

JIMMA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE
THE SCHOOL OF LAW

**THE RIGHT TO FREE LEGAL ASSISTANCE DURING PRETRIAL STAGES IN
ETHIOPIA: A COMPARATIVE STUDY**

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Declaration

I hereby declare that, this paper prepared for the partial fulfillment of the requirements for LL.M Degree in Human rights and Criminal law in a title “The Right to Free Legal Assistance during Pretrial Stages: A comparative Study” is my own work and that it has not been submitted for any degree in other university. I also declare that any source used in the paper has been duly acknowledged.

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Lists of Acronyms and Abbreviations

ACoHPR	African Commission on Human and People's Right
ACHPR	African (Banjul) Charter on Human and Peoples' Rights
CBP	Community Based Paralegals
CSs	Charities and Societies
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FDRE	Federal Democratic Republic of Ethiopia
GC	General Comment/Grand Chamber
HPR	House of Peoples' Representative
ICCPR	International Covenant on Civil and Political Rights
LASA	Legal Aid South Africa
NGO	Non-Governmental Organizations
No.	Number
NLAC	National Legal Aid Council
PD	Public Defenders
PDO	Public Defender Office
UNDP	United Nations Development Program
UNHRC	United Nations Human Rights Committee
Vol.	Volume

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Abstract

The right to free legal assistance is considered as a cornerstone to ascertain a fair trial, thus, in its absence it is hard to enforce other rights including rights conferred during pretrial stages. Albeit free legal assistance in pretrial stages is not explicitly recognized in binding international and regional human right instruments, norms and jurisprudences developed at the international floor enjoins state parties including Ethiopia to confer the right. Bearing this in mind, the paper aims to assess the status of the right to free legal assistance in pretrial stages, the institutional setup and approaches employed to render free legal assistance in Ethiopia through a comparative perspective and mainly a doctrinal one.

Legal assistance serves as an instrument to create equality of arms among contentious parties. Inequality of arms is apparent in all stages of the criminal proceedings including pretrial stages and justice cannot be assured without ascertaining a legal assistance by states for all eligible persons. Notwithstanding, in this paper, the author finds that the prominent approaches employed to create equality of arms through rendering free legal assistance in Ethiopia have rare experience of providing the right in pretrial stages. The main reasons for this are owing to lack of recognition of the right to free legal assistance for detained/arrested persons inside the FDRE constitution and subsequent legislations as well as lack of institutional setup to fulfill the obligation of Ethiopia which emanate from; the cumulative reading of Article 14/3/b and 14/3/d of ICCPR, the jurisprudence of UNHRC, Article 9/4 and 13 of the FDRE constitution.

The right to free legal assistance in pretrial stages is not recognized in Ethiopia and the approaches employed are not comprehensive enough. Therefore, the author through considering; international and regional standards regarding free legal assistance during pretrial stages, the value of the right and experience of comparative jurisdictions, argues for; (i) the incorporation of the right under the FDRE constitution and the enactment of a comprehensive legal framework thereof, (ii) the establishment of autonomous institution to manage the delivery of the service through diversifying providers, and (iii) the employment of a special procedure to render free legal assistance during pretrial stages of the criminal proceedings.

Key words:

Ethiopia, Free Legal Assistance, Pretrial Stages, Norms, Jurisprudence, Approaches, Special Procedure, Legal Framework, Institutional Setup

CHAPTER ONE: INTRODUCTION

1.1. Background of the Study

The right to legal assistance¹ is among fair trial rights that serve as a means for the realization of access to justice. Since the right to legal assistance is ‘foundation for the enjoyment of other rights’², it is an integral part to a fair trial. In the absence of a legal assistance, it is difficult to enforce other rights such as, the right to be heard, protection from forced confession and preparation for defence. Some authors stated the impossibility of realizing some human rights without ascertaining the delivery of the right to legal assistance. With regard to this Howard and others provided that; ‘Honoring and implementing human rights cannot happen without meaningful access to legal representation.’³ Owing to this, the author of this paper expresses the right as the ‘machine right’ which catalyzes the operation of other fair trial rights.

As a result of its grandness, international and regional human right instruments accredited the right through incorporation.⁴ For instance, ICCPR is the first binding international human right instrument to explicitly confer the right to legal assistance for all who face a criminal charge to realize a fair trial. In this regard, article 14/1/d of the same instrument grants the right to defend through legal assistance as a minimum guarantee and free legal assistance should be available when the interest of justice requires and the beneficiary lacks a means to hire a lawyer. In such

¹ For the purpose of this thesis, ‘legal assistance’ refers to advice and representation in criminal proceedings without remuneration. In the present paper, on certain occasions the phrase ‘legal aid’ and ‘free legal assistance’ will be interchangeably employed. However, some concepts of ‘legal aid’ such as, ‘legal Education’ and access to ‘legal information’ are debarred.

² UNODC, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (Resolution adopted by the General Assembly 67/187) (2013) principle 1 [hereafter, UN Principles and Guidelines];

³ See, Howard Lintz and others, *A Basic Human Rights: Meaningful Access to Legal Representation*, (2015) 9.

⁴ UDHR in general terms, granted all the guarantees necessary for defence for those who charged with a penal offence. See, Universal Declaration of Human Rights (1948) Article 11/1 [hereafter, UDHR]; International Convention on Civil and Political Rights, (General Assembly resolution 2200A (XXI) 1966), Article 14/3/d [hereafter, ICCPR]; Convention on the Rights of the Child, (General Assembly resolution 44/25 of 1989), Article 40/2/b/ii; see European Convention on Human Rights (the Convention for the Protection of Human Rights and Fundamental Freedoms) (1950) Article 6/3/c [hereafter, ECHR]; American Convention on human rights, (1969) Article 8/2/e [hereafter, ACHR/the san Jose pact]; African (Banjul) charter on human and peoples’ rights, 1981, Article 7/1/c [hereafter, ACHPR/the Banjul charter]; The Convention on the Elimination of all forms of Discrimination Against Women(1979) Article 2/c; The Convention on the Rights of Persons with Disability (2007) article 13/1 and 14/2.

cases state parties shoulders the onus to provide a legal assistance to the accused without awaiting remuneration in response.

As provided under the first paragraph of Article 14 of ICCPR, all persons shall be treated in equal manner. According to such provision, equality before a law is considered as the general guarantee for fair trial rights and it refers, *inter alia*, equal equipment between contentious parties.⁵ The covenant also affirms equality before the law and equal protection of the law irrespective of, *inter alia*, property.⁶ The right to legal assistance is entitled in full equality.⁷ Thus, for persons who face criminal charge, their economic capacity should not be a parameter to cater the right to legal assistance. However, bearing in mind international principles, norms and jurisprudence, the conferment of the right in all stages of the criminal proceeding particularly, during pretrial stages is not explicitly recognized under the covenant.

In addition to the above international conventions and declaration, regional based human right instruments,⁸ that are complimentary to the former, also accord the right to legal assistance. For instance, the Banjul charter bestows the right to be defended by counsel.⁹ Beside the charter, the African Commission on human and peoples' rights adopted several principles and guidelines governing the delivery of free legal assistance in all stages of the criminal proceedings.¹⁰

Virtually all binding international and regional human right instruments, accord the right to free legal assistance after the institution of the charge.¹¹ Nonetheless, decades after the adoption of

⁵ ICCPR (n 4) Article 14/1; Jixi Zhang, 'Fair Trial Rights in ICCPR' (2009) 2 J. Pol. and L., 39.

⁶ ICCPR (n 4) Article 26.

⁷ See, *ibid*, Article 14/3.

⁸ European Convention on Human Rights recognizes the right of anyone charged with a criminal offence, 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.' see ECHR (n 4) Article 6/3/c; Likewise, the American Convention on Human Rights entitles a minimum guarantee that every person accused of a criminal offence, 'the right to defend himself or be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel' and of 'the inalienable right to be assisted by counsel provided by the state.' See ACHR (n 4) Article 8/2/d and e.

⁹ See the Banjul charter (n 4) Article 7/1/c.

¹⁰ See for instance, Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa, Lilongwe, Malawi (2004) [hereafter, the Lilongwe declaration]; Dakar Declaration and Recommendations (1999); The African Commission on Human and Peoples' Rights, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa DOC/OS(XXX)247 (2001) [hereafter, African principle and guideline].

¹¹ See for instance, ICCPR (n 4) Article 14/3/d; ECHR (n 4) Article 6/3/c; the san Jose pact (n 4) Article 8/2/e.

those international and regional human right instruments, several norms, principles and jurisprudences are developed both under international and regional floors. For instance, in 2012, UN general assembly adopted principles and guidelines on access to legal aid in criminal justice systems to guide states parties on the principles on which free legal assistance is delivered and to encourage them to draw appropriate principles to enhance the efforts on access to free legal assistance in criminal justice systems.¹² The third principle urge states to grant a legal assistance for arrested, detained, and suspected persons at all stages of the criminal proceedings including during pretrial phases. With regard to the eligibility criteria to grant free legal assistance during pretrial stages of the criminal proceedings, it is widely drawn, i.e. such principles and guidelines provided the delivery of free legal assistance where the interests of justice so require, regardless of the person's means to access a lawyer.¹³ Besides, the United Nations body of principles for the protection of all persons under any form of detention or imprisonment provides that a detained person shall be entitled to have legal assistance assigned by a judicial or other authority in all cases where the eligibility criteria fulfilled.¹⁴ Further, in 2007 a conference was held in Kyiv to enhance the criminal justice system. The conference was followed by a declaration which stipulates the bestowal of free legal assistance that commence when a person is under arrest.¹⁵

Moreover some regional principles and jurisprudences are also developed to accord the rights before the institution of the charge. For instance, in the last decade of 20th C the African human rights commission adopted a resolution on free legal assistance and the principles and guidelines thereof.¹⁶ Under the second paragraph of the general principles, the entitlement to have a legal assistance during pretrial stages commenced from the arrest of a person.¹⁷ Besides, another soft law known as, the Lilongwe declaration also explicitly stipulates the need for free legal assistance to the needy. The declaration provided that; 'a legal aid program should include legal

¹² UN Principles and Guidelines (n 2).

¹³ Ibid, principle 3-Legal aid for persons suspected of or charged with a criminal offence, para 21.

¹⁴ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (9 December 1988).

¹⁵ Kyiv declaration (2007), the declaration was adopted during a conference on the protection and promotion of human rights through provision of legal service, best practice from Africa, Asia and Europe, Kyiv Ukraine, 2007

¹⁶ ACoHPR, Resolution on the right to a fair trial and legal aid in Africa ACHPR/res.41(XXVI)99 (1996); see African principle and guideline (n 10).

¹⁷ African Principles and Guidelines (n 10) general principle A. 2(f), provisions applicable to arrest/detention M. 2(f) and provisions applicable to proceedings relating to criminal charges N. 2(c).

assistance at all stages of the criminal process includes *inter alia*, investigation, arrest and pretrial detention ... to ensure that human rights are protected.’¹⁸ Furthermore, in Europe, although the right is not explicitly recognized under the continent’s human right convention, European Union’s and European court of human rights (hereafter, ECtHR) effort enhance the recognition and applicability of the right before the institution of the charge. For instance, in 2008 the ECtHR in *Salduz* pass a groundbreaking decision which grant the right in pretrial stages and held that; the right to legal assistance is required to bestow a meaningful enjoyment of fair trial rights.¹⁹ Since then a series of verdicts in favor of delivering the right during pretrial stages of the criminal proceedings that commence from the arrest of the suspect is adjudge by the court.²⁰

In addition to the above efforts to accord the right during pretrial stages of the criminal proceedings, authors such as, Verhoeven²¹ argues for the recognition of the right to legal assistance in all stages of the criminal proceeding, particularly during pretrial stages. In his study the author reveals various results:

First, suspects who consulted a lawyer before the interrogation more often used their right to remain silent than suspects who did not consult a lawyer before the interrogation. Second, on average criminal investigators used more intimidation tactics when confronted with suspects who used their right to remain silent compared to suspects who talked. Third, during interrogations in the presence of a lawyer criminal investigators on average used less intimidation tactics compared to interrogations in the absence of a lawyer.²²

According to the finding of Verhoeven, to safeguard the rights of arrested persons and to prevent them from coercion, the delivery of legal assistance plays vital role. Although the delivery of legal assistance during pretrial stage is justified by some authors, this is not sound for others and argues as follows; ‘... early access to legal advisors, especially their presence during police

¹⁸ The Lilongwe Declaration (n 10) para 3.

¹⁹ Application No 36391/02 (2008) ECtHR (GC).

²⁰ For more discussion on the ECtHR/Strasbourg jurisprudence, see below section 2.1.2. of chapter two

²¹ See, Willem-Jan Verhoeven, ‘Perspectives on Changes in the Right to Legal Assistance Prior to and during Police Interrogation’ (2014) 7 Erasmus L. Rev., 171.

²² Ibid

interrogation, may interfere with the truth-finding process ...²³ for this author, during interrogation the concept of ‘crime control’ get more weight and argue for the non-bestowal of a legal assistance irrespective of a persons’ capacity to afford a lawyer.

Since individuals entitled several human rights during pretrial stage, state should enjoin to deliver the right in all stages of the criminal proceedings including before the institution of the charge. With regard to the mechanisms to provide the right, the question here should be how the right is delivered? What kind of mechanisms should states implement to furnish a meaningful legal assistance during pretrial stages to the needy?

To provide a legal assistance without remuneration several mechanisms are developed. For its effectiveness, international²⁴ and regional²⁵ standards frame the delivery of free legal assistance through collaboration between state and non-state actors. The most prominent approaches for the deployment of the right include; Public defender systems, *ex officio/judicare*, *pro bono publicio*, contract service model, civil society providers and hybrid systems.²⁶

Public defender system is delivered primarily through governmental institution that employs lawyers to provide legal assistance to the needy.²⁷ This is a model employed in several jurisdictions including Ethiopia where the system is embedded within the judiciary and serves indigent under the auspices of the courts. However, the South Africa public defenders have been

²³ M. Bockstaele, ‘Changing Interrogation and Investigation Techniques in Accordance with the ‘Salduzwet’’, in P. Ponsaers and others (eds.), *Innovation in Criminal Investigation: an Exploration* (2013) cited in WJ. Verhoeven, (n 21) 171.

²⁴ For instance, basic principles on the role of lawyers provide that; ‘Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.’ See, United Nations Basic Principles on the Role of Lawyers (1990), Para 3

²⁵ For instance, the Lilongwe Declaration provides that; ‘Each country has different capabilities and needs when consideration is given to what kind of legal aid systems to employ. In carrying out its responsibility to provide equitable access to justice for poor and vulnerable people, there are a variety of service delivery options that can be considered. These include Government funded public defender offices, *Judicare* program, justice centers, law clinics, as well as partnerships with civil society and faith-based organizations.’ See, the Lilongwe Declaration (n 10) Para. 6.

²⁶ United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa* (2011) 27-41; United Nations Development Programme and United Nations Office on Drugs and Crime, *Global Study on Legal Aid: Global Report* (2016) 39-54 [hereafter, global study] United Nations Office on Drugs and Crime and United Nations Development Programme, *Early Access to Legal Aid in Criminal Justice Processes: a Handbook for Policymakers and Practitioners*, criminal justice hand book series (2014) 72-84 [hereafter, early access to legal aid]

²⁷ Early Access to Legal Aid, *ibid*, 73; Global Study, *ibid*, 44.

integrated into the legal aid board's (now, legal aid South Africa) justice centers and undertake both criminal and civil matters.²⁸ In addition to public defender office, private lawyers also provide free legal assistance in different ways such as, *ex officio* and *pro bono*. The former is delivered through contractual agreement with states and taking compensation thereof. While *pro bono* service is provided without compensation. However, the latter's applicability is not identical across the world; rather some jurisdictions like Ethiopia apply a mandatory *pro bono*,²⁹ while in other jurisdictions like South Africa it is provided in a voluntary basis.³⁰ Likewise, states also compensate and deliver free legal assistance in contract service model. The difference in contractual service system is that, the negotiation is between the government and bar associations or other non-state organizations which takes role in the delivery of legal assistance.³¹ Furthermore, civil societies also deliver the right through several mechanisms such as, legal clinics and paralegals.³²

Nowadays, an approach that becomes increasingly popular is the hybrid system, known as 'mixed-model', which recommends states to choose a combination of the above models. The hybrid system is suitable since it 'maximize the strengths and minimizing the weaknesses of the traditional models.'³³ On the road to deliver free legal assistance, developing countries confront a number of challenges. One of the main constraints which inhibit their effort to deliver the right is lack of resources. With regard to this, Ethiopia is not an exception.

In Ethiopia, to fulfill the promise under international and regional human right instruments and to facilitate the means of delivering the right, several laws are promulgated. For instance, the 1995 FDRE constitution _ the 'supreme law of the land,' lifted the status of legal assistance right

²⁸ Federal Court Proclamation No. 25/1996 (1996) Article 16(2)(j); David McQuoid-Mason, 'Holistic Approach to the Delivery of Legal Aid Services–The South African Experience' in H. Thelle and P. Dalton (eds) *A Human Right to Legal Aid* (2010) 143; besides this approach is also implemented in Moldova having various offices throughout the country. See for instance, M. Gramatikov and N. Hriptievschi, *Impact Assessment of the Moldovan Law on State Guaranteed Legal Aid* (2012) 17.

²⁹ Federal Advocates' Code of Conduct, Council of Ministers Regulations No. 57/1999 (1999) Article 3.

³⁰ Seehaam Samaai, 'The Promotion of Access to Justice by University Law Clinics in South Africa' in H. Thelle and P. Dalton (eds) (n 28) 244; see David McQuoid-Mason (n 28) 143.

³¹ Handbook on Improving Access to Legal Aid in Africa (n 26) 28.

³² See Early Access to Legal Aid (n 26) 77. As provide in this document, paralegal also called, 'barefoot lawyers' are persons who are not fully qualified lawyer, but provides some of the services that are provided by fully qualified lawyers.

³³ Global study (n 26) 51.

to the constitutional level.³⁴ Article 20 of the constitution, captioned, ‘Rights of Persons Accused,’ lists some rights accorded to accused persons and paragraph five of the same reads as follows; ‘Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense.’³⁵

The constitution let accused persons to choose a legal assistor, when they have a means (financial capacity) to hire a lawyer. However, if they have no means to do so and justice is at stake, the constitution enjoins the government to provide a legal assistance without remuneration. Thus, alike ICCPR, to provide a legal assistance at the expense of state, the FDRE constitution seeks the fulfillment of two cumulative requirements; financial constraint to hire a lawyer and the probability of miscarriage of justice. Nonetheless, the constitution doesn’t accord the right at the earliest stages of the criminal proceedings. The constitution under Article 19 provided a number of human rights for persons under arrest without the bestowal of free legal assistance. Besides the supreme law of the land does not deal on questions like, what miscarriage of justice constitutes? When it is resulted? Owing to this, although the right to legal assistance is recognized after the institution of the charge, lack of clarity under the constitution creates disparity in its enforcement.³⁶ With regard to guaranteeing the right at the highest possible level; under the constitution, the experience of South Africa and Moldova is different since in those jurisdictions the right is recognized to be accorded during pretrial stages of the criminal proceedings.³⁷

³⁴ Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 (1995) Article 20/5 [hereafter, the FDRE constitution].

³⁵ Ibid

³⁶ Mulugeta Akalu, ‘The Right to State Funded Legal Counsel in Criminal Proceedings in Ethiopia; the Need for a Reform on the Law and Practice’ (2017) 22 *IOSR-JHSS*, 2; in his study, Mulugeta reveals that; ‘The lack of clarification of miscarriage of justice by the relevant laws of the country had made it difficult for our courts to determine what types of cases qualify for free legal assistance through state appointed legal counsel’ ... ‘Some courts appoint counselors only for capital crimes by taking the constitutional provision of *grave miscarriage of justice* workable only for capital crimes. Some courts appoint counselor for defendants accused of felony while others do not appoint state funded counselors even for capital punishments on the ground of lack of funds to do that.’

³⁷ See Constitution of the republic of South Africa (1996) section 35(2) (b) (c) and The Constitution of the Republic of Moldova (1994) Article 26.

Although the FDRE constitution is not clear about the phrase ‘miscarriage of justice,’ some legislation³⁸ determine the threshold when it is resulted. The first legislation is the defense forces proclamation, which is enacted a year later to the constitution, provide free legal assistance when the accused person face a minimum of five year imprisonment.³⁹ The second proclamation is the 2008’s Oromia national regional state proclamation which re-establishes the region’s courts. Alike the defense forces proclamation, this proclamation also take a five year imprisonment as a minimum requirement for the susceptibility to miscarriage of justice.⁴⁰ Although the two proclamations determine what meant by ‘miscarriage of justice’, they neither have nationwide applicability nor accord the right during pretrial phases of the criminal proceedings.

Irrespective of lacking exhaustively framed statute for the delivery of free legal assistance for all persons who confront with the criminal justice system and everywhere in the country, some Approaches/models to deliver free legal assistance is available in Ethiopia. These are the public defenders system, *pro bono publico* and the law school legal clinics. However, all of them are not successful to cater free legal assistance as provided under the FDRE constitution.⁴¹

Inadequacy of the legal frame work together with the ineffectiveness of the existing mechanisms to provide free legal assistance can jeopardize the right and simultaneously affects the operation of other rights thereof. Since the right to legal assistance is a ‘machine right’ which catalyze the operation other fair trial rights, states should hunt effective mechanisms for the realization of this right at the earliest phases of the criminal proceedings. As a result, in this paper the author endeavors to bring an approach which fits best for the effective delivery of legal assistance during pretrial stages in Ethiopia through a comparative study.

³⁸ Defense Forces proclamation No. 27/1996, (as amended, Proc No. 343/2003); Proclamation to provide for the Re-establishment of Oromia National Regional State Courts, Proc No. 141/2008, *Megeleta Oromia*.

³⁹ Defense Forces proclamation, *ibid*, Article 34/1.

⁴⁰ Oromia courts re-establishment proclamation (n 38) Article 17/2.

⁴¹ With regard to the status and performance of public defender’s office in Ethiopia see, Elias N. Stebek (ed.), *Public Defender’s Services in Ethiopia: Assessment of Current Gaps and the Way Forward*, Ethiopian Lawyers Association and Ethiopian Young Lawyers Association (2015); likewise, with regard to the applicability of *pro bono* model in Ethiopia, see, Hussein A. Tura, ‘Indigent’s Right to State Funded Legal Aid in Ethiopia’ (2013) 2 Int’l Hum. Rts. L. Rev. 120 and Mulugeta Akalu (n 36); further, for the status of law school legal clinics, see Mizanie Abate and others ‘Advancing Access to Justice for the Poor and Vulnerable through Legal Clinics in Ethiopia: Constraints and Opportunities’ (2017) 11 Mizan law review 1.

