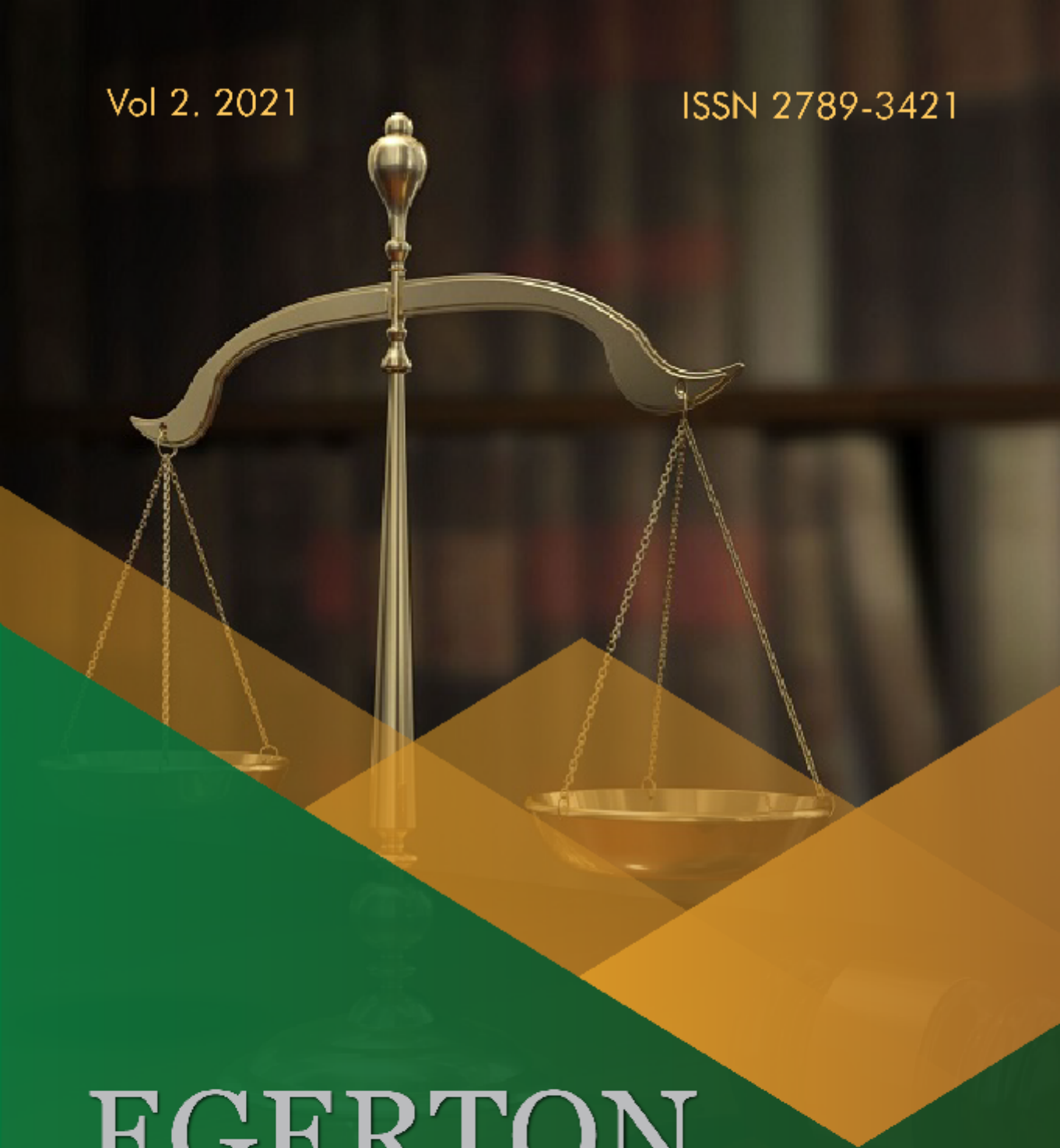
Vol 2. 2021

ISSN 2789-3421



EGERTON LAW JOURNAL

Published by Egerton University

Volume 2, 2021

EGERTON LAW JOURNAL

Egerton University
Njoro

Egerton Journal Law is published annually by Egerton University,
P. O. Box 536, Egerton 20115, Kenya.

ISSN: 2789-3421

Printed at: Egerton University Press

Preface

Access to justice is a basic principle of the rule of law and component of justice. It is a right guaranteed under international instruments and the Constitution of Kenya. Accessing justice is complex and can be difficult especially for the vulnerable and marginalized members in the society due to inequality, socio-economic status, gender bias and stereotypes in the justice system. I fully appreciate the work done by various entities in the justice system in promoting access to justice in their various spheres. The academy plays a pivotal role in access to justice as it is through its training that lives of those responsible for administering justice is initially shaped.

The Faculty of Law, through collaboration and with the support of European Union and UNDP *Amkeni Wakenya* co-created a conference on the theme ***Strengthening Access to Justice through Legal Aid***. This conference brought together stakeholders in the justice sector to a high-level dialogue on access to justice and legal aid through presentations of quality papers on the various thematic areas. By discussing the thematic areas, the articles in this journal bring to the fore challenges and opportunities in the field of access to justice and legal aid that generate useful information for reading and future interventions to improve access to justice for citizens.

Volume 2 brings to the fore legal aid as a human right, role of alternative justice systems in securing women's land rights in Kenya, enhancing access to justice through corporate social responsibility, access to justice and institutionalization of tradition dispute resolution mechanisms, legal aid for children in conflict with the law and access to justice, role of county governments in promotion of legal aid for the poor, legal aid in criminal justice system, enhancing access to justice through regulation of paralegal education and training, effective reparation for victims of post-election violence and finally monitoring and evaluation of legal aid in Kenya.

Prof. Isaac Kibwage HSC
Vice Chancellor, Egerton University

Foreword

On behalf of the United Nations Development Programme (UNDP), I am proud to be associated with the publication of the inaugural volume of the Egerton Law Journal. This is indeed a milestone, being the first publication focusing exclusively on the submissions from the 1st National Legal Aid Conference on Access to Justice in Kenya, held in December 2020 to share experiences on access to justice through legal aid.

The inaugural volume explores the journey in operationalising Article 48 of the Constitution of Kenya- a guarantee of *access to justice for all.* The contributions analyse the multi-layered and complex challenges of accessing justice for the sections of society that are poor, vulnerable, and marginalised such as women, children, persons with disabilities and other groups. These groups are disproportionately affected by inequality and other structural impediments that hamper their capabilities. Importantly, the issue highlights the value of the constitutional right to access to justice as a basic principle of rule of law and a component of attaining the Sustainable Development Goal (SDG) 16.

The Journal consists of 10 articles, including an introduction by the Egerton University Vice Chancellor, Professor Isaac Kibwage. I commend the Faculty of Law at Egerton University, contributors, and peer reviewers for pulling together a timely and thought-provoking volume that brings together authors displaying a wide breadth of expertise not only about the highly complex challenges and problems facing the access to justice in Kenya but also regarding the potential that exists in the legislative and policy framework to support inclusive development and just peace.

This collection of articles pursues specific objectives while complementing the existing literature on legal aid and law school-based schemes, alternative justice systems and traditional dispute resolutions mechanisms. In acknowledging the importance of operationalisation of the Legal Aid Act, 2016 and the Alternative Justice System Baseline Policy (2020), the articles critically analyse the implications of formalisation, and to an extent, regulation of informal justice structures, including the paralegal schemes and traditional dispute resolutions mechanisms that exist within informal urban and rural contexts. Alternative Justice Systems (AJS) have extensively featured in this journal issue with authors articulating the importance of implementation of the AJS policy as a means of providing more flexible and friendly dispute resolution mechanisms.

In documenting the role of legal education providers and challenges faced by universities and law schools in ongoing university-based legal aid programmes, the review of school based pro-bono schemes is set to ignite discussions on the alternatives pursued in the issue including unique

improvements in the clinical legal education, provision of adequate funding while also incentivising advocates through tax reliefs and integration of pro bono services within the Law Society of Kenya's Continuous Professional Development (CPD) system.

While I hope this journal will appeal to justice sector practitioners, I am confident that the volume will raise interest amongst development partners, civil society organisations, scholars and legal practitioners on the broader peace, justice, and development nexus.

Walid Badawi
UNDP Kenya Resident Representative

Acknowledgement

The editorial Board would like to thank all those who have made it possible for the successful production of the Faculty's inaugural journal on ***Strengthening Access to Justice through Legal Aid- Gaps, Challenges and Opportunities***. We sincerely thank all the authors who have contributed to this Volume. Special gratitude goes to our panel of peer reviewers for dedicating their time, energy and expertise in ensuring quality of the papers published. We recognize Mr. Walid Badawi, Dr. Dan Juma, Dr. Kituku Wambua, Gathoni Njenga and Brenda Achungo and the entire *Amkeni Wakenya* team for their commitment and valuable support as we worked towards making the launch of this inaugural journal a reality. We are greatly indebted to European Union and United Nations Development Programme *Amkeni Wakenya* Project for the technical and financial support for the entire process of producing the journal. We appreciate the entire staff of the Egerton University Faculty of Law and the FOLLAP team for their support to the project. Finally, we extend our gratitude to our advisors and the following Universities- Egerton University, The University of Nairobi, Moi University, Strathmore University and Africa Nazarene University for making this collaboration possible.

EGERTON LAW JOURNAL

ISSN 2789-3421 Volume 2 (2021)

Legal Aid for Effective Victim Legal Representation in Kenya's Post-Election Violence: Lessons from the International Criminal Court

Dr. Charles A. Khamala*

ABSTRACT

The International Criminal Court's legal aid scheme pays court-appointed victims' lawyers. Yet, whether external or internal legal representation is more effective in protecting victims' rights, is problematic. In circumstances where guilt is difficult to prove, as in the ICC's Kenya cases*, victims' interests may be better satisfied by pursuing compensation from local courts. This paper therefore asks whether post-election violence victims' interests may be satisfied by legal aid to support domestic compensation claims. Although numerous victims participated in the* Kenya cases*, non-confirmation of charges against the former Police Commissioner, withdrawal of the* Muthaura and Kenyatta case, *and declining to conduct reparation hearings after vacating charges in the* Ruto and Sang case, *culminated in widespread victim dissatisfaction. The paper contrasts the fortunes of victims who participated at the ICC with those of the CAVI* Police Shooting case *and COVAW* Sexual and Gender Based Violence case *which effectively proved more satisfying for some victims. The question is whether legal aid for victims' representatives before domestic courts may enhance the effectiveness of local responses to atrocity crimes. Although the comparatively successful recent domestic suits illustrate advantages of pursuing constitutional-based compensation claims, as opposed to punitive-contingent reparations before the ICC, these test cases require upscaling. Notwithstanding the 'Kenyan Trial Approach's' significant impact on ICC evolution, to vindicate victims' rights, the Trust Fund for Victims may consider donating to Kenya's Victim Protection Fund so as to supplement PEV victim compensation. Kenya's Legal Aid Act requires reforms to support indigent victims, particularly those suffering abuse of power.*

* Ph.D. in Droit Privé (Sciences Criminelles) Université de Pau et des Pays de l'Adour (*mention trés honourable*); LL.M. (University of London),LL.B. (University of Nairobi), Advocate of the High Court of Kenya.

Keywords: Access to justice, victims, post-election violence, human rights, violations, compensation, international court and national courts.

INTRODUCTION

This paper compares the International Criminal Court's[1] effectiveness with those of domestic trials for obtaining compensation for post-election violence (PEV) victims. Recently, Kenyan courts awarded compensation to PEV victims for state liability. This occurred in *Citizens Against Violence (CAVI) & 14 others v Attorney General & 3 others*,[2] and *Coalition on Violence Against Women (COVAW) & 11 others v Attorney General & 5 others.*[3] By contrast, in 2016, despite terminating the *Ruto and Sang case* and vacating the charges, the ICC merely gave the prosecution liberty to 'start afresh, by laying new charges at a more convenient time in the future'.[4] Because ICC reparations are contingent on criminal convictions which demand higher standards of proof, among other hurdles,[5] therefore collapse of the *Kenya cases* denied PEV victims an opportunity to present their claims at reparations hearings.[6] Where are the PEV victims' grievances more likely to receive redress? Before the ICC or locally? This paper argues that despite the latter forum having its merits, without legal aid PEV victims' claims are less likely to succeed.

---

1 International Criminal Court Statute of Rome 1998, The Statute entered into force on 1st July 2002. <http://www.icccpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> accessed 1 November 2020.

2 *Citizens against Violence (CAVI) & 14 others v Attorney General & 3 others* [2020] eKLR (the *Police Shootings case*).

3 *Coalition on Violence against Women (COVAW) & 11 others v Attorney General & 5 others* [2016] eKLR See <https://www.justiceinitiative.org/litigation/coalition-violence-against-women-and-others-v-attorney-general-kenya-and-others> 2 November 2020.

4 Decision on Defence Applications for Judgments of Acquittal, 5 April 2016 Trial Chamber V(a), *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-2027-Red> accessed on 28 October 2020. (*Ruto and Sang case*') paras 113-140.

5 Charles Khamala, 'Victims and Witnesses Protection in the Ruto and Sang case: Implication on Secondary Victimization' in Francis Nyawo and Joseph Wasonga (eds.) *International Criminal Justice since the Rome Statute* (Law Africa 2019) 107-133.

6 L. Juma and C. Khamala, 'A Dynamic Interpretation of the International Criminal Court's Performance in the Kenya cases' (2017) Lesotho Law Journal, 25, 2, 39-73.

Section 2 sketches the ICC's inquisitorial function of seeking the truth through realizing the victim's entitlement to participate at appropriate stages throughout the proceedings for purposes of enhancing the Court's assessment of harm inflicted on mass atrocity victims. However, because prosecuting mass atrocities is onerous, section 3 shows that some PEV victims sought local remedies, whether from the executive, judiciary or legislature.[7] Ultimately, representatives determine which victims are members of the appropriate constituency, whether within the ICC or locally. Section 4 illustrates that if the ICC appoints an internal common legal representative from the Office of the Public Counsel for Victims (OPCV), a trial may proceed more expeditiously and risks of prejudicing suspects through multiple victims' cases are reduced. However, such representative may provide views and concerns of victims' that are less authentic. Conversely, section 5 shows successful domestic victim compensation claims. These awards were secured on grounds of state breaches of constitutional duties. Yet, at the ICC: 'Common legal representatives will have to take instructions from their clients for meaningful representation. There is a jostling of making awards in so-called 'collective basis' to provide meaningful reparations'.[8] Instead, an ICC judge Christine Van Wyngaert recommends that if victims find satisfaction of immediate basic needs such as housing, medical treatment or education, to be more meaningful, then such restorative justice goals may be more conveniently pursued by a Victims Reparations Commission which is a separate institution from the ICC. The paper agrees that the role of the ICC's Trust Fund for Victims[9] therefore requires rethinking.[10] Section 6 concludes that victim compensation claims, whether predicated on state complicity or on non-prosecution of PEV suspects, have relatively higher chances of attaining victim satisfaction than does awaiting reparations contingent upon renewal of the Kenya cases before the ICC. The provision of legal aid for local victims' counsel can address important questions amid renewed debate about justice for PEV victims.

7 Internally Displaced Persons and Affected Communities Act no. 56 of 2012.

8 Christine Van den Wyngaert, 'Victims before the International Criminal Court: Some Views and Concerns of an ICC Judge' (2011) Case W. Res. Journal of International Law, 44, 475-496, 491.

9 Rome Statute (n 1) Article 75(2).

10 Wyngaert (n 8) 495.

Conviction as a Prerequisite to ICC Reparations

Substantive Crimes under the Rome Statute

Most domestic criminal justice systems are ill-equipped to effectively respond to mass atrocities. African states are particularly fragile. The 1998 Rome Statute is an ambitious attempt by the international community to provide legal redress to the victims of such crimes. However, to qualify for reparations, the Statute burdens the prosecution to first establish beyond reasonable doubt that an accused person is individually criminally responsible for a crime within its jurisdiction. Victims comprise affected persons who are invariably anxious to clarify whether the magnitude of harm inflicted, was attributable to a senior political or military suspect's commands.[11] For example, commanding attacks on an entire village would attract higher reparations, than if direct harm is imputed to a physical perpetrator.

The International Criminal Court as a Victim's Court

The ICC model incorporates a *partie civil* principle from European continental law's inquisitorial systems. It facilitates victim participation throughout the criminal trial process, so as to enable the Court to measure the degree of harm suffered by victims. However, the ICC's limitation is that victim-participants only become entitled to receive reparations from the TFV, if an offender is convicted.[12] Unsurprisingly, several problems arise from the ICC's hybrid structure which incorporates a victim participatory regime throughout its proceedings. Some scholars have analysed its common law-civil law dichotomy and illustrated their respective approaches for balancing retributive and restorative justice.[13]

The Kenyan Situation

Without Parliamentary or Civil Compensation

I have argued elsewhere that the international community may impute negligence liability for the Kenya police's 'failure to protect' the PEV victims.[14] Remarkably, emerging jurisprudence in Kenya's *Police Shootings case* and

11 Rome Statute (n 1) Article 28.
12 ibid art 75(3).
13 Wyngaert (n 8).
14 Khamala (n 5) 126.

the *SGBV case* now imposes constitutional liability, *inter alia*, for police failure to provide information and prosecution failure to give an effective remedy. This suggests that it is no longer necessary for PEV victims who possess evidence of police commission of brutality or omissions amounting to complicity, to rely on the goodwill of philanthropists for compensation. They may claim damages from the state for breach of their constitutional rights.

Until recently, Kenya's response to the crimes against humanity perpetrated during PEV was for the most part administrative, rather than legislative or judicial. Yet no assistance been given from the Kshs 10 billion (US$ 9.8 million) which President Uhuru Kenyatta offered for 'restorative justice'.[15] Therefore, there was little precedent of how to compensate mass atrocity victims in future. One victim of previous episodes of trespass to land during the 1990s was able to identify his tortfeasor and obtained judicial repossession of his land.[16] To provide comprehensive reparations for forcible mass displacement, in 2012 Parliament enacted the Internally Displaced Persons and Affected Communities Act.[17] However, the courts have construed beneficiaries of the enabling legislation narrowly. It defines an 'internally displaced person' as:

> [A] person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, large scale development projects, situations of generalized violence, violation of human rights or natural or human made disasters, and who have not crossed an internationally recognized state border. [18]

In *Joseph Kibiwott Melly and 14 others v Ministry of Interior and Coordination of National Government & 5 others,*[19] the petitioners sought to stay payment of disbursement by the government from being made to a discreet list of persons masquerading as genuine PEV victims. Their petition sought copies of registers of IDPs registered at Nandi County and an account of the beneficiaries of money and any land allocated for resettling the IDPs in Nandi

---

15 Human Rights Watch, 'ICC: Kenya Deputy President's Case Ends' *ReliefWeb* 5 April 2016 <https://reliefweb.int/report/kenya/icc-kenya-deputy-president-s-case-ends> accessed 28 November 2020.

16 *Adrian Gilbert Muteshi v William Samoei Ruto & 4 others* [2013] eKLR.

17 IDPA (n 7).

18 ibid s 2.

19 *Joseph Kibiwot Melly & 14 others v Ministry of Interior and Coordination of National Government & 5 others* [2018] eKLR.

County. However, Eldoret Judge S. M. Githinji held that the petitioners fell outside the 'internally displaced person' legal definition. Although possibly affected by the PEV, they failed to prove that they had fled or left their homes or places of habitual residence, as a result of or in order to avoid the effect of armed conflict. Clearly, problems of proving 'who done it' resulted in failure to identify not only specific aggressors, but even that harm was caused by the PEV, generally.

Reparations under International Law

Notwithstanding difficulties constraining individual citizens from identifying perpetrators of mass atrocities, Kenya did not establish special criminal tribunals to prosecute PEV suspects.[20] Furthermore, as individuals are not parties to the UN Charter,[21] they lack legal standing to seek reparations from the International Court of Justice. Neither do they possess standing before the African Court of Human and Peoples' Rights.[22] Given domestic inaction in 2009, the ICC's Chief Prosecutor Luis Moreno-Ocampo invoked his Office's *prorpio motu* jurisdiction[23] to initiate investigations against persons bearing greatest individual criminal responsibility for crimes against humanity. In 2012, the ICC confirmed cases against four suspects. However, Brigadier Hussein Ali, the former Commissioner for Police was one of the two suspects whose cases were not confirmed. Meanwhile, Kenyan authorities charged a few physical perpetrators with ordinary serious crimes, such as murder, robbery with violence, and assault, before local courts.[24] Subsequently, both the PNU and ODM cases were terminated, with new prosecutor Fatou

20 Charles Alenga Khamala, *Crimes against Humanity in Kenya' Post-2007 Conflicts: A Jurisprudential Interpretation* (Wolf Legal Publishers 2018) 119-122.

21 Article 92, UN Charter, <https://www.icj-cij.org/en/charter-of-the-united-nations> See also Statute of the International Court of Justice <https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf> accessed 16 December 2020.

22 The African Court on Human and Peoples' Rights, adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 January 2004. <https://www.achpr.org/afchpr/#:~:text=The%20Protocol%20on%20the%20Establishment,protective%20mandate%20of%20the%20Commission.&text=The%20seat%20of%20the%20Court%20is%20Arusha%2C%20Tanzania> accessed 16 December 2020.

23 Rome Statute (n 1) Art 15.

24 *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 23 January 2012, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Situation in the Republic of Kenya <https://www.icc-cpi.int/courtrecords/cr2012_01006.pdf > accessed on 29 November 2020.

Bensouda lamenting lack of cooperation from domestic authorities. Despite failing to achieve retribution and in turn reparations, at least the prosecutions catalyzed structural transformation by way of comprehensive constitutional and electoral reforms.

