A perspective on utilizing legal frameworks to obligate service providers to protect human rights in Malawi: A Case of the Mandatory Provision on Pro Bono Services under the Legal Education and Legal Practitioners Act, 2018

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Abstract

Malawi's Constitution of 1994 changed the law in a pro-human rights direction. It provides for safe guarding measures aimed at protecting human rights. Malawi also has progressive pro-human rights legislations which emulate provisions of international and regional human rights instruments. However, enforcement of legal frameworks remains a challenge, partly due to poverty hence a large percentage of the population is unable to meet legal costs; lack of legal literacy and distance hinders access justice. A culture of silence continues to perpetuate human rights violations, so too uncoordinated efforts by service providers in protecting human rights. The majority of legal practitioners practice commercial law hence over burdening the Legal Aid Bureau with under privileged clients, whose cases mostly border on human rights violations.

This paper will look at the opportunities government has in utilizing the legal frameworks to obligate duty bearers to provide services that aim to promote human rights including access to justice for under privileged Malawians. Legal practitioners are now, under the Legal Education and Legal Practitioners Act of 2018, obligated to provide pro bono legal services in order to have their licenses renewed. This has seen a rise in the number of under privileged people, particularly women, able to access justice at various levels. This can also be attributed to human rights awareness done by the Human Rights Commission, human rights lawyers and civil society organizations. This paper will therefore examine the positive impact such an initiative has had in protecting human rights and upholding the rule of law in Malawi.

A. Introduction

The backbone of the freedom to live in dignity is the international human rights framework, together with international humanitarian law, international criminal law and international refugee law. Those foundational parts of the normative framework are complementary bod-

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ies of law that share a common goal: the protection of the lives, health and dignity of persons. The rule of law is the vehicle for the promotion and protection of the common normative framework. It provides a structure through which the exercise of power is subjected to agreed rules, guaranteeing the protection of all human rights.

As defined by the Secretary-General, the rule of law requires that legal processes, institutions and substantive norms are consistent with human rights, including the core principles of equality under the law, accountability before the law and fairness in the protection and vindication of rights (S/2004/616, para. 6). There is no rule of law within societies if human rights are not protected and vice versa; human rights cannot be protected in societies without a strong rule of law. The rule of law is the implementation mechanism for human rights, turning them from a principle into a reality.[1]

There is no doubt that nurturing good governance is essential to ensuring respect for human rights. Without the rule of law, independent courts and other institutions of the modern society – essential components of good governance – the promise of human rights may remain just that: a promise unfulfilled. Enforcement of fundamental freedoms when it matters may be impossible. The lesson of history is that transparent, responsible, accountable and participatory governance is a prerequisite to enduring respect for human dignity and the defense of human rights.[2]

Further, the rule of law is fundamental to international peace and security and political stability; to achieve economic and social progress and development; and to protect people's rights and fundamental freedoms. It is foundational to people's access to public services, curbing corruption, restraining the abuse of power, and to establishing the social contract between people and the state. Rule of law and development are strongly interlinked, and strengthened rule of law-based society should be considered as an outcome of the 2030 Agenda and Sustainable Development Goals (SDGs).[3]

In addition, Goal 16 is an enabling goal for Member States to generate national-level policy changes that advance progress on other SDGs. The development of inclusive and accountable justice systems and rule of law reforms will provide quality services to people and build trust in the legitimacy of their government. This approach should respond to the needs of individuals and groups and their meaningfully participation from the outset, paying particular attention to those historically marginalized and at risk of being left behind. It includes prevention of serious violations of human rights, achieving credible accountability for those responsible at national and international levels and empowering individuals and communities to make use of justice mechanisms to protect their fundamental human rights.[4]

1 UN on the Rule of Law and Human Rights, accessed at https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/.

2 Preamble, *Universal Declaration of Human Rights,* GA Res 217A (III), UN Doc A/810 at 71 (1948).

3 UN on the Rule of Law and Human Rights, supra note 2.

4 UN on the Rule of Law and Human Rights, supra note 2.

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Access to justice is a basic principle of the rule of law. It is a fundamental right that allows individuals to use legal tools and mechanisms to protect their rights. It is the right of all individuals to use the legal tools and mechanisms to protect their other rights. There is no access to justice when, for economic, social, or political reasons, people are discriminated against by law and justice systems.

