after examining the three countries. First by looking at England and Wales criminal legal is well established in terms of having all necessary elements which enhance effective and efficient provision of criminal legal aid. The England and Wales system ensures quality of provision of criminal legal aid which is under established Legal Services Commission, the law and other supporting units which start from police stations. Furthermore, criminal legal aid in England and Wales is a "highly funded system by government in the world in 2003/4 the funding was just under three billion Euros with annual per capita cost of almost sixty Euros."²³⁶ Therefore one can see that criminal legal aid in England and Wales is fully implemented and it is not half way or incomplete in the criminal

²³⁶ Roger Smith "Legal Aid in England and Wales: current Issues and Lessons" Making Legal Aid a Reality, Public Interest Law Institute, 2009. page35

justice system. The country recognizes the importance of a reasonably suspected person to have legal assistance from the first interrogation at police station to avoid self-incrimination. The provision of criminal legal aid does not cover only nationals but also asylum seekers and other foreigners as it was seen in previous chapter.

Legal aid in South Africa is effective and well established and it aims at bringing justice to the poor. The legal aid system caters for everyone regardless of race or sex and it aims to cure the injustice of the past regime of apartheid system. The scheme involves diverse stakeholders and it employs different methods to reach the aim of promoting justice to the poor who cannot afford lawyer's fees. The system is sustainable financially as the funds come directly from the State through Parliament so one can see the initiatives of the government are meant to have a sustainable legal aid scheme.

On the side of Tanzania legal aid scheme is backward generally if compared to other two jurisdictions above. Even though the Constitution²³⁷ provides for the right to legal representations there is no policy or law that reflects the provision on legal aid to the poor. The model of delivering legal aid is very limited if compared to South Africa which has multiple partners involving in providing legal aid in criminal justice. To be specific criminal legal aid in Tanzania is not given much attention if compared to civil legal aid. Most of stakeholders who provide legal aid have based only in civil cases and not criminal cases, therefore criminal suspects who cannot afford to hire lawyers are left out without help in criminal proceedings. Despite having Legal Aid (Criminal Proceedings) Act [CAP.21], 1969 one can say that it is not enough to ensure criminal justice system to offender with no sufficient means because then Act only helps suspect who committed either of two the grave offences which are murder and treason.

²³⁷ United Republic of Tanzania Constitution, 1977 Article. 13(6) (a).

4.2 Key Findings in Tanzania

The key findings focus on Tanzania because the hypothesis was to prove that legal aid in Tanzania is backward if compared to the other two jurisdictions which are England and Wales and South Africa and to international standards. Generally there are a lot gaps in Tanzanian legal aid scheme especially criminal legal aid and therefore the key findings are on comparative basis. Below are the key findings;

- Legal aid in criminal process in Tanzania is very limited if compared to other two jurisdiction and established international standards through law, case laws and General Comments. Generally criminal legal aid is less provided when compared to civil legal aid. This is quite different from England and Wales and South Africa as in those countries criminal legal aid is very high and civil legal aid is less.
- While law is very important for the guidance of provision of legal aid unfortunately in Tanzania there is no specific law which is fully committed to the legal aid. There is a constitutional provision which supports criminal legal aid but there is no law which is enacted to cater for that. However the Tanzanian Constitution²³⁸ does not clearly show provision of legal aid in criminal proceedings as the Constitution of South Africa²³⁹ which has a provision specifically explaining legal id in criminal proceedings which include free legal aid to the accused. The present Legal Aid (Criminal Proceeding) Act, 1969 as elaborated in this work is very limited to cater for the legal aid. For example in Section 3 the Act exempt Primary Courts when speaking of eligibility for

²³⁸ United Republic Constitution of Tanzania section 13 (6) (a)

²³⁹ Constitution of the Republic Of South Africa, Section 35 (3) (g).

criminal legal aid and at the same time people with petty criminal offence appear in the Primary Court.