Perhaps sensing futility internationally, so far two dozen victims have pursued constitutional compensation claims for injury and loss arising from PEV incidents. Interestingly, these domestic suits were not merely against the physical perpetrators, but against state agencies for police brutality and failure to investigate or prosecute known perpetrators of primary violence. This paper thus seeks to compare the frustrated search for conviction or reparations through a common legal representative before the ICC, with the successful pursuit of domestic compensation for victims against the state.

The 'Kenya Trial Approach' to Victim Representation before the ICC

In the situation in Kenya in what became known as the 'Kenya trial approach',[25] ICC Trial Chamber II adopted a proactive role in the organization of victims' representation, finding:

> [i]t appropriate to request the Victims Participation and Reparations Section ('the VPRS') to: (1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations; (2) receive victims' representations (collective and/or individual); (3) conduct an assessment, (of) whether the conditions set out in Rule 85 have been met; and (4) summarize victims' representations into one consolidated report with the original representations annexed thereto.

Luc Walleyn observes how, following orders from the single judges of the Pre-Trial Chambers, the VPRS started to organize the victims' application process. Representation was operationalized by, for example, drafting application forms, putting victims in contact with local partners through local intermediaries, and collecting and controlling the forms. The VPRS also started to screen the applications and decide on their merits, submitting to the Chambers for approval only the selected applications. Further, by selecting candidates for common legal representation from applications received after

[25] Luc Walleyn, 'Victims' Participation in ICC Proceedings: Challenges Ahead' (2016) International Criminal Law Review, 16, 995-1017, 1005.

a 'call for candidates' circulated among the List of Counsel before the ICC.[26] However, the OPCV has sometimes promoted itself as offering a better and cheaper alternative than external counsel. Alarmingly, Walleyn reports of more frequent tensions with external legal teams, which has led some counsel to avoid seeking the support and advice from the OPCV. Externals see the OPCV as the legal representative of groups of victims having a conflict of interests with their own clients, or even as a rival.[27] He concludes that:

> [R]epresentation of all victims in all situations under investigation by a small number of counsel based at The Hague is an extremely difficult if not impossible task. This explains why some Chambers have appointed external assistants based in the field to mitigate the difficulties experienced by the OPCV to have access to the victims.[28]

However: 'This is a strange situation, because it means that, ultimately, the external counsel become the assistants to the OPCV, despite (the fact) that the OPCV was created and established to provide external counsel with assistance'.[29] The Office of the Prosecutor represents the international community's interest, which is a collective good and therefore diverges from an individual victim-witness's personal interest. Moreover, Walleyn laments the anomaly that a suspect whose limited resources are deployed in researching and answering a specific claim laid in the charges as framed may then be challenged to respond to multiple claims from multiple victim-witnesses. As judge Wyngaert explains, this is consequential because the Trial Chamber has wide latitude to recharacterize the charges at any time before judgment, therefore, an accused risks 'being beaten with a fresh stick' offered by a victim-witness. Collateral effects arising from increased likelihood of conviction include victim-vulnerability.

Comparative Domestic Satisfaction

Counsel's Role while Representing Victims in Criminal Courts

Kenya is a signatory and has ratified numerous international instruments. The Constitution validates the enforcement of the country's international obligations, including its commitment to the Rome Statute, UN Declaration of

[26] Walleyn (n 25) 1006.
[27] Walleyn (n 25) 1007.
[28] Walleyn (n 25) 1009.
[29] Walleyn (n 25) 1009-10.

Basic Principles of Justice for Victims of Crime and Abuse of Power (Victim's Declaration) and Malabo Protocol. These treaties incorporate victims' rights, into Kenyan domestic law by dint of Chapter I of the Constitution which provides that:

> (5) The general rules of international law shall form part of the law of Kenya.
> (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution[30].

The ICC's broad definition of victims closely resembles the definition in the Victim's Declaration that:

> States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.[31]

In addition, Kenya has ratified the Malabo Protocol.[32] It requires that the country:

> should periodically review existing legislation and practices to ensure…responsiveness to changing circumstances….enact and enforce….legislation proscribing acts…..promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.[33]

The guarantee of fair trial rights requires Parliament to enact 'legislation providing for the protection, rights and welfare of victims of offences'.[34]

---

30 Constitution of Kenya (The Government Printer 2010), Art 2(5) and (6).

31 Article 19, The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985 <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf> accessed 2 October 2020.

32 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights adopted on 27 June, 2014. <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> accessed 2 October 2020.

33 Constitution of Kenya (n 30) Art 20.

34 Constitution of Kenya (n 30) Art 50(9).

Moreover the rights to a fair trial are non-derogable.[35] Kenya's Supreme Court has interpreted the victim legal representative's mandate under the Victim Protection Act,[36] in *Joseph Lendrix Waswa v Republic.*[37] It held that the Act, the Constitution and international law all support the right of victims to be represented by counsel in court. Thus counsel watching brief may not only make submissions at the close of the prosecution case on whether there is a case to answer; final submission should the accused be put on his defence; on points of law should such arise in the course of trial, and upon application at any stage of the trial for the consideration by the Court, but may even be allowed to ask questions of the witnesses.

Compensating Police Shootings Victims for Human Rights Violations

CAVI & others v AG & others was filed at the High Court in Nairobi in February 2013. The petitioners include 13 survivors of or relatives of victims of police shootings and two organizations: Citizens Against Violence and the Independent Medico-Legal Unit. They sued the Attorney General, the Director of Public Prosecutions, the Independent Policing Oversight Authority and the Inspector General of Police.

On 27 July, 2020, Judge Fred Ochieng held the government liable for failing to protect and address the concerns of Alice Atieno Ochieng, Hudson Bob Libabu Lumwaji and Tobias Wanga Odhiambo who alleged that they or a relative of theirs were victims of police shootings in the PEV that wrecked Kenya. Ochieng testified in 2018, while Lumwaji and Odhiambo testified in 2019.

Judge Ochieng determined that the other 12 petitioners in the case had failed to prove that the government was liable for any injuries they suffered or the deaths of any of their relatives.[38] He heard that Alice Atieno Ochieng (not related to the judge), PW1 the ninth petitioner, was shot at as she returned home on 28 December, 2007. However, she did not see who shot her. Her evidence was that her landlord told her it was the police who shot her. The

35 Constitution of Kenya (n 30) Art 25(c).
36 Victim and Witness Protection Act No. 17 of 2014, L.N. 43/2015.
37 [2020] eKLR.
38 Tom Maliti, 'Kenyan Court finds Government is Liable for Harm Suffered by Three Victims of Police Shootings', 8 October, 2020 <https://www.ijmonitor.org/2020/10/kenyan-court-finds-government-is-liable-for-harm-suffered-by-three-victims-of-police-shootings/> accessed 29 November 2020.

landlord did not testify in court to corroborate Ms. Ochieng's hearsay. The judge observed that Ms Ochieng reported the shooting at a police station in May 2008 and got a medical report stating she had a gunshot wound. Altogether 'the totality of the evidence tendered in respect of PW1 is that she did not identify the person who shot her. In the circumstances, there is no basis upon which the court could reasonably conclude that it is a police officer who shot the ninth petitioner'.

Judge Ochieng heard from Lumwaji that his daughter was shot and killed on 31 December, 2007. Furthermore, when he went to report the matter to the police, he was informed that an inquest had been opened into his daughter's death.

> In effect, the issue about that particular incident was already being handled by the police. However, the police failed to provide this court with any information concerning the status of the inquest. The State has an obligation to expeditiously and effectively investigate any incident in which there is suspicion that the state agents had used either excessive force or lethal force.

Consequently, Judge Ochieng therefore held that the Attorney General and the Inspector General of Police 'violated the rights of' Ms. Ochieng and Mr. Lumwaji, 'to information and remedy'. The judge further held that the 12th petitioner, Mr. Odhiambo, 'tendered sufficient evidence to show that it is the police who shot him. The police action was unlawful and brutal. It violated his Right to Security of the Person'. He also found 'that the police failed to discharge their obligation to investigate and to prosecute the perpetrators of the unlawful shooting of the 12th petitioner'.

Compensating Sexual and Gender-Based Violence Victims for Human Rights Violations

The effectiveness of the roles played by domestic victim legal representatives to claim victims' rights, is further illustrated by *COVAW & 11 others v Attorney General & 5 others*[39] lodged in February 2013 at the High Court in Nairobi, seeking compensatory relief for a select constituent of PEV sexual and gender based violence victims and survivors. Their petition claimed that:

> The Kenya government failed to properly train and prepare the police to protect civilians from sexual violence while it was occurring; In the aftermath of the violence, the police refused and/or neglected to document and investigate claims of SGBV (sexual and

[39] *COVAW SGBV case* (n 3).

> gender-based violence), leading to obstruction and miscarriage of justice; The government denied emergency medical services to victims at the time; and, the government failed to provide necessary care and compensation to address victims' suffering and harm.

In their evidence: 'The survivors detailed a range of harrowing accounts from the 2007-2008 post-election violence: incidents of individual and gang rape, forced circumcision, and other forms of sexual violence, which resulted in severe physical injuries, psychological and socio-economic suffering, and other serious health complications'.[40] Although COVAW's suit was brought on behalf of eight SGBV survivors, drawn from three geographical locations: Nairobi, Kericho and Kisumu, only four claims succeeded.

On 10 December, 2020 Judge Weldon Korir ruled held the government responsible for a 'failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence'.[41] The judge further declared a violation of the four petitioners' 'right to life; the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality and freedom from discrimination; and the right to remedy'. Resultantly, two of the six respondents, namely the Attorney General and the Inspector General of the National Police Service, were ordered to pay compensation of Kshs 4 million (approximately US $35,000) to each of the successful victims, together with costs of the suit.[42]

Atrocity Victims' Right to Access Legal Aid

The Legal Basis for Financial Assistance Paid by the ICC

The procedure for victim participation before the ICC is based on common legal representation. This will include both an appointed CLRV and the OPCV acting on the CLR's behalf. The CLR thus possesses primary responsibility for being the point of contact for the victims whom he/she represents, to

---

40 Kevin Short, 'Court Delivers Justice for Several Survivors of Post-Election Sexual Violence in Kenya' *Reliefweb* <https://reliefweb.int/report/kenya/court-delivers-justice-several-survivors-post-election-sexual-violence-kenya> accessed 29 December 2020.

41 Physicians against Violence <https://phr.org/issues/sexual-violence/program-on-sexual-violence-in-conflict-zones/advocacy/public-interest-litigation/> accessed 16 December 2020.

42 *COVAW SGBV case* (n 3) 98, para 171.

formulate their views and concerns and to appear on their behalf at critical junctures of the trial.[43]

To expound, the 'balance' that the Chamber 'must find' between the two has a number of objectives. Those objectives 'include' the following in particular:

> (a) the need to ensure that the participation of victims, through their Legal Representative, is as meaningful as possible, as opposed to purely symbolic; (b) the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial; (c) the Chamber's duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity, and (d) the Chamber's obligation under article 68(3) of the Statute to 4.[44]

This is so because 'it is a matter of eminent common sense to prompt a public functionary, who is assigning counsel to clients on legal aid, to consider that it may be best for lawyers to be based in a location that makes them more easily accessible to the clients they represent'.[45] The ICC Appeals Chamber underlines that:

> victims who lack sufficient financial means do have access to legal aid for legal representation. Nonetheless, such representation is offered free of charge only in relation to the common legal representative(s) which the Court appoints. When, instead, victims elect to appoint a legal representative of their own choice – which, subject to a Chamber's power to trump such choice for the purposes of ensuring the effectiveness of the proceedings, is otherwise legitimate and provided for under Rule 90(1) of the Rules – they shall cover the related expenses.[46]

---

43 *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* Situation in the Republic of Kenya, 09 October 2012, Trial Chamber V paras. 41-43 and 60; <https://www.icc-cpi.int/pages/record.aspx?uri=1479374> accessed 30 November 2020, cited in Office of Public Counsel for Victims*, Representing Victims before the International Criminal Court: A Manual for Legal Representatives* (International Criminal Court 2019) 242.

44 *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* Situation in the Republic of Kenya, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V, 23 November 2012, paras. 2-7. <https://www.icc-cpi.int/CourtRecords/CR2012_09724.PDF> accessed 30 November 2020.

45 ibid.

46 The Prosecutor v William Samoei Ruto and Joshua Arap Sang (n 44) 246, citing *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 3

Instructively, 'when the Registrar makes decisions in relation to the day-to-day operating of defence counsel or Legal Representatives and their teams, the (Appeals) Chamber…is not supposed to micromanage the…Registrar's responsibility to administer the available legal aid budget'. Consequently:

> [T]his means that: (i) in reviewing such decisions, the Chamber must not consider whether it would have made the same decision as the Registrar; (ii) instead, the Chamber must assess (a) whether the Registrar has abused her discretion; (b) whether the Registrar's decision is affected by a material error of law or fact; and (c) whether the Registrar's decision is manifestly unreasonable. The Chamber adds that it will only intervene if counsel can show that the Registrar's decision meets one or more of these criteria.[47]

Then the 'activities of the Legal Representative may be remunerated through the Court's legal aid scheme'. To 'receive payment, such activities must be authorised beforehand by the Registry. Thus, the Appeals Chamber has to review whether, at this stage of the proceedings, remuneration only of pre-authorised activities of the Legal Representative is adequate'.[48] Thus 'victims are generally free to choose a legal representative. It is only for reasons of practicality that the Single Judge may disturb this freedom'.[49] Accordingly, 'common legal representation can be organised for all victims who have not chosen'. Finally, '[A] victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance'.[50]

The Ugandan Experience

April 2012 regarding Legal Aid <https://www.icc-cpi.int/CourtRecords/CR2012_05210.PDF> accessed 30 November 2020.

47 The Prosecutor v William Samoei Ruto and Joshua Arap Sang (n 44) 244; *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the 'Application of the Victims' Representative pursuant to Article 83 of the Regulations' situation in the Republic of Kenya, para 22 <https://www.icc-cpi.int/CourtRecords/CR2012_05209.PDF> accessed 30 November 2020.

48 ibid 245.

49 ibid. citing Rules 90(1), (2) and (3)., International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1. (2000) <http://hrlibrary.umn.edu/instree/iccrulesofprocedure.html> accessed 25 October 2020.

50 ibid Rule 90(5).

As seen earlier 'the OPCV is an independent office, of which the task is, inter alia, to represent victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice'.[51] Yet the Chamber has 'power to appoint a legal representative of victims where the interests of justice so require, explicitly mentions the possibility of appointing counsel from the OPCV'.[52] Regarding 'counsel from the OPCV currently represent(ing) certain victims participating in the case against Joseph Kony and Vincent Otti and in the situation in Uganda' in the *Ongwen case*:

> the Registry reports that the victims whose applications were transmitted generally agree that one legal representative could represent all the victims participating in the case, and that they would like to be represented by someone from the Acholi region or who speaks Acholi, who will be able to communicate with the victims, and who possesses positive professional and human qualities such as ethical integrity, competence, kindness and sense of caring for the victims.[53]

The above endorsement of the 'Kenya Trial Approach' is because:

> [T]his course of action combines optimally the OPCV's knowledge and experience in the procedure before the Court, which is markedly distinct from national procedures, and the knowledge of the local circumstances and culture of the communities where the participating victims reside, providing for the best possible legal representation of the participating victims, which is in the interests of justice.[54]

In conclusion 'victims who individually choose their legal representatives before the Court do not qualify for financial assistance by the Court (contrary to those victims for whom a common legal representative is appointed by the

---

51 Regulations of the Court, Adopted by the judges of the Court on 26 May 2004, Fifth Plenary Session, The Hague, 17-28 May 2004, Official documents of the International Criminal Court ICC-BD/01-01-04. Regulation 81, 55. <https://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf> accessed 8 November 2020.

52 ibid Regulation 80.

53 *The Prosecutor v Dominic Ongwen*, Situation in Uganda, paras. 16-24. <https://www.icc-cpi.int/CourtRecords/CR2015_22895.PDF> accessed on 30 November 2020, cited in Office of Public Counsel for Victims (n 135) 245-6.

54 ibid.

Court) stems from the plain language of Rule 90(5) of the Rules'. Ultimately 'the scope of legal assistance paid by the Court regarding victims is determined by the Registrar in consultation with the Chamber'.[55] It rejected the Legal Representative for Victims' request that '[i]nternational standard(s) and comparative experience support the provision of legal aid to victims who participate in criminal proceedings'.[56] This interpretation avoids '"an inevitably unwieldy system" whereby the Court, when upholding the right of victims to appoint counsel of their own choice, would also be obligated to provide financial assistance to any legal representative appointed by any victims' group, even if this results in dozens of such representatives being part of the legal aid scheme for a single case'. Nonetheless: 'A statement of indigence shall normally be accompanied by a signed declaration certifying the correctness of the information provided and authorising the Registrar to take all necessary steps to decide on the eligibility for legal assistance paid by the Court. It shall also contain the engagement from the person to communicate to the Registry any change in his or her financial situation'.[57] Since 2008, the TFV has been delivering assistance and rehabilitation to victims under the assistance mandate across 18 districts in Northern Uganda, providing services to victims of crimes against humanity and war crimes through a network of local and international non-governmental organizations. The assistance mandate of the TFV is distinct from reparations before the ICC or the payment of compensation to victims which may accrue from the *Ongwen case*, if the accused is convicted.[58] The Ugandan 'government also quickly provided compensation for the victims by paying a lump sum amount of 5 million Ugandan shillings (approximately US $1,400) for each of the deceased persons and 3 million Ugandan shillings (approximately US $850) for those who survived with injuries'.[59]

---

55 *The Prosecutor v Dominic Ongwen*, 26 May 2016, paras. 7-13. <https://www.icc-cpi.int/CourtRecords/CR2016_03718.PDF> (*Ongwen*'s *case*) accessed on 30 November 2020.

56 *The Prosecutor v Dominic Ongwen*, 14 November 2016, paras. 1-3. <https://www.icc-cpi.int/CourtRecords/CR2016_25176.PDF> accessed on 30 November 2020, cited in ibid 247.

57 Situation in the Democratic Republic of the Congo, 26 March 2008, 3-4. <https://www.icc-cpi.int/CourtRecords/CR2008_02252.PDF> accessed on 30 November 2020, cited in The Prosecutor v Dominic Ongwen (n 56).

58 'The Trust Fund for Victims Launches New Assistance Projects in Northern Uganda' 3 July 2015 <https://www.icc-cpi.int/Pages/item.aspx?name=pr1126> accessed on 19 December 2020.

59 Lino Owor Ogora, 'Why Victims "Feel Abandoned" by the Ugandan Government' *International Justice Monitor*, 30, May, 2017.> accessed 19 December 2020

Compensation under Kenya's Victim Protection Act

During two months of Kenya's PEV, along with 1,133 people killed, 650,000 (initially underestimated at 350,000) were forcibly displaced, hundreds of thousands were assaulted, 900 raped and billons of shillings worth of property was destroyed.[60] Although the Kenya government is yet to honor its pledges to compensate victims of historical injustices, in 2014 Parliament enacted a Victim Protection Act (VPA). Under this legislation, victims '"victim" means any natural person who suffers injury, loss or damage as a consequence of an offence.' They have a right to restitution or compensation from the offender. Enforcement of the right to compensation extends to economic loss occasioned by the offence, including loss of or damage to property, loss of user over the property, personal injury, the costs of any medical or psychological treatment and even costs of necessary transportation and accommodation suffered or incurred as a result of an offence. If specific property is recoverable under a right to restitution of which the victim is deprived as a result of an offence.[61]

The court may award compensation under the VPA including financial compensation for expenses incurred as a result of the loss or injury resulting from the offence complained of which shall be charged from the Victim Protection Trust Fund (VPTF).[62] It is established from monies appropriated by the National Assembly as well as those received by the Fund as grants, donations or gifts from non-governmental or non-public sources.[63] The Board of Trustees has discretion to make payments out of the Fund for expenses arising out of crime victims' assistance.[64]

The Quest for Victim Representation and Access to Justice under the Legal Aid Act

By November 2020, Kenya's Director of Criminal Investigations, George Kinoti had received '118 cases in total registered today with complainants and witnesses'. Consequently he 'reopened the lid into the 2007/2008 Post Election Violence (PEV) cases following claims by victims of new threats

60 Khamala (n 20) 2.
61 Victim Protection Act 2014 s 23.
62 Victim Protection Act (n 61) s 24.
63 Victim Protection Act (n 61) s 27.
64 Victim Protection Act (n 61) s 28.

against their lives.'[65] This announcement followed lawyer Paul Gicheru's appearance before the ICC Pre Trial Chamber after surrendering to Dutch authorities.[66] The question is the extent to which the DCI's prosecution strategy satisfy PEV victims' interests. Going by the widespread dissatisfaction emanating upon the failed Kenya cases, this paper finds that most PEV victims may receive greater satisfaction from receiving non-conviction-based compensation domestically, rather than from pursuing symbolic remedies which participating in ICC trials may confer. Indeed, this thesis may explain why, soon after Kenya's DCI moved to re-open prosecution of the incidents 'Kiambaa survivors called a press conference and denied claims that they appeared before the DCI on Monday because they had been threatened'.[67] In any event, murder charges against the four persons suspected of burning Kiambaa church were unsuccessful.[68] Consequently, much more victim satisfaction may accrue if these particular victims are compensated for their losses incurred during the PEV. However, the statutory time limitation bars tort claims against the government brought after one year.[69] Instead, assuming that sufficient evidence can be produced implicating state officials, then constitutional claims may be lodged following the *CAVI* and *COVAW* precedents. These cases show that where evidence of state acquiesce in victim harm or neglect to inform victims or prosecute suspects is available, then the state may be held liable for acts of commission or omission, respectively. This paper recommends that compensation payments may be forthcoming from the VPTF.