International human rights law requires states to respect a panoply of human rights. At the very least, a state must give effect to its international obligations in a manner that is adequate and effective,[5] thereby effectively promoting human rights. While plenty has been done at the international level, a lot still needs to be done in regards to effectiveness and awareness of access to justice. Daily challenges have hindered this access, especially for disadvantaged and vulnerable groups.

It is against this background that this paper looks at the utilization of legal frameworks to obligate service providers to protect human rights in Malawi. In particular, this paper will look at sections 30 and 42 of the Legal Education and Legal Practitioners Act, 2018 (the LELPA) and its promotion of the rule of law through the provision of mandatory pro bono services.

B. Legal Frameworks on the Provision of Pro Bono Services

I. International Frameworks

Internationally, the UN Human Rights Committee has pioneered the treaty bodies of the United Nations in interpreting the concepts of access to justice. These rights are also foreseen in international instruments such as, for example, in Article 2 paragraph 3 and Article 14 of the UN International Covenant on Civil and Political Rights (ICCPR) and in Article 8 and 10 of the Universal Declaration of Human Rights. The main elements of these rights include the effective access to a dispute resolution body, the right to a fair trial and the timely resolution of disputes, the right to an adequate remedy, as well as the general application of the principles of efficiency and effectiveness of justice. The UN General Assembly, in resolution 67/1 on 24 September 2012, expressed its willingness to guarantee the right to equal access to justice for all, including to people belonging to vulnerable groups.[6]

The International Covenant on Civil and Political Rights17 (1966, ICCPR) stresses States' obligation to ensure that effective remedies are provided when rights are violated, in particular, through "competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State." Article 14(3)(d) of the ICCPR affirms the right of individuals facing criminal charges to have legal assistance

5 *Bonita Meyersfeld*, Domesticating International Standards: The Direction of International Human Rights Law in South Africa, Constitutional Court Review, University of the Witwatersrand, (2015) CCR 16, page 414.

6 *Lima, V., Gomez, M*, Access to Justice: Promoting the Legal System as a Human Right, in: Peace, Justice and Strong Institutions. Springer International Publishing, Cham, 2019, Page 3.

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assigned to them and, "where the interests of justice so require," that such assistance be provided "without payment by him [or her] … if he [or she] does not have sufficient means to pay for it[.]"18 The ICCPR additionally emphasizes that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."19 The Human Rights Committee further elaborated on the right to legal assistance in its General Recommendation 32 noting that the " availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant."[7]

While not expressly addressing the right to legal assistance, the International Covenant on Economic, Social and Cultural Rights21 (1966, ICESCR) asserts State parties' obligation to uphold rights without discrimination, and to ensure the equal rights of men and women to the protections arising from the ICESCR. The Convention on the Elimination of all forms of Discrimination Against Women (1979, CEDAW), which is the key international instrument for achieving equality between men and women, includes a reference to the "establishment of legal protection of the rights of women on an equal basis with men … through competent national tribunals and other public institutions [for] the effective protection of women against any act of discrimination." In addition, the CEDAW Committee published a General Recommendation 33: Women's Access to Justice in 2015, which includes guidelines on strengthening access to legal aid services for women, including promoting gender-sensitive services, improving accountability and legal awareness.[8]

States parties to the United Nations Convention on the Rights of the Child (1989, CRC) undertake to treat accused children "in a manner consistent with the promotion of the child's sense of dignity and worth," including access to "legal or other appropriate assistance" to enable the child to prepare his or her defence. The CRC reiterates the priority established in other international instruments to provide "conditions of equality" and non-discrimination, with a right to an effective remedy as stipulated in the Optional Protocol 3 on the Involvement of Children in Armed Conflict. Although the Convention and its concomitant optional protocols do not specifically address the right to legal aid at no cost to the

7 Human Rights Committee, General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007 (CCPR/C/GC/32).

8 *The United Nations Development Programme and the United Nations Office on Drugs and Crime,* Global study on Legal Aid Report, October 2016, accessed at https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf on page 16 (30).