- This is contrary to Article 14 paragraph 3(d) of the International Covenant on Civil and Political Rights (ICCPR) which provides for right to fair hearing before any competent court of law. There are things to be looked at e.g. interest of justice and financial capacity to determine eligibility for legal aid, therefore exempting persons with criminal case in primary court is to deny them a right to fair hearing and right to legal representation. Provision of legal aid should be available to all offenders regardless of the courts that their matters are heard. Furthermore the Act is dormant in its implementation; Section 7 of the Act²⁴⁰ provides that “Chief Justice may with the consent of the minister make rules for the better carrying out of the purposes and provisions of the Act”. But unfortunately there has never been any rule made by Chief Justice and the Act does not give a Chief Justice a absolute power to make rules still he needs consent of the Minister.
- Absence of legal aid national body to oversee legal aid matters in the country unlike England and Wales and South Africa. England and Wales and South Africa have specific bodies which are given mandate to regulate, supervise and guide legal aid but there is no such a body in Tanzania. The absence of the body to oversee legal aid lead to poor coordination of the legal aid providers because to make legal aid effective it needs cooperation in process of providing legal aid. There have been some private initiatives to come up with a body that will coordinate legal aid for the sake of legal aid but it will be wise if the body will

²⁴⁰ Legal Aid (Criminal Proceedings) Act, 1969

be established by the government itself for sustainability rather than private initiatives as they depend much on donor funded financial support which are not sustainable. The South African body operates its activities by using funds from the parliament and England and Wales Legal Service commission use public funds to operate its legal aid activities.

- Models of legal aid delivery are very limited if compared to other two jurisdictions mentioned above. In Tanzania legal aid is provided by CSOs, Bar Association, University Clinics and Paralegal but when one looks at South African system on legal aid it encompasses various models of legal aid delivery. For example apart from having models that Tanzania has it went further to use intern students, entering into corporation with private law firms, strong relationship with law clinics at various Universities and judicare model though outdated. In Tanzania even at University law clinics students are not involved in provision of legal aid but members of staff are the ones who provide legal aid. For example this is a situation at the Legal Aid Committee of the law school of University of Dar es Salaam where students are not used in provision of legal aid. Furthermore there is no any mandatory requirement for the student to volunteer as is the case for the legal aid as in some Universities in South Africa like Witwatersrand and Kwazulu Natal Universities which has incorporated clinical law in their curriculum²⁴¹.
- The lack of law and body on legal aid affect the quality of legal aid which is provided because there is no codified quality markers as in England and Wales. The ongoing Legal Aid is provided without being evaluated or monitored or

²⁴¹ Paper by, David McQuoid-Mason, Clinical Legal Education and the Role of Law Clinics in South Africa p 4

without specific guidance which compromise the standard of legal aid. Legal aid must be provided by people with qualifications to make sure that justice is attained for the indigents. If legal aid is delivered by persons with no credible qualifications the meaning of legal representation is at stake. Since legal aid in criminal proceedings or even in civil cases aims to bring equality of the people in society then qualified lawyer should be the one to provide legal aid.

- Legal aid services to the poor do not reach the people in need because most of the legal aid providers are situated in urban areas. People living in remote areas cannot access their right to legal representation which is contrary to international standards because in any determination of criminal charges the accused have rights among others right to legal representation in full equality.²⁴² Most of legal aid provider's are lawyers there is no formal recognition of other stakeholders like paralegal to assist on the provision of legal aid. Due to that it makes it difficult for poor people in rural areas to access lawyers for legal aid as most of them works in towns. Not only that lawyers are found in town but also the number of lawyers is small compared to population that they are supposed to serve.
- The current legal aid scheme in Tanzania regardless of whether is criminal or civil depends to the greater extent on donor supports not on the governmental support. Generally legal aid in Tanzania is provided by Civil Society Organizations most of which are donor funded and thus likely to follow the interest of the donor. Therefore if the interest of the Donors is not on legal aid especially criminal legal aid then legal aid becomes dormant. And for criminal

²⁴² ICCPR Article 14(3)

legal aid becomes worse because most of donor are interested to fund programmes which reflect civil legal aid.

As stated in part of this work, government through Legal Sector Reform Programme supports legal aid providers but the amount of money given is not enough to cover both civil and criminal legal aid. Even the funds that come from LSRP are donors' funds, the worries here is the sustainability of the programme. Unlike South Africa and England and Wales where funds come directly from the State in Tanzania is donor funded programme.

- Another finding is the non use of paralegals in Tanzania as compared to South Africa where they use paralegals to provide legal aid. Paralegals are not legally recognised in Tanzania therefore they are also restricted to represent clients in courts but still some legal aid providers use paralegals for legal advice or right awareness dissemination.

