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Expanding indigent people's right of access to justice and fair trial through a limited right of legal representation by paralegals in Malawi

Submitted in partial fulfilment of the requirements of the master's degree in Human Rights and Democratisation in Africa

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Date: 23 October 2023

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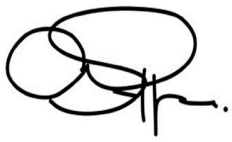
Signature: 

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Abstract

In Malawi, the Legal Aid Bureau is mandated to offer legal aid to the indigent and other vulnerable groups through its lawyers and paralegals, also known as legal aid assistants. Legal aid is available in the form of legal advice, legal assistance, legal literacy services, and legal representation. While both Legal Aid Bureau's lawyers and paralegals can jointly offer the first three forms of legal aid, only lawyers and not paralegals can offer legal aid through legal representation. This is chiefly because the Legal Education and Legal Practitioners Act 31 of 2018 reserves legal representation in court for lawyers admitted to the Bar. In a country with insufficient lawyers generally and at Legal Aid Bureau in particular, this leaves a huge lacuna in the legal representation of the indigent and hence their right to access justice, effective remedies, and fair trial contrary to Malawi's obligations under the Constitution of the Republic of Malawi 1994 as well under the African Union and United Nations human rights systems. This study contends that the law should reflect the realities and needs of society, solve a society's problems, be rational and just, and be dressed in *ubuntu* or humaneness in sync with sociological, *ubuntu*, and natural law legal theories. Consequently, allowing legal aid paralegals to represent clients in subordinate courts would encapsulate the foregoing jurisprudential underpinnings and be a plausible solution to expanding the indigent people's right to access justice and fair trial in Malawi. The study postulates that this solution comports with Malawi's socioeconomic status and reality and is justifiable under the Constitution of the Republic of Malawi 1994, the African Union and United Nations human rights systems, and comparable foreign law. Therefore, it recommends the amendment of relevant statutes, especially the Legal Education and Legal Practitioners Act 31 of 2018 and Legal Aid Act 28 of 2010, to allow and regulate legal aid paralegals to offer limited legal representation in all subordinate courts in Malawi.

Dedication

I dedicate not only this dissertation but the entire LLM voyage, of which this dissertation is just one ingredient, to my family.

To my ‘girls’ – wife Estell and daughters Riya Kristen and Shiloh Dianne – thanks for supporting and cheering me throughout the LLM journey. To the time that was supposed to be dedicated to you but could not, we find solace in the fact that it was sacrificed for a greater good.

To my elder brother, Dr George Chithope-Mwale, thanks for the ever-flowing support and encouragement. To my mum, after whom my second daughter is named, and the rest of my siblings, you are the rock foundation from which I tower.

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Fortunately, or unfortunately, I cannot manage to mention everyone lest I end up with a second mini-dissertation within a dissertation! However, I thank you all who contributed either directly or indirectly to this dissertation or generally to my LLM voyage.

Whilst I have received the best guidance and support, any shortfalls in this work are not a reflection of any lapses in the efforts or input of my supervisors or anyone who has shared insights or supported me in different ways, but my own, for to err is human.

Acronyms and Interpretations

Acronyms

ACmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
AfCLR	African Court Law Reports
AHRLR	African Human Rights Law Reports
AU	African Union
CA	Courts Act
CPEC	Criminal Procedure and Evidence Code
DHRMD	Department of Human Resource Management and Development
HC	High Court
ICCPR	International Covenant on Civil and Political Rights
ECHR	European Court of Human Rights
EU	European Union
LAA	Legal Aid Act (Malawi)
LAB	Legal Aid Bureau
LELPA	Legal Education and Legal Practitioners Act
MCLA	Malawi Council of Legal Education
MILE	Malawi Institute of Legal Education
MLS	Malawi Law Society
MSCA	Malawi Supreme Court of Appeal
SCA	Malawi Supreme Court of Appeal
UN	United Nations

UNDP	United Nations Development Program
UNHR Committee	United Nations Human Rights Committee
UN ECOSOC	United Nations Economic and Social Council
UNODC	United Nations Office on Drugs and Crime

Interpretations

African Charter	African Charter on Human and Peoples' Rights
Constitution	The Constitution of the Republic of Malawi 1994
Rules of the Court	African Court on Human and Peoples' Rights Rules of Court (2020)

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Chapter One

Introduction and Background

> It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses on the other side. He may be tongue-tied or nervous, confused or wanting in intelligence… If justice is to be done, he ought to have the help of someone to speak for him…[1]

1.1. Background

Human rights are basic entitlements that inhere in every human being. Amongst several human rights that are guaranteed to every person under the Constitution of the Republic of Malawi 1994 (Constitution) are the right of access to justice and effective remedies, and the right to a fair trial.[2] Such rights are also guaranteed under the African Charter on Human and Peoples' Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR), which Malawi ratified.[3]

Access to justice is the ability to claim rights, enforce obligations, and obtain effective remedies in the justice system through both formal and informal institutions of justice.[4] On the other hand, a fair trial is a trial that is conducted justly and with procedural regularity by an impartial arbiter.[5] Noteworthy, there is an overlap amongst the rights of access to justice, effective remedies, and a fair trial. The right to a fair trial and effective remedies is considered a subset of access to justice.[6] At the same time, access to justice is also considered a subset of effective remedies.[7] This overlap is inevitable and intelligible since human rights are indivisible, interdependent, and interrelated.[8]

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1 *Pett v Greyhound Racing Association Ltd* (1969) 1 QB 125 at 132 (Lord Denning).

2 Secs 41 & 42(2)(f).

3 Arts 7 and 14 respectively. Also, see the Universal Declaration of Human Rights arts 10 & 11.

4 Legal Aid South Africa 'Legal Aid Manual' (2017) at 10 https://legal-aid.co.za/wp-content/uploads/2018/11/Legal-Aid-Manual.pdf (accessed 20 July 2023); UNDP 'Programming for Justice: Access for All, A practitioner's guide to a human rights-based approach to access to justice' (2005) at 8.

5 Human Rights Committee General Comment 32 para 25; Merriam-Webster Dictionary https://www.merriam-webster.com/legal/fair%20trial (accessed 20 July 2023).

6 L Greenbaum 'Access to justice for all: a reality or unfulfilled expectations?' (2020) 53 *De Jure Law Journal* 248 at 250; Constitution sec 41(3).

7 ACmHPR 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003) sec C(b)(1); UN 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2005) secs 11(a), 12(c) & 13.

8 F Gomez Isa 'International protection of human rights' in F Gomez Isa and K de Feyter (eds) *International Human Rights Law in a Global Context* (2009) at 39.

Nevertheless, one subtle and crucial takeaway is that whilst access to justice extends to a fair trial,[9] a person can access justice without a trial. An example is where a dispute is amicably settled without trial or unjustified criminal charges are dropped before trial.[10]

One of the key ingredients of the right of access to justice and a fair trial is the right to legal representation.[11] Every person has the right to choose a legal representative of his or her choice.[12] However, where a person is indigent or interests of justice demand so, legal aid becomes the vehicle for enjoying this right.[13] Legal aid refers to free or subsidised legal services in the form of legal representation, legal assistance, legal advice, and legal education and information.[14] Through legal aid, indigent people know of and safeguard their rights, pursue their claims in courts or tribunals and secure effective remedies, challenge discrimination, and hold decision-makers accountable.[15] Inherent in the concept of legal aid is an acknowledgment that the state is the primary duty bearer for the promotion and protection of the right of access to justice and fair trial, amongst other human rights.[16] Legal aid is thus a significant aspect of and enhances the rights of access to justice and fair trial in both civil and criminal matters for the indigent or where interests of justice demand so.[17] For this reason, legal aid is also available even before the African Court on Human and Peoples' Rights (ACtHPR).[18]

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9 *Francis Kafantayeni & Others v Attorney General* Constitutional Case 12/2005 Malawi High Court, Principal Registry sitting as Constitutional Court at 5.

10 ACmHPR 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003) sec F(j)(1) requires a prosecutor not to initiate or continue prosecution where charges are unfounded.

11 For other ingredients of these rights, see Constitution secs 41 & 42; African Charter art 7; ICCPR art 14; R Murray *The African Charter on Human and Peoples' Rights: A Commentary* (2019) at 205-252.

12 Constitution sec 42(1)(c); ICCPR art 14(3)(d); African Charter art 7(1)(c).

13 As above.

14 S Rice 'A Human Right To Legal Aid' (2009) at 1 https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=S+Rice+%E2%80%98A+Human+Right+To+Legal+Aid%E2%80%99+&btnG= (accessed 24 July 2023); Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004) sec 1.

15 UN 'Access to Justice' https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ (accessed 24 July 2023).

16 *Groupe de Travail sur les Dossiers Judiciares Stratégiques v Democratic Republic of Congo* Communication 259/ 2002, ACmHPR (24 July 2013) at para 82.

17 *Kennedy v Trinidad and Tobago* Communication 845/1999, UNHR Committee (26 March 2002) UN Doc CCPR/C/74/D/845/1998 (2002) at para 7.10; *Isiaga v Tanzania (merits)* (2018) 2 AfCLR 218 paras 78-79. *Isiaga* confirmed that 'free legal aid is a right intrinsic to the right to a fair trial'. For civil matters, see art 14(1) ICCPR; Murray (n 11) at 205; Human Rights Committee General Comment 32 para 16.

18 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and People's Rights art 10(2); ACtHPR 'Rules of the Court' (2020) rule 31(4). In *Rajabu*

To ensure the enjoyment of the right of access to justice and a fair trial and other rights by the indigent in Malawi, Malawi's Legal Aid Act 28 of 2010 (LAA) establishes the Legal Aid Bureau (LAB), a public office that predominantly relies on funding from the Malawi government. LAB is mandated to offer legal aid to indigent and other vulnerable persons. In Malawi, legal aid comes in four forms namely legal advice, legal assistance, legal literacy services, and legal representation in both civil and criminal matters.[19] Legal aid is offered through legal aid advocates, who are licensed lawyers or legal practitioners admitted to the Malawi Bar (lawyers), as well as paralegals who are styled legal aid assistants.[20] Paralegals are non-lawyers who have received training on aspects of the law and who assist others in legal matters.[21] While paralegals can offer legal advice, legal literacy services, and legal assistance under the guidance of lawyers, they cannot represent clients in court.[22] Yet, over 90% of the complaints that LAB receives require legal representation.[23]

Currently, LAB has only 41 lawyers across Malawi against a caseload of over 24 000 cases, representing an average ratio of at least 585 cases per lawyer and over 520 cases requiring legal representation (90% of 585 cases). Noteworthy, this is the workload for only those persons who have managed to access LAB offices and not the entire number of persons who seek legal aid across Malawi, which is even higher. Malawi has 28 districts yet only has legal aid lawyers in six districts across the country, leaving the indigent in 22 districts, which is 78.5% of the districts, without access to a legal aid lawyer within the districts. Malawi is one of the poorest countries in the world and it survives on substantial economic aid.[24] As such, the Malawi government cannot afford to employ and pay a reasonable number of lawyers to make LAB more effective. Additionally, there are

and others v Tanzania (merits and reparations) (2019) 3 AfCLR 539 at para 52 ACtHPR held that the applicants should be granted legal aid on account of being 'lay, indigent and incarcerated'.

19 LAA secs 16-20.

20 LAA secs 12-14.

21 'Task Force on Justice, Justice for All – Final Report' (2019) at 13.

22 LAA sec 14; LELPA chapters IV and V.

23 This emanates from LAB's case statistics and the author's experience at LAB, where the author has worked for at least ten years. In most cases, the indigent will have pursued out-of-court options, such as engaging traditional leaders or the police, hence by the time they approach LAB court action would be necessary.

24 UNDP 'Human Development Report 2021/2022 Uncertain Times, Unsettled Lives: Shaping our Future in a Transforming World' (2022) at 274, 296 & 309. In this 2022 report, Malawi ranked 169 on the Human Development Index, a statistical index developed by the UN to measure countries' levels of social and economic development.

generally insufficient lawyers in Malawi. Currently, there are less than 800 licensed lawyers against a population of at least 19 million people.[25]

Consequently, numerous indigent and vulnerable people eligible for legal aid are deprived of their constitutionally guaranteed rights to access justice, effective remedies and a fair trial. This deprivation also affects their other rights, such as the right to liberty, property, and labour rights that fail to be safeguarded for want of legal aid.[26] For instance, having legal representation would be the difference between retaining or losing one's home in a court proceeding, or between being acquitted or wrongfully convicted of a crime by a court. Further, this deprivation also runs counter to Sustainable Development Goal 16 which envisages access to justice for all and effective institutions.[27] This Goal requires that 'the people must be able to access justice through the legal processes and institutions, fundamental rights must be enforced and defended, and the rule of law must be upheld.'[28]

Noteworthy, the challenges Malawi faces are widespread in Africa. The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, 2004 (Lilongwe Declaration) proclaimed that there are not enough lawyers in African countries to provide the legal aid services required by hundreds of thousands of persons and that the shortcomings in access to legal aid are aggravated by shortages of personnel and resources.[29] The African Commission on Human and Peoples' Rights (ACmHPR) echoed the same message in its Principles and Guidelines on the Right to a Fair Trial and Legal

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25 As of 30 May 2023, there were only 715 licensed lawyers in Malawi. See Malawi Law Society 'Legal Practitioners List for 2023-2024' (2023) https://malawilawsociety.net/membership/licensed-member-list (accessed 30 May 2023). The number remained the same as of 1 September 2023.

26 In *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 126 the ACmHPR held that it is through the respect of fair trial rights in article 7 of the African Charter 'that other rights guaranteed by the Charter may also be realised'.

27 Targets 16.3 and 16.6.

28 S Kalembera 'Jurisdictional limits for magistrates are hindering access to justice in Malawi' (2017) *Goal16 of the Sustainable Development Goals: Perspectives from Judges and Lawyers in Southern Africa* 103 at 109 https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Kalembera.pdf (accessed 26 July 2023).

29 Preamble para 12 & sec 7 https://www.penalreform.org/resource/lilongwe-declaration-accessing-legal-aid-criminal-justice-system/ (accessed 30 May 2023). 128 delegates from 26 countries, 21 of which were from African countries, attended a conference on legal aid in criminal justice systems across Africa in Lilongwe, Malawi from 22-24 November 2004. Judges, Ministers, lawyers, academics, prison commissioners, international, regional, and national non-governmental organisations were the attendees who adopted the declaration at the end of the conference.