1.2. Statement of the Problem

The right to a fair trial in criminal proceedings is universally recognized norm that embodied several rights inside including the right to legal assistance. The right to legal assistance is recognized under several international and regional human right instruments.⁴² In all human right instruments, the spirit of the right is almost the same; they confer the right to accused persons and free legal assistance is accorded when the means-merit tests are met.

The right to legal assistance is recognized under ICCPR for the realization of fair trial in equal manner. As provided under the first paragraph of Article 14 of the covenant, all persons are equal before the law irrespective of their economic capacity. According to such provision the right to be equal refers, *inter alia*, equal equipment between contentious parties⁴³ and ‘justice cannot be achieved without securing access to legal assistance ... for everyone.’⁴⁴ The ICCPR doesn’t explicitly shoulder the onus on state parties to deliver the right during pretrial stages of the criminal proceedings. However, it is apparent that there is inequality of arms in all stages of criminal proceedings. Without the realization of the right to legal assistance in all stages of the criminal proceeding, ‘... those who come into contact with the intricacies of the system and rules of procedure would be unfairly pitted against the stronger, publicly funded criminal justice system...’⁴⁵ Since the right to legal assistance is a cornerstone for the enjoyment of other rights, it serves as an instrument to fix such power imbalance among contentious parties.

As provided in the background of this study legal assistance is a ‘machine right’ which catalyzes the operation of other rights including rights entitled during pretrial stages. Thus, without recognizing legal assistance before the institution of the charge, efforts to enforce rights in pretrial stages face difficulties.

Ethiopia, alongside the ratification of international and regional human right instruments, incorporates the right to legal assistance under the FDRE constitution. The constitution, alike human right instruments, under article 20/5 confer the right to legal assistance exclusively after

⁴² See above note 4 et seq.

⁴³ Jixi Zhang, (n 5) 39; see also, ICCPR, (n 4) Article 26.

⁴⁴ Victor Muntean, *Free Legal aid in Moldova*, prepared for seminar on The Legal Profession in Europe: Access to Justice/The Lawyer and the State available at www.ccbe.eu/search/?tx_keserch accessed May 15, 2018.

⁴⁵ Handbook on Improving Access to Legal Aid in Africa (n 26) 7.

the accusation of the alleged person. Besides, under the caption ‘Detained persons right to consult advocate’, the 1961 and the working criminal procedure code of Ethiopia in its Article 61 let detained person to communicate his advocate. Notwithstanding, such provision does not address and determine the fate of indigent persons who confronts the criminal justice system. Although Ethiopia lacks clearly framed statute to provide free legal assistance in all stages of the criminal proceedings, some approaches are available to deliver the right. These include; public defender system, mandatory *pro bono* and law school legal clinics. However, neither of them performs meaningfully to deliver the right to legal assistance at state expense.⁴⁶ In developing countries like Ethiopia, disproportional number of lawyers to the population,⁴⁷ together with the high cost of their fees, made it unlikely for indigents to afford a lawyer. In general, developing states are recommended to diversify providers of free legal assistance, adopting an inclusive approach, and enter into agreements with, *inter alia*, non-governmental organizations, community based organizations and faith-based groups.⁴⁸ In Ethiopia, efforts are undertaken to realize the right and some models are also furnished to deliver the right. However, the right is not provided in a meaningful way and the diversification of providers is not entirely employed.

States shoulder the responsibility to provide free legal assistance. But such responsibility incumbent on states is primary (the so-called primary positive obligation of state) and other non-state actors also play a vital role. In this case, the responsibility of states become creating a working condition, *inter alia*, through enacting legislation which promote the delivery of the service (the so-called secondary positive obligation of state). In Ethiopia, besides lacking resource to fulfill the promise, what makes the situation severe is that, some statute inhibits the commendable part played by non-state actors.

⁴⁶ With regard to the status and performance of public defender’s office in Ethiopia see, Elias N. Stebek (ed.) (n 40); likewise, with regard to the applicability of *pro bono* model in Ethiopia, see, Hussein A. Tura (n 41) and Mulugeta Akalu (n 36); further, see, Mizanie Abate and others (n 41) for the status of law school legal clinics in Ethiopia. Besides, absence of legal assistance before the filing of a case in court as a problem with regard to the rights of *inter alia*, arrested persons and a person held in custody is the concern of the first National Human Rights Action Plan. See FDRE National Human Rights Action Plan, 2013-2015, Section 2.3.4.

⁴⁷ For instance, the number of Lawyers *per capita* in Ethiopia is 1 to 20,250. See Handbook on Improving Access to Legal Aid in Africa (n 26) 12; besides, in Moldova, the shortage of lawyers particularly outside the capital is one of the constraint that the national legal aid council is facing. See M. Gramatikov and N. Hriptievshi (n 28) 20.

⁴⁸ Handbook on Improving Access to Legal Aid in Africa, (n 26) 38.

In the present study the author endeavors to assess effective mechanisms to deliver the right during pretrial stages of the criminal proceedings. Although some studies are conducted on the right to legal assistance for indigents, almost all of them are heeded on the bestowal of the right after the institution of the charge (in trial and post-trial stages). However, this study through justifying the need to accord the right during pretrial stages, appraise effective approaches for the delivery of the right in cost effective manner in Ethiopia. The paper will also contribute to commute the current status of recognizing and enforcement of the right in Ethiopia through a comparative study.

1.3. Objective of the Study

1.3.1. General Objective

The general objective of this study is to examine the right to free legal assistance during pretrial stages under the Ethiopian legal frameworks, the institutional setup to manage the overall delivering system of the right and to evaluate the approaches employed to render free legal assistance through a comparative study.

1.3.2. Specific Objective

- To assess the rational and justifies the need to provide the right to legal assistance during pretrial stages of the criminal proceeding.
- To assess the legal framework and institutional setup to accord free legal assistance during pretrial stages for eligible persons in Ethiopia.
- To draw a lesson from selected jurisdictions through;
 - ◆ Exploring a commendable legal and institutional framework to alleviate the bestowal and deliverance of free legal assistance during pretrial stages in Ethiopia.
 - ◆ Endeavoring approaches in order to enhance the means to deliver free legal assistance during pretrial stages in Ethiopia.

1.4. Research Question

- What is the status of the Ethiopian legal framework and institutional setup to cater the right to free legal assistance during pretrial stages?
- What is/are the commendable mechanism(s) to provide free legal assistance during pretrial stages of the criminal proceedings?
- How Ethiopia realize the right to free legal assistance during pretrial stages in a commendable and cost effective way?
- What are the approaches implemented to deliver free legal assistance during pretrial stages in the selected jurisdictions? And what are the lessons that can be drawn from?

1.5. Literature Review

According to the accessibility and knowledge of the author of this paper, no study is exclusively conducted on the right to legal assistance during pretrial stages through a comparative perspective. However, some studies are conducted on the right to free legal assistance in Ethiopia without according a special attention on the delivery of the right in pretrial stages. They either select a single approach to provide legal assistance without remuneration or endeavors the realization of the right during post-charge phases; first instance and appeal stages. In following paragraphs prior studies related to the right to free legal assistance will be reviewed and their limitations in relation to this study will be demonstrated.

The first reviewed literature is conducted in 2015 by Ethiopian lawyers association and Ethiopian young lawyers association titled ‘Public Defender’s Services in Ethiopia: Assessment of Current Gaps and the Way Forward.’⁴⁹ This study endeavors institutional set up, the *modus operandi*, adequacy and quality of public defender’s offices in Ethiopia and demonstrates, *inter alia*, the inadequacies of the existing legal framework since administrative and operational independence of the public defender’s office is not recognized. Furthermore, with regard to accessibility and performance of the office, the study reveals, (1) the non-accessibility of the office for all who meet the eligibility criteria; the means and the merit test and (2) under-performance of the office owing to, *inter alia*, budgetary constraint, lack of motivation and gap

⁴⁹ Elias N. Stebek (ed.) (n 41).

in professional skills. Not only this, the study also assesses the adequacy and quality of the service delivered by public defenders and reveals the non-availability of the service at all tiers of courts and the effect of inadequate professional competence, backlog and understaffing on the quality of their service. However, in relation to the present study, it addresses a single mechanism of delivering free legal assistance and doesn't assess and justify the right during pretrial stages of the criminal proceedings.

Likewise, Hussein Ahmed in his journal article titled, 'Indigent's Right to State Funded Legal Aid in Ethiopia',⁵⁰ assesses the recognition and implementation of state-funded legal aid in criminal cases in Ethiopia. In his study, Hussein discusses the route for effective implementation of the right to legal assistance at the expense of state. His study reveals factors that inhibit the delivery of free legal assistance in one of Southern Ethiopia's administrative zones, Wolaita. The finding of the study discloses two main impediments for effective implementation of free legal assistance. The first impediment is lack of legal awareness in the public at large about the Ethiopian justice system in general and the availability of free legal assistance in particular and, the second is unavailability of access to free legal assistance particularly for criminal defendants due to absence of public defender office in all tiers of the courts. In addition to these impediments, the study also reveals the absence of meaningful mandatory *pro bono* service as another factor that inhibits the realization of free legal assistance in his study area. Following analysis of the finding, the author recapitulate his study by demonstrating the inadequacy of the domestic legal frame work owing to practical reasons and recommend for the establishment of national legal aid agency (NLAA) that manage the overall activities of delivering free legal assistance. In spite of such effort, in relation to the present study, Hussein's study didn't address all available mechanisms to deliver free legal assistance in all stages of the criminal proceeding in Ethiopia and obstructions thereof.

Besides, Mulugeta Akalu's study titled 'The Right to State Funded Legal Counsel in Criminal Proceedings in Ethiopia; the Need for a Reform on the Law and Practice',⁵¹ clearly demonstrates the insufficiency and vagueness of the existing legal provisions on the right to free legal assistance in Ethiopia. As provided in his study, although the right to free legal assistance is

⁵⁰ Hussein A. Tura (n 41).

⁵¹ Mulugeta Akalu (n 36).

recognized under the FDRE constitution, courts doesn't have uniformity in appointing legal counsel for the defendants. Some courts provide free legal assistance based on the seriousness of the crime, while others, especially those in remote areas, fail to do so irrespective of the complexity and seriousness of the case. This is because of different interpretation of the constitutional clause; 'miscarriage of justice.' Furthermore, the author stated that; 'Despite a constitutional provision for state funded legal counsel, in practice most courts are not allocated the funds needed for that purpose.'⁵² According to him, this does not completely owing to lack of resources since many courts have sufficient fund. Rather, it is because of lack of willingness on the part of the judges. The author also reveals the failure of most judges to inform the accused's constitutional rights of free legal assistance. Because of this, the author tries to justify the need to reform the law and practice. Then he urges for the amendment of the constitution or inclusion of detail provision to avoid the interpretational disparity. The author also enjoins for the bestowal of the right at the possible earliest time and imposition of obligation on courts to inform the right holders about their right to legal assistance. Further, to saw a life on the right, the author commend for the delivery of human right related training for law enforcement officials in general and for judges in particular. In relation to the present study, Mulugeta's study heeded on a single modality and confers slight attention to other approaches of delivering free legal assistance. Besides, although the author reveals the defect of the non-recognition of the right to legal assistance during pretrial stages, he didn't justifies and assess a means or an approach to deliver the right in that stage.

The last reviewed literature is the latest one. The 2017's study of Mizanie Abate, Alebachew Birhanu and Mihret Alemayehu titled 'Advancing Access to Justice for the Poor and Vulnerable through Legal Clinics in Ethiopia: Constraints and Opportunities',⁵³ demonstrates the realization of access to justice, *inter alia*, through the bestowal of free legal assistance. However, the study entirely gives heed to one of the mechanisms to provide free legal assistance; legal clinics. True, the objective of their study is not to assess effective implementation of the right to legal assistance in general, rather on the challenges and the prospects of delivering legal assistance through law school legal clinics and the realization of access to justice for the indigent and vulnerable quarters thereof. The study reveals the absence of legal clinics in Ethiopian law

⁵² Ibid, 8.

⁵³ Mizanie Abate and others (n 41).

schools. Instead mere legal aid centers in several law schools are available. The authors obtain several challenges faced by the so-called legal clinics in Ethiopia. This includes, *inter alia*, financial constraints. The resource allocated from their respective universities is not sufficient and they are forced to beg from other sources. To settle such constraint the authors argues that; although the 2009's charities and societies proclamation prevents Ethiopian Civil Society Organizations to generate more than ten percent of their funds from foreign sources, it 'Does not prohibit law schools from securing external funding.' They further opined that:

Funding limitations (under the charities and societies proclamation) do not apply to university-based legal clinics. Thus, they can access the pool of foreign funders to establish legal clinics and expand their services to the needy, poor and marginalized sections of the society. This can enhance their pursuits to fulfill their mandate of community service through expanded and high quality legal aid.⁵⁴

Lack of resource is among the factors that inhibit the effort of Ethiopian law schools to deliver the service. However, in doing so their study provides a commendable finding.

In general, literatures in Ethiopia do not exhaustively address the delivery of the right through several approaches. However, diversifying providers of free legal assistance is recommended.⁵⁵ This is owing to, some approaches to deliver the right have their own strength and shortcomings in specific cases and in some stages of the criminal proceedings. Further, in which stage of the pretrial phase the right should be delivered is another issue that is not addressed by literatures. Some literatures that enjoins for the delivery of the right at the earliest possible period are also doesn't assess and come up with an effective approach that fits for Ethiopia. Although the FDRE constitution and international instruments such as ICCPR does not explicitly recognize the right to legal assistance during pretrial stages of the criminal proceedings, recently there is a paradigm shift.⁵⁶ Nonetheless, those literatures heeded on selected mechanism to deliver free legal assistance and no literature in the area justifies the right to legal assistance in all stages of the

⁵⁴ Ibid, 30.

⁵⁵ Handbook on Improving Access to Legal Aid in Africa (n 26) 38.

⁵⁶ For instance, see, *Aliboeva v. Tajikistan* the Communications No. 985/2001, para. 6.4, UNHRC; In this case the committee stipulate that; 'In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings'; *salduz v. turkey* (n 19); UN principles and guidelines (n 2) principle 3. For more discussion on developed norms and jurisprudence thereof, see the first two sections of chapter 2.

criminal proceeding. However, the present study addresses these issues through a comparative analysis.

1.6. Research Methodology

In order to accomplish the objectives and to address the research questions, the study is conducted in a comparative perspective and a doctrinal one. However, to substantiate the discussion and consolidate arguments, the paper also employs some relevant empirical data through conducting an interview. The research is a comparative study of three jurisdictions; Ethiopia, South Africa and Moldova. The author enjoined to employ this jurisdictions based on the nature of the right, i. e. in order to render free legal assistance for indigents, shortage of resource is the main challenge which inhibits the effort of states. It is apparent that resource is one of the constraints in Ethiopia. Thus, a comparative study with jurisdictions which struggle with resource constraints but a commendable legal framework⁵⁷ and achievements⁵⁸ give sense.

In doing so, the paper employed both primary and secondary sources which are relevant to conduct this study. Primary sources such as, constitution, statutes, human rights instruments, reports and verdict of international, regional and national adjudicatory bodies are used while

⁵⁷ For instance, the South African Constitution provides state funded legal assistance for all detained persons. See, Constitution of the Republic of South Africa Act 108 (1996) Article 35/2; besides, South Africa is one of the countries which have a developed jurisprudence. As provided by McQuoid-Mason; ‘The South African experience is valuable because the country has established one of the most sophisticated legal aid schemes in the developing world ...’ see David McQuoid-Mason (n 28) 136; Regarding Moldovans experience, free legal assistance is recognized in all stages criminal proceedings. See The Constitution of Moldova (n 37) Article 26. Moreover, ‘Legal aid, as part of an access to justice agenda, is a rapidly growing area in the world, which is in its advanced stages in some countries *such as*, Moldova’ see, UNDP, *Widening Access to Justice: Quality of Legal Aid and New UN Principles and Guidelines on Access to Legal Aid* (2013) 3.

⁵⁸ In order to challenge resource constraints, employing the hybrid system of delivering free legal assistance is recommended. South Africa implements this system to minimize lacuna owing to financial constraint. See, Handbook on Improving Access to Legal Aid in Africa (n 26) 38; Besides, Moldova, in order to guarantee a fair trial and access to justice through confronting the limited public resources, employ the commendable contribution of non-state actors and deliver the right during pretrial stages irrespective of economic status of the beneficiary. See M. Gramatikov and N. Hriptievshi (n 28) 22. Moreover, regarding the criminal justice system all selected jurisdictions employ quasi-adversarial system. Regarding the Ethiopian legal system Alemu Mehretu argues that; ‘the Ethiopian system exhibits both adversarial and inquisitorial features, albeit it inclines to the former.’ See Alemu Mehretu, *Introducing Plea bargaining in Ethiopia: Concerns and Prospects*, A Thesis Submitted for the Degree of PhD at the University of Warwick (2014) available in <http://wrap.warwick.ac.uk/74194> pdf visited, May 25, 2018; Ed Cape and Zaza Namoradze, *Effective Criminal Defence in Eastern Europe* (2012) 260.

secondary sources such as books, journal articles, commentaries and unpublished thesis will be used.

1.7. Significance of the Study

All persons are equal before the law and this birthed the principle of equality of arms which is a means to realize a fair trial. Inequality of arms is axiomatic in all stages of the criminal proceedings and this is adjusted through the bestowal of the right to legal assistance. Thus, this study assesses commendable mechanisms to accord the right to free legal assistance and contributes for the effective realization of a fair trial in Ethiopia.

Several approaches to provide free legal assistance are employed and they have their own strengths and shortcomings in several stages of the criminal proceeding. The study will demonstrate effective mechanisms to provide legal assistance during pretrial stages of the criminal proceedings through a comparative study. Accordingly, the paper draw lessons from selected jurisdictions and this will improve the implementation of the right in Ethiopia.

The right to legal assistance serves as a tool for the enjoyment of fair trial rights. Without the realization of this right, the recognition of other fair trial rights is futile. Thus, simultaneously through revealing the rational to provide the right to legal assistance during pretrial stages of the criminal proceeding, the paper contributes to advance understanding about the right and this will urge stakeholders to realize the right through, *inter alia*, making a legislation which enhance the *status quo* in Ethiopia.

1.8. Delimitation of the Study

In this paper pretrial stage incorporates the detention, arrest, investigative and the so-called non-contested hearing phases of the criminal proceedings. The right to legal assistance can be delivered in criminal, civil or administrative cases. However, the scope of this study is to address the right to legal assistance in criminal proceedings for indigent quarters of the community. Further, free legal assistance can also be accorded to suspected persons, victims of the crime or witnesses as well. However, neither of the last two quarters is inside the domain of this study.

To realize the right states shouldered the so-called positive obligation (primary or not) when the means-merit requirements are fulfilled and the heed of the paper is on this obligation of states i.e. the right to free legal assistance for indigents without allotting a special attention to other susceptible groups.

1.9. Limitation of the Study

Through conducting this study, the author faces factors which more or less an adverse impact to address each and every aspect of the subject matter. These are; shortage of time and lack of research fund allocated for this study. Besides, the shortage and inaccessibility of some materials on the topic in Ethiopia also prevent the progress of the study.

1.10. Structure of the Study

This paper organized into four chapters. Chapter one allotted to the proposal that lays groundwork for following chapters. It incorporates background of the study, statement of the problem, objective of the study, research questions, literature review, methodology, significance of the study, delimitation and limitations of the study.

Chapter two covers international norms and jurisprudences and justification on the delivery of the right during pretrial stages thereof. Besides, this chapter also addresses approaches/models to deliver the right without remuneration.

Under the third chapter, the paper compares the legal framework, the institutional setup and the approaches employed to deliver a free legal assistance and this followed by drawing a commendable lessons from the selected jurisdictions.

Finally chapter four concludes the study and gives its recommendation to effectively accord free legal assistance to indigents during pretrial stages of the criminal proceedings.

CHAPTER TWO: NORMS, THE JURISPRUDENCE AND APPROACHES TO DELIVER FREE LEGAL ASSISTANCE DURING PRETRIAL STAGES

Introduction to the Chapter

International and regional binding human rights instruments accord the right to free legal assistance for those who confront a criminal charge and eligible persons. However, the conferment of the right to free legal assistance before the institution of the charge is not explicitly provided in those instruments. Nonetheless, in recent decades several principles and standards both under international and regional floor are developed. Since then the human rights adjudicatory bodies held a consistent line of jurisprudence to accord free legal assistance during pretrial stages of the criminal proceedings.

Another important issue in the road to realize the right is mechanisms employed to deliver the right. Several approaches are applied to provide the right to indigent quarters. Some approaches are efficient in some jurisdictions but not in others based on their respective resource accumulation. Owing to these, in this chapter the paper endeavors to discuss norms and jurisprudence of UNHRC and regional based adjudicatory bodies which are followed by a discussion on the approaches to deliver the right.

2.1. International and Regional Norms and Jurisprudence on the Right to Free Legal Assistance during Pretrial Stages

The entitlement of legal assistance is emanated from the right to a fair trial and equality before the law as defined under the UDHR. Article 7 and 11 of this declaration refers the right of all persons to be treated equally before the law and a person charged with a criminal offence has entitled all the guarantees that are necessary for his defence respectively. This is dilated under article 14/3/d of ICCPR in the following terms;

In the determination of any criminal charge against him, everyone shall be entitled ... in full equality: ... to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance

assigned to him, in any case where the interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Thus, the covenant grant accused offenders; first, either to defend in person or through legal assistance of his own choosing; second, to be aware of this right from any adjudicatory body and third, access to legal assistance without remuneration based up on the fulfillment of two cumulative requirements. These are (1) when accused person is indigent (known as, the means test) and (2) when justice is at stake (known as, the merit test). The determination of free Legal assistance is not provided under the covenant in detailed manner and state parties entitled the discretion to determine the delivery of free legal assistance. However, such discretion entitled to state parties is delimited.⁵⁹

Although several rights are accorded during pretrial stages of the criminal proceedings, neither ICCPR nor other complimentary regional instruments explicitly recognize and incumbent the onus upon states to grant the ‘machine right’ during pretrial stages. In spite of such omission, several international and regional norms/standards together with the human rights committee’s and regional jurisprudences create a monumental improvement in the area.

2.1.1. International and Regional Norms on Free Legal Assistance during Pretrial Stages

Although free legal assistance before the institution of the charge is not precisely provided under binding human right instruments, in the last two decades several norms and principles were developed both under international and regional arena. In following paragraphs the paper appraises such norms and principles that urge states to accord free legal assistance during pretrial stages of the criminal proceedings.

