

Access to Legal Aid in Pretrial Processes: A Comparative Study of Tanzania, Malawi and South Africa

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Declaration

I, **Jonas Munguatosha Lyakundi**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree, Human Rights.

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Dedication

This work is dedicated to my lovely son, Jason Jonas Lyakundi who promoted to the eternal life in the middle of pursuing my LL.M studies. May his soul rest in peace.

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This work is the product of the combined efforts of different dedicated persons who deserve special appreciation and acknowledgment. These persons through their moral encouragement, academic guidance, expertise, advice and material support have helped me to accomplish this work.

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Abstract

This study addresses the accessibility of legal aid at the pretrial stages in Tanzania, Malawi and South Africa. It examines international, regional and national legal framework on access to legal aid in general and in particular on accessibility of legal aid at the earliest stages of criminal justice processes. This work has been accomplished by reviewing various literatures on the subject.

This study has established that legal aid regimes and schemes of Tanzania, Malawi and South Africa have not adequately provided a room for accused person to access legal aid in pretrial stages. The Constitution of Tanzania does not have express provision for right to legal aid; there is no comprehensive legal regime for provision of and accessibility of legal aid in Tanzania. As such, the accessibility of legal aid in pretrial stages in criminal justice is not guaranteed.

In Malawi, this study established that the constitution provided for legal aid in pretrial stages. It also has comprehensive legal aid laws but the accessibility of legal aid at the pretrial stages has become problematic because of legal aid model adopted by Malawi. The Constitution of South Africa, just like that of Malawi, has provision for legal aid at pretrial stages. It also has comprehensive laws and guide on legal aid matters. Access to legal aid during pretrial stages in criminal processes in South Africa is in away accessible in some provinces because of using mixed and flexible legal aid model.

Accessibility of legal aid in pretrial stages needs holistic approach in Tanzania, Malawi and South Africa. Legal aid models should take in to account the meaningful access to legal aid in pretrial stages in order to safeguard the right of suspects, arrested, detained and accused person.

List of Abbreviations

ACHPR	African Charter on Human and People`s Right
Cap	Chapter
CSO`s	Civil Society Organizations
ECHR	European Convention on Human Rights
GC	General Comment
HRC	Human Right Committee
ICCPR	International Covenants on Civil and Political Rights
NGO`s	Non-Governmental Organizations
No	Number
OAU	Organization of African Union
PASI	Paralegal Advisory Service Institute
RES	Resolution
TLS	Tanganyika Law Society
UDLAC	University of Dar es Salaam
UN	United Nations

List of Authorities

International, Regional Treaties and Conventions

African Charter on Human and People`s Rights, 1981
European Convention on Fundamental Freedoms and Human Rights, 1950
International Convention on Political and Social Rights, 1966
Universal Declaration of Human Rights, 1948

Declarations and Resolutions

Kyiv Declaration, 2007
Lilongwe Declaration on Access to Legal Aid in Africa, 2004
Principles and Guidelines to Fair and Legal Assistance in Africa, 2001
Resolution and Right to Recourse and Fair Trials
United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System, 2012

National Legislations

Tanzania

Legal Aid (in criminal Proceedings) Act, 1969 Cap 21 of Laws of Tanzania
The Constitution of United Republic of Tanzania, 1977
The Criminal Procedure Act, CAP 20 of Laws of Tanzania

Malawi

Criminal Procedure and Evidence Code of Malawi, Chapter 80:01
The Malawi Legal Aid Act, 2011
The Constitution of Republic of Malawi, 1994

South Africa

South Africa Legal aid Act, 1969 (as amended from time to time)
South Africa Criminal Code, 1977
The Constitution of Republic of South Africa, 1996

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CHAPTER ONE

AN OVERVIEW OF LEGAL AID IN PRETRIAL STAGES

1.0 Introduction

Access to justice for all is one among pillars of equality before the law for all and rule of law and it is effected in different ways. Legal representation is one of the means to access justice in court of law and an established tribunal. It is an established principle of law that everyone has the right to legal representation before the court of law or tribunal established by law. Representation may be effected by the person himself or herself or through the service of a lawyer. Self-representation is always limited by the fact that many people are ignorant of legal procedures and their rights. Due to these limitations, representations by a lawyer become necessary. Unfortunately representation by a lawyer involves cost and it has always been the case that not all accused persons can afford paying service for the lawyer.

Throughout the history of mankind economic inequities has persisted. These economic inequities have necessitated the societies to develop some mechanisms to try to mitigate the inequalities so that all members of the society may have access to all important social needs.¹ Lawyering, being a professional service, carries with it a “price tag” which poor people cannot afford to pay for it.² It has been submitted that in theory, everyone is equal before the law, but “in practice access to justice does not work exactly as the theory says

¹Kapinga, Wilbert B. L. (1985) "A Survey of Voluntary Legal Assistance for the Poor in Tanzania," *Third World Legal Studies*: Vol. 4, Article 12, pg.183. Available at: <http://scholar.valpo.edu/twls/vol4/iss1/12>

²*Ibid*

it should.”³ In order to make access to justice to all is enjoyed by all in criminal justice systems, legal aid and assistance mechanisms have been developed by states over the years to assist accused persons who cannot represent themselves or pay for the service of the lawyer to access justice.

Legal aid mechanisms differ from legal system to legal system and country to country but the underlying principle is that an accused persons have to be assisted to access justice regardless of economic or professional status. Legal aid then becomes one of the rights to fair trial that an accused person is entitled to.

Criminal justice systems in many jurisdictions start to run against any person when the person is arrested or investigations are launched against such a person or when a person is placed under custody and finally brought before the court. Before an accused person is brought to appear before the court he/she passes through pretrial stages, which include arrest, interrogations, search and remanding the accused under custody. Pretrial stages are very crucial stages in the entire criminal process and it is upon this stage where rest of the trial depends. During the pretrial stages accused person whether poor or rich are entitled to all fundamental human rights. Some of rights at these stages are very important and these rights will be referred to as pretrial rights in this study.

A functioning criminal justice system of any legal system presents different stages and each stage involves several guarantees and rights of accused persons. Tanzania, Malawi and South African criminal justice systems follows the common law legal system and it is guided by the same principles in all stages of the trial. In order to understand and to be

³Hillery Anderson, Justice Delayed in Malawi's Criminal Justice System Paralegals vs. Lawyers International Journal of Criminal Justice Sciences Vol 1 Issue 1 January 2006, pg 1

specific, it is important to divide the criminal justice process in its appropriate stages and identify rights which the suspected, arrested, interrogated, investigated, accused and sentenced persons are entitled to at each stage.

Pretrial stages, involves suspecting a person based on reasonable grounds that he or she has committed or is involved in commission of a crime. Pretrial stages also involves arrest of the suspected person by police or other authorized person. An arrest is carried out by restraining a person in manner that deprives them their liberty. In order to charge the suspected and arrested person, the police, and authorized authority have to gather evidence and testimonies in order to establish the alleged crime. This is done by interrogating and investigating the suspect or arrested person and also searching premises of the suspected and arrested person. Pretrial stages also involve detaining the suspected and arrested person in custody pending investigation or trial of the case.

The second stage of the trial is bringing the suspected, arrested or detained person to court of law or tribunal. It is at this stage that evidence and testimonies are adduced to prove the commission of the crime. It is also at this stage that the accused persons have the opportunity to defend himself or herself by disproving the charges or allegations leveled against him or her.

The third stage of the trial is sentencing, this entails convicting the accused person upon being found guilty of the crime he or she is charged of or releasing the accused person if he or she is found not guilty.

The fourth stage of the trial is appeal; at this stage, if the accused person is found guilty, he or she may choose to appeal to challenge decision of the trial court or the prosecutor

may also elect to appeal the decision to acquit the accused person. It has been submitted that in all these stages of the criminal process suspects, arrested detained and accused persons are entitled to several rights.⁴ This study deals only with the first stage of the criminal justice system and it evaluates whether the criminal justice system and the mechanism in place in Tanzania, Malawi and South Africa provides room for effective access to legal aid in pretrial stages.

In pretrial stages, the suspected, arrested and accused persons have different categories of rights which include the right not to be arrested “arbitrarily,” “right to know the reasons for the arrest”, rights not to be “tortured”, right to be treated in a humane manner and to be detained in good condition during “pretrial detention”, the right to a “legal counsel” and Legal Aid, “ the right to appear before court or tribunal to challenge the lawfulness of the arrest and detention”.⁵It has been acknowledged that during the process of arresting, searching, investigating and detention of the accused person in custody, it always results in violation of the fundamental human rights.⁶ Pretrial rights are basic foundation for realization of fair trial rights.⁷ Pretrial rights help suspects, accused persons, detained and appellants to prepare their defense, challenge the lawfulness of the detention and to appeal.⁸

This study analyses the legal aid regimes and schemes of Tanzania, Malawi and South Africa. It analyses how right to legal aid is accessed by poor suspected, detained and

⁴ United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa: Survey Report* (Vienna, 2011), at Pg 9

⁵Lawyers Committee for Human Rights, *What is Fair Trial? A Basic Guide to Legal Standards and Practice*, Lawyers Committee for Human Rights (2000), United State of America Pg 4-8

⁶United Nations (2011), *Handbook Supra* note 4 at Pg.10

⁷Amnesty International, *Fair Trial Manual Second Edition*, Amnesty International Publications, 1 Easton Street London WC1X 0DW United Kingdom, 2014 Pg. 46

⁸ *Ibid*

accused persons in pretrial stages in criminal justice systems in the aforementioned jurisdictions.

It has been agreed that in almost all criminal justice systems if a person is suspected of committing a crime, arrested for committing a crime, charged for a crime or detained pending investigation or trial, he or she has a right to legal aid and assistance if that person has no lawyer and cannot afford to pay a lawyer for his or her representation.⁹ In an attempt to make the right to legal aid realizable to a poor person, the legal profession felt it has a moral duty to provide free legal assistance to those who cannot afford to pay for the legal services to access justices through *Pro Bono* schemes.

On the other hand, the state felt compelled to make trial fair to all accused persons in criminal justice process along with the rights to legal representation to those who cannot afford to pay lawyers. Despite the state's role on prosecuting criminals, it is duty bound to make the proceeding to be fair to accused persons. In Africa, as elsewhere around the world, states have recognized and legislated on the provision of legal aid at the state's expense and accessibility of legal aid to poor.¹⁰

The right to legal aid to poor persons in criminal justice process manifest itself in criminal procedures. Criminal Procedures are drafted taking into account poor person who cannot afford to pay lawyers for their representation in criminal matters. Most of the provision are enacted to incorporate a right to legal aid or assistance and also to protect the rights of the arrested, interrogated, detained, prosecuted and sentenced person.¹¹

⁹ Amnesty International, *Supra* note 7

¹⁰ United Nations (2011), Handbook *Supra* note 4 at Pg.2

¹¹ Section 10 of Criminal Procedure Act, Cap 33 Tanzania, Parties III-V of Criminal Procedure and Evidence Act, 1968 of Malawi

On the same line, some states have enacted a comprehensive legislation on the provisions of legal aid in criminal and civil matters.¹² These legislations put in place mechanisms through which accused persons in criminal cases may access legal aid and assistance and also how plaintiffs and defendants in civil matters may defend their cases. States become responsible to pay for lawyers who represent poor persons charged with a criminal offense in a certain arranged mechanisms.

1.1 Background Information

Legal aid has been defined to mean free legal services provided in the forms of legal information and education, legal advice and assistance, alternative dispute resolution and legal representation in the court of law to individuals or groups of people who cannot afford to hire an advocate or a lawyer in order to access justice.¹³ Right to legal aid entails that all accused persons or part to civil litigation have a right to be availed with assistance of a lawyer or in pursuing his or her case before the court or tribunal regardless of his or her economic status.

The right to legal aid has been recognized as important right in all processes of the criminal justice system by the United Nations and also in regional human rights instruments.¹⁴ Despite the recognition of the right to legal aid in all stages of the criminal justice system, the access to and guarantee of these rights face a lot of obstacles in developing countries due various reasons, which would be stated later in this study.¹⁵ This

¹² Legal Aid Act, 2010 of Malawi, Legal aid Act, 1969 of South Africa

¹³ Danish Institute for Human Rights (2011), Access to Justice and Legal Aid in East Africa. A Comparison of legal Aid Scheme in the Region and the Level of Cooperation and Coordination between Various Actors, A Report by Danish Institute for Human Rights based on Cooperation with East Africa law Society.

¹⁴ Principle 3 (20) of United Nations Guideline on Principles and Guidelines on the Access to legal Aid in Criminal Justice Systems, A/RES/67/187 of 2013.

¹⁵ United Nations (2011) Handbook *Supra* note 4 at Pg.8

study argues that one of these obstacles is embodied in the legal aid regime and schemes adopted in respective countries.

Legal aid provide an avenue to minimize the violation of suspects and accused person`s rights and strengthens his or her defense in the criminal process. The right to legal aid thus forms an integral part of the right to a fair trial, legal representation, the rule of law, the presumption of innocence, equality of arms and equality before the law regardless of social-economic status of an individual in criminal justice systems. Taking into consideration the way the criminal justice system operates legal aid is meaningful if it is offered from the pretrial stages to appeal stage.

1.2 Scope and Jurisdictions of the Study

This study addresses access to legal aid in pretrial processes in criminal justice systems for the poor persons in Tanzania, Malawi and South Africa. Pretrial process in this study refers to arrest, investigation, interrogation, searching and remanding suspects or accused person in custody.

This study focuses on poor persons because basically legal aid regime and schemes are aimed at assisting poor persons due to the fact that they cannot represent themselves because of lack of knowledge of law and they cannot afford to hire a lawyer to represent them in criminal cases. It has been submitted that most poor persons do not have legal education and that they do not have the necessary information to defend themselves.¹⁶

This study draws lessons and practices from Malawi and South Africa from which Tanzania can learn and improve its legal aid regime and schemes in order to comply with

¹⁶ Fredereck, *Supra* note 3 at Pg. 6

international standards on access to legal aid in all processes of criminal justice system. In so doing the study suggests practical solutions for Tanzania.

1.3 Rationale for Legal Aid in Pretrial Stages in Criminal Case

Right to counsel is a right entitled to everyone in any criminal proceeding or civil litigation in almost all legal systems. It has been argued that there are three basic reasons for providing legal aid or legal service to a poor person. These are for “proper functioning and integrity of the machinery of justice”, that legal aid and service is needed for “humanitarian and charitable reason” and that “all citizens must have equal access to information about the legal system and to expert advice and service”.¹⁷ In common law system, legal aid has another justification that is connected to an adversarial model. In the adversarial model parties to the proceeding are expected to investigate and prosecute or defend their cases, the court act as an umpire in the whole process.

It has been observed that in countries that follow common law and apply adversarial system rules of evidence and procedure protects the rights of the suspects and accused persons.¹⁸ While this proposition holds water, it is not true to poor and indigent person due to the fact that they cannot effectively defend themselves nor employ a lawyer to defend them in criminal charges. In this situation legal aid is required to bring about equality. In order for the legal aid to keep the required balance between prosecuting authority and accused persons legal aid has to be offered in the early stage of the criminal justice process.

¹⁷Reyntjens in Chris Maina Peter, Human Rights in Tanzania, Selected Cases and Materials, Koln: Koppe (1997) pg 337

¹⁸ M.R Damaska, The Faces of Justice and State Authority, A Comparative Approach to the Legal Process, New Haven and London: Yale University Press, 1986, pg 5

It has been argued that “decision made” and ‘action taken” in the pretrial stages to a great extent determine the ability of the accused person to effectively defend himself or through a counsel. At this stage “suspects, accused person are at greatest risk of torture or other forms of ill-treatment, ranging from neglect and demands for bribes, to coerced confessions and unlawful detention.”¹⁹ The rationale of legal aid in criminal case in general and in pretrial stages in particular is to ensure equality of arms in criminal proceedings and to make sure that the accused person is treated humane and receives a fair trial.

1.4 Statement of Problem

Right to legal aid in criminal cases is founded on the right to legal counsel and equality of arms and it forms part of the right to a fair trial. Right to a fair trial in the pretrial stage implies the following elements, prohibition of arbitrary arrest and detention, right to know the reasons for arrest, right to legal representation and right to access to legal aid for people who cannot defend themselves and who cannot hire an advocate, right to promptly be brought before a judge and the prohibition of torture in pretrial detention.²⁰ It is agreed that all elements of fair trial have to be observed in the entire criminal process and not only in court. However, in practice this is far from that reality.