4.3 Recommendations and Conclusion

Legal aid in criminal justice is not a favour but it is a right which is recognized at international and regional levels. Therefore due to its importance in criminal justice there are certain things which need to be improved or implemented by government in accordance to international standards. Below are recommendations to be looked at as they focus on redressing the current gaps in provision of effective legal aid to the indigents:

- Legal aid should cater for criminal cases to reverse the current trend of basing into provision of civil legal aid than criminal legal aid. Provision of criminal legal aid will benefit the criminal justice system for example if people are well represented for defence in criminal cases, it will reduce the number of unnecessary prisoner and pre-trial detention. The prisons facilities are

overcrowded (among other reasons) due to lack of criminal legal aid and most of sentenced prisoners cannot access legal aid to appeal for their cases so it is found that prison facilities are having unnecessary people in there.

- Enactment of a new law on legal aid will pave the way to harmonise current efforts of legal aid providers. The law should cover among other things provision criminal legal aid in criminal justice in lengthy and there must be follow up on implementation of the law. This recommendation will positively materialize may be 2013 as for now there is ongoing process of drafting a Bill on legal aid in Tanzania. But first and foremost the constitution must contain a provision on criminal legal aid as other countries Constitution for example South Africa²⁴³ and Kenya²⁴⁴. Constitution is a mother law therefore containing a provision on legal aid will strengthen the upcoming new law on legal aid.

Enactment of a new law on legal aid will lead to an establishment of a body overseeing legal aid matters in the country rather than not having one. Establishment of the legal aid body will enhance smooth organization and coordination of legal aid in Tanzania. Things like evaluation, monitoring of legal aid providers will result into providing legal aid with good quality and not a mere legal aid. Having a body to regulate legal aid matters will enhance to reach many in needy people who are in rural areas. Most of in needy people cannot get legal aid services because most of legal aid providers are located in big towns or cities. Therefore through a legal aid body many ways of legal aid delivery will be devised to supply the service large in needy population.

²⁴³ Constitution Of The Republic Of South Africa No. 108 Of 1996 Section 35(2) (C),

²⁴⁴ The Constitution of Kenya, 2010 Section 50 (2) (h)

- The use of students in provision of legal aid is recommended to cover the scarcity of lawyers when compared to the population of the country. There must be initiatives to reform the curriculum of the legal education to include mandatory “clinical law” participation of students to provide in legal aid clinic at their final year. Among other things it will help to reach many in needy people and enhance fair trial in criminal proceedings. It is a high time that the State should think of using law clinic in different universities to make sure poor people are served their justice of legal representation in court proceedings. This model is easy and cheap to use as there are no much expenses needed to run the programme if compared to private law firms or running NGOs. Presently Tanzania has many law graduates who graduate from many higher learning institutions who qualify to assist to provide criminal legal aid.
- There must be public awareness on the importance of legal aid in criminal proceedings. Because promotion of legal aid will be in vain if the end users who are indigents are not well equipped on the right to criminal legal aid
- Paralegals are important especially in Tanzania where lawyers are few compared to the number of clients that are to be served or even reached in rural areas. Paralegals are closer to the people in needy because most of them are located in rural areas. Using paralegals in provision of criminal legal aid system will help to reach indigents who cannot afford to travel to town or cities looking for legal aid providers. The government must compliment the efforts of the Non-government Organisations who have initiated the process of training paralegals using their own resources because without a law these paralegals will be equal to nothing. Therefore a law recognizing paralegals is needed as it will speed the

increase the number of paralegals as of present still there are few paralegals and are not well qualified to represent suspects in criminal proceedings. But there is foreseeable obstacle to paralegals from 2013 as primary courts will be presided by resident magistrates and it seems doubtful for paralegals to be allowed to appear before resident magistrates. So there is a long way to go for paralegals to be accepted in the system of criminal law.

- Education on importance of criminal legal to stakeholders like police force, prosecutors and magistrate must be provided. Most of stakeholders like police and prosecutors overlook the rights of the suspect or indicted person to have legal representations that is why the State end up having unnecessary big number of pre trial detainees and prisoners. But all of this will be possible if there is law or policy which support right of legal representation of the accused.

Therefore it is concluded that effective criminal legal aid is very important in criminal justice system so a poor person charged with crime would not face injustice. The criminal justice system in Tanzania should properly incorporate international standards and other soft laws as elaborated in previous part. Despite the poor economic situation of the country to implements what is required by international standards, the State should devise affordable mechanisms that can at least reach the “minimum core” requirement than not having criminal justice system that does not fully encompass legal aid at all. Above all, Tanzania has ratified ICCPR and African Charter on Human and Peoples Rights so it has obligation to implement them.

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