Assistance in Africa, 2003 (ACmHPR Fair Trial Guidelines).[30] Similar challenges are also prevalent globally, hence they led to the adoption of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (UN Legal Aid Guidelines) by the United Nations (UN) General Assembly in December 2012.[31] The UN Legal Aid Guidelines is the first international instrument to deal with legal aid and recognize paralegals as legal aid workers. It calls upon states to incorporate other actors in the provision of legal aid work, including paralegals.[32] Likewise, the Lilongwe Declaration proclaims that the only feasible way to deliver effective legal aid to the maximum number of persons is to diversify legal aid service providers and rely on non-lawyers, including law students and paralegals.[33] The message is the same in the ACmHPR Fair Trial Guidelines.[34]

Despite these instruments, gaps remain. During the commemoration of the 10th Anniversary of the UN Legal Aid Guidelines on 20 December 2022 Jennifer Smith, a member of the expert group that was convened to draft the UN instrument, remarked that the adoption of the UN Legal Aid Guidelines 'was a huge victory, but much work is still needed to fulfil its promise' since 'there are still huge gaps in access to legal aid' globally.[35]

Noteworthy, when formulating the current 2010 LAA, the Malawi Law Commission (Law Commission), a constitutional office that is mandated to formulate and review laws, considered the question of whether paralegals should be granted limited rights to appear in subordinate courts for minor matters. However, according to its 2005 report, it decided against this 'on account of the strength of resistance' to the issue on the part of stakeholders at the consultative forum.[36] The stakeholders who resisted and their reasons are not stipulated in the report. Thus, the Law Commission did not probe the merits or demerits of the option.

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30 Sec H(g).

31 https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf (accessed 30 May 2023).

32 Guideline 13 & 14.

33 Sec 7.

34 Sec H(g).

35 10 Years Later: The UN Principles & Guidelines on Access to Legal Aid in Criminal Justice Systems (20 December 2022) https://www.theilf.org/post/10-years-later-the-un-principles-guidelines-on-access-to-legal-aid-in-criminal-justice-systems?blm_aid=18818607 (accessed 30 May 2023).

36 Law Commission Report on the Review of the Legal Aid Act (29 March 2005) at 37, footnote 36.

The Law Commission also considered the issue of paralegals' regulation and audience before subordinate courts when reviewing the old leading to the current Legal Education and Legal Practitioners Act 31 of 2018 (LELPA).[37] However, according to its 2013 report, it decided that a separate statute would be ideal, hence it also abandoned the issue and recommended that a special Law Commission team should be impanelled to 'develop legislation on paralegals'.[38]

The issue of paralegals' legal representation resurfaced in 2021 when LAB, triggered by its immense workload against very few lawyers, engaged Parliament's Legal Affairs Committee (Committee) with a proposal that its paralegals should be able to offer legal representation in subordinate courts.[39] In turn, the Committee solicited views from the general public. Notably, the initiative was supported by the Judiciary, Malawi Human Rights Commission, Prison Inspectorate, and at least six civil society organisations.[40] On the other hand, the Malawi Council of Legal Education (MCLE), Malawi Institute of Legal Education (MILE), and Malawi Law Society (MLS) in a staunch protectionist stance, vehemently resisted the proposal.[41] The resistance was so severe that MLS came out guns blazing and rushed to the High Court to strangle the initiative in its infancy so that even the views could not be solicited at all. The Court, in *Malawi Law Society v Chairperson of the Legal Affairs Committee of the National Assembly*,[42] held that the Committee had the mandate to solicit the views, contrary to MLS' contention that it did not have, and hence dismissed MLS' application. The Court stated that it was 'premature and unjustifiable' to 'stifle consultation and open dialogue on issues of the law in society' and that MLS could commence public interest litigation 'at an appropriate time and for appropriate reasons' if 'steps will have been taken that are considered unlawful or

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37 Report of the Law Commission on the Review of the Legal Education and Legal Practitioners Act (26 July 2013) at 141 & 142.

38 As above.

39 Legal Affairs Committee is responsible for matters concerning the administration of the law and providing oversight over constitutional bodies, amongst others, see Constitution sec 56(7)(c); *Malawi Law Society v Chairperson of the Legal Affairs Committee of the National Assembly* Judicial Review 54/2021, Malawi High Court, Principal Registry.

40 National Assembly 'Report of the Legal Affairs Committee on access to justice by vulnerable people through legal representation in the country' (2021).

41 As above. MCLE exercises general supervision and control over legal education; MILE provides practical legal training; and MLS regulates the practice of law, see LELPA secs 4, 15 & 64.

42 n 39 at 7-8.

unconstitutional'.[43] MLS' objections were thus not dealt with on their merits. After soliciting the views, the Committee recommended that the government, through the Law Commission and Ministry of Justice, 'should consider access to justice by the vulnerable people with extreme urgency' and 'should institute a comprehensive law review in order to address the issue of legal protectionism which has been hindering access to justice for the majority of the population for long in the country.'[44] No progress has been made beyond the recommendation.

Admittedly, no scholarly or comprehensive study has been done on the subject to explore whether the option is ideal or not to resolving the indigent's access to justice and fair trial plight in Malawi, and to guide relevant decision makers, especially the Law Commission, Executive, and Parliament. No wonder the issue keeps on resurfacing but always fails to take off. In the meantime, huge gaps persist in Malawi in the provision of legal representation and hence access to justice and fair trial for the indigent.

Notably, for over 40 years paralegals have been used in Malawi to prosecute criminal matters and to adjudicate matters as lay magistrates.[45] Paralegals working for the office of the Director of Public Prosecutions and police prosecutors appear in all classes of magistrate courts to represent the state.[46] Lay magistrates, whose position is even entrenched in Malawi's 1994 Constitution,[47] adjudicate both criminal and civil cases across the country,[48] with sentencing powers of up to 14 years imprisonment sentence.[49] Police prosecutors and lay magistrates are available in all 28 districts of Malawi. Thus, while there is appreciation under Malawi's legal system that prosecution and adjudication of matters cannot be restricted to lawyers due to lack of sufficient resources and personnel, conspicuously missing is a similar appreciation when it comes to representing the indigent in criminal and civil matters.

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43 *Malawi Law Society* (n 39) at 9.

44 National Assembly Report (n 40) at 25-26.

45 Prosecution paralegals were authorised to act as prosecutors in 1962, see Criminal Procedure and Evidence Code (Appointment of Public Prosecutors Rules) Chapter 8:01, Laws of Malawi. As of 1983, Malawi was already using lay magistrates, see MRE Machika *The Malawi legal system: An introduction* (1983) at 21-25.

46 Criminal Procedure and Evidence Code, Chapter 8:01, Laws of Malawi (CPEC) sec 79; Criminal Procedure and Evidence Code (Appointment of Public Prosecutors Rules) Chapter 8:01, Laws of Malawi.

47 Sec 110(1).

48 Courts Act, Chapter 3:02, Laws of Malawi (CA) sec 35.

49 CA sec 39; CPEC sec 14.

1.2. Problem Statement

Malawi is a poor country with an insufficient number of lawyers generally and, in particular, at LAB to provide legal aid. Resultantly, there is a wide gap in the realisation of the right of the indigent and other vulnerable groups to access justice, effective remedies, and fair trial. The problem is aggravated when it comes to legal aid in the form of legal representation because only lawyers can provide legal representation in courts in Malawi.[50]

1.3. Research Objectives

Against the above background, and recognising that laws do not exist in a vacuum but are supposed to be tailored and respond to the prevailing needs of the society at any given time, the main objective of this study is to assesses whether paralegals can be competently utilised in Malawi to fill the gap in the provision of legal aid to the indigent by providing legal representation in limited instances, such as in subordinate courts and minor civil claims and criminal offences. In so doing, the study also seeks to assess the optimum qualifications, training and regulation that could ensure effective legal representation by legal aid paralegals.

1.4. Research Question(s)

The key research questions are as below:

Main question:

- Can paralegals be competently utilised to offer limited legal representation to enhance the rights of access to justice and fair trial for the indigent in Malawi?

Sub-questions:

- How can allowing paralegals to offer limited legal representation be justified?
- What is the nature and scope of matters, civil or criminal, that paralegals can competently offer limited legal representation in?
- Which type of courts can paralegals competently offer limited legal representation in?

[50] LELPA chapters IV and V.

- What minimum qualifications should paralegals have to be effective at offering limited legal representation?
- How can paralegals' limited right to legal representation be regulated to ensure professionalism and effectiveness?

1.5. Literature Review

As observed above, the challenges Malawi faces concerning offering legal aid and ensuring access to justice and fair trial are widespread in Africa and, by extension, globally. The available literature recognises that there is a myriad of barriers regarding access to justice and fair trial for the indigent. Aside from the shortage of lawyers and financial resources, other barriers are illiteracy, delays in the administration of justice, the absence of sufficient courts and judicial officers to adjudicate matters, technical legal language, and exorbitant legal costs.[51] Restrictive laws regarding who can practice the law and render accessible forms of legal services, such as paralegals, have been recognised as another hindrance to access to justice.[52]

Whilst a lot has been written about paralegals, the author has found no scholarly literature that addresses the issue of legal representation by legal aid paralegals in Malawi. The available literature the author has combed through, from Malawi and Africa generally, mainly focuses on two key themes. First, it focuses on glorifying paralegals' important role in the realisation of the right of access to justice. Christening paralegals 'barefoot lawyers', such literature heaps praise on paralegals for their involvement in the informal and formal justice sectors through rendering legal advice, legal literacy services, legal assistance, and being the bridge between people deserving legal aid and lawyers.[53] Paralegals are also credited for informing policy, screening children in custody for possible diversion, facilitating the holding of camp courts in prisons in liaison with judicial officers and prosecutors thereby ensuring that trials are conducted and prison

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51 M Anderson 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2001).

52 DM Kaunda *Expanding access to justice for the Poor: Malawi's Search for Solutions* (2011) at 12.

53 UNODC 'Handbook on improving access to legal aid in Africa' (2011) at 31-36.

overcrowding is reduced, and tracing sureties, witnesses and parents or guardians of children arrested for being in conflict with the law, amongst others.[54]

Second, given paralegals' important role in both the formal and informal justice sectors, the literature also focuses on calling for their formal recognition.[55] For a long time before paralegals' first formal recognition as legal aid providers in Africa by the ACmHPR through the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa in 1999 (ACmHPR Dakar Declaration),[56] most legal aid paralegals in Africa have been rendering a helping hand without any formal recognition and regulation in state laws.[57] With the increased momentum from the African Union (AU) and UN human rights systems for the use of paralegals to provide legal aid in the formal justice sector within the last twenty-five years, the calls are for states to adopt legislation or at least policies to formally recognise legal aid paralegals and stipulate their roles.[58] Currently, only a few African states formally recognise paralegals as legal aid workers.[59]

The closest literature on the subject at the African level is merely a hint that calls for paralegals to offer legal aid through legal representation may be probable and imminent:[60]

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54 As above, Open Society Justice Initiative and the Paralegal Advisory Service Institute 'Empowering Paralegals to Assist Pretrial Detainees' (2010) at 3; M Schönteich 'A Powerful tool of Justice: Paralegals and the provision of affordable and accessible legal services' (2012) 42 *SA Crime Quarterly* at 21-25. Also see The Legal Aid Forum – Rwanda 'The Paralegal Practice Manual: A Guide to Paralegal Roles and Techniques' (2009).

55 R Nanima & E Durojaye 'A research report on the Legal Recognition of Paralegals in Africa: Lessons, Challenges and Good Practices' (2021) at 7 https://reformar.co.mz/publicacoes/legal-recognition-of-paralegals-in-africa.pdf (accessed 30 May 2023); A Kempen 'Access to legal aid is possible' (2017) 110(4) *Servamus Community-based Safety and Security Magazine* 33 at 35 https://journals-co-za.uplib.idm.oclc.org/doi/epdf/10.10520/EJC-62b10841a (accessed 13 August 2023).

56 G Dereymaeker *Formalising the law of paralegals in Africa: A review of legislative and policy developments* (2016) at 8.

57 Schönteich (n 54) at 25 & 26.

58 As above; R Nanima & E Durojaye (n 55); R Nanima & E Durojaye 'Paying Lip Service to Access to Justice?: A review of African Countries' Voluntary National Reviews on SDG 16.3 to the High Level Political Forum on SDGs' (2019) at 37-42; S Ibe 'Plugging the Legal Aid Gap in Africa: Paralegals to the Rescue?' (2022) 22(2) *ESR Review: Economic and Social Rights in South Africa* 4; Open Society Justice Initiative (n 54) at 4.

59 R Nanima & E Durojaye (n 55) at 7. For instance, Tanzania and Sierra Leone recognise paralegals through the Legal Aid Act 1 of 2017 and Legal Aid Act 6 of 2012 respectively. The paralegals provide legal aid other than through legal representation.

60 UNODC (n 53) at 31.

> with the system inundated with cases and under pressure to perform, the notion that *trained non-lawyers can provide* appropriate … advice and *even representation* is less far-fetched today than it was seen to be 10 years ago.[61]

However, the literature does not go beyond the hint to actually call for and attempt to justify the use of paralegals to offer legal aid through legal representation.

Beyond Africa, in a 2019 article concerning access to justice in the United States of America entitled 'Paralegal Assistance and Limited Representation as Alternatives to Self-representation', Cook takes off from a good angle discussing the prevalence and drawbacks of self-representation and thereafter suggests expanded paralegal assistance and limited representation as two solutions.[62] However, her touchdown ends with a recommendation for limited representation not for paralegals but for lawyers.[63]

The most relevant literature on the subject comes from and pertains to Ontario, Canada. The province of Ontario allowed paralegals to represent clients in court in 2007.[64] It represents a very rare situation in the world where paralegals have been allowed to penetrate the most jealously and strongly guarded profession by lawyers and represent clients.[65] Trabucco observes that there exists an 'access to justice crisis' in Canada, yet there is continued resistance by lawyers in all other provinces of Canada, besides Ontario, to allow paralegals to represent clients in court as one ready solution.[66] She observes that allowing paralegals to represent clients in court in Ontario has enhanced access to justice.[67] However, she does not specifically examine the question of the

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61 My emphasis.

62 L Cook 'Paralegal Assistance and Limited Representation as Alternatives to Self-Representation' (2019) 32(1) *Journal of the American Academy of Matrimonial Lawyers* 193.