Violation of right to legal aid and fair trial rights in pretrial stages has far reaching consequences to suspects or accused persons, his or her family and community as whole. Among the direct consequences of violating right to legal aid and fair trial right in pretrial stage are unnecessarily detaining the suspects or accused persons and this leads to

¹⁹ Moritz Birk and others, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (New York: Open Society Foundations, 2011)

²⁰ Lawyers Committee for Human Rights, (2000) *supra*, note at Pg 4-10

congestion in detainee's facilities, failure to prepare effective defenses on the part of the accused person during the trial, ill treatment of the suspect and accused person, wrong convictions. Some of indirect consequences of violation of the right to legal aid in pretrial stages and fair trial rights are loss of income for the suspect and accused person, dropping out of school, if the suspect or accused person is a juvenile or provides and support family member on education matters. In general violation of right to legal aid in pretrial stage leads to poverty and loss of trust in criminal justice system.

It has been estimated that over three million people every day are behind the bar waiting for trial and they may spend months and even years without being brought before the court and they languish in worse condition in prison.²¹ In Tanzania, the numbers of pretrial detainees in 2012 were 17,554 which is 52.7 percent of the prison population. In Malawi, the number of pretrial detainees in the same year were 1,951, which is 15.9 percent of the prison population and in South Africa in the same year they were 43,954 which is 28 percent of the prison population.²²

The figures above explain the number of pretrial detainees in Tanzania, Malawi and South Africa. In Tanzania figures of pretrial detainees is very high due to the lack of effective legal aid mechanism that operates in pretrial stages. In Malawi the figures seem to be low because of recently introduced pilot programs, which involve paralegals providing legal aid pretrial stages in police stations and pretrial detentions. The Open

²¹ Open Society Justice Initiative, Justice Fact Sheet, Why Do We Need Global Campaign For Pretrial Justice, Justice Initiatives Pretrial Detention 2008 <http://www.justiceinitiative.org/db/resources2?resid=104079> Statistics; International Centre for Prison Studies (iCPS).

²² <http://www.prisonstudies.org/> accessed on 12 November, 2013

Society Justice Initiative sponsors this pilot program.²³ South Africa's figures are relatively low because of its legal aid models and schemes.

Tanzania, just like other countries, has a legal aid regime and different legal aid schemes that offer legal aid to poor persons. The Constitution of United Republic of Tanzania, 1977 does not have specific provision for the right to legal aid. There is no comprehensive legal aid in place of Tanzania, therefore the legal aid regime is contained under the Criminal Procedure Code and Legal Aid (in Criminal Proceedings) Act, 1969. The legal aid system of Tanzania is therefore comprised of a scattered state legal aid regime, Non-government Organizations Schemes (NGO's) and legal profession schemes.

The state legal aid regime is contained in the Legal Aid (Criminal Proceedings) Act, 1969, which empowers the judges of the High Court and magistrates of the Resident Magistrate Court and District Court to certify that an accused is a poor person and cannot afford to pay a lawyer and he or she needs representation in the interest of justice. After certification the judge or magistrate will proceed to make an order that an accused person before him or her to be availed with legal aid in the interest of justice.²⁴ The court appoints a lawyer to represent the poor person at the expense of the state. Under this regime, legal aid is provided during the trial stage and there is no chance for the court to make intervention during the pretrial stages.

Non-governmental Organizations scheme offers legal aid in thematic areas and they do not generally provide legal aid in criminal cases unless it is a high profile case or public

²³ Open Society Initiative for South Africa, Pretrial Detention in Malawi: Understanding Case Flow Management and Condition of Incarceration, 2011 pg 32

²⁴ Section 3 of Tanzania Legal Aid (Criminal Proceedings) Act, Cap 21.

interest cases and they take up the case in the middle of criminal process especially during the trial or appeal stage.²⁵

Tanganyika Law Society (TLS), which represents the legal profession in Tanzania, just like state scheme and non-governmental organizations, offer legal aid during the trial stage in the criminal process. TLS provides legal aid when approached by the person who needs legal aid or when the court refers the case them. In this way the legal aid provided by TLS does not cover pretrial stages.

The existing legal aid regime and schemes in Tanzania do not offer legal aid in pretrial stages, however right to legal representation and legal aid in criminal cases are contained in Criminal Procedure Code of Tanzania.²⁶

Unlike Tanzania, Malawi has a Constitutional provision which touches on legal aid in general and in particular pretrial stages.²⁷ Malawi also has comprehensive legislation on legal aid. It is the Legal Aid Act, 2010. This Act establishes the Legal Aid Bureau in the Ministry of Justice, which provides and regulates the provision of legal aid in Malawi.²⁸ Its sole function is to “to make provisions for the granting of legal aid to poor persons and matters connected therewith and incidental thereto.”²⁹

²⁵ Shivji, I.G Voluntary Legal aid in Tanzania: retrospect and prospect, Tanzania Notes and Records (1984) Pg 90-91.

²⁶ Section 310 of Criminal Procedure Act of Tanzania,

²⁷ Article 41 of Constitution of Malawi, 1994

²⁸ Section 6 of the Legal Aid Act of Malawi

²⁹ Bruno Kalembe “Access to Justice: The State Of Legal Aid Services In Malawi” *A Human Rights and Legal Aid* in Hatla Thele and Paul Dalton, Denmark (2010) Pg 102

The legal aid regime of Malawi is contained in Malawi Constitution, 1985, Legal Aid Act, 2010, Malawi Criminal and Evidence Act, 1968. All these authorities contain express provision for the right to legal aid, which also covers pretrial stages.³⁰

Malawi also has legal aid schemes offered by Non-governmental Organizations.³¹ These organizations provide legal aid on thematic areas such a women`s rights, juvenile rights and other categories. Both legal aid regime and schemes in Malawi provide for the access to legal aid during pretrial stages, however, it has been argued that access to legal aid in pretrial stages is unavailable despite the express provision contained in the constitution and other laws.³²It can be argued that having constitutional and legislative provisions on access to legal aid in pretrial stages, is not enough to guarantee access to pretrial rights by the accused person in practice. The situation in Malawi poses a question of legal aid model adopted by a particular country.

South Africa is the most developed African country in the area of access to legal aid. Right to legal aid is guaranteed by the South African Constitution of 1996 to every person who is suspected, arrested, detained and accused persons.³³ Just like Malawi, South Africa has comprehensive legislation on legal aid, which is South Africa Legal Aid Act, 1996. This Act establishes Legal Aid Board, which provides mechanisms for access to legal aid in all stages of the criminal process.³⁴

³⁰Article 41 of the Malawi Constitution, Legal Aid Act, Part III, IV, and V of Criminal and Evidence Act of Malawi, 1968

³¹ A4ID Legal Aid Guide Advocates for International Development, Pg 66 available at www.a4id.org

³²Justice Andrew Nyirenda, An Overview of Pretrial Justice in Malawi, www.osisa.org/sites/default/files/sup_files/Speech%20by%20Justice.

³³ Article 35 of the Constitution of South Africa, 1996

³⁴ Section 2 of the Legal Aid Act, 1969 of South Africa

South Africa provides legal aid in criminal, civil and criminal cases. Legal Aid South Africa operates through Justice Centres established in every province in South Africa.³⁵ Some of Justice Centres have a mechanism that allows poor people who need legal aid in pretrial stages to access their services, but those persons have to be eligible for legal aid and have to apply for legal aid.³⁶ The process of applying for legal aid and assessing eligibility of the person hinders the access to legal aid in pretrial stages in South Africa.

Legal Aid South Africa collaborates with Non-governmental Organizations (NGO`s) and Legal Profession to provide legal aid.³⁷ NGO`s and legal profession in South Africa offers legal aid mainly during the trial stage.³⁸

While the right to legal aid has to be accorded in all processes of the criminal justice system, it is apparent that the law and practices do not provide room for provision or access to legal aid during arrest, interrogation and detention in Tanzania.³⁹ This situation discloses a gap in the legal aid system of Tanzania that needs immediate redress. In Malawi the existing legal aid regime provides for the right to legal aid in pretrial processes, but the right is not accessible in practice.⁴⁰

The laws, regulations and the legal aid model adopted by Malawi are not clear enough and effective to make the right to legal aid in pretrial stages accessible by poor persons. Contrary to Tanzania and Malawi, South Africa has a legal aid regime and scheme which accords legal aid in pretrial processes for poor persons and the rights are accessible by poor persons because of legal aid schemes and models which are in place. This study

³⁵ United Nations Office on Drugs and Crime, *supra* note 4

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ United Nations Office on Drug and Crime, at pg 11

³⁹ Section 3 of Legal Aid (Criminal in Criminal Proceeding) Act, 1969 Cap 21 of Laws of Tanzania

⁴⁰ *Ibid* Justice Andrea Nyirenda, *supra* note 32

addresses the gap in the legal aid regimes, schemes and models in Tanzania, Malawi and South Africa.

Tanzania, Malawi and South Africa, just like other developing and developed countries, poor persons are mostly accused of committing crimes.⁴¹ Most of these people are illiterate of their rights, law, court procedures, nature of allegations against them, defenses available to them and they cannot afford to hire lawyers to represent them. The existing legal aid regime and schemes in Tanzania do not avail access of legal aid to poor persons in pretrial stages, whereas in Malawi the legal aid regime provides for the right to legal aid in criminal stages yet access to legal aid in pretrial stages is inaccessible in practice. Legal regime and schemes in South Africa have demonstrated the possibilities to access legal aid in all stages of the criminal process.⁴²

This study gives a description of the legal aid system in Tanzania, Malawi and South Africa and addresses the gap of accessibility of legal aid in the pretrial stage in the criminal justice system in a comparative manner. The study also assesses the practice in Malawi and South Africa and suggests solutions for Tanzania in the light of the international and regional instruments on human rights and standards on access to legal aid in criminal justice systems.

1.5 Hypothesis

This study is driven by the hypothesis that legal aid regime and schemes in Tanzania is not effective in providing access to legal aid in pretrial processes for poor persons,

⁴¹ The Centre for the Study of Violence and Reconciliation, Why South Africa is so violent and what we should be doing about it, on <http://www.csvr.org.za/docs/study/CSVStatement091110.pdf>, accessed on 13th December, 2013 at 11:30 a.m.

⁴² Hennie van As, Legal Aid in South Africa: Making Justice Reality, *Journal of African Law*, Vol. 49, No. 1 (2005), pp. 54-72: Cambridge University Press, <http://www.jstor.org/stable/27607933> Accessed: 18/09/2013 17:34

whereas legal aid regime in Malawi provides for the right to legal aid in pretrial stages, but the legal aid model and mechanism to access legal aid in the pretrial process is unclear to poor persons and legal aid providers. South Africa has an effective and developed legal aid regime and schemes which afford access to legal aid in pretrial processes in the criminal justice system due to its *modus operandi*.

1.6 Objective

This study is aimed at contributing and expanding accesses to legal aid in pretrial stages in particular and in all stages of criminal justice in general. Legal aid is generally acknowledged to exist in almost all legal systems but the question is legal aid model, scope and accessibility of legal aid in the pretrial stages in a criminal proceedings has been ignored. This study provides an opportunity to understand legal aid regime and schemes in Tanzania, Malawi and South Africa.

1.7 Justification

In recent decades the need to access legal aid in all stages of criminal process of criminal justice systems has become subject of discussion at international, regional and national fora. The underlying reasons for these debates include the congestion in pretrial facilities, insufficient pretrial detainee facilities, unresponsive criminal justice systems in many countries, caseloads in courts of law, poverty caused by criminal processes, violation of human rights during the pretrial processes and failure of criminal justice system to reduce and combat contemporary crimes.

At the international level, the United Nations General Assembly has adopted the Principles and Guideline on Access to Legal Aid in Criminal Justice System and call for its members to reform their criminal justice system to avail access to legal aid in all stages

of criminal proceeding.⁴³ The principles and guideline set minimal standards which have to be met by member states.

At the regional level, particularly in Africa, there are number of declarations and soft law instruments which call for the reform of the criminal justice system to accord legal aid in all process of criminal proceedings. These declarations include Kyiv Declaration, and Lilongwe Declaration.⁴⁴ At the national level, some states have limited and insufficient legal framework which can support provision and access to legal aid in pretrial stages and they are currently working on it. Some states have effective legal aid regime which provides for the access to legal aid in pretrial cases.

This study therefore, is justified by the need to have an effective legal aid right that can be accessed in pretrial stages and subsequent stages in criminal justice systems for poor persons.

1.8 Methodology

In accomplishing this study, secondary technique on data collection was the main technique used to collect data and information. In this technique, international and regional instruments related to the right to access legal aid in criminal justice systems were highly consulted. National laws on the subject matter were also reviewed. Different literatures from different jurisdictions ranging from Books, Journal Articles, Project reports and online materials addressing the same matter were reviewed.

⁴³ *Ibid* note, 4

⁴⁴ Kyiv Declaration, Lilongwe Declaration, 2007

1.9 Literature Review

In recent decades a lot have been written about access to justice to all which point out the importance of legal aid in all criminal and civil cases. Most of literatures have addressed the issue of legal aid in general terms and when it tends to discuss it generally address only legal aid during the trial stage leaving the pretrial stage unaddressed at all or inadequately addressed. The following literatures are some literatures which have attempted to address the subject of legal aid.

Peter, underscores that right to legal representation of an accused is universally recognized and it is not limited to those who can afford to hire lawyers but also to the poor.⁴⁵ The author traces the development of the right to legal aid to poor from the time of Magna Carta period (1215) and in 1495 of statute of King Henry VII, which generally provide for the right to legal aid to poor persons during the trial.⁴⁶ Despite these notable endeavors, the author at this stage did not make any finding about the right to legal aid before the person is brought before the court or before the trial commences. The author elaborates how legal aid right found its way to the Tanzanian legal system and he did mention that it was introduced during the colonial era by the British through the Poor Prisoners Defense Ordinance, 1945 and then repealed and replaced by Legal Aid (Criminal Proceeding) Act, 1969.⁴⁷ The author failed to identify the limitation of these two laws that they limited the right to legal aid during the trial stage leaving pretrial legal aid right unaddressed. This study addresses this omission from the statute.

⁴⁵ Chris Maina Peter, *Human Rights in Tanzania, Selected Cases and Materials*, Koln: Koppe, (1997) at Pg 337

⁴⁶ *ibid*

⁴⁷ *Ibid*, pg 339

Apart from addressing the legal aid regime Peter also gave an account of the legal aid scheme available and working in Tanzania.⁴⁸ He pointed out the inability of the state to provide legal aid or service to poor in criminal cases and that the whole burden of legal aid to the poor is carried by Non-Government Organizations.⁴⁹ He gave an account on *modus operandi* of the organizations involved in the provision of legal aid for poor person and all of the organization provides legal aid during the trial stage and after the trial.⁵⁰ No findings were made by the author as to why legal aid providers do not provide legal aid in pretrial stages by the organizations.

It may be argued that these organizations by providing legal education to the general public are also engaged in the provision of legal aid in Tanzania. This argument holds water, but the question is how that general and theoretical knowledge will help an arrested and accused poor person in the hands of police officer or in police detention? This study addresses and brings on board the importance of the provision of legal aid in pretrial stage and how can it strengthen the accused's rights at the hearing stages.

Mchome, writing on rights suspects and accused person in Tanzania, explains the power of law enforcement in relation to the rights of suspects and accused person as provided by the law.⁵¹ The author's work is very important to this study as it uncovers the rights of criminal suspects and accused persons. The author explains in detail the role of investigative police officer and underpins that despite the statutory provisions which mandate the police officer to take into consideration; most of police officers and investigators do not comply with the law partly because the suspects and accused persons

⁴⁸ *Ibid*, pg 140-148

⁴⁹ *Ibid*,pg 342

⁵⁰ *Ibid*

⁵¹ Sifuni Mchome, Due Process of the Law: the Rights of Suspects and Accused Person, Pp155-168

are unaware of their right and the duties of police during investigation.⁵² The author made it clear that the police investigation is regulated by law and the judiciary and at this juncture he pointed out Police Force Ordinance 1953⁵³, Criminal Procedure Act, 1985⁵⁴ and the Evidence Act, 1967.⁵⁵

Mchome insists that those police officers are mandated to comply with the statutory provision even if the accused person is illiterate and unaware of his rights as provided in the law.⁵⁶ He makes an insufficient effort to substantiate the accused's rights to ask for a lawyer or a friend or relative before or during the interrogation and provided by section 53 of the Criminal Procedure Act.⁵⁷

Mchome assumes that every arrested and detained person or their relatives will be able to afford the lawyer's fees or the relatives are in the position of helping the accused person about his or her right as he doesn't provide a situation for an accused person who is poor. This raises the question as who is to be contacted by a poor person for legal help. The author, however, explained that the statements obtained in violation section 53 of the Criminal Procedure Act may be declared inadmissible by the court.⁵⁸ It is true that the court will declare evidence and statements obtained in violation of the law inadmissible, the question is who will raise that question before the court since a person is ignorant of his or her right from the beginning? Suffice to say is that it will depend on whether during

⁵² *Ibid*,157

⁵³ Chapter 322 of the Revised Laws of Tanzania Mainland, particularly section 5(1) which generally provide for the duties of police officer in relation to preservation of peace, maintenance of law and order, prevention and detection of crime, apprehension and guarding of the offender and the protection of property.