Currently, there is no provision of legal aid for advocates who represent indigent victims before domestic courts. This gap exists in the statute. Kenya's Legal Aid Act (LAA), defines persons eligible for legal aid to include indigent

---

65 Erick Owenga, 'DCI reopens Post Election Violence Cases as Victims Claim New Threats', *Citizen Digital*, 23 November 2020. <https://citizentv.co.ke/news/dci-reopens-post-election-violence-cases-as-victims-claim-new-threats-963389/> accessed on 29 November 2020.

66 Mike Corder, 'Kenyan Lawyer denies ICC Allegations of Witness Tampering', *ABC News*, 6 November 2020 <https://abcnews.go.com/International/wireStory/kenyan-lawyer-denies-icc-allegations-witness-tampering-74060575> accessed 29 November 2020.

67 Onyango K'Onyango, 'DCI Boss Kinoti duped us, say Poll Violence Survivors', *Saturday Nation*, 28 November, 2020 <https://nation.africa/kenya/news/dci-boss-kinoti-duped-us-say-poll-violence-survivors 3212284?view=htmlampaccessed> accessed 29 November 2020.

68 Khamala (n 20) 119-120, citing Nakuru High Court HCCR 34/2008, *R v Stephen Kiprotich Leting and three others*.

69 Government Proceedings Act (Chapter 40 Laws of Kenya).

persons, resident in Kenya and are either Kenyan citizens, children, refugees, victims of human trafficking, internally displaced persons or stateless persons.[70] Yet, such aid appears restricted to *accused persons* to the exclusion of victims. Therefore the court only has a duty to not only promptly inform an unrepresented *accused person* of his or her right to legal representation, but also, if substantial injustice is likely to result, promptly inform the *accused* of the right to have an advocate assigned to him or her. The court is also bound to inform the National Legal Aid Service to provide legal aid to such *accused person*.[71] There is need to reform the LAA so as to broaden its scope so as to encompass legal aid for representation of indigent victims.

CONCLUSION

Notwithstanding that in 2012 the ICC Pre-Trial Chamber confirmed four cases against senior PEV suspects, by 2016 all had ultimately collapsed. Yet conviction is a condition precedent for reparations hearings. Therefore no victims were heard by the ICC and all remain uncompensated from its TFV. Pemberton *et al.*[72] therefore root for the ICC victims' right to reparation (reparation assistance) to be achieved through the other elements of reparative justice, both in the immediate aftermath (emergency aid, assistance, health care) and the longer run (as an element of social and economic development).

In 2020, three PEV victim survivor's claims were successful in CAVI's *Police Shootings case* and four in COVAW's *SGBV case*. Domestic courts held the state liable for violating victims' constitutional rights through various acts of commission and omission. So far, a total of seven victims have successfully claimed compensation following effective legal representation in domestic cases supported by NGOs. Having evaluated challenges afflicting victims' common legal representation before the ICC, this paper concludes that the Kenyan victims who won compensation at the local level received relatively greater satisfaction. However, sixteen of the domestic claims failed for lack of evidence. For while victims are accorded legal aid before international courts, similar enabling provisions, procedures and avenues are only beginning to

---

70 Legal Aid Act No. 6 of 2016, Act No. 11 of 2017, s 36.

71 Legal Aid Act (n 70) s 43.

72 A. Pemberton, R.M. Letschert, A.-M. de Brouwer and R.H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2016) *International Criminal Law Review*, 16, 2, 339-368, 345.

receive domestic realization. Complex enabling procedures to facilitate CLR participation in criminal proceedings were improvised in the 'Kenya Trial Approach'. Still, pursuing reparations which are contingent on criminal conviction is harder to attain since the standard of proof required is one of beyond reasonable doubt. Nonetheless, victim participants may be more motivated to participate in the ICC proceedings since on so doing, they receive assistance from the TFV as well as the CLR and OPCV. Despite an external CLR liaising with the OCPV, the *Kenya cases* at the ICC were discontinued due to 'troubling incidence of witness interference and intolerable political meddling' which made it impossible for the Court to determine the case.[73]

Doing justice to PEV survivors is hard. Criminal law's retributive goal has largely proved elusive. Instead, a handful of PEV victims, courtesy of assistance from local NGOs, have opted for constitutional claims which require proof on a balance of probabilities, before domestic courts. It follows that other PEV victims who possess evidence of police brutality or state omissions are similarly eligible for compensation. The aggrieved PEV survivors may seek damages and enforce payment of compensation from the VPTF. Donor organisations, such as the ICC's TFV, may provide financial assistance for this purpose. Comparatively, Kenya's VPA has proven effective in providing tangible, rather than merely symbolic, punitive remedies for PEV victims. Victims of police brutality and SGBV comprise special categories of survivors who could either identify their tortfeasors or establish police or prosecution negligence. Yet, two thirds of the claims lodged by some two dozen PEV victims in domestic courts were unsuccessful. This indicates that victims of PEV atrocity crimes require financial assistance to empower them to investigate, lodge and prove their claims. Furthermore, while elaborate eligibility procedures facilitate collective legal representation before the ICC, domestic courts award individualized, rather than representative, remedies. Although victim voices appear more authentic before domestic courts, narrow constructions of statutory definitions of who constitutes an IDP tend to exclude individuals who cannot produce concrete evidence to substantiate their victimhood statuses. Just like: 'In the ICC, "victimhood as a legal category – juridified victimhood – is much narrower than that massive base".'[74]The

[73] Juma and Khamala (n 6).

[74] Dovi (n 55) 6 citing Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2014) *Law and Contemporary Problems*, 76, 235-262, 241.

landmark PEV cases were not representative suits. Kenyan courts are yet to award collective remedies to broader victim constituencies such as commemoration or memoralization. As it stands, numerous PEV survivors are each required to lodge and prove individual claims. Given that the LAA makes no provision for indigent victims, there is urgent need for the Board of Trustees under the VPTF to extend assistance so as to provide legal aid to facilitate representation of indigent Kenyans and IDPs to file claims seeking compensation for losses arising from PEV. Policymakers may therefore consider extending legal aid to victim's representatives of dissatisfied PEV victims who may possess evidence against physical perpetrators of mass atrocity crimes or police brutality or state inaction.

Access to Legal Aid in Criminal Justice System in Kenya: Challenges and Solutions

Marube Charles Getanda*

ABSTRACT

An accused person undergoing a criminal trial is entitled to a number of fundamental rights. These rights collectively make up what is called a "fair hearing". These are to be enjoyed right from the time of arrest up to the conclusion of the trial. The poor, vulnerable and marginalized rarely enjoy these rights because of their inability in understanding them and paying for legal services. The protection of these rights has led to evolution of legal aid to those who cannot access justice because legal services are very dear. Provision of legal aid takes various forms in a criminal justice model and for this to be successful, it has to be well-regulated and supported by some guiding principles. However, provision of legal aid in Kenya is not without challenges and these challenges may require solutions. If the government and other stakeholders come together to support provision of legal aid, the vulnerable, marginalized and the disadvantaged can access justice in Kenya. This paper attempts to explain the meaning of legal aid, the guiding principles, the legal framework and challenges involved in Kenya. The paper also suggests solutions to the challenges.

Key Words: Legal Aid, fair hearing, criminal justice model, legal framework, guiding principles, forms of legal aid, legal aid service providers, challenges and solutions.

INTRODUCTION

When a crime is alleged to have been committed, the law enforcement officers are required to undertake independent investigations. This entails among others issues the identification of the suspect or the criminal offender, collection and analysis of evidence linking the suspect to the alleged crime. If there is sufficient evidence to sustain a charge against the suspect, he/ she is arrested or summoned to appear in court to answer

* Lecturer; Faculty of Law; Egerton University Tel. 254 733963942; Email: charles.getanda@egerton.ac.ke

charges related to the alleged offence. Despite the evidence available against the suspect, under the rules of natural justice, the accused person is assumed to be innocent till he/she is proven guilty and convicted according to the law. This process may start with arrest followed by trial and finally serving a prison term at a correctional institution. In all these stages the accused is entitled to a number of rights which are guaranteed by the constitutions of states, regional agreements and international conventions. These rights collectively make up what is called "*Fair Hearing*" in a criminal justice process. One of the fundamental rights to an accused person is entitlement to the provision of legal aid which is the subject of this paper.

The basis of the right to Legal Aid in our criminal justice system is enshrined in our Constitution[1] and other International Instruments and Conventions under the umbrella term '*Fair Hearing*". This principle is universally recognized by most criminal justice systems. Fair hearing, entails the right of an accused person to be protected by the law because errors may occur during the trial of criminal proceedings which may be prejudicial to the accused person. This principle requires that the accused person is represented by an advocate of their own choice, have their case heard without delay, they be given adequate notice to prepare for their case and have a right to challenge evidence tendered against them through cross-examination or by tendering their Defence. In short the accused person must be given an opportunity to be heard. Without legal representation some of the rights of fair hearing to which an accused person is entitled may be violated.

It is the responsibility of the state to ensure that all Kenyans enjoy the right to access justice and if payment of any fees is required to be made, it should be reasonable and should not be an impediment to accessing justice.[2] Criminal Defence being a fundamental right needs the protection of the state particularly for those who cannot afford legal services due to financial constraints or due to their vulnerability. In Kenya, the majority of the population resides in rural areas and have no access to justice because they are vulnerable, particularly women, children and elderly; first they lack financial resources and secondly they do not understand what accessing justice is nor do they understand its meaning.

1 Constitution of Kenya 2010 Article 49 & 50
2 Article 48 of the Constitution of Kenya 2010

With the current criminal justice system in Kenya, the essential ingredients of 'fair hearing' as contained in the constitution and international conventions cannot be attained and hence the poor and vulnerable are locked out of the system. In this regard Kenya as a state considers provision of legal aid as its responsibility and enacted the Legal Aid Act[3]. This opened a new dawn for the poor, marginalized and vulnerable Kenyans to access justice not only in criminal cases but also in civil cases. However, the enjoyment of the right to legal aid is not without impediments.

This paper discusses the concept of legal aid, the criminal justice model and process in Kenya, the forms and players involved in provision of legal aid and the regulatory framework of providing legal aid in Kenya. Guiding principles of providing legal aid are also covered and finally an analysis of the challenges and solutions of offering legal aid is given.

THE CONCEPT OF LEGAL AID

Legal aid may be defined as a system of providing free advice about law and practical help with legal matters for the people who are too poor to pay for it.[4] Malli Karju[5] states that; " Legal Aid implies giving free legal services to the poor and needy who cannot afford the services of a lawyer for the conduct of a case or a large proceeding in any court or tribunal." The Legal Aid Act[6] does not specifically explain the meaning of legal aid but states what it includes. It stipulates that it includes: legal advice; legal representation; assistance in - resolving disputes by alternative dispute resolution; drafting of relevant documents and effecting service incidental to any legal proceedings; and reaching or giving effect to any out-of-court settlement; creating awareness through the provision of legal information and law-related education; and recommending law reform and undertaking advocacy work on behalf of the community. It can be concluded that legal aid is the legal assistance given to those who cannot afford to pay for legal services. Provision of legal aid takes various forms and this is explained later in this study.

---

3 Legal Aid Act No.6 of 2016

4 This definition has been obtained from the Cambridge English Dictionary

5 Dr. G. Malli Karju, "Universities, intellectual property Rights and Spinoffs: A critical Evaluation" 2013, 235

6 See section 2 of the Legal Aid Act 2016

Criminal Justice Model

Criminal justice is a multilayered social activity that contains many conflicts and competing policies. From criminological literature, there are different social theories or models that underpin the criminal justice system. In Kenya three models apply:-

Due Process Model

This model was propounded by an American commentator[7] when he contrasted the due process model with the crime control model. This model emphasizes fair and procedural due process. It stresses on the rules of the process of evidence gathering and dealing with issues that are needed to protect the accused against error and to restrain the exercise of arbitrary power. Principles of natural justice and rule of law apply in this model. It underscores equality of all before the law and that none should be charged with an offence unknown in law or an act which was not an offence at the time of its commission. The model aims to have a criminal justice system which is "fair and just" for all- whether poor or rich. The model protects the rights of accused persons as provided for in the constitution if Kenya and other international conventions.

Crime Control Model

The primary social goal of this model is to control crime and punishing of offenders. Its focus is to ensure that the police and prosecution are able to obtain convictions in courts. Its aim is to protect the society from criminals by regulating their conduct. However, one of the weaknesses of this model is that the process seems to imply guilt on the part of the accused person. It is assumes that the accused person is guilty till proven innocent. We always witness the brutality of the police in controlling crime in Kenya especially during the time of general elections.

Conflict Model

Under this model various actors in the criminal justice system have varying interests and policies. These actors sometimes do not always cooperate resulting in a conflict as there are varying degrees of mistrust among the components of criminal justice. It has been witnessed in Kenya where the police bypass the prosecution and have suspects charged in court without the approval of the prosecution. In some cases the police and the

---

7 Packer, J (1964) Two Models of Criminal Process, *University of Pennsylvania Law Review,* 113 (1)

prosecution feel they have sufficient evidence to sustain a charge only to have their case dismissed by the court for lack of sufficient evidence. Those who are highly positioned in society use the power to protect their interests. Karl Marx is one of the proponents of this model.

Criminal Justice Process

The criminal justice process involves a series of phases. It can be an overwhelming process for anyone who is not familiar and this is where legal aid is needed most. This section critically examines the criminal justice process and accentuates the centrality of establishing the link between legal aid and the criminal justice process. In Kenya the guiding law is the Constitution and the Criminal Procedure Code. The major steps include the following;

Reporting of the Crime and the conduct of investigation

This is the first step in the criminal justice process. It is undertaken by the law enforcement officers. The report about commission of a crime is made to the police who then commence their investigations. The purpose of investigations is to gather evidence which may link the suspect to the commission of a crime and hence secure their arrest. The conduct of an investigation may require a search to be conducted on the person or his property. A search can be carried out with or without a warrant[8]. In searching ones' property the police require a search warrant obtained in accordance with the law.[9] While carrying out a search, the police must respect the right to privacy as provided for by the constitution[10] which states that every person has the right to privacy, which includes the right not to have their person, home or property searched. It is debatable whether the police actually respect this right. The police are not allowed to enter a man's house which is believed to be his "castle".[11] Though one's privacy is a fundamental right to be respected, Lord Denning further stated that "No man's house is to be used as a hiding place for thieves or receptacle for stolen goods. If there is a reasonable ground for believing that there are stolen goods in the house , information can be laid before a magistrate on oath and a magistrate can then issue a warrant authorizing a constable to

8 Macmillan English Dictionary, International Students' Edition 2006
9 Section 118 0f the Criminal Procedure Code (CPC)
10 Article 31 of the Constitution of Kenya 2010
11 Lord Denning in the case of *Chi Fashions(West Wales Ltd v. Jones*(1968) 2 QB 299

enter the house and seize the goods." This goes to show that the right to privacy is a fundamental right but subject to reasonable and lawful limitation. For the court to issue the warrant of search, it must be satisfied that there is probable reason to carry out a search hence a search warrant is necessary. In this regard Justice Osiemo in Vitu *Ltd V. The Chief Magistrate at Nairobi and 2 others*[12] held that when a police officer seeks a warrant of search from court, he has to show reasonable suspicion that an offence has been committed or is about to be committed. While a search is conducted on a person a woman suspect should be searched by a female police officer and a male suspect by a male police officer.

But there are also exceptional cases where police can carry a search without a warrant. This means that some rights may be limited.[13] This right to privacy is frequently violated by the police hence it requires protection of the law. Many people do not know that they have a right to privacy as provided for by the constitution and the limitations provided by law. This is one of the areas that provision of legal aid is required during the criminal justice process. Experience in Kenya has proven that implementation of many laws is still a huge concern. In many cases the police hardly show the warrant to the accused even when they have it.

Arrest of a suspect by the Police

This involves the taking of a suspect into police custody for the purpose of holding him/her and then presenting them to court to face criminal charges. Where the suspect agrees to go with the police without resistance there is no need to touch, hold or confine the suspect. Unfortunately, the police always believe that the accused must be handcuffed even where the accused does not resist arrest and is ready and willing to accompany the police to the police station. The presence of a legal aid service provider during arrest will be of great help to minimize some of these violations. However, the officer may use all means necessary to effect arrest, including the use of reasonable force.[14] The arrest can be done with or without a warrant of arrest.[15] In the case of *R V. Athman bin Salim* [16] a police officer stopped a lorry on a public road at 3.00 am because he suspected that the lorry was carrying something unlawful. The driver of the lorry ran away but was arrested later. On carrying out a search on the lorry, government

12 High Court Misc. Application No. 475 of 2004
13 See Article 24 of the Constitution of Kenya 2010
14 Section 22(2)(1) CPC
15 Section 26 of the CPC
16 (1946) 22(1)KLR 49

ammunition was found. The driver was convicted of conveying suspected stolen property. On appeal against his arrest without a warrant, the court held that the police officer was entitled to act as he did. The law provides for instances when a police officer can arrest without a warrant.[17] However, a suspect can be compelled to appear in court through the court issuing summons for the accused person to appear as required without being arrested.[18] Is important that through legal aid, the public is informed of their rights during arrest as captured in the Constitution.

Decision to Prosecute

The decision whether to prosecute a suspect is made by the Director of Public Prosecutions (DPP). The decision is made on the basis of the evidence available. The DPP must be satisfied that the evidence available is sufficient to support the charges and that the public interest will be served by taking into account social, political and economic factors, what is commonly known as the public interest test. The DPP has power to commence, takeover and continue criminal proceedings against any person before any court.[19] This is the legal basis of the prosecution. The DPP does not require consent of any person or authority to commence criminal proceedings nor is the DPP subject to directions or control of any person or authority.[20]

Taking of Plea

If the DPP decides to prosecute, the accused person is taken before a court of competent jurisdiction to take a plea. He/she is called to take his/her position in the dock; the charge is read and explained to them in a language they understand; he/she is asked whether they understand the charge; he/she is then asked how they plead. The court has to record what the person says as nearly as possible in the words used by the accused.[21] This is another stage where legal aid is required. In many occasions, where the accused is not legally represented, the police wrongly advice the accused person to plead guilty to a charge in order to get lesser punishment.

The Prosecution Case

Assuming the accused person pleads not guilty, the case is fixed for hearing and evidence of the prosecution witnesses that supports the charge is

17 Section 29 of the CPC
18 Sections 91-99 of the CPC
19 See Article 157 0f the Constitution.
20 Article 157(11) of the Constitution of Kenya 2010
21 See the case of *Wamithandi v, Republic* 3 EALR 101

taken.[22] Each prosecution witness gives evidence on oath and is led in examination in chief by the prosecution. The accused person has a right to cross-examine the prosecution witnesses as this is one of the fundamental ways through which the accused can challenge the evidence of the prosecution witnesses.[23] The trial will be rendered unfair if the accused is denied the right to cross examine the prosecution witnesses. Unfortunately, many accused persons are unable to exercise this right because either they find the court environment hostile or they do not know or understand what cross-examination is hence the need for legal aid at this stage.

Defence Case

Once the prosecution's case is closed, the court makes a ruling on whether the accused has a case to answer or not. This is mandatory as was held in the case of *Wanjiku v. Republic*[24] in which the court emphasized that failure to make a ruling on whether there is a case to answer or not upon the closure of the persecution's case is a defect that cannot be cured. If the court finds that there is no case to answer the charges are dismissed.[25] In the event the court finds that the accused person has a case to answer, the court explains the charge to the accused person, the difference between sworn and unsworn testimony and his /her right to call witnesses.[26] The accused may also opt to keep quiet and wait for the judgment of the court. In the case of Njoka *v. Republic,* [27] the court of appeal emphasized that the provisions of section 211(1) contain fundamental rights that an accused person is entitled to and are meant to ensure that a fair trial is held.

Judgment

Upon the close of the defence case the court makes a final decision called a judgment. The judgment must be in writing, dated and signed by the presiding officer. It must be delivered in open court and in a language that the accused person understands. If the accused is found not guilty he/she is acquitted.[28] If he /she is found guilty he /she is convicted and sentenced in accordance with the law. However, the accused person must be informed of his right of appeal. Filing an appeal is a complex process. The accused will require to be assisted on how to do it through legal aid. It will be a violation

22 See section 300 of the CPC
23 Article 50 (2) (k) of the Constitution of Kenya 2010
24 (2002) 1 KLR 825
25 Section 210 0f the CPC
26 Section 211(1) of the CPC
27 (2001) KLR 175
28 Section 215 of the CPC

of the right of an accused if the appeal is not filed merely because the accused does not know how to do it. If the accused has to serve a prison term then he/she is taken by the correction agencies. It is therefore vital that everyone has access to legal aid in order to comprehend the various stages of the criminal justice process.

Players in the Criminal Justice System

This section highlights the key players in the criminal justice system. It focuses on their roles and interconnectedness with legal aid. The key players of the Kenyan criminal justice are:-

The Kenya National Police Service (NPS)

This organ is established under the Constitution.[29] It comprises the Kenya Police Service and the Administration Police Service.[30] The National Police Service is the component which is tasked with the responsibility of investigating commission of crimes and apprehending the suspects. Under the regular Police Service is established the Directorate of Criminal Investigations (DCI) which undertakes investigations in serious crimes because the officers in this department have specialized training. The core functions of the National Police Service[31] in relation to criminal justice matters is investigation of crimes, collection of criminal intelligence, prevention and detection of crime and apprehension of offenders. It is important that the citizenry is informed of the role played by the National Police Service through mechanisms such as legal aid to ensure that they understand their rights during investigations and arrests.