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child (or his parents), the Committee on the Rights of the Child addressed this in General Comment 10: Children's Rights in Juvenile Justice, which provides that "legal or other appropriate assistance in the preparation and presentation of his/her defence … should be free of charge."

The Convention on the Rights of Persons with Disability (2007) also includes provisions on access to justice for persons with disabilities. Specifically, the Convention stipulates in Article 13 that the States parties "shall ensure effective access to justice for persons with disabilities on an equal basis with others … in all legal proceedings, including at investigative and other preliminary stages."

The African Charter on Human and People's Rights (1979) likewise guarantees equal protection of the law and states that everyone is entitled to the right to defence, including the right to be defended by counsel of his [or her] choice. The Protocol to the Charter on the Rights of Women in Africa (2003) further stresses the principle of equal protection of the law and calls upon States to ensure "effective access by women to judicial and legal services, including legal aid."[9]

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012, UN Principles and Guidelines) is the first international instrument dedicated to the right to legal aid; they highlight and reaffirm that legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law; a foundation for the enjoyment of other rights, including the right to a fair trial; and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process and enables access to justice. The UN Principles and Guidelines provide States with 14 principles and 18 guidelines on the establishment, reform or administration of national legal aid systems in the context of criminal justice, and on ways to ensure that legal aid is "accessible, effective, sustainable and credible." Collectively, they offer detailed guidance on the provision of legal aid at various stages of criminal justice proceedings and for various types of beneficiaries. When adopting the UN Principles and Guidelines, the General Assembly urged States to establish, strengthen and expand legal aid "to the maximum extent possible."[10]

In 2014, the Johannesburg Declaration on the Implementation of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 65 which emerged from the International Conference on Access to Legal Aid in Criminal Justice Systems held in Johannesburg, South Africa, called upon States to fully implement the UN Principles and Guidelines and provisions related to legal aid contained in international and regional instruments.[11]

9 *African Union*, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

10 UNDP and UNDOC, supra note 9, page 21 (35).

11 The Johannesburg Declaration on the Implementation of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Johannesburg, 24–26 June 2014.

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II. The Provision of Legal Aid/Pro Bono Services in Other Jurisdictions

In other countries, bar associations or law societies, such as Malawi, are playing an active role in overseeing the provision of mandatory legal aid by establishing criteria for the renewal of practicing licenses where hours of pro bono services have been met. However, roughly a third of the countries have not yet enacted specific legislation on legal aid. While the development of legal aid legislation is a positive start, translating the law into national policies and strategies to ensure delivery of legal aid services is essential in establishing an effective national legal aid system. Although many countries recognize the right to legal aid for criminal defendants who cannot afford a lawyer, the availability and quality of legal aid provided in practice is limited. For example, there are gaps between legal provisions and their implementation for the requirement that a legal aid provider be provided from the "moment a law enforcement representative restricts a person's freedom". This violation of the right to a fair trial increases the risk of additional abuses that many vulnerable populations are at an increased risk of, such as torture, coerced confessions and arbitrary or prolonged pretrial detention.[12]

In most countries, the right to legal aid is part of national legal frameworks, from Constitutions to specific national laws and dedicated policies on legal aid. General references to legal assistance, and some specific references to legal representation, are included in many constitutions, and increasingly more States are developing specific legislation on the right to legal aid as the responsibility of the State.[13]