⁵⁴ No 9 of 1985

⁵⁵ No. 6 of 1967

⁵⁶ Mchome, *supra*

⁵⁷ *Ibid* 159

⁵⁸ *Ibid*.

the trial an accused person is represented and that a lawyer will probably discover the foul otherwise it is very difficult for the court to raise that question *suo motto*.

It is important for the suspects and accused persons to know their rights before the interrogation as it informs him on what he can and what he cannot do or say at that time and its implications. Interrogation of an accused person without informing them their rights and the consequences of their answers is to blackmail the accused persons.

Mubangili, writing on protection of human rights in South Africa, gave an account of what is involved in the pretrial stages.⁵⁹ In explaining the rights of an accused person, the author explains what accused person passes through; he argued that the accused person is firstly “arrested” “detained” and then “accused”.⁶⁰ This explanation is very important as it shows clearly what transpires in pretrial stages and importance of legal aid in these stages. From that explanation, one can assess what kind of rights an accused person is entitled during the pretrial stages while making it easier to devise a mechanism for an accused person to access these rights at that stage. Though the author did not mention investigation and interrogations, which always go together with arrest and detention of the accused person it is important to point out that accused person need legal aid when is questioned by authorities and while in custody.

This study argues that most of the accused persons are illegally arrested, wrongly interrogated, investigated and they don’t understand the implication of what they reply and its consequences during the trial. As a result a person falling in the hands of arresting,

⁵⁹ John C Mubangili, *The Protection of Human Rights in South Africa, A Legal and Practical Guide*, Juta and Company Ltd, Lansdowne, 2005, pg 94.

⁶⁰ *Ibid*

investigating, prosecuting and custodian officers suffers serious violation of their fundamental human rights because of lack of legal aid at the pretrial stages.

Mubangili elaborates different rights of arrested persons such as the right to remain silent, presumption of innocence and others and argues that these rights accrue when a person is arrested.⁶¹ That account will build on this study, but the question which still remains unanswered is how this arrested person gets to know that he has a right to remain silent, presumed innocent, right to access a lawyer even if he cannot afford to pay for the expenses? The Author discusses how rights in pretrial stages have been upheld by courts and he pointed out the decision in the case of *S v. Andrew*⁶² where the court held that the right to silence for an accused person begins the moment he is arrested and it was held that the right to silence was violated when the accused person was made to make a statement before his lawyer arrives.⁶³

Although the author discusses rights of an accused person in pretrial stages as laid down in the Constitution of South Africa and the way courts give effect to those rights, the author does not explain how these rights are accessible by poor persons in practice. This study makes a case on how these rights in pretrial can be accessed by poor person who are ignorant of their rights at pretrial stage and those who cannot afford to contact a lawyer or pay for a lawyer.

⁶¹ *Ibid*, 94-101

⁶² 1996(2) SACR396 (E)

⁶³ *Supra* note 18, pg 94

Van As, addresses methods used to provide legal aid in South Africa and he places the duty to provide legal aid to the state and the legal profession.⁶⁴ He argued that the legal profession has the duty to provide legal aid to those who cannot afford to pay for the service because state have given them the monopoly over the provision of legal service.⁶⁵ The author does not substantiate why the state is duty bound to provide legal aid to the poor persons. It is submitted that the state's duty to provide legal aid, accrues from the very nature of state functions.

Hennie traces the origin of organized legal aid in South Africa and he submitted that it started in 1935 under the auspices of the South African Institute of Race Relation, Ministry of Justice and incorporated Law Society.⁶⁶ The author pointed that from the inception of legal aid in South Africa to 1960's the government opposed to the establishment of the legal aid system on the ground that the administration of criminal justice was sufficient and that establishing legal aid system will "undermine the administration of justice".⁶⁷ The government opposition can be understood from South African's history of apartheid. The author noted that legal aid was also used as a weapon to fight against apartheid regime of that time.⁶⁸ His work is very important in this study as it informs on how successful the legal aid regime has evolved in South Africa.

Van As accounts on how South Africa enacted its Legal Aid Act, 1969 (Act no. 22 of 1969) which, according to the author it was the effort of the government to put down

⁶⁴Hennie van As, Legal Aid in South Africa: Making Justice Reality, Journal of African Law, Vol. 49, No. 1 (2005), pp. 54-72: Cambridge University Press, <http://www.jstor.org/stable/27607933> Accessed: 18/09/2013 17:34

⁶⁵ *Ibid* pg 54

⁶⁶ *Ibid*, pg 55

⁶⁷ *Ibid*

⁶⁸ *Ibid*

initiatives by non-governmental organizations to provide legal aid to poor people.⁶⁹ It must be noted that the South African government of that time was in support of apartheid regime and that most of the organizations were fighting apartheid regime.

Van As argued that the Legal Aid Board established by Legal Aid Act, 1969 provided legal aid in civil cases, and not in criminal matters in order to suppress the human rights movements but the situation was reversed through the interim Constitution of 1993 and the Constitution of South Africa of 1996 which provides rights “to fair trial, equality before the law, rights to detained persons to choose and consult legal practitioner, as well as right to have legal practitioner assigned by the state and at state expenses in the interest of justice”.⁷⁰ From this historical backdrop, it is apparent that legal aid in South Africa was recognized and could accrue only at the trial stage and this fact escaped the attention of the author.

In describing the current legal aid system Hennie argued that the South African government strive to implement constitutional provision through legal Aid Board (now Legal Aid South Africa) established by the Legal Aid Act, 1969. It also prioritized areas for provision of legal to poor people at state's expenses.⁷¹ He pointed out that under the current Constitution an accused person in criminal cases is granted legal aid, however, he did not explain at what stage this legal aid is granted and how is it accessed.⁷² This study argues that it is important to clarify in explicit term on what stage legal aid is granted and how is it accessed in order for the right to be meaningful to an accused person and in the criminal justice system. This study clarify at what stage legal aid is available to accused

⁶⁹ *Ibid*

⁷⁰ *Ibid*, pg 56

⁷¹ *ibid*

⁷² *Ibid*

person in South Africa under the current Constitution and present models in which legal aid is availed to accused person at pretrial stage in South Africa.

Kalembe, writing on access to justice in Malawi, discusses the state of legal aid in Malawi and argues that in 1994, Malawi “adopted a progressive Constitution, which reinforces the right to access to justice and remedies during pretrial, trial, and post-trial stages in criminal justice system”.⁷³ This work is very important to this study as it highlights the legal aid regime of Malawi and how it is structured.

Kalembe recounts the evolutionary trend of codification of the right to legal aid in Malawi and demonstrated clearly that right to legal aid is the social service and it is “the service to poor persons” which the state has to strive to provide and that the state has shown willingness to provide legal aid services to poor person in criminal cases through established legal bodies and mechanism.⁷⁴ He makes a finding that most of people in Malawi are poor as they live below one US Dollar a day as indicated by United Nation poverty index.⁷⁵

Bruno argued that half of the population of Malawi is eligible for legal aid, however the Ministry of Justice has the uncontrolled power to refuse granting legal aid.⁷⁶ The author does not explain in details how poor person can access legal aid in pretrial stages in criminal cases offered by Legal Aid Bureau. The author discusses on how the Legal Aid Bureau works to make the right to legal aid accessible to non-criminal cases, but neglect

⁷³Bruno Kalembe (2010) “Access to Justice: The State of Legal Aid Services In Malawi” *A Human Rights and Legal Aid* in Hatla Thele and Paul Dalton, Denmark, Pg 99

⁷⁴ *Ibid*, pg 99-

⁷⁵ *Ibid*, pg100

⁷⁶ *Ibid*

to take into account how the same right can be accessed by arrested or detained person in criminal cases in pretrial stages.⁷⁷

Bruno discusses challenges facing Malawi in the provision of legal aid and the author argues that the main challenges are “poverty”, “illiterate”, “few lawyers”, “inadequate resources and lack of national coverage”.⁷⁸ The challenges pointed out are general as they generalize all aspects of access to legal aid in different stages. It is submitted that the access to legal aid in pretrial stages have a little to do with challenges pointed out and it can be easily accessible by poor person by making the law enforcers who are police officers and detainee officers provide all useful information about the rights of the arrested person to the poor person. This does not need lawyers and resources as argued, it only needs to equip law enforcers at the pretrial stages to make sure right to legal aid in pretrial stages accessible to poor people whenever they are suspected, arrested or detained.

This study makes a case for law enforcers involved in pretrial stages to make right to legal aid in pretrial stage accessible to poor persons. Rights of suspected, arrested and detained persons are violated by the officers responsible for arresting, investigating and detaining these poor persons. The proper focus has to be directed to the institution responsible for handling suspects and accused persons in pretrial stages because the damages made at these stages may become difficult to remedy in the subsequent stages in the interest of justice for the accused and the victims of the crime.

⁷⁷ *ibid*

⁷⁸ *Ibid*, pg100-101

Zemans addresses the subject of legal aid in general and gives an illustrative definition of who is entitled to legal aid.⁷⁹ The author argues that legal aid aimed to help “underprivileged person” to access justice and he defines “underprivileged person” to mean “those people who experiences physical, psychological and financial difficulties in an attempt to assert a right, make a claim or present a defense”.⁸⁰ This definition is very useful as it covers each aspect of the right to legal aid and it provides a wide understanding of the contents of legal aid in all stages. It is true that legal aid does not cover only defenses in criminal or civil case, but it also includes “asserting rights and bringing a claim” about the existence and violation of right.⁸¹ This fact is always overlooked by many authors on the subject.

Zemans explains the physical barrier to access legal aid to poor person and he claims that most of lawyers’ offices are located in towns and that those who live in upcountry find it difficult to travel to meet lawyers to represent them.⁸² While it's true that physical barrier hinder the access to legal aid and access to justice in general, but the author overlooked the fact that a poor person always get arrested and kept in detention even in cities where lawyers and organizations providing for legal aid are available. On “psychological barrier” he argues that “this is the sense of fear, hopelessness, and lack of information, ignorance and unfamiliarity”.⁸³ These barriers are very relevant when it comes to access to legal aid in pretrial stages. Most of poor persons suffer from this barrier and the

⁷⁹ Frederick H. Zemans, *Perspectives on Legal Aid, An International Survey*, Greenwood Press, Inc., Westport, Connecticut. (1979), Pg 6

⁸⁰ *Ibid* pg 5

⁸¹ *Ibid*

⁸² *Ibid*

⁸³ *Ibid*

prosecution authority take advantage over this to accomplish their task as correctly argued by Bruno.⁸⁴

On financial barriers, Fredrick argued that a person is poor when he cannot afford to get an income which will cater for his necessities of life and that the person is incapable of paying for legal services of any kind.⁸⁵ The author pointed out the financial requirement like court fees and lawyers' fees to be very much expensive and that there is no country that has yet socialized the legal sector to remove this obstacle.⁸⁶ While it is true that poor persons cannot afford paying lawyers' fees and court fees, but that is more relevant during the trial and post-trial and less relevant though important during the pretrial stages. The claim about court fees is irrelevant and unreal in criminal cases as the prosecuting authorities are not required to pay any court fees in opening a criminal charges against the accused, in addition the accused person who is certified as poor are exempted by court to pay some fees even in civil cases.⁸⁷ The crucial and important point during pretrial stages for a poor person is how to get to know his rights and assert them. This point remains unaddressed by the author; this study addresses this point in more detailed and understandable manner.

1.10 Overview of Chapters

This work is divided into Four Chapters. Chapter One covers an introductory part of this study and its addresses background information, rationale for legal aid in criminal cases, scope and justification of this study. This chapter states the legal problem which is addressed in this study, it sets up the objective of this study and it states the methodology

⁸⁴ Bruno Kalemba *Supra*

⁸⁵ Fredrick Hemans, *Supra* note 71

⁸⁶ *Ibid*

⁸⁷ Chris Maina Peter, *Supra* note 45, Pg 343

used to carry out the study in Tanzania, Malawi and South Africa. This chapter also presents a literature review on the subject matter of the study.

Chapter Two presents legal aid frameworks at international, regional and national level. In this chapter legal aid standard set by the United Nations is presented and it also shows how those standards have been interpreted by respective bodies. African instruments on legal aid standards as set by different human rights instruments are also presented in this Chapter. National legal aid frameworks of Tanzania, Malawi and South Africa are presented in this Chapter.

Chapter three discusses the access of legal aid in pretrial stages in criminal justice systems of Tanzania, Malawi, and South Africa. This chapter explains different legal aid models, regimes and schemes and how they are used in the aforementioned jurisdiction. This chapter also provides the findings in the analyzed regimes and schemes and identified whether these regimes and schemes afford access to legal aid in the pretrial process in the criminal justice system in those jurisdictions.

Chapter Four provides for the conclusion and recommendation based on the findings of the assessment and comparison on how to make legal aid more accessible during pretrial process.

CHAPTER TWO

Legal Frameworks on Access to Legal Aid in Pretrial Stages in Criminal Justice Systems

2.0 Introduction

This Chapter addresses the underlying legal frameworks on access to legal aid during in criminal justice systems from the international, regional to national jurisdictions under considerations. From that overview of access to legal aid at international and regional level this chapter narrows down the subject and addresses the access to legal aid in pretrial stages by persons who cannot afford to pay for the service of a lawyer or advocate in national legal frameworks.

As observed in chapter one, in some jurisdiction under consideration the Constitutions have included right to legal aid as one of the guarantees and courts have taken positive approach in recognizing right to legal aid and access to legal aid in all stages of the criminal justice process for all people suspected, detained or accused for committing crimes, this chapter look at some human right judicial bodies' decisions on the subject matter at international and regional level.

2.1 International and Regional Frameworks on Access to Legal Aid

In this context international framework will refer to those binding and non-binding instruments adopted by United Nations, which address access to justice, human rights and legal aid generally but specifically on access to legal aid in pretrial stages in the criminal justice processes.

It also involves the regional legal instruments which are binding and persuasive on human rights, justice, criminal justice and professional which are adopted at regional levels which touches access to legal aid in criminal justice system.

2.1.0 Universal Declaration of Human Rights, 1948

It is almost impossible to address matters relating to access to justice, human rights, equality before the law and right to legal representation without mentioning Universal Declaration of Human Rights (UDHR). UDHR was adopted by United Nations General Assembly in 1948, though not binding legal instrument, it has been submitted that it enjoys the status of customary international law in many aspects and that binds all states.⁸⁸

From its generality, UDHR contains principles of human rights which regulate state conducts. It provides that all people charged with penal offense should be provided with “all guarantees necessary for his defense”.⁸⁹ This provision does not offer clear guidance at what stage the guarantees have to be granted. It has been submitted that it is not clear about what guarantees have to be granted.⁹⁰ However, it can be correctly submitted that the guarantee referred to by that article are fair trial guarantees in criminal cases which include access to legal aid in criminal trial in all stages.

Article 7 of the Declaration provides that “all people are equal before the law and are entitled to equal protection of the law, without any discrimination” this implies that regardless of economic status of a person everybody is also equal before the law and should be treated as such. This provision, in a way, establishes right to legal aid to people

⁸⁸ Danish Institute for Human Rights, *supra* note 13, Pg 19

⁸⁹ Article 11 of Universal Declaration of Human, 1948

⁹⁰ Fredrick Hemans, *Supra* note 79 at Pg. 19

who cannot defend themselves or hire lawyers to defend him, but the provision is very general and it can be hardly connected with protection of the accused rights at all stages of a criminal trial.