The Prosecution

It falls under the office of the Director of Public Prosecution (DPP). The office of the DPP is a creation of the Constitution.[32] It is charged with the responsibility evaluating evidence presented by the Police, prefers charges and prosecutes offenders and can also discontinue any criminal proceedings.[33] To avoid violation of rights of the accused persons, it is important that legal aid comes in to provide civic education on the rights of an accused person and the obligations of the prosecution during trial.

---

29 Article 243 of the Constitution of Kenya 2010
30 Article 243 (2) (a) and (b)
31 National Police Service Act Cap 84 Sec 24
32 Article 157 of the Constitution of Kenya 2010
33 Article 157 (6) (a) (b) (c) of the Constitution of Kenya 2010

The Judiciary

The judicial process is conducted by this body. Judicial authority is provided for in the Constitution[34] through the courts and tribunals established under it. In exercising judicial authority courts and tribunals are guided by the following principles: Justice shall be done to all, irrespective of the status;[35] justice shall not be delayed; [36]alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted and; [37]Justice shall be administered without undue regard to procedural technicalities.[38] It is charged with the responsibility of determining the guilt or innocence of the accused person upon conducting criminal proceedings. It is also responsible for sentencing and determining the appropriate punishment of a convicted person. The judiciary therefore plays a key role in ensuring access to justice for all. It is vital that the Judiciary staff be trained in order to ensure they dispense justice accordingly. It is also vital that the public have a grasp of how the Judiciary operates. Legal aid can come in handy in this area to ensure the public understands the criminal justice process.

The Correctional Department

This is the body which is charged with the responsibility of executing the punishment imposed by the courts and other established tribunals; in particular through imprisonment. This is carried out by the Kenya Prisons Service. The major duties of this department are to reform, rehabilitate and reintegrate the convicts back to the community. The Probation and after Care Services are also offered under his department. Prison visits by legal aid officers aids in conducting civic education and awareness to convicts in helping them understand processes such as appeals, review and revision.

It is important that the key players outlined hereinabove establish strong partnerships in ensuring that legal aid is provided to the indigent who may not understand how the criminal justice system works. This is an important and progressive step to the realization of access to justice for all.

---

34 Article 159 (1) of the Constitution of Kenya 2010
35 Article 159 1 (a) of the Constitution of Kenya 2010
36 Article 159 1 (b) of the Constitution of Kenya 2010
37 Article 159 1 (3) (c) of the Constitution of Kenya 2010
38 Article 159 1 (e) of the Constitution of Kenya 2010

Legal Framework of Providing Legal Aid in Kenya

This section examines the various legal instruments put in place to address legal aid. It pinpoints the international frameworks, regional frameworks and the domestic instruments.

(a) International frameworks

Pursuant to Article 2 (5) and 2 (6) of the Constitution of Kenya 2010, treaties and conventions and general rules of international law form part of our laws. Here the study focuses on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The Universal Declaration of Human Rights, 1948 (UDHR)

Article 7 of the declaration provides that "all are equal before the law and are entitled without any discrimination to equal protection of the law." It is further provided at Article 11 that everyone charged with a Penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense." Equality before the law and the presumption of innocence are fundamental principles that the indigent and vulnerable populations may not comprehend. Legal aid comes in to assist the public to understand these rights.

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

Article 9(6) of the covenant provides that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Article 14 of The convention provides for an outline of the rights of accused persons similar to what is provided for under the Constitution of Kenya 2010 which include: equality before the courts and tribunals; presumption of innocence; Accused to be informed promptly and in detail in a language he understands the nature of the charges against him; accused to have adequate time to prepare their defense; Right to communicate to counsel of their own choice; Right to be tried without undue delay; Right to cross-examine witnesses; to have free assistance of an interpreter if they do not understand the language used in court; and right to have right of appeal upon conviction.

Without legal assistance through legal aid, implementing these rights becomes a tough nut to crack. It is important that states fulfil their international obligations as primary guarantors of rights and ensure

actualization of these rights through legal aid services in order to ensure substantive access to justice for all.

(b) Regional instruments

African Charter on Human and Peoples' Rights 1981 (ACHPR)

This Charter was ratified by Kenya on 23rd of October, 1992. The Charter contains principles and guidelines on the right to fair trial and legal assistance in Africa. For instance, under Article 7, The charter makes it an obligation of state parties in ensuring that an accused person has the right to be presumed innocent until proved guilty by a competent court or tribunal and the right to defense, including the right to be defended by counsel of his choice.

The African Charter on the Rights and Welfare of the child (ACRWC) 1989

The children's' charter was adopted by Organization of African Unity (OAU) (now African Union AU) in 1990 and was ratified by Kenya on 25th July 2000. This is a comprehensive instrument that sets out the rights and defines universal principles and norms of the status of children. The rights under this convention have been reproduced in the children's Act of 2001. This Act led to the establishment of Children's court to handle children's cases. Legal Aid is an important tool to ensure that the public and all other relevant stakeholders understand these rights captured in these instruments, through mechanisms such as civic education and creation of legal awareness.

(c) Domestic laws

The Constitution of Kenya 2010

The Constitution of Kenya 2010 is the supreme law. Its supremacy is well set out in the constitution.[39] Unlike the repealed constitution, the Constitution of Kenya 2010 is more elaborate on the rights of accused persons during arrest and trial.[40] The Constitution further puts emphasis on access to justice for all; [41]though this article does not specifically indicate that this shall apply to criminal cases, the provision gives an indication that there

[39] Article 2(i) of the Constitution of Kenya 2010
[40] Article 49 and 50 of the Constitution of Kenya 2010
[41] Article 48 of the Constitution of Kenya 2010

shall be a waiver of court fees for purposes of enabling an accused person to access justice. Instances where a person will need to pay fees in criminal proceedings are; filing a petition (Memorandum) on appeal; obtaining certified copies of proceedings and judgment and; filing of Notice of Motions. Pursuant to the 5th schedule of Constitution of Kenya 2010 parliament has passed the Legal Aid Act 2016.The Constitution of Kenya 2010 is, therefore, the basis of any laws relating to the legal aid.

The Legal Aid Act No. 6 of 2016

This Act was passed pursuant to the 5th schedule of the Constitution of Kenya 2010 under which the government was required to enact legislation to give effect into Article 19 (2), 48 and 50 (2) (g) of the Constitution. The act was assented on 22nd April, 2016 and took effect on 10th May 2016. This Act provides for a legal and institutional framework under which legal aid shall be provided. It makes provision for who qualifies for legal aid. The establishment of the Nation Legal Aid Service (NLAS) under Part II of the Act as an institutional framework of legal aid, is a positive step in enabling the poor, vulnerable and marginalized to have access to justice in Kenya.

The above frameworks are indeed instrumental in providing the formal basis for provision of legal aid. Important to note, states must ensure compliance with international obligations and must ensure implementation of these frameworks in the society in order to ensure access to justice for all. This duty lies with states as they are the primary guarantors of human rights. Through this, states ensure not just formal but substantive equality for all in accessing justice.

Guiding Principles in the Provision of Legal Aid

This section analyses the guiding principles in the provision of legal aid services in Kenya. These principles are anchored in the Constitution and other statutes. This study focuses on non-discrimination and the right to information as the key guiding principles. These principles are the controlling factors in determining the procedure and methods of providing legal aid services.

Non-discrimination

The Constitution of Kenya 2010 provides for equality and freedom from discrimination. It provides that[42] every person is equal before the law and

[42] Art.27(1) of the Constitution of Kenya 2010

has the right to equal protection and equal benefits of the law. It is the responsibility of the state to provide for legal aid. The same should be provided to everyone and in particular the marginalized and the vulnerable who cannot afford representation by counsel. The Constitution[43] further provides that the state shall not discriminate directly or indirectly against any person on any ground inter alia race, sex, pregnancy, health status, ethnic or social origin, age or disability. This constitutional provision is similar to United Nations Provision Model Law on Legal Aid in Criminal Justice Systems (With commentaries (2017)[44] which provides that states should ensure the provision of Legal aid to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status. These provisions make it clear that all are entitled to legal aid without discrimination. In Kenya, we have many people who are marginalized and vulnerable; they are all entitled to legal aid.

To obtain legal aid in Kenya, a person must be unable to pay for legal services. In addition the person must be resident in Kenya, be a child, a citizen, and refugee or trafficked or a stateless person.[45] It appears then that a non-citizen adult who is accused of a crime and is not a refugee or stateless may not qualify for legal aid under the current law in the Act. This may contradict the Constitution and International Conventions to which Kenya is a party which recognize the rights of accused persons to access justice. This principle of non-discrimination is provided for under the Legal Aid Act.[46] Other jurisdictions have similar provisions on non-discrimination. For example under Ukrainian Law[47] it is provided that while exercising the rights to free legal aid, discrimination based on race, skin colour, political, religious and other convictions, and gender, ethical and social background, place of living and language shall not be allowed. Article 10 of the Constitution of Kenya 2010 also provides for equality and non-discrimination as values and principles of governance.

Right to Information

The Constitution of Kenya 2010 has provision for access to information. Every citizen has the right of access to: Information held by the state and;

---

43 Art 27(4) of the Constitution of Kenya 2010

44 Article 5.1 of the United Nations Provision Model Law on Legal Aid in Criminal Justice Systems (With commentaries (2017)

45 Section 36 of the Legal Aid Act 2016

46 Section 4 (c) and (d) of the Legal Aid Act

47 Article 4 The Law of Ukraine on Free Legal Aid 2011

information held by another person and required for the exercise or protection of any right or fundamental freedom. [48]

At the same time further provision is made on values and principle of public service.[49] This section has briefly analysed some of these values and principles relevant to legal aid.

Transparency and provision to the public of timely, accurate information

An accused person should be informed of his right to legal aid and other rights and be cautioned of the consequences of voluntary waiver of his rights. The information required is not limited to legal aid but covers other procedural safeguards. These procedural safeguards are provided by the Constitution and include: Reason for arrest;[50] the right to remain silent and;[51] the consequence of not remaining silent.[52]

The right to information on legal aid is important to enable accused persons benefit from this service if they are not aware of its existence. Police officers, prosecutors, and judicial officers have the responsibility of informing accused persons who are unrepresented of their right to legal aid and of other procedural safeguards in our criminal justice process. In this regard, Principle No. 8, paragraph 30 of the United Nations principles and guidelines provides that states should ensure that information on rights during criminal justice process and in legal aid services is made freely available and is accessible to the public. It is the responsibility of NLAS and other stakeholders to avail this information at Police stations, Prisons, Courts, Educational and Religious Institutions, Community meeting (*barazas*), Media, Internet among others.

Protection of the vulnerable

One of the principles to guide provision of legal aid is the protection of vulnerable persons who are mostly women, children and groups with disabilities, persons with mental illness, persons with HIV, drug users, stateless persons, asylum seekers, refugees, and internally displaced people among others. The government should ensure that many of the Kenyans who stay in rural areas and are socially and economically

48 Article 35 (1) (a) and (b) of the Constitution of Kenya 2010
49 Article 232 (1) (f) of the Constitution of Kenya 2010
50 Article 49 (1) (a) (i) of the Constitution of Kenya 2010
51 Article 49 (1) (a) (ii) of the Constitution of Kenya 2010
52 Article 49 (1) (a) (iii) of the Constitution of Kenya 2010

disadvantaged have access to legal aid. For example, in Afghanistan the law relating to legal aid on the vulnerable provides that Legal Aid departments are obligated to take into priority the children, guardianless, women, deaf, blind, disabled people when legal aid is provided.[53]

While the Legal Aid Act[54] provides that those who should be protected are the marginalized groups, it does not provide for the definition of a marginalized group hence we resort to the Constitution of Kenya[55] which provides that a "marginalized group" means a group of people who, because of laws or practices before or after the effective date, were, or are disadvantaged by discrimination on one or more of grounds in Article 27 (4). These grounds have already been captured earlier by the study. Article 27 (4) provides for equality and freedom from discrimination. All are equal before the law and there should be no discrimination of any nature.

Rules of Natural Justice

This means fair administration of laws. With regard to criminal justice, it means that the accused person should be given a fair and unbiased hearing before their case is decided. The accused person must be given adequate notice to prepare for the hearing of their case. They should also be given an opportunity to cross-examine prosecution witnesses and be allowed to offer their defense. The Constitution provides for adequate time and facilities to prepare for a defense[56] and the right to adduce and challenge evidence.[57] These rights among others amount to fair hearing. Legal Aid services can help ensure the accused persons access these rights efficiently.

Forms of Legal Aid in Criminal Justice

The Legal Aid Act[58] provides for legal aid in criminal matters among others. Under Kenyan criminal justice process, legal services to be provided by legal service providers include: -The provision of Legal Advice relating to criminal matters such as whether to be plead guilty or not guilty or to keep silent when an accused person is charged; Provision of Legal Assistance which may encompass legal representation at the time of arrest and trial so

53 Afghanistan Legal Aid Regulation 2008 Article 11-Right to priority
54 Section 4(e) of the Legal Aid Act
55 Article 260 of the Constitution of Kenya 2010
56 Article 50 (1) (c) of the Constitution of Kenya 2010.
57 Article 50 (1) (k) of the Constitution of Kenya 2010.
58 Section 35 of the Legal Aid Act

as to ensure that the rights of the accused person are not violated as provided for under the Constitution of Kenya 2010; Provision of legal representation is also recognized under regional and international conventions; Provision of Legal Information to the marginalized and vulnerable in particular about fundament rights while under arrest and undergoing trial; Legal Drafting in that some of the documents that may be used during the criminal justice process require technical knowledge which could be beyond the knowledge of accused persons. Such documents include drawing a notice of motion, affidavits, petitions and memorandum of appeal. Many of the accused persons will require somebody with knowledge and skill to assist in drawing these documents; Legal Education which entails equipping the public with basic legal knowledge. Workshops and seminars can be held where the general public is made aware of what the Constitution and statutory laws say about rights of an accused person under arrest and those undergoing trial.

Legal Aid Service Providers

This section highlights the key legal aid service providers in Kenya. The Legal Aid Act[59] provides for who qualifies to be legal service providers as follows:

An Advocate
An advocate operating the *pro bono* programme of the Law Society of Kenya is an example of a legal service provider. This provision covers legal practitioners accredited to offer legal aid by NLAS as provided for under the Act.[60] Lawyers can also fall under this category.

Civil Society Organizations or Public Benefit Organizations[61]
This is a group of people that operate in a community in a way that is independent from the government. They do not aim at making a profit in what they do. Membership is voluntary.

Paralegals[62]
These are people who offer legal services to the public because of their ability to understand the law. Lawyers sometimes delegate some work to

59 Section 2 of the Legal Aid Act
60 Section 56 of the Legal Aid Act
61 Supra note 66
62 Section 2 (b) of the Legal Aid Act

paralegals. They gain their knowledge out of experience, training and also by undertaking some basic law courses. They can recognize the files, draft documents and conduct legal research. Through learning and training they can acquire certificates in general law and practice. But they are not necessarily lawyers or advocates.

Public Benefit Organizations or Faith based Organizations[63]
These cover non-governmental organizations, community-based organizations and faith based organizations accredited by NLAS.[64]

A University or other Institutions operating Legal Aid Clinics[65]
Universities have programmes on legal aid usually termed as Law Clinics. Students who are about to complete their law degree and have acquired skills in law are trained on how to offer professional advice in criminal cases. These students, however, should have done courses covering Criminal law, Criminal procedure, Law of evidence, Constitutional and Administrative law. A University or other Institutions operating legal aid clinics can offer legal aid through their students and staff. Egerton University through faculty of Law is offering the same with the support of UNDP Amkeni Wakenya. Under such programmes, the law students are not paid legal fee by legal aid beneficiaries.

Government Agencies
Those particularly accredited under the Legal Aid Act can also offer legal aid services.[66]

Intermediaries
Though not provided in the Act, intermediaries and other lay persons may provide legal advice and assistance which the accused person may require. Where the accused person appears in court without an Advocate and there is no paralegal, the court may allow the accused to be advised by an intermediary like social workers. The intermediaries can offer advice on issue relating to bail applications, pleading of charges, suggest questions that the accused might ask during cross-examination and how to make final submissions before judgment and sentencing. In this regard the

63 Section 2(d) of the Legal Aid Act
64 Section 59 of the Legal Aid Act
65 Section 2 (e) of the Legal Aid Act
66 Section 2 (f) of the Legal Aid Act

Constitution[67] provides that in the interests of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

The role of the intermediary includes assisting the vulnerable witnesses in understanding the questions posed and also protecting witnesses especially children and old people from the hostile environment of cross examination by lawyers.

To offer legal aid services in Kenya one must be accredited by NLAS.[68] A formal application is made using the prescribed form accompanied with application and accreditation fees. It should be noted that Legal Aid Service providers have a number of duties as they offer their services. This may include: Duty of confidentiality to the Legal Aid beneficiary; they must offer quick and effective legal aid ascending to the standard set under the Act; they must act in a manner that protects the interests of the legal aid beneficiary; must disclose or declare conflict of interest; must abide by the rule of procedure of criminal trials; they must treat the vulnerable legal aid beneficiaries with respect and take into account their needs; provide the legal aid beneficiary with appropriate and relevant information ; attend regular trainings on legal aid and; not to demand legal fees from the legal aid beneficiary.[69]

Challenges of Accessing Legal Aid in Kenya

Here, the section analyses challenges of accessing legal aid in Kenya. For instance, time within which to process the application for legal aid may be a challenge. The Act[70] provides that the service shall make a decision on every application for legal aid without undue delay but not later than forty eight hours from the date of receipt, by the service, of such application. This may turn out to be unrealistic. Majority of Kenyans are poor and vulnerable. Since legal aid is offered in civil, criminal, children, constitutional and matters of public interest and any other type of case or type of law that NLAS may approve,[71] cases may pile up and delays may occur. The accused person right to a speedy trial may be violated.

---

67 Article 50(7) of the Constitution of Kenya 2010
68 Section 56 of the Legal Aid Act
69 Section 61 of the Legal Aid Act
70 Section 44(3) of the Legal Aid Act
71 Section 35 of the Legal Aid Act

NLAS is supposed to fix fees for legal aid services most likely less than the normal fees charged by advocates under The Advocate Remuneration order. Some lawyers may reject the fees because it would be unethical for a lawyer to accept undercutting.

There are also financial Challenges. Legal aid may be accepted and approved. But what happens when there are no funds? And how much money will be enough to run the legal aid fund? Budgetary constraints my hamper the implementation of some of the provisions of the Legal Aid Act.

Another challenge that may arise is how independent the scheme of Legal Aid will be. The government has the obligation to provide funds to NLAS to pay the Legal aid service providers. Suppose accused persons qualify for legal aid but they are critical of or opposed to how the government operates, Legal aid service for such people may be denied or withheld.

There are also capacity building constraints. There is inadequate number of legal aid service providers. The lawyers available may not be able to cope with the demand for legal aid services. Those who are quick to volunteer have no adequate knowledge on legal issues. Lawyers who are overburdened by their clients' work maybe unwilling to take additional workload.

Furthermore, the Legal Aid Act puts a limit as to who qualifies for legal aid and the areas in which legal aid is offered. It is possible a genuine legal aid seeker may be denied legal aid merely because he or she falls outside the category of those outlined in the Act.

As provided for in the Act, the procedure for obtaining legal aid service is very involving. The application must be made in writing. This may be problematic for the illiterate. In this context, the disadvantaged may require legal aid in preparing the paperwork for legal aid application.

CONCLUSION

Legal aid is a fundamental component of fair hearing in criminal proceedings. It is a basic right that an accused person is entitled to during the entire process of criminal justice. Unfortunately, the poor, marginalized and vulnerable cannot access justice because they cannot afford to pay for legal services. Legal aid helps such people to access justice. Criminal

justice players have the responsibility of informing the accused persons about the availability of legal aid so that they can take advantage of it. Previously, it was a challenge to access legal aid for lack of a legal framework and resources to support the same. However, with the passing of the Legal Aid Act, there is now a legislative and institutional framework for providing legal aid in Kenya. However, the implementation process has been slow due to lack of the required resources.

This study proposes that the government and other stakeholders should work together to make provision of legal aid in Kenya a reality by providing the required resources such as funding and capacity building. For instance, the government should provide adequate funding for legal aid. In addition, fees paid to legal aid service providers should be reasonable and comparable to other professionals. This may require the state to ensure adequate funding of NLAS. Moreover, the process of seeking and obtaining legal aid service from NLAS should be made less rigorous. Lastly, in order to meet the needs of the marginalized, more legal service providers should be trained especially those who will work at the rural areas. If the aforementioned suggested strategies are implemented, access to justice in the criminal justice system will be greatly realised.

Enhancing Access to Justice through Corporate Social Responsibility

Robert Mutembei*

ABSTRACT

This paper explores practical ways of involving the business sector to achieve increased access to justice. Through an analysis of Corporate Social Responsibility (CSR) and a critical evaluation of the current legal and normative framework on legal aid, this paper explores an expansion of the scope of CSR by business entities in order to make provision for initiatives that advance access to justice. The hypothesis being tested is that the CSR mandate for business entities can be expanded successfully by legislative and policy interventions to involve the business sector as duty bearers in promoting access to justice and provision of legal aid. The paper further makes proposals for legal reforms to ensure a direct involvement of profit making entities in advancing universal access to justice as encapsulated under SDG16. It is divided into four parts. Part I focuses on provision of legal aid in Kenya. It analyses the legal framework and the actors involved. This demonstrates how the business community has been marginally involved in the push for access to justice. Part II examines the role of the business firms in access to justice, illustrating that the business community is a key stakeholder in the justice sector. Part III examines the concept of CSR and considerations for making it mandatory. Part IV analyses reforms that can be undertaken in law to achieve increased participation of the business sector in the provision of legal aid. This section is based on an expansion of the policy actions in the Kenya National Action Plan on Business and Human Rights as informed by the UN Guiding Principles on Business and Human Rights. It makes a case for the use of CSR as an entry point for businesses in the provision of legal aid and increased access to justice. It also explores incentives for involvement of the business sector, including use of public procurement law and tax rebates.