2.1.1.1. The UN Principles and Guidelines on Free Legal Assistance

In 2012, the UN commission on crime prevention and criminal justice adopted the first international instrument exclusively dedicated to legal assistance without remuneration. Under the second principle of this instrument, States shoulders the responsibility to provide

⁵⁹ With regard to the delimitation to provide a legal assistance at state expense by adjudicatory human right bodies, see below section 2.1.2.1 of this chapter.

comprehensive and effective free legal assistance through the establishment of a legal aid body to provide, administer and coordinate the mechanisms of delivering the right.⁶⁰

With regard to the delivery of the right during pretrial stages of the criminal proceedings, the UN principles and guidelines urge states to accord the right at all stages of the criminal justice process for all persons irrespective of accumulated property.⁶¹ Such instrument opt the merit test as the sole requirement of eligibility and provided that;

States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process. ... *and the right is provided, regardless of the person's means, if the interests of justice so require,*⁶²

Further, this instrument also suggest that, States should involve a wide range of stakeholders to provide the service for instance through NGOs, community based organizations, professional bodies and associations and law students. Besides, it recognizes the use of paralegals specifically where access to lawyers is limited.⁶³

The UN principles and guidelines do not permit derogation from the right to consult a lawyer at the investigative stage, but they do permit a person to be interviewed in the absence of a lawyer if there are compelling circumstances. According to it, States must introduce measures 'to prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police in the absence of a lawyer, unless the person gives a *verified* voluntary consent to waive the lawyer's presence.'⁶⁴ It is suggested that, if the law of a particular country provides for derogation from the right to free legal assistance during pretrial stages, such derogation should compulsory and narrowly defined.

⁶⁰ See also, UN principle and guideline (n 2) Guideline 11 and 12; With regard to this South Africa have a commendable experience of establishing a legal aid board that has been active since 1971 to ensure the delivery of the right. See V. Vedalankar and P. Hundermark, *Legal aid South Africa* (2015) 6, country report.

⁶¹ UN principle and guideline (n 2) Principle 6 and 7.

⁶² Ibid, Principle 3; besides the first guideline of the same instrument provided that; 'Persons who are denied legal aid on the basis of the means test have the right to appeal that decision.'

⁶³ Ibid, Guideline 14 and 16.

⁶⁴ Ibid, Guideline 3, para. 43; besides the UN in its principle to protect detained persons provided that; 'the right may not be suspended or restricted, save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.' See UN body of principle to protect detained and imprisoned persons (n 14) Principle 18 (3).

2.1.1.2. UN Basic Principles on the Role of Lawyers

The 1990 UN Congress on the prevention of crime and the treatment of offenders come up with the basic principles on the role of lawyers to assist member states in their task of promoting and ensuring the proper role of lawyers. This basic principle recognizes the bestowal of assistance through lawyer at all stages of the criminal proceedings based upon the eligibility of the beneficiary.⁶⁵ This instrument under its first and seventh principles recognizes the delivery of the right promptly after arrest and, in any case, no later than forty eight hours from the time of arrest. Besides, such basic principle's paragraph three and seven incumbent the primary responsibility on states and urge professional associations to cooperate in the organization and provision of the service.

2.1.1.3. The Dakar Declaration

At the end of a seminar organized by the ACoHPR in 1999 in Dakar, Senegal, a declaration was issued.⁶⁶ This seeks to consolidate the standards on fair trial under the African Charter as well as taking into account relevant jurisprudence from the African Commission and other international human rights bodies. The declaration recommends the delivery of free legal assistance to realize access to justice as part of the right to a fair trial. As provided under paragraph nine of this declaration; 'access to justice is a paramount element of the right to a fair trial... . It is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective.' The declaration urges states to encourage a commendable part taken by non-state actors through cooperation and provided that; 'In collaboration with bar associations and NGOs enable innovative and additional legal assistance programs to be established including allowing paralegals to provide legal assistance to indigent suspects at the pretrial stage.'⁶⁷

⁶⁵ UN Basic Principles on the Role of Lawyers (n 24) para. 1 and 6, the preamble; a standard that has a similar spirit is obtained in principle 17 of the body of principles for the protection of all persons under any form of detention or imprisonment. It provides the accordance of information about the right for detained persons and free legal assistance is delivered based on eligibility. See UN body of principle to protect detained and imprisoned persons (n 14) principle 17.

⁶⁶ The Dakar declaration (n 10).

⁶⁷ Ibid, the third recommendation.

2.1.1.4. The African Principle and Guideline on Legal Assistance

In accordance with the Dakar Declaration, in 2001 the ACoHPR adopted the ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.’⁶⁸ Under this principles state parties to the Banjul charter strongly recommended to incorporate the principles and guidelines into their respective national legislations. With regard to the right to legal assistance, state parties urged to bestow the right for arrested persons, unless such person has waived this right in writing and any information obtain without consulting his lawyer should be inadmissible.⁶⁹ Further, this instrument under the caption ‘Right to counsel’ stipulate the bestowal of the right during pretrial stages of the criminal proceeding and provided as follows; ‘This right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.’⁷⁰

2.1.1.5. The Lilongwe Declaration

In 2004 more than a hundred delegates from 26 countries met in Lilongwe, Malawi, to discuss on the services of free legal assistance in the criminal justice systems in Africa. In that conference, ministers of State, judges, lawyers, academicians, international, regional and national NGOs were contribute for the outcome. The conference then produced a soft law alias, the Lilongwe declaration to alter the criminal injustice confronted by indigents through taking in to consideration of the non-accordance of the right during pretrial stages of the criminal proceedings.⁷¹ Owing to this, the declaration recommends states to confer the right during pretrial stages and the third paragraph reads as follows;

A legal aid program should include legal assistance at all stages of the criminal process including investigation, arrest, pretrial detention, bail hearings ... to ensure that human rights are protected. Suspects, accused persons, and detainees should have access to legal assistance immediately upon arrest and/or detention wherever such arrest and/or detention occurs. A person subject to criminal proceedings should never be prevented from securing legal aid and

⁶⁸ African principle and guideline on legal assistance (n 10).

⁶⁹ Ibid, clause ‘M’, provisions applicable to arrest and detention, para 2(f).

⁷⁰ Ibid, clause ‘N’, provisions applicable to proceedings relating to criminal charges, para 2 (3).

⁷¹ See Lilongwe declaration (n 10) the preamble.

should always be granted the right to see and consult with a lawyer, accredited paralegal or legal assistant. Governments should ensure that legal aid programs provide special attention to persons who are detained without charge... .

As provided under the above paragraph, the Lilongwe declaration explicitly recognizes the conferment of free legal assistance during pretrial stages and the so-called non-contested hearings of the criminal proceedings. With regard to the commencement of the right in that stage, the declaration prefers the delivery of the right from the moment that there is a significant curtailment of liberty and the interrogator set out his investigation. Surprisingly, the declaration, unlike binding international and regional human right instruments, advocate states to give heed for those who didn't face a criminal charge. This is one of the footings in recent decades that demonstrate the paradigm shift in relation to the bestowal of the right during pretrial stages of the criminal proceedings.

With regard to the approaches for the delivery of the right, this declaration shoulders the primary responsibility on state. Based on their capability, states can employ variety of service delivery options that can be considered. These include government funded public defender offices, *ex-officio*, justice centers, law clinics, paralegals as well as partnerships with civil societies.⁷² In short, the declaration suggests states for the diversification of free legal assistance delivery systems through employing several providers and motivates non-state actors for their commendable contribution in the realization of a fair trial through actuating the right to free legal assistance.'

2.1.2. International and Regional Jurisprudence on Free Legal Assistance in Pretrial Stages

The ICCPR and other regional human right instruments take different linguistic approaches to the right to access a legal assistance. Under the ICCPR, the right to a legal assistance in criminal proceedings is mentioned in two contexts: first, under Article 14/3/b, as a right to communicate with a lawyer for the preparation of a defence; and then, under Article 14/3/d, as a right to defend

⁷² Ibid, para 6; Thomas O. Hansen, *Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors*, (Danish Institute for Human Rights, 2011) 25; for detail discussion on several approaches to deliver legal assistance without remuneration, see the second section of this chapter, note 102 et seq.

oneself through a legal assistant. The effect is that a person charged with an offence should have the right to a legal assistance both for the preparation of defence, and also for the conduct of that defence in trial. In contrast, the Banjul charter, the San Jose pact and the ECHR as well in Article 7/1/c, 8/2/d and 6/3/c respectively refers only to right to a lawyer to defend oneself through a legal assistance.⁷³

Although the linguistic preference on the bestowal of the right to legal assistance for the preparation of defence is not indistinguishable among ICCPR and regional human right instruments, the spirit and the pragmatic enforcement under their respective adjudicatory bodies are almost identical. Within a decade a number of verdicts that held the violation of the right to legal assistance if it is not provided during pretrial stages was passed by international and regional human right bodies. In following paragraphs the paper discusses about the case-law of such human right bodies that creates a clear-cut and consistence line of jurisprudence. In doing so, the finding of such adjudicatory bodies on the eligibility requirements, the rational provided by them to accord the right, issues concerning the choice of a lawyer and derogation from the right will be addressed.

2.1.2.1. Eligibility Criteria to Accord Free Legal Assistance

All international and regional human right instruments entitles the right to defend oneself through a legal assistance without remuneration based on the fulfillment of two cumulative criteria; merit-means tests. With regard to the merit test, it is determined by both international and regional case laws particularly, the UNHRC and the Strasbourg jurisprudence in several cases held the gravity of offence,⁷⁴ the seriousness of the offence and the severity of the penalty, the possibility of deprivation of liberty, complexity of the case, as well as the personal situation of the accused⁷⁵ are among the tests used to determine the merit requirement. Besides, to

⁷³ ODIHR, Legal Digest of International Fair Trial Rights, (OSCE Office for Democratic Institutions and Human Rights 2012) 119; The ECtHR, however in *Campbell and Fell v United Kingdom* case read Article 6(3)(b) together with 6(3)(c) to imply a right to a lawyer during the preparation stage of proceedings. See *Campbell and Fell v the United Kingdom* (1984) para 98, ECtHR.

⁷⁴ General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial (UNHRC, UN Doc. CCPR/C/GC/32, 2007) para 38 [hereafter, GC 32]; see *Lindon v. Australia* (1995, Communication No. 646) para 6.5, ECtHR.

⁷⁵ *Quaranta v. Switzerland* (1991, Series A no. 205) para 33, ECtHR; in this case the court stated that, the personal situation refers the capacity of the particular accused to present his case and it may include the unfamiliarity with the language used at court and the particular legal system.

determine the merit requirement, the probability of ‘actual damage’ in defence owing to lack of a lawyer is not a reason to confer or not, rather, a less stringent test i.e. whether it appears ‘plausible in the particular circumstances’ that the lawyer would be of assistance.⁷⁶ Regarding the second requirement; the means test, neither ICCPR nor UNHRC’s general comment on the right to equality before courts and tribunals and to a fair trial determine the ambit of such criteria. However, the ECtHR in *Pakelli* determines it. The court in such case shoulders the obligation to proof indigence on suspected person. Nevertheless, the beneficiary is not expected to proof ‘beyond all doubt’ instead, it is sufficient that there is ‘some indications’ i.e. establishing ‘lack of clear indications to the contrary’ is adequate.⁷⁷

2.1.2.2. The Bestowal of the Right in Pretrial Stages: Rationales and Justifications thereof

Human right instruments accord the right to free legal assistance after the institution of the charge. However, there are recent developments that extend the scope to include the accordance of the right during pretrial stages of the criminal proceedings. For instance, the human rights committee in *LaVende v Trinidad and Tobago* stated that; ‘in cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.’⁷⁸ In this case the phrase ‘capital punishment’ expresses one of the eligibilities to cater free legal assistance i.e. the merit test. Besides the case also enjoins to grant the right to free legal assistance in all stages of the criminal proceeding which includes pretrial stages. Thus, from the above case it is not difficult to deduce that free legal assistance in pretrial stages should be accorded based on the fulfillment of the merit test. Likewise, the committee in *Butovenko*, where a complainant was interrogated by the police inquiry officers in the absence of a lawyer and without having been explained his rights. Although he has access to a lawyer after three days of his arrest, since the investigation commence promptly, the committee demonstrate a violation of his right to prepare a defence through a legal assistance.⁷⁹ As provided above ICCPR bestow free legal assistance for the preparation of defence which commence at the earliest stage of the criminal proceedings and this is replicated under the *Butovenko*. Besides, in

⁷⁶ *Artico v. Italy* (1980, Series A no. 37) para 34 and 35, ECtHR.

⁷⁷ *Pakelli v. Germany* (1981, no. 8398/78) para 34, ECtHR; although the two cumulative requirements are provided under international as well as regional human right instruments and the jurisprudences thereof, the United Nation principles and guidelines take the merit test as the sole requirement. See note 62 above.

⁷⁸ *LaVende v Trinidad and Tobago* (1993, communication no. 554) para 58, UNHRC.

⁷⁹ *Butovenko v Ukraine* (2005, U.N. Doc. CCPR/C/102/D/1412) para 7.6, UNHRC.

Krasnova, the committee held that, the presence of a lawyer during investigation was necessary, particularly for vulnerable such as minors and for suspects of serious crime.⁸⁰ In this verdict the committee alike the *LaVende* held for the conferment of free legal assistance if the alleged crime is serious i.e. if the merit test is fulfilled the investigation should be takes place through the assistance of a lawyer. Otherwise, a violation of the right under article 14/3/b of the Covenant is apparent.⁸¹

Furthermore, a nimble development was obtained in the Strasbourg jurisprudence. In 2008 for instance the court in *Salduz v Turkey* passed a groundbreaking decision for the bestowal of the right during pretrial stages particularly, when suspected person was interrogated. In *Salduz*, the applicant alleging, *inter alia*, the denial of the right to legal assistance while in police custody and argue that the confession at that stage without access to a legal assistance is unfair. In its potent paragraph the Court finds that;

In order for the right to a fair trial to remain sufficiently ‘practical and effective’, Article 6/1 (of the ECHR) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.⁸²

legal assistance at state expense is recognize under the ECHR as one of fair trial rights and accordingly, in *Salduz* case, the ECtHR held for the bestowal of free legal assistance in pretrial stages particularly during police investigation. The rational opined by the court for this is to effectuate a fair trial since legal assistance serve as an instrument thereto. Hence, since *Salduz* it is therefore clear that the feasibility of according a legal assistance during pretrial stages for suspected persons is lifted to realize the pragmatic enforcement of a fair trial.

⁸⁰ *Krasnova v Kyrgyzstan* (2010, U.N. Doc. CCPR/C/101/D/1402) para 8.6, UNHRC.

⁸¹ *Ibid*

⁸² *Salduz v Turkey* (n 19) para 55; see also *John Murray v the United Kingdom* (1996) para 63, ECtHR; see Council of Europe, *Guide on Article 6 of the Convention: Right to a fair trial* (2014) 47; furthermore, in *Ocalan and Magee*, the court concludes that; such protection may thus become relevant even before the institution of the charge if the fairness of the trial is likely to be seriously prejudiced by the pretrial stages failure to comply with the minimum guarantees of fair trial. See *Ocalan v Turkey* (2005, no. 46221/99) para 131, ECtHR (GC); see also *Magee v the United Kingdom* (2000, App no. 28135/95) para 41, ECtHR.

From the rights that are accorded during pretrial stages and the adjudication of human right bodies, it is not difficult to deduce the rationale for the bestowal of free legal assistance during pretrial stages of the criminal proceedings and the justification thereof. When persons confront the criminal justice system, they become vulnerable quarters owing to their deprivation of liberty. Accordingly, it is difficult for detained/arrested persons to communicate the outside world and enforce their right, thus, free legal assistance based on eligibility should be provided by the state and its allies.

The recognition and implementation of free legal assistance to indigents by duty-bearers has a number of benefits, for instance the UN principle and guidelines was enacted through recognizing that:

Free legal assistance is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that it is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.⁸³

The words of the principle and guideline demonstrate the very necessity of legal assistance as a prerequisite to enjoy other recognized fair trial rights. Owing to this the right to legal assistance is an instrument to access justice in a fair manner. When accessing legal assistance in all stages of the criminal proceedings is effectuated, consequently, a person's fair trial rights including; avoiding arbitrary pretrial detention, protection against ill-treatment/torture and other procedural rights are also realized, as discussed below.

The prohibition from arbitrary pretrial detention/arrest is recognized in international⁸⁴ as well regional⁸⁵ human right instruments. Jeopardizing this right is caused by a number of reasons such as, lack of cognizance or skills to make an effective application for pretrial release, the enactment of ambiguous laws, ignorant of the legal and factual criteria that courts take into account in making their decisions.⁸⁶ Free legal assistance providers can take a big part to assist

⁸³ UN principles and guidelines (n 2) preamble para. 9.

⁸⁴ See for instance UDHR (n 4) Article 9; ICCPR (n 4) Article 9/1.

⁸⁵ See for instance ACHPR (n 4) Article 6; ECHR (n 4) Article 5/1/c.

⁸⁶ Early access to legal aid (n 26) 15.

the needy in pretrial detention through *inter alia*, assisting suspects to understand and enforce the promised rights and instituting a claim when arbitrary pretrial detention is happened.⁸⁷ Besides, regarding ill-treatment, the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment noted that the greatest risk of torture and physical ill-treatment occurs during police detention.⁸⁸ The active involvement of providers of legal assistance during pretrial stages of the criminal justice process can help to ensure protection against ill-treatment and torture.⁸⁹ Moreover, the right to a fair trial incorporates several procedural rights which are recognized under human right instruments which includes; the right to be informed promptly of the reasons for the arrest, brought in a specific period before a court, presumption of innocent until proved otherwise and not to be compelled to confess to guilt.⁹⁰ To effectuate these rights accorded in pretrial stages, the impact of legal assistors is crucial through; (i) enhancing the suspect's cognizance about the law which enable them to persuade the judiciary, (ii) representing the suspect to make the possessed rights respected or (iii) in case of human right abuses the legal assistor may claim and request a remedy thereof.

Besides, one of the main rationales for catering free legal assistance is to create equality of arms among contentious parties. Since inequality of arms is apparent between contentious parties, without alteration of such inequality it is hard to realize a fair trial. Inequality of arms among confronting parties in the criminal proceeding is not commence after the institution of the charge, rather it is reflected in all stages of the criminal justice system and the initial confrontation with the criminal justice system is crucial to maintain individual rights throughout the criminal justice process.⁹¹ Whenever some rights are accorded during pretrial stages and since the criminal justice system is one of the potential areas where protected rights are prejudiced, the cognizance and implementation of such rights at the early stages should be realized and the holders should enjoy them. In doing so, the right to legal assistance plays an irreplaceable part. In this regard, the ECtHR in *Salduz*, for instance justified its decision by reference to the importance of

⁸⁷ Ibid

⁸⁸ Moritz Birk and others, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (New York, Open Society Foundations, 2011) 27.

⁸⁹ Ibid

⁹⁰ See for instance ICCPR (n 4) Article 9/2, 9/3, 14/2, 14/3/g; ACHPR (n 4) Article 7/1/b; ECHR (n 4) Article 5/2, 6/2; ACHR (n 4) 8.

⁹¹ Widening Access to Justice (n 57) 10.

preserving the privilege against self-incrimination, and its necessity to safeguard against ill-treatment.⁹²

Moreover, preparation for defence through a legal assistance is recognized under article 14/3/b of ICCPR. The outset of such preparation is not after the institution of the charge rather it is during pretrial phases. This is owing to the dilemma confronted by the suspect in that stage inhibits the enforcement of such right. With regard to this the ECtHR for instance in *Murray* opined that; ‘If the suspect were to choose to remain silent, adverse inferences could have been drawn against him. On the other hand, if he were to opt to break his silence during the course of interrogation, he would have run the risk of prejudicing his defence.’ Under such conditions, the Court found that, ‘the concept of fairness of the trial requires that the accused has the benefit of a lawyer’s assistance already at the initial stages of police interrogation.’⁹³

To recapitulate, although preparation for a defence through a legal assistance is incorporated under ICCPR, indigent suspect neither able to hire a lawyer nor effectively prepares his defence because of the complexity of the law and its procedure. Because of this the possibility of injustice is apparent, however, free legal assistance either from the government or its allies has the capacity to fix such injustice through creating equality of arms. The inequality of arms come through in all stages of the criminal justice system and challenges the enforcement of a fair trial. Such inequality can be altered through rendering a legal assistance, this is owing to free legal assistance during pretrial stages of the criminal proceedings is ‘a prerequisite for the real and practical enjoyment of the right to fair trial.’⁹⁴

2.1.2.3. Choice and Derogation from the Right to Legal Assistance in Pretrial Stages

Free legal assistance during pretrial stages may confront a restriction only for a good cause. To restrict the right states should ensure the legitimacy to achieve a fair trial, defend oneself and the

⁹² *Salduz v Turkey* (n 19) para 54; besides the court in 2011 emphasized that, Despite the justification that legal assistance is a necessary safeguard in respect of the right against self-incrimination, the right should apply even if the suspect exercises his/her right to silence. See *Huseyn and Others v Azerbaijan* (2011, No. 35485/05) para 171, ECtHR.

⁹³ *John Murray v the United Kingdom* (n 82) para 66; see also Fionnal Leverick, ‘The Right to Legal Assistance during Detention’ 15 *Edinburgh L. Rev.* 352 (2011) 370. In this journal article the author argued that; ‘Even if a suspect has fully understood the Right to Silence and decided that it is in his best interests to remain silent, he may find this difficult to sustain in the coercive atmosphere of the interview room.’

⁹⁴ *Artico v Italy* (n 76) para 33.

suspect should not also be deprived of a fair hearing in the entire proceedings.⁹⁵ This is owing to, the human rights adjudicatory bodies such as, the ECtHR emphasizes on the grandness of pretrial phase since, ‘The evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial.’⁹⁶ *Salduz* has been followed by several subsequent rulings, which form a clear and consistent line of jurisprudence that the use of evidence obtained from a suspect through interrogation without having a legal assistance funded by states or its allies will breach Article 6 of the European convention.⁹⁷ Besides, the court in *Pishchalnikov* let the suspect to waive his right to legal assistance. However, before concluding on his implied or explicit waive of a legal assistance, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. The court continues and stated that, if an accused left without a legal assistance, it is not easy to be aware of his rights and as a consequence, there is less chance that they will be respected.⁹⁸

With regard to the choice of a legal assistance, the UNHRC has of the opinion that while article 14/3/d, does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice.⁹⁹ However in 2010, the committee in *Lyashkevich* concludes that denying the access to the legal counsel of his choice ... and conducting investigation acts during that time constitutes a violation of rights under Article 14/3/b.¹⁰⁰ In a similar matter, the ECtHR finds the non-absoluteness of choosing a lawyer and in *Meftah* stated that; the national courts may override that person’s choice if it is necessary in the interests of justice. The special nature of the proceedings that seeks a specialist lawyers is a good instance.¹⁰¹

⁹⁵*Salduz v Turkey* (n 19) para 52; *Magee v. the United Kingdom* (n 82) para 41; ODIHR, Legal Digest of International Fair Trial Rights (n 73) 145.