Article 10 of UDHR provides “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.” This provision can be interpreted to include the right to legal aid for accused person as the article requires “full equality” in the criminal proceedings and that what individual cannot afford in making the trial fair the state is duty bound to assist this individual to make the trial fair.

2.1.1 International Covenant on Civil and Political Rights, 1976

The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966 by United Nations General Assembly and entered in to force in 1976. It is a legal binding international instrument. Unlike UDHR, ICCPR binds all states that have signed and ratified it from 1976. Tanzania, Malawi and South Africa have signed and ratified the ICCPR.⁹¹ Article 9 and 14 of ICCPR have indirect bearing on the right to legal aid in pretrial stages for suspect, arrested, accused and detained person. Article 9 provides that

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

⁹¹ Tanzania ratified the ICCPR on 11th June 1976, Malawi 22nd December 1993 and South Africa 10 December, 1998.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The provision quoted above is relevant in pretrial stage because the criminal process usually starts with deprivation of liberty of the suspect or accused person by arrest and detention. Article 9(2) is very relevant to arrested person at the pretrial stage as it provide two important rights “reason for arrest and charges against him”. This sub article provides only right to be informed of the reasons for arrest and charges but not rights to be informed about right to legal aid at that stage.

Article 9(3) is also important as it touches pretrial stage as it provides right to the arrested or detained to be brought before the court and tried within reasonable time. Article 9(4) and 9(5) are also fundamental rights at the pretrial stage as it provides some form of remedies to suspects, arrested, accused and detained person.

The contents of article 9 of ICCPR as a whole though relevant does not provide expressly the right to legal aid during the arrest, detention, initial questioning by police and other authorities. Despite this omission Human Right Committee has given wide interpretation of article 9 using the language of “legal assistance” to take on board right to legal aid in pretrial stage especially when a person is suspected, arrested, detained questioned or accused of committing a crime.⁹²

In a way, article 9 of ICCPR tries to deal with some rights of arrested, detained and accused persons in pretrial stages but right to be informed about availability of legal aid and how to access it is not included.

⁹² *Borisch v. Hungary*

Article 14 of the ICCPR contains fair trial guarantee for accused person. Article 14 provides

1. 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. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (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; 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;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The provisions of article 14 quoted above address rights to a fair trial and guarantees of accused person before the Court or tribunal and it relent during the trial but it has necessary connection with pretrial processes article 14(3) (d) is very important as it

provides that the accused person should be informed of his right to legal assistance assigned to him if he does to have.

Most of the fair trial guarantees contained in article 14 though connected to right to legal aid, the guarantees are expressly applicable during the trial and not during pretrial stage. However the United Nations Human Rights Committee has observed that fair trial guarantees contained in article 14 are applicable in pretrial stages.⁹³

Despite the limitations in article 9 and article 14 in regards to legal aid in pretrial stage the Human Right Committee jurisprudence is that article 14(3) applies to all criminal cases including those persons who are not in detention (pretrial stage).⁹⁴ It was clarified that the guarantees under article 14 (3) arise where the prosecution decides to take procedural steps against accused person or a person who is suspected of committing an offense.⁹⁵ It was further held in *Borisenko v. Hungary* that legal assistance (legal aid) should be provided at all stages of criminal proceedings.⁹⁶

Suffice to argue is that although ICCPR provision does not include right to legal aid to suspected, arrested, accused and detained person, the Human Right Committee has tried to interpret the provision to cover pretrial stage.

2.1.2 The Principle and Guideline on Access to Legal Aid in Criminal Justice Systems, 2012

In recognizing the importance of legal aid in criminal justice system in all stages, the United Nations adopted Principles and Guideline entitled “United Nations Principles and

⁹³ United Nations General Comment on Article. 14

⁹⁴ ICCPR, United Nations General Comments on Article 14 of 1984 (as replaced by GC No. 32), Para 7

⁹⁵ *Ibid*

⁹⁶ Comm. no. 852/1999, HRC views of 14 October 2002, para. 7.5

Guideline on Access to Legal Aid in Criminal Justice Systems.⁹⁷ The principles and guidelines basically deal with accessibility of legal aid in criminal justice systems.

The principles and guidelines provide that legal aid should be availed to accused person in all stages of the criminal justice process.⁹⁸ States are invited to implement the principles and guidelines in their domestic legislations in order to reduce congestion in prisons and avoid violation of human rights of the accused person in hands of the state machinery.⁹⁹

2.1.3 Kyiv Declaration, 2007

This declaration was a result of a conference which involved African, Asian and European countries which met to discuss how to increase efficiency in criminal justice,¹⁰⁰ The in considering the importance of legal aid in criminal justice systems the representatives of the countries resolved that legal aid should be provided at all stages of the justice system.¹⁰¹

The underlying believe of Kyiv declaration is that government is responsible for the working system of access of justice for all and that it should be accorded in all stages of the criminal justice process.

2.2.0 Regional Frameworks on Access to Legal Aid

There are some regional binding and non-binding instruments which in one way or the other addresses the issue of access to legal aid in criminal justice systems. Regional

⁹⁷ United Nations, General Assembly Resolution, A/RES/67/187, 28 March , 2013

⁹⁸ *Ibid* Principle 3, 8, Guideline 2, 3, and 4

⁹⁹ *Ibid*

¹⁰⁰ 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 Europe, Kyiv Ukraine 27-30 March 2007

¹⁰¹ *Ibid*, Para 2

instrument which will be under consideration in this work include African system because of its connection with this study and European system because of its historical influence on the legal system in the African continent.

2.2.1. The African Charter on People`s and Human Rights, 1981

Famously known as Banjul Charter, African Charter on People`s and Human Rights was adopted by the Organization of African Unity and entered into force in 1986. African Charter on People`s and Human Rights (ACPHR) is the principal human rights instrument in the African region. It deals with the protection and promotion of the human rights in the region generally. In connection with a right to access to justice, legal representation, and equality before the law and legal aid it, provides general principles for the State parties to apply in criminal cases and other proceedings in court or tribunal for protection of rights of arrested, detained and person in a court or tribunal.¹⁰² In connection with the right to legal aid, the African Charter does not explicitly contain provision elaborating it; leave alone right to legal aid in pretrial stages.

Article 7 of the Charter contains general and unelaborated provision for the minimum guarantee of fair trial. Article 7 provides that;

1. Every individual shall have the right to have his cause heard. This comprises:
 - a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
 - C) The right to defense, including the right to be defended by counsel of his choice
 - d) The right to be tried within a reasonable time by an impartial court or tribunal
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

¹⁰² Article 7 of the Africa Charter on People`s and Human Rights, 1981

Acknowledging the importance of the right to fair trial the African Human Rights Commission adopted Resolution on the Right to Recourse and Fair Trial on 9 March, 1992 which seems to clarify and add what seem to miss in article 7 of the Charter.¹⁰³

2.2.2 Resolution on the Right to Recourse and Fair Trial, 1992

Again, this resolution provides right to an accused person in criminal cases when she/he is before the court and it is not explicit on the right of an accused person during pretrial stages.¹⁰⁴ In another occasion African Human Rights Commission in recognizing the importance of fair trial and legal assistance adopted a Resolution on Fair Trial and Legal Aid in Africa in 1996.¹⁰⁵ This resolution was followed by the adoption of Principles and Guidelines on Right to a Fair Trial and Legal Assistance in Africa in 1999 also adopted by the African Human Rights Commission which is not binding on the members¹⁰⁶

2.2.3 Principles and Guidelines on Right to Fair Trial and Legal Assistance in Africa

These Principles and Guidelines expanded the right to fair trial to cover all stages in criminal proceedings generally.¹⁰⁷ Although para 2(f) does not mention legal aid or assistant, but as it states that, “accused person shall have an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings” shows that legal aid may be provided during pretrial stages.

¹⁰³The African Commission on Human and Peoples’ Rights, meeting in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992 in Tunis, Tunisia available at <http://www.achpr.org/sessions/11th/resolutions/4/> accessed on 19th February, 2014, 1:30

¹⁰⁴ *Ibid* Para, 2

¹⁰⁵ ACHPR /Res.41(XXVI)99: Resolution on the Right to Fair Trial and Legal Aid in Africa (1996) available at <http://www1.umn.edu/humanrts/africa/resolutions/rec46.html> accessed on 19th February, 2014 at 1:40

¹⁰⁶ Principles and Guidelines on Right to Fair Trial and Legal Assistance, available at http://www1.umn.edu/humanrts/research/ZIM%20Principles_And_G.pdf , accessed 19th February, 2014

¹⁰⁷ *Ibid* Para 2(f)

The right of an accused person during the pretrial stages is specifically mentioned in para N (Right to Counsel) of the Principles and guidelines on Right to Fair Trial and Legal Assistance in Africa in the following terms that, “This right [legal counsel] applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.” From that reading therefore in the African region through this resolution, right to legal aid have to be availed to accused person in all stages of criminal proceeding.

The Principles and Guidelines contain provisions for the role of prosecutors in criminal proceeding, but it does not make a relevant connection between the rights of an accused person in pretrial stages and duties of the prosecutor.¹⁰⁸ It is important to note that prosecutors are very vital in dealing with the accused person during the pretrial stage and most of the accused’s rights are violated in the hands of prosecutors and investigators during pretrial stages.

Another important non-binding instrument is the Lilongwe Declaration on Accessing Legal Aid in Criminal Justice System in Africa, this declaration was adopted in 2004 and its main focus is to address the access to legal aid in criminal cases, identifying key players and scope of legal aid in the criminal justice system.¹⁰⁹ The Lilongwe Declaration recognizes right to legal aid as an important right in the criminal justice system and it can help the criminal justice system to function effectively.¹¹⁰ Para 3 of the declaration provides that legal aid should be provided at all stages of criminal proceeding and it must start the moment the accused person is arrested. The paragraph is very explicit, it makes it

¹⁰⁸ *Ibid*, Para H

¹⁰⁹ Lilongwe Declaration on Access to Legal Aid in Criminal Justice System in Africa, Conference on Legal Aid in Criminal Justice, The Role of Lawyer`s, Non-Lawyer`s and other Service Providers in Africa, Lilongwe, Malawi, November 22-24, 2004

¹¹⁰ *Ibid*, Preamble

clear that legal aid should be accorded at arrest, investigation, pretrial detention, bail hearing and other stages.¹¹¹

The development of African human rights instruments reflects strong recognition of the right to legal aid in pretrial stages. Some of the constitution in African countries enshrines the right to legal aid in all stages of criminal justice system.¹¹² Tanzanian Constitution does not recognize legal aid in its current constitution but efforts are underway to include it as a separate fair trial guarantee. Comprehensive legislation on provision of legal aid also draws aspiration from contents of the binding and non-binding human rights instruments in African region.

2.2.4 European Convention on Fundamental Freedoms and Human Rights, 1950

European Convention on Human Rights was adopted in 1950 by members of Council of Europe and came into force in 1953. This is a human rights instrument applicable to countries which are members of the Council of European and European Union and it has been widely interpreted to protect various human rights.¹¹³ Article 5 and 6 of European Convention on Human Rights has almost similar provision with article 9 and 14 of ICCPR which deals with the right to liberty and fair trial. Sub article (2), (3), (4) and (5) which are most relevant provides

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

¹¹¹ Para, 3

¹¹² Malawian and South African Constitutions contain these provision Article 41 and 34 respectively

¹¹³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as Amended) (ECHR) art. 3

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation

The above sub articles have relevance during the pretrial stage as it provides for the right to be informed of the reasons for the arrest and charges against him, to be brought before the judge within reasonable time and release pending the trial. Sub article 4 and 5 provides for remedy for arrested and detained person. Although article 5 does not provide specifically that the accused person has a right to legal aid during arrest and detention, the European Court of human rights has ruled that arrested and detained person has right to legal aid and has to be informed about that right.¹¹⁴

Article 6 of the convention deals with fair trial rights in which right to legal aid can be grasped. Article 6 provides that,

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (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;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

¹¹⁴ *Imbrioscia v. Swaziland*

In particular, Article 6(3) provides for the right to the accused person defend himself in “person or through legal assistance.” It has been argued that although article 6 (3) provide for that right, it is silent on how it can be utilized.¹¹⁵

In addressing whether rights to counsel and legal assistance have to be provided during pretrial stage, the European Court of Human Rights in the case of *Imbrioscia v. Swaziland*¹¹⁶ stated that,

Certainly the primary purpose of Article 6 as far as criminal matters were concerned was to ensure a fair trial by a 'tribunal' competent to determine 'any criminal charge', but it did not follow that the article had no application to pre-trial proceedings

The European Court of Human Rights added that the right to legal counsel or legal aid during the pretrial stage should be accorded depending on the circumstances of the case.¹¹⁷ In this way it can be argued that although article 6 of the European Human Rights Convention does not explicit mention pretrial stage but is applicable in pretrial stage and that accused person are entitled to legal aid, legal counsel and legal representation during the pretrial stage.

Although the right to legal aid during detention, questioning and preliminary investigation is not expressly set out under the European Convention, the European Court of Human Rights has clarified that right to legal aid in pretrial stages is required for the meaningful exercise of the right to a fair trial.¹¹⁸ In the case of *Salduz v. Turkey* the Grand Chamber held that the accused person has the right to legal aid in pretrial detention and before

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*, Para 60

¹¹⁷ *Ibid*

¹¹⁸ Amnesty International, *supra* note 7 pg. 65

questioning.¹¹⁹ The jurisprudence of the European Court of Human Rights has established a general rule that “the right to a fair trial requires an accused person to be allowed legal assistance (including legal aid) as soon as they are placed in custody, including during the initial stages of police investigation”¹²⁰

The European Court of Human Rights has also ruled that suspects should have access to a lawyer or legal aid from the first questioning by authorities unless there are compelling reasons and that the denial of access to lawyer or legal aid will irreparable prejudice the right to defense if incriminating statement is made by accused person during questioning by police and it is used to support the conviction.¹²¹

The right to legal aid in pretrial processes is not set out clearly under articles 5 and 6 of European Convention of Human Rights however the jurisprudence of European Court of Human Rights in interpreting those articles has ruled that accused and detained person has the right to legal aid in pretrial processes.

2.3.0 National Legal Frameworks on Access to legal Aid in Pretrial Stages

It is important to briefly review on how Tanzania, Malawi and South Africa legal frameworks address accesses to legal aid in pretrial stages in their respective legal frameworks. Constitutions and other legislations which have bearing on access to legal aid in criminal cases are reviewed in this part.

¹¹⁹ (36391/02), European Court Grand Chamber (2008) Paras 54-55.

¹²⁰ European Court of Human Rights *Dayanan v. Turkey* (7377/03)

¹²¹ *Ibid* note 119, Para 55

2.3.1 Tanzania Legal Framework

Constitution of United Republic of Tanzania of 1977 provides in general term that everyone equal before the law and shall have access to a court of law in the determination of their guilty and right without any discrimination.¹²² The constitution provides that everyone shall be presumed innocent till proved guilty by a court of law, it prohibits treating accused as criminal, it also provides for right to legal representation.¹²³

Right to legal aid is not expressly provided in the Tanzanian Constitution, but provision related to legal aid are contained in other pieces of legislations.¹²⁴ It is worth to note Tanzania is currently going through constitutional reform and there is greater pressure from legal aid provider to include the right to legal aid among constitutional rights.

Legal Aid (Criminal Proceedings) Act, 1969 provides for provision of legal aid in criminal cases in the interest of justice.¹²⁵ The right to legal aid, according to this Act accrues when the accused person is brought in the court of law and it is the discretion of the presiding judge or magistrate to order provision of legal aid upon certification. This Act therefore does not in any way put a mechanism for the provision of legal aid in pretrial stages.

Criminal Procedure Act contains procedural steps of handling arrested or suspects of crimes.¹²⁶ According to section 23 of Criminal Procedure Act, the arrested person has only right to be informed of the reason for his or her arrest. However, this right is not mandatory as it can be abrogated on the ground “of the circumstances in which he is

¹²² Article 13 of Constitution of United Republic of Tanzania, 1977

¹²³ *Ibid*, Article 13

¹²⁴ These Include, Legal Aid (criminal Proceeding) Act, Cap 21 of Laws of Tanzania, Criminal Procedure Act, Cap. 20 of laws of Tanzania.