* Lecturer Egerton, University, Faculty of Law.

Key Words: Kenya, Corporate Social Responsibility, Legal Aid, Access to Justice, Business and Human Rights.

INTRODUCTION

There are many actors providing legal aid in Kenya, mainly drawn from the civil society.[1] The state offers legal aid primarily through the National Legal Aid Service (NLAS).[2] Other public institutions such as public universities are also recognized as legal aid providers.[3] However, the business community, which is a significant player, does not actively participate in offering legal aid or increasing access to justice directly save for efforts to comply with the law on good business practices and respect for human rights as guided by the Kenya National Action Plan on Business and Human Rights. The other contribution of the business community in the society often comes in form of Corporate Social Responsibility (CSR) initiatives. Offering legal aid and funding access to justice is left to civil society organizations, going by the past trends in Kenya.[4]

The primary legislation on legal aid has not made a direct provision for the involvement of profit making entities.[5] The Legal Aid Act, 2016 has focused on the role of non-profit organizations and state actors while leaving out the business sector.[6] This is notwithstanding the fact that large business entities have often been blamed for violating human rights in commercial transactions.[7] This paper argues that there is need for a framework within

---

1 Kenya Office of the Attorney General & Department of Justice, *National Action Plan: Legal Aid 2017-2022 Kenya* (Office of the Attorney General and Department of Justice 2017). The term Civil Society Organizations is used here broadly and not synonymous with NGOs. It is used to represent all the actors in the civil society including NGOs, Faith Based Organizations and Community Based Organizations.

2 Legal Aid Act, 2016 has established the National Legal Aid Service as the premier institution offering legal aid in Kenya.

3 See Legal Aid Act, 2016, s 2.

4 See National Action Plan on Legal Aid.

5 The National Legal Aid Act, 2016 lays down a framework for legal aid and access to justice and makes no provision for the business sector.

6 Section 2 of the Act defines legal aid providers but does not include the private sector in the list, except for advocates working in private capacity who decide to take up pro bono cases.

7 See 'How and Why the Private Sector Needs to Stand up for Human Rights' (*Office of the Secretary-General's Envoy on Youth*, 11 January 2017) <https://www.un.org/youthenvoy/2017/01/dollars-sense-private-sector-needs-stand-human-rights/> accessed on 14 March 2021.

which the business community can be involved more robustly to increase access to justice for all. The law should go beyond encouraging compliance through voluntary initiatives to a smart mix of strategies including mandatory provisions that yield the aspirations of the United Nations Guiding Principles on Business and Human Rights.

This paper contends that an inclusion of the business community as duty bearers is a strategic intervention to address the funding gap that has often bedevilled the legal aid sector. Civil society organizations offering legal aid mainly rely on donor funding. The other source of funding emanates from the government and is often limited. Public institutions which are recognized and mandated to offer legal aid suffer budgetary and financial constraints, limiting their efforts greatly.[8] The National Legal Aid Service currently operates as a department of the Attorney General's office despite being established as an independent institution. Public universities which offer legal aid have also experienced budgetary cuts. The judiciary has also suffered the same fate and struggles to expand its network to reach more areas of the country meaningfully.[9] This calls for a need to entrench sustainable strategies and establish a framework within which other significant actors such as the business sector can contribute resources in access to justice.

This paper explores approaches of involving profit making entities in the efforts of enhancing access to justice through strategic interventions under company law, public procurement law and corporate governance. These interventions can be largely accommodated through Corporate Sustainability initiatives (also known as Corporate Social Responsibility) by corporate entities. The paper argues that the involvement of the business community through Corporate Social Responsibility (CSR) will achieve sustainability in access to justice and further entrench human rights based approaches in the business sector. It makes reference to the National Action Plan on Business and Human Rights, UN Guiding Principles on Business and Human Rights as well as other business laws in Kenya with a view to establishing gaps and proposing reforms.

---

8 The National Legal Aid Service and Public institutions are funded from public funds.

9 See 'Judiciary in a Ksh23.6 Billion Budget Deficit – The Judiciary of Kenya' <https://www.judiciary.go.ke/judiciary-in-a-ksh23-6-billion-budget-deficit/> accessed on 8 May 2021.

This paper further demonstrates how the involvement of the business community will expand the scope of legal aid and access to justice beyond the present constraints. The current legal and institutional framework on legal aid gives a disproportionate attention to criminal cases compared to civil cases. The Constitution of Kenya, 2010 has limited the right of legal representation to criminal cases, where substantial injustice is likely to be occasioned.[10] This reveals a gap in the range of legal problems qualifying for legal aid. To expand this range calls for a strategic involvement of actors in the commercial sector, which this paper promotes.

Analysis of Legal aid in Kenya

Legal aid entails provision of legal services for free or at a lower cost to those who cannot afford.[11] It has been provided for in various legal instruments, ranging from international to domestic. The motivations for offering legal aid may be different in different civilizations but mainly emanate from the need to promote the dignity of human beings. It is also one of the ways of enhancing access to justice and in effect promoting rule of law. Equal access to justice for all also helps in poverty eradication and development of a nation. This has been recognized in various development plans in Kenya.[12]

The history of legal aid in Kenya is well articulated in the National Action Plan on Legal Aid, 2017-2022. Provision of legal aid in Kenya has been through many phases before the government expressed its commitment through establishment of the requisite legal structure. Kenya is also a signatory to several international legal instruments that obligate the state to create a state funded legal aid scheme.[13] It is on this backdrop that the Constitution of Kenya 2010 laid a basis for the institutional and legal framework on legal aid.

The year 2016 marked a major milestone in the efforts to enhance access to justice through provision of legal aid. The Legal Aid Act, 2016 was enacted to

---

10 See Article 50 (2) (h).

11 See Kenya National Action Plan on Legal Aid 2017-2022. <https://repository.kippra.or.ke> accessed 8 May 2021.

12 See Kenya Vision 2030. See also National Poverty Eradication Plan 1999-2015 and Investment Programme for Economic Recovery Strategy for Wealth and Employment Creation 2003-2007 <https://repository.kippra.or.ke> accessed 8 May 2021.

13 See The International Covenant on Civil and Political Rights (ICCPR), 1966, The UN Convention on the Rights of the Child (CRC),1989, The UN Convention on the Rights of Persons living with Disabilities, 2007, UN Basic Principles on Role of Lawyers,1990, UN Guidelines on the Role of Prosecutors, 1990.

establish the National Legal Aid Service[14] and facilitate access to justice and social justice. This marked a new approach in the provision of legal aid in Kenya, with a more elaborate framework involving both state and non-state actors.

Legal aid in Kenya was, in its nascent stages, offered by civil society organizations and members of the Law Society of Kenya through pauper briefs.[15] The dominant involvement of the civil society is noted in the National Action Plan on Legal Aid.[16] The Law Society of Kenya has also historically provided legal aid through its members. Subsequently the government came up with a programme for provision of legal aid under the then Ministry of Justice and Constitutional Affairs.[17] This was later succeeded by the National Legal Aid Service after enactment of the Legal Aid Act in the year 2016. The Board of NLAS then embarked on formulation of a National Legal Aid Action Plan, 2017-2022 (the National Action Plan) in line with the Legal Aid Act and the Constitution of Kenya 2010.

The National Action Plan identifies various strategies for enhanced provision of legal aid. These strategies include formation of partnerships with the private sector and the civil society organisations. This is in line with the Legal Aid Act which underscores the need to ensure collaborative efforts of various actors to achieve the intended results. This is recognition of the role of various actors that must be involved to achieve the ends of justice for all.

However, partnership with the private sector has not been given prominence in the law and practice in Kenya. The Legal Aid Act recognizes non-state actors without directly involving those in business. There is no mention of the business community as legal aid providers, save for law firms that choose to provide legal aid. Private universities have also filled the gap in provision of legal aid and awareness but the wider business community is left out despite the challenges facing provision of legal aid.

Actors providing legal aid in Kenya face many challenges. Firstly, available resources are limited. The legal aid sector has been sustained mainly by funding from donors and other international development partners such as

---

14 The National Legal Aid Service is established to be the main government entity championing provision of legal aid in Kenya.

15 Provided under the Civil Procedure Act.

16 Kenya Office of the Attorney General & Department of Justice (n 1).

17 National Action Plan on Legal Aid 2017-2022.

UNDP[18] and World Bank. These institutions often intervene through provision of grants to select Civil Society Organizations to implement legal aid and access to justice programmes at the grassroots areas.[19] The lifespan of such activities is dependent on availability of continued funding, highlighting the key challenge of financial constraints. From the situation in Kenya, the dependency on donor funding is substantial.

The National Action Plan acknowledges this challenge[20] but offers no plausible strategies beyond funding by the government. This is not sustainable considering the limitations of government funding in a developing nation with a fledgling democracy and a considerable public debt vis-à-vis the Gross Domestic Product (GDP).[21] This paper argues that involvement of the business sector is a strategic intervention that will address the shortfall by the government funding thereby creating sustainability.

Secondly, there has been a strained relationship between the government and civil society. The tussle saw significant threats by the Non-Governmental Organisation) (NGO) Coordination Board[22] to enforce sanctions against organizations seen to be anti-government agenda. This can be attributed to the nature of previous activism by civil society organizations especially in the agitation for accountability and good governance.[23]

---

18 The UNDP has been implementing the PLEAD programme aimed at enhancing access to justice in Kenya. The PLEAD programme is a flagship of the EU and was launched in 2018 with an aim of supporting universal access to justice. The programme brings on board various actors to take up access to justice interventions. See United Nations Development Programme <https://www.ke.undp.org/content/kenya/en/home/presscenter/pressreleases/2018/eu-launches-plead-program-to-ensure-equal-justice-for-all-kenyan.html > accessed12 March 2021.

19 PLEAD programme was launched by the EU and UNDP in partnership with the Government of Kenya in 2018 and has offered an opportunity for Civil Society Organizations to be funded. See 'The Programme for Legal Aid and Delivery in Kenya (PLEAD) | UNDP in Kenya' <https://www.ke.undp.org/content/kenya/en/home/projects/amkeni-wakenya/PLEAD.html> accessed 26 June 2021.

20 Kenya Office of the Attorney General & Department of Justice (n 1).

21 'Public Debt | CBK' <https://www.centralbank.go.ke/public-debt/> accessed 26 June 2021;See also Tuesday February 23 2021, 'Kenya's Debt Bigger than Reported' (*Business Daily*, 22 February 2021) <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/kenya-s-debt-bigger-than-reported-3300678> accessed 26 June 2021.

22 The institution mandated with the registration and regulation of NGOs in Kenya.

23 'In Kenya, the OGP Process Provides Space to Redefine Civil Society Relations with Government' (*Open Government Partnership*)

Promotion of the rule of law comes with attendant consequences that can be offensive to those in power, fuelling misgivings by the government, in the framework of national security. There are instances when civil society organizations have moved to court against the government, and such actions have led to tense relations. This was witnessed in Kenya in the year 2017 during the election period when the government made a notice to deregister several NGOs.[24]

Thirdly, the civil society in Kenya has often operated in an uncertain institutional and regulatory environment. The current law on registration of Non-Governmental Organizations and other forms of civil society organizations is scattered in several legal instruments.[25] The Public Benefits Organizations Act, 2013 (PBO Act) was enacted to address this challenge but has not been operationalized since the year 2013. Civil Society Organizations continue to operate in uncertainty despite pushing for the operationalization of the new law. The government has not explained the delay, eight years later. This is telling of lack of political goodwill. The attendant consequences limit the funding such NGOs would attract if the operating environment was free from of such bottlenecks.

Fourthly, the National Legal Aid Service is not yet fully operational as envisaged in the Legal Aid Act. The operationalization and envisioned independence of the National Legal Aid Service remains a challenge. NLAS works as a department under the Office of the Attorney General.[26] It is yet to be separated to operate as an independent entity with its own funds. As such, it is unable to hire its own staff or even roll out innovative programmes with ease. This limits its operations a great deal. In the circumstances, it is hard for the organization to operate boldly in the provision of legal aid and implementation of programmes leading to increased access to justice for all.[27]

<https://www.opengovpartnership.org/stories/in-kenya-the-ogp-process-provides-space-to-re-define-civil-society-relations-with-government/> accessed 26 June 2021.

24 'Dispatches: Kenya's Human Rights Groups Still in the Crosshairs' (*Human Rights Watch*, 30 October 2015) <https://www.hrw.org/news/2015/10/30/dispatches-kenyas-human-rights-groups-still-crosshairs> accessed 26 June 2021.

25 The registration regime for nonprofit entities in Kenya is made up of several statutes, namely- Trustees (Perpetual Succession) for charitable trusts, NGO.

26 See the National Action Plan on Legal Aid.

27 Kenya Office of the Attorney General & Department of Justice (n 1).

Although the National Legal Aid Service is recognized as the lead organization in the provision of legal aid, there is need to complement its efforts by bringing in more partners from the business sector, as this paper demonstrates. This can be done in various ways including provision of funding and accreditation of other legal aid providers.[28] With funding, NLAS will be better placed to provide increased legal aid. More partners will also ease the burden of legal aid provision considering the increased need for legal aid especially during COVID 19 pandemic.[29]

The Legal Aid Act establishes a fund to be managed by NLAS.[30] The sources of this fund include allocations from Parliament, grants, gifts, loans and other sources recognized in law. [31] However, considering the financial constraints that Kenya is facing as a developing nation burdened with a rising public debt, this fund is likely to be limited and there is need to explore complimentary sources.

The Legal Aid Act recognizes the need to adopt a collaborative approach in the provision of legal aid and enhancing access to justice. The definition of a legal aid provider is wide and captures actors in the private sector as well as those in the public sector. These actors include advocates working under any umbrella, Civil Society Organizations, paralegals, Public Benefit Organizations, and faith based organizations, universities and other government agencies.[32]

The wide scope of legal aid providers recognized under the Legal Aid Act buttresses the collaborative approach taken by the government in provision of legal aid. The Act envisages a situation where various stakeholders work together with the aim of providing legal aid. The list of providers prominently captures state actors ranging from diverse government agencies to academic institutions and universities.

---

28 The National Legal Aid Service is mandated to accredit Legal Aid Providers. This is meant to increase the number of legal aid providers operating in Kenya.

29 Ensuring Access to Justice in the Context of Covid 19 UNODC <https://www.unodc.org/documents/AdvocacySection> accessed 26 June 2021.

30 Legal Aid Act, 2016, s 29.

31 ibid.

32 Legal Aid Act, 2016, s 2.

It is on this account that universities such as Egerton University Faculty of Law have established robust programmes for legal aid provision.[33] However, this comes at a time when government funding for public universities has been reduced and the sector is struggling for survival.[34] With such limited financial capacity, universities are unlikely to make any significant contribution in the provision of legal aid. They are now forced to rely on donor funds just like the civil society. In their weakened state, there is less reliance on public universities to bridge the gap in legal aid provision and access to justice.

Notably, the Legal Aid Act has expanded the scope of legal aid providers but has failed to make provision for inclusion of the business sector despite its dominant presence in the society. This part of the private sector forms a significant section of the society whose contribution is crucial in any interventions for social transformation. However, this potential has not been tapped in a robust manner, as evidenced by the limited scope of involvement of the business community. Currently, the players in the business sector involved in legal aid are merely private law firms and private universities.

Role of the Business Sector in access to justice

The role of business sector in access to justice is not pronounced in Kenya owing to lack of a clear legal framework for its inclusion. Although some sector-specific laws have provisions that impose responsibilities on the business community, the law in Kenya has not provided a clear mandate for the business community to play an active role in the justice sector. It is not evident to many businesses what their role is in enhancing access to justice or pursuing rule of law. The National Action on Legal Aid recognizes the involvement of the private sector through strategic partnerships but no framework exists to ensure involvement of the business sector other than the guidelines under the National Action Plan on Business and Human Rights on compliance with human rights. Stakeholders in the justice sector also rarely consider the contributions of the business community in engagements touching on legal aid and access to justice. The Guiding Principles on Business and Human Rights encourage states to ensure access to remedy

---

33 See Faculty of Law Legal Aid Project <follap@egerton.ac.ke> accessed 26 June 2021.

34 Monday February 15 2021, 'Varsities Face Deeper Cash Crisis on Sh4bn Budget Cut' (Business Daily, 16 February 2021) <https://www.businessdailyafrica.com/bd/economy/varsities-face-deeper-cash-sh4bn-budget-cut-3291236> accessed 26 June 2021.

for business related violations of human rights and hence a basis for inclusion of the business sector in the provision of legal aid.

The call for involvement of the business community in enhancing access to justice must be considered in the context of how businesses operate. Business enterprises are often after profit maximization,[35] which determines the scope of their operations. This is explained by the shareholder theory advanced by Milton Friedman highlighting that the only social responsibility of businesses is to make profit for their owners.[36] The theory considers profit making as the sole objective. It explains why businesses would only engage in programmes that are directly linked to the core objectives of the business.

There is a constant tension between the objectives of businesses and other extraneous pursuits of a business organization such as access to justice. Driven by profit, any business pursuing profit establishes how it can make more revenue for the owners. Taking up rule of law initiatives therefore runs parallel to profit maximization and businesses would be reluctant to invest in such unless convinced of a convergence with profit objectives. This is the same approach that circumscribes CSR initiatives, whereby businesses choose to give back to the society only within their scope of operations. Nevertheless, there are business enterprises that have undertaken projects on rule of law albeit indirectly.

Safaricom Limited Plc, a leading Telecommunication Company in Kenya, has recently initiated an internal framework that will lead to more deliberate efforts on rule of law as captured under Sustainable Development Goals (SDG) 16.[37] The board has amended its charter to introduce SDGs as a measure of performance. SDG 16 concerns access to justice and it is hoped that this is a window within which the company can support the justice sector. However, while this is a commendable effort, it is not directly connected to active provision of legal aid or access to justice.

Currently, most businesses only limit themselves to non- contentious activities in giving back to the society. They do not actively participate in pursuing the

35 Milton Friedman, 'The Social Responsibility of Business Is To Increase Its Profits', New York Times Magazine, vol 32 (2007).

36 ibid.

37 'What Can Business Do to Advance Access to Justice and the Rule of Law?' (World Justice Project) <https://worldjusticeproject.org/world-justice-forum-vi/what-can-business-do-advance-access-justice-and-rule-law> accessed 10 March 2021.

rule of law together with civil society organizations. It is not clear whether they should take an active or passive role[38] and many do not care, going by the absence of the business sector in the pursuit of the rule of law.

The dismal involvement of the private sector in access to justice can be explained by considering the risks that come with it. Access to justice involves pushing for interventions to ensure those who do not have access get opportunities to claim and enforce their rights. This often sets the organizations involved on a collision path with the government and compromises the profit objective. In this way, investment in rule of law initiatives is seen to contradict the objective of profit maximization, something that business managers will tactically avoid for their survival.

In the call for rule of law, the private sector is often pushed to action by crises. In such instances, the key players and umbrella bodies often swing to action driven by the need for self-preservation. In those instances businesses can easily come together to issue a joint statement or undertake a project to confront a common enemy in the justice sector. Their involvement in such cases is not out of a belief in the rule of law or need for justice but the desire to improve their operating environment. At all other times when the poor and marginalized are frustrated by the justice system and there is lack of remedies for business related human rights violations, the business sector will be mostly silent and focused on profit making.

The Kenya National Action Plan on Legal Aid reveals that the civil society has been the major player in the push for access to justice. The private sector seems left out, a trend that is attributable to the nature of business and lack of working strategies by the government to bring on board the business actors. Drawing from their core objective, business people are likely to take up only what appears rewarding to invest in. Accordingly, as long as rule of law is not presented as something within the domain of business, the private sector will remain indifferent. It will pay to adopt a strategy that employs sensitization of the business community to understand the nexus between access to justice and development.

Businesses owners should not view their involvement in the rule of law as a diversion from the core objective of doing business. There are many inherent benefits for the business sector when access to justice is enhanced and access to remedies is provided for violations of human rights. A country that

38 ibid.

enforces rule of law creates an enabling environment for businesses to thrive. Such an environment affords better enforcement of laws and protection of property. This how increased access to justice interplays with the economic welfare of a nation.

Development of a society is not only in economic terms. Rule of law is equally a core aspect of development. Max Weber wrote in the 19th century about the link between law and development.[39] Many other writers have explored this topic and there is an established role of law in development. Relatedly, law contributes to the functioning of the market system. Owing to the imperfections of the market, the market needs proper regulation and this works best where rule of law is upheld.

Law is a tool for social development and cannot be ignored in any sphere of the society. It is not beneficial to have law without access to justice. It is access to justice that helps people to realize the fruits of the law on paper. The gap between law as passed and the reality of people's experiences needs to be bridged by access to justice interventions. The government does not always enforce laws perfectly; this is an assumption of a perfectly competitive market but the reality is that there are gaps in the enforcement of laws, necessitating interventions for increased access to justice.

Another reason why the business sector may shy away from investing in access to justice is the perception that legal aid is a preserve of the government. This amounts to categorizing legal aid as a public good that the private sector cannot afford to offer. However, access to justice should concern everyone in the society. The business sector is a key beneficiary of rule of law and must be involved where it matters. The government should make business organizations see the link between rule of law and business objectives.

Accordingly, the business sector should be concerned about justice and the rule of law just like the civil society. Efficient access to justice for all benefits everyone, the business person and the consumer alike. No one is exempted from the ravages of bad governance in a nation. An oppressive regime affects everyone in a similar manner except for those in power. Collaborative efforts

[39] David M Trubek, 'Max Weber on Law and the Rise of Capitalism' in A Javier Treviño, The Sociology of Law (1st edn, Routledge 2017). <https://www.taylorfrancis.com/books/9781351473712/chapters/10.4324/9781315135069-17> accessed 14 March 2021.

on rule of law and a sustainable legal framework for redress of business related violations of human rights are therefore inevitable for posterity.