Legal aid for criminal matters has been granted in most jurisdictions, through the constitution or other national laws. As per the ICCPR, State parties have an obligation to ensure that there is an equality of arms between parties and that everyone has access to legal counsel even when they are unable to afford one in cases where there is a possibility of deprivation of liberty or where the interest of justice requires it.[14] Provision of State-funded legal aid in civil matters is relatively limited. In many States, it is provided through NGOs or through pro bono services by the private sector. However, States are increasingly recognizing the importance of also providing services, particularly for vulnerable populations, in some civil/administrative matters, such as family law cases, property disputes, access to government entitlements and social services, amongst others.[15]

National legal aid systems and structures have been established independently of each other in different countries and regions, often following their own specific historical pathways and trajectories. Thus there is a wide variety of schemes and approaches currently in use by various countries for the delivery of legal aid to poor and marginalized groups. The

12 UNDP and UNDOC, supra note 9, page 16.

13 UNDP and UNDOC, supra note 9, page 23 (37).

14 United Nations, Treaty Series, vol. 999, No. 14668., art. 14, para. 3(d).

15 UNDP and UNDOC, supra note 9, page 24 (38).

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range of services that fall under the rubric of legal aid varies greatly from country to country.[16]

In Tunisia, legal assistance and representation are governed by a set of laws within the Criminal Procedure Code (1968), the Child Protection Code (1995), and specific laws on legal aid services (2002), legal assistance in administrative matters (2011) and the organisation of the legal profession (2011). Legal aid services are provided through an assigned council system or through an application to the legal aid office. However, the role of the President of the Bar Association and that of the presiding judge in the case are sometimes controversial on the question of who has the authority to assign cases. In Egypt, the Advocates Law requires that the bar associations create local committees to provide legal aid services on a pro bono basis, but in practice, these services are not readily available.96 There are also limited legal aid services provided through the Ministry of Justice, mostly supported through donor funds, as well as through CSOs.[17]

While in Bangladesh, it was not until 2000 that the legal framework was established through the Legal Aid Services Act, which provides legal services to people who are unable to access justice due to limited socio-economic means. This Act also established the National Legal Aid Service Organisation (NLASO) and further policies and regulations followed to establish the legal aid system, including the latest Legal Aid Services Regulations in 2015. NLASO is a statutory body under the Ministry of Law, Justice and Parliamentary Affairs. It is governed by a Board consisting of representatives of Ministries, Members of Parliament, the Bangladesh Bar Council, the Supreme Court Bar Association, and members of civil society.[18]

A review of literature on the provision of pro bono services in other jurisdictions sampled in this paper, shows that laws have been domesticated to provide for legal aid. However, who provides for such aid differs according to laws in each country with most having a national legal aid body coordinating and providing legal aid. There have not been any reviews on countries with provisions on mandatory provision of pro bono/legal aid services so far.

III. Legal Frameworks on the Provision of Legal Aid in Malawi

Access to justice is often hindered by economic, structural, and institutional factors. In many situations, the complexity and the cost of legal processes, as well as geographical and physical constraints, prevent poor and marginalized groups from accessing the justice system. Among other factors, costs and trust in the justice system determine whether someone will seek legal assistance or act to resolve their legal problems (Barakat 2018)[19]

16 Ibid.

17 UNDP and UNDOC, Ibid, page 33 (47).

18 UNDP and UNDOC, Ibid, page 37 (52).

19 UNDP and UNDOC, Ibid, page 7.

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The criminal justice system in Malawi faces numerous challenges that impede access to the formal justice system, especially for poor and vulnerable citizens. In 2013, the WJP Rule of Law Index® revealed four serious problems with Malawi's formal justice system: 1) delays in concluding cases; 2) a lack of mechanisms to track court efficiency; 3) congested courts; and 4) a lack of pro bono lawyers to represent poor and vulnerable clients. In a country where many fail to access formal justice due to excessive caseloads, a lack of resources, and insufficient manpower, many Malawians hold the belief that 'justice is for the rich'. As a result, poor and rural Malawians tend to prefer customary or informal justice systems that are riddled with their own problems. For example, the customary justice systems do not comply with standards of non-discrimination and equality before the law, thus making the rural and peri-urban populations more vulnerable to unfair decisions or decisions that do not respect human rights.[20]Marginalized groups in Malawi face significant obstacles in accessing the formal justice system, particularly because of congested courts and a lack of pro-bono lawyers.[21]