¹²⁵ Section 3 of Legal Aid (criminal Proceeding) Act, Cap 21 of Laws of Tanzania

¹²⁶ Criminal Procedure Act, Cap 20, Laws of Tanzania

arrested, that person ought to know the substance of the offence for which he is arrested or by reason of his actions the person arrested makes it impracticable for the person effecting the arrest to inform him of the offence for which he is arrested".¹²⁷ This create an incentives to police officer to violate suspects and arrested person`s rights in pretrial stages. There is also a presumption that the arrested person was informed of the reason for his or her arrest during the arrest.¹²⁸

According to Criminal Procedure Act, an accused person under custody of police or the investigation officer may be questioned and investigated without any safeguard of his right or access to a lawyer or legal aid providers.¹²⁹ There are duties imposed on interviewing of the suspects by section 53 of the Criminal Procedure Act, which includes cautioning him about his statement, but this become irrelevant because the investigation officer may proceed with the interview and asking the suspects questions in disregard of his or her duties under the provision because it is the police officer or investigator who will then show that he complied with his duties under that section.

The Criminal Procedure Act provides that persons under restraint has to be informed of their rights.¹³⁰ The types of rights listed in that section include not to be asked anything about the crime unless the police discloses his or her rank, that the accused has been informed that he/she is under arrest in writing and that he is not obliged to answer any question other than name and address.¹³¹ The right to communicate with a lawyer or relative is provided for in section 54 but subject to the request of an accused person and

¹²⁷ *Ibid*, section 23(3)

¹²⁸ *Ibid*, section 23(2)

¹²⁹ *Ibid*, section 48(1)

¹³⁰ *Ibid*, section 53

¹³¹ *Ibid*, section 53

that even when the accused person makes a request, the police officer may refuse to allow accused person to communicate to a lawyer or relatives.¹³²

Under Tanzania Criminal Procedure Act, as general rule is that police is not obliged to inform the accused person about right to legal aid the accused and availability of free legal aid to poor persons.

2.3.2 Malawi Legal Framework

As pointed out in the beginning the constitution of Malawi contains a special provision addressing “access to justice”, “legal remedies” and “rights of arrested, detained person and fair trial.”¹³³ In regard to rights of arrested, detained and accused person the Constitution provides together with other rights that they “shall be promptly informed about his or her right to remain silent and consequences of making any statement.”¹³⁴

The constitution of Malawi differentiates between arrested person and detained person. Detained person has a right to a lawyer or legal assistance when she or he is in detention facility pending trial or investigation.¹³⁵ The constitution is silent about right to lawyer or relative and legal aid information to a person during the arrest. The rights of arrested person are provided in article 42 (2), the only right to be provided during the arrest is right to be informed of the charges before the accused person in understandable language.¹³⁶

¹³² *Ibid*, section 54(2)

¹³³ Articles 41 and 42 of the Constitution of Republic of Malawi, 1994

¹³⁴ *Ibid*, article. 42(2)

¹³⁵ *Ibid*, article 42(1)

¹³⁶ *Ibid*, article 42(2)(1)

The Legal Aid Act of Malawi, 2011 is a comprehensive legal aid legislation dealing with organization and provision of legal aid in the country.¹³⁷ This Act establishes Legal Aid Bureau, which is empowered to regulate and organize the provision of legal aid to poor person in Malawi.¹³⁸ The Bureau is empowered to put in place mechanisms which will make it possible for access to legal aid by arrested person, a person in custody or person under criminal investigation.¹³⁹

As comprehensive legislation, the Legal Aid Act provides for the right to legal aid in pretrial stages as the Act empowers the Bureau to make those arrangements.¹⁴⁰ Bureau in consultation with other organizations are directed to provide legal aid to the accused person. Mechanisms for access and provision of legal aid in the criminal justice process are explained in relevant chapter in this work.

The Criminal Procedure and Evidence Code of Malawi, contains detailed provision for the rights of arrested persons.¹⁴¹ The Code makes it unlawful to arrest a person without informing him or her reason(s) for arrest and other rights but not right to legal aid.¹⁴² The arrested person has right to be informed the reasons for his or arrest.¹⁴³ The Act contains a pretrial custody limit which is forty eight hours for the accused to be brought before the court, but it does not contain other pretrial rights of the accused person such as the right to be informed about right to legal aid.¹⁴⁴

¹³⁷ Legal Aid Act, 2010

¹³⁸ *Ibid*, sections 3, 4 and 5

¹³⁹ *Ibid*, section 17

¹⁴⁰ *Ibid*

¹⁴¹ Criminal Procedure and Evidence Act, of 2010

¹⁴² *Ibid*, section 20

¹⁴³ *Ibid*

¹⁴⁴ *Ibid*, section 160

The Malawi legal framework provides right to legal aid in its constitution, Legal Aid Act and the Criminal Procedure and Evidence Code, however the legal aid model adopted by Malawi make it difficult for poor accused persons to access legal aid in pretrial stages.

2.3.3 South African Legal Framework on Access to Legal Aid

The South African Constitution contains relevant provision for access to legal aid generally, but also specifically to accused person who are in pretrial detention.¹⁴⁵ The constitution categorizes rights of arrested, detained and accused person.¹⁴⁶ Arrested persons have right to be informed the reason(s) for arrest, right to remain silent and effect of not remaining silent, not be compelled to confess, right to be brought before the court and right to be released.¹⁴⁷ The constitution is silent on the right to be informed on right to legal aid and right to a lawyer to arrested person, but the South African Court has held that once a person is arrested has right to be informed of right to a lawyer and legal aid.¹⁴⁸

In South Africa a detained person has to be informed the reasons for the detention, has the right to choose and appoint a lawyer and also be informed about this right, a lawyer assigned to him or her at the expense of the state if he or she cannot pay a private lawyer, Challenge his or her detention in court of law, to be visited and other rights connected to rights to a fair trial.¹⁴⁹

South Africa Legal Aid Act, 1969 is a comprehensive legal aid legislation which caters for the provision of legal aid in criminal and civil cases for person who cannot afford to

¹⁴⁵ Article 35(2)(c) of the South Africa Constitution, 1996

¹⁴⁶ *Ibid*, article 35

¹⁴⁷ *Ibid*, article 35

¹⁴⁸ *S v. Andrew*, 1996(2) SACR396 (E)

¹⁴⁹ Article 35(2) of South Africa Constitution, 1996

pay for the services of advocates.¹⁵⁰ The Act establishes Legal Aid Board (now Legal Aid South Africa), which is mandated to make legal aid available to indigent persons and organize for its provision.¹⁵¹ The Act is not so expressly on the scope of legal aid and how people can access legal it in all stages of the criminal justice process; however the Board is empowered to undertake measures and adopt legal aid which insures that constitutional provision on provision of legal aid is availed to the needy person.¹⁵²

The Act gives power to the court to order a certain person to be provided with legal aid at the expense of the state.¹⁵³ This is done when the accused person appears in the court and he was not accorded legal aid while he or she was eligible.

Criminal Procedure Code of South Africa, just like that other countries' provides rights for the right to be informed the reasons for arrest to arrested persons.¹⁵⁴ A person in detention has a right to be informed about right to apply for bail.¹⁵⁵ Section 73 provides that an accused person is entitled to "legal assistance to his lawyer from the time of arrest." It is also provided that at the time of arrest, service of summons, indictment the accused person shall be informed of the right to legal representation at his own expense and if he cannot afford be informed of the forum for legal aid in which he may apply.¹⁵⁶

¹⁵⁰ South Africa Legal Aid Act, 1969

¹⁵¹ *Ibid*, section 2

¹⁵² *Ibid*, section 3

¹⁵³ *Ibid*, section 3B

¹⁵⁴ Section 35(2) of South Africa Criminal Procedure Code, 1977

¹⁵⁵ *Ibid*, section 50(1)(b)

¹⁵⁶ *Ibid*, section 73(2A)

It is further stated that the accused person should be given enough time to obtain legal assistance.¹⁵⁷ It is evident from South Africa Criminal Procedure Act that the right to legal aid is established from the pretrial stages.

The legal framework of South Africa provides right to legal aid and assistance in criminal justice process which also cover pretrial stages. The criminal procedure code is very specific on the right to legal aid during the arrest and subsequent stages of the criminal process. The South Africa legal Aid Act establish a flexible framework in which different models of legal aid can be adopted and it has facilitated the Legal Aid South Africa to adopt legal aid models which make it possible to provide legal aid in pretrial stages.

Conclusion

The legal frameworks on access to legal aid in the pretrial stages in criminal cases are not expressly established in binding international and regional human rights instruments. Non-binding international and regional human rights contains an express provisions which makes it clear that the right to legal aid in pretrial stage is very vital and it can be accorded effectively.

The national legal frameworks on access to legal aid in pretrial stages are not that much clear as there are no straightforward provisions in some constitutions which clearly guarantee right to legal aid in pretrial stages. Legal aid legislation which regulates and organizes the provision of legal aid to the needy person also falls short of clear guidance on how legal aid can be accessed from pretrial stages. Most of criminal procedure laws contain some safeguards and rights of arrested and detained person, however few of these provision touches the right to legal aid at the pretrial stages but in other codes it does not

¹⁵⁷ *Ibid*, section 73(2B)

exist at all. In different occasions courts have held that the right to legal aid accrues the moment a person is arrested.

Next chapter details legal aid models and the accessibility of legal aid in the pretrial stages by assessing the legal aid regime and schemes in the respective jurisdiction.

CHAPTER THREE

Accessing Legal Aid in Pretrial Stages in Criminal Justice Systems

3.0 Introduction

Having looked at the importance of legal aid and the legal aid framework in pretrial stages as stated in chapter one and two this Chapter discusses legal aid models and how legal aid is accessed at the pretrial stages. This chapter take into account what is provided in the law and what is in the practice in Tanzania, Malawi and South Africa. This Chapter draws some common features found in both legal aid regimes and schemes in the three criminal justice systems.

3.1 Legal Aid Models

There are different models in which legal aid is delivered to poor persons. This models differs from county to and country and also differs in efficiency and on how accused person access legal aid providers. Some legal aid models are efficient in delivering legal aid from the pretrial stage to appeal stage while some models are best at trial and appeal stage. Some countries like South Africa use mixed model for delivering legal aid while other countries like Malawi and Tanzania have more or less one model.¹⁵⁸In the following section this study presents and discusses some legal aid model which different countries have adopted to deliver legal aid to poor persons suspected, arrested, detained, accused for committing crimes.

3.1.1 Public Defender model

Public Defender model or scheme is the model which uses different personnel such as private lawyers, paralegals or law students to deliver legal aid. Public Defender are

¹⁵⁸ United Nations Office on Drug and Crimes, Early Access to Legal Aid in Criminal Justice Processes: A handbook for Policy Makers and Practitioners, Criminal Justice Hand Book Series, Vienna (2014)

mainly organized by civil society organizations and NGO`s and are funded by government and NGO`s.¹⁵⁹ In some States, legal aid is provided only by public defender, whereas in others, legal aid is provided by other legal aid service providers as an alternative to the public defender or public defender supplement other legal aid schemes.¹⁶⁰ Most of public defender are managed and organized by specialized lawyers in criminal justice system.

Public Defender scheme operates in a way that suspected, arrested, detained, accused and charged person contact or apply to public defender for legal aid. The mode of contacts differs from jurisdiction to jurisdiction. In some jurisdiction like South Africa are free calls which facilitate communication between suspects, arrested, detained, accused and charged person with public defenders. In other jurisdictions a judge refers the accused and charged person to public defender in the interest of justice and upon assessing seriousness and complexity of the offense.

Public Defender may render legal aid in pretrial processes but it depends on how criminal justice system is organized. It has been submitted that public defender if well-resourced may provide legal aid in early process of criminal justice system. Public defender has also advantages over other model of legal aid delivery as it is cost effective, it is specialized, and it can be used in pretrial stages. It has been submitted that “public defender schemes have the organizational ability and resources to provide such aid at the early stages of the

¹⁵⁹ *Ibid* pg 73

¹⁶⁰ *Ibid*. Pg 76

criminal justice process even when demand is unpredictable and requires a speedy response”.¹⁶¹

Despite these advantages over other models it has been submitted that public defender suffer some flaws, such lack as, of resources and independence when funded by states.¹⁶² These challenges may however be tackled by allocating enough to funds public defenders whether operated by state or organized by NGO`s or Civil Society Organizations and there must be effective mechanism for accountability of those funds. Independence of public defender can be guaranteed by laws and regulations.

3.1.2 Private Lawyer model

Due to the problem of establishing, organizing public defender scheme and lack of enough criminal law lawyers, many countries uses lawyer in lawyer firm. Private lawyers are contacted to provide legal aid to poor persons charged with crimes. Private lawyers are used in different ways such as contract, ex officio and *Pro Bono*.

In contract scheme, private lawyers or firms are contracted by established legal aid body to provide legal aid to selected accused person. These private lawyers and firms are paid on agreed amount in the contract. In *ex Officio* lawyers are appointed to take individual case by prosecutor or judges and they are appointed when they are needed.

Pro Bono scheme involves lawyers in legal profession to provide legal aid to poor persons. Pro Bono schemes are different in different countries whereas in some jurisdiction once a person is enrolled as advocate are obligated by legal profession

¹⁶¹ *Ibid*

¹⁶² T. Geraghty and others, “Access to justice: challenges, models, and the participation of non-lawyers in justice delivery”, in Access to Justice in Africa and Beyond: Making the Rule of Law a Reality, Penal Reform International and Bluhm Legal Clinic of Northwestern University School of Law (Chicago, National Institute for Trial Advocacy, 2007), p. 60.

organization to provide free legal aid service to poor person as condition to renew their practicing certificate. *Pro Bono* services do not mandate lawyers to take criminal cases and as a result they avoid taking criminal cases. In other jurisdictions *Pro Bono* is voluntary and that lawyers choose to provide legal aid as they wish.

It has been submitted this that these contract and *ex officio* model are good in terms of quality of the legal aid provided because it is competitive and that each appointed lawyer or firm will try to do the best so that they may be contracted again.¹⁶³ However this model is not good in regard to access to legal aid in pretrial stages as the contracting and appointing authority are not involved during the pretrial process. In regard to *Pro Bono* scheme, lawyers are also appointed after the cases have entered the trial stage and go on to provide representation and that most lawyers are reluctant to provide free legal aid in pretrial processes.

3.1.3 Paralegal Model

This is an emerging model of delivering legal aid to poor person in criminal justice system in most of the countries. Its emergence is due to various factors such as few number of lawyers which does not correspond to the population and need of legal services, uneven location of the legal services and legal aid providers, unresponsive criminal justice systems, expense of legal service in criminal case, lack of interest by young lawyer in criminal cases, congestion in prison and pretrial detention and other factors. It has been submitted that there is no clear definition of paralegal but basically a

¹⁶³ United Nations Office on Drug and Crimes, (2014) *supra* note 158, pg 76

paralegal “is a person who is not a fully qualified lawyer who provides some or all of the services that are provided by fully qualified lawyers”.¹⁶⁴

Paralegals and their roles in legal system has been problematic in many jurisdiction because some countries do not recognize paralegals, however in some countries such Wales, paralegals are legally recognized and their functions are regulated by law and code of conduct which govern them and their activities.¹⁶⁵ In most of African countries paralegals are not recognized and their functions are not regulated. However, there are some countries such as Malawi and Sierra Leone which have recognized the role and functions of paralegals and they have enacted specific law to recognize and regulate their actions in the legal profession.

It has been proved and submitted that paralegals have successfully provided legal aid in pretrial processes of criminal justice process and they provide full or partial of what lawyers can do if they are well trained.¹⁶⁶ Paralegals operate in different ways depending on the way legal aid delivery system is structured and organized.

Paralegals have been useful in provision of legal aid in pretrial stage especially in police stations, pretrial detention and in prison.¹⁶⁷ Paralegal works have helped to reduce number of help in pretrial detention by providing necessary information to the accused including processing their bail pending investigation of their case. It has been submitted that “Paralegal schemes have particular advantages in countries, or locations, where there is

¹⁶⁴ United Nations Office on Drug and Crimes, (2014), *supra* note 158 pg 74

¹⁶⁵ Rogers Smith, Legal Aid in English and Wales: Current Issues and Lesson “Making Legal Aid a Reality: A Resource Book for Policy makers and Civil Society, Public Interest Law, 2009 at pg 20

¹⁶⁶ *Ibid*

¹⁶⁷ Open Society Foundations and United Nations Development Programme, *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations, 2011)

an insufficient number of qualified lawyers who are willing and able to deliver early access to legal aid'.¹⁶⁸

Despite the usefulness of paralegal scheme in pretrial process it has been argued that for it to be effective there is a need to assure the quality of their services. It has been opined that paralegal services may be assured if paralegals are recognized and their functions determined, training and accreditation.¹⁶⁹

3.1.4 Legal Aid Centres

This is another model for delivering legal aid, legal Aid Centres are mainly run by NGO`s, CSO`s but others are organized and run by states.¹⁷⁰ Legal Aid Centre provide legal aid in various ways including raising awareness to the general public about legal aid, through advocacy, strategic litigation, publication, training to various group of people in the community. Legal Aid Centres also deliver legal aid to suspects, arrested, detained, accused and charged person and by doing this it can be argued that they provide legal aid in pretrial stages.