63 Cook (n 62) at 213. By limited representation, the author entails that a lawyer should break down legal tasks into a menu for a client to choose only one or a few tasks to minimise costs.

64 L Trabucco 'What Are We Waiting For? It's Time to Regulate Paralegals in Canada' (2018) 35 *Windsor Yearbook of Access to Justice* 149 at 150 https://doi.org/10.22329/wyaj.v35i0.5277 (accessed 5 September 2023).

65 Paralegals are licensed to independently represent people in Small Claims Court, Provincial Offences Court, some criminal matters, and before tribunals. Ontario is the only province in Canada to allow and regulate paralegals to represent clients, see T Donnelly 'Celebrating 15 years of regulation of Ontario's paralegals' *Law Society of Ontario* (2022) https://lso.ca/gazette/blog/celebrating-15-years-of-regulation-of-ontario%E2%80%99s-pa (accessed 5 September 2023).

66 Trabucco (n 64) at 149-150.

67 Trabucco (n 64) at 151.

indigent's right of access to justice and fair trial. Furthermore, since the literature focuses on Canada, it naturally does not address the issue of legal aid paralegals' legal representation in Malawi.

Admittedly, the discussion of having paralegals representing clients in court is a very unpopular subject as lawyers are protectionists when it comes to the practice of the law. This explains the dearth of literature on the subject. However, as Freeman correctly argues, giving people rights but without access to people who can present those rights in the form of the right of representation is of little value.[68] Not every person has the capacity to conduct self-representation effectively.[69] Therefore, this study explores the gap in legal representation for the indigent in Malawi and assesses if it can be filled up by paralegals.

If found to be a workable solution, this would enhance access to justice and fair trial for the indigent in Malawi. The study could specifically guide Malawi's key stakeholders in the initiation and formulation of laws, particularly the Law Commission, Executive, and Parliament, in addressing the issue of paralegals' legal representation that has repetitively arisen yet repetitively failed to take off. Additionally, the initiative can be replicated in other countries struggling with similar access to justice and fair trial challenges within and outside the African continent, especially developing countries. Finally, the study would also grow the literature and jurisprudence on the subject, especially given that the milestones and momentum for the formal recognition and utilisation of paralegals to provide legal aid in the formal justice system under the AU and UN human rights systems have only come about within the last twenty-five years, to wit, from 1999 in Africa[70] and 2012 globally.[71] In Malawi, formal recognition of paralegals in the provision of legal aid, other than through legal representation, only came in 2010 with the enactment of LAA. Hopefully, the study may fuel the momentum further and, possibly, spur the promulgation of a treaty on the subject.

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68 M Freeman 'The Value and Values of Children's Rights' in U Kilkelly & L Lundy (eds) *Children's Rights* (2017) at 16.

69 *Pett* (n 1) at 132.

70 ACmHPR 'Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa' (1999); ACmHPR 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003); Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004).

71 UN 'Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' (2012).

1.6. Methodology

This study is mainly based on desk research. It focuses on literature as well as Malawian, international, and comparative foreign law touching on legal aid, access to justice, fair trial, and legal representation. This includes books, articles, reports, decided cases, soft law, and discussions with supervisors. The study particularly draws some lessons from Ontario, Canada, where paralegals represent clients in court. The lessons unearthed from the desk research aid the study's position and recommendations.

1.7. Overview of Chapters

This dissertation is divided into five chapters. Chapter one introduces the gist of the study. It gives background information to the research, problem statement, research questions, literature review and significance of the study, methodology, layout, and limitations. The chapter also unpacks the key terms and concepts used in the study such as paralegals, legal aid, access to justice, and fair trial.

Chapter two covers jurisprudential theories and concepts that aid the critical discussion and analysis of the research topic as well as form the backbone of the study. In particular, it discusses sociological, *ubuntu*, and natural law legal theories and concepts that cumulatively postulate that the law must reflect and address the needs and problems of society, and be rational and just.

Chapter three justifies the use of legal aid paralegals to offer limited legal representation. Amongst others, it draws from the jurisprudence from the AU and UN international human rights systems, Malawi's regulatory framework that currently allows paralegals working for the prosecution and lay magistrates to prosecute and adjudicate matters, as well as from comparative foreign jurisprudence. The chapter also draws from the comparative medical profession where practitioners other than and less qualified than medical doctors are allowed to discharge limited medical work, including conducting some operations or surgeries. It also addresses probable challenges or counterarguments to the option.

Chapter four explores and proposes a model of operation and regulation of paralegals' limited legal representation, especially in subordinate courts and in less complex civil and criminal matters, that can effectively solve the indigent's access to justice and fair trial

plight, yet also ensure that such and other rights are not compromised. It includes proposing requisite minimum qualifications and training.

Chapter five concludes the study and gives recommendations.

1.8. Limitations

The study is limited to desk research. Further, whilst legal aid is broad, similar to access to justice and fair trial, the main focus of this study is on the legal representation aspect. The study is also limited to paralegals' legal representation in the formal justice system, hence does not specifically engage with paralegals' roles in the informal justice system. Finally, given that the identified gap pertains to the indigent, the study is thus limited to exploring the utilisation of paralegals in respect of indigent people or for legal aid purposes.

Chapter Two

Theoretical Framework: Sociological Jurisprudence, the *Ubuntu* Conception of the Law, and the Natural Law Theory

> The law should always be viewed from the standpoint of society, and not from the standpoint of law itself. …The law is made for society, and not society for law. The interests of society are primary; the interests of the law [are] secondary. Society is the master, and the law its handmaiden.[72]

2.1. Introduction

Laws do not exist in a vacuum. Laws exist in societies driven by values,[73] needs, challenges, and aspirations of the societies. Thus, laws are a social construct and are always a by-product of some values and considerations.[74] Building on the foundation laid in chapter one, this chapter jackets the study with a theoretical framework. It discusses some theories and concepts that inform or ought to inform laws, particularly sociological jurisprudence, *ubuntu* concept, and natural law legal theory. It concludes by weaving the theories and concepts into a jurisprudential strand which forms the benchmark for analysing whether legal aid paralegals' legal representation is justifiable.

2.2. Sociological Jurisprudence

Sociological jurisprudence considers the law in relation to society, especially the way the law is linked to health, welfare, education, economics, and other social activities. Sociological legal theories reject the view that law is a closed logical order and postulate that the law is related to its social context.[75] Ehrlich asserts that law is derived from social facts or forces, consideration of which ensures that solutions are found to emerging problems for which the existing formal law does not provide solutions.[76]

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72 LB Colt 'Law and Reasonableness' (1903) 26 *Annual Report of the American Bar Association* 341 at 460-461.

73 R Cotterrell *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (2018) at 17 quoted in BZ Tamanaha 'Sociological Jurisprudence Past and Present' (2019) 19(3) *Law and Social Inquiry, Forthcoming, Washington University in St Louis Legal Studies Research Paper* 1 at 29.

74 D Priel 'Law as a Social Construction and Conceptual Legal Theory' (2019) 38(3) *Law and Philosophy* 267; H Bhandarkar 'The Law as a Social Construct' *Legal Service India E-Journal* https://www.legalserviceindia.com/legal/article-3114-the-law-as-a-social-construct.html (accessed 19 October 2023).

75 MDA Freeman *Lloyd's Introduction to Jurisprudence* (2008) at 835.

76 Freeman (n 75) at 835 & 846-847.

Jhering, another scholar, contends that laws are instruments for serving the needs of society, and their purpose should be to further and protect the needs of society.[77] For Jhering, the law is 'infinitely varied and relative to the different societies'.[78] Thus, the '*law cannot make the same regulations* for *all the time* and *for all the people* [but it] must *adapt* them to the *conditions of the people*, to their *degree of civilisation* and to the *needs of the time*.'[79]

On his part, Pound contends that laws must be developed in relation to existing social needs and to further social ends.[80] He asserts that sociological jurisprudence 'wrestles with concrete legal and social problems' in a bid to solve society's problems.[81] He sees the law as a tool for social engineering to match social circumstances, achieve social purposes, and to comport with the prevailing sense of justice within society.[82]

Given the importance of society and its needs, sociological legal theorists contend that '[a]ny portion of the law needs re-examination to determine how far it fits the society it purports to serve'[83] in a bid to promote the law's 'well-being' and justice.[84] Therefore, as the needs and interests valued in society change, 'the law does and should change as well' and satisfy the demands of society.[85]

A typical example of sociological jurisprudence in action that demonstrates the law reacting to the needs of society is the adoption of the African Charter on the Rights and Welfare of the Child, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disability in Africa. Despite the existence and ratification of corresponding UN treaties on similar thematic areas by African states, Africa still required these treaties that 'Africanise' human rights by addressing the needs, realities, and issues

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77 RWM Dias *Jurisprudence* (1980) at 423.
78 EG Nalbandian 'Introductory Concepts of Sociological Jurisprudence: Jhering, Durkheim and Ehrlich' (2010) 4(2) *Mizan Law Review* 348 at 350.
79 As above. My emphasis.
80 Freeman (n 75) at 850; Tamanaha (n 73) at 16.
81 Tamanaha (n 73) at 23.
82 Tamanaha (n 73) at 27; S Vago *Law and Society* (1981) at 21.
83 Karl Llewellyn, see Tamanaha (n 73) at 19.
84 Tamanaha (n 73) at 29, 37 & 38.
85 Tamanaha (n 73) at 13-14.

affecting children, women, and persons with disabilities endemic to African societies, including the communitarian aspect.

2.3. *Ubuntu* Conception of the Law

Ubuntu is a common term amongst many ethnic groups in Africa albeit under different formulations.[86] *Ubuntu* embodies the gist of being human and a positive perception of African personhood.[87] It entails that a person is a person through others, meaning that 'each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through recognition of the individual's humanity.'[88] It thus represents the collective interdependence and solidarity of communities of affection, unique African values, and an African worldview.[89] *Ubuntu* is a philosophic ethic that also typifies humanity, humaneness, and morality.[90] Its relevance spreads across disciplines and exists not only in law but also in religion, business, democracy, politics, social security, gender, globalisation, and healthcare, among others.[91]

With a specific focus on the law, Ramose propounds an *ubuntu* or African conception of the law, and asserts that '[l]aw consists of rules of behaviour contained in the flow of life'.[92] He posits that *ubuntu* law aims at achieving justice, and is flexible and adaptable to changing social circumstances since social realities are never static.[93] He postulates that 'both justice and the validity of law are judged by the yardstick of *ubuntu*', and hence for the law to be worth its name and to command respect, it must evidence *ubuntu*.[94]

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86 MJ Nkhata 'Rethinking governance and constitutionalism in Africa: The relevance and viability of social trust-based governance and constitutionalism in Malawi' PhD thesis, University of Pretoria, 2010 at 21 & 33 https://repository.up.ac.za/bitstream/handle/2263/25693/Complete.pdf?sequence=9&isAllowed (accessed on 4 August 2023); R Tambulasi & H Kayuni 'Can African feet divorce Western shoes? The case of 'Ubuntu' and democratic good governance in Malawi' (2005) 14(2) *Nordic Journal of African Studies* 147 at 148.

87 Nkhata (n 86) at 21 & 33; L Mbigi *The spirit of African leadership* (2005) at 69.

88 Tambulasi & Kayuni (n 86) at 148.

89 Nkhata (n 86) at 21 & 33.

90 JY Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1 at 2.

91 Nkhata (n 86) at 38.

92 MB Ramose 'An African perspective on justice and race' (2001) https://them.polylog.org/3/frm-en.htm (accessed 15 August 2023)**;** D Bilchitz, T Metz & O Oyowe *Jurisprudence in an African Context* (2020) at 31-32.

93 As above.

94 As above.

The *ubuntu* notion, as expressed proverbially that 'an individual is an individual through others', entails that one cannot impinge on the rights of others but safeguard them since 'your pain is my pain [and] your salvation is my salvation.'[95] Thus, *ubuntu* is also a pro-human rights notion. It safeguards both individual and societal rights.[96]

To the extent that the *ubuntu* conception of the law is anchored in social realities and welfare, it can thus be christened the African sociological jurisprudence. It represents an autochthonous African legal theory. Noteworthy, the *ubuntu* concept has gained judicial recognition and application. In *Steven Mponda and Others v Council of the University of Malawi and Another*[97] the High Court held that the 'spirit of *umunthu*' has a major bearing on human rights for Malawians and Africans in general.

2.4. Natural Law Legal Theory

Natural law legal theory propounds that there is a higher morality or certain higher principles of human conduct which are beyond and superior to man-made laws; that the principles of natural law have universal validity and applicability, and are immutable.[98] Truths of natural law are ascertainable by humans through reason with which they are by nature endowed,[99] and which is the first principle of all human action.[100] Cicero thus states that true law is the right reason in agreement with nature.[101] Things that assist man in achieving certain natural ends that his nature inclines him to, like procreating children and ensuring his survival, assist the purposes of nature and hence constitute natural law.[102] Humans fulfil their survival as a natural purpose by enjoying and safeguarding their human rights such as the right to life, property, liberty, security, family and marriage. Natural law thus hinges on nature or naturalness and reason.

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95 Tambulasi & Kayuni (n 86) at 150.

96 As above.

97 Judicial Review 13/2020, Malawi High Court, Zomba District Registry at 18. *Umunthu* is the Malawian version of *ubuntu.* Also see *S v Makwanyane* 1995 (3) SA 391 (CC); *AZAPO v The President of the Republic of South Africa* 1996 (4) SA 672 (CC).

98 JG Riddall *Jurisprudence* (2005) at 54-55.

99 Riddall (n 98) at 58.

100 Freeman (n 75) at 138-143.

101 JW Harris *Legal Philosophies* (1980) at 7-8.

102 Riddall (n 98) at 57.

Aquinas avers that human laws add much to the natural law which is useful to human activity, and so long as human law is guided by a reasoned assessment of the common good it has the power to bind in conscience.[103] Therefore, Aquinas adds, the validity of a law depends upon it being just, and that in human affairs a thing is said to be *just when it accords aright with the rule of reason*.[104] If man-made law is unjust or unreasonable it offends natural law, and hence it is invalid and should not be obeyed.[105] Conversely, a norm that is just or reasonable is treated as law even if it has not been formally adopted.[106] This is unlike legal positivism which espouses that a law suffices as valid solely based on the way it is enacted notwithstanding that it may be unreasonable or unjust.[107]

Indeed, reason or rationality is indispensable in human affairs and, by extension, the law. For instance, judicial review, law of torts, and interpretation of statutes are anchored in gauging whether the conduct of persons or bodies and an interpretation is reasonable or not.[108] It is on account of natural law premises that, historically, most oppressive, unjust or unreasonable laws have been challenged and societies freed from the yokes of oppression.[109] Ultimately, for natural law theorists, laws have to aid the natural purposes of human beings and be rational and just.