⁹⁶ See *Salduz v Turkey*, *ibid*, para 54; the court also in *Gafgen* stated that; ‘The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.’ See *Gafgen v Germany* (2008, App. No. 22978/05) ECtHR (GC).

⁹⁷ *Salduz* has been followed by a number of rulings against multiple countries; see for example, *Pishchalnikov v Russia* (2009, Application No. 7025/04) ECtHR; *plonka v Poland* (2009) ECtHR; *Shabelnik v Ukraine* (2009) ECtHR; open society justice initiative, *Arrest Rights Brief No.3: The Right to Legal Aid* (2013) 9

⁹⁸ *Pishchalnikov v Russia*, *ibid*, para 77 and 78

⁹⁹ *Kelly v Jamaica* (1987, communication No. 253) para 5.10 UNHRC.

¹⁰⁰ *Lyashkevich v Uzbekistan* (2010, UN Doc CCPR/C/98/D/1552/2007) para 9.4 UNHRC.

¹⁰¹ *Meftah and Others v France* (2002, nos. 32911/96) para 45 and 47, ECtHR (GC); the African commission in 1998 stated that the purpose of choosing a lawyer is to ensure the confidence of the beneficiary in his legal counsel.

2.2. Approaches to Deliver Free Legal Assistance

Regarding the manner to rendered free legal assistance, in general, there are two fundamental approaches. The first approach shoulders the onus on the legal profession to provide professional services free of charge for indigent members of the public. It is reasoned that lawyers should willingly carry cases for the needy in exchange for the monopoly on the provision of professional legal services they were granted by the State.¹⁰² However, the second approach shouldered the bulk of the onus on the State and lawyers should carry only part of the burden.¹⁰³

For the effective delivery of free legal assistance, international¹⁰⁴ and regional¹⁰⁵ standards frame a mechanism through collaboration between state and non-state actors. Accordingly, several approaches/models are employed by state and non-state actors to realize free legal assistance for eligible persons of the community. These approaches are not uniformly implemented across jurisdictions, some jurisdictions employ a single model to deliver the right while other engage in holistic approach i.e. the hybrid system of delivering the right. These approaches have their own strength and shortcomings in the realization of human rights that are entitled during pretrial stages of the criminal proceedings. They are delivered either through state funded mechanisms or by non-state actors. In both situations the onus incumbent on states is the so-called positive obligation. The preceding one is the primary positive obligation of states; however, states also have the obligation of bringing a working condition for non-state actors. In this sub-chapter, the paper discusses on several approaches to deliver a free legal assistance to indigent quarters.

‘Failure to provide for this may expose the accused to a situation where he will not be able to give full instructions to their counsel for lack of confidence.’ See Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v *Nigeria* (1998, 218/98) para 28, ACoHPR.

¹⁰² Hennie van As, ‘Legal Aid in South Africa: Making Justice Reality’, 49 J. Afr. L. 54 (2005) 54.

¹⁰³ *Ibid.*, 54.

¹⁰⁴ For instance, basic principles on the role of lawyers provide that; ‘Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.’ See, UN Basic Principles on the Role of Lawyers (n 24) Para 3.

¹⁰⁵ For instance, the Lilongwe Declaration provides that; ‘Each country has different capabilities and needs when consideration is given to what kind of legal aid systems to employ. In carrying out its responsibility to provide equitable access to justice for poor and vulnerable people, there are a variety of service delivery options that can be considered. These include Government funded public defender offices, *Judicare* program, justice centers, law clinics, as well as partnerships with civil society and faith-based organizations.’ See, the Lilongwe Declaration (n 10) Para. 6.

2.2.1. Approaches Funded by States

States shoulder the primary responsibility to provide free legal assistance where the eligibility standards are met. This obligation of state extends to ensuring the delivery of the right for those who didn't face a criminal charge.¹⁰⁶ However, neither international nor regional principle and guidelines have details on the means of delivering the right during pretrial stages of the criminal proceedings. State funded legal assistance is accorded either directly through the office administer by the government or by private lawyers/law firms compensated by the state. Here the paper discusses approaches delivered directly or not by the government to realize the right and catalyze the operation of other rights thereof.

2.2.1.1. Public Defender Office

The public defender office provides a free legal assistance primarily under the direct aegis of the government and sometimes supplemented by other non-state actors. In relation to other private models of delivering a free legal assistance, public defender scheme have a number of advantages. These includes *inter alia*, cost-effectiveness, enables the government to give a speedy reaction at the earliest possible stages of the criminal proceedings, lawyers at the public defender office also have a better opportunity to expertise in criminal cases which enhance the quality of the service.¹⁰⁷ Furthermore, 'as a specialist organization, a public defender service has the potential to develop a 'zealous defence' culture.'¹⁰⁸ Besides, it is also in a better position to cooperate with interrogators to endeavor a means to deliver the right during pre-trial stages of the criminal proceedings.¹⁰⁹

Although the delivery of the right through the public defender office has the above strengths, it does not elude some pragmatic shortcomings. For instance, in several jurisdictions including Ethiopia the office face a resource constraints and backlogs which inhibit the quality of the service.¹¹⁰ Besides, since the public defender office is mainly funded by the state, it lacks

¹⁰⁶ UN Basic principles on the role of lawyers (n 24) para 5-7.

¹⁰⁷ Early access to legal aid (n 26) 74.

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ T. Geraghty and others, 'Access to justice: challenges, models, and the participation of non-lawyers in justice delivery', in *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007) 60; Elias N. Stebek

independent, which is one of the practical requirements for functional legal aid system.¹¹¹ The office have the opportunity to cooperate with justice enforcers of the pretrial stage, thus, the delivery of the right through public defender office has the capacity to accord a legal assistance at such phase of the criminal proceeding. However, resource constraints and caseloads on the office hamper the effort undertaken by the office to deliver a free legal assistance not only before the institution of the charge but also afterwards.

2.2.1.2. *Ex-officio/judicare* Approach and the Contract Service System

The *ex-officio* or *judicare* in common law legal system is a common means to deliver free legal assistance. In *ex-officio*, private lawyers provide a legal service to the needy and are compensated for their services by the State. In this system the court/prosecutors or police officials either employ licensed private lawyers through rotation or referring based on their eligibility/specialization.¹¹² The independency of the providers and the compensation for their service raise the quality of the service delivered in *ex-officio* approach. However, the delivery of the right through inexperienced law school graduates in some jurisdiction inhibits the quality of the service.¹¹³ In this approach, for each case assigned to private lawyers, the government should compensate them; owing to this it is not easy for developing countries to deliver the right via employing this model.

In contract service system, alike the *ex-officio*, free legal assistance is accorded through the contractual agreement between the state and law firms in response of compensation. In several jurisdictions this approach is employed in place of the service deliver by the public defender office as privatizing the service directly deliver by the states.¹¹⁴ This system is considered as the capitalist form of delivering free legal assistance for indigents those met the merit test. The concern in this system is related with the bid for the service i.e. once the providers access the

(ed.) (n 41) 55-63. According to the later study independence of the public defender office is also another concern in Ethiopia.

¹¹¹ T. Geraghty, *ibid*, 16.

¹¹² Global study (n 26) 44.

¹¹³ Early access to legal aid (n 26) 75.

¹¹⁴ Global study (n 26) 45.

possibility to provide the service, they can heeded on increasing the profit margin at the cost of the quality of legal assistance.¹¹⁵

2.2.1.3. Expanded Duty Counsel Approach

Duty counsels are lawyers who are available at court to quickly assess a person's legal problems and provide immediate help. This council serves as the 'emergency room' of the court when accused persons appear before a court.¹¹⁶ In this system, individuals who met the required requirements are represented in trial stages of the criminal proceedings or at most in non-contested hearings of the court. Thus, the efficiency of duty council system to deliver the right during pre-trial stages of the criminal proceeding is not laudable.

2.2.1.4. Law School Legal Clinics

Law school clinical education curriculum and law school legal aid center also plays a commendable part to provide a free legal assistance to the needy. This approach aims at 'instilling skill to law students combines with community service with practical student learning.'¹¹⁷ The objective of clinical legal education is to attain the standard of law students to 'think like lawyers.' In USA this mechanism of legal education referred as, the 'Langdellian method'.¹¹⁸ Law school legal clinics also offers law faculty and students a range of practical benefits, such as training, trial experience, and professional contacts.¹¹⁹ Besides, it maximizes the motivation of law students to deliver the right in the future through *pro bono* mechanism.

¹¹⁵ Ibid, 47.

¹¹⁶ Legal Aid Ontario, Business Plan (2007) Cited in Melina Buckley, *Moving Forward on Legal Aid Research on Needs and Innovative Approaches* (2010) 8.

¹¹⁷ Jeff Giddings, *Promoting Justice through Clinical Legal Education* (2013) cited in Mizanie Abate and others (n 41) 15; besides, Novak in his journal article call Law students 'untapped resource' for providing free legal assistance to the indigents, see Andrew Novak, 'The Globalization of the Student Lawyer: A Law Student Practice Rule for Indigent Criminal Defense in Sub-Saharan Africa' 3 *Hum. Rts. & Globalization L. Rev* (2009-2010) 33.

¹¹⁸ Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, cited in Wizner Stephen, 'The Law School Clinic: Legal Education in the Interests of Justice' *Fordham Law Review* (2002) 1931. The Langdellian method is experienced in US and it 'revolutionized American legal education, because it turned students' attention away from doctrinal treatises...'

¹¹⁹ Deborah L. Rhode, 'Legal Education: Professional Interests and Public Values' 34 *Ind. L. Rev.* 23 (2000) 44; Steven Schneebaum, 'Pro Bono Publico, Pro Bono Mundi' 15 *ILSA Quart.* (2007) 11; some studies compare law school legal aid clinics to teaching hospitals. Like good teaching hospitals in relation to health care for the poor, law school clinics can be sites of research relevant to critical questions confronting the legal services and access to justice community, See for instance Melina Buckley (n 116) 99.

As provided under UN principles and guidelines, states shoulder the responsibility to encourage and support the constitution of legal clinics in law schools and allow students to practice the law under the supervision of qualified staff members. Such instrument also encourages states to boost such approach and promote public interest law programs through providing incentives to law students.¹²⁰ This approach is recognized in several jurisdictions including Ethiopia and South Africa and has a commendable contribution to render free legal assistance in cost effective way. However, since they are not fully professional, it has an adverse impact on the quality of the service.

2.2.2. Free Legal Assistance Delivered by Non-state Actors

2.2.2.1. *Pro bono publico* approach

Pro bono publico is a mechanism of delivering free legal assistance through employing licensed private lawyers. In this approach, uncompensated legal services are performed by legal practitioners for the interest of the public. It is ‘an adjunct to, not a substitute to ... *other* schemes.’¹²¹ Scholars such as, Rhode stipulates some justifications for the conferment of a legal assistance through *pro bono* scheme. These are; first, to address unmet legal needs since access to legal assistance is a fundamental interest of the public and second, lawyers shoulder a professional responsibility to challenge injustice and charitable contribution also promotes the physical as well as mental well-being of volunteers.¹²²

The applicability of *pro bono* is not identical across the world; it might be mandatory or voluntary. In some jurisdictions like Ethiopia the delivery of free legal assistance through *pro bono* approach is provided under a professional obligation of licensed lawyers while, a voluntary *pro bono* scheme is implemented in jurisdiction like South Africa.¹²³

¹²⁰ See UN principle and guidelines (n 2) Guideline 16, Partnerships with non-State legal aid service providers and universities

¹²¹ David McQuoid-Mason, Holistic approach (n 28) 140; see also David McQuoid-Mason, *Some Reflections on the Impact of the Constitution on Legal Aid in South Africa 1994-2014* (2015) 8.

¹²² D. Rhode, Legal Education (n 119) 147; D. Rhode, *pro bono in principle and in practice: public service and the profession* (Stanford university press, 2005) 26-31.

¹²³ See Federal Advocates' Code of Conduct (n 29) Article 3; although *pro bono* service in South Africa is not mandatory, recently, the Cape Law Society has made it compulsory for its members to do *pro bono* work. See David McQuoid-Mason, Holistic approach (n 28) 139.

Lawyers who are required to assist without compensation might be reluctant, and its effectiveness is questionable. However, in order to promote the service delivered through *pro bono* system, states should implement a working condition which motivates private lawyers to provide a free legal assistance. This working condition may include incentivizing their tax and providing a support from law school legal clinics and paralegals to avert hesitation and to create motivation on the providers.

2.2.2.2. The Paralegal System

The paralegal system, also known as, a ‘barefoot lawyer’ delivery approach, lacks a settled meaning but delineated as persons who are not advocates/law graduates who have no license but provides some of the services that are provided by qualified lawyers.¹²⁴ Although paralegals are not fully qualified, with proper training and supervision it is essential means to provide a free legal assistance.¹²⁵

There are two types of paralegal systems involved in delivering free legal assistance during pre-trial stages. The first type urges paralegals to perform the functions of lawyers, but not in full range. They either work with lawyers to support or refer cases to lawyers when the service can only be carried out by lawyers.¹²⁶ In this type, lawyers are the primary providers of free legal assistance and paralegals support the service delivered by them. This type is prominent in jurisdictions like South Africa where the paralegal provide advice through toll-free call centers. However, in the second type, paralegals (also referred as, ‘accredited representation’) usually employed by a law firms and provide almost the service delivered by lawyers only during pretrial stages.¹²⁷

Paralegals from the community and serves for organizations that are based to provide the service are referred as ‘community-based paralegal’ (hereafter, CBP). In relation to lawyers, community-based paralegals perform with having several distinct advantages. These includes, *inter alia*, CBP provide for the interest of the community as a whole rather than based on the client’s

¹²⁴ David McQuoid-Mason, ‘A Series of Pointers Clarifying the Role of Paralegals’ in *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007) 291

¹²⁵ Melina Buckley (n 116) 83

¹²⁶ See Jacqueline M. Rasmussen and Paul M. Sedlacek, ‘Paralegals: Changing the Practice of Law’ 44 S.D. L.Rev. (1999) 320.

¹²⁷ David McQuoid-Mason, Holistic approach (n 28) 160; see Early access to legal aid (n 26) 77

financial capacity, it is much easier and less expensive to train and deploy them, they can deliver the right before the institution of the charge and resolve the issue faster than lawyers.¹²⁸ Thus, this approach often effective to deliver a free legal assistance during pre-trial stages of the criminal proceedings particularly in jurisdiction like Ethiopia where resource is a constraint to provide the right in all stages of the criminal proceedings and there is an insufficient number of qualified lawyers who are committed to deliver a free legal assistance during pre-trial phases.

For a pragmatic delivery of free legal assistance through paralegals, United Nations principles and guidelines in its guideline number fourteen stipulates several measures undertaken by states. The guideline urges states to recognize the role played by paralegals, to ensure access for accredited paralegals for arrested and interrogated persons. Besides, states are encouraged to enhance the quality through providing adequate training and create a working condition to operate under the auspices of qualified lawyers and formulate evaluation mechanisms by enacting a code of conduct. Furthermore, the guideline provides states to identify the types of legal services that can be provided by paralegals and the types of services that must be provided exclusively by lawyers.¹²⁹

Conclusion

The concept of equality of arms, preparation for defence and practical enforcement of a fair trial are the rationales to deliver legal assistance for all quarters during pre-trial stages. Although no erstwhile human rights instruments explicitly accord a legal assistance before the institution of the charge, international norm and principles that confer free legal assistance during pretrial stages are developed and settled. With regard to this the part undertaken by human rights adjudicatory bodies especially the UNHRC's and the Strasbourg jurisprudence is vital. In those jurisprudences the committee and the court finds two main rationales to bestow free legal assistance during pretrial stages, these are; the decisiveness of the right for the preparation of one's defence and to actualize a fair trial through realizing equality of arms.

For practical enforcement of free legal assistance, several approaches to deliver the right for eligible persons are developed across the world. With regard to this the most prominent models

¹²⁸ Early access to legal aid, *ibid*, 77.

¹²⁹ UN principle and guidelines (n 2) guidelines 14, Paralegals

were discussed in this chapter. Among them PDO, paralegal (including CBP), law school legal clinics, civil society providers and *pro bono publico* have salient features to cater the right commendably and cost effectively during pretrial stages of the criminal proceedings.

CHAPTER THREE: THE RIGHT TO FREE LEGAL ASSISTANCE DURING PRETRIAL STAGES IN SOUTH AFRICA, MOLDOVA AND ETHIOPIA

Introduction to the Chapter

This chapter endeavors to discuss the legal, institutional frameworks and approaches to render free legal assistance in three jurisdictions. Namely; South Africa, Moldova and Ethiopia. The first section of this chapter discusses on the experience of free legal assistance during pretrial stages in South Africa. Section two addresses the Moldovan legal framework and institutional setup as well as the approaches employed to render free legal assistance in pretrial stages. The third section after analyse the legal framework and the prospects on the recognition of free legal assistance during pretrial stages, addresses the status and operation of providers which is followed by analysis regarding the performance of suppliers in Ethiopia.

3.1. Free Legal Assistance during Pretrial Stages in South Africa

The South African experience is praiseworthy owing to the country has established one of the most sophisticated legal aid schemes in the developing world.¹³⁰ Accordingly, in this section the paper discusses the recognition of the right to free legal assistance during pretrial stages and assess whether it is consistent with international standards. Besides, institutional framework to manage the overall activities regarding the delivery of the right and approaches to render free legal assistance in general and during pretrial stages in particular is discussed.

3.1.1. Legal and Institutional Framework on Free Legal Assistance during Pretrial Stages in South Africa

The guarantee of free legal assistance at the possible highest level under national legal system was urged by the first principle of the United Nations principles and guidelines. In this regard the 1996 constitution of South Africa is consistent with this principle. Besides, the criminal

¹³⁰ David McQuoid-Mason, *Holistic Approach* (n 28) 13.

procedure act 51 of 1977 and legal aid South Africa Act also confer and enjoin the government to bestow the right during pretrial stages of the criminal proceedings.

As provided under the South African constitution, detained persons are informed about the existence of the right to legal assistance and let to choose his lawyer thereof. The catering of the right without remuneration is also recognized in pretrial stages when justice is at stake i.e. the constitution opt the merit test as the sole explicit requirement and Article 35 of the supreme law of the republic reads as follows;

Everyone who is detained, ... has the right, to choose, and to consult with, a legal practitioner; and to have a legal practitioner assigned to him by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly ...¹³¹

This paragraph of the constitution accord the right for detained persons and the fate of arrested persons is determined under sub-article one of the same provision. However, sub-article one does not provide a legal assistance at the expense of the state. Although arrested persons are not explicitly entitled to the right to free legal assistance under the republic's constitution, in 1996 the constitutional court held for the bestowal of free legal assistance to arrested persons and information thereto.¹³² The constitutional court, regarding eligibility also stated that the factors that should be taken into account when interpreting 'if substantial injustice would otherwise result' are; (i) the complexity of the case in fact and in law; (ii) the personal equipment of the accused to fend for himself or herself; and (iii) the gravity of the case, the nature of the alleged offence, and the possible consequences for the accused if convicted.¹³³

Beside the constitution, as indicated above, the criminal procedure law and the South African legal aid Act also backed indigent members of the community to access a free legal assistance.

¹³¹ The South African constitution (n 57) Article 35/2/b and c.

¹³² *S v Andrew* (1996) cited in Jonas M. Lyakundi, *Access to Legal Aid in Pretrial Processes: a Comparative Study of Tanzania, Malawi and South Africa* (2014) 22 (unpublished LLM thesis).

¹³³ *Ibid*; see also legal aid South Africa Act no 39 (2014) Section 22/1/a [hereafter, LASA Act]; the phrase 'if substantial injustice would otherwise result' in terms of the Constitution is interpreted in the Legal Aid Guide as taking place if: (a) a person cannot afford legal representation; (b) there is a possibility of being sentenced, to direct imprisonment of more than three months; and (c) if given the option of a fine, the fine is or would remain unpaid two weeks after the date of sentence. See Legal Aid South Africa Legal Aid Guide (2009) para 4.1 [hereafter, LASA legal aid guide]; legal Aid South Africa handbook, available at www.legal-aid.co.za/?p=14 accessed in May 15, 2018.

For instance, the criminal procedure act in its chapter eleven under the caption ‘assistance to accused’, provided that;

Every accused shall, at the time of his or her arrest; be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.¹³⁴

Individuals who afford to hire a lawyer should have informed about such right and entitled the right to choose. Regarding indigent arrested persons, although choice of an assistor is not explicitly provided, such Act let them to request the legal aid South Africa (formerly, legal aid board and hereafter, LASA) to enjoy the right during pretrial stages of the criminal proceedings.

Besides, legal aid South Africa Act regulates the conduct of legal aid South Africa and established to ensure access to justice in general and the realization of free legal assistance in particular.¹³⁵ This Act refers the constitutional provision to accord the right for indigents who met the merit test and as provided above, free legal assistance under article 35 of the South African constitution is accorded during pretrial stages of the criminal proceedings. LASA Act confers a legal assistance at the expense of the state for eligible persons and shouldered the onus to deliver the right upon legal aid South Africa.¹³⁶

Legal aid South Africa is an autonomous body established by the LASA Act 39 of 2014 as an institution to operate the legal aid scheme. It is a national public entity governed by a Board of Directors which is accountable to the minister of justice and constitutional development, as well as to the South African parliament. The Board of LASA consists of fourteen members including a judge, chief executive officer and Director General.¹³⁷ In terms of section 3 of the Act, the objective of LASA is to render or make available legal assistance at state expense as provided in the Constitution and it’s enabling Act. The right to legal assistance at the expense of state during pretrial stages of the criminal proceedings is recognized in the above statutes of the country including the supreme law of the land and Legal aid South Africa is an institution that manage

¹³⁴ Criminal Procedure Act 51 of South Africa (1977) Section 73 (2A) as amended by Act 86 (1996) Section 2.

¹³⁵ LASA Act (n 133) the preamble.

¹³⁶ See, Ibid, Section 3/b, 4/1/f and 22/6.

¹³⁷ Ibid, Section 6/1; V. Vedalankar and P. Hundermark (n 60) 6.

the overall activities regarding the delivery of the right. The mechanism by which eligible persons apply their request to access the right to free legal assistance is the question should be answered on this point.