Legal Aid Centres are organized in such a way that they provide legal aid in different thematic areas such as gender based violence, juvenile justice, women and lawyer and others and they also limit their services in a given locality. Most of legal Aid Centres are funded by international donors and other receive limited fund from the government. Effectiveness of Legal Aid Centres mainly depend on availability of funding.

¹⁶⁸ United Nations Office on Drug and Crimes, (2014), *supra* note 158 Pg 78

¹⁶⁹ Guideline 14 of UN Principles and Guidelines on Access to Legal Aid in Criminal Cases

¹⁷⁰ South Africa legal Aid Centres are organized and run by the government

It has been argued that Legal Aid Centres are important in demonstrating the need to have comprehensive legal aid services that provide legal aid in all stages of criminal justice system.¹⁷¹ In countries where there are no comprehensive legal aid laws Legal Aid Centres organize themselves and regulate their affairs on way to provide legal aid and areas to provide legal aid. Most of these Legal Aid Centres do not provide legal aid in criminal cases.

3.1.5 University Law Clinics

It has been a custom for Universities both public and private with law faculties to establish legal aid clinics in which they involve academic members and law students to provide legal aid to poor person in different areas of law. These clinics operate in a way that the persons in need of legal aid approach clinics offices and narrate their concerns. Some clinics set some outreach programmes in which they visit prisons and pretrial detentions for a day in a week and provide required legal aid to those arrested and detained persons. In Africa, countries with universities with law clinics which provide legal aid in criminal cases include, Ethiopia, Tanzania, Kenya, Mozambique, Nigeria, Sierra Leone and South Africa.¹⁷²

University law clinics are effective in developing clinical legal education, research, strategic litigation and they can do best in appeal stage in criminal cases. It has been argued that university law clinics have some advantages over other models of provision of legal aid which include less expensive and that they motivate students who are

¹⁷¹ United Nations Office on Drug and Crimes, (2014), *supra* Pg 81

¹⁷² United Nations Office on Drugs and Crime, Handbook on Improving Access to Legal Aid in Africa, pp. 29-30.

prospective lawyer to engage in provision of legal aid in their future career.¹⁷³ Despite these advantages University law clinics are not effective in provision of legal aid in pretrial stage because academic members are always busy with academic duties and students are not competent in many areas of criminal law and they need constant supervision. Students also lack enough experience to take complicated criminal cases.

University law clinics can work to compliment other legal aid model and motivate students to serve the community and to sharpen their legal skills.

3.2.0 Legal Aid Regimes and Schemes in Tanzania, Malawi and South Africa

The national legal frameworks discussed in Chapter two in one way or another establishes regimes and schemes in which legal aid is provided to poor persons. Malawi and South Africa have comprehensive legislation which deals with the provision of legal aid to poor persons. These comprehensive legislations establish legal framework in which legal aid is provided and regulated as stated in chapter two of this Study.

The legal framework establishes autonomous body or authority in the form of “Legal Aid Board” (now Legal Aid Africa) as the case in South Africa, “Legal Aid Bureau in case of Malawi.”¹⁷⁴ These body or authority sets standards and guidelines in which legal aid is to be offered and the way legal aid can be accessed.

As observed in Chapter 2 of this study, Tanzania does not have comprehensive law which creates autonomous body or authority to provide legal aid to poor person, however at the time of conducting research for this study and writing this work, Tanzania was in the

¹⁷³ United Nations Office on Drug and Crimes, (2014), *supra* note 158 pg 83

¹⁷⁴ Section 2 of South Africa Legal Aid Act, 1969, and Section. 3 of Malawi Legal Aid Act, 2010 respectively.

process of enacting comprehensive legislation on regulation and provision of legal aid.¹⁷⁵

There is a proposed Bill for legal Aid Act for Tanzania which aims at regulating provision legal aid in the country.¹⁷⁶ The proposed Bill establishes “Legal Aid Regulatory Authority” to regulate the provision of legal aid in Tanzania.¹⁷⁷

These Authorities established by comprehensive laws are given general mandates to adopt legal aid models, to regulate and provide legal aid to poor people at expense of the state. The subject of this study is to examine whether the adopted legal aid models as established by those systems provide an opportunity for access and provision of legal in pretrial stages in the criminal justice system.

3.2.1 Tanzania Legal Aid Regime and Scheme

As observe above currently Tanzania does not have comprehensive legal aid law, the laws which organize provide for legal aid are scattered in different pieces of legislations.¹⁷⁸ In the absence of comprehensive legislation providing for the provision of legal aid in Tanzania, there are several governmental, semi-governmental and nongovernmental schemes in which legal aid is provided to poor persons in Tanzania.

3.2.1.1 Legal Aid under Government Scheme

Under the government scheme, courts are empowered through Legal Aid (Criminal Proceeding) Act, 1969 to order a person to be availed legal aid on the ground of interest of justice and lack of sufficient means to pay for the legal services.¹⁷⁹ Courts are

¹⁷⁵ Daily News online edition, 02 August 2013 “Legal Aid soon become necessary to all” by Faustine Kapama

¹⁷⁶ *Ibid*

¹⁷⁷ Section 4 of Legal Aid Bill, 2013

¹⁷⁸ Legal Aid (Criminal Proceeding Act), Cap 21, Criminal Procedure Act, Cap 20, Tanganyika Law Society Act, Cap 307 of Laws of Tanzania

¹⁷⁹ Section 3 of Legal Aid (Criminal Proceedings) Act, 1969

empowered to assign the indigent to an advocate to be accorded legal aid and that the advocate will be remunerated by government.¹⁸⁰ The type of legal aid provided under the Legal Aid (Criminal Proceedings) Act, 1969 in Tanzania is limited to capital offense which carries death penalty or life imprisonment. Legal aid under this regime thus excludes other criminal offenses.

Under this scheme, poor person facing criminal charges will be accorded legal aid when brought in the court of law and upon assessment of the trial court. This means that the court cannot properly intervene or make orders for provision of legal aid during pretrial stage. There have been complaints about remuneration paid to the advocate dealing with legal aid cases.¹⁸¹ The complaints mainly concern about the remuneration to be very low.

Legal aid provided under legal aid (in Criminal proceeding) Act, 1969 discloses a gap between pretrial and trial stages. This gap provides room for violations of suspects and accused rights during the pretrial stages and courts cannot easily intervene. It is common knowledge and fact in Tanzania that most of police and investigating authorities use torture, threats and force to extract information and evidence from the accused person. It has been noted that suspects, arrested, detained and accused person are vulnerable in the hands of police, detention officer and investigating authorities.¹⁸²

Evidence obtained in violation of suspects and arrested person's rights sometime are used to support conviction of the accused. It has been argued by Sifuni Mchome that courts have discretion to exclude evidences and testimonies obtained in violation of suspect's and accused's rights during the pretrial stage by excluding those evidences and

¹⁸⁰ *Ibid*

¹⁸¹ Chris Maina Peter *Supra* 45, pg 343

¹⁸² Legal and Human Right Centre Tanzania Human Rights Report 2013, Legal and Human Right Centre and Zanzibar Legal Services Centre, (2013) Pg 224

testimonies.¹⁸³ Excluding evidence and testimony obtained in violation of suspects and accused person's rights may not be an effective remedy for the violation of pretrial rights of the suspects and accused person. Courts should go as far as to dismiss all charges against the accused person in order to cultivate a culture of respect to pretrial rights of the suspects, arrested and accused person.

3.2.1.2 Non-Governmental Organization Civil Organizations Scheme

Non-Governmental Organization's (NGO's) and Civil Society Organizations (CSO's) play a greater role in the provision of legal aid in Tanzania.¹⁸⁴ Most of NGO's which are involved in the provision of legal aid do it in different forms such as advocacy, education, legal assistance, arbitration, mediation and court representation. The provided legal aid by NGO's and CSO's is however limited to civil cases and rarely deal with criminal matters.¹⁸⁵ In case they deal with criminal matters, the poor person or his /her relatives who need legal aid have to approach the organizations and make formal application for legal aid and if they pass the organization's eligibility criteria's the organization will provide the required legal aid.¹⁸⁶

As NGO's and CSO's provision of legal aid is limited to civil cases even the type of legal aid that they provide in form of education is also limited to civil matters such as marriage, labour, land, succession and other non-criminal matters. It is very rare for

¹⁸³ Sifuni Mchome *supra*, 51 pg.159

¹⁸⁴ The most prominent organizations in Tanzania which deals with human right and provide legal aid in criminal matter include Legal and Human Right Centre available at <http://www.humanrights.or.tz/>, Tanzania Network for Legal Aid Providers, available at <http://www.tanlap.or.tz/> and National Organization for Legal Assistance, <http://www.nola.or.tz/index.php>

¹⁸⁵ Legal Services Facility, *Baseline Survey on Tanzania Mainland and Zanzibar for Legal Aid Facility*, ID: LSF 001 BLST SCTA, March 2012 pg. 30

¹⁸⁶ *Ibid*, pg 29

NGO`s to undertake legal education in criminal matters and is because of the donors priorities.

Most NGO`s and CSO`s depend on donors to run their project upon submission of human rights project proposals and unfortunately most of donors are not interested in criminal justice system. This increases the problem of access to legal aid not only at pretrial stage, but also in all process of the criminal justice process in general. People are left ignorant as to how the criminal process operate and how they can protect themselves against violation of their fundamental rights in criminal justice process

3.2.1.3 Tanzania *Pro Bono* Scheme

Tanganyika Law Society (TLS) is lawyer`s society in Tanzania which sets and regulates the professional standards of practicing lawyer in Tanzania.¹⁸⁷ This society was the first semi-governmental organization which started to provide legal aid in Tanzania through *Pro Bono* scheme. It has to be noted that when Tanzania got its independence had few lawyers and that courts, NGO`s used to and still refer person who need legal aid to TLS for legal aid in criminal cases. This society provides legal aid to person who need legal aid when there is a reference to it by court or NGO`s and the secretariat of the Society assign the case to the legal practitioner. Taking legal aid case entitles legal practitioner a credit necessary for renewal of the practicing certificate.¹⁸⁸

Legal aid offered by the TLS is mainly provided during the trial or appeal stages and it hardly offered at pretrial processes. In order for the court to refer a case to TLS the accused person must be brought in court of law and court have to make assessment and

¹⁸⁷ *Ibid*

¹⁸⁸ *Ibid*

decide whether the accused person qualify for provision of legal aid. NGO`s and CSO`s refers cases to TLS when it is criminal case or the case need representation in court of law.

Most of lawyers in Tanzania are situated in big cities and they hardly take *Pro Bono* cases in rural areas.¹⁸⁹ The head office of the TLS is in Dar es Salaam which is the Tanzanian biggest business capital and has very few regional offices in upcountry which are not accessible. This makes accessibility of legal aid very difficult for people who need legal aid in criminal cases. *Pro Bono* scheme in Tanzania is not effective in provision of legal aid in pretrial processes and it takes few criminal cases and the mechanism to follow up is very weak.

3.2.1.4 University Law Clinics in Tanzania

In Tanzania there are university based legal aid clinics and several universities are involved in the provision of legal aid in selected matters. University of Dar es Salaam through Legal Aid Committee (UDLAC) offers legal aid in different thematic areas such as land, labour, matrimonial cases and some sensitive criminal cases. UDLAC mainly use academic staff, employed legal officers and students to provide legal aid and they are assisted by volunteers. UDLAC provides legal aid in different forms, ranging from legal education, legal advice and assistance, drafting legal document and attesting them, legal representation and also alternative dispute resolution and strategic litigation¹⁹⁰

¹⁸⁹ Chris Maina Peter *supra* Note 45, pg 344

¹⁹⁰ Wilbert Kapinga *supra* note 1, pg 189

UDLAC has priority areas and eligibility criteria's in which a person who need legal aid must fall within the priority areas and must fill up an eligibility form.¹⁹¹ A person who need legal aid has to visit the UDLAC offices at University of Dar es Salaam premises and meet with UDLAC member and explain his or her problem and if she/ he qualify for legal aid he or she will be assigned to lawyer in the faculty of law who will handle the case. Sometimes UDLAC conduct outreach programme in which they visit prisons and police stations and provide special training to police and prison officers about human rights in general and provide legal aid to prisoners and detained person.¹⁹²

As observed earlier in this chapter University law clinics are not effective in providing legal aid in early stages of criminal processes. The way UDLAC operates, it mainly deal with the case during the trial stage and it is not structured in a way that it can offer legal aid at the pretrial stages other than general legal education through outreach programme and publications. There are other universities which also have Legal Aid Clinics in Tanzania and these include Open University of Tanzania, St. Augustine University of Tanzania, Ruaha University College and Tumaini University Makumira Campus.¹⁹³ The legal aid clinics in these universities operate the same way as UDLAC

¹⁹¹ Priority area for UDLAC are Labour, Land, Matrimonial, landlord and tenant cases. Eligibility criteria's focus on age, vulnerability, financial ability, complex of the case, impact of taking the case in community at large.

¹⁹² Wilbert Kapinga, *supra* note 1, pg 192

¹⁹³ The information about these Universities may be accessed in their respective websites University of Dar es Salaam(www.lac.udsm.ac.tz), St Augustine University of Tanzania(<http://www.saut.ac.tz/human-rights-centre/>) Ruaha University College (<http://www.ruco.ac.tz/index.php>), and Tumaini University Makumira (<http://www.ruco.ac.tz/index.php>)

3.2.2 Malawi Legal Aid Regime and Schemes

In Malawi, the Legal Aid Act of Malawi establishes Legal Aid Bureau.¹⁹⁴ This Bureau replaces the Legal Aid Department, which was under the Ministry of Justice in the Legal Aid Act, 1964.

3.2.2.1 Malawi Legal Aid Bureau

Malawi Legal Aid Act establishes Legal Aid Bureau which is empowered among other duties to provide legal aid in accordance with the legal Aid Act, to make a determination of persons to whom legal aid may be granted and on what matters.¹⁹⁵ In provision of legal aid, the Bureau may put conditions or vary conditions, withdrawal or revoke the grant of provision of legal aid. The Bureau is also empowered to enter into contracts with private legal practitioners, cooperate with NGO`s, CSO`s or any persons who are interested in the provision of legal aid, develop *Pro Bono* programs and dissemination of information.¹⁹⁶

According to Malawi legal Aid Act, legal aid consists of legal advice, legal assistance, legal representation and civil education and information about law.¹⁹⁷ The scope of legal aid in Malawi does not cover aspects of mediation and arbitration, which have been recommended and included among content of legal aid.¹⁹⁸ However, one may argue that arbitration and arbitration, may be found in legal assistance and advice aspects. The Bureau is tasked to provide legal aid to individuals whom criminal proceedings have been instituted against them. Literally, this means that the Bureau will start to work upon the institution of criminal proceeding against individual who fulfill the requirements of section 18.

¹⁹⁴ Section 3 of Malawi Legal Aid Act, 2010

¹⁹⁵ *Ibid*, section 4

¹⁹⁶ *Ibid*

¹⁹⁷ *Ibid*, section 16

¹⁹⁸ Danish Report (2011), *Supra* note 12, pg 17

The Bureau is empowered to act *suo motto* or through other legal aid providers to provide legal aid to individuals who are arrested, held in custody of police, detention and individual under criminal investigation.¹⁹⁹ This duty to the Bureau seems to be attractive and promise to provide legal aid in pretrial stage, but it is discretionary and if it is mandatory, it would raise some difficulties in implementation because of financial and human resource implications. This particular function will work perfectly without financial implication if it was placed or connected to the police department, prosecutor, investigator, pretrial detentions and prison.