2.5. Conclusion

This chapter has demonstrated that laws are spin-offs of some values and considerations, and that laws cannot be divorced from society and its attendant realities. Sociological, *ubuntu,* and natural law theories all postulate that laws must be just and solve society's problems. As a common denominator, laws must therefore encapsulate basic jurisprudential underpinnings, namely, they must reflect and address the needs of a

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103 Harris (n 101) at 9.

104 Freeman (n 75) at 138-143; Bilchitz, Metz & Oyowe (n 92) at 48.

105 C Roederer & D Moellendorf *Jurisprudence* (2004) at 26; Harris (n 101) at 9.

106 Bilchitz, Metz & Oyowe (n 92) at 57.

107 Bilchitz, Metz & Oyowe (n 92) at 47 & 48.

108 *Bussily v Car Hire Ltd & Another* [1995] 2 MLR 521 (HC); *Zodetsa & Others v Council for the University of Malawi* [1994] MLR 412 (HC); *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Malawi Law Society v Stanbrook* [1995] 2 MLR 474 (SCA).

109 For instance, pro-human rights and democratisation struggles by John Chilembwe in Malawi, Nelson Mandela and Bram Fischer in South Africa, and Martin Luther King in the United States of America, see B Morris 'The Chilembwe Rebellion' (2015) 68(1) *The Society of Malawi Journal* 20; DO Linder 'Famous Trials: I am Prepared to Die' https://famous-trials.com/nelsonmandela/709-preparedtodie (accessed 15 August 2023); S Clingman *Bram Fischer: Afrikaner Revolutionary* (2011) at 409-410.

specific society at any given time in sync with its level of civilisation, and, in so doing, laws must accord with reason, be just, and be dressed in *ubuntu* or humaneness. This study will thus use this jurisprudential aggregate of sociological, *ubuntu*, and natural law legal theories and concepts to analyse the issue of paralegals' limited right to legal representation in subsequent chapters. Specifically, it will analyse if the current legal framework that does not allow legal aid paralegals to represent clients yet allows prosecution paralegals and lay magistrates to have court audience, is reasonable, just, addresses Malawi's societal problems, and is dressed in *ubuntu* or humaneness.

Chapter Three

A Case for Paralegals' Right to Legal Representation: Half-bread or Zero-bread?

> The legal profession has created an all-or-nothing situation, where the client either gets Cadillac service with a lawyer or goes on foot by himself, when in truth Buick service with a paralegal might be entirely adequate and far better than what he will do on his own.[110]

3.1. Introduction

The yawning lacuna pertaining to access to justice and fair trial for the indigent that chapter one has unearthed partly stems from Malawi's current legal framework that restricts legal representation to lawyers.[111] Accordingly, this chapter examines the option of utilising paralegals to represent the indigent in court to bridge the lacuna. It also addresses actual and probable counterarguments to the option. In so doing, this chapter builds on the jurisprudential strand coalesced in chapter two, to wit, that laws must reflect the needs of society, solve society's problems, be rational, just, and evidence *ubuntu* or humaneness.

3.2. Does Legal Representation Matter?

In Malawi, a litigant has the right to self-representation, also known as *pro se* representation, except in a few instances such as in homicide matters where the state grants automatic legal representation to any accused person through LAB.[112] The fact that the default mode of litigating is self-representation immediately begs the question of whether legal representation matters at all.

Avowedly, self-representation has its own advantages. First, it is cheaper. Second, court proceedings are normally faster without lawyers, especially in less complicated matters. Lawyers often delay matters because of their elaborateness, court dates are tied to their free dates, and have more than one client to assist, amongst others. Third, a *pro se* litigant, by being perceived as a weaker party for being unrepresented hence appearing

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110 I Scott, Ontario's Attorney General, see Legislative Assembly of Ontario 'Hansard Transcripts: Paralegal Agents Act' (26 June 1986) https://www.ola.org/en/legislative-business/house-documents/parliament-33/session-2/1986-06-26/hansard (accessed 3 October 2023).

111 LELPA chapters IV and V.

112 CA secs 4(5) & 60A; *Nthala & Others v Republic* [2000-2001] MLR 356 (SCA) at 358; *William Daudi v Republic & Legal Aid Bureau* Constitutional Case 1/2018, Malawi High Court, Principal Registry sitting as Constitutional Court at 8. This is also the position under international human rights law, see *Groupe de Travail sur les Dossiers Judiciares Stratégiques* (n 16) at para 82; *Isiaga* (n 17) paras 78-79.

as a 'David' against a 'Goliath', may occasionally gain a tactical advantage against an adversary by obtaining sympathy from the court. Additionally, since a litigant knows their story better than anyone else, self-representation may be effective as opposed to having a novice or disinterested lawyer.[113] Justice can often 'be done by a good layman than a bad lawyer.'[114]

However, self-representation has numerous disadvantages. It is not every person who is capable of effective self-representation.[115] Some people cannot bring out points in their favour or show weaknesses on the other side.[116] They may lack basic skills in how to examine or cross-examine witnesses[117] such that they may not cross-examine at all or, if they do, the same may only be 'perfunctory, superficial and aimless'.[118] They may, instead of building and advancing their cases, end up bulldozing their cases.

The reasons for these are many. A litigant may be 'tongue-tied, nervous, confused, wanting in intelligence',[119] unsophisticated or uneducated.[120] Further, the law and its practice are highly technical fields, hence even an intelligent or educated person may not be able to manoeuvre the meanders of court proceedings in the absence of special legal knowledge and training. In short, a *pro se* litigant is usually both 'legally and generally ignorant';[121] hence neither competent to 'venture into the world of criminal and civil trial practice, nor into the world of codes, digests and citators'.[122] However, even if a *pro se* litigant is legally knowledgeable or even a lawyer, as an interested party they may lack the ability to see both sides of a case.[123] Self-representation has thus been described as akin to 'self-surgery in medicine'.[124] The precarious situation *pro se* litigants find

113 RT Begg 'The reference librarian and the pro se patron' (1976) 69 *Law Library Journal* 26 at 29.
114 *Enderby Town Football Club Ltd v Football Association Ltd* [1971] 1 All ER 215 at 218 (CA).
115 *Pett* (n 1) at 132.
116 As above.
117 As above.
118 *S v Khanyile & Another* 1988 (3) SA 795 (NPD) at 797.
119 *Pett* (n 1) at 132.
120 GD Makanje 'The protection of vulnerable witnesses during criminal trials in Malawi: Addressing resource challenges' (2020) 20 *African Human Rights Law Journal* 206 at 210.
121 Begg (n 113) at 27.
122 As above.
123 MT Morodomi **'**The Man Who Represents Himself Has a Fool for a Client' 19 July 2017 https://www.acbanet.org/2017/07/19/man-represents-fool-client/ (accessed 21 August 2023).
124 Begg (n 113) at 27; *United States v McMann* 236 F Supp 592 at 593.

themselves in gave birth to the maxim that 'the man who represents himself has a fool for a client'.[125] When a person self-represents, it is easy to 'get lost and confused'.[126]

A good illustration of the hazards of self-representation is the case of *A Den Adihaji and 67 Others v Republic*[127] wherein 68 Somalians pleaded guilty to and hence were convicted of the offence of illegal entry. Yet, the Immigration Act which the prosecution relied on created no such offence. On appeal, the Malawi High Court observed that they only pleaded guilty 'for lack of better knowledge and appreciation of the legal matters before them', hence quashed the conviction and ordered that they had to be processed as asylum seekers instead.[128] In the South African case of *State v Sonele Percival Bhengu*[129] the accused person could 'barely cross-examine state witnesses' or 'advance his case any further', prompting the court to proclaim that '*in truth, he was merely a stranger in the courtroom entangled in the legal machinery of the courtroom drama to swallow him*.'[130]

Further, the reason that self-representation is faster is occasionally a double-edged sword. In certain cases, it ends with delays on account of an appeal or a re-trial process to address breaches of fair trial tenets arising from self-representation. Similarly, a double-edged sword is the reason that self-representation is less costly. Occasionally, beyond compromising on one's rights and interests, a *pro se* litigant ends up losing more.[131] For instance, where he or she loses property or liberty in a civil or criminal case not properly defended.

Aside from self-detriment, a *pro se* litigant also places an undue burden on the judicial officer and court staff by creating the need for them to spend a disproportionate amount of time leading a *pro se* litigant through the maze of trial.[132] This burden also disrupts the principle of neutrality required of a judicial officer.[133] Essentially, in the process of guiding

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125 Morodomi (n 123); Begg (n 113) at 27.
126 Cook (n 62) at 195.
127 Criminal Appeal 74/2005, Malawi High Court, Lilongwe Registry.
128 As above at 6.
129 Review Case DR 596/2010 High Court, KwaZulu Natal para 6.
130 My emphasis.
131 M Masoud 'The importance of legal representation' (2018) https://masoudlaw.com/the-importance-of-legal-representation/ (accessed 21 August 2023).
132 Cook (n 62) at 196.
133 As above.

a *pro se* litigant to navigate the contours of court processes, the judicial officer is made to appear as siding or sympathising with them. Yet, a judicial officer ought to be a mere referee[134] and 'leave the management of the trials he hears and the combat waged in them to the adversaries thus engaged'.[135] Nevertheless, 'even the most conscientious and sympathetic' judicial officer guiding a *pro se* litigant would still leave a gap since, aside from providing guidance, he or she cannot go further to do for the litigant that which they are supposed to do.[136] For instance, trial observations conducted in Malawi showed that litigants 'miserably failed to conduct their cases' even when magistrates explained the procedure to them.[137]

Consequently, legal representation is very important. Legal representatives are knowledgeable in the law and its practice and hence can provide effective legal representation. They would spare a litigant the detriment of pleading guilty to a non-existent offence. They canvass material points to aid a litigant's position and plan the strategy and tactics to be used in a case.[138] As the trial progresses, many a time various and impromptu legal points arise requiring written or oral legal submissions to resolve. The legal representatives would know the law, or at least where to find it, to address such points. They object to the admissibility of any questionable evidence. They help a litigant advance their case not only by their evidence but also through the adversaries' evidence. They thoroughly and effectively cross-examine to 'show errors [made by the adversaries' witnesses] in observation and recollection, to demonstrate uncertainty and confusion in their minds, to exploit inconsistencies and improbabilities in their versions, [and] to expose bias and downright lying once such looks likely.'[139] Like signposts, legal representatives guide the court to relevant legal authorities and persuade or at least assist the court with perspectives of analysing the evidence and the law. Further, since they are not party to the case, ordinarily legal representatives would not be emotionally attached to the case

134 Cook (n 62) at 197.
135 *Khanyile* (n 118) at 799.
136 *Khanyile* (n 118) at 798.
137 W Schärf & Others 'Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums' (2002) at 14 https://gsdrc.org/document-library/access-to-justice-for-the-poor-of-malawi-an-appraisal-of-access-to-justice-provided-to-the-poor-of-malawi-by-the-lower-courts-and-the-customary-justice-forums/ (accessed 30 August 2023).
138 *Khanyile* (n 118) at 798.
139 As above. Also see *Republic v Dr Saulos Klaus Chilima* Criminal Case 10/2023, High Court, Lilongwe Registry at 7.

and are able to objectively assess both sides of the case and make better judgments.[140] Overall, as Justice Didcott said, legal representatives cast on the client's case 'the best light that the law and the evidence sheds.' [141]

Legal representation is thus both a core component of as well as a bridge to access to justice and fair trial.[142] It enables a litigant to present his or her case in a legally effective manner.[143] In that regard, it is now universally regarded as a necessity, not a luxury.[144] Studies evidence that legal representation is effective and beneficial.[145]

3.3. Justifying Paralegals' Limited Right to Legal Representation

This section focuses on why paralegals' legal representation can be a viable and justifiable option for the expansion of the indigent's right of access to justice and fair trial, which is the epicentre of this study.

3.3.1. Non-lawyers as Players in Court Proceedings

Indisputably, a court is a place where serious legal business affecting people's rights is transacted. An important question, though, should be asked: Is the court too sacred such that it is or ought to be an absolute no-go zone for non-lawyers? Not really. As observed above, Malawi's legal system already accommodates *pro se* litigants. Additionally, it accommodates many other non-lawyers who play diverse roles in court proceedings either as part of the judiciary or as legal representatives.

From the apex to the bottom, the Malawi judiciary comprises the Supreme Court of Appeal, the High Court, and courts subordinate to the High Court, namely the Industrial Relations Court (IRC) and magistrate courts.[146] Lay magistrates, who are specifically

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140 EST Poppe & JJ Rachlinski 'Do lawyers matter? The effect of legal representation in civil disputes' (2016) 43(4) *Pepperdine Law Review* 881 at 885.

141 *Khanyile* (n 118) at 798.

142 PM Bekker 'The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa' (2004) 37(2) *Comparative and International Law Journal of Southern Africa* 173 at 174, 176 & 177.

143 Bekker (n 142) at 177.

144 Bekker (n 142) at 176. Also see NC Steytler 'The undefended accused on trial: Justice in the lower courts' PhD thesis, University of Natal, 1986 at 18-31 https://researchspace.ukzn.ac.za/handle/10413/5235 (accessed 25 August 2023).

145 Poppe & Rachlinski (n 140) at 885, 933 & 942; Cook (n 62) at 196.

146 Constitution secs 104-110. The law also provides for local courts, but these are non-existent, see Local Courts Act, Chapter 3.03, Laws of Malawi.

recognised in the Constitution,[147] preside over three categories of graded magistrate courts.[148] People qualify for appointment as lay magistrates so long as they are 'fit and proper'.[149] Accordingly, for a long period, people with mere certificates in law have been appointed and served as lay magistrates.[150] It was only around 2020 that the judiciary started restricting appointments to holders of diplomas in law as a minimum qualification.[151] Lay magistrates have jurisdiction to preside over both criminal and civil matters across Malawi.[152] They have jurisdiction to try and determine any civil matter where the amount in dispute or value of the subject matter is 20 000 000 Malawi Kwacha or less (approximately 310 000 Rands) and, in criminal matters, they have sentencing powers of up to 14 years imprisonment.[153]

Jurors are the other lay players on the side of the judiciary. All criminal trials in the High Court are required to be by jury.[154] Whilst in 2008 some offences were exempted from being tried by a jury, the jury system remains for all offences not exempted, such as treason, abuse of office, and sexual harassment.[155] The jurors are mostly lay[156] and are the ones who assess the evidence and render a verdict.[157]

Coming to legal representatives, paralegals who prosecute criminal matters working for the office of the Director of Public Prosecutions, Anti-Corruption Bureau, Department of Immigration and Police appear in all classes of magistrate courts representing the

147 Sec 110(1).

148 CA sec 33. The provision establishes four categories of magistrate courts: Resident, First Grade, Second Grade, and Third Grade magistrate courts. The last three categories are presided over by lay magistrates and only the first category is presided over by lawyers.