To access free legal assistance, an applicant may enter the application at any office of LASA, through any LASA officer or at any court. The person taking the applications must ensure that the applicant fills the application form which incorporates a simplified means test and are properly completed, then the officer send it to the justice center executive which is operated under the auspices of LASA.¹³⁸ In deciding whether or not to grant a free legal assistance, the justice center executive follows a three-step procedure. First, whether the applicant's entitled to enjoy free legal assistance under the Constitution or under the LASA Act? Second, does the applicant qualify in terms of the means test? Third, if there is the probability of miscarriage of justice.¹³⁹ If the constitution urge for the bestowal of the right, the next issue would be the determination of the means test which takes the following into account; the applicant's income, the value of owned immovable and movable properties.¹⁴⁰ To qualify, the applicant must have an amount not exceeding five thousand five hundred Rand (about five hundred fifty dollar) and six thousand Rand (about six hundred dollar) for a household. Besides regarding the accumulation of the property, clients should possess an immovable property to a value not exceeding five hundred thousand Rand (fifty thousand dollar) and a hundred thousand Rand (ten thousand dollar) for movable property.¹⁴¹ In South Africa, although those who are eligible based on this requirement deserve to access the right at the full expensed of the state, those who are 'not so poor' (find themselves on the borderline of affordability) also have a favorable condition to contribute to the cost of service. The amount of the contribution is calculated based on a formula which takes into account the amount by which the applicant exceeds the means test.¹⁴²

Once the legal and institutional frameworks to accord free legal assistance is established the next issue becomes addressing the mechanisms to deliver the right. Initially the South African legal aid system operated by using the *judicare* approach of referring clients to private lawyers, rather

¹³⁸ Legal Aid South Africa Legal Aid Manual (2017) para. 3.1 [hereafter LASA legal aid manual].

¹³⁹ Ibid, para. 3.4.

¹⁴⁰ LASA Legal Aid Guide (n 133) paras. 5.1.4 and 5.1.5.

¹⁴¹ Ibid, paras. 5.1.4 and 5.1.5; V. Vedalankar and P. Hundermark (n 60) 9.

¹⁴² V. Vedalankar and P. Hundermark, *ibid*, 10.

than the salaried lawyer approach.¹⁴³ However, since the promulgation of the 1996 constitution, the demand becomes escalated. Owing to this the government can't able to satisfy the whole claims and this forced to revise the strategies concerning the delivery of the services.¹⁴⁴

3.1.2. Approaches to Deliver Free Legal Assistance in South Africa

Based on an assessment of the right in South Africa, Mason, in his study of holistic approach to deliver free legal assistance, establishes several mechanisms to deliver legal aid and describe a holistic approach as a commendable 'if an under resourced country is to make the most of its limited resources.'¹⁴⁵ Accordingly, following paragraphs discuss on the approaches employed in South Africa through classifying in to state and non-state funded approaches.

3.1.2.1. State Funded Free Legal Assistance in South Africa

State funded justice center is the main delivery mechanism and the first approach to be discussed in this part. This approach is 'one-stop-shop' instead of being continually referred to different agencies. As opined by Mason, 'A number of developing countries employ a 'one stop shop' aspect of delivering the right. However, none of their services areas comprehensive as those provided by the South African justice centers.'¹⁴⁶ Legal aid board (now, legal aid South Africa) setup a network of fifty-eight justice centers and forty-one satellite offices. The satellite offices are much smaller than the regular justice centers and service the rural towns.¹⁴⁷ The justice centers encompasses qualified attorneys and advocates employed as principals, public defenders, law intern public defenders, paralegals, and administrative staff but, satellite offices have a much

¹⁴³ Hennie v. As (n 102) 59.

¹⁴⁴ David McQuoid-Mason, Some Reflections (n 121) 9; Hennie v. As, *ibid*, 59; As provided in Hannie's study, besides the Constitutional requirement for legal representation, massive fraud by practitioners, the cost and the success of pilot public defender projects elevates the demand to employ salaried lawyers.

¹⁴⁵ See David McQuoid-Mason, Holistic Approach (n 28) 135. The approaches employed in South Africa are; (i) state funded justice centers(ii) state-funded *judicare, exofficio* or referrals to private lawyers; (iii)state-funded public defenders; (iv) state funded interns in rural law firms; (v) state-funded law clinics; (vi) *pro bono publicio*; (vii) state-funded impact litigation; (viii) state funded cooperation agreements; (ix) public interest law firms; (x) university legal aid clinics; (xi) street law-type clinics; and(xii) paralegal advice offices.

¹⁴⁶ *Ibid*, 137.

¹⁴⁷ *Ibid*.

smaller core staff component.¹⁴⁸ When there is a perception of lack of capacity on the part of the justice center, a *judicare* approach might be employed.¹⁴⁹

As provided above, the *judicare* approach is the main method of delivering the right up until the enactment of the 1996 constitution of South Africa. The *judicare* system worked when the LASA had the resources to handle it.¹⁵⁰ Since the *judicare* approach is not cost-effective than the salaried lawyer system (PDO), pilot projects testing the cost of public defenders is launched and later decided to opt for a predominantly a salaried lawyer model. Nowadays, *Judicare* is only used as an adjunct to PDO in areas where there are no justice centers or the PDO cannot handle cases for ethical reasons.¹⁵¹

Since the pilot project assures its cost-effectiveness, the public defenders together with law intern defenders have been integrated in to the board's (now, LASA's) justice centers. The public defender approach employs legally qualified persons to represent indigent persons.¹⁵² However, in state-funded interns of rural law firms approach, private attorneys in selected rural towns were given funding by the board (LASA) to employ intern law graduates as candidate attorneys to provide free legal assistance.¹⁵³ The latter one is cheaper to supplement the salaries of law interns in rural law firms than to establish branch offices and it is also help to overcome the shortage of internship places.¹⁵⁴

Besides, with regard to state-funded law clinics, 'South Africa was one of the first developing countries in the world to consider using law graduate interns as public defenders on a substantial scale.'¹⁵⁵ According to this approach, LASA establish the clinics that have been separated from the universities and incorporated in to the justice centers and required to employ a principal (an attorney with sufficient practical experience) to supervise law graduates.¹⁵⁶ This efficient and

¹⁴⁸ David McQuoid-Mason, *Holistic Approach* (n 28) 137. Staff members have their own mandate in the center, for instance Paralegals have the mandate of *inter alia*, the initial screening of eligible persons. However qualified members can appear in courts.

¹⁴⁹ LASA Legal Aid Guide (n 133) para 1.2.

¹⁵⁰ David McQuoid-Mason, *Holistic Approach* (n 28) 142.

¹⁵¹ *Ibid.*

¹⁵² *Hennie v. As* (n 102) 57.

¹⁵³ *Ibid.*, 59.

¹⁵⁴ *Ibid.*

¹⁵⁵ David McQuoid-Mason, *Holistic Approach* (n 28) 143-44.

¹⁵⁶ *Ibid.*, 144.

cost-effective method of delivering the right is a multi-dimensional approach; (i) provide practical legal training for aspiring young lawyers who may otherwise not be able to gain access to the legal profession or faced with a shortage of places for internships; (ii) with a proper training and supervision, their standard of service will be equal to that of qualified lawyers.¹⁵⁷

3.1.2.2. Free Legal Assistance Delivered by Non-state Actors in South Africa

In South Africa some approaches which are not fully funded by the government are employed to deliver the right for eligible quarters. For instance, university legal aid clinics were developed during the early 1970's and has continued to grow from strength to strength and nowadays almost all law schools at South African universities operate their task independent of the state-funded law clinics and sponsored by university authorities or outside donors or combinations of both.¹⁵⁸ In order to get accreditation by the local law society, the clinics employ directors who are practicing attorneys or advocate. Moreover, to represent the university law clinics on the LASA and to strengthen their fund, the association of University legal aid institutions (AULAI) was established.¹⁵⁹

Besides, in South Africa a large number of organizations are involved in paralegal and work for access to justice, *inter alia*, through providing legal advice. In South Africa the training of paralegal staff varies from formal training offered by lawyers for human rights and the community law and rural development center, leading to diploma courses to mainly practical experience obtained on the job.¹⁶⁰ Since then Paralegal advice offices through located where communities make their first contact with the law, provide a legal advice and resolve the problem, however, where the advice office cannot solve the problem the party concerned is usually directed to the LASA's offices. Furthermore, akin to AULAI, in order to raise fund and to deliver training, a National Paralegal Institute (NPLI) has been setup to assist paralegal advice offices.¹⁶¹ Lastly, *pro bono* approach of a voluntary basis is also employed in South Africa

¹⁵⁷ Ibid, 144-147.

¹⁵⁸ Seehaam Samaai (n 30) 234.

¹⁵⁹ Ibid, 234.

¹⁶⁰ David McQuoid-Mason, A Series of Pointers (n 124) 291.

¹⁶¹ David McQuoid-Mason, 'The Supply Side: The Role of Lawyers in the Provision of Legal Aid-Some Lessons From South Africa' in Penal Reform International and Bluhm Legal Clinic, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007) 114.

except in Cape law society where the right is delivered compulsorily. This approach regarded as an adjunct to, not a substitute for, a properly functioning deliverance of the right that pays lawyers for their services.¹⁶²

As provided above, in South Africa, the right to free legal assistance during pretrial stages of the criminal proceedings is explicitly accorded under the 1996 constitution for those who are eligible and in order to deliver such right a number of approaches are employed to implement such constitutional provision. Here the issue should be how eligible persons access the right from the body (LASA) which takes the mandate to do so. The South African experience demonstrates that, a general advice is provided primarily by paralegals that are based at all justice centers. Particularly, since 2010 general advice service was expanded by the establishment of the advice line, a dedicated call center service to provide telephonic advice. A toll-free line is available, wherever they may be, to call for immediate legal advice, at no cost to them.¹⁶³ Besides, the center for criminal justice, established at the University of KwaZulu-Natal, runs an action under which deliverers based in container offices next to police stations to provide free legal assistance to some vulnerable quarters of the public.¹⁶⁴

To recapitulate, In South Africa, the right to free legal assistance during pretrial stages is elevated to the status of constitutional right since it is incorporated under the 1996 constitution. Besides, the later promulgated LASA Act and amended criminal procedure Act are comprehensive documents which are supported by the LASA's legal aid guide and manual. These laws determine the commencement of the right, eligibility criteria, approaches of delivery, organization and management of the overall system. To administer and coordinate the delivery of free legal assistance, a national public entity known as, legal aid South Africa is established as an independent organ by the LASA Act. The LASA create some sort of integration among the providers of the service which enables to make the service accessible. A good instance for this is employing paralegals to render a telephonic advice inside the justice center which enables mainly to satisfy the urgent needs of individuals during pretrial stages.

¹⁶² Seehaam Samaai (n 30) 232.

¹⁶³ V. Vedalankar and P. Hundermark, (n 60) 9; early access to legal aid (n 26) 71.

¹⁶⁴ Early access to legal aid, *ibid*, 72.

3.2. Free Legal Assistance during Pretrial Stages in Moldova

The catering of free legal assistance, as part of access to justice, is widely accepted norm across the world, which is in its advanced stages in some jurisdictions of central and Eastern Europe *such as*, Moldova.¹⁶⁵ Through taking this in mind, in this section the paper assesses the experience of Moldova on free legal assistance during pretrial stages of the criminal proceedings. Accordingly the legal recognition as well as the institutional framework to administer the delivery of free legal assistance to eligible persons will be addressed. Finally, the issue concerning the management and accordance of free legal assistance during pretrial stages through employed special procedure will also be the subject assessed in this section.

3.2.1. Legal and Institutional Framework on Free Legal Assistance in Moldova

Akin to the South African experience and following international norms, free legal assistance during pretrial stages of the criminal proceedings is also elevated to the status of constitutional right in Moldova as it is incorporated within the 1994 constitution. As provided under Article 26 of the supreme law of the country, a person has the right to be assisted by a lawyer which is appointed by the government throughout the criminal proceedings.¹⁶⁶ However, the constitution doesn't identify eligible beneficiaries and the details regarding the means-merit tests. Nevertheless, the right to free legal assistance during pretrial stages is not only reaffirmed under the 2003's criminal procedure code (hereafter, CPC) but it is also expatiated. The CPC in its Article 17 explicitly accord the right to free legal assistance during pretrial stages and reads as follows; 'In the entire course of a criminal proceeding, the ... suspects have the right to be assisted ... by a defense counsel. If the suspect cannot afford a defense counsel ... he shall be assisted free of charge'¹⁶⁷ The provision of CPC in those words explicitly accord the right for suspected persons either he is detained or arrested and in order to enjoy the right, eligibility is

¹⁶⁵ See, UNDP, *Widening Access to Justice* (n 57) 3.

¹⁶⁶ The Constitution of Moldova (n 37) Article 26; Tudor Osoianu and MihaelaVidaicu, *Rights of suspects in police Detention* (2015) 75.

¹⁶⁷ See also The Criminal Procedure Code of the Republic of Moldova (2003) Article 64/2/1 [hereafter, CPC of Moldova]

tested by the mean test since assistance free of charge is promised if the suspect lacks a financial capacity to afford the cost of a lawyer.

For the realization of the right through ensuring the participation of a lawyer to defend the suspect, the onus is, *inter alia*, upon the criminal investigation body.¹⁶⁸ In case the arrested person does not have the possibility to contact a chosen lawyer, the criminal investigation body shall, within one hour contact the national legal aid council (hereafter, NLAC) for state guaranteed free legal assistance to appoint a lawyer. Accordingly, urgent/emergency legal assistance is delivered within three hours from the moment the person was arrested.¹⁶⁹ However, if during pretrial stages the enforcement of the right has not been ensured, the law allows for *inter alia*, mitigates punishment.¹⁷⁰

In Moldova, the delivery of free legal assistance was changed significantly since the promulgation of the 2007's legal aid law (hereafter, LAL).¹⁷¹ This statute elucidates the commencement of the right, eligibility criteria, means of delivery, organization and management of the system. Prior to this statute, there was no clear division of responsibilities between the bodies involved in the delivery of free legal assistance such as, the ministry of justice, the bar and the criminal investigation office. Following the entry into force of such statute, thus far the management of the delivering system becomes functioning.¹⁷² Regarding legal assistance at the expense of the state, as provided under Article 19/1/b of the LAL, any arrested person who confronts the criminal proceeding is eligible for legal assistance and stated that; free legal assistance is available to 'any person who needs urgent/emergency legal aid (assistance for detained/arrested persons) in cases of arrest in a criminal process.' Article 20 of the same law specifies that, urgent free legal assistance is provided irrespective of the financial status of the beneficiary.

Surprisingly, Article 69 of the criminal procedure code of Moldova which is reaffirmed by Article 19 of the LAL, stated that, during pretrial stages free legal assistance may be

¹⁶⁸ Ibid, Article 17 para 3 and 5.

¹⁶⁹ Ibid, Article 167 para.1¹; Tudor Osoianu and MihaelaVidaicu, (n 166) 85.

¹⁷⁰ See CPC of Moldova (n 167) Article 251 and 385/4.

¹⁷¹ Moldovan Legal Aid Law (2007) [hereafter, LAL]

¹⁷² Ed Cape and Zaza Namoradze (n 58) 286; Tudor Osoianu and Mihaela Vidaicu (n 166) 46.

mandatory.¹⁷³ Although legal assistance at the expense of state during pretrial stages is recognized in Moldova, the beneficiary can waive this right voluntarily and reasonably. However, the waiving of the right may be rejected for the interest of justice and mandatory legal assistance is delivered thereof.¹⁷⁴ The determination of whether the interests of justice require mandatory legal assistance depends on the following circumstances; (i) the complexity of the case, (ii) the suspect's/defendant's capacity to defend himself; and (iii) the gravity of the crime for which the person is suspected.¹⁷⁵ Whereas, if the case falls out of the scope of mandatory legal assistance, ordinary free legal assistance (not urgent) is delivered based on the fulfillment of the means test. Regarding the means test, it is regulated by the LAL and other secondary legislation. Based upon the decision of the government, free legal assistance is provided to persons whose average monthly income for the past six months is lower than the minimum existence level per capita in the country.¹⁷⁶

In Moldova, if the merit test is fulfilled, free legal assistance is delivered mandatorily. If the merit test is not fulfilled the second test i.e. the means requirement is appraised. However, according to Article 20 of the LAL, urgent/emergency free legal assistance (a legal assistance in pretrial stages) is provided irrespective of the financial status of the beneficiary. Hence, from the above premise one can deduce that; in Moldova, the delivery of free legal assistance during pretrial stages of the criminal proceedings is conferred irrespective of the fulfillment of the two cumulative requirements. Which means emergency legal assistance is rendered immediately for detained/arrested persons through duty lawyers and assignment of duty lawyer does not need the financial capacity of the beneficiary. However, afterwards and in the subsequent stages of the criminal proceedings the eligibility of the beneficiary is assessed.

For the management of legal aid and free legal assistance during pretrial stages in particular, three institutions takes the responsibilities, these are; national legal aid council (NLAC), the

¹⁷³ CPC of Moldova (n 167) Article 69 (1); LAL (171) Article 19, para.1 (1c). According to these provisions, mandatory legal assistance is provided either when the suspect/defendant is disable, minor, soldier, face language problem, or the interests of justice require.

¹⁷⁴ CPC of Moldova (n 167) Article 71/2.

¹⁷⁵ Ibid.

¹⁷⁶ LAL (n 171) Article 21.

territorial offices of the national legal aid council and the ministry of justice.¹⁷⁷ As provided in Article 11 of LAL, NLAC which is a collegial body composed of seven members,¹⁷⁸ shoulders the onus for administering the delivery of the right throughout the country. The LAL entrusted the council with very important functions. As provided in Article 12/2 of LAL, the main functions of the NLAC include; implementing the right related policy in the state; determining the financial criteria and mechanisms for eligibility, subject to the subsequent approval of the government; establishing the admission criteria for lawyers willing to be included in the national registry to deliver the right; determining the payment mechanism and amounts of fees and other costs to be paid to lawyers; ensuring the quality of the services, including by establishing standards for the providers involved in the system; and determining assessment criteria for monitoring the services, in cooperation with the Bar.

3.2.2. Approaches Employed and Special Procedures to deliver Free Legal Assistance during Pretrial Stages

Under the Moldovan LAL, a mixed system of deliverance was established. Public defender offices and private lawyers approaches are employed for the qualified deliverance of free legal assistance, moreover, paralegals and specialized NGOs are also available to deliver primary free legal assistance.¹⁷⁹ In public defender approach, a qualified lawyer who receive a fixed monthly

¹⁷⁷ The purpose of the territorial offices of the NLAC is to implement the policies adopted by the NLAC in the territory of their jurisdiction. They are in charge of the determination of eligibility, appoint *ex officio* lawyers, making the duty schedules of lawyers for urgent delivery of the right, reviewing the lawyers' reports and making payments, and submitting activity reports to the NLAC every three months. However, the Ministry of Justice remains the policymaking body in the field, reporting to the government and the Parliament. See Ed Cape and Zaza Namoradze (n 58) 286.; Tudor Osoianu and Mihaela Vidaicu (n 166) 46.

¹⁷⁸ The members are comprised of two members from the Ministry of Justice, two from the Bar Council, one from the Superior Council of Magistrates, one from the Ministry of Finance and one chosen by the Ministry of Justice through a public nomination process among NGOs and academia. Such a diverse representation was deliberately chosen, as an additional guarantee of its independence. See LAL (171) Article 11; Ed Cape and Zaza Namoradze (n 58) 286; according to an assessment conducted in 2012, 'NLAC is a semi-independent body and its creation allowed the ministry of justice to distance themselves from improper functions, in order not to affect the impartial image of the legal aid system in the society.' See Martin Gramaticov, Nadejda Hriptievski, *Impact Assessment of the Moldovan Legal Aid Law* (2012) 14.

¹⁷⁹ Qualified free legal assistance refers the provision of legal advice, representation and defence before criminal investigation bodies and courts, while, Primary free legal assistance refers the provision of information about the normative acts, the rights and duties of subjects of law. To deliver the right, although the above two categories are available, free legal assistance in criminal proceedings mainly delivered through the qualified means. See Ed Cape and Zaza Namoradze (n 58) 291; Tudor Osoianu and Mihaela Vidaicu (n166) 45.

remuneration from NLAC deliver the right including urgent free legal assistance.¹⁸⁰ With regard to the delivery of the right through private lawyer/*judicare* system, licensed lawyers enter into contract with the territorial office of the council if they are interested to provide the right and are registered in the national registry of legal assistance providers.¹⁸¹

Likewise, as provided above, primary free legal assistance which is equivalent to advice and consultation is delivered via paralegals and specialized NGOs. Paralegal is a new approach for the legal system of the country, but not a substitute for lawyers.¹⁸² In Moldova, paralegals operate based on the contract concluded with the National Council and its essence resides in its accessibility at the earliest possible stage of the criminal proceedings.¹⁸³ Besides, specialized non-governmental organizations were included as service providers of primary free legal assistance which provide advice services, especially valuable in the regions where there are not enough lawyers through providing legal advice.¹⁸⁴

With regard to the special procedures to deliver the right during pretrial stages, as provided above urgent/emergency free legal assistance is accorded at the earliest stages i.e. during pretrial stages of the criminal proceedings through duty lawyers.¹⁸⁵ The duty lawyers are called through the territorial office during office hours and directly by, *inter alia*, the criminal investigation body outside of office hours. Duty lawyers are assigned irrespective of the financial status of the person and if that person does not call a chosen private lawyer, a duty lawyer shall be provided to the client within three hours from the instant of arrest.¹⁸⁶

The procedure for assigning the duty lawyer is provided in detail in the CPC, as well as the NLAC regulations. If the person is detained during the office hours of the territorial offices of the NLAC, the criminal investigation body requests them to appoint a lawyer. Outside working

¹⁸⁰ Ed Cape and Zaza Namoradze, *ibid*; Tudor Osoianu and Mihaela Vidaicu, *ibid*, 48.

¹⁸¹ Ed Cape and Zaza Namoradze, *ibid*; Tudor Osoianu and Mihaela Vidaicu, *ibid*, 48.

¹⁸² Anna Ogorodova, *International Study of Primary Legal Aid Systems with the Focus on the Countries of Central and Eastern Europe and CIS* (2012) 23; Tudor Osoianu and Mihaela Vidaicu (n 166) 47.

¹⁸³ Tudor Osoianu and Mihaela Vidaicu (n 166) 48.

¹⁸⁴ Article 17 of LAL (n 171); see also, Anna Ogorodova (n 182) 23.

¹⁸⁵ Ed Cape and Zaza Namoradze (n 58) 294; Tudor Osoianu and Mihaela Vidaicu (n 166) 48.