Having analysed the role of the business sector, it is needful to look at how its potential can be harnessed. This begins with an alignment of internal policies and strategies to ensure that business practices are guided by ideals of justice and human rights based perspectives. The guidelines of the obligations of the state and the business sector on this are well articulated in the UN Guiding Principles on Business and Human Rights as well as the National Action Plan on the same. However, the National Action Plan needs to be complemented as it contains recommendations that are not mandatory nor accompanied by a force of law. A balanced mix of voluntary and mandatory provisions will achieve more in getting more compliance in the business sector.

Businesses that are in violation of human rights cannot be proper partners in matters access to justice. Imposing duties on an organization in violation of human rights is an unpleasant irony. That is why implementation of the guidelines on business and human rights is imperative. Once a business is compliant in its operations, it can then actively participate in interventions leading to increased access to justice.

There are several avenues that business entities can use to participate as actors in increased access to justice, especially in provision of remedies for business related human rights violations. Principally, businesses can do this by contributing funds towards legal aid activities. This can be done through a scheme designed to mobilize resources within an appropriate legal framework. In Kenya, the National Legal Aid Service offers an ideal platform for such contributions. Other options include select civil society organizations and universities running active legal aid programmes. Academic institutions have an advantage by providing a more neutral platform for the business community to identify with access to justice.

Funding legal aid activities is critical in access to justice. One of the major challenges facing access to justice is lack of funding and therefore this presents a unique opportunity for the private sector to be involved. Most civil society organizations offering legal aid have limited funding. Additional funding from the business community would therefore go a long way in ensuring sustainability in ensuring access to justice. This will take care of all forms of violations and those who suffer from business related human rights violations are covered.

Business entities can also be involved through setting the agenda for policy formulation. During policy formulation process, there are many interest groups agitating for a particular position and sometimes divergent views are pursued for recognition and a compromise reached by policy makers. The business community can contribute in access to justice by influencing the policies needed to pursue respect for rule of law and its various subsets such as access to justice. For instance, Safaricom PLC in Kenya has demonstrated that businesses can influence legislation by working with the Kenyan government to pass the anti-bribery legislation.[40]

Concept and scope of CSR

The concept of CSR has been the subject of many definitions and theories.[41] It is commonly used to refer to the activities that business entities undertake to integrate their business objectives and social concerns. The definition of CSR has continued to evolve and now businesses are talking more about sustainability, with reference to a commitment to development that has long term benefits for all stakeholders.[42] It is notable that most CSR initiatives that are undertaken by business entities revolve around philanthropic activities, touching on social welfare and the environment.[43]

The concept of CSR as applied by businesses has received both praise and criticism in equal measure. Some businesses see it as a way of endearing themselves to the community while others view it as a liability. Milton Friedman, writing in the 1970s argued that "the social responsibility of business is to increase its profits."[44] This is the basis of shareholder theory cited earlier in this paper, which advocates for businesses to focus on making

---

40 'What Can Business Do to Advance Access to Justice and the Rule of Law?' (n 37).

41 Seema Sharma, 'Corporate Social Responsibility in India- The Emerging Discourse & Concerns' (2013) 48 Indian Journal of Industrial Relations 582.

42 CMA, Code of Corporate Governance for issuers of securities to the public, 2015. The code introduces a parameter of sustainability in determining the overall governance of public companies.

43 A look at the governance reports of most public companies in Kenya reveals that CSR initiatives are mostly focused on matters of social concern like building schools, educating the needy and such other activities. For instance Equity Bank in Kenya has invested in CSR through education for the needy; Safaricom Limited PLC has also set up a foundation with a focus on education.

44 Friedman (n 35).

profit and no other social objectives. The shareholder theory has been loosely described as synonymous to profit for its emphasis on business gain.[45]

Shareholder theory has been used to circumscribe CSR and exclude it from the focus of business entities. According to this theory, a company owes a responsibility to its shareholders and that responsibility is to make profit.[46] This means that shareholders are the only stakeholders the management should think about. However, this idea is contrasted with the stakeholder theory which extends the focus of businesses to other stakeholders, not just shareholders. The basis of stakeholder theory arises from a consideration of the impact of businesses. When a business organization operates, it is deemed to operate in an external environment and its influence extends to the community around it. For instance, a business that has a manufacturing plant near a river faces the risk of polluting the river. Stakeholder theory considers this possibility and imposes a duty on the business to consider the environment in its operations. On the other hand, the shareholder theory assumes no such permissibility and focuses on the owners of business as the only focus.[47]

Using shareholder theory, any activity which does not involve profit making goes contrary to the best interests of the owners of the company and therefore should not be allowed. Based on this theory, profit making entities ought to focus solely on increasing their profit and paying taxes. The proponents of this theory further reason that revenue making is the only way of increasing value for business owners. It is further argued that since business entities pay taxes from their profits, it is the duty of the government to use those taxes to implement projects that are for social benefit. It implies that to subject profit entities to further social contribution would amount to another form of taxation. However, this view is limited as it does not consider the value created by the participation of businesses in the external operating environment.

CSR has also been opposed as lacking in any philanthropic value and being a strategy to increase profit for many business entities. Those who make this argument further claim that CSR is merely a term meant to insinuate that the profit making entity cares about the community without necessarily doing so. In this view, some firms use philanthropic activities to enhance their image

---

45 Brian P Schaefer, 'Shareholders and Social Responsibility' (2008) 81 Journal of Business Ethics 297.

46 ibid. See also Sharma (n 41).

47 Schaefer (n 45).

while at the same time doing actions that hurt the society. For instance, some entities would undertake initiatives to plant trees while at the same time releasing factory wastes into rivers. This is counterproductive and such CSR is reduced to an image enhancing activity for public relations. The UN Guidelines on Business and Human Rights and the National Action Plan have responded to this challenge and the implementation of the proposals therein will ensure genuine CSR initiatives. Accordingly, the presence of rogue players should not dim the potential of CSR in achieving social development.

Laszlo, writing on the stakeholder theory makes an argument that justifies CSR by including the society as key stakeholders of a business.[48]This extended stakeholder framework justifies the investment by businesses in philanthropic activities. This paper goes further to explore the extent to which CSR activities can be stretched to include provision of legal aid and access to justice interventions. It uses CSR as an avenue for achieving social objectives by the government without using mandatory regulations.

The extended stakeholder theory considers stakeholders to include all those who are morally considerable.[49] It looks into the extent to which businesses affect the human ecosystems, to affect current and future generations. Accordingly, matters of social justice and human rights are at the core of the involvement of businesses and they ought to justify the inclusion of the society as stakeholders in the business arena.

Laszlo further argues that businesses should enhance the freedoms of future generations.[50] Posterity cannot be safeguarded in the absence of human rights and access to justice. The operating environment of businesses touches on human rights and hence the need to include businesses as duty bearers.

The concept of CSR should not be limited to only a select range of social activities. There is no reason why legal aid activities should not be viewed as initiatives within the purview of CSR. Businesses operate in an external environment made up of many aspects including legal concerns. When businesses invest in access to justice they will have accomplished beyond

48 Laszlo Zsolnai, 'Extended Stakeholder Theory' (2006) 1 Society and Business Review 37.
49 ibid.
50 ibid.

their objectives since access to justice guarantees development and rule of law.

Enhanced access to justice has an economic impact on the society. When legal aid is offered to a group of people, it opens up many opportunities for them. This is in contrast to certain limited activities that have been traditionally the focus of CSR by major businesses. Most businesses have limited the scope of CSR to activities that are only convenient to their programmes. Out of convenience, businesses will find it easier to engage in that which is within the scope of their core objectives as opposed to external goals such as access to justice. It is because of this reasoning that business organizations invest in neutral philanthropic activities depending on the profit focus of the organization.

CSR offers businesses an opportunity to connect with the society and integrate their objectives with the community in which they operate. It therefore follows that legislation can be introduced to encourage business entities to give back to the society. The government can use CSR to achieve that which would be difficult through mandatory regulations.[51]

Legislation of CSR and its use in the development agenda is gaining traction. India has led in coming up with a legislation for mandatory participation in CSR for companies with a certain threshold of profits.[52] This has been received with mixed reactions and some companies have resorted to the minimum statutory requirement even though they could have done more without the mandatory requirement.

The effects of legislating on CSR with mandatory provisions can be far reaching where there is a creation of new obligations that chip away profits. The key actors must be adequately prepared and actively involved at every stage leading to new regulations to avoid a cold reception of the resultant framework. A consensual approach is likely to yield more in such circumstances. Such an approach would also involve establishing an

---

51 Sharma (n 41).

52 'Corporate Social Responsibility in India' (*India Briefing News*, 23 March 2020) <https://www.india-briefing.com/news/corporate-social-responsibility-india-5511.html/> accessed 16 March 2021. See also HRLPR, 'CSR In Legal Aid: Ameliorating Legal Aid Services In India' (*HRLPR*, 29 July 2020) <https://www.hrlrblog.com/post/csr-in-legal-aid-ameliorating-legal-aid-services-in-india> accessed 10 March 2021.

understanding of the needs of the business entities and emphasizing on the benefits that businesses stand to get from the proposed changes.

CSR is therefore a tool for development in the hands of the government and the business sector. However there is need for an optimal legal framework that incorporates a smart mix of voluntary and mandatory provisions. In such a framework a collaborative approach is ideal to ensure a supportive environment for business firms and to maintain a desirable ease of doing business in Kenya. The next section considers the legislative avenues available to the government to achieve this partnership where business firms are treated as duty bearers in access to justice.

Legal avenues for strengthening access to justice through CSR

CSR offers an opportunity for introducing a commitment in business organizations for access to justice. This involves expanding the scope of CSR beyond the current confines of social philanthropy. It looks at a broader view of CSR in the interests of development, considering sustainability in the business sector. As explained in earlier sections of this paper, access to justice is a concept of the rule of law and affords a sustainable operating environment for businesses and the society at large. This means that policy interventions to incorporate access to justice in CSR will benefit both the business firms and the society.

UN Guiding Principles on Business and Human Rights enjoin states to provide guidance on how to respect human rights. This proposes the use of both mandatory and voluntary measures to ensure that businesses are operating within the confines of human rights. However, the guidelines are limited to ensuring respect for human rights rather than involving businesses as duty bearers, as this paper proposes.

However, the proposals this paper makes find basis in the Kenya National Action Plan on Business and Human Rights which provides a thematic area on access to remedy. This is based on SDG 16 on access to justice. The Action Plan further makes reference to the use of Company Law and Public Procurement to ensure respect for human rights. The policy actions recommended in the Action Plan are expanded in this paper to ensure businesses are duty bearers in access to justice, other than just complying with the law.

The envisaged policy and legislative interventions can be explored in company law, public procurement law and taxation law. Company Law offers a framework for companies while public procurement is flexible tool that has been used severally to achieve social objectives.[53]Public procurement law, alongside tax law further afford a chance to offer incentives for participating businesses.

Legislating on CSR through Company Law

There are several laws that govern business enterprises in Kenya depending on the nature of the business organization in question. Different business associations are subjected to different legal regimes.[54] Company law governs companies and offers a strategic avenue through which businesses can be mandated to undertake CSR with some of the contributions channelled to a specific fund applied to legal aid and access to justice in general. The working of this fund is discussed in the next part of this paper.

Legislation can be introduced under company law requiring companies to undertake CSR activities directly or indirectly. This paper advocates for a mix of approaches, using 'comply or explain'[55] for certain matters and 'comply or else'[56] for areas of compliance pertaining human rights and access to justice. The reason for this is that there are certain aspects that ought to be mandated by the state and not left to market forces owing to their importance and impact on the society.

The sensitive part of legislating CSR lies in the approach it takes and the sanctions applied for non-compliance. While this paper advocates for a

---

53 Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' (2004) 28 Natural Resources Forum 257.

54 The various laws governing business enterprises include Partnerships Act, Business Registration Services Act 2015, Insolvency Act 2015, Special Economic Zones Act, 2015. There are other sector specific laws governing insurance, banking, cooperatives, capital markets and pension industry.

55 Comply or explain is an approach of corporate governance that has been applied in several countries. It gives companies the discretion to apply the set standards or explain non-compliance, thereby giving discretion for the companies. See Mohd Hassan Che Haat, Rashidah Abdul Rahman and Sakthi Mahenthiran, 'Corporate Governance, Transparency and Performance of Malaysian Companies' (2008) 23 Managerial Auditing Journal 744.

56 Comply or else is a term used to describe the mandatory approach to governance where companies have no option but to comply or face sanctions from the state. This approach has been applied in countries such as India and the US. See Mohd Hassan Che Haat, Rashid Abdul Rahman and Sakthi Mahenthiran (n 55)

mandatory approach where companies are mandated to contribute a certain percentage of profits, it cautions that there is need for corresponding incentives to avoid industry backlash during implementation.[57] Mandatory CSR is taking root in the world with several countries introducing it in their laws.[58] However, there is no one-size-fits all approach of mandating CSR and the efficacy of such laws depend on the country specific factors, context of application and the approach the law takes. Countries should be innovative and pass laws that serve the needs of their specific circumstances while borrowing universally applicable principles.

Mandatory CSR can be received favourably or otherwise depending on what is in it for the organizations expected to comply. The business sector is strongly profit oriented and any change in law that brings profit reduction is likely to face resistance. It may be seen as disguised tax and discourage even the entities that are already participating in CSR voluntarily. This is even more for a developing country like Kenya where the tax burden is increasing for businesses.[59]

The attendant negative impact of mandated CSR can be mitigated by introduction of incentives. For instance, in Kenya the corporate tax rate currently standing at 30%[60] can be reduced in exchange for a corresponding contribution to a specified fund for legal aid and access to justice run by the National Legal Aid Service. A tax rebate of this nature is an incentive that can remove the tag of profit reduction on mandated CSR initiatives. Where the

---

57 India is one of the countries that have implemented the mandatory provisions for CSR but not with a focus on access to justice like this article. The attitude of business on mandatory CSR is negative, where business managers view CSR as a cost and not in any way aligned to competitive advantage for business. See Deepak Verma, 'An Empirical Investigation of Managerial Perceptions in Indian Organisations Regarding CSR after Legislation of CSR in India' (2019) 9 1098.).

58 India introduced a provision in its Companies Act 2013 for a set percentage mandatory contribution to CSR. See (Ministry of Corporate Affairs, Government of India <https://www.mca.gov.in/MinistryV2/efiling.html > accessed 10 March 2021), Philippines has also enacted a similar law while Netherlands, Sweden, Denmark, France, Australia and China have laws on mandatory reporting on CSR for companies. See Rajat Panwar, Shweta Nawani and Vivek Pandey, 'Legislated CSR: A Brief Introduction' (2018) Emerald Publishing Limited. <https://doi.org/10.1108/S2514-175920180000002004> accessed 15 March 2021.

59 Recently the Finance Act 2021 has introduced the Digital Services Tax, which is seen as an additional burden for businesses.

60 See Income Tax Act. < http://kenyalaw.org:8181/exist/kenyalex/index.xql > accessed 15 March 2021.

law comes with a harsh stance, it is unlikely to make any headway in fruitful compliance. On the other hand, if the reforms are introduced with adequate stakeholder participation and consideration of enforcement challenges, there is a likelihood of successful implementation.

Legislating on CSR therefore appears to present unique challenges from the onset but remains a viable option if the obstacles are addressed sufficiently. If it is presented as a punitive approach it is unlikely to work well but if undertaken with sufficient incentives it presents good chances of success. The viability of legislated CSR is therefore predicated on the approach taken in the legislation and the enforcement mechanism chosen. It would therefore appear that mandated CSR can take different forms to serve country specific needs.

There are many factors to consider when legislating on CSR to ensure that it achieves the envisioned goal. Such legislation is not a new concept and has been tried in some countries. India introduced provisions in its Companies Act 2013 requiring companies with a certain threshold of profitability to contribute a set percentage to CSR. This is a 'comply or else' approach that has taken root in India. The jury is out on the success of this approach in India but it presents a demonstration of such a framework.

Currently, CSR in Kenya is voluntary and done on a philanthropic basis. However, the Companies Act 2015[61] provides certain conditions that directors have to take into account when making decisions concerning the company. Among the factors a director is required to consider is the impact of the company operations on the community and the environment. The introduction of these considerations appears to codify common law duties of directors and further introduces matters of social and environmental justice. This is an indirect way of asking companies to contribute beyond taking care of the shareholders of the company.

Companies undertaking CSR in Kenya mostly carry out activities that benefit the community in which the company is operating. This often has to do with social welfare and the environment. When the Companies Act provides that a director should consider the community and the environment, it is a way of

[61] Section 143 of the Companies Act 2015 provides for duties of the directors in promoting the success of the company. In undertaking these duties, a director is required to have regard on the impact of the company operations on the community and the environment. This is an indirect legislation of CSR.

encouraging CSR without making it mandatory for companies to do so. However, the existence of such provisions does not force businesses to undertake CSR but demonstrates how legislation on CSR can be introduced in Kenya. The current provisions have also avoided mandatory reporting obligations on CSR involvement.

Incentivized involvement of Business Entities in Legal Aid

An involvement of business entities as duty bearers in access to justice can be a difficult task considering its implication of reduced business profits. By their nature, businesses have to see the benefit of their involvement, considering the overarching profit objective. This is further buttressed by the fact that businesses in Kenya are subjected to many taxes.[62] Although the ease of doing business in Kenya has improved over the years owing to various reforms undertaken,[63] the business operating environment is equally difficult for some sectors due to many regulations and licenses applicable.[64]

Bringing the business sector to participate in access to justice therefore requires a well thought out incentive plan. There are many options available in introducing incentives. These incentives can be applied simultaneously, they are not mutually exclusive. They can be guided in a policy on the involvement of the private sector in access to justice. The National Action Plan on Business and Human Rights is a starting point to inform legislative and policy reforms in the sector.

First, tax benefits can be introduced for business entities that choose to contribute into access to justice fund. One of the major challenges of getting business entities to participate in corporate social responsibility is the

---

62 Kenya has imposed various forms of taxes on business. The current forms of taxes include Digital Services Tax, Turnover Tax, Value Added Tax, Withholding Tax and Income Tax. See <https://www.kra.go.ke/en/ > accessed 15 March 2021.

63 See Explore Economies' (World Bank) <https://www.doingbusiness.org/en/data/exploreeconomies > accessed 28 March 2021.

64 Some industries such as the financial sector have multiple regulators where entities seeking to operate in different subsectors have to apply for different licenses. Commercial Banks that wish to deal in bancassurance and Capital Markets products have to get a license from the Insurance Regulatory Authority and the Capital Markets Authority respectively. See Insurance Regulatory Authority < https://www.ira.go.ke/index.php > Accessed 15 March 2021, Capital Markets Authority < https://www.cma.or.ke/ > accessed 15 March 2021.

perception that business organizations exist only to make profit for their owners, as explained earlier in this paper. When they pay taxes, it is expected that the government will do its part and initiate projects for social transformation. Offering tax rebates therefore attracts entities to make contributions on access to justice.

This incentive can be more appealing for corporates that are subjected to 30% corporate tax. This percentage of tax contribution can be reduced slightly and channelled to a corresponding fund to cover access to justice. The government should not find this as a revenue reduction since it is mandated to fund access to justice. Introducing this rebate has two-fold outcomes, raising revenue for legal aid and involving the business sector in active contribution to the justice sector. This will also cause a renewed interest in human rights and access to justice.

Second, public procurement can be used as a tool to achieve desired policy objectives in CSR.[65] It takes up a significant percentage of the country's GDP and as such can be used to implement social objectives by the government.[66] The use of public procurement as a tool for public policy has been explored in many countries to achieve socially desirable outcomes such as equality. Phoebe Bolton writing in the context of South Africa explains the unique advantage that public procurement presents to the government.[67]

Owing to its nature, public procurement therefore affords as a viable platform for further incentives through set asides, preferences and contractual conditions in public procurement. Particularly, business organizations that participate in enhancing access to justice can be granted preferential treatment and enjoy procurement benefits. Such businesses should be encouraged and given a better chance to work with the government. This serves as a mitigating factor where CSR is mandated and increases compliance.

---

65 Christopher McCrudden, 'Corporate Social Responsibility and Public Procurement' (Social Science Research Network 2006) SSRN Scholarly Paper ID 899686 <https://papers.ssrn.com/abstract=899686> accessed 26 June 2021.

66 McCrudden (n 53).

67 Phoebe Bolton, 'Government Procurement as a Policy Tool in South Africa' (2006) 6 Journal of Public Procurement 193.

Kenya's public procurement framework has several provisions that take into account social policy.[68] Through reservations and set asides, the Public Procurement and Asset Disposal Act 2015 makes provisions for various groups including the youth and women.[69] This is used to achieve specific objectives targeting such groups.

Another approach that has been used in public procurement is introduction of conditions in contracts between government entities and suppliers. Such conditions are often used to achieve social policy objectives. Similarly, these avenues can be explored to introduce conditions that touch on investment in legal aid and access to justice.

Third, self-regulation can be introduced as an incentive where there is a mix of voluntary and mandatory provisions on CSR. Self-regulation involves giving the industry players a chance to come up with regulations on their operations as opposed to government regulation. This approach of regulation is particularly preferable where there is need to ensure increased compliance. Mandatory provisions often require the force of legal enforcement to achieve the intended purpose but self-regulation provisions have a high rate of acceptance.

Fourth, participatory involvement of the private sector to develop a policy would be an incentive. The players in the business industry need to feel engaged beyond merely being informed. This can start with a national conference on the role of the business sector in access to justice. During such a conference, the sector players will get an opportunity to contribute to a discourse on the role of the business community in pursuing universal access to justice. Such a platform will bring out the prevailing perspectives from the business owners and further inform the policy makers on strategies that can be used to engage the sector more efficiently.