149 CA sec 34(b).

150 Training and qualifications for lay magistrates and prosecutors are further discussed in chapter four.

151 Judicial Service Commission 'Vacancies for Third Grade Magistrates (Grade K)' (2020). This is the lowest tier of magistrates.

152 CA sec 35.

153 CA Second Schedule as read with sec 39(1); CPEC sec 14. Lay magistrates also exist in other jurisdictions like Jamaica, Zambia, and the United Kingdom.

154 CPEC sec 294(1).

155 CPEC sec 294(2). This provision entitles a Minister to exempt any offences from jury trials. Therefore, the Minister exempted some offences under the Criminal Procedure (Trials Without Jury) Order, notably homicide offences. In June 2023, the High Court ordered a jury trial and reiterated that all offences not exempted ought to proceed by jury in *Republic v Aubrey Sumbuleta* Criminal Case 4/2022, High Court, Principal Registry.

156 Legal Practitioners in active practice are excluded from service, see CPEC sec 296(g).

157 CPEC sec 321.

state.[158] For the police prosecutors, every police officer of the rank of Sub Inspector and above is appointed a public prosecutor in all criminal matters before subordinate courts and the law does not require that they should have any legal qualifications or training at all.[159] In practice, police prosecutors undergo a three-month training where they are taught criminal law, criminal procedure, law of evidence, advocacy, human rights, statutory law, and legal research.[160] Thus, the lowest cadre of police paralegals does not even have a minimum of a diploma in law. Yet, police prosecutors prosecute most cases within the criminal justice system due to a shortage of lawyers at the office of the Director of Public Prosecutions.[161]

In employment matters, non-lawyers are allowed to represent a party before the IRC. A party may be represented by an officer of a trade union or employers' organisation; a member or official of an organisation of which he or she is a member; a labour officer; a co-employee; or any other person that a party so appoints.[162] Despite the legal representation regime in the IRC being flexible and arguably capable of accommodating LAB paralegals, in practice the IRC refuses LAB paralegals audience on the unjustified understanding that once LAB is engaged as a legal representative, then it must be its lawyers who have to represent clients. Nevertheless, the major point remains that the law allows non-lawyers to render legal representation in the IRC.

All these non-lawyers impact people's human rights. For instance, through their decisions in criminal matters, lay magistrates impact the accused persons' right to liberty and fair trial, just like they impact the right to effective remedies and dignity of victims of crime. The same is true for prosecution paralegals through their prosecution of matters.[163] Lay legal representatives in the IRC also impact labour rights.

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158 CPEC sec 79; Criminal Procedure and Evidence Code (Appointment of Public Prosecutors Rules), Chapter 8:01, Laws of Malawi.

159 As above.

160 WhatsApp correspondence with C Panyani-Phiri, Malawi Police lawyer and prosecutor's trainer, on 4 September 2023.

161 Report of the Independent Expert on the enjoyment of human rights by persons with albinism on her mission to Malawi, Human Rights Council (14 December 2016), UN Doc A/HRC/34/59/Add.1 para 38.

162 Labour Relations Act, Chapter 54:01, Laws of Malawi sec 73(1).

163 States' duty to investigate, prosecute and try suspects hinges on the right to fair trial: *Zongo v Burkina Faso* Application 013/2011 ACtHPR (2014) paras 156 & 199; *Alex Thomas v United Republic of Tanzania* Application 005/2013 ACmHPR (2015) para 136.

Given that non-lawyers already participate in court proceedings in various capacities, including offering legal representation, there thus already exists a basis for allowing legal aid paralegals to likewise represent clients. At the centre of allowing non-lawyers to take part in court proceedings, aside from jurors, is an appreciation that Malawi's legal system cannot be restricted to only trained lawyers to prosecute or adjudicate matters due to insufficient resources and personnel. Given the insufficiency of LAB lawyers, this appreciation should equally apply to the indigent's legal representation. This will reflect Malawi's social realities in line with sociological and *ubuntu* jurisprudence.

Otherwise, it is illogical and devoid of *ubuntu* or humaneness and equality that the same legal system which, due to the insufficiency of resources and lawyers who can be prosecutors and magistrates, allows a lay prosecutor and magistrate to respectively prosecute and adjudicate a matter concerning an indigent person, but does not allow the indigent person who is a 'stranger in the courtroom'[164] to access a similarly qualified person, who might even be a former classmate to the former two, to defend him or her. It is irrational and unjust that Malawi's legal system allows such a 'stranger in the courtroom' to self-represent at the risk of self-detriment, but not to be represented by a legally knowledgeable paralegal. Yet, as sociological, *ubuntu*, and natural law legal theories demand, laws must be rational, just, and evidence *ubuntu* or humaneness.[165]

Crucially, there is evidence from Ontario, Canada, that paralegals' legal representation in court is workable.[166] There, clients assisted by paralegals have been 'highly satisfied' and paralegals have been touted as 'key providers' of access to justice for Ontarians.[167] Ontario's paralegals include those who hold graduate certificates, diplomas, and bachelors in paralegal studies.[168]

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164 *Sonele* (n 129) para 6.

165 See chapter two.

166 This is notwithstanding that Canada is wealthier than Malawi. In a 2022 UNDP report, Canada ranked 15 on Human Development Index, 154 places above Malawi, see UNDP 'Human Development Report' (n 24) at 272.

167 Trabucco (n 64) at 171-172.

168 Law Society of Ontario 'Accredited Paralegal Education Program' https://lso.ca/becoming-licensed/paralegal-licensing-process/paralegal-education-program-accreditation/accredited-programs (accessed 25 September 2023).

3.3.2. Jurisprudence from the AU and UN International Human Rights Systems

As observed in chapter one, the access to justice and fair trial challenges that Malawi faces are widespread globally. Such challenges gave birth to the ACmHPR Dakar Declaration in 1999, the ACmHPR Fair Trial Guidelines in 2003, the Lilongwe Declaration in 2004,[169] and the UN Legal Aid Guidelines in 2012.[170] They all call upon states to utilise paralegals to address the shortcomings in access to legal aid.[171] The UN Legal Aid Guidelines specifically recognise 'socioeconomic conditions' as a key basis for settling for this option.[172] This is an acknowledgment that the law has to rationally be aligned to and reflect social realities and the level of civilisation of society, as sociological, *ubuntu* and natural law legal theories postulate.

Guideline 14 paragraph 68(g) of the UN Legal Aid Guidelines specifically calls upon states to allow '*court accredited* and duly trained paralegals to *participate in court proceedings*.'[173] The use of the word 'participate', which entails 'to take part in or become involved in an activity',[174] together with 'court accredited' logically means or at least includes offering legal representation.[175] Accordingly, paralegals' right to offer legal representation is also grounded in emerging jurisprudence from the international human rights systems.

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169 ACmHPR endorsed it, and UN's Economic and Social Council recognised it, triggering the process that led to the drafting and adoption of UN Legal Aid Guidelines, see ACmHPR 'Resolution on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System - ACHPR/Res.100(XXXX)06' (2006) https://achpr.au.int/index.php/en/adopted-resolutions/100-resolution-adoption-lilongwe-declaration-accessing-legal-aid (accessed 20 May 2023); *Alex Thomas* (n 163) para 121; UN ECOSOC 'Commission on Crime Prevention and Criminal Justice' (2007) UN Doc E /CN.15/2007/L.16/Rev.1.

170 The former two are both criminal and civil justice-oriented, and the latter two are criminal justice-oriented.

171 UN 'Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' (2012) guidelines 13 & 14; ACmHPR 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003) sec H(g)-(k); Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004) para 12 & sec 7.

172 Preamble para 10.

173 My emphasis.

174 Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/participate (accessed 24 August 2023); The Law Dictionary https://thelawdictionary.org/participate/ (accessed 24 August 2023).

175 Also see ACmHPR 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003) sec A(2)(f). It does not restrict representation to lawyers but broadens legal representation by entitling a person to be represented by a 'legal representative or *other qualified* persons.'

Admittedly, all four instruments are mere soft law, which is considered not binding on states.[176] However, soft law has abundant value in international law. As Killander observes, soft law has the capacity to inform domestic laws and policies.[177] For instance, countries like Angola, Kenya, Uganda, Burundi, Liberia, Sierra Leone, and Sudan have adopted laws and policies dealing with internally displaced persons based on the UN Guiding Principles on Internal Displacement.[178] The use of soft law instruments facilitates consensus which may be difficult to secure through treaties.[179] Furthermore, in practice, soft law instruments may 'acquire considerable strength in structuring international conduct, or even reflect, initiate or consolidate that very practice of states through which customary international law is built.'[180] Most importantly, soft law instruments may actually include individual binding norms 'regulating the rights and obligations of states in a determinate manner.'[181] This study contends that the soft law instruments discussed here hinge on existing binding norms of access to justice and fair trial, as such the use of legal aid paralegals to offer legal representation does not necessarily create any fresh obligation. Conversely, it is merely an interpretation and application of the norms that Malawi is already bound to under its Constitution and international human rights law.[182] Such interpretation of human rights norms must be felt and resonate at the domestic level.[183]

Standing on this solid benchmark, it is not surprising that the ACtHPR has endorsed and relied on both the ACmHPR's Fair Trial Guidelines and the Lilongwe Declaration.[184]

176 A Orakhelashvili *Akehurst's modern introduction to international law* (2018) at 48-49.

177 M Killander 'How international human rights law influences domestic law in Africa' (2013) 17(si-1) *Law, Democracy & Development* 378 at 389.

178 As above.

179 Orakhelashvili (n 176) at 49.

180 As above.

181 As above. For an elaborate discussion of soft law, see M Naicker 'The use of soft law in international legal system in the context of global governance' LLM Dissertation, University of Pretoria, 2013 at 15-18 & 36-41 https://repository.up.ac.za/handle/2263/41197 (accessed 25 August 2023).

182 ACmHPR has the mandate to interpret the African Charter under art 45(3) thereof. Malawi is mandated to 'have regard to current norms of public international law' under sec 11(2)(c) of the Constitution.

183 F Viljoen 'From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25-year mark' (2013) 17(si-1) *Law, Democracy & Development* 298 at 314.

184 *Alex Thomas* (n 163) para 121.

Notably, even offering legal representation before the ACtHPR is not restricted to lawyers but is rather open to both lawyers or counsel and 'other person of the party's choice'.[185]

3.3.3. Comparison with the Medical Profession

The model this study proposes is also used in the medical profession in Malawi. Medical practitioners, other than and less qualified than medical doctors, are allowed to discharge medical work, including conducting some surgical procedures. A 'medical practitioner' is any person who practices medicine or surgery and may be a holder of a degree, diploma or other recognised qualification.[186] Any medical practitioner, which term includes clinical officers and paramedicals, can even run a private practice.[187] The law allows this even though the non-doctors make life-and-death decisions that impact people's right to health and life. The rationale is the same: Malawi is underdeveloped to afford to restrict the practice of medicine to only medical doctors or degree holders and risk depriving people of medical services. This position is rational, humane and reflects Malawi's realities in line with sociological, *ubuntu*, and natural law legal theories. Consequently, there is nothing odd to allow properly qualified and trained paralegals to offer legal representation in limited instances.

3.3.4. The Gains from Paralegals' Legal Representation

Paralegals are less expensive than lawyers.[188] It would thus be easier to employ more paralegals to supplement lawyers to fill the yawning access to justice gap. For instance, a salary for the most junior lawyer at LAB is sufficient to employ three paralegals at entry level.

Further, paralegals are more accessible than lawyers since they stay in communities or rural and hard-to-reach areas which lawyers shun.[189] For instance, whilst LAB has its lawyers in only six out of 28 districts, its paralegals are in 17 districts. Just like Justice

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185 ACtHPR 'Rules of Court' (2020) rule 31(1). ACtHPR's website stipulates that '[o]ne need not be a lawyer to represent a party before the African Court', see ACtHPR 'Fees and Legal Aid' https://www.african-court.org/wpafc/fees-and-legal-aid-3/ (accessed 25 August 2023).

186 Medical Practitioners and Dentists Act, Chapter 36:01, Laws of Malawi, secs 26(1).

187 Medical Practitioners and Dentists Act secs 38 & 60(3); Paramedicals and Allied Health Professionals (Private Practice) Regulations; CPEC sec 180(2).

188 M Schönteich (n 54) at 21.

189 As above; Kempen (n 55) at 34.

Ntaba has written in support of lay magistrates that they dispense justice in rural areas, properly trained legal aid paralegals would likewise mete out justice in rural areas through their legal representation.[190]

Since LAB paralegals are in most districts, allowing them to represent clients would also reduce operational costs. For instance, for a case in Nkhotakota district, a lawyer must travel about 400 kilometres to and from the capital city of Lilongwe to represent a client in the magistrate court, spending at least 140 000 Malawi Kwacha (2 500 Rands) for fuel and allowances for each court trip. On average, each court case requires at least three trips to conclude, and the estimated cost per trip does not include the wear and tear of the few and aging fleet. Further, this is just one case out of thousands. This is not sustainable. In fact, LAB once suspended defending homicide suspects because it did not have funds to cater for its lawyers' travel to the districts for trials.[191] It took the intervention of donors to inject resources and bail out the indigent.[192]

Yet, Nkhotakota district has a LAB paralegal. The magistrate and police prosecutors there are also paralegals. Thus, if the LAB paralegal was able to represent clients like the similarly qualified prosecutor before the similarly qualified magistrate, such resources would be saved. In fact, some of the matters are petty to have a lawyer cover 400 kilometres and incur a lot of expenses, including wear and tear.[193] It is not every legal problem that automatically requires the services of a lawyer,[194] hence the wise saying that sometimes retaining a lawyer is like 'hir[ing] a surgeon to pierce an ear'.[195] Moreover, LAB paralegals already apply legal principles in their day-to-day work. Crucially, sometimes lawyers in fact simply adopt some of the excellent legal documents they draft,

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190 Z Ntaba 'Sustainable Development Goal 16 and access to justice: The case of lay Magistrates in Malawi' (2016) at 35 https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Ntaba2.pdf (accessed 30 May 2023). Lay magistrates, just like police prosecutors, are available in all 28 districts.