¹⁸⁶ Ed Cape and Zaza Namoradze, *ibid*.

hours and during weekends and public holidays, the criminal investigation body directly contacts the duty lawyer from a list provided to deliver the legal assistance during pretrial stages.¹⁸⁷

To sum up, in Moldova, with the incorporation of human rights principles into the criminal justice system, recently significant change is found particularly with regard to the delivery of free legal assistance in pretrial stages. The Moldova experience also demonstrates that legal assistance at state expense in pretrial stages is lifted to the status of constitutional right. Besides, the LAL of 2007 creates a clear division of responsibilities between the bodies involved in the delivery of free legal assistance and also promotes the contribution of non-state actors. The legal aid law also enables to determine the eligibility criteria, mechanisms to render the right and for the administration of the legal aid system. To access free legal assistance during pretrial stages the urgent/emergency scheme is developed. In this scheme the means test is not taken in to account and all beneficiaries irrespective of their financial capacity are allowed to access free legal assistance. Besides, if the merit test is fulfilled free legal assistance is rendered mandatorily. Thus, from this premises the author deduce that, the right to free legal assistance during pretrial stages is accorded without considering the fulfillment of means-merit test at least until the means test is being determined.

Regarding the overall institutional mandate, mainly the NLAC shoulders the onus for the administration of delivering free legal assistance throughout the country. This institution also employs a special procedure to deliver the right in pretrial stages through implementing urgent/emergency legal assistance scheme which render the service for detained/arrested persons. For the realization of this, the cooperation with criminal investigation body is created and the criminal investigation body shall, within a specific period contact the NLAC for state guaranteed free legal assistance.

¹⁸⁷ Article 166 of the CPC of Moldova (n 167); Article 26 (2) of LAL (n 171).

3.3. Free Legal Assistance during Pretrial Stages in Ethiopia

3.3.1. Introduction

Alike human right instruments ratified by Ethiopia, free legal assistance during pretrial stages is not explicitly recognized under the FDRE constitution. However, as discussed in chapter two international and regional principles and standards together with the jurisprudence of human right adjudicatory bodies cement the conferment of free legal assistance in pretrial stages. Thus, to effectuate the norms and to fulfill their respective obligations, states should assess mechanisms to satisfy the needs of indigent quarters of the community. In this section of the chapter the legal as well as the judicial recognition of free legal assistance during pretrial stages in Ethiopia is assessed. In doing so, the status of the FDRE constitution, the criminal procedure code, the verdict of federal Supreme Court's cassation bench (FSCtCB) and other relevant laws are appraised. Besides, the section also explore whether a prospect to cater free legal assistance in pretrial stages is available in Ethiopia. Then, before goes to a comparative analysis, the final sub section addresses the approaches employed and their accessibility for indigents to enjoy free legal assistance in pretrial stages.

3.3.2. Legal Framework to Render Free Legal Assistance in Pretrial Stages in Ethiopia

This section aims to assess the legal frameworks which accord the right to free legal assistance during pretrial stages. In addition to the working and binding legislation, the section also appraise whether the presence of prospect of recognizing the right to free legal assistance in pretrial stages inside the non-binding instruments. In doing so, some provisions of the FDRE constitution, the criminal procedure code, the verdict of the FSCtCB and other relevant statutes will be discussed. Besides, the FDRE criminal justice policy and the draft criminal procedure and evidence law of Ethiopia are also not overlooked.

3.3.2.1. The FDRE Constitution

In Ethiopia beside the domestic laws including the FDRE constitution, international agreements ratified by Ethiopia are also part of the laws of the country. As provided under the FDRE constitution's Article 9/4; 'All international agreements ratified by Ethiopia are an integral part

of the law of the land.’ Moreover, Article 13/2 of the constitution provides that; ‘the fundamental rights and freedoms recognized under the Constitution shall be interpreted in a manner conforming to the principles of ... international instruments adopted by Ethiopia.’ Hence, in Ethiopia beside the domestic legal frame works, international instruments become binding norms since their ratification by the house of people’s representative. Notwithstanding recent developments, virtually all human right instruments bestowed the right after the institution of the charge.¹⁸⁸ Akin to this, Article 20/5 of the FDRE constitution reads as follows, ‘Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense.’ The constitution confers right to representation through legal assistor of his choice if a person’s financial status let him to do so and the right without remuneration is promised when means-merit requirements are met. However, unlike the South African and the Moldovan experience, in Ethiopia, neither the means nor the merit test is explicated. Although the merit test (the phrase ‘miscarriage of justice’) lack details and not clear, some authors for instance, Muradu Abdo argue in favor of its ambiguity and stated that;

It seems to be a realistic construction in the light of the acute shortage of resources in the country... . the elasticity of the term miscarriage of justice in the constitution is commendable since it leaves room for Ethiopian judges to see the circumstances of each case and allows them to broaden the scope of the right progressively... .¹⁸⁹

In his words, the author through considering the reality of the country let the judiciary to extend the right’s delimitation. However, the *status quo* and the trend demonstrate the judiciary organ’s ‘limited role in constitutional interpretation.’¹⁹⁰ Although one argue that it is not about the subject of constitutional interpretation, limpidity of the statutes can ease the implementation of the law and effectuate the right thereof.

¹⁸⁸ See for instance, ICCPR (n 4) Article 14/3/d. However, the UNHRC’s verdict on *Butovenko* is a good instance to enjoin state parties to deliver the right at the earliest stages of the criminal proceedings. For more see note 79 et seq. of chapter two.

¹⁸⁹ M Abdo, ‘The Indigent’s Right to Defense Counsel in Ethiopia; cited in Hussien A. Tura (n 41) 133.

¹⁹⁰ Tsegaye Regassa, ‘Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia’ (2009) 3 Mizan L. Rev. 288, 303.

As provided above, international instruments ratified by the house of people's representatives are regarded as the law of the land and Ethiopia becomes a state party to ICCPR. Legal assistance after the institution of the charge is recognized under article 14/3/d of ICCPR and the right free of charge is delivered based on the fulfillment of means-merit test. However, such instrument doesn't determine the scope of those requirements, but, the 2007's General Comment 32 which replaces the 1984's GC 13, delimits particularly the scope of the merit test. The UNHRC in that GC stated that; 'the gravity of the offence is important in deciding whether counsel should be assigned 'in the interest of justice.'¹⁹¹ Although ICCPR doesn't explicitly recognize and incumbent the obligation upon states to grant the right during pretrial stages, the UNHRC in *Butovenko* case enjoin state parties for the conferment of the right since its contribution for the preparation of defence is praiseworthy.¹⁹²

Although Ethiopia becomes a state party to several human right instruments such as, ICCPR, incorporation of free legal assistance at the possible highest level under national legal system was strongly recommended by international norms.¹⁹³ However, regarding this when the FDRE constitution is scrutinized neither detained nor arrested persons entitled the right to free legal assistance. Chapter three of the constitution; fundamental rights and freedom incorporates several rights including the rights of arrested persons. Article 19 under the caption 'Right of Persons Arrested' provide several rights such as, privilege against self-incrimination, *habeas corpus*, protected from forced confession, the right to bail and others but, overlooks the right to legal assistance.

3.3.2.2. The Criminal Procedure Code and Other Relevant Statutes

Though the draft law is prepared to revise it, the criminal procedure code under its book two, captioned, 'prosecution and inquiry,' a person's right to legal assistance during pretrial stages is recognized and Article 61 provided as follows; 'Any person detained on arrest or on remand shall be permitted forthwith to call and interview his advocate'¹⁹⁴ The right to free legal

¹⁹¹ See GC 32 (n 74) para 38.

¹⁹² *Butovenko v Ukraine* (n 79) para 7.6.

¹⁹³ See for instance, United Nations principles and guidelines (n 2) principle 1.

¹⁹⁴ Criminal Procedure Code of Ethiopia, Proclamation No.185 (1961) Article 61. Moreover, under Article 174 of the code, the court shall appoint a lawyer to a young person if no parent/guardian represent him or he face rigorous

counsel in this outdated law is accorded for detained persons whether they are remanded or not, i.e. the law allowed the enjoyment of the right before and after a person brought before a court. However, the concern is that, such provision does not address and determine the fate of indigent persons who confronts the criminal justice system. Later in 2011, this is replicated under section 4.7.1 of the FDRE criminal justice policy.

Besides, alike the FDRE constitution, the defence force and Oromia national regional state courts re-establishment proclamations accord accused persons the right to free legal assistance. However, unlike the FDRE constitution which lacks clarity regarding the two cumulative requirements to access free legal assistance, these two proclamations determine the threshold when ‘miscarriage of justice’ is probably resulted. the defense forces proclamation, which is enacted a year later to the FDRE constitution, in its article 34/1 provided that; ‘the state shall provide a defence counsel to a person who renders military service in the national defense forces on a permanent basis and charged with an offence punishable with imprisonment of not less than five years and is unable to retain a counsel.’ Under this statute a person charged with an offence punishable with five years and above was considered as a parameter for the susceptibility to injustice. Likewise, with regard to the merit test, the 2008’s Oromia national regional state courts re-establishment proclamation under Article 17/2 promulgate almost a verbatim copy of the defence force proclamation and stated that; ‘the court shall assign a defence council to an individual who is accused of a crime punishable with a rigorous imprisonment not less than five years.’ To determine the probability of miscarriage of justice (the merit test), the UNHRC in its GC 32 expresses the importance of gravity of the offence and the above two proclamations are in consistence with this interpretation of the committee. Although the two proclamations determine the threshold for the probability when ‘miscarriage of justice’ would result, they don’t have nationwide applicability. Besides, another commonality among these proclamations is the bestowal of the right after the institution of the charge. Hence, in addition to determining the merit test, their contribution to accord the right during pretrial stages of the criminal proceedings is not apparent.

imprisonment exceeding ten years or with death. However, the right is accorded for accused persons and young persons or other susceptible group doesn’t get much heed in this paper.

3.3.2.3. Judicial Recognition of the Right to Free Legal Assistance

In Ethiopia, interpretation of a law by the federal Supreme Court rendered by the cassation division is binding on all federal as well as regional tiers of courts.¹⁹⁵ Owing to this, the 2001's the Supreme Court's cassation bench verdict on *Captain Hussien Ali v. Somali regional state public prosecutor*¹⁹⁶ is the relevant decision regarding free legal assistance and serve as precedent. In this case Captain *Hussien* was accused of aggravated homicide which is committed against *Yusuf Mohammed* and accordingly in 1999 the public prosecutor instituted a charge. After the institution of the charge, *Hussien* requested a legal assistance at the expense of the state, which he was granted by the court and the bench consequently read out and explained the charge to the accused and enter a plea of not guilty. On the day of calling of witnesses the state appointed lawyer of the accused was unable to appear owing to his appointment on another court and the accused request an adjournment which is rejected by the court. Consequently, the trial court proceeded with the hearing of witnesses and convicted the accused of aggravated homicide which leads to the imposition of death penalty. Since the accused appeal had no success, the file was instituted to the federal Supreme Court's cassation bench.¹⁹⁷

The bench then expressed concern that the punishment commence from the moment when the constitutional right of the accused was ignored and held that, the accused should entitled with (i) the right to information about free legal assistance; (ii) assignment of lawyer based on the choice of the accused but at the expense of the state¹⁹⁸ and (iii) sufficient time for preparation. Consequently, the bench owing to basic error of law with in the decision of the lower courts adjudicates for the retrial of the case by the lower courts in light of the constitutional rights of the accused.¹⁹⁹ Through stating in such way, the bench broadens the scope of the right under Article 20/5 of the constitution and Article 14/3/d of ICCPR since neither of the above three (the right to

¹⁹⁵ Federal Courts Proclamation Re-amendment Proclamation No. 454 (2005) Article 2/4.

¹⁹⁶ *Captain Hussien Ali v. Somali regional state public prosecutor* (2001) vol. 9, file no. 37050, federal Supreme Court cassation bench.

¹⁹⁷ *Ibid*, Para 1 and 2.

¹⁹⁸ The bench regarding a choice of a lawyer stated in Amharic that; 'የአሁኑ አመልካች ከሂደቱ መጀመሪያ ጀምሮ እስከ መጨረሻው 'በፈለጉት ጠበቃ' የመወከል ሕገ-መንግሥታዊ መብታቸው በቂና አሳማኝ ጊዜ ተሰጥቷቸው በስር ፍ/ቤት የተከበረላቸው አለመሆኑን ከክርኩሩ ሂደት ተገንዝበናል።' see *ibid*, para 8. Although the constitution let the accused to choose a lawyer if he has a means (financial capacity) to do so, the bench broaden the scope of the right which is also not expressly conferred under ICCPR.

¹⁹⁹ *Ibid*, para, 9.

information about free legal assistance, assignment of a chosen lawyer at the expense of the state and sufficient time for preparation) is recognized under FDRE constitution and ICCPR does not explicitly allow accused persons to choose a lawyer which is provided at state expense. Thus, in this adjudication of the federal Supreme Court's cassation bench, the right to free legal assistance is elucidated and broadened as compared to the FDRE constitution and the ICCPR. Notwithstanding, the concern of the bench is fenced solely to confer free legal assistance during trial and post-trial stages. However, since the bestowal of the right during pretrial stages is developed based on a cumulative understanding of Article 14/3/b and 14/3/d of the ICCPR as well as the jurisprudence of the UNHRC, the elucidation and broadening the delimitation of the right (i.e. recognizing the choice of lawyer) can be employed during pretrial stages of the criminal proceedings. When the author argues in such way, it does not mean that the right to free legal assistance during pretrial stages is recognized under the verdict of the federal Supreme Court's cassation bench. Rather, the elucidated and the broadening of the accused's right to information, assignment of a chosen lawyer at the expense of the state and sufficient time to prepare with a lawyer can be analogically extended during pretrial stages of the criminal proceedings. This is owing to the rational of bestowing the right whether it is before or after trial stage is similar; i.e. to prepare and defend the allegation thereof.²⁰⁰

3.3.2.4. FDRE Criminal Justice Policy

In 2011 the ministry of justice (now, attorney general) enact the criminal justice policy to realize, *inter alia*, fairness, accessibility, speedy criminal justice system based up on the principle of transparency and accountability. To this end, investigative body, the prosecutor, and judiciary shoulders the responsibility to make certain that accused persons adequately access a legal assistance.²⁰¹ The criminal justice system could not be effective without the operation of all rights accorded in all stages of the criminal proceedings and the right to legal assistance serves as an instrument thereto. As a result, the policy aims, *inter alia*, to building a criminal justice system which able to respect and realize individual's human rights including the right to legal assistance.²⁰² The policy besides stated that; during its enactment, the provisions of the FDRE Constitution, binding international human rights instruments and other universally accepted

²⁰⁰ See ICCPR (n 4) Article 14/3/b and 14/3/d; *Butovenko v Ukraine* (n 79) para 7.6.

²⁰¹ FDRE Criminal Justice Policy (2011) the preamble and Section 4.7.1.

²⁰² *Ibid*, the preamble and Section 1.2, 4.7.1.

criminal justice principles and practices are taken as sources and incorporated under the criminal justice policy.²⁰³ The right to free legal assistance after the institution of the charge is one of the rights which are incorporated within international human right instruments as well as FDRE constitution. In this regard, the criminal justice policy improve it and what it makes diverge from FDRE constitution is that, it urge for the explicit recognition of legal assistance for arrested person through providing as follows;

There would be revision of existing laws on the issue of the right to legal assistance in criminal proceedings, which includes, *inter alia*, the right of any arrested person to be assisted by a lawyer of his choice to defend the allegations brought against him; *and* law enforcement officials obligation to inform the suspect or the accused about the right to be represented by a lawyer in the language he understands and to facilitate access to such right.²⁰⁴

From such words, one can infer a promise towards the bestowal of the right to legal assistance during pretrial stages of the criminal proceedings. However, regarding the fate of indigent suspects who can't access the right as a result their financial status, the policy opts to be silent. Owing to this, in order to ascertain free legal assistance during pretrial stages, it is difficult to expect a prospect emanate from the policy.

3.3.2.5. The Draft Criminal Procedure and Evidence Law of 2017: A Prospect towards Realizing Free Legal Assistance during Pretrial Stages

To build up-to-date criminal justice system which is consistent with the FDRE constitution, international principles and human right instruments ratified by Ethiopia, the criminal procedure code is set to be revised.²⁰⁵ Besides, since the 1961 and the working criminal procedure law has a legal gaps to administer complicated issues based on internationally accepted principle, the draft law is prepared to fulfill such loophole and enable the government to accomplish the obligation shouldered by international laws.²⁰⁶

²⁰³ Ibid, Section 1.1.

²⁰⁴ Ibid, Section 4.7.1 para. 2.

²⁰⁵ The Draft Criminal Procedure and Evidence Law of Ethiopia (2017) the preamble, para. 1. [hereafter, the draft law]

²⁰⁶ Ibid, preamble, para.2 and 4.

Several rights are incorporated inside the draft criminal procedure and evidence law of Ethiopia and the right to free legal assistance is not overlooked. Unlike the above laws including the FDRE constitution, this draft law explicitly confer the right to free legal assistance during pretrial stages of the criminal proceedings and provided that;

Every one suspected or accused of a crime has the right to a legal assistance of his choice from the moment of his arrest or accusation. If he lacks a means to be assisted by a lawyer of his choice and substantial injustice would otherwise result a legal assistance should assigned to him at state expense.²⁰⁷

In this provision, suspected persons are let to enjoy the right to a legal assistance which commence from his arrest and allowed to choose the lawyer if he has a financial capacity to hire them. Regarding indigent persons, although a legal assistance of his choice is not recognized, free legal assistance is promised based on the fulfillment of means-merit requirements.

Besides, akin to the Moldovan experience, the right to free legal assistance during pretrial stages may surprisingly be mandatory and the issue should not be proceed without a legal assistance if either of the following three circumstances are fulfilled; (i) if the person is young²⁰⁸; (ii) if a person charged with an offence punishable with imprisonment of not less than five years; (iii) when the law explicitly provided otherwise.²⁰⁹

As provided above, legal assistance during pretrial stages under the draft law commence from the moment of arrest and in later stage this law prohibits police investigation in the absence of a legal assistance. As stated under Article 120/7 of the draft law, ‘Suspected person can be asked to answer the complaint made against him inside the investigation room or on the crime scene. Such investigation shouldn’t be conducted without the presence of a lawyer when it takes place inside the investigation room.’ However, although the draft criminal procedure and evidence law encompasses some prospect, it is like a constitutional phrase and issues such as, eligibility

²⁰⁷ Ibid, Article 10/1; under the draft law, a legal assistance free of charge based on the fulfillment of means-merit requirement is also conferred to accused defendants. See, *ibid*, Article 257/7. With regard to choice of lawyer, the draft law only opt prisoners to entitle it. See, *ibid*, Article 10/3.

²⁰⁸ Young person is person between the ages of nine and fifteen years. See the FDRE Criminal Code Proclamation No. 414 (2004) Article 53.

²⁰⁹ The draft law (n 205) Article 10/2.

criteria, the duty and responsibility of providers, the means to access the service is not determined, thus, it is not comprehensive enough.

3.3.3. The Right to Free Legal Assistance during Pretrial Stages in Ethiopia: A Charity or the Onus Incumbent on the Government?

As provided under the FDRE constitution's Article 9/4; 'All international agreements ratified by Ethiopia are an integral part of the law of the land' and 'Fundamental rights and freedoms recognized under the Constitution shall be interpreted in a manner conforming to the principles of ... international instruments adopted by Ethiopia.'²¹⁰ Ethiopia is a state party to several international and regional human right instruments which incorporate the right to free legal assistance. Unlike regional human right instruments, the right to a legal assistance within the ICCPR, mentioned in two circumstances: first, under Article 14/3/b, as a right to communicate with a lawyer for the preparation of a defence; and then, under Article 14/3/d, as a right to defend oneself through the assistance of a lawyer. The effect is that a person charged with an offence should have the right to a legal assistance both for the preparation of defence, and also for the conduct of that defence in trial. It is apparent that the commencement of such preparation is not after the institution of the charge rather it is during pretrial phases.

Although during pretrial stages of the criminal proceedings, the FDRE constitution entitled arrested persons several rights through overlooking the right to legal assistance, the human rights Committee has determine the delimitation of the right to free legal assistance in its General Comment 32 in which it clarified the obligation of states parties to the Covenant by providing that; 'In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.'²¹¹ Moreover, the United Nations human rights committee in *Butovenko* and *Lyashkevich* finds a violation of the right to prepare a defence through a legal assistance because of denial of free legal assistance and conducting investigation acts during pretrial stages.²¹²

²¹⁰ FDRE constitution (n 34) Article 13/2.

²¹¹ GC 32 (n 74) para. 38.

²¹² The committee in *Butovenko*, where a complainant was interrogated by the police inquiry officers in the absence of a lawyer and without having been explained his rights. Although he has access to a lawyer after three days of his arrest, since the investigation commence promptly, the committee finds a violation of his right to prepare a defence

The bestowal of free legal assistance at all stages of the criminal proceedings, including pretrial phases can, thus, be regarded as part of the constitutionally guaranteed right of arrested persons which accordingly imposes an obligation against the Ethiopian government. In addition to recognizing the human right, Ethiopia shoulders the obligations ‘to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the covenant without distinction of any kind’ and ‘to take necessary steps ... to give effect to the rights...’²¹³ Such obligation incumbent on the state can be primary positive obligation which enjoins the government to provide free legal assistance or the so-called secondary positive obligation which encourage the vital role taken by non-state actors. In the second circumstance, the responsibility of states can include creating a working condition, *inter alia*, through enacting legislation which promotes the delivery of the service.

3.3.4. Institutional Framework and Approaches to Deliver the Right to Free Legal Assistance in Ethiopia

In Ethiopia, unlike the experience of South Africa and Moldova which institute a comprehensive body to administer the delivery of the right, some dispersed institutions take the mandate to manage and render free legal assistance to eligible persons of the community. Yet few institutions prefer to deliver the right by giving a special attention for civil cases and for vulnerable quarters which is out the delimitation of this paper.²¹⁴ However, institutions such as, the federal Supreme Court, the ministry of justice (now attorney general) and law school legal aid clinic offices takes the mandate to deliver free legal assistance in Ethiopia. These three institutions take the mandate to deliver the right through employing their respective approaches.

through a legal assistance. See *Butovenko v Ukraine* (n 79) para7.6. Besides, in 2010, the committee in *Lyashkevich* concludes that denying the access to the legal counsel of his choice ... and conducting investigation acts during pretrial stages constitutes a violation of rights under article 14/3/b.’ *Lyashkevich v Uzbekistan* (n 100) para 9.4.

²¹³ ICCPR (n 4) Article 2.