Despite the instruments being in place to protect human rights, there is limited awareness of human rights among the population with little capacity to claim them6. The other area of weakness has been the area of enforcement of rights. The main instrument to enforce the human rights obligations in Malawi is the court system which is still largely inaccessible to the majority of the citizens, especially those in the rule areas.[22]

The 1995 Constitution contains a number of references to good governance and accountability and foresees an elaborate system of checks and balances, including a provision that explicitly refers to the need to "guarantee accountability, transparency, personal integrity and financial probity".[23]

Noteworthy in Malawi's system of checks and balances is the comprehensive body of independent case-handling institutions that were established by the Constitution of 1995. They were set up with a mandate to safeguard important constitutional principles and handle complaints made against public officials or agencies. These institutions include, amongst others, the Anti-Corruption Bureau (ACB), Malawian Human Rights Commission (MHRC) and the Office of the Ombudsman (OMB). These three bodies have played a most visible role as drivers of accountability. However, they also face challenges, such as a lack of funding, capacity constraints and political interference. Moreover, their effectiveness crucially depends on an independent judiciary and relationships with other drivers of ac-

20 Ibid.

21 Implementing the Legal Aid Act in Malawi; June 1, 2014 – July 1, 2015. Accessed at file:///C:/Users/USER/Documents/GWRD/Paper%20on%20LELPA%20and%20CSOs/Malawi_research_findings.pdf page 9.

22 Ibid.

23 See Constitution of the Republic of Malawi, Chapter III, article 13 o.

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countability, such as Parliament, civil society and the press (interviews, CABS Development Partners 2010, p. 6 and 28).[24]

Access to legal aid or pro bono services in Malawi has transitioned progressively over the years. Prior to the Legal Aid Act which establishes the Legal Aid Bureau, Malawi had a state owned Legal Aid Department which fell under the Ministry of Justice and Constitutional Affairs whose enabling legislation was the Legal Aid Act Cap 4:01 of the Laws of Malawi which was an Act

> *"to make provisions for the granting of legal aid to poor persons and matters connected therewith and incidental thereto"*

The Legal Aid Act was enacted in 1964 to provide for Legal aid to poor persons for free and at a contribution to those whose levels of income allow such contribution. The Legal Aid Department (LAD) was understaffed, had a high turnover of Advocates, and was in need of additional funding.

Reforms ushered in the Legal Aid Bureau which was established under section 3 of the Legal Aid Act of 2011 to provide legal services to people who cannot afford private lawyers. It is one of the social services government provides to its citizens such as health, education, food and water. It is the only such institution in Malawi.

The Legal Aid Bureau plays an important role to ensure that poor people have access to justice and legal remedies as provided for under section 41 of the Constitution. The Legal Aid Bureau provides legal aid services to persons of insufficient means to hire private lawyers. Priority for legal aid is given to vulnerable groups such as women, children, the elderly and the sick.

On the other hand, Malawi has a bar association, the Malawi Law Society. The Malawi Law Society's mission is to be a world recognized bar association in the provision of quality services, fostering advocacy and the rule of law. The society is an umbrella organization of all lawyers in Malawi and it is a membership organization. The regulating framework recently went through reforms which included the introduction of a new provision on the provision of pro bono services.

A brief background as to why reforms were needed to regulate the provision of pro bono services whilst the law already provided for the Legal Aid Bureau is necessary. The existing legal framework regulating the legal profession consists mainly of the Legal Education and Legal Practitioners Act, 2017. The principal legislation in Malawi is the Constitution. The Constitution has made no specific reference to the regulation of the legal profession but has made provision for some aspects which inevitably touch on the legal profession in terms of its role in ensuring the protection of the sanctity of a constitutional order in Malawi. the preamble of the constitution provides, among other things, that the people of

24 *Christiane Loquai and Henrike Klavert,* Supporting domestic accountability in the context of budget support, Briefing Note No. 28, accessed at https://ecdpm.org/wp-content/uploads/2013/11/BN-28-Domestic-Accountability-Budget-Support-German-Development-Malawi-2011.pdf on page 6.