Section 18 of the Legal Aid Act provides all people are eligible for legal aid if it is in interest of the justice that the legal aid is sought and that the person seeking legal aid must have insufficient means to pay for the legal service. In case the Legal Aid Bureau did not act on its own or through other legal aid providers, arrested, detained and accused person may apply for legal aid to the Bureau if he can prove two elements, namely the interest of justice and lack of means to pay for the legal services.²⁰⁰

It has been submitted that according to the poverty ravaging majority of people in Malawi, majority of the population qualify for legal aid.²⁰¹ There is no reference to the authorities which deals with the accused person during arrest, police custody or detention. This omission removes the possibility of police and detentions officers to communicate with the Bureau or any other legal aid providers to provide legal aid to persons in their custody.

¹⁹⁹ *Ibid* section 17,

²⁰⁰ *Ibid*

²⁰¹ Bruno Kalembe *Supra* note 73, pg 100

Different factors are taken into consideration in Malawi to determine whether it is in the interest of justice or a person lack sufficient means to pay legal services and that it proper to avail him or her with legal aid or not. These factors include, type of the offense, substantial questions of law, knowledge and ability of the accused, nature of defense, interest of others, inability to pay a fine (if fine is imposed).²⁰²

The provision of the Legal Aid Act, which empowers provision of legal aid to individuals are in general terms just like in the Constitution and this raises a lot of doubts on whether in practice individuals arrested, detained and investigated can apply for the Bureau at the appropriate time and their pretrial rights be protected. It can therefore be argued that the right to legal aid at pretrial stage is provided by the Constitution of Malawi and in the Malawi Legal Aid Act; however the means of accessing the Bureau in pretrial stage for realization of pretrial rights right remain a challenge to the arrested and detained poor persons.

The Malawi Legal Aid Act also empowers Court of law to refer to the Director of the Bureau a person who needs legal aid.²⁰³ This recognizes that suspects and accused persons may reach a trial stage without being accorded legal aid for a person who was eligible for legal aid. This shows that rights of suspects and accused persons during the pretrial stages are not fully covered in the scope of legal aid of Malawi just like Tanzania and South Africa.

²⁰² *Ibid*, section18

²⁰³ *Ibid* section 23

3.2.2.2 Non-Governmental Organizations and Civil Societies Organization in Malawi

Apart from the Legal Aid Bureau and Court, NGO`s and CSO`s are also involved in the provision of legal aid in Malawi. It has been submitted that in Malawi matters of legal aid and human rights are mainly carried out by NGO`s, CSO`s and Paralegals.²⁰⁴ Paralegals who are mainly under NGO`s have been recognized as key players in the provision of legal aid in Malawi and in the few regions which they operate they are stationed in police station, detention facilities and prisons.²⁰⁵ It has been observed that stationing paralegals supervised by NGO`s and CSO`s in those places have improved the protection of suspects and accused person's rights during the pretrial stage and also reduces the number of pre detained persons.²⁰⁶

It has been observed that NGO`s and CSO`s provide elementary legal education to the majority of poor people in Malawi and they mainly educate them about substantive legal rights as opposed to legal procedures rights which enable them to assert but difficult to use it to protect themselves in courts and protect their rights when suspected or accused of crimes.²⁰⁷ This practice is commendable as it covers provision of legal aid in general however there are some lingering doubts of the effective application of the education in a real case in police stations, pretrial detentions and prisons.

3.2.2.3 Malawi Paralegal Scheme

Malawi has recognized role and functions of paralegal in provision of legal aid in criminal cases. Although Malawi legal Aid Act does not does not give powers to

²⁰⁴ Bruno Kalembe, *supra* note 73 Pg 103

²⁰⁵ Adam Stepleton, *Paralegal Aid in Africa, A case Study from Malawi*, Correction Today, January 2002

²⁰⁶ Hillery Anderson, Justice Delayed in Malawi's Criminal Justice System Paralegals vs. Lawyers International Journal of Criminal Justice Sciences Vol 1 Issue 1 January 2006, pg 4

²⁰⁷ *Ibid*

paralegals to represent people in court of law, paralegals through their organizations are stationed in police stations, pretrial detentions and in prisons in which they provide legal aid to poor persons.

Malawi has developed effective paralegal scheme through Paralegal Advisory Services Institute (PASI). PASI uses trained paralegals to provide legal aid and advice from pretrial stage to appeal stage in criminal justice system of Malawi.²⁰⁸ Paralegals are stationed in police station and in prison and they are equipped with motor-cycles, computers, printers, a copier and cellphone for urgent communications.²⁰⁹ Through these facilities paralegals in Malawi have been able to provide required legal aid in pretrial stage and they have been able to liaise with lawyers to represent accused persons in court.²¹⁰

The use of paralegal scheme in providing legal aid in pretrial stages is efficient and cost effective in many ways. Proper trained paralegals have helped to reduce prison population in Malawi prisons and also helped to facilitate bail for arrested persons and by doing this they reduced the number of persons held in pretrial detentions.²¹¹ The legal profession is skeptical about the role of Paralegal and some Law Societies and lawyers are not comfortable with them because they think they are taking their jobs.²¹²

3.2.2.4 University Law Clinics in Malawi

In Malawi University Law Clinics are less used as model of provision of legal aid. There is only one University Law Clinic in Malawi found in Malawi University, Chancellor

²⁰⁸ <http://pasimalawi.org/index.html> accessed on 13th July, 2014, 10:30am

²⁰⁹ *Ibid*

²¹⁰ *Ibid*

²¹¹ United Nations Office on Drug and Crimes, (2014), *supra* note 158 at pg 28

²¹² *Ibid*

College.²¹³ This Law clinic was established in 2012 and their main focus is on human rights and HIV issues, disability, bail and mitigation, child rights.

Malawi legal aid clinic operate in a way that a person in need of legal aid have to visit the university and narrate his/ her legal problem and then she or he will be helped. The clinic also assists relatives of accused to process their bail. In that practice the clinic assist some accused persons in pretrial stages but it's only limited to bail processes and other pretrial rights.

3.2.2.5 *Pro Bono* Scheme in Malawi by Law Society

The Malawi Legal Aid Act provides that Legal Aid Bureau and Malawi Law Society should work together and establish *Probo Bono* programmed which will assist on provision of legal aid to poor person. At the time of writing this work there was no *Pro Bono* programme established by Malawi Law Society to provide legal aid. However Malawi Law Society engages in general human rights and rule of law.

Malawi legal aid regime establishes Legal Aid Bureau to provide and coordinate provision of legal aid in Malawi and it generally provides for access to legal aid in pretrial stages however there is no effective mechanism which facilitate access to legal aid during pretrial stages. Malawi legal aid schemes and programmes operate as ad-hoc scheme and not specifically established in legal aid legal framework.

3.2.3 South Africa Legal Aid Regime and Schemes

South Africa has comprehensive legal aid legislation which establishes Legal Aid Board (now Legal Aid South Africa) in terms of section 3A Legal Aid Act, 1969 and it is

²¹³http://www.chanco.unima.mw/departement/departement.php?DepartmentID=43&Source=Department_of_Practical_Legal_Studies

categorically mandated to provide legal aid to “indigent person” in both criminal and civil matters. The term “indigent person” is not defined by the Legal Aid Act, however Legal Aid South Africa through the Legal Aid Guide have given guidelines and criteria to determine who indigent person is for the purposes of provision of legal aid.

There are number of means testing and criteria established by the Legal Aid South Africa, which include matters which must fall within the legal aid scheme and that the “indigent” person must pass the means test.²¹⁴ This guide is reviewed from time to time. The means test which is currently used to sort out the economic status to qualify for legal aid include the income of the applicant which must be less than R5, 500 per month, holding immovable property worth not less than R500, 000 and for movable property worth less than R100, 000.²¹⁵

Legal aid in South Africa is accessed by accused poor person through application to Justice Centres and other legal aid providers. In Justice Centres applicants must fill-up a special form in which she/he has to answer a number of questions.²¹⁶ The way the South African legal aid regime is structured and explained in the legal aid guide is that apparently the person who needs legal aid must apply in person or by his or representative to be availed legal aid. The application process is not friendly for access to legal aid in pretrial stages in criminal justice system however there are calling systems which has been introduced by some Justice Centre which allows the arrested or detained person to call and inquire legal aid.²¹⁷

²¹⁴ Legal Aid Africa South Africa, Legal Aid Guide 2014, 13 edition, pg 75, available at www.legal-aid.co.za

²¹⁵ *Ibid*

²¹⁶ *Ibid* pg. 159

²¹⁷ United Nations Office on Drug and Crimes, (2014), *supra* note 158 pg 26

The legal aid guide is addressed to Justice Centre, legal practitioner, Paralegal, Magistrates and Judges.²¹⁸ The operation of legal aid regime in South Africa rest upon applications by indigent person, which means a person who needs legal aid has to apply for legal aid. Application process always affects the rights of suspected, accused, detained and accused person in pretrial stages as they have must be arrested or detained before making application for legal aid.

Public Prosecutor, Police Force, and Prison Departments are not mentioned as the addressee of the Legal Aid Guide despite being consistently involved in dealing with the suspects, arrested, accused and detained persons. This means that the Prosecutor, Police and Prison Department are left out in the scope of provision of legal aid in the pretrial stage. It is without doubt that pretrial rights are not addressed in the Legal Aid Guide. Legal aid is not addressed to police, detention, and prison officer and by doing that it renders accused arrested, detained and accused person vulnerable in hand of police officers during arrest, prosecutor during investigation and collection of evidence, prison officers during pretrial detention.

South Africa employs a different legal aid models to provide legal aid to poor person who qualifies for the legal aid. South African models have been described as mixed model.²¹⁹ The following are the main legal aid models in which legal aid is provided in South Africa.

²¹⁸ *Ibid*, pg 1

²¹⁹ United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa: Survey Report* (Vienna, 2011), *supra* note 4 Pg 11

3.2.3.1 Justice Centres

This is the main scheme used in South Africa to provide legal aid and it is a state funded model. The Justice Centres are managed by salaried legal practitioner employed by the Legal Aid Board of South Africa.²²⁰ This model provides legal aid to the needy persons who are poor and eligible according to the criteria set by Legal Aid Guide as explained above. As observed earlier that a person who need legal aid have to apply to the Justice Centre.

Justice Centre may also move on its own to provide legal aid to suspects or accused person however it is unclear on how Justice Centre can move on its own to provide legal aid at pretrial stages. Suffice to argue is that Justice Centre can play a great role in the provision of legal aid when suspects or accused person are in police custody or are in pretrial detention, but this will depend on the information flow between police stations, pretrial detention facilities and the Centre and also the effort of the suspected, arrested, detained or accused person.

There are several Justice Centres established in different parts of South Africa.²²¹ Despite the fact that the Justice Centres have been commended for the widening scope of provision of legal aid to the poor person there are begging questions, one is how the arrested person may access the Justice Centre for legal aid during the pretrial stages and especially during arrest, questioning and police custody without applying to the Justice Centre? Second question is about whether Justice Centres are close to people who really need legal aid in rural areas.

²²⁰ *Ibid*, pg 11

²²¹ For the Current Justice Centres visit <http://www.legal-aid.co.za/>

In regard to the first question it very important for Justice Centres, Police Force, Detention Officers and Prison Department to work together in order to make real realization of the right to legal aid in pretrial stages. This will help to resolve the second questions because police working together with Justice Centre will ensure protection of suspected and accused person in all stages of the criminal justice process. This is so because when criminal process is initiated against person by state authorities the accused person will have the opportunity to receive information about legal aid at early stage of the criminal process.

3.2.3.2 Judicare

This model was mainly used before the introduction of Justice Centres in South Africa in 1994. Under this model the presiding judge or magistrate refer the accused person who needs and qualifies for legal aid to private legal practitioner for legal aid and assistance. The legal practitioner was in turn paid by the government. This model is still in place despite the introduction of Justice Centres, however, it has been argued that it is mainly used when there is a conflict of interest between the Justice Center and the person in need of legal aid or in case of lack of capacity in Justice Centres.²²² The greater shift seems to be instead of paying private practitioner for legal aid and assistance the Justice Centers now employ legal practitioner to do the job.

The Judicare model therefore supplements the Justice Centers system. It has been submitted that under the new model, the Judicare practitioner has to apply for accreditation with the Legal Aid South Africa first before taking legal aid cases.²²³ Judicare model operate through court in way that court refers a person who need legal aid

²²² South Africa Legal Aid Guideline, 2014, *supra* note 214

²²³ *Ibid.*

to Justice Centres or other legal aid providers. This means that an accused person will be referred to Justice Centre or private legal practitioner after pretrial stages and in initial appearance in the court. This means Judicare system is not in place to provide effective legal aid during the pretrial stages of the criminal justice process in South Africa.

3.2.3.3 Non-Governmental Organizations

The legal aid regime and scheme in South Africa also involves NGO`s to provide legal aid to indigent persons. In South Africa there are NGO`s which provide legal aid in different forms and in different areas of law.²²⁴ Most NGO`s provide legal aid in the form of legal education. NGO`s play a great role in South Africa to provide legal education through different ways, such as seminars, advocacy and general legal empowerment activities in collaboration with the Legal Aid South Africa and other actors. It may be argued that legal education is very important to people in understanding, defending and claiming their rights. But the way legal education is provided, it is not easy to reach poor people because of the means that they use.

NGO`s mainly use media, television and different forms of publications to educate people about their rights. In doing this they forget that many poor people may not have TV to watch their program and also may lack money to buy and read their publications, and some of them do not know how to read in case those publications are provided for free. The question which arises here is how do these poor people who cannot buy Tv, buy human rights publications and who cannot read make use of legal education provided by NGO`s to protect their pretrial right in criminal proceedings?, How much this legal education if they are lucky to get be applied to defend and protect their pretrial rights

²²⁴ These NGO`s Include Lawyers for Human Rights (<http://www.lhr.org.za/>) and Legal Resource Centre (<http://www.lrc.org.za/>)

against brutal police and detention officers?. These questions will remain unanswered till the system makes the use of police and detention officer in the provision of legal aid in a meaningful manner in pretrial stages

NGO`s are very useful in providing legal education in general because the education may also cover all the stages of criminal justice system, including pretrial stage, however most of NGO`s devote themselves to educate in substantive rights rather than procedural rights and how to claim it. It must be noted that most of pretrial rights are contained in criminal procedures.

Apart from providing legal education to the public, NGO`s also provide other form of legal aid such as legal assistance, legal advice and also representation if they are in capacity to do so. South Africa legal aid regime was very much driven by NGO`s and civil society organization litigating and fight of the oppressive regime of apartheid.²²⁵ To date NGO`s and CSO remain involved in the provision of legal aid but mainly after the pretrial stages.

3.2.3.4 South Africa Paralegal Scheme

South Africa is known for the use of Paralegals to provide legal aid and assistance to poor persons in South African community. It has been submitted that paralegals in South Africa were set up by community “in response to the political and human rights persecution of the apartheid state.”²²⁶ Paralegal offices were the entry point for many

²²⁵ Hennie Vas, *Supra* note 33

²²⁶ Seehaam Samaai, The Promotion of Access to Justice by University Law Clinics in South Africa in Hatla Thelle and Paul Dalton “A Human Right to Legal Aid, Danish Institute for Human Right 2010, pg. 233

“political detainees” and poor members of community who need legal assistance and access the justice system.²²⁷

There are numerous paralegal organizations in South Africa which mainly deal with educating the public about their “legal rights” training paralegal to offer legal advice to people.²²⁸ Paralegal works are not mainly focused on criminal cases but it has been submitted that paralegal works assist people to access justice in South Africa.²²⁹ Paralegal organizations are linked up with other legal aid providers such as “Legal Resource Centre”, “Lawyers for Human Rights and the Community Law and Development Center” and other private legal practitioners and they operate in rural and urban areas in South Africa.²³⁰

Paralegal organizations work effectively in police stations, prisons and they offer meaningful legal aid and assistance during pretrial processes. It is important to note that paralegals apart from having their independent organization they form part of Justice Centres, NGO`s and CSO`s staff members.