²¹⁴ For instance, Ministry of Women, Children and Youth Affairs take mainly the mandate on women and child rights issues and deliver a legal related assistance for these groups of the community. Kokebe Wolde (ed.), *Assessment of Legal Aid in Ethiopia: A Research Report & Proceeding of the National Workshop of Legal Aid Providers* (Center for Human Rights, Addis Ababa University, 2013) 55. Moreover, the ministry of justice (now, attorney general) also delivers free legal assistance in civil suits for vulnerable quarters. See Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010 (2010) Articles 16/11 [hereafter, the proclamation on the power and duties of executive organ]

The public defender office deliver the right under the auspices of federal Supreme Court²¹⁵, the ministry of justice administer the delivery of the right through *pro bono publico*²¹⁶ and law school legal aid clinic offices employ *inter alia*, salaried lawyers, law students and staff members to render the right to eligible persons.

3.3.4.1. The Public Defender Office and its Status to Render Free Legal Assistance in Pretrial Stages

Public defender system delivers the right primarily through governmental institution that employs lawyers to provide free legal assistance for those who are eligible.²¹⁷ This is a model employed in several jurisdictions including Ethiopia where the system is embedded within the judiciary and serves the needy under the auspices of the courts. In Ethiopia, to determine the jurisdictional matters of the federal courts and to effectuate the FDRE constitution and the promises under human right instruments ratified by Ethiopia, the federal Supreme Court through their respective public defenders offices (hereafter, PDO) render free legal service to accused persons.²¹⁸ However, regarding its genesis, the idea of organizing the public defenders' office in Ethiopia attracts the attention of the government in relation to the prosecution of former *Dergue* officials. Thus, the establishment and operation of public defenders preceded the coming into force of the FDRE Constitution.²¹⁹

Later when the FDRE constitution was promulgated, Article 20/5 confers the right to free legal assistance for accused persons who are eligible to enjoy it. To this end, the 1996 federal Courts proclamation shouldered the responsibility to organize and manage the public defender office on the president of the federal Supreme Court.²²⁰ The office provides free legal assistance service to indigents charged with genocide, corruption, treason, and other serious criminal cases.²²¹ However, some studies conducted on the performance and accessibility of the Ethiopian PDO demonstrate the operation of the office under severe constraints; these includes *inter alia*, limited

²¹⁵ Federal Court Proclamation (n 195) Article 16/2/j.

²¹⁶ Federal Court Advocates' Code of Conduct Regulations (n 29) Article 49.

²¹⁷ Early Access to Legal Aid (n 26) 73; Global Study (n 26) 44.

²¹⁸ See Federal Court Proclamation (n 195) preamble, para. 2 and Article 16/2/j.

²¹⁹ Abera H. Woldeyesus, *Public Defender's Services in Ethiopia: Assessment of Current Gaps and the Way Forward*, in Elias N. Stebek (ed.) (2015) 24.

²²⁰ Federal Court Proclamation (n 195) Article 16/2/j.

²²¹ World Bank, *Ethiopia Legal and Judicial Sector Assessment* (2004) 30.

resource, gap in professional skills and non-accessibility of the office for all who meet the eligibility criteria. Besides, the situation is aggravated owing to the absence of the office in all tiers of courts.²²² Owing to this, the delivery of the right through public defenders is limited and inadequate.²²³

Regarding the organization of the public defender's office, citing Peter Bach's study, Abera provided that;

The PDO is organized as an entity under the central Supreme Court and headed by a chief public defender and a deputy public defender. To date, no legislation has been enacted to establish the legal foundation for the work of the PDO. Consequently, the exact mandate, structure and organization are not instituted by law.²²⁴

In relation to this, as provided above, Article 16/2/j of federal court proclamation is the single provision that serves as the legal basis for the constitution of the public defender's office in Ethiopia. However, the draft criminal procedure and evidence law of Ethiopia incorporates some details regarding the mandate and responsibility of public defender office.²²⁵ Besides, what is commendable under the draft law regarding this study is that, it enjoins the public defender's office to render the right during pretrial stages.²²⁶ However the *status quo* is different, i.e. the right to free legal assistance during pretrial stages of the criminal proceedings is not a developed trend.²²⁷ According to the interviewed judge, in order to render a defense lawyer, the accused person, the public prosecutor or the judge through its initiation may request the Supreme Court for the assignment of the defense lawyer and since the capacity of the PDO is minimum it is not easy to request for all eligible persons.²²⁸ Besides, concerning eligibility criteria the requirements provided under the FDRE constitution is taken in to account and the merit test is determined based on either the seriousness of the alleged crime or the personal condition of the accused

²²² World Bank, *ibid*, 30; Abera H. Woldeyesus (n 219) 51-62.

²²³ World Bank, *ibid*, 30; Mizanie Abate and others (n 41) 9.

²²⁴ Peter Bach, 'War Crimes Trials and the Establishment of a Public Defender's Office in Ethiopia: Field Report' cited in Abera H. Woldeyesus (n 219) 25.

²²⁵ See, The draft law (n 205) Article 23, 57 and 59.

²²⁶ *Ibid*, Article 23.

²²⁷ Interview with Mr. Abiy Mengistu, federal first instance court judge, Kolfe Keranyo Branch, held on May 27/2018; Interview with Mr. Tarekegn Taye, federal first instance court judge, Akaki Kality Branch, held on May 26/2018.

²²⁸ *Ibid*.

person.²²⁹ However, the interviewed judge could not recall a single case which requests the Supreme Court for the assignment of defense lawyer during pretrial stages.²³⁰

The last but no means least is the issue of independence i.e. recognizing the right in legislations and institutional arrangement *per se* is not enough for pragmatic realization of the right to free legal assistance. The practical requirement for functional legal aid system includes *inter alia*, ensuring the independence of the right providers.²³¹ To this end, although independence of public defence office is not available in Ethiopia, the 2011's FDRE criminal justice policy envisions the establishment of an independent and impartial public defender's office which adequately represents accused persons.²³² Thus, foreseeing an independent body by this criminal justice policy is a commendable effort. However, since the policy urge for the bestowal of the right for accused persons, the prospect of recognizing the delivery of the right during pretrial stages of the criminal proceedings emanated from the policy seems unlikely.

3.3.4.2. The *Pro Bono Publico* Approach and its Status to Render Free Legal Assistance in Pretrial Stages

Ministry of justice (now, attorney general) is one of the institutions which take part on the delivery of free legal assistance. As provided under the proclamation which defines the powers and duties of the executive organs, the ministry of justice mandated to monitor advocates and have the power and duty to: *inter alia*, 'license and supervise in accordance with law the advocates practicing before federal courts, facilitate conditions necessary for advocate to provide free legal aid service to the public and supervise execution of such obligation.'²³³ The ministry issue three types of license. These are; (i) a federal first instance court advocacy license; (ii) federal courts advocacy license; and (iii) a federal court special advocacy license. The first two types should pass stringent qualification criteria in relation to the last license which allow professionals to deliver the right but may not receive any kind of reward from the

²²⁹ Ibid. According to Mr. Abiy, 'since there is no binding instrument or manual to determine the seriousness of the case, its determination is subjective among judges.'

²³⁰ Ibid. As provided in the 'delimitation of the study' in chapter one, pretrial stage incorporates the detention, arrest, investigative and the so-called non-contested hearing phases of the criminal proceedings.

²³¹ The UN Principles and Guidelines (n 2) Principle 2 at para.16 and Principle 12 at para.36; open society justice initiative (n 97) 16.

²³² FDRE criminal justice policy (n 201) section 4.7.2.

²³³ The proclamation on the power and duties of executive organ (n 214) Articles 16/12.

beneficiaries.²³⁴ Hence, *pro bono* through lawyers having a special advocacy license is delivered the right in a voluntary basis while, lawyers who have either federal first instance court advocacy license or federal courts advocacy license are obliged to deliver free legal assistance, unless their license is not renewed.²³⁵ However, lawyers taking federal first instance court advocacy license or federal courts advocacy license may render a voluntary free legal assistance services without a special advocacy license through notifying the ministry before rendering such a service.²³⁶

As provided under the federal courts advocates licensing and registration Proclamation, the ministry of justice shall *inter alia*, renew licenses of private lawyers.²³⁷ One of the requirements for the renewal of the license is rendering *pro bono publico* service and the law stated that;

Any advocate shall render at least fifty hours of legal service, in a year, free of charge or upon minimum payment. The service shall be rendered to; (i) persons who cannot afford to pay; (ii) charity organizations, civic organizations, community institutions; (iii) persons to whom court requests legal service; (iv) committees and institutions that work for improving the law, the legal profession and the justice system.²³⁸

As provided in this provision, lawyers taking federal first instance court advocacy license or federal courts advocacy license shall render a legal assistance service of fifty hours *per annum* for those listed beneficiaries. Among those beneficiaries, persons under the first and the third list are relevant for this paper. Regarding the third listed beneficiaries, the law let the judiciary to select persons who are eligible for enjoying the right without determining the stage by which the right is delivered, which means the court have the discretion to request for the delivery of the right before or after the institution of the charge. Unlike the FDRE constitution which accords

²³⁴ Federal Courts Advocates Licensing and Registration Proclamation No. 199/2000 (2000) Article 8-10. As provided under Article 10 of the same law, in order to take a federal court special advocacy license, unlike a federal first instance court advocacy license and federal courts advocacy license, some requirements such as, passing the advocacy entrance examination, examining their code of conduct and entering a professional indemnity insurance policy are not a mandatory requirements.

²³⁵ Ibid, Article 10/1/b; Federal Advocates' Code of Conduct Regulations (n 29) Article 49.

²³⁶ Proclamation on Advocates Licensing and Registration (n 234) Article 10/2.

²³⁷ Ibid, Article 19.

²³⁸ Federal Advocates' Code of Conduct Regulations (n 29) Article 49; However, Some regional states have prepared a different scheme regarding the extent of *pro bono* legal obligations of lawyers. For instance, the 2015 Tigray regional Courts Advocate's License and Registration Proclamation No. 262 has introduced the obligation of at least one file representation per year instead of the fifty hours of *pro bono* legal services. This shift in approach makes sense given that fifty hours may not be enough in some cases. Mizanie Abate and others (n 41) 11.

the right exclusively after the institution of the charge, this law is open to confer a legal assistance during pretrial stages. This is owing to the contact between the court and suspected/arrested persons before the institution of the charge i.e. when the person brought before the court for the so-called non-contested hearing procedures (this includes when issues such as bail and remand is determined). In such procedural stages the court is not prohibited to request the service of licensed lawyers and thus, indigents can access the right during pretrial stages.

Moreover, with regard to the bestowal of a legal assistance to the first beneficiaries (persons who cannot afford to pay), unlike the third beneficiaries no organ explicitly shoulders the mandate to request private lawyers for their *pro bono* service and the stages by which the right is delivered is not determined in such law. Hence, licensed lawyers can through taking in to account the FDRE constitution and international norm's eligibility criteria are not prohibited to render the right to legal assistance in all stages of the criminal proceedings through their initiation. Notwithstanding, the practice does not demonstrate delivery of the right to free legal assistance through their initiation. According to the advocate license and legal aid directorate public prosecutor of attorney general interviewed for this study expresses that, if licensed lawyers render free legal assistance through their initiation, the directorate may admit the service and considered as fulfilling his obligation to provide fifty hour *pro bono* service after crosschecking whether the service is render for eligible persons.²³⁹ However, although the directorate is ready to accept the delivery of the service through the lawyers' initiation, the interviewee could not recall any licensed lawyer who deliver free legal assistance during pretrial stages and request for the acknowledgment of his service.²⁴⁰

3.3.4.3. Law School Legal Clinics and its Status to Render Free Legal Assistance in Pretrial Stages

Diversifying providers of the right by adopting a holistic approach including law school legal clinics is recommended and states should, where appropriate, also take measures to encourage law students to participate in the delivery of free legal assistance under the proper supervision of

²³⁹ Interview with Abera Tadesse, Attorney General, the advocate's license and legal aid directorate public prosecutor, held in June 1, 2018.

²⁴⁰ Ibid.

qualified lawyers as part of their academic curriculum.²⁴¹ This is as a result of they are ‘untapped resource’ for providing the right to indigent members of the community.²⁴² Owing to this, several jurisdictions including Ethiopia employ this approach to fulfill their promises under human right instruments. In Ethiopia, the higher education proclamation states the provision of community service as one of the objective of higher education institutions.²⁴³ The establishment of legal clinics and clinical legal education (hereafter, CLE) enables law schools to achieve this objective. Akin to other jurisdictions, the establishment of law school legal clinics in Ethiopia has dual purpose; first, enable students to achieve excellence in practice and second, it render a free legal assistance to indigent quarters of the public.²⁴⁴

Currently, in Ethiopia, up to twenty public universities render free legal assistance service through their respective legal clinics.²⁴⁵ In order to render free legal assistance Ethiopian law schools employ mainly academic staffs (those teaching law), employed lawyers and law students.²⁴⁶ In some universities students of clinical legal education deliver almost independently from the legal aid centers²⁴⁷ while in other Universities students of clinical courses deliver the right in collaboration with law school legal clinics.²⁴⁸

²⁴¹ UN principles and guidelines (n 2) guideline 5 and 16.

²⁴² Andrew Novak (n 117) 33.

²⁴³ Higher Education Proclamation No. 650/2009 (2009) Article 4/4.

²⁴⁴ Wizner Stephen (n 118) 1931.

²⁴⁵ These are: Mekelle, Bahir Dar, Jimma, Haramaya, Gonder, Addis Ababa, Jijiga, Dire Dawa, Debre Markos, Wolayta Soddo, Hawasa, Wollega, Ambo, MizenTepi, Wachamo, Dilla, Wallo, Adama, Wolkite and Arbaminch University; Kokebe Wolde (n 214) 60. To assess law school legal aid centers on the delivery of the right during pretrial stages, five universities based on their performance are selected for this study. According to the annual performance report of the EHRC, Bahir Dar, Mekelle, Gondar, Jimma and Haramaya University legal aid clinics are the leading performers. See EHRC, Annual Performance Report (2012) 15.

²⁴⁶ For instance Gondar University employ 8 lawyers and also use staff members and 4th and 5th year law students who are voluntary to provide the service. Interview with Mr. Demoz Kassie, legal aid director of Gondar University, held in May 10, 2018; In Haramaya University, students of CLE provide a legal advice and support the works of lawyers hired by the legal aid center. Interview with Mr. Dawit Berihun, Clinical legal education coordinator of Haramaya University, held in May 17, 2018; Interview with Mr. Mohammed Kebe, legal aid director of Jimma University, held in May 30, 2018; However, According to interviewed directors of Bahir Dar and Mekelle University’s legal aid centers, in some cases the center request a *pro bono* service from private licensed lawyers. Interview with Mr. Belayneh, legal aid director of Bahir Dar University, held in May 14, 2018; Interview with Mr. Mebrhatom Fitiwi, legal aid director of Mekelle University, held in May 30, 2018.

²⁴⁷ For instance, the Haramaya University CLE office employ three instructors whose mandate is only supporting law students for practical education in addition to rendering free legal assistance. But, sometimes the students of CLE support hired lawyers of the law school legal aid center through, *inter alia*, writing a pleading. Interview with Mr. Dawit Berihun (n 246).

Regarding the source of funds, in addition to the budget allocated by universities to fulfill their community service, the interviewed director of Mekelle, Haramaya, Bahir Dar, Jimma and Gondar university legal aid centers expresses the financial support they get from Ethiopian human rights commission.²⁴⁹ However, Mekelle University's legal aid center get additional fund for instance, from European Union civil societies.²⁵⁰ Since the providers and the source of fund are determined, eligibility criteria to identify the beneficiaries can be another issue. In this regard, the criterion employed among all university legal aid centers is not identical. For instance, the director interviewed expressed that, all clients who seek the legal aid can access it, however, in two conditions the center select the beneficiaries. These are, first, when there is a backlog and second, the beneficiary seeks court representation.²⁵¹ While, according to interviewed law school legal aid directors of Mekelle, Bahir Dar and Jimma University, all centers employ the same procedure i.e. they seek a letter from social courts which proof neediness. However, this requirement is not employed for vulnerable quarters of the community.²⁵²

Regarding the proceeding by which the right is delivered, university legal clinics render the right both in civil and criminal proceedings. However, an interview with Mekelle, Bahir Dar, Haramaya, Jimma and Gondar university legal aid directors stated that, although their center is ready to render in both proceedings, in relation to the legal aid delivered in civil cases, the number of beneficiaries who seek the service in criminal proceedings is minimum.²⁵³ According to the directors interviewed for this study, when the criminal client seeks the service of the

²⁴⁸ In this regard, Gondar university legal aid center for instance employ 4th and 5th year law students who take CLE or not to provide the service. Interview with Mr. Demoz Kassie (n 246)

²⁴⁹ EHRC collaborate with sixteen universities. See UNDP, *Democratic Institution Program: Annual Report* (2011) 18; besides, Interview with Mr. Demoz Kassie (n 246); Interview with Mr. Dawit Berihun (n 246); Interview with Mr. Mebrhatom Fitiwi (n 246); Interview with Mr. Mohammed Kebe (n 246); Interview with Mr. Belayneh (n 246).

²⁵⁰ Interview with Mr. Mebrhatom Fitiwi (n 246).

²⁵¹ Interview with Mr. Demoz Kassie (n 246).

²⁵² Besides, for legal aid center of Mekelle University a letter from institutions such as, women, children and youth affairs (a letter for youth persons) is also relevant to access the service. Moreover, both centers are on the way to enact a guideline. Interview with Mr. Mebrhatom Fitiwi (n 246); Interview with Mr. Belayneh (n 246); Interview with Mr. Mohammed Kebe (n 246).

²⁵³ Interview with Mr. Mebrhatom Fitiwi (n 246); Interview with Mr. Belayneh (n 246); Interview with Mr. Dawit Berihun (n 246); Interview with Mr. Mohammed Kebe (n 246); Interview with Mr. Demoz Kassie (n 246).

center, the seriousness of the crime is not considered.²⁵⁴ But, in relation to this study, what makes the service not accessible is that, free legal assistance during pretrial stages of the criminal proceedings is not a developed trend. For instance, the interviewed directors of Gondar University could not recall any assistance rendered during pretrial stages.²⁵⁵ The interviewed director was of the opinion that, the reason for such lack of accessibility is owing to the time by which the clients seek the service i.e. almost all clients request the service when the charge was instituted.²⁵⁶ Besides, the interviewee stated that; ‘in order to create awareness and promote the service we delivered, schools, prison institutions and court are the target areas. However, legal awareness and the promotion of the service we rendered is not available in police stations.’²⁵⁷ Likewise, according to the CLE coordinator of Haramaya University, ‘almost all advice delivered by law students is rendered after the institution of the charge. He further stated that, ‘Even several cases are arrived to us after the judgment was passed and during post-trial stages.’²⁵⁸ However, when the beneficiary is women or children, the office of women, children and youth affairs seek the service immediately after the charge was instituted. But, during pretrial stages the service through students of clinical legal courses is not available.²⁵⁹

Concerning the delivery of free legal assistance in pretrial stages through law school legal clinics in Ethiopia, the experience of Mekelle, Bahir Dar and Jimma university legal aid centers is not different. For instance, according to the interviewed director of Mekelle university legal aid clinic, although indigents enjoy a legal assistance of the center in criminal cases, the service was limited in pretrial stages.²⁶⁰ He stated that; ‘the delivery of a legal aid during pretrial stages of the criminal proceedings is not a developed trend.’ This is owing to the perception on investigative and other police officers. Besides, not only in police stations, but also a person under investigation who join prison institutions is blocked from the service we rendered.²⁶¹ The interviewee continues and opined that, although they don’t have a legal ground to do so, we

²⁵⁴ Interview with Mr. Belayneh (n 246); Interview with Mr. Demoz Kassie (n 246); Interview with Mr. Dawit Berihun (n 246).

²⁵⁵ Interview with Mr. Demoz Kassie (n 246).

²⁵⁶ Ibid

²⁵⁷ Ibid

²⁵⁸ Interview with Mr. Dawit Berihun (n 246).

²⁵⁹ Ibid.

²⁶⁰ Interview with Mr. Mebrhatom Fitiwi (n 246).

²⁶¹ Ibid

didn't go further to alter such trend.²⁶² Likewise, the Bahir Dar University's legal aid center doesn't provide the service during pretrial stages. This owing to the center left the mandate to public prosecutors to follow up the human right situation of arrested and detained person.²⁶³ However, the interviewed director stated that, although the service is not rendered in police stations, indigents who send to prison institutions before the institution of the charge can access the service we provide through the branch office which is situated inside the prison institution.²⁶⁴ Likewise, Jimma University legal aid center's experience is also demonstrates the non-bestowal of the right to legal assistance during pretrial stages of the criminal proceedings. According to the interviewed director of Jimma University, the center neither has branch office in police station nor referral mechanisms developed.²⁶⁵ The director continues and stated that, although a workshop held in 2008 urge for the referral of the case from police and public prosecutor's office, no practical enforcement is commenced.²⁶⁶

3.4. The Comparative Analysis of the Right to Free Legal Assistance during Pretrial Stages in South Africa, Moldova and Ethiopia

To fulfill the objective of this study, the research is conducted in a comparative perspective with the selected jurisdictions which struggle with resource constraint but having a commendable experience. In this section the paper endeavors to analyse the recognition as well as means of enforcing free legal assistance in pretrial stages. The section compares the experience based on three issues. First, the status/recognition of the right to free legal assistance in pretrial stages; second, the institutional setup to manage the overall activity of free legal assistance and finally the approaches employed to render free legal assistance in general and particularly during pretrial stages of the criminal proceedings.

²⁶² Ibid

²⁶³ Interview with Mr. Demoz Kassie (n 246).

²⁶⁴ Ibid; likewise, according to the interviewed director of Jimma University, neither the center has branch office in police station nor referral mechanisms is developed. The director continues and stated that, although a workshop held in 2008 urge for the referral of the case from police and public prosecutor's office, no practical enforcement is commenced.

²⁶⁵ Interview with Mr. Mohammed Kebe (n 246).

²⁶⁶ Ibid; he further stated that, owing to the shortage of resource, the delivery of the right for all eligible persons and establishing branch offices in all target areas becomes overlooked.