191 RE Kapindu 'Study on challenges and best practices in investigations, prosecutions and sentencing in offences against persons with albinism in Malawi' (2018) at 46; O Khalamula 'Malawi Legal Aid Bureau puts on hold murder cases: No funds' (30 March 2016) https://www.nyasatimes.com/malawi-legal-aid-bureau-puts-on-hold-murder-cases-no-funds/ (accessed 25 August 2023).

192 EU 'EU launches a Justice and Accountability Programme in Malawi' (24 July 2018) https://www.eeas.europa.eu/node/48789_fr (accessed 25 August 2023).

193 For instance, a dispute of 20 000 Malawi Kwacha (320 Rands) bananas in *Ester Juma v Mirriam Kaunda* Civil Case 147/2016, Rumphi First Grade Magistrate Court.

194 Ibe (n 58) at 4.

195 DL Rhode 'Access to Justice' (2001) 69(5*) Fordham Law Review* 1785 at 1814.

such as bail applications and skeleton arguments, for purposes of court proceedings. There is thus no reason why the paralegals cannot personally voice those same legal principles and arguments in court which they have ably prepared.

Having legal aid paralegals represent clients in befitting cases corresponding to their competencies would also ease the burden on the few LAB lawyers. In turn, the lawyers would be afforded spare time to channel towards complex cases and other matters in superior courts.

Finally, it would increase LAB's legal representation capacity. By adding its 44 eligible paralegals to its 41 lawyers, LAB will have doubled its legal representation capacity. A similar initiative of using paralegals 'has already been successfully implemented by the [Malawi] Judiciary that has expanded its services by increasing the number of [m]agistrates'.[196]

3.4. Why Not a Full Loaf? Countering the Counterarguments

Immediately a case is made for half a loaf, it begs the question: Why not a full loaf? Admittedly, a full loaf is better than half.[197] However, whether half a loaf is better or worse ultimately depends on the available options. Below, the study discusses and counters probable concerns and counterarguments to paralegals' legal representation, including those MLS, MCLE, and MILE have raised in various fora. Notably, the resistance to paralegals' representation by MLS, MCLE, and MILE echoes Sach's words that 'legal systems historically have been created to regulate the affairs of the wealthy, and to keep the poor in their place.'[198] The resistance is also reminiscent of his prophesy that 'to demand that the dispossessed have access to the instruments of justice is like pushing water uphill. It can be done, but it goes against gravity.'[199]

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196 Law Commission Legal Aid Report (n 36) at 37. Increasing LAB's representation capacity is discussed further in chapter four at 45.

197 Professor Danwood Chirwa advances this philosophy in his socio-economic rights article, see DM Chirwa 'A full loaf is better than half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi' (2005) 49(2) *Journal of African Law* 207.

198 A Sachs 'Foreword' in Public Interest Law Institute *Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society* (2009) at 7.

199 As above.

3.4.1. Employ More Lawyers

One argument is that the government should just employ more legal aid lawyers. However, as observed, Malawi is one of the poorest countries in the world.[200] As such, Malawi is not in the current crisis wilfully or for lack of awareness on the part of the government that more legal aid lawyers are required. Malawi is financially struggling in all spheres of life from legal to medical spheres, and from educational to agricultural spheres.[201] Thus, the government cannot channel all or a greater part of its resources towards legal aid lawyers at the expense of other equally important needs of the Malawian society.

However, for argument's sake, we will assume that the government had the capacity to employ more legal aid lawyers. Aside from LAB, some lawyers would also be required for private practice and the corporate sector to safeguard the rights and interests of persons who are not indigent. Additionally, the government would also need prosecution lawyers who, as this study has demonstrated, are necessary for safeguarding the rights of victims of crime.[202] Equally dividing the current 715 licenced lawyers amongst only the Directorate of Public Prosecutions, LAB, and private practice/corporate sector would leave LAB with 238 lawyers, translating to around 100 files per lawyer. This ratio would still be high. Crucially, it must be remembered the current workload does not represent the actual demand for legal aid across Malawi, since others in need of legal aid cannot access LAB offices. Additionally, realistically it is not only these three sectors that require lawyers. On the part of the government alone, there are several other legal departments and institutions that also need lawyers for the promotion and protection of various rights, either directly or indirectly, such as the office of the Ombudsman, Human Rights

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200 UNDP 'Human Development Report' (n 24).

201 For instance, some students learn under trees or in dilapidated buildings, one of which collapsed and killed four students; prisoners spend days without food; and some hospitals do not have drugs, see Nyasa Times 'School block wall kills four primary school learners in Zomba' (7 June 2018) https://www.nyasatimes.com/school-block-wall-kills-four-primary-school-learners-in-zomba/ (accessed 29 August 2023); Malawi Human Rights Commission and Legal Aid Bureau 'Statement on the plight of pre-trial detainees in Malawi' (15 April 2023) https://legalaidbureau.org/documents/uploads/2023-04/Joint%20statement%20on%20the%20plight%20of%20pre%20trial%20detainees%20in%20Malawi.pdf (accessed 25 August 2023).

202 See at 27.

Commission, Anti-Corruption Bureau, Law Commission, Independent Complaints Commission, Attorney General, Registrar General, and Administrator General.

3.4.2. Use of *Pro bono* Lawyers

Another argument is that the provision of legal aid services can be supplemented by *pro bono* lawyers.[203] Granted, LAB together with MLS are mandated to manage a *pro bono* scheme.[204] Under the scheme, LAB allocates files to private lawyers to dedicate a minimum of 24 hours to mandatory *pro bono* work every year for purposes of annual practising licence renewals.[205] However, this is not an effective solution. First, as the study has already shown, lawyers are generally insufficient in Malawi.[206]

Second, private lawyers are based in Malawi's four cities and are reluctant to take up cases in the 24 rural and remote districts, which represent 86% of all districts, due to time and cost implications.[207] Yet, it is mainly in those areas where legal aid is mostly needed[208] since LAB also has its lawyers in all four cities.

Third, private lawyers do not dedicate sufficient time to *pro bono* work.[209] Since the devil is in the details, the study will demonstrate this point using the *pro bono* scheme report for lawyers' license renewals for the current 2023/2024 practice year.[210] Across Malawi, 300 lawyers collected files from LAB between 1 February 2022 and 31 January 2023, representing 42% of licenced lawyers. They dedicated a cumulative 8178.5 hours, representing an average of 27 hours per lawyer per annum. 27 hours per annum is equal to only four days' or one week's work in 365 days, representing 0.01% of all days and 0.02% of all weeks per annum.[211] The total number of files collected was 646, representing 0.02% of over 24 000 matters registered by LAB across Malawi. Clearly, for

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203 MLS' submissions in *Malawi Law Society* (n 39) at 19-20.
204 LAA sec 5(2)(i); LELPA sec 42.
205 LELPA sec 30(5)(b).
206 The number of lawyers has been constantly acute. As of April 2020, there were only 502 licenced lawyers, see Makanje (n 120) at 210.
207 The four cities are Blantyre, Lilongwe, Mzuzu, and Zomba. Some rural districts are very far from the nearest city, for instance, Chitipa district is 316 kilometres away (one way) from the nearest city of Mzuzu.
208 Schärf & Others (n 137) at 9.
209 Lawyers can also pay MLS in lieu of *pro bono* work, see LELPA sec 42(3).
210 Legal Aid Bureau/Malawi Law Society '*Pro bono* scheme report' (2023). Practice year starts from 1 February to 31 January.
211 Malawi has 7½ official working hours per day (7.30 am-12 noon; 1.30 pm-4.30 pm).

the indigent who seek legal aid the entire year and in over 24 000 matters, the time dedicated by private lawyers to *pro bono* work and the attendant matters handled are too negligible to make any meaningful impact.

Fourth, experience has shown that after fulfilling the meagre 24 hours of *pro bono* work, some private lawyers lose the zeal to pursue the matters, such that some files are returned to LAB. That explains why the average time per annum is only 27 hours per lawyer as, apparently, some private lawyers just want to reach the minimum threshold to renew their practising licences. Indeed, most private lawyers only collect *pro bono* files when licence renewal dates are near.

Fifth, some lawyers do not litigate generally or in routine matters that LAB handles. Therefore, not every private or corporate lawyer would possess trial advocacy skills and effectively offer legal representation, for instance in criminal matters. Yet, having paralegals regularly represent clients in some routine LAB matters would make them specialise and render effective legal representation.

Finally, private lawyers also have their own workload to deal with. Consequently, even if they wanted to, they could not manage to be fully or meaningfully available for legal aid work.

Ultimately, the *pro bono* scheme is a good initiative to merely supplement but not entirely replace the need for mechanisms for the expansion of legal representation capacity within LAB.

3.4.3. Lowering the Standards for the Right to Legal Representation

The other argument touted is that using paralegals would lower the right to legal representation which the Constitution stipulates is supposed to be by a 'legal practitioner' as enshrined in sections 42(1)(c) and 42(2)(f)(v) thereof.[212] Consequently, legal representation by paralegals would violate the right to equality between the rich and the poor since the wealthy will have a 'legal practitioner' yet the indigent will have a paralegal, so goes MLS' argument.[213]

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212 Also see secs 2, 22 & 23 LELPA.

213 MLS' submissions in *Malawi Law Society* (n 39) at 18-19.

As this study has demonstrated, legal representation is a subset of the right to a fair trial and access to justice.[214] MLS' can thus be understood to be contending, by extension, that legal representation by legal aid paralegals would compromise the right to a fair trial and access to justice. This study spotlights that human rights promotion and protection is multifaceted. Human rights can be promoted and protected through defending accused persons, just like the same can be done through prosecuting, trying, and convicting accused persons, thereby safeguarding the human rights of victims of crime. If the legal system does not flinch to safeguard human rights using paralegals to prosecute and lay magistrates to adjudicate matters, then it becomes illogical that the same threshold and reasoning ironically evaporate when it comes to legal aid paralegals. As the jurisprudence from the international human rights systems has shown, paralegals are not an antithesis but the aiders and abettors of rights to fair trial and access to justice.

Further, Malawi's Constitution neither defines nor confines the word 'legal practitioner' to a degree holder or a lawyer. It is the LELPA that does so.[215] Yet, the word 'legal practitioner' itself is broad and encompasses any person who practices the law, including a lawyer as well as other special 'pleaders not at the bar'.[216] Since LELPA is subservient and cannot be 'rebellious' to the Constitution,[217] LELPA can just be amended to incorporate other practitioners besides lawyers or degree holders. This will be similar to the term 'medical practitioner' which, in Malawi's context, is not restricted to medical doctors or degree holders but includes clinical officers and paramedicals who do not have degrees.[218] Noteworthy, even the term 'medical practitioner' is also stipulated in the Constitution.[219] After all, the law assigns meanings to words such that legal fiction has made the words importing a male also mean a female and vice versa.[220] Consequently, there is no reason why the term 'legal practitioner' cannot be made to include other practitioners who are non-lawyers or do not have degrees.

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214 See chapter one at 1-2.

215 Secs 2, 23 & 24.

216 BA Garner *Black's Law Dictionary* (2004) at 915. The dictionary defines a 'pleader' as a person who pleads in court on behalf of another, who may not be an attorney, see at 1190-1191.

217 *Chilima* (n 139) at 9; Constitution secs 5 & 199.

218 Medical Practitioners and Dentists Act, Chapter 36:01, Laws of Malawi, secs 26(1), 38 & 60(3).

219 Constitution secs 42(1)(d).

220 General Interpretation Act, Chapter 1:01, Laws of Malawi sec 2(1) & (2).

Moreover, a constitution's 'language must be considered as if it were a *living organism* capable of growth and development.'[221] Thus, it requires a broad, liberal, and purposive interpretation in matters of human rights, and its principles must be taken into account in 'bringing it into conformity with the *needs of time*.'[222] The needs of the time in Malawi's society demand this broad, liberal, and purposive interpretation of the right of access to justice and fair trial, in particular words 'legal practitioner' to include paralegals. Thus, LELPA should incorporate that. However, even if the Constitution's use of the words 'legal practitioner' could be taken as being limited to lawyers, even the Constitution itself is amendable as it is not cast in stone.[223]

Noteworthy, even under the AU and UN international human systems legal representation is not restricted to lawyers. Article 11(3)(d) ICCPR simply uses the words 'legal assistance' and article 7(1)(d) of the African Charter uses the words '*including* to be defended by counsel'.[224] The word 'including' denotes that what is stipulated is not exhaustive or restrictive. Indeed, it is the absence of such restriction that the UN and ACmHPR have been able to promulgate and call for the recognition and accreditation of paralegals to participate in court proceedings, and that rule 31(1) of ACtHPR Rules of Court (2020) allows legal representation by counsel or 'other person of the party's choice'. Such would not have been the case if representation by a non-lawyer amounted to fouling the benchmarks of rights of access to justice and fair trial, particularly legal representation, since these are the institutions that set the normative human rights standards at the international level.

Additionally, if this argument was valid, it would mean that lay magistrates and prosecution paralegals ought to be phased out, for they are similarly qualified and similarly impact human rights. The argument would similarly be that the rights of access to justice of victims of crime whose cases end up before lay prosecutors and magistrates are being violated or lowered, as opposed to the rights of those victims whose cases are handled by prosecutors and magistrates who are lawyers. Yet, that is not the case.

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221 *The Registered Trustees of the Public Affairs Committee v Attorney General & Another* [2002–2003] MLR 333 (HC) at 351-352. My emphasis.

222 As above. My emphasis.

223 Constitution secs 195-197.

224 My emphasis.

Actually, far from abolishment, lay magistrates' indispensability under Malawi's justice system was underscored in November 2022 by Parliament enhancing their jurisdiction via the Courts (Amendment) Act 36 of 2022.