Fifth, the Legal Aid Act affords an avenue or reforms through amendments to provide incentives for business firms contributing to legal aid. The Act provides the framework for provision of legal aid and financing of legal aid in Kenya. It establishes the National Legal Service and its functions. A significant part of the Act is dedicated to the structure and functioning of the

---

68 The Public Procurement and Asset Disposal Act, 2015 makes provisions on pursuit of affirmative action programmes through preferences for specific groups such as women and the youth.

69 See Public Procurement and Asset Disposal Act, 2015, s 53.

National Legal Aid Service. The Act is therefore an avenue through which the scope of legal aid can be expanded by granting businesses a chance to contribute to the legal aid fund. The sections on the fund can be amended to make provision for contributions from the business sector.

As an incentive to the business sector, the National Legal Aid Service can be authorized to give references to organizations seeking to contract with the government. The government should then implement a preferential treatment for such entities through procurement law. This will act as an enticement for business entities to contribute to the legal aid fund.

Challenges of engaging the business sector

From the nature of business operations, there are several challenges that come with getting into the arena of the rule of law and access to justice. The major challenge is the inclination of businesses to profit maximization as explained in the section on CSR. This discussion goes back to the debate raised by Friedman that the only goal of businesses is to make profits.[70]

The viability of adding externalities to the profit maximization objective is the main issue to grapple with in bringing the business sector on board. It has also been argued that profit maximization and social goals are not mutually exclusive.[71] According to this view, firms that maximize profit inherently serve a social goal and only need to realize it. This implies that it is not the case that firms are socially responsible when they roll out specific social activities.

Where a business has many owners it becomes difficult to unite their objectives outside profit or get them to accede to an investment in what are considered divergent goals. Some business owners may also find it difficult to measure the performance of its managers in other investments other than profits. Berle[72] wrote long ago about the focus of businesses as profit and no

---

70 Friedman (n 35).

71 Paul Clyde and others, 'The Social Impact of Profit-Maximizing Firms' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3284113 <https://papers.ssrn.com/abstract=3284113> accessed 13 March 2021.

72 Fenner Stewart, 'Berle's Conception of Shareholder Primacy: A Forgotten Perspective For Reconsideration During the Rise of Finance' 34 43. Adolph A Berle wrote in the 1920s and the 1930 s.

other.[73] Dodd took the view that businesses have a dual function, being profit and social functions.[74]

The view taken by Berle is captured in what is called shareholder primacy.[75] However, considering the emerging issues and changes in the business environment with advances in technology, is it time to reconsider this debate and establish the role of businesses in access to justice. There are many notable social problems today, many for which business corporations have been blamed and rightly so. This paper takes the stance that the issue is not whether businesses pursue profit or not, the focus should be on social responsibility of businesses. The debate should be on how profit maximizing businesses can give back to the society.

Relatedly, there is a challenge on the negative perception of imposing new responsibilities on businesses. Going back to the arguments of Friedman, it may be seen as a form of tax.[76] Critics argue that businesses pay taxes so that the government can take care of other social needs. To call upon the business community to contribute further is imposing a tax undemocratically.[77]

This is a legitimate concern especially in developing nations where there the ease of doing business is rated poorly.[78] Kenya has recently introduced a digital services tax[79] targeting businesses. This comes at a time when most businesses are increasing digital transactions and start-ups are using technology more than before. Such measures are prohibitive and give the perception that doing business in Kenya is getting harder by the day. This is

---

73 E Merrick Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1145. See also Lynn A Stout, 'Bad and Not-So-Bad Arguments For Shareholder Primacy' [2002] SSRN Electronic Journal <http://www.ssrn.com/abstract=331464> accessed 13 March 2021.

74 Stout (n 64).

75 ibid.

76 Friedman (n 35).

77 Stout (n 64).

78 World Bank, *Doing Business 2020: Comparing Business Regulation in 190 Economies* (Washington, DC: World Bank 2020) <http://hdl.handle.net/10986/32436> accessed 13 March 2021.

79 'Digital Service Tax (DST) - KRA' <https://kra.go.ke/en/helping-tax-payers/faqs/digital-service-tax-dst> accessed on 13th March 2021. Businesses operating through a digital marketplace are required to pay a digital services tax and VAT on digital supplies in addition to other taxes applicable under Kenyan tax laws.

coupled with an increased public debt[80] that has affected the performance of the economy negatively.

Introduction of new social responsibilities on businesses also faces the challenge of enforcement. Mandatory enforcement of corporate social responsibility is likely to face resistance as a disguised form of tax. This is because business entities do not pursue a role in social transformation but profit maximization. However, compliance can be achieved if reforms are introduced with incentives as proposed in this paper.

CONCLUSION

This paper has explored the ways in which the business sector can be engaged as duty bearers in matters access to justice. The UN Guiding Principles on Business and Human Rights have established a basis for business entities to operate with due regard to human rights. The government of Kenya has followed up with the National Action Plan on Business and Human Rights but there is need to go beyond begging for compliance to imposing compliance using innovative strategies and reforms.

This paper has placed the business sector at the centre of access to justice in Kenya. It has explored corporate social responsibility as a tool to make the business sector a crucial partner in the justice sector. It has further considered the concept of corporate social responsibility in the context of legislation, to find out the viability of policy and legislative interventions of expanding the scope of CSR to incorporate access to justice. The paper has highlighted the various ways through which the business sector can be integrated as duty bearers in access to justice, through provision of funding for legal aid, compliance with human rights and influencing the course of national policy.

The paper has also demonstrated how the introduction of mandatory CSR provisions may face challenges that can be mitigated by incentives. Key incentives considered include the use of public procurement and tax rebates. These incentives make it possible for a framework to be established to make the business sector a duty bearer in access to justice.

[80] See Central Bank of Kenya < https://www.centralbank.go.ke/public-debt/ > accessed 15 March 2021.

Role of County governments in promotion of legal aid for poor and vulnerable: prospecting for concurrency of functions under Constitution of Kenya 2010

Wambua Kituku*

ABSTRACT

A review of the division of functions between the two levels of governments under the Constitution of Kenya (CoK) (2010) indicates that institutions which play key roles in provision of administration of justice such as courts, police and police fall under the exclusive orbit of national government. As such, these institutions are not devolved but have nevertheless decentralized their structures and services in accordance with the system of devolved government. Yet county governments have in recent months, partnered with national government organs and agencies along with civil society organizations supported under the EU-funded Programme for Legal Empowerment and Aid Delivery in Kenya (PLEAD) to promote legal aid initiatives within their respective jurisdictions. The scheme of devolution under the CoK 2010 is such that county governments can only lawfully perform functions listed in the Fourth Schedule under their exclusive jurisdiction or those deemed to be shared and therefore concurrent. On the other hand the national government is vested with functions that are not only exclusive and concurrent but also residual. The national government formulated the National Legal Aid and Awareness Policy and subsequently enacted the National Legal Aid Act (2016) which affirm the mandate of providing legal aid as a national function. This paper interrogates the legal basis of and emerging practices as well as issues in County governments' active involvement in the delivery of legal aid initiatives in Kenya. The paper argues that the county government's constitutional mandate of promoting popular participation of communities in governance at the local level creates a basis for concurrency between the two levels of government in the provision of justice services including legal aid in Kenya. Despite emergent challenges, county governments have a

* PhD (University of Nairobi), LLM (University of Nairobi) LL.B (University of Nairobi), Advocate of High Court of Kenya & Project Manager, UNDP Kenya.

stake and duty therefore to enable the people access justice services, as a key aspect of promoting popular participation in governance processes at the local level.

Key words: Legal aid, Devolution, County governments

INTRODUCTION

According to the United Nations, 4.5 billion people are excluded from opportunities that the law provides, out of which 253 million live in extreme conditions of injustice, whereas 1.5 billion cannot resolve their justice problems.[1] These are rather grim statistics, given the fact that realization of access to justice for all is considered as one of the sustainable development goals to be achieved by 2030.[2] In Kenya, it is estimated that 63% of the population encounters legal problems which merit some form of redress, that out of this proportion, 25% are not able to seek legal assistance in the form of information or advice.[3] Among the key barriers to access to legal assistance include apathy, ignorance and poverty.[4] In a country where poverty rates are estimated at 36%, the challenge of seeking legal assistance is significant.[5]

In 2016, the Kenyan parliament enacted the Legal Aid Act (LAA) as the legal framework providing for establishment of the National Legal Aid Service, funding of legal aid and giving effect to the relevant constitutional provisions on promotion of access to justice as a right.[6] The adoption of the LAA, was culmination of a policy reform effort, which began in the mid- 1990s with the formation of legal aid steering committee under the Office of Attorney General

---

1 United Nations, *Task force on justice: justice for all- final report* (Center on International Cooperation, 2019) 33.

2 United Nations, T*ransforming our world: the 2030 agenda for sustainable development,* A/RES/70/1 of 2005 ,<sustainabledevelopment.un.org> accessed 08 June 2017; SDG 16.3 exhorts member states to promote rule of law at the national and international levels and ensure equal access to justice for all.

3 Hiil, *Justice needs and satisfaction in Kenya, 2017* (Hiil, 2018) 24 &48-9 www.hiil.org/publications/data-reports. accessed 24 September 2020.

4 Ibid, 59.

5 Kenya National Bureau of Statistics, *Basic report on well-being in Kenya based on the 2015/16 Kenya integrated household budget survey (KIHBS)* (KNBS, 2018) 44.

6 Act No 6 of 2016 (hereinafter referred to as the LAA, 2016).

that was tasked to design a national legal aid scheme.[7] The recommendations of the steering committee were later adopted in 2005, when the government began establishing the National Legal Aid and Awareness Programme (NALEAP). The inaugural Board of NALEAP was gazetted in 2007 and later launched in 2008 under the erstwhile Ministry of Justice, Constitutional Affairs and National Cohesion with support from a host of development partners.[8] A key goal of NALEAP was to advocate for policy and legal framework to govern provision of legal aid in Kenya.[9] About the same time, the Attorney General appointed a task force on judicial reforms, which later in 2010 submitted a report recommending for adoption of a legislative and policy framework on the establishment of a national legal aid system.[10]

The adoption of a new Constitution in 2010 gave further impetus to the realization of the national legal aid system by providing anchorage to a rights-based approach to access to justice.[11] Besides, Kenya's long-term development blue print, *The Vision 2030*, prioritized judicial reforms and enhancement of Bill of Rights,[12] and these were elaborated in the first *Medium Term Plan 2008-2012*, which further prioritized adoption of a Legal Aid Bill.[13] In the second *Medium Term Plan 2013-2017*, the government underscored the need to finalize the legislative and policy framework on legal aid as well as operationalizing national legal aid scheme.[14] It is against this background that the government finalized and ensured adoption of the LAA. The National Legal Aid Services (NLAS) was established to provide legal aid services, effectively taking over the role of the NALEAP.

---

7 Carole Amondi, 'Legal aid in Kenya: building a fort for wanjiku' in Yash Ghai and Jill Ghai (eds) *The legal profession under the new constitutional order in Kenya* (Strathmore University Press, 2014) 207

8 Republic of Kenya, *National legal aid and awareness policy* (Office of the Attorney General and Department of Justice, May 2015) 13.

9 H. Abigail Moy, 'Kenya community paralegals' in Vivek Maru & Varun Gauri, *Community paralegal and the pursuit of justice,* (Cambridge University Press, 2018) 177.

10 Republic of Kenya, *Final report on the task force on judicial reforms* (Government Printer, 2010) 89.

11 Constitution of Kenya, 2010 arts 19, 48 and 50.

12 Republic of Kenya, *Sessional paper No. 10 of 2012 on Kenya Vision 2030,* (Office of Prime Minister, Ministry of State for Planning, National Development and Vision 2030, 2012) 160.

13 Republic of Kenya, *First medium term plan (2008-2012*, (Office of Prime Minister, Ministry of State for Planning, National Development and Vision 2030, 2008) 132.

14 Republic of Kenya, *First medium term plan (2008-2012*, (The Presidency, Ministry of Devolution and Planning, 2013) 104.

The Constitution establishes two levels of government comprising the national government and 47 County governments which, though distinct and interdependent, are required to consult and cooperate with each other in the discharge of their respective mandates.[15] Responsibilities of the respective levels are defined in terms of functions or powers, which are divided according to the Fourth Schedule to CoK 2010. Where a particular function or power is only assigned to a particular level of government, such function is said to be exclusive.[16] The level of government which is not assigned such functions cannot purport to have legal competence to legislative over or discharge the same except with permission or compact with holder of the said function. On the other hand, where the CoK 2010 assigns a particular function or power to both levels of government, such is deemed as shared or concurrent.[17] Because concurrent functions overlap, the imperative for integration and coordination between both levels of government is self-evident. However, where the Constitution does not specify in which level of government a particular function should vest, the same is said to be residual and therefore exclusive to the national government.[18]

A reading of the LAA reveals that provision of legal aid is basically a function of the national government. The NLAS is created as a national government agency, providing no role for the County governments in its operations.[19] Even though the National Legal Aid and Awareness Policy of 2015, envisages decentralization of the NLAS to all counties, it does not provide a specific strategy on engaging County governments in the provision of legal aid.[20] The Constitution vests mandate over courts and therefore administration of justice, in the national government as an exclusive function.[21] It is therefore understandable that the current policy and legal framework governing legal aid in Kenya leaves county governments out of the equation.

---

15 Constitution of Kenya 2010, art 6 (1) &(2).

16 John Kangu, *The constitutional law of Kenya on devolution* (Strathmore University Press, 2015) 186-192; the author rightly notes that whereas art 186 (4) gives power to national parliament to legislate on any matter, a purposive interpretation of the Constitution and in particular Fourth Schedule bears out functional areas that are only vested in County governments.

17 Constitution of Kenya, 2010, art 186 (2).

18 Constitution of Kenya, Art 186 (3).

19 Legal Aid Act, 2016, s 9 (1).

20 Republic of Kenya, *National legal aid and awareness policy* 25.

21 Constitution of Kenya 2010, Fourth Schedule, s 8.

To support the effective implementation of LAA, development partners, civil society and state agencies have developed partnerships aimed at accelerating provisions of legal aid services at the grassroots. One such initiative is the Programme for Legal Empowerment and Aid Delivery (PLEAD), which is funded by the European Union and implemented by United Nations in conjunction with the National Council for Administration of Justice (NCAJ) and civil society organizations.[22] Experiences emerging from the implementation of PLEAD reveal that County governments are now forging partnerships with civil society organizations to establish schemes for provision of legal aid.[23] In the absence of provisions indicating concurrency between National and County governments, of functions and powers relating to administration of justice, on what legal basis are counties dabbling into what is understandably is a national government function? This is the central question this paper seeks to address.

This paper interrogates the legal basis of and emerging practices as well as issues in County governments' nascent involvement in the delivery of legal aid initiatives in Kenya. Academic discourses have neglected the role of subnational governmental authorities in provision of legal aid and this is a gap which the paper responds to. The paper argues that a purposive interpretation of application of Bill of Rights and the division of responsibilities between the two levels of government creates a basis for concurrency between the two levels of government in the provision of limited justice services including legal aid in Kenya. After introducing the subject, the second section of this paper explores the conceptual linkages between legal aid, rights and governance. A theoretical basis of envisioning legal aid provisions as essential to realization of human rights and sound governance is canvassed. The third section examines the legal basis for Counties to undertake legal aid initiatives as a concurrent function. In the fourth section, the paper provides an assessment of emerging practices, challenges and prospects underpinning the role of Counties in the provision of legal aid before conclusions in the final section.

---

[22] See https://www.judiciary.go.ke/legal-empowerment-aid-delivery-plead-programme-launched/ accessed 4 December 2020; the report refers to this problem as the 'justice gap'.

[23] See for instance PLEAD Verdict, issue No 3 of 2020, < https://www.unodc.org/documents/easternafrica//Criminal%20Justice/PLEAD_Verdict_Issue_3_APR_2020.pdf> accessed on 4 December 2020; the Newsletter reports the establishment of the first-ever County Legal Unit by the County Government of Mombasa in collaboration with the Human Rights Agenda (HURIA), a coast-based NGO and legal aid provider.

Conceptualizing link between legal aid, rights and governance

Legal aid is defined as legal advice, assistance and/or representation at little or no cost to the person designated as entitled to it.[24] The definition is broad enough to cover legal aid in both criminal and civil proceedings. This is significant because historically, the concept of legal aid has evolved from legal frameworks focused on right to fair trial within the context of criminal proceedings.[25] The fact that the only stand-alone international framework on legal aid- the United Nations Principles and Guidelines on Access to Justice in Criminal Justice Systems[26]- leans towards criminal trials underscores this bias. The necessity of, and rationale for, legal aid also grew from the fundamental imperative under international law to afford equal protection of the law to all, particularly the poor, marginalized and vulnerable groups in society.[27] As such, legal aid for civil cases is now viewed as an important legal empowerment strategy to strengthen livelihoods and better secure socio-economic rights for poor and marginalized.[28]

Legal aid has been conceptualized with the formal legal systems in mind, yet the poor and excluded have to contend with injustices within informal justice systems, where representation by counsel is non-existent.[29] Thus, a legal empowerment strategy which promotes legal and human rights education can be viewed as creating sufficient agency among the poor to represent themselves or have lay paralegals represent them in informal justice systems with success.[30] The Lilongwe Declaration on Accessing Legal Aid in the

---

24 UNODC & UNDP, *Global study on legal aid: global report* (United Nations, 2016) 8 <https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/global-study-on-legal-aid.html> accessed 4 December 2020.

25 Ibid 14.

26 General Assembly Resolution 67/187 of 2012.

27 UNDP & UNODC (n 24).

28 UNDP, *Legal aid service provision: a guide on programming in Africa* (UNDP, 2014) xi <https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/legal-aid-service-provision.html> accessed 4 December 2020.

29 Jury Helbling, Walter Kalin & Prosper Nobirabo, 'Access to justice, impunity and legal pluralism in Kenya' (2015) 47 Journal of Legal Pluralism and Unofficial Law, 348; authors point out that informal justice systems are susceptible to manipulation by elite, decision-makers lack training and supervision; reinforce patterns of discrimination and lack ability to resolve trans-community disputes.

30 Vivek Maru, 'Between law and society: paralegals and the provision of justice services in Sierra Leon and worldwide' (2006) 31 Yale Journal of International Law 428.

Criminal Justice System in Africa recognizes the role of informal justice systems and the need to divert cases from formal institutions while ensuring compliance of informal mechanisms with human rights standards.[31] It is noteworthy that definition of legal aid under the LAA embraces the one advanced by the international community, while incorporating promotion of legal awareness and education but falls short of recognizing the essence of legal assistance in informal justice systems.[32]

To provide justification for the provision of legal aid by the government, the utilitarian approach that is anchored in economic analysis of law theory, views legal assistance as a welfare good meant to maximize benefits to the poor.[33] Thus, legal aid is deemed an instrumental good and its importance is derived from the benefits that accrue to its recipients, for example legal reform and shift in wealth and power relationships in society.[34] This theory inclines the State to view provision of legal aid as an act of charity, conditioned on overall improvement of welfare of the recipients. To advance this approach, a cost benefit analysis is employed as the tool to evaluate the impact of legal aid services and enable policymakers adopt informed decisions on how to address gaps and allocate resources more efficiently and effectively.

A report by the World Bank which reviewed various cost-benefit analysis (CBA) studies revealed that benefits in investments on legal aid schemes outweigh the costs, including savings to government and society largely from avoided cost related to unfair imprisonment and efficiency gains in expedient court processes.[35] For instance in England and Wales, it is estimated that for every dollar invested in providing legal aid generates $2.40 in savings for government and $14.50 in wider social and economic benefits.[36] In Uganda,

---

31 Penal Reform International, 'The Lilongwe declaration on accessing legal aid in the criminal justice system in Africa' (Conference on legal aid ain the criminal justice: the role of layers, non-lawyers and other service providers in Africa' (Lilongwe Malawi, November 22-24, 2004) Clause 6 < https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-2004-lilongwe-declaration-en.pdf> accessed 8 December 2020.

32 Legal Act Aid 2016, s 2.

33 Marshall Breger, 'Legal aid for the poor: a conceptual analysis' (1982) 60 North Carolina Law Review 286-7.

34 Ibid.

35 George Harley, Irina Capita, Milo's Markovic & Elaine Panter *A tool for justice: the cost benefit analysis of legal aid* (World Bank & International bars Association, 2019) 14-5 <http://documents.worldbank.org/curated/en/592901569218028553/pdf/A-Tool-for-Justice-The-Cost-Benefit-Analysis-of-Legal-Aid.pdf> accessed 4 December 2020.

36 United Nations, *Justice for all* 20.

a CBA that was carried out before the establishment of a national legal aid scheme revealed net positive benefits would accrue from reduction in case backlogs, cost savings in reduction in prison populations, employment benefits (in terms of recruitment of paralegals and post-detention productivity).[37] Investment in legal aid at the sub-national level also brings net positive benefits, for instance providing legal representation to poor people at risk of losing homes saved the city of New York about $320 million per year.[38] Even though review of literature on access to justice in Kenya reveals a gap in the area of CBA, it is plausible that similar benefits could accrue from investments in legal aid, given the persistent problems of case backlogs in courts, overcrowding in prisons, economic disruptions caused by conflicts and socioeconomic rights violations among others.