First, regarding the status of the right to free legal assistance, the first principle of the United Nations principles and guidelines urge the incorporation of free legal assistance at the possible highest level under national legal system. In this regard the experience of South Africa and Moldova is almost similar and consistent with this principle since the right to free legal assistance in all stages of the criminal proceedings including pretrial stages is lifted to the status of constitutional right. As provided under the South African constitution, free legal assistance based on the fulfillment of the merit test is recognized during pretrial stages. With regard to the merit test, the South African constitutional court elucidates it and enjoins adjudicatory bodies to consider the personal situation, the gravity and complexity of the case. Likewise, the Moldovan constitution, unlike the FDRE's, recognizes free legal assistance during pretrial stages. Article 26 of the supreme law of the country recognizes preparation of defence with the assistance of a lawyer appointed by the government throughout the criminal proceedings which includes pretrial stages. However, under the FDRE constitution, although free legal assistance is explicitly recognized, it is exclusively accorded to accused defenders and the fate of indigent persons during pretrial stages is not determined.

Moreover, since constitutions have a general nature, laws which elucidate and contain every items of the right should be enacted. In this regard, to effectuate the constitutional provision, both South Africa and Moldova enact laws which incorporate particulars of the right. For example, the South African criminal procedure law and the LASA Act clarify the vague terms; means-merit test and determine eligible beneficiaries in an elucidative manner. Regarding the means test, for instance, it is determined through taking in to account the income as well as the accumulation of movable and immovable properties. Beside the clarification of the means-merit test in South African legal system, what is an illuminating experience for Ethiopia is the 'contribution scheme' i.e. in South Africa for those who are 'not so poor', there is a favorable condition to contribute for the legal aid service. Further, LASA Act shouldered the onus to deliver the right upon LASA which cater its service for claimants who fulfill the qualification procedures.

Similarly, the Moldova legal framework on free legal assistance is a comprehensive one. In Moldova, the CPC and the LAL are promulgated to determine *inter alia*, eligibility criteria, approaches, organization and management of the overall system. Regarding eligibility criteria,

beneficiaries who fulfill the merit test is obliged to prepare their defence through the assistance of a lawyer. Besides, urgent/emergency legal assistance scheme which exclusively rendered during pretrial stages by the duty lawyers is accorded for all persons irrespective of their financial status. In such laws division of responsibilities between the bodies involved in the delivery of free legal assistance is provided, for instance, the criminal investigation body shall within an hour contact the NLAC and accordingly, the NLAC should render urgent/emergency legal assistance within three hours. However, in Ethiopia, since the FDRE constitution does not recognize free legal assistance during pretrial stages, no subsequent law is promulgated to elucidate the right. But, the outdated criminal procedure code of Ethiopia accorded the right for detained persons. Notwithstanding, the concern is that, the CPC of Ethiopia does not address and determine the fate of indigent persons who confronts the criminal justice system, thus, free legal assistance during pretrial stages is not recognized in this law. Therefore, unlike the South African and Moldovan criminal justice system, no binding national statute is conferred the right to free legal assistance during pretrial stages in Ethiopia. Notwithstanding, the draft criminal procedure and evidence law has some prospect since it let an indigent persons to enjoy free legal assistance which commence from the moment of his detention/arrest. However, the draft law is like a constitutional phrase and issues such as, eligibility criteria, the duty and responsibility of providers, the means to access the service is not determined, owing to this, it is not comprehensive enough.

Second, with regard to the institutional setup to manage the overall activity of free legal assistance, unlike the experience of Ethiopia, legal aid Acts of South Africa and Moldova establish an autonomous body. The South African LASA and the Moldovan NLAC shoulders the mandate to administer the delivery of the right throughout their respective countries. The LASA is an institution governed by board of directors which are accountable to the minister of justice and constitutional development, as well as to the South African parliament. LASA receive application letter from the beneficiaries and decide whether to grant a free legal assistance.

Likewise, the Moldovan LAL establishes NLAC for the management of legal aid in general and free legal assistance during pretrial stages in particular. In Moldova, in addition to the NLAC the ministry of justice and the territorial offices of the NLAC take the mandate to administer the service. The council as provided in Article 12/2 of LAL, has the main functions of;

implementing the right related policy in the state; determining the financial criteria and mechanisms for eligibility; establishing the admission criteria for lawyers willing to be included in the national registry to deliver the right; determining the payment mechanism and amounts of fees and other costs to be paid to lawyers. However, in Ethiopia, unlike the experience of South Africa and Moldova, no autonomous body to administer the delivery of the right is established. Instead some dispersed institutions such as, the federal Supreme Court, Attorney General (formerly, ministry of justice) and law school legal aid clinic offices take the mandate to manage and render free legal assistance to eligible persons through employing their respective approaches. Namely; the PDO, *pro bono* and law school legal clinic.

Third, regarding the approaches employed to render free legal assistance in general and particularly during pretrial stages of the criminal proceedings, both South Africa and Moldova have a commendable experience, however, in Ethiopia, although some approaches are employed to render free legal assistance, their status to deliver the service in pretrial stages is worse. However, the South African experience is one of the advanced systems and employs a ‘holistic approach’ which is advisable for developing countries to challenge resources constraints. In South Africa state funded justice center is the main delivery mechanism which incorporates PDO, paralegals and law intern public defender inside. For the accessibility of the service, the PDO employ satellite office in rural areas. Besides, intern public defender approach (state-funded law clinic) is another commendable experience to render the right in cost-effectively. According to this approach, LASA establish the clinics which are incorporated inside the justice centers and employ an attorney with sufficient practical experience to supervise the service of law graduates. Moreover, alike the Ethiopian experience law school legal clinics are also provide the service in South Africa. However, unlike law school legal aid centers of Ethiopian universities, the South African law schools are funded by foreign donors.

Regarding the Moldovan approach, a mixed system of deliverance which promote the contribution of non-states actors is established. In Moldova, beside the PDO and private lawyers approaches which render qualified free legal assistance, paralegals and specialized NGOs are employed. Thus, Unlike Ethiopia where NGOs are hammered, NGOs and paralegals in Moldova render primary legal assistance (legal advice) through concluding a contract with the NLAC. Regarding approaches employed in Ethiopia, alike the South African experience, the PDO, law

school legal aid centers and *pro bono* approaches (albeit mandatory) are employed to render free legal assistance for indigents quarters who fulfill the merit test. However, in Ethiopia, since the right to free legal assistance during pretrial stages is recognized in neither FDRE constitution nor other binding instruments, the providers does not develop a trend to cater the service in pretrial stages of the criminal proceedings. Besides, unlike the South African and Moldovan experience, the role of non-state actors (which is the so-called secondary positive obligation of states) is inhibited owing to the funding restriction and denial of foreign CSs to participate on human rights issues by Article 2/3 and 14/5 of the 2009's CSs proclamation

Finally, another scheme to be drawn by Ethiopia is the special procedures employed both in South Africa and Moldova. In these jurisdictions, as provided above the LASA and NLAC shoulders the responsibility to manage the legal aid system throughout the countries. These institutions employ a special procedure in their respective countries to cater free legal assistance during pretrial stages. LASA employ a toll-free telephonic advice line while NLAC of Moldova implement urgent/emergency legal assistance scheme which render the service for detained/arrested persons through duty lawyers.

3.5. Finding and Analysis

The right to legal assistance serves as a tool to operate fair trial rights. Owing to this the first principle of the United Nations principles and guidelines express the right as, the cornerstone to enjoy fair trial rights. Accordingly, the right to free legal assistance to indigent quarters of the community is recognized under several human right instruments such as, ICCPR which is ratified by Ethiopia in 1993. Besides, other complimentary regional human right instruments including ACHPR also accredited the right to be defended by a legal counsel based on the beneficiary's choice. However, no explicit recognition of the right to free legal assistance during pretrial stages is found inside international and regional human rights laws including ICCPR and ACHPR. The ACHPR is even worse than the ICCPR owing to the right to free legal assistance is explicitly recognized neither during trial nor pretrial stages of the criminal proceedings.

Albeit no binding human rights instruments explicitly accord free legal assistance during pretrial stages, several norm and principles that confer free legal assistance during pretrial stages are

developed and settled across international as well as regional board. Besides, with regard to this the part undertaken by human rights adjudicatory bodies especially the UNHRC's and the Strasbourg jurisprudence is praiseworthy. In those jurisprudences the committee and the court finds two main rationales to bestow free legal assistance during pretrial stages, these are; the decisiveness of the right for the preparation of one's defence and to actualize a fair trial through realizing equality of arms. Regarding the first rational (free legal assistance for the preparation of defence) the UNHRC from the words of Article 14/3/b and 14/3/d in *Butovenko* case deduced that the very reason to confer the right to legal assistance is for the preparation of defence and since a preparation for one's defence is commenced at the earliest stages of the criminal proceedings, states parties are under obligation to provide the right for eligible persons during pretrial stages. And regarding the second rational (to fix inequality of arms) the human rights adjudicatory bodies enjoin their respective state parties to cater free legal assistance to create equality of arms which is apparent among contentious parties in all phases of the criminal proceedings including pretrial stages.

With regard to the status of the right to free legal assistance during pretrial stages in selected jurisdictions, the experience of South Africa and Moldova is almost similar. In both jurisdictions free legal assistance in pretrial stages is lifted to the status of constitution right. Besides, since other statute expatiate and incorporate particulars of free legal assistance in general and during pretrial stages in specific, clear and comprehensive legal framework to accord free legal assistance in pretrial stages is developed.

Regarding the Ethiopian experience, although some prospect of realizing the right is found under the draft criminal procedure and evidence law, neither the FDRE constitution nor other binding statute explicitly recognize the right to free legal assistance during pretrial stages of the criminal proceedings. For instance, FDRE constitution in its Article 20 captioned, 'Rights of Persons Accused' list a number of rights including free legal assistance entitled to accused persons. However, the bestowal of the right in pretrial stages is not recognized insider the FDRE constitution. Besides, the right to free legal assistance under the criminal procedure code is accorded during pretrial stages of the criminal proceedings. Albeit the conferment of the right during pretrial stages in the criminal procedure code is commendable, the concern is that, such provision does not address and determine the fate of indigent persons who confronts the criminal

justice system but not have a means to access a lawyer by themselves. Hence, the question which raised here should be, whether the delivery of the right during pretrial stages is the obligation of the government or not. Through the cumulative reading of Article 14/3/b and 14/3/d, from the UNHRC's GC 32 and the above discussed verdicts of the committee, it is not difficult to deduce the developed and settled norm which confers the right during pretrial stages of the criminal proceedings. As provide in Article 9/4 and 13/2 of the FDRE constitution international instruments ratified by Ethiopia are considered as the binding laws of the country and chapter three of the constitution is interpreted in conformity with *inter alia*, ICCPR. Thus, from the words of; Article 2 of ICCPR which shoulders the obligation to respect and fulfill the rights recognized under the covenant, and Article 13/1 of the constitution, it is not difficult to impose the so-called positive obligation upon Ethiopia. Since the mandate of the government is inferred, the next issue becomes; how the right to free legal assistance is rendered to indigent quarters of the country?

For the practical enforcement of free legal assistance, several approaches to deliver the right to free legal assistance for eligible persons are developed across the world. Among them PDO (including law graduate interns as PD), paralegal (including CBP), law school legal clinics, civil society providers and *pro bono publico* have salient features to cater the right commendably and cost effectively during pretrial stages of the criminal proceedings. In this regard, the approaches employed to render free legal assistance in general and particularly during pretrial stages, both South Africa and Moldova have a commendable system. Promoting the service rendered by non-state actors is advisable for states to challenge resources constraints. Accordingly, South Africa and Moldova employs a hybrid system which includes encouraging the part taken by non-state actors.

When the employed approaches in Ethiopia is assessed, delivering the right through PDO, *pro bono publico* and law school CLE and legal aid centers are the most prominent mechanisms. However, neither of these approaches have a favorable procedures to render the right to free legal assistance in pretrial stages. The first approach assessed regarding its performance of delivering free legal assistance during pretrial stages is the PDO. To effectuate the right to free legal assistance as recognized under the FDRE constitution, the federal Court proclamation's single provision (Article 16/2/j) shouldered the responsibility to organize the public defender

office on the president of the federal Supreme Court, but, the mandate and responsibility of public defender office is not determined. Although a single provision under the federal courts proclamation is serves as the legal basis for the establishment of the PDO, the draft criminal procedure and evidence law of Ethiopia has a prospect since it incorporates some details regarding the mandate and responsibility of the office including the delivery of free legal service in pretrial stage. However, the finding of this study demonstrates that, the delivery of free legal assistance in pretrial stage through requesting the PDO is not a well-developed trend in Ethiopia. Another approach to access free legal assistance in Ethiopia is the contribution of private lawyers through *pro bono* service. In Ethiopia, the service is mandatory for fifty hours and the law also let and encourages rendering a free legal assistance in a voluntary basis. To access free legal assistance through *pro bono* service the court may request the private lawyers for their service or the lawyer by his personal initiation can fulfill the mandate impose upon him. But, regarding the enjoyment of the right by detained/arrested persons, the *pro bono* service does not have a commendable experience. The finding expressed that, the General Attorney's advocate license and legal aid directorate is ready to accept the delivery of the service by private lawyers through their initiation at any stages of the criminal proceedings. However, this is not a developed trend and in almost all case the private lawyers wait until the referral by the judge, which is requested after the institution of the charge.

In addition to the above approaches, currently, in Ethiopia law school legal clinics play a commendable part to render free legal assistance for vulnerable and indigent groups of the community. However, the finding of this paper demonstrates that the enjoyment of free legal assistance in pretrial stages rendered by law school legal clinics and students on CLE is rare. Some centers like, Gondar University legal aid centers render a legal aid service before the institution of the charge if indigents who send to prison institutions request the service from the branch offices which are situated inside the prison institution. Unless catering the service for detained/arrested persons in police stations is not the experience of law school legal aid centers in Ethiopia. This is owing to; (i) lack of promotion about the service render by the legal aid clinic; (ii) lack of cooperation among the legal aid clinics and other stake holders such as, the police and public prosecutors' office; (iii) shortage of resource to address eligible persons through establishing branch offices.

Generally, in Ethiopia, three issues inhibit the conferment of free legal assistance during pretrial stages. The first is the preference made by the FDRE constitution to cater the right to free legal assistance for accused persons. This can create a misperception on lawyers in general and particularly on adjudicatory organs that the delivery of free legal assistance during pretrial stages as a charity which is accorded based on the free will of the government. The second is lack of a comprehensive legal framework which enables to determine issues such as, the moment by which the right to free legal assistance is commenced, eligibility criteria, the approaches to deliver free legal assistance, the situation to cater mandatory free legal assistance during pretrial stages, and the role, duty and responsibility of the police and other stake holders. The third is the absence of autonomous legal aid authority to administer the overall activities of legal aid through *inter alia*, coordinating the providers of free legal assistance in order to render free legal assistance in pretrial stages of the criminal proceedings.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

The right to legal assistance serves as an instrument to operate fair trial rights. Owing to this the right to free legal assistance to indigent quarters of the community is accredited under several human right instruments such as, ICCPR which Ethiopia is a state party. However, no explicit recognition of the right to free legal assistance is found inside international and regional human rights laws including ICCPR. Moreover, although several authors argue for the bestowal of the right to free legal assistance in pretrial stages to effectuate a fair trial, this is not sound for other and argue for not to confer the right owing to its interference in truth-finding process.

However, in recent decades several principles and standards which urge for the conferment of free legal assistance in pretrial stages are developed inside international as well as regional floor. This includes *inter alia*, The UN principles and guidelines on free legal assistance, UN basic principles on the role of lawyers, African principle and guideline on legal assistance and the Lilongwe declaration. These principles and standards urge states to accord free legal assistance in all stages of the criminal proceedings based up on the eligibility of the beneficiary and the primary responsibility to deliver the right is shouldered on states. Since the development of the above norms, human rights adjudicatory bodies held a consistent line of jurisprudence to accord free legal assistance during pretrial stages. Inside the European human rights system, the ECtHR's verdict in *Salduz* is a groundbreaking decision which leads states parties to revises their respective national law to accord the right during pretrial stages. But, the relevant and the direct impact on Ethiopia is the decision held by the UNHRC. The committee in a number of cases such as, in *Butovenko, Lyashkevich and Krasnova* find the violation of Article 14/3 of ICCPR owing to the denial of free legal assistance during pretrial stages of the criminal proceedings.

When the adjudicatory bodies enjoin state parties for the bestowal of the right in pretrial phases, the rationales behind includes since the right in pretrial phase enable; to prepare a defence, to create equality of arms among contentious parties and in general it is a prerequisite for the real and practical enjoyment of fair trial rights.

In this paper, through the comparison made with South Africa and Moldova it is identified that there is no binding national law is promulgated to confer and manage the delivery of free legal assistance before the institution of the charge in Ethiopia. However, in South Africa and Moldova there is a clear and comprehensive legal and institutional framework as well as special procedure to render the right in pretrial stages is employed. In both countries legal assistance at state expense in pretrial stages is elevated to the status of constitutional right and a legal aid law is also promulgated to determine the commencement of the right, eligibility criteria, approaches of delivery, organization and management of the overall system.

In South Africa and Moldova, regarding the institutional mandate, LASA and NLAC respectively shoulders the onus for administering the delivery of the right throughout the countries. These institutions also employ a special procedure in their respective countries to deliver the right in pretrial stages. LASA employ a toll-free telephonic advice line while NLAC of Moldova implement urgent/emergency legal assistance scheme which render the service for detained/arrested persons.

However, although the obligation incumbent on the Ethiopian government to deliver a free legal assistance in pretrial stages is inferred from, (i) ICCPR; (ii) the jurisprudence of UNHRC; (iii) Article 9/4 and 13 of FDRE constitution, the Ethiopian legal and institutional framework regarding the conferment of legal assistance at state expense in pretrial stages is not comprehensive enough. Regarding the legal framework, neither the FDRE constitution nor the criminal procedure code accorded free legal assistance during pretrial stages. Although free legal assistance is promised inside the FDRE constitution, it is opted to deliver exclusively after the institution of the charge as it is provided under Article 20 _ rights of persons accused. Besides, in Ethiopia, no national statute is conferred the right to free legal assistance during pretrial stages of the criminal proceedings. Notwithstanding, the 2017's draft criminal procedure and evidence law has a prospect since it let an indigent persons to enjoy free legal assistance which commence from the moment of his detention/arrest.

Regarding the mechanism to rendered free legal assistance, in general there are two fundamental approaches. The first approach shoulders the primary responsibility on the states, while, the second approach shoulders part of the burden on non-state actors. In the second approach, the responsibility of states become creating a working condition, *inter alia*, through enacting

legislation which promote the delivery of the service. For practical enforcement of free legal assistance, several mechanisms are developed across the world. Among them, the public defender's office, *pro bono publico*, law school legal clinics, law intern public defenders, civil society providers and paralegal (including CBP) are commendable and cost effective to cater the right to free legal assistance.

In Ethiopia, the first three models i.e. PDO, *pro bono publico* and law school legal clinics are the prominent approaches. The first is the PDO which operates under the aegis of federal Supreme Court and render free legal assistance for eligible persons. Currently, although a single provision under the federal courts proclamation is serves as the legal basis for the constitution of the PDO, the draft criminal procedure and evidence law of Ethiopia has a prospect since it incorporates some details regarding the mandate and responsibility of the office. Regarding the delivery of free legal assistance during pretrial stages through PDO, owing to lack of enacting manual/guideline, the practice follows the words of the FDRE constitution. The second approach is *pro bono* service by licensed private lawyers. The regulation which imposes a fifty hour mandatory free legal assistance upon licensed lawyers, in addition to the delivery of the right based on the request of the courts, does not prohibit the delivery of the right by the initiation of private lawyers through selecting the stages of the criminal proceedings. However, there is no trend to deliver free legal assistance during pretrial stages through the initiation of the licensed lawyers. The third approach is law school legal clinics which employ *inter alia*, 'untapped resources' _ law students. Currently, in Ethiopia, a number of public universities render free legal assistance service through their respective legal clinics. However, the finding of this paper demonstrate that in rare cases a legal assistance is render by law school legal clinics when indigents who send to prison institutions before the institution of the charge access the service provided through the branch offices which are situated inside the prison institution. This is owing to; (i) lack of promotion about the service render by the legal aid clinic; (ii) lack of cooperation among the legal aid clinics and other stake holders such as, the police and public prosecutors' office; (iii) shortage of resource to address eligible persons through establishing branch office.

Considering, international standard regarding free legal assistance in pretrial stages, the value of the right to legal assistance, and the experience of comparative jurisdictions, this paper argues for the enactment of a comprehensive legal and institutional framework, the diversification of free

legal assistance providers through promoting the role of non-state actors and employing special procedures to deliver the right in pretrial stages. Finally, Ethiopia shoulders the obligation to render free legal assistance during pretrial stages which emanate from; the a cumulative reading of article 14/3/b and article 4/3/d of ICCPR, the jurisprudence of UNHRC, Article 9/4 and 13 of FDRE constitution and Article 2 of ICCPR.

4.2. Recommendations

From the premises deduced above, Ethiopia shoulders the onus to render free legal assistance during pretrial stages. Thus, Ethiopia is required to guarantee the right to free legal assistance in pretrial stages within the national legal systems in a comprehensive manner.

Therefore, bearing this in mind and taking the problems identified in to account, the following recommendations are given:

- The government should consider the provision of free legal assistance during pretrial stages as its responsibility. To this end, elevating the status of the right to free legal assistance at the highest level i.e. incorporating inside the FDRE constitution is urged. Accordingly, Everyone detained or arrested of a crime has the right to legal assistance of his choice from the moment of his detention or arrest; to be informed of this right promptly; and taking in to account special procedure prescribed by law, a legal assistance without payment may assigned if they lacks sufficient means to pay for it and miscarriage of justice would result.
- To effectuate the delivery of free legal assistance during pretrial stages, the author recommend for the establishment of comprehensive legal framework through enacting specific legislation and a regulation thereof. The law should determine *inter alia*; (i) eligibility criteria i.e. it should clearly set out the means-merit tests; (ii) the approaches to deliver free legal assistance; (iii) the circumstances for the bestowal of mandatory free legal assistance during pretrial stages; (iv) the duty and responsibility of the police, the public prosecutors or other relevant officials to facilitate the service; and the last but no means the least is that the law should establish an independent institution to manage the delivery of the service.

- To manage, coordinate and monitor the overall provision of the service rendered *inter alia*, in pretrial stages, the legal aid authority should be established as an independent body which is accountable to the HPR. This authority may have a Board chaired by officials from Attorney General, members of EHRC, members of the bar association, representatives of NGOs, representatives of universities law clinics and other relevant stakeholders. Besides, regarding the approaches to deliver the service, through diversifying the providers, the legal aid authority can employ and create integration among commendable and cost effective approaches such as, the PDO, law school legal clinics, law intern public defenders, private legal practitioners, community based organizations, paralegals and NGOs.
- A special procedure should also be employed to render free legal assistance immediately at the moment of arrest until eligibility of the beneficiary is being determined. The approach can be a free call center inside the branch offices of the legal aid authority and/or a prompt referral mechanism by the police officers.

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