But, notwithstanding the above, would there not really be inequality in legal representation if a paralegal faces a lawyer as an adversary in court? Noteworthy, the same question can apply even if a lawyer faces another lawyer as an adversary. One lawyer could be more intelligent, yet another average; one lawyer would have practised for a long period and hence experienced, yet another could be a fresh graduate; and one would have secured a postgraduate qualification, yet another could have only a bachelor's degree. Ultimately, what matters are not merely the differences in qualifications or experience, but the basic knowledge and skills required for undertaking a particular matter. The solution is to assign paralegals matters within their competence, such that even if the adversary is a lawyer, it would be akin to the adversary bringing a 'bazooka to kill a fly' when a bare hand would suffice. This means that the legal issue(s) before the court would be those capable of being resolved using basic legal principles, such that the 'bazooka' would not even count as both sides would end up using bare hands, hence being on an equal footing. Equality thus lies in the possession of similar basic knowledge and skills to effectively undertake a task. The Director, Deputy Director, and Chief Legal Aid Advocates (LAB approving officers) who are senior and experienced LAB officers responsible for assessing, approving, and assigning legal aid matters, shall be responsible for determining matters within the competence of paralegals.[225]

Finally, 'lowering' standards of legal representation is contextual and a matter of perspective. 'Lowering' assumes that a person is on a higher level. However, for an illiterate and innumerate indigent person who is on ground zero and without legal representation, being given a properly trained legal aid paralegal to represent them would actually be upgrading.

3.4.4. Lawyers' Infallibility?

Another argument advanced against legal aid paralegals representation is the need to avoid the miscarriage of justice. Implicit in this argument is the suggestion that lawyers

[225] This point is further discussed in chapter four.

are infallible. Yet, examples abound of errors lawyers have made, such as failing to submit mitigating factors resulting in the court imposing the death penalty,[226] drafting poor legal documents, filing court documents in the wrong court,[227] or generally offering ineffective legal representation.[228] In *Lilongwe Water Board and Others v Malawi Law Society*,[229] the MLS itself failed to meet stipulated timeframes for filing court process thereby extinguishing the proceedings, compelling the court to declare MLS' conduct as a 'flirtation dangerously close to negligence'.[230] Perhaps the epitome is *Professor Arthur Peter Mutharika and Another v Dr Saulos Chilima and Another.*[231] The notice of appeal signed by the Chairperson of the Malawi Electoral Commission, who was not only Malawi's previous Attorney General but was also a sitting Supreme Court of Appeal Judge with a doctorate degree in law, was manifestly non-compliant with procedural rules and hence was branded 'embarrassing'.[232] In fact, the existence of appeal remedy in legal systems speaks of the existence and inevitability of errors, factual or legal, made by courts even presided over by judicial officers who are lawyers.

Ultimately, the reality is that lawyers can and do equally make errors. Therefore, the solution is not necessarily to shut the doors to legal aid paralegals from representing clients but to ensure that they are properly qualified and trained, and handle matters within their competence to eradicate or minimise errors.

3.4.5. 'Stealing' Lawyers' Businesses

That paralegals would 'steal' lawyers' clients and businesses, features as a prominent reason for resisting paralegals' general role in the provision of legal services.[233] Even though lawyers claim that their interest is to protect the public rather than the profession,[234] this appears to be the most plausible explanation for lawyers' resistance in

226 *Republic v Willard Mikaele* Homicide Case 238/2018, High Court, Principal Registry at 8-9.
227 *Barnet Nansongole v National Bank of Malawi Plc* Miscellaneous Civil Application 1/2020, Malawi Supreme Court of Appeal at 2.
228 Begg (n 113) at 29; *Beyers v Director of Public Prosecutions, Western Cape* 2003 (1) SA 164 (SCA).
229 MSCA Civil Appeal 59/2017, Malawi Supreme Court of Appeal.
230 As above. At 4-5.
231 MSCA Constitutional Appeal 1/2020, Malawi Supreme Court of Appeal.
232 As above, at 42.
233 Ibe (n 58) at 6.
234 Kaunda (n 52) at 66.

and outside Malawi. Lawyers in Malawi do not contest the role of lay prosecutors and magistrates in court proceedings because they do not offer any competition for either clients or for jobs since, for similar financial challenges that make the government unable to employ sufficient LAB lawyers, the lawyers might not get the lay prosecutors' and magistrates' jobs even if they opposed their roles. Yet they vigorously oppose allowing paralegals to represent clients. If the 'protecting the public' argument was valid, they would have likewise protested the role of paralegals as lay prosecutors and magistrates. Thus, the real reason is the fear that paralegals would take away clients.[235]

Nevertheless, as far as the indigents are concerned, the 'stealing clients' argument is invalid. Persons who seek and are entitled to legal aid are indigent and hence cannot pay a private lawyer in the first place. Accordingly, even in the absence of a paralegal offering legal representation, they still cannot go to a private lawyer. Their only option would be self-representation. One does not lose what one does not or cannot have in the first place.

3.5. Conclusion

This chapter has justified legal aid paralegals' limited right to legal representation on account of Malawi's socio-economic status; non-lawyers who already participate in court proceedings; the jurisprudence from the AU and UN international human rights systems; comparison with the medical profession; and the resultant gains. This approach acknowledges the indigent's plight and Malawi's social realities, as *ubuntu* and sociological jurisprudence demand. It embraces natural law's rationality and *ubuntu* philosophy's humaneness that, as chapter two radiated, should inform the law by spotlighting that, whilst legal representation by a lawyer is ideal, legal representation by a paralegal is better than self-representation. In other words, that half-bread is better than nothing for the indigent. No rational person with *ubuntu* or humaneness would let the indigent die of hunger when they can have and survive on half-bread. It is for this reason that in *SERAC v Nigeria*[236] the ACmHPR held that 'international law and human rights must be responsive to African circumstances.'

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235 Ibe (n 58) at 6.

236 (2001) AHRLR 60 (ACHPR 2001) para 68.

This chapter has also demonstrated why a 'full-bread' approach is a challenge. Full-bread reasoning erroneously assumes that the options on the menu for the indigent are either half or full-bread. Yet, the sad reality for most indigent Malawians is that even half-bread is non-existent, hence the only option on the menu is self-representation which comes with its own hazards.

The law should render 'rights practical and effective [and] not theoretical and illusory'.[237] Thus, LELPA's shackles should be unshackled. The obligation to safeguard human rights necessitates the obligation 'to prevent [the] rights from being jeopardised by the law itself'.[238] Thus, the right to legal representation must include the right to be afforded a reasonable opportunity to secure it for it to have any meaning.[239] Paralegals are the plug to fill the access to justice hole. However, to ensure effective legal representation, paralegals' legal representation must be properly delineated and regulated, hence the concept of 'limited' legal representation. The next chapter addresses this.

237 *Goodwin* v *UK* Application 28957/95 ECHR para 74.

238 D Mailula 'Taking children's rights seriously: access to, and custody and guardianship of, a child born out of wedlock' (2005) 46(1) *Codicillus* 15 at 28.

239 Bekker (n 142) at 180.

Chapter Four

The Hows of Paralegalism: The Nature, Scope, and Regulation of Paralegals' Legal Representation

4.1. Introduction

Chapter three has made a case for granting paralegals a right to represent the indigent in court. However, to the indigent, being represented does not simply mean having someone standing next to them and speaking on their behalf.[240] Legal representation has to be effective.[241] Consequently, this chapter explores a model of operation and regulation of paralegals' legal representation that can effectively solve the indigent's access to justice plight, yet also ensure that their rights to access justice and fair trial are not compromised. It thus discusses requisite minimum qualifications, the nature and scope of matters that paralegals can competently handle, courts in which they can render legal representation, and how they can be regulated.

4.2. Which Matters and Which Courts?

In Malawi, legal aid is available in both civil and criminal matters subject to indigence or interests of justice.[242] Further, all lay magistrates have jurisdiction in both civil and criminal matters. Therefore, it is only logical, as natural law legal theory demands, that legal aid paralegals should represent the indigent and hence safeguard their rights in both civil and criminal cases.

In terms of courts, chapter three has demonstrated that non-lawyers are able to offer legal representation in all courts subordinate to the High Court, namely magistrate courts and the IRC. Therefore, it logically follows that legal aid paralegals should also be allowed to represent clients in all categories of subordinate courts. This will match prosecution paralegals who prosecute matters before both lay and professional magistrates.

The above entails that legal aid paralegals will be eligible to represent clients in all criminal matters under the jurisdiction of magistrates, wherein the magistrates' sentencing powers

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240 Bekker (n 142) at 192.

241 As above, *Amini Juma* v *United Republic of Tanzania* Application 007/2015 ACtHPR (merits and reparations) (31 September 2021) para 91.

242 LAA secs 17 & 18. In other jurisdictions, like the United States of America, legal aid is only available in criminal matters.

are throttled at a maximum of 21 years imprisonment.[243] Conversely, they will be ineligible to represent clients in offences that are excluded from the jurisdiction of magistrates such as treason, murder, manslaughter, and piracy.[244] It also entails that they will be eligible to represent clients in all civil matters in the subordinate courts, namely labour matters in the IRC[245] and any civil matters under the jurisdiction of magistrates where the amount in dispute or value of the subject matter is 25 000 000 Malawi Kwacha[246] (approximately 775 000 Rands) or less. Conversely, they will not be able to represent clients in matters that are excluded from the IRC or magistrates' jurisdiction, such as constitutional matters, disputes for ownership of land, and injunctions.[247] However, paralegals' legal representation should be subject to the option of legal aid lawyers handling any complex matters as determined by LAB approving officers who assign matters.[248]

4.3. Training and Qualification

Prosecution paralegals within and outside the Police range from those with a minimum of a diploma in law to those without. However, as observed in chapter three, most criminal prosecutions in Malawi are done by Police prosecutors.[249] Police prosecutors undergo a three-month training.[250] In that period, they are taught criminal law, criminal procedure, law of evidence, advocacy, human rights, statutory law, and legal research.[251] For lay magistrates, before 2020 the judiciary would employ lay magistrates both with and without a minimum of diploma in law, including those with a mere Malawi School Certificate of Education.[252] Mostly, it would recruit some of its court clerks as lay magistrates after undergoing a six-month training at the Staff Development Institute at Mpemba in Blantyre.[253] However, over time this training was found inadequate for the magistrates to

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243 This is the threshold for the top-most professional magistrate, given that the argument is for legal aid paralegals to appear in all classes of magistrate courts, including of professional magistrates like lay prosecutors do, see CPEC sec 14(1).

244 CPEC secs 13 & 14.

245 Constitution sec 110(2).

246 This is the threshold for the top-most professional magistrate, see CA sec 39 as read with the Second Schedule.

247 See CA secs 9(2) & 39(1) as read with the Second Schedule.

248 The point is further discussed at 46-47.

249 Report of the Independent Expert (n 161) para 38. Also see Kapindu (n 191) at 49; W Schärf & Others (n 137) at 23.

250 Such training which they undergo at Police Training School is deemed insufficient, as above.

251 Panyani-Phiri (n 160).

252 O level equivalent.

253 DHRMD 'Study for the functional review of the Judiciary' (2016) at 80-81.

be fully-equipped to deal with the cases under their jurisdiction.[254] Consequently, this triggered the need to recruit persons with a minimum of a diploma in law which started in 2020.[255]

Currently, the University of Malawi offers a two-year law diploma programme. 85 students were selected for the 2022/2023 academic year and 50 students were selected for the 2023/2024 academic year.[256] Tuition is 950 000 Malawi Kwacha (approximately 14 600 Rands) per annum.[257] The courses offered are legal systems and methods, constitutional law, administrative law, criminal law, criminal procedure, civil procedure, law of evidence, experiential/research project, law of equity and trusts, law of torts, and law of contract.[258]

LAB has paralegals both with and without a minimum of a law diploma.[259] Out of LAB's 49 paralegals, five have Certificates in Legal Studies, 23 have Diplomas in Law, 20 have Bachelors of Laws but have not yet been admitted to the Bar, and one has a Master of Law together with a Diploma in Law. For the purposes of legal representation, the study recommends granting the limited right to legal representation to only paralegals with a minimum of a diploma in law. Thus 44 LAB paralegals will qualify. The courses offered under the diploma programme and the duration thereof would offer better and sufficient basic knowledge for paralegals to handle matters in the subordinate courts. This would also address deficiencies spotted with respect to lay prosecutors and magistrates without a minimum of a diploma in law.

However, the only missing components to the jigsaw puzzle are practical legal education and a human rights course. Since legal representation requires special trial advocacy skills, such as examination in chief and cross-examination, the study further recommends that all eligible paralegals should undergo practical legal training administered by MILE

254 As above.
255 Judicial Service Commission 'Vacancies for Third Grade Magistrates (Grade K)' (2020). This is the lowest tier of magistrates.
256 University of Malawi 'Announcements' https://www.unima.ac.mw/announcements (accessed 25 September 2023).
257 University of Malawi 'Call for applications for the enrolment into the diploma in law programme' https://www.unima.ac.mw/announcements/call-for-applications-for-enrolment-into-the-diploma-in-law-programme-03-06-2023 (accessed 25 September 2023).
258 University of Malawi 'Diploma in law programme course outline' (2023).
259 LAA sec 14 simply requires that paralegals should have 'a basic understanding of common legal concepts'.

as determined by MCLA.[260] Practical or clinical legal education equips participants with comprehensive legal experience which encompasses both the theoretical foundations of the law as well as the practical legal skills training.[261] Paralegals will learn from practical experience since knowledge of practice cannot be acquired by any other method, other than practical experience.[262] This should be followed by mandatory yearly continuous legal education, just like lawyers undertake,[263] to keep abreast of legal developments in the ever-evolving legal profession. Further, to ensure legal aid paralegals' better understanding, promotion, and protection of all human rights, MCLA should prescribe a human rights course to Malawi's law diploma curriculum under its mandate under section 2 of LAA as read with section 4 of LELPA.

The above will satisfy guideline 14 paragraph 68(g) of UN Legal Aid Guidelines and section H(h) of ACmHPR Fair Trial Guidelines which envisage that paralegals' legal representation should be by duly qualified and trained paralegals.

4.4. Regulation

Legal representation by legal aid paralegals ought to be regulated. Regulation is an important component of human affairs, for even a 'society of angels would need rules if only to help them coordinate their altruistic activities'.[264] Regulation guarantees orderliness and quality assurance.[265] It ensures that people offering legal services meet desired minimum standards, are professionally competent and disciplined, and that the public interest is protected, amongst others.[266] The first safeguard lies in the allocation of matters. The Director, Deputy Director, and Chief Legal Aid Advocates, who are the responsible officers for reviewing and approving applications for legal aid as well as

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260 MCLA exercises general supervision and control over legal education, see LELPA secs 4(1), 4(2)(a) & (b); LAA sec 2. MILE in turn provides practical legal training for courses approved by MCLA, including for paralegals, see LELPA secs 15(1) & 15(2)(c)(iii) & (iv).