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Malawi are desirous of creating a constitutional order based on the need for an open, democratic and accountable Government. The legal profession has a paramount role in the realization of this desire by ensuring that openness, democracy and accountability are entrenched. similarly, the legal profession has a major role in assisting the Judiciary in interpreting, protecting and enforcing the constitution and all laws in accordance with the constitution in an independent and impartial manner.[25]

At policy level, Government adopted the Malawi Growth and Development strategy 2018–2022 (MGDS) whose overall objective is to reduce poverty through sustained economic growth and infrastructure development. It might appear from the face of it that the focus of the blueprint has left professional development out of the picture. However, the key priority areas interface with the legal profession in a myriad of ways. improvement of any of these areas would feed into the core business of the legal profession in such areas as improving access to justice through provision of infrastructure such as courts and legal houses; agriculture and food security which tends to affect crime rates and prevention and management of HIV and AIDS which has also affected legal practitioners by killing individuals on whom vast resources have been spent to educate.[26]

Theme five on improved Governance has been unpacked into six sub-themes which touch on the following areas: macroeconomic Growth; public policy formulation, fiscal management, public sector management and corruption; Decentralization; Developing a strong Justice system and rule of law; security; and corporate Governance. as such, the legal profession has a role to play in the realization of the goals of the MGDs and the realization of those goals also positively affects development of the profession. the law is an instrument for development for its core function is to restructure, plan and encourage enterprise. thus, it is an instrument of wide-scale social and economic planning. Therefore, training of legal practitioners has to envisage the important role of the law in realization of national development.

The Law Commission was also mindful of the Malawi Law Society's proposal that the law should provide that legal practitioners should perform fifty hours of mandatory pro bono services per year. the commission defined pro-bono services to include providing free legal advice and free legal representation to the needy and deserving. it further proposed that the provision should exempt legal practitioners in 'active employment in public service'.[27]

The Law Commission adopted the proposal. However, it cautioned against legal practitioners picking up the cases anyhow. The commission therefore recommended that the society should allocate the pro bono work to the legal practitioners. it was of the view that the society may liaise with the Department of Legal aid and Non-Governmental organizations

25 Law commission report no. 24, the report of the Law commission on the Legal education and Legal practitioners act (cap. 3:04), page 13.

26 Law Commission Report, Ibid, Page 14.

27 Law Commission Report, Ibid, Page 66.

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(NGOs) to identify the needy and deserving and allocate their cases to legal practitioners. It was the Commission's view that in this way the society can easily monitor the cases it has referred to practitioners. the commission also observed that the society may need to consider pro bono services that legal practitioners already do on their own when allocating the mandatory pro bono work. in this case, legal practitioners already undertaking pro bono services would have to inform the society of that fact.[28]

Following its enactment, the Act added a new provisions relating to the provision of mandatory pro bono services. Mandatory in the sense that, without fulfilling the required hours Section 30 (5) (b) of the Act provides for that the Registrar shall not issue a license to practice to a legal practitioner unless the legal practitioner has performed the full hours for the annual mandatory pro bono work as determined by the society from time to time.

Further, section 42 provides that the Society shall in liaison with the Director of the Legal Aid Bureau allocate pro bono work to every legal practitioner annually. When allocating the pro bono work, the Society shall have regard to pro bono work that a legal practitioner already undertook on his own in that particular year and 26th July, 2013 67 Pro bono work any outstanding pro bono work that a legal practitioner may have. Where a legal practitioner informs the Society that he will not be able to perform the pro bono work, he shall pay to the Society an amount of money, determined by the Society, with which the Society shall hire services of another legal practitioner to perform the work. A legal practitioner who contravenes this section shall be liable to disciplinary action. However, this section shall not apply to legal practitioners in the public service.