3.2.3.5 University Law Clinics in South Africa

South African legal Aid regime and scheme also involves University Law Clinics in provision of legal aid.²³¹ The first South African University legal aid clinic was established in 1971 at the University of Cape Town.²³² University law clinics in South Africa have long history in provision of legal aid and assistance to “poor and

²²⁷ *Ibid*

²²⁸ The Delivery of Civil Legal Aid in South Africa, 2000, pg 133

²²⁹ *Ibid*

²³⁰ *Ibid*

²³¹ Legal Aid Guide 2014, pg 8

²³² McQuoid-Mason D (2004) Access to Justice and the role of law schools in developing countries: some lessons learned Pg 34

marginalized communities” to access justices.²³³ Most of Universities in South Africa with law faculties carry within them legal aid clinics which provide legal aid to poor person and marginalized communities in different form.²³⁴ Several universities with law clinics enter into an agreement with the Legal Aid South Africa (previously Legal Aid Board) and they are subjected to the same operation of the provision of legal aid in the country as provided by the Legal Aid Act.²³⁵

University legal aid clinics just like NGO`s and CSO`s in South Africa provide legal aid and assistance in various area of law such as consumer complaints, housing issues, access to social services, maintenance and family law matters, land, debt- related matters and criminal matters.²³⁶ Legal aid clinics use different ways to impact general legal human rights awareness and representing poor person in court of laws. University legal aid clinics in South Africa are located either in the premises of the universities and outside the university and they operate from their offices in the way that a person who needs legal aid visit their offices and make appointment and then they are interviewed by the person who is in charge of the office at material time.²³⁷

University legal aid clinics also work with Legal Aid Africa in provision of legal aid and it has important role in helping poor in accessing justice but it is not placed in a better position to offer legal aid in pretrial stages of the criminal justice process in South Africa.

²³³ Seehaam Samaai, *supra* note 226, pg 237

²³⁴ David McQuoid Mason, *Holistic Approaches to the Delivery of Legal Aid Services – the South African experience*, in Hatla Thelle and Paul Dalton “A Human Right to Legal Aid, Danish Institute for Human Right, 2010, pg 154

²³⁵ Legal Aid Board Annual Report 2006-2007 (2008) p. 24

²³⁶ Seehaam Samaai, *supra* note, pg 239

²³⁷ *Ibid*

3.2.3.5 South Africa Pro Bono Services by Law Societies

In the history of South Africa, the legal profession stood in frontline in the battle against apartheid regime and it provided free legal representation to poor person and people accused for fighting the oppressive apartheid system.²³⁸ As a result of that spirit many private lawyers and law firms through there law societies still provide free legal aid and assistance to poor persons because there are still marginalized communities which cannot access justice. Some provinces like Cape Town, the Cape Town law society makes it mandatory for private lawyers and law firms to provide free legal aid to poor persons.²³⁹

Legal Aid South Africa work in collaboration with several Law Societies in South Africa to offer legal aid through *Pro Bono*.²⁴⁰ Legal Aid Africa enters into a special agreement with these law societies to provide legal aid to indigent persons. Members of these law societies are conditioned to take *Pro Bono* cases as a part of the professional requirements.²⁴¹ *Pro Bono* operates in the way that a person who need legal aid or assistance is referred to the practicing advocates by the law society and the assigned practicing advocate have to provide legal aid to that person.²⁴²

Pro Bono services in South Africa just like that of Tanzania and Malawi are not positioned in a place to offer legal aid during the pretrial stages in criminal justice process. The reference to law societies is done either when suspect or accused person has already made some initial appearance in the court during the trial stage or when the accused is released on bail and apply for legal aid to the Legal Aid South Africa. Law

²³⁸ *Ibid*,

²³⁹ *Ibid*, pg 232

²⁴⁰ The list of Law Societies which works with Legal Aid Board of South Africa is available at <http://www.legal-aid.co.za/?p=816>

²⁴¹ Dave Holness, Recent Developments in the Provision of Pro Bono Legal Services by Attorneys in South Africa, 2013(16)1 PER /PELJ, Pg. 137

²⁴² Legal Aid Guide, *supra* 214, pg 53

societies are also involved in educating the public about law in general and by doing this it may be argued that it covers the pretrial stages. It has been submitted that legal aid provided by law societies through *Pro Bono* to poor persons is not effective.²⁴³ As argued earlier, most of pretrial rights are procedural rights and it is rare to be covered in the general legal education provided by law societies and other actors.

Although legal aid regime and schemes in South Africa is not structured in a way that makes legal aid accessible in pretrial stages, in practice there are some emerging practices that demonstrate that legal aid can be accessed during pretrial stage.²⁴⁴ The mixed legal aid model adopted by South Africa enable suspects and accused persons to access legal aid in pretrial stages. Legal Aid South Africa has developed the practice of involving paralegals and lawyers in pretrial stage in provision of legal aid. These practices are not codified in the law and also not seen in the legal aid guide. There is a need to codify the best practices and include them in South Africa legal aid guide.

3.3 Observations and Analysis

This study has several observations observed from the three jurisdictions in regard to the duty of state to make legal aid available to poor persons in all stages of criminal justice systems. In fulfilling that duty, all states under consideration, assumes that by legislating on the law regulating and providing for legal aid and by setting up semi-independent authority to provide legal aid guarantee the realization of the right to legal aid in all stages of criminal justice systems including pretrial stages. This assumption is negated in practice when the poor citizen is arrested, kept in police custody, pretrial detention and

²⁴³David McQuoid Mason,*supra* note 179, pg Pg 140

²⁴⁴ United Nations Office on Drug and Crimes, (2014), *supra* note 158, pg 71

investigated without being availed access to legal aid or informed their rights to legal aid at the appropriate time.

The established mechanism and authorities are not accessible in pretrial stages in criminal justice process with exceptional ad-hoc paralegal and call in services installed in Malawi and South Africa. Legislating on provision of legal in criminal cases has for so long been ignored pretrial trial rights of suspects, arrested, detained and accused person. What seems to be consensus is that rights of the suspects, arrested and accused persons are not full recognized and protected at pretrial stage but guaranteed during the trial stage and subsequent stages. There is a total disregard of pretrial stages which is the foundation of protecting the rights of the accused in subsequent stages.

It has been observed by this study that the available legal aid models, regimes and the scheme does not specify exactly how legal aid can be accessed and provided during pretrial to the suspects, arrested, detained and accused persons. Right to legal aid to suspects, arrested, detained and accused person in pretrial stages remain on procedural laws and they are not reflected in comprehensive legal aid laws. In Tanzanian proposed Legal Aid Legal Aid Bill, there is an attempt to include those procedural provisions related to right of suspected, arrested detained and accused person in general to the realm of legal aid and particularly right to legal aid at the time of arrest, custody and detention.²⁴⁵

It is clear from the structural arrangements and the way legal aid regimes and schemes operates in Tanzania, Malawi and South Africa they do not provide sufficient room for the access and provision of legal aid in pretrial stages. The available legal aid models

²⁴⁵ Section 33 of the proposed Legal Aid Bill, 2013

have application process and eligibility criteria which make suspects, arrested, detained and accused person to apply for legal aid to relevant authorities. These application procedure and criteria increases the difficulties of accessing legal aid in pretrial stages and also complicate the whole process of accessing justice to all.

The available legal aid models in place are not structured in a way that they that they stress more on provision of legal aid during the trial other than in pretrial stage. Despite the fact that pretrial rights and right to access legal aid in pretrial stages have been ignored and left aside in criminal justice system of many countries. However there are legal reforms which are going on in recognizing rights to legal aid in pretrial stages.²⁴⁶

²⁴⁶ United Nations Office on Drug and Crimes, Handbook (2014)

CHAPTER FOUR

Conclusion and Recommendations

4.0 Introduction

This chapter provides conclusion of the study after analyzing legal aid models in Tanzania, Malawi and South Africa. It also contains recommendations for policy makers, law makers, legal aid providers and the public at large in regard to access to legal aid in all stages of criminal justice system. The recommendations are general and specific to Tanzania, Malawi and South Africa.

4.1 Conclusion

The study has sought to examine legal aid models of Tanzania, Malawi and South Africa in order to establish whether or not legal aid is accessed in pretrial stages of criminal justice process. In this endeavor this study has examined the relevant international conventions, regional and national laws and procedures which directly or indirectly deals with criminal justice and applicable in early stages of the criminal process. Substantive and procedural legal aid legislations and regulations were extensively reviewed.

This study has established that almost all prominent legal aid models overlook pretrial stages in issues of legal aid. Current legal aid models avails provision of legal aid during the trial and it's through application by the person who needs legal aid. The mixed legal aid models seem to work perfectly in South Africa but these models are not embodied in the law. Paralegal schemes in Malawi which seem to effectively provide access to legal aid in pretrial stage is an adhoc initiative by NGO`s and international organizations which is not backed up by laws and procedures.

It has been established by this study that international and regional legal framework for access to legal aid in early stages of the criminal justice process is inadequate. Most of these instruments provide for rights to legal aid without giving guidance on how this right can be accessed. The access to legal aid in pretrial stages has been spearheaded by international organizations such as Open Society Justice Initiative, International Penal Reform Programme and others. It is important for government to recognize work of these organizations by effecting their recommendations.

It has been established by this study that access to legal aid in early stage and during pretrial stages, it is hardly a presence in the criminal justice system of Tanzania, Malawi and South Africa. The legal framework of all countries under consideration is not specific and helpful in accessing legal aid in pretrial stages of criminal justice system. What is in place in Malawi and South Africa is not satisfactory in providing legal aid in pretrial stages of criminal justice system.

The constitutions of all countries under examination address general right of the accused person including the right to legal aid to people who cannot afford to pay for the service of a lawyer. These constitutions do not distinguish pretrial rights of suspected, arrested, detained and accused persons from fair trial during the trial stages in a meaningful manner.

Substantive and procedural criminal laws and regulations contain some rights of suspected, arrested, detained and accused persons during the pretrial stages, but it is silent on how they can be accessed at pretrial stages. The criminal laws and procedures give unchecked power to the police, investigators and prosecutors to the extent that those powers violate rights of suspects, arrested, detained and accused persons.

Substantive law and procedural regulations which organize and regulate provision of legal aid are insufficiently in providing access legal aid in pretrial stages. All legal aid legislations of the countries under consideration provide that the accused person in need of legal aid has to apply for it to the responsible authority. This create a procedural gap because at the time of suspicion and arrest the accused person is entitled some rights which may not be taken in consideration. Application of legal aid is a complicated process and time consuming. This application process bars the accused person to full enjoy pretrial rights.

This study concludes that in all jurisdictions the access to legal aid in early stages of the criminal justice process is insufficient and inadequate. The process of accessing legal aid does not cover pretrial stage in its fullest. The practice of NGO's in providing access to legal aid in the pretrial stages are out of the legal framework of all countries.

4.2 Recommendations

The following are general and specific recommendations which this study argue that if adopted they will contribute to access to legal aid in pretrial stages in criminal justice systems in general and also in particular in the countries under consideration.

4.2.1 General Recommendations

It is possible to develop a legal aid model which can effectively facilitate access to legal aid in all stages of the criminal process and in pretrial in particular. International and regional human rights instruments have to be updated to recognize right to legal aid and provide clear guidance on how right to legal aid can be accessed in pretrial stages. This is because pretrial rights have been mixed to fair trial rights in core human rights instruments and this make many authority to forget pretrial stages.

Pretrial rights are mainly procedural rights and in order to establish an effective legal aid model in which legal aid can be accessed in pretrial stage and international and regional human rights instrument can provide general framework and guidelines on the appropriate model. The existing efforts of criminal justice reform from international, regional and national level should include pretrial rights of accused persons in their framework and address how accused person can access legal aid in pretrial stages.

International and regional human rights instruments should bring law enforcement agencies and law enforcers especially police, investigators and judiciary in addressing access to legal aid in pretrial stages. Law enforcers are very important in making access to legal aid to the accused persons at the earliest stages of criminal process possible because it is in the hands of these institutions pretrial rights of the accused persons are violated. The information gathered during pretrial stage shapes and influences the entire proceeding and the results of the case and this makes pretrial trial stage very crucial.

4.2.2 Specific Recommendation for Tanzania

As observed in this study Tanzanian legal framework on access to legal aid has various flaws which hinder access to legal aid in pretrial stages. In order to establish effective and responsible legal aid mechanism which affords legal aid in pretrial and other stages, Tanzania should do the following; as Tanzanian Constitution, 1977, does not recognize legal aid as a constitutional right, there is a need to recognize legal aid as a constitutional rights standing independently from other fair trial rights. Including the right to legal aid to the general scope of fair trial rights tend to undermine the essence and importance of legal aid in pretrial stages all stages of the criminal process and creates difficulties for suspects,

arrested, detained and accused person to access to claim and enforce enjoy rights to legal aid and other fair trial guarantees.

Legal aid is specific and particular right which has to be recognized on its own and given importance it deserves at the constitutional level. Right to legal aid has to be provided for in the constitutional level and other laws have to be enacted to give effect to this particular right. Tanzanian police force, public prosecutor, the judiciary and other players in the criminal process in Tanzania should understand that legal aid is a constitutional right and it is not a matter of charity. Right to legal aid should be anchored and established in the constitution of the country in order to realize the access to justice for all and in order to enjoy other fair trial rights provided in the constitution.

As Tanzania is in the process of enacting comprehensive legislation on legal aid, it should make sure that it creates an avenue for adoption mixed legal aid models which can make right to legal aid accessible from the pretrial stage to the appellate stage. Legal aid legislation should make the arresting, investigating and prosecuting authorities responsible for the provision of legal aid to all suspects arrested and accused persons upon arrest, investigating and other process of establishing the guilt of the accused person.

Tanzania should avoid application procedure in accessing for legal aid, it should adopt simplified procedure that will make pretrial rights are accessed without difficulties at the pretrial stages. Free legal aid should be accorded to all suspects, arrested, detained and accused persons at pretrial stages and issued of application procedure and eligibility criteria may well sorted out in later stages of the proceedings.

In regard to criminal laws, procedures and their regulations, they should be amended to reflect African human rights instruments and United Nations binding and non-binding legal instrument. It is very unfortunate that old procedure and practice in criminal process dating back to colonial era are still in place today. These old laws and practice complicate the criminal justice process and adding to it unnecessary costs. These laws violate the basic international recognized standards of fair trial. It is high time for Tanzania to consider taking a quick step toward reforming its criminal laws and practices.

Tanzania should think of establishing legal aid units in all of its criminal machinery, mainly police, prison and prosecutor. These Units in collaboration with other human rights player should play the role of providing legal aid to all accused persons in all stages of the criminal process.

4.2.3 Specific Recommendations for Malawi

Malawi is step ahead in recognizing legal aid as a rights independent from other fair trial rights. As observed in this study, the Malawi Constitution provide for rights to legal aid in different stages of the criminal process. This is a progressive approach in recognizing right to legal aid in all processes of criminal justice, however the challenge remains on the legal aid model adopted which seem not to facilitate access to legal aid in pretrial stages. The constitution is silent on how legal aid and other fair trial rights can be accessed at the pretrial stages. In this regard the constitution should provide a clear guidance on how legal aid can be accessed at the pretrial stage and other subsequent stages.

In regard to criminal laws, procedures and regulations, it should be amended to make them friendly for access to legal aid in pretrial stages. The legal criminal law and procedures as it stands today does not offer an effective way of accessing legal aid for

suspects, arrested detained and accused persons. It relies on the application procedure and eligibility models. This model is ineffective in the pretrial stages because it is during this process of applying for legal aid and being assessed, pretrial rights become crucial and violated by state police, investigator and detention officers.

As observed in this study that the practice on ground for provision of legal aid in Malawi is outside it the scope legal aid framework. It is important for Malawi to reflect on what is provided by the law and what is done in practice in make necessary amendments to the law in order to codify the best practice which has proved worth in the Malawi criminal justice system.

4.2.4 Specific Recommendation to South Africa

South Africa as an example for other African countries in legal reforms and other aspects of human right have to improved its legal aid system in regard to access of legal aid in pretrial stages so that other countries may follow suit. South African legal aid model of provision of legal aid is commendable in many ways, but the way in which access to legal aid in the early stage of the criminal proceedings needs to be viewed and made friendly to the accused person. Legal Aid South Africa should think about abandoning application and eligibility criteria at pretrial stages.

Public prosecutor, police force, and prison department should be made part in the provision of the legal aid in the country. Law enforcement agencies should be made part of the legal aid system. These law enforcement agencies have wider discretion which violate fundamental rights of suspects, arrested, detained and accused person. Empowering these law enforcement agents to provide legal aid in pretrial process will

help to stream down the powers to violate fundamental human rights of suspects, arrested, detained and accused person.

Legal Aid South Africa should considers to install free calling service to all Justice Centres and other legal aid providers which are linked with police, investigators, pretrial detention prison and court to facilitate communication between accused person and legal aid providers.

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