261 SO Manteaw 'Legal Education in Africa: What Type of Lawyer Does Africa Need?' (2008) 39 *McGeorge Law Review* 903 at 951-952; G Jessup 'Symbiotic relations: clinical methodology fostering new paradigms in African legal education' (2002) 8(2) *Clinical Law Review* 377 at 400.

262 Manteaw (n 261) at 951-952.

263 LELPA sec 30(5)(c).

264 Leslie Green, see Tamanaha (n 73) at 35-36.

265 Trabucco (n 64) at 151.

266 B MacKenzie 'Why do we regulate lawyers' (2021) https://www.slaw.ca/2021/01/14/why-do-we-regulate-lawyers/ (accessed 1 September 2023).

assigning files, should be the first port of call in the regulation.[267] They should carefully scrutinise the matters registered and allocate to paralegals only such matters as may be within their competence.

Further, paralegals should work under the general supervision of lawyers. Supervision does not entail that the lawyer must constantly accompany the paralegal and monitor their performance of tasks.[268] It simply means general oversight which leaves the lawyer with confidence that the paralegal has gotten the task right.[269] Inevitably, during the first stages of legal representation, lawyers must be physically present in court to supervise the paralegals. The more paralegals practice under the supervision of lawyers, the more the prospects increase that they will get better.[270] Once the paralegal's legal representation reaches a threshold where the lawyer is confident that the paralegal gets and can get tasks right, supervision may be limited to off-court discussions about the law, evidence, and case strategies.

Additionally, they should have a code of conduct and ethics to ensure professionalism and adherence to ethical rules of engagement.[271] The rationale is that aside from owing an obligation of competence to LAB as the employer, by practising paralegals thereby also assume special duties directly towards clients and the court. They become officers of the court.[272] This is also the position in Ontario, Canada, where paralegals represent clients in court.[273] As officers of the court, it means that the court could also guide the paralegals and advise LAB's approving officers that a particular case, depending on issues that unfold in the course of a trial, befits a lawyer.[274]

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267 For the grant of legal aid and exercise of duties, functions, and powers in respect thereof, see LAA secs 13 & 17-26.

268 PR Tremblay 'Shadow Lawyering: Nonlawyer Practice within Law Firms' (2010) 85 *Indiana Law Journal* 653 at 680; Cook (n 62) at 203.

269 As above.

270 Cook (n 62) at 202.

271 For instance, Tanzania's Legal Aid Act 1 of 2017 sec 42(2) requires such a code for paralegals.

272 An officer of the court owes a court a duty to promote justice and uphold the law. These duties are in addition to but separate from duties owed to clients and also entail that a practitioner may be disciplined by the court, see Cornell Law School 'Legal Information Institute' https://www.law.cornell.edu/wex/officer_of_the_court (accessed 5 September 2023).

273 Donnelly (n 65).

274 For a discussion on the court's role in ensuring a fair trial, see NC Steytler (n 144).

Paralegals should also be subject to LAB's general mandate of regulating and ensuring discipline in the provision of legal aid. Lessons should be plucked from Tanzania and Sierra Leone where Legal Aid Boards accredit, register, supervise, regulate, suspend, and cancel the registration of legal aid providers.[275] In Malawi, where a Bureau option was favoured as opposed to the Board option on account of resources,[276] such mandate should lie with LAB. LAB should thus be able to discipline paralegals, including to suspend or rescind paralegals' court accreditation for gross misconduct or incompetence.

Noteworthy, as public officers, paralegals would also automatically be subject to LAB's conditions of service regarding professionalism, competency, and discipline. They would further be subject to Malawi's general regulatory and remedial legal framework such as the Civil Procedure (Suits by or against Government or Public Officers) Act,[277] judicial review, and the law of torts.

4.5. Conclusion

This chapter has discussed the nature, scope, and regulation of paralegals' legal representation limited to civil and criminal matters in the subordinate courts. Appreciating that legal representation is nothing except when it answers to the tag 'effective legal representation', the chapter highlighted that regulation, optimum qualifications and training are the benchmarks for effective legal representation. It has particularly recommended that a minimum of a diploma in law and practical legal education should be the prerequisites.

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275 Tanzania Legal Aid Act 1 of 2017 secs 7-18; Sierra Leone Legal Aid Act 6 of 2012 secs 9-10, 30-33 & 39-40.

276 Law Commission Legal Aid Report (n 36) at 13-15.

277 Chapter 6:01, Laws of Malawi. It regulates suits against the government or public officers regarding their official conduct.

Chapter Five

Conclusion and Recommendations

The sun does not forget a village because it is small.[278]

5.1. Conclusion

This study has unearthed the yawning gap pertaining to access to justice and fair trial for the indigent, in particular the legal representation aspect thereof, in Malawi's legal system. It has demonstrated that the principal legal aid provider, LAB, does not have sufficient capacity to represent in court all deserving indigent people across Malawi. This negatively impacts indigent people's right of access to justice and fair trial. Since these two rights are the bedrock and a bridge to other human rights, their curtailment or extinguishment has a domino effect of curtailing or extinguishing other rights too. Consequently, chapter one focused on giving a background to this gap as well as zeroing in on the literature review, research objectives, methodology, and limitations in a bid to contextualise the study on a path to exploring a solution.

To appreciate what informs or ought to inform the law, chapter two discussed sociological, *ubuntu,* and natural law legal theories and concepts. It demonstrated that the law is not measured from the yardstick of the law itself but using extrinsic values and considerations, particularly social realities and needs, reason, and *ubuntu*. Ultimately, the chapter concluded that laws must reflect the needs of society, solve society's problems, be rational, just, and be clothed in *ubuntu* or humaneness.

Thus, in chapter three, the study measured Malawi's current legal representation normative framework against the sociological, *ubuntu,* and natural law legal theories yardstick. The current normative framework, which does not allow legal aid paralegals to represent the indigent in subordinate courts but, ironically, allows prosecution and judiciary paralegals to prosecute and adjudicate cases, did not pass the litmus test. Overall, the chapter justified the use of legal aid paralegals to render limited legal representation.

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278 African Proverb.

Chapter four, recognising that legal representation goes beyond just having someone standing next to indigent persons and speaking on their behalf even if it is gibberish, highlighted that legal representation must be effective. It thus discussed the model of operation and regulation of legal aid paralegals' legal representation that will not only fill the access to just gap but will also guarantee effective legal representation. It thus proposed limiting paralegals' legal representation to civil and criminal matters in subordinate courts and to holders of at least a law diploma who have undergone practical legal education; continuous legal education; and the regulation of paralegals' representation through meticulous assignment of matters, code of conduct, supervision, and remedial and disciplinary measures, including rescission of court accreditation.

Below, this chapter completes the study by roofing it with recommendations that can give effect to the solutions proposed thus far and others.

5.2. Recommendations

The law is a fundamental aspect of human society[279] and it is almighty such that it can both shackle and liberate. With respect to the liberating power of the law, as Pound postulates in his sociological legal theory, the law is a tool for social engineering that can be used to 'engineer' and hence shape and make societies, in this case Malawi, better.[280] It is for this reason that the primary means of fulfilling human rights obligations is adopting laws, especially legislating, as provided for in article 1 of the African Charter and article 2(2) ICCPR.[281] Section 20(1) of Malawi's Constitution likewise urges Malawi to pass legislation to address inequalities in society.

Therefore, since the shackle to legal aid paralegals' legal representation lies in how 'legal practitioner' is defined in section 2 as read with sections 22 and 23 of LELPA, LELPA must be amended to designate legal aid paralegals as eligible to offer limited legal representation. As the study has shown, legal aid paralegals' limited legal representation

279 Bilchitz, Metz & Oyowe (n 92) at 19.

280 See chapter two at 16; S Khrishan 'Roscoe Pound theory of Social Engineering' *Legal Service India E-Journal* https://www.legalserviceindia.com/legal/article-10837-roscoe-pound-theory-of-social-engineering.html (accessed 5 September 2023).

281 Also see UN 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' (1998) art 2.

can be accommodated without touching the Constitution. However, since the Constitution is the fountain from which all other laws flow and a means of ring-fencing human rights, the study also recommends clarifying in the Constitution that legal representation includes representation by suitably qualified paralegals.

Besides the definition, additional amendments must be made to all laws that have a bearing on legal representation, in particular LELPA and LAA.[282] The amendments should provide for the qualifications and training of paralegals as well as the nature, scope, and regulation of their legal representation as proposed in chapters three and four hereof.

However, whilst this solution will double LAB's legal representation capacity, more reforms and initiatives will still be required since, as the study has shown, the access to justice gap is too wide. First, *pro bono* hours per lawyer should be enhanced to at least 100 hours per annum. Otherwise, only 24 hours per lawyer in a year's 8 760 hours, representing 0.002%, are negligible to make any meaningful impact.

Further, the door should be opened to other non-LAB paralegals with a minimum of a diploma in law and who have undergone MILE's practical legal education to offer legal representation to the indigent. Contrary to the Law Commission's opinion that new legislation would be required for the regulation of paralegals and their audience in court,[283] this study's position is that broadening the definition of 'legal practitioner' in the LELPA is all that is required to make paralegals eligible to represent indigent clients.[284] For the overall regulation, as far as paralegals offering legal aid are concerned, necessary amendments to LELPA and LAA would be enough to accommodate non-LAB paralegals and civil society-based paralegals to complement LAB's legal representation capacity. For instance, civil society institutions like the Paralegal Advisory Service Institute (PASI), which has already been offering legal aid other than through legal representation since 2 000 and has at least 36 paralegals in at least 19 districts across Malawi, would come in

282 CA is another relevant Act, see sec 4.

283 Report of the Law Commission on LELPA (n 37) at 141 & 142.

284 As shown in chapter three, medical doctors and paramedicals in Malawi are regulated under the same Act. Further, LELPA already mentions paralegals' training in sec 15(2)(c)(iv). Indeed, in Ontario, Canada, lawyers and paralegals are also regulated under the same Act.

handy.[285] LAB should be responsible to accredit, register, supervise, regulate, suspend, and cancel the registration of legal aid providers.[286] After all, LAB is already responsible for managing the *pro bono* scheme as well as chairing the National Legal Aid Coordination Committee, which is responsible for identifying, pooling, and collaborating with legal aid providers in Malawi.[287]

Finally, all law graduates should be attached to LAB and be deployed to all districts of Malawi for obligatory legal aid work, especially legal representation, as part of their MILE's one year pre-admission practical legal training and Malawi Law Examination programme under section 23 of LELPA.[288]

These solutions will bridge the current justice gap and reflect the reality that the law cannot be divorced from and ought to be a reflection of the realities, challenges, and needs of a society at any given time, as *ubuntu* and sociological legal theories postulate. The solutions will also comport with reason that natural law posits, as it is unreasonable to allow paralegals for the prosecution and judiciary to play crucial roles in court proceedings but not similarly qualified legal aid paralegals. The solutions will particularly evidence *ubuntu* or humaneness which demands that everyone, including the indigent, benefits from whatever little Malawi can offer from the human rights buffet within its socio-economic muscles. The equality principle likewise demands so. This also resonates with the 'Leave No One Behind' Agenda 2030 slogan as far as eradicating or reducing inequalities is concerned.[289]

After all, human rights are entitlements, as opposed to privileges; they are claims as of right, and not by approval to grace, charity, brotherhood or love, hence they need not be

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285 PASI's paralegal programme has been exported to other places like Uganda and Bangladesh due to its success, see S Ibe (n 58) at 6; also see PASI's website at http://pasimalawi.org/index.php (accessed 4 September 2023).

286 This is the position in Tanzania and Sierra Leone where Legal Aid Boards exercise such mandate, see Tanzania Legal Aid Act 1 of 2017 secs 7-18; Sierra Leone Legal Aid Act 6 of 2012 secs 9-10, 30-33 & 39-40. Under these Acts, paralegals, civil society organisations, non-governmental organisations, and university law clinics can be accredited to provide legal aid.

287 Strategic Plan for the Legal Aid Bureau 2017-2021 (2017) at 45; LAA secs 4(1)(g) & 5(2)(c).

288 This is akin to Nigeria's National Youth Service Corps community service, which includes legal aid, see National Youth Service Corps https://www.nysc.gov.ng/legal.html (accessed 19 October 2023). The use of law graduates for legal representation is plausible as elsewhere, like in Australia, even law students have been used, see S Campbell 'A student right of audience? Implications of law students appearing in court' (2004) *Journal of Clinical Legal Education* 22.

289 UN 'Leave No One Behind' https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind (accessed 5 September 2023).

earned or deserved and cannot be taken away.[290] Thus, access to justice and fair trial are not privileges or grace-dependent gifts that can be afforded to some, the rich, and not to others, the indigent. Like the sun that shines in both megacities and small villages, the Malawi justice system and its human rights regime ought to shine on the indigent as well. As Sachs observes, it is actually 'the poor, not the rich, who most need rights' as the 'rich cannot easily be ignored' since they 'have money, power, and influence'.[291] Hence, the state is duty-bound to create pathways for the enjoyment of human rights by the indigent.

At this juncture, Malawi is still a crawling baby in its infancy development-wise. The law has to reflect this reality. The fact that legal representation by legal aid paralegals has never been done before in Malawi is no reason for not doing it, as societies would never progress if people would never do what has never been done before.[292] If such reasoning prevailed, today there would be no cell-phones or WhatsApp, humans would not drive cars and fly in aeroplanes, and Africans and blacks would still be chained to the yokes of slavery, apartheid, and colonialism. Change is a necessary 'constant' in life to address current society needs and challenges, as *ubuntu* and sociological jurisprudence demand. When Malawi eventually migrates to the 'walking and running' phase in its development and can afford sufficient lawyers to provide legal representation to the indigent, the law could be amended again that time to reflect that new reality. Otherwise, until such a time, may Malawi grant the indigent their half loaf of bread than nothing at all.

Word count: 19 998

290 *Attorney General* v *Lunguzi* [1996] MLR 8 (SCA) at 10.
291 Public Interest Law Institute (n 198) at 7.
292 *Packer v Packer* [1954] P 15 at 25.

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