IV. Has the revised LELPA worked to promote human rights through mandatory provision of pro bono services?

In light of section 30 of the LELPA, the assumption is that all the legal practitioners who renewed their practicing licenses in the year 2020/2021 provided pro bono services. A gazetted publication of a list of licensed legal practitioners for the year 2020–2021 shows that 588 legal practitioners renewed their licenses. Since the law is not specific on how many cases a legal practitioner is to handle under section 42 of the LELPA, an impact analysis shall have to be carried out from another dimension.

An analysis of the data for cases handled under the pro bono services programme, with focus on Lilongwe, 110 cases were allocated to various legal practitioners on various issues including employment, land, matrimonial, chieftaincy, deceased estates, child maintenance, and assault disputes. Considering the provision is fairly recent, the mandatory aspect of it has seen private practice lawyers provide legal aid services to under privileged people on various aspects of the law. Not only has this assisted with sharing the burden to lessen the work load the Legal Aid Bureau has but it has begun a culture of improving access to justice to all by breaking the economic barrier to accessing justice.

28 Law Commission Report, Ibid, Page 67.

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Efforts to be provided with data regarding the number of cases the Legal Aid Bureau and the Society provided legal practitioners bore little fruit. Understandably so as this is the first year the two provisions have been implemented. The Law Society and the Legal Aid Bureau drew a Memorandum of Understanding guiding the enforcement of the provisions which include that once a file has been adopted by a legal practitioner, the legal practitioner shall provide services until the completion of the matter. The Legal Aid Bureau has a register providing a list of legal practitioners and the case files they are handling. However, there seems to be a lack of systematic record keeping by both the Society and the Legal Aid Bureau which would enable them to easily monitor which legal practitioners have case files under this initiative. It would also enable them to track progress being done on the case files during the course of the year as this initiative targets private practice practitioners who, due to the nature of their practice, are likely to pay more attention to their paying clients rather than their non-paying clients. There is room for delay for their non-paying clients to access justice later than expected as section 42 of the LELPA is attached to section 30 of the LELPA in that the 24 hours of pro bono services will go towards the legal practitioner's annual renewal of their licenses. Without a clear and set undertaking to ensure the cases under this initiative are handled throughout the course of the year even within the 24 hours rather than be shelved and handled during the month or so prior to the renewal of licenses in order to meet the mandatory requirement.

Is there an opportunity to regulate section 42 of the LELPA to iron out the above concerns? Yes, section 121 (1) of the LELPA provides that the Minister may, with recommendation from the Society, make regulations for the better carrying out of the Act. This would provide the Society with an opportunity to regulate how section 42 should be implemented and thereby ensure the effective provision of pro bono services to clients whose human rights violations need remedying.

C. Conclusion

Malawi has a 'mixed model' for the provision of legal aid under which both public and private entities provide legal aid with supervision and management by both the Malawi Law Society and the Legal Aid Bureau as provided for under the Legal Aid Act and the LELPA. this is progressive as the pro bono services are now mandatory, having being linked to the renewal of annual subscription of legal practitioners practicing licenses. The huge work load the Legal Aid Bureau had is now being shared, more particularly with private practice practitioners, thereby providing many under privileged people an opportunity to access justice which is recognized as a human right.

However, despite an MOU between the two entities, there seems to be a challenge in systematic and coordinated disaggregated data between the two entities over the nature of cases being handled by legal practitioners even months after the first initial implementing year passed.

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The protection and respect for human rights is of significance to the many rights provided for in international, regional and domestic laws. It is therefore of utmost importance that the Malawi Law Society and the Legal Aid Bureau lay out a holistic but practical strategy to ensure the provision of the mandatory pro bono services is effectively and fully realized not at the detriment of the client by merely fulfilling a legal obligation towards renewing of the legal practicing license. The rule of law should prevail even in the carrying out of this noble cause for the promotion and protection of human rights, in this case, the right to access justice.

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