A rights-based approach in theorizing the justification for legal aid views the same as necessary for realization of access to justice for those who wish to make use of state-sanctioned dispute resolution mechanisms but cannot afford the same.[39] UNDP broadly defines access to justice as the ability of people especially from disadvantaged groups to seek and obtain just and equitable remedy through formal and informal institutions of justice, in conformity with human rights standards.[40] Thus, legal aid provides a vital link between the vulnerable and marginalized with the justice system broadly, as an arena for vindication of rights as legal claims.
In criminal trial process, the right to legal aid in the form of free legal representation has been established under international law, with the United Nations Human Rights Committee affirming in the case *Robinson v Jamaica*[41] that an accused person charged with capital offence was entitled to legal representation at the cost of the State, for the interests of justice so required, as per Art 14 (3) (d) of the International Covenant on Civil and Political Rights. It should be noted that before 2010, the Kenyan Constitution explicitly

---

37 Legal Aid Service Providers Network, 'Cost benefit analysis of the Uganda national legal aid policy' (LASPNET, May 2016) ,< https://www.jlos.go.ug/index.php/com-rsform-manage-directory-submissions/services-and-information/press-and-media/latest-news/item/579-cost-benefit-analysis-of-the-legal-aid-policy> accessed 5 December 2020.

38 Harley et al (n 35) 8.

39 Breger (n 33), 287-291.

40 UNDP Access to Justice practice note' (UNDP,2004) 6 <https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/access-to-justice-practice-note.html> accessed 4 December 2020.

41 UNHRC Communication No 223/1987 delivered on 30 March 1989.

precluded the right to legal representation at the expense of the State.[42] This changed with the adoption of CoK 2010, and the framing of the right to legal representation embraced the wording of ICCPR.[43]

Before the adoption of the LAA, the Kenyan courts adopted the approach of the UNHRC in the case of *David Njoroge Macharia v Republic*,[44] noting that accused persons were entitled to legal aid in capital offence cases where the penalty is loss of life. However, the Court of Appeal in *Thomas Alugha Ndegwa v Republic*[45] noted that the right to legal aid under such circumstances was not absolute and could be circumscribed if it was proven that the accused person was able to afford legal representation. In this case, the Court also extended the right to free legal assistance to accused persons facing offences with the punishment of life imprisonment.

With regards to civil cases, the Supreme Court in the case *Republic v Karisa Chengo & 2 others* observed that the right to free legal assistance under CoK 2010 covers both criminal and civil trials only "if substantial injustice would otherwise result".[46] The Court further noted that even though the LAA 2016 does not provide a definition of "substantial injustice", the Act nevertheless provide a basis for NLAS to determine when legal aid would be provided to applicants.[47]

Legal aid can also be viewed as a social policy tool facilitating persons to uphold their citizenship rights in the struggle against social exclusion.[48] This opens way for conceptualizing legal aid as a means to promoting the participation of excluded citizens in civic life and therefore governance of their respective societies. Attributes of sound governance include a fair and reliable dispute resolution systems, which allow challenges to procedural and substantive legality of decisions, acts of omissions made by governing

---

42 Constitution of Kenya (1963) (now repealed) s 77 (4).

43 CoK 2010, art 50 (2) (h).. "*..to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this rights promptly*".

44 (2011) eKLR, also cited as Criminal Appeal 497 of 2007.

45 2016 eKLR also cited as Criminal Appeal (Application) 2 of 2014.

46 (2017) eKLR also cited as Petition No 5 of 2015, Para 84.

47 Ibid para 90; the provisions of s 36 (4) provide a criteria which NLAS can apply to determine if legal aid should be provided to an applicant.

48 Hilary Sommerald, 'Some reflections on the relationship between citizenship, access to justice and the reform of legal aid' (2003) 31 Journal of Law and Society, 348.

authorities.[49] In this regard, UNDP views legal aid as playing a critical role in mobilizing poor and marginalized communities to challenge discriminatory norms, policies, and institutions which perpetual exclusion, impunity and injustice through such advocacy for reforms and strategic public interest litigation.[50]

The LAA adopts a governance approach to legal aid provision, by including in the definition of the concept, "....*recommending law reform and undertaking advocacy work on behalf of the community*".[51] In addition, one of the functions of the NLAS is to promote public interest litigation including on areas of concern to marginalized groups.[52] This creates basis for extending legal aid to indigent persons desiring to pursue strategic public interest litigation in a manner that may promote social inclusion and participation in governance.
From the foregoing, there exists a strong normative basis for advancing the argument that legal aid is necessary for promotion of human rights and citizen participation in governance processes. There is also a strong utilitarian basis for advocating for state investment in legal aid schemes at both national and sub-national levels, owing to the net benefits accruing from a welfare point of view.

Legal entry points for Counties' role in providing legal aid in Kenya

The LAA and the National Legal Aid and Awareness Policy, 2015 frame the provision of state-funded legal aid 1s a national government function. To justify a role for County governments in provision of legal aid for public resources therefore would require an inquiry on the Constitution, with a view to establishing concurrency of functions and powers pertaining to state-funded legal aid.

One area for prospecting concurrency is examining the implication of Bill of Rights on the functions and powers of County governments. The right to state-funded legal aid is constitutionally anchored in the Bill of Rights, which binds the state organs and all persons.[53] Organs of County governments, by dint of definitions of terms provided for in the Constitution fall within the meaning of

---

49 Stephen Tully, 'Access to justice within the sustainable development self-governance model' (London School of Economics & Political Science Discussion Paper No 21 June 2004) 1.
50 UNDP, *Legal aid service provision,* 10-11.
51 Legal Aid Act 2016, s2.
52 Legal Aid Act 2016, s 7 (1) (e).
53 Constitution of Kenya 2010 Art 20 (1).

a state organ.[54] The clause on the supremacy of the constitution alludes to "state organs at both levels of government" buttressing this position.[55] The High Court in the case, *Andrew Njeru & 34 Others vi County Assembly of Embu and 3 others*,[56] issued a conservatory orders against the County government of Embu, Speaker of the County Assembly of Embu, the Senate and the Speaker of the Senate as state organs involved in the impeachment proceedings of the Governor of Embu County.

The binding nature of the Bill of Rights is such that it enjoins County authorities to observe rights and take positive measures to ensure fulfilment of rights.[57] Positive measures explicitly recognized by the Constitution refer to legislative, policy, standard setting and other measures to achieve progressive realization of rights enshrined in Article 43.[58] The rights articulated under Article 43 relate to socioeconomic rights such as water, sanitation, food, Healthcare, social security and education. These rights correlate with the service delivery functions and powers of County governments as listed in the Fourth Schedule. International standards on socioeconomic rights include state obligations on provision of access to effective judicial and other appropriate remedies at both national and international levels.[59] One can therefore argue that Counties have an obligation to provide legal assistance to aggrieved persons seeking judicial remedy as a result of complaint relating to violation of right to food.

---

54 Constitution of Kenya 2010. Art 260; state organ means a commission, office, agency or other body established under the Constitution.

55 Constitution of Kenya 2010. Art 2 (1).

56 (2014) eKLR also cited as Petition No 8 of 2014.

57 Jill Ghai, 'The bill of rights and county governments: emerging jurisprudence from the courts' in Conrad Bosire & Wanjiru Gikonyo (eds) *Animating devolution in Kenya, the role of the judiciary: commentary and analysis on Kenya's emerging devolution jurisprudence* (IDLO, Judiciary Training Institute & Katiba Institute, 2015) 167.

58 Constitution of Kenya 2010, art 21 (2).

59 See for instance, United Nations Economic and Social Council, 'Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights: general comment 12 (twentieth session, 1999) the right to adequate food (art. 11)' E/C.12/1999/5 dated 12 May 1999, para 32 http://www.fao.org/fileadmin/templates/righttofood/documents/RTF_publications/EN/General_Comment_12_EN.pdf. 6 December 2020.

The Bill of Rights imposes duties on all State organs to address the needs of vulnerable groups in society.[60] Needs of these groups can be construed to include gaps in access to justice. Where such gaps overlap with violations relating to access to socioeconomic rights, it is arguable that County governments have a justification to provide legal aid services to vulnerable groups.

The second area of prospecting for concurrency is in the interpretation of the objects of devolution using the utilitarian approach highlighted in the previous section. It must be noted from the onset that the objects of devolution are part of the purposes of the CoK 2010 to be promoted through interpretation and in some cases, when read together with other parts of the document, may give rise to enforceable obligations.[61] One of the objects of devolution is facilitate the decentralization of State organs, their functions and services away from Nairobi.[62] It is in line with Article 6 (3) which requires national state organs to ensure reasonable access to services to all parts of the Country.

The Judiciary as one among the National state organs has since rolled out a programme of construction and opening of courts in various counties, with the aim of ensuring High court presence in all 47 counties.[63] County governments have played a role in this Programme by donating land for purposes of construction of courts.[64] It can be argued therefore that by doing so, Counties have been fulfilling the requirements of Art 174 (1) (h) to facilitate decentralization of judicial services to counties. Provision of state- funded legal aid has not matched the expansion of courts however. The National Legal Aid Service has so far managed to establish branches in not more than

---

60 Constitution of Kenya 2010, art 21 (4); Vulnerable groups are broadly defined to include women, the aged, youth, minorities (ethnic, religious, cultural etc) and marginalized communities.

61 Kangu (n 16) 109.

62 Constitution of Kenya art 174 (h).

63 See Word Bank, 'Project information document- judiciary performance improvement (P 105269) https://documents.worldbank.org/en/publication/documents-reports/documentdetail/144861468774902740/project-information-document-appraisal-stage-judicial-performance-improvement-p105269. accessed 6 December 2020; the World Bank noted that in 2012, there were only 17 High Court stations and the hence the plan to build 30 new stations and over 200 new magistrates courts in Kenya would be the largest courthouse construction Programme in sub-Saharan Africa.

64 See for instance https://www.judiciary.go.ke/new-court-facilities-in-country-to-improve-service/. accessed 6 December 2020; County government of Muranga donated two acres of land for construction of a new high Court building.

6 counties outside Nairobi. The slow pace of decentralizing NLAS will disadvantage vulnerable groups from accessing state-funded legal aid schemes, particularly in marginal areas of the Country. From a utilitarian perspective, allowing Counties to establish legal aid schemes, especially in areas where NLAS is yet to decentralize, should be viewed as advancing the requirements of decentralization under Art 174.

The third area of prospecting for concurrency is in the County government's mandate of promotion self-governance and participation. The Fourth Schedule lists as a function of County governments, ensuring and coordinating the participation of communities and locations in governance at the local level.[65] Viewed together with the object of devolution that promotes self governance and participation of the people in the exercise of powers of State and decision-making,[66] it is possible to interpret a duty on County governments to adopt laws and measures to promote self-governance and participation. The County Government Act[67] has extensively elaborated on this function, by mandating County governments to conduct civic education[68] and facilitate public participation[69] in governance processes. County government are further mandated to establish citizen service centers and entering into agreements with the national government or its agencies for provision of shared services.[70] Because facilitating access to justice is a useful strategy in empowering the vulnerable and marginalized to challenge State decisions and actions, it is arguable that County governments should be allowed to establish legal aid initiatives alone or in partnership with national government (or its agencies) for this purpose. These initiatives should empower locals through civic education to understand governance processes and where need be, move Courts to check or curb excessive or oppressive decisions or actions of the State at both levels.

65 CoK 2010, Fourth Schedule, Part 2, s14.
66 Art 174 (1) (c).
67 County Governments Act, Act No 17 of 2012 (Revised Edition 2020).
68 County Government Act No.17 of 2012, part X.
69 County Government Act No.17 of 2012, part VIII.
70 County Government Act No.17 of 2012, s 118 & 119.

Emerging practices, issues and prospects in Counties' roles in provision of legal aid- the case of Mombasa County Legal Aid Unit

Mombasa County plays host to Kenya's second- largest city located in the coastal region, and with an estimated population of 1.2million people.[71] Poverty rate in the County is estimated at 27% which is below the national rate even though levels of inequality are quite high.[72] According to UNDP, an estimated 15% of the residents of Mombasa who identified themselves as marginalized sought and access justice.[73] The level of awareness on existence of legal aid programmes in the county was generally low, with only an estimated 22% of the population demonstrating awareness on the subject.[74] Of the total survey respondents in the county, only 7% had benefited from any form of legal aid programmes that were offered in the localities.[75] The foregoing paints a rather problematic status of access to justice in the County.

When UNDP launched a call for proposal under PLEAD for civil society organizations (CSOs) on promotion of access to justice in 12 counties (including Mombasa), Human Rights Agenda (HURIA) was among the selected grantees from Mombasa.[76] HURIA embarked on raising awareness on legal issues through open forums, radio broadcasts and social media campaigns. In conjunction with the University of Nairobi's School of Law students, HURIA organized legal aid clinics, dispensing legal advice and information to poor and vulnerable residents of the County. Most of the complaints brought to the clinics related to violations meted out on residents by the enforcement officers from the County Government of Mombasa (CGM).

HURIA therefore approached the Office of County Attorney to explore ways in which human rights approaches to enforcement of County laws could be

---

71 Republic of Kenya, *2019 Kenya population and housing census document 1: population by county and sub*-County (KNBS, 2019) 7.

72 KNBS (n5) 50.

73 UNDP, *Baseline survey for phase II of amkeni waKenya Programme (2015-2018)- final report*, (UNDP, 2017) 63.

74 Ibid 70.

75 Ibid 71.

76 HURIA received a 3-year grant of $100,000 per year.

improved.[77] Among the strategies agreed upon was the establishment of the Mombasa County Legal Aid Center (CLAC) to provide legal information and advice to residents of the County, particular those facing enforcement charges at the Mombasa County Court Station. The CLAC is also meant to promote legal literacy on county laws and regulations. In November 2019, HURIA signed a memorandum of understanding with the CGM to formalize the partnership towards establishment of CLAC.[78]

The CLAC was eventually inaugurated in March 2020. The CGM provided office space and furniture, whereas HURIA leveraged on its partnership with University of Nairobi School of Law to provide personnel and donate computers for record keeping. The outbreak of COVID-19 pandemic and public health restrictions that ensued led to temporary closure of the CLAC but the Center was able to handle 436 cases by end of September 2020.[79] The Unit nevertheless was the first such initiative of its kind in Kenya. The CGM relied on the provisions of the Mombasa County Office of the County Attorney Act[80] legal basis for establishment of CLAC. The Act empowered the County Attorney to establish legal aid service unit[81] and undertake litigation on in public interest.[82]

Several legal issues arise from the establishment of CLAC. First, it should be noted that the Parliament enacted the Office of the County Attorney[83] in 2020 as the national law regulating the functions and powers of the Office of County Attorney and therefore a risk of conflict of laws arises. The functions and powers of the County Attorney under the national law though similar to those under the Mombasa County law are rather circumscribed,[84] and that the

---

77 HURIA, 'Enhancing access to justice through public partnership' (HURIA, 2020), <https://huria.ngo/wp-content/uploads/2020/08/Enhancing-Access-to-Justice-through-Partnerships.pdf> accessed 6 December 2020.

78 Memorandum of Understanding between Human Rights Agenda (HURIA) and the County Government of Mombasa, dated and last signed by the parties November 2019

79 HURIA, 'Operationalizing access to justice where it begun: the journey of establishing the legal aid centre' a brochure produced by HURIA and on file with the author.

80 County Attorney Act No. 3 of 2017; the Act provides for framework for establishing the office of County Attorney and regulates the appointment, functions, operations and dismissal of the office-holder.

81 County Government Act No.3 of 2017s 7 (2) (a) (v).

82 County Government Act No.3 of 2017s s 6 (1) (e).

83 Mombasa County Attorney Act No 14 of 2020.

84 National Assembly of Kenya, 'Parliamentary debates, national assembly official report', Tuesday 4th June 2019, 13; < http://www.parliament.go.ke/sites/default/files/2019-06/Hansard%20Report%20-%20Tuesday%2C%204th%20June%202019%28P%29.pdf>

functions of litigating in public interest and providing legal aid are excluded.[85]Rather, under the national law, the County Attorney is limited to rendering legal advice on legal and legislative matter and representing the county government in civil suits. A question therefore arises as to whether the national law takes away the functions of the Mombasa Office of County Attorney related to provision of legal aid.

The legislative authority of county assemblies include enacting laws that are necessary for or incidental in the performance of County functions.[86] Ostensibly, this constitutional provision provided basis for CGM along with other counties therefore enacted respective county laws establishing the office of County Attorney, even in the absence of the national law on the subject matter. However, the Constitution also empowers parliament to legislate on any matter[87] and this creates concurrency in the power to legislate over the office of County Attorney[88] thus bringing into operation, the relevant provisions on conflict of laws. One of the tenets applied in resolving conflict of laws is that national legislation overrides county legislation if the former applies uniformly and establishes uniform norms, standards and national policies.[89] This is the case with the national law on county attorneys which is designed as a framework law. However, by circumscribing functions of County Attorneys granted in the pre-existing county legislations, is the conflict sustainable?

It has been cautioned that national laws operating under the uniformity clause should not impose identical regulatory regimes across the nation, but rather, should allow for experimentation by counties without risk to the rest of the country.[90] Similarly, framework laws enacted to provide uniformity of norms and standards should not exhaustively legislate in a manner that pre-empts further legislation by counties on that particular matter.[91] It is instructive that

accessed 7 December 2020; In moving the motion, the leader of Government Business, Hon Duale stated that the intention of parliament was to create an office which was equivalent to the Attorney-General's but with less powers.

85 Mombasa County Attorney Act No 14 of 2020 s 7 & 8.

86 County Government of Kenya Art 185 (2).

87 County Government of Kenya Act No.3 of 2017s art 186 (4).

88 Kangu (n 16) 195; author argues that Art 186 (4) is rather meant to enable parliament legislate on areas where there is uncertainty or lack of clarity on whether a function or power in question is exclusive, concurrent or residual.

89 County Government of Kenya 2010, art 191 (2) (a) as read with (3) (b).

90 See the case of *New State Ice Co v Liebmann* 285 U.S. 262, 311 (1932).

91 Kangu (n 16) 227-8.

the national law on county attorneys leaves room for additional functions and powers as may be necessary for effective discharge of mandate and administrative interests of the office holder.[92] Thus, creation of legal aid schemes and pursuing public interest litigation may be viewed as legitimate functions and powers necessary for the furtherance of the mandate of County Attorneys, going by the justifications provided in previous section.

The second issue relates to regulation of the legal aid function of County governments, to avoid a race to the bottom.[93] There is no singular framework regulating establishment of paralegal schemes. Thus counties will rely on various existing legislations for this purpose. The County Attorneys must seek accreditation of legal aid service units as legal aid providers from the National Legal Aid Service.[94] The personnel working under the CLAC must abide by the Code of Conduct, and in the case of paralegals, they must belong to a self-regulatory association.[95] However, it should be noted that for one to be accredited as a paralegal, they must have undergone a training programme accredited by the Council of Legal Education (CLE).[96] For now, the CLE has not promulgated regulations to govern accreditation of paralegal training programmes and for this reason, the accreditation process may be inoperable. For now Mombasa CLAC has a long way before achieving accreditation and enjoying the benefits thereof.

The third issue emanates from the lack of independence of the CLAC as currently constituted, which goes against the Lilongwe Declaration. The Declaration recommends that States establish institutions to provide legal aid that are independent of government justice departments and accountable to parliament.[97] In the case of CLAC, the entity is a department within the CGM and reports to the County Attorney and not the County Assembly. The County Attorney is in turn accountable to the Governor. The risk of political interference in the operations of the CLAC is significant.

---

92 The Office of County Attorney Act, 7 (h) & 8 (2) (b).

93 Ghai (n 57), *The bill of rights and county governments*, 167; the author envisages as a risk, the lowering of human rights safeguards by Counties as a strategy for attracting benefits (e.g. investments) or discouraging vulnerable groups from taking residence within their jurisdictions.

94 Legal Aid Act 2016, s 57 as read with The Legal Aid (General) Regulations, 2020, r 29 (6); this rule provides for accreditation of State agencies.

95 Legal Aid Code of Conduct for Accredited Legal Aid Providers, 2019.

96 The Legal Aid (General) Regulations, 2020, r 29 (1).

97 Lilongwe Declaration, Annex on Legal Framework.

The fourth, CLAC is not adequately funded by the CGM and therefore its sustainability is not guaranteed. Indeed, the Lilongwe Declaration recommends for government funding to ensure sustainability of legal aid in African countries. Assessment of the Mombasa County Annual Development Plan for the financial year (FY) 2020/1 fails to identify any particular allocation for the CLAC. Instead, the plan prioritizes construction of county courts in Changamwe (Ksh25 million) as part of efforts of bringing justice services closer to the people.[98] Unless the CGM allocates resources for the CLAC, it is plausible that the operations of the Unit will rely heavily on donor funding through HURIA. Thus, the County Attorney should therefore seek accreditation from the NLAS in order access legal aid funding in the interim as a way of diversifying funding sources for sustainability. Advocacy for budgetary allocations is also necessary.

Fifth, there is limited interface or interaction between CLAC and informal justice systems as recommended by the Lilongwe Declaration.[99] This siting of CLAC at the Mombasa Law Courts premises underlines the fact that it is designed to serve indigents engaged with formal justice institutions. The MOU signed between CGM and HURIA does not make reference to support for persons facing with informal justice systems. In the absence of a deliberate strategy on this matter, it is possible that the CLAC may sideline those with justice needs connected to informal justice systems, with the risk of leaving further behind, the poor and vulnerable all together.

The above challenges notwithstanding, there are prospects for strengthening Counties roles in provision of legal aid. There is strong goodwill from the government and development partners to support legal aid programmes in Kenya, as signified by the commitments made under MTP-III and PLEAD initiative respectively. CGM and HURIA should tap into this goodwill while taking care not to fall into the aid trap that undermines sustainability. The country is facing an unprecedented oversupply of lawyers and therefore opportunity arises to tap into the unlicensed and unemployed lawyers to provide services in CLAC on probono basis. Having established concurrency in the mandate of provision of legal aid, there are prospects for Counties to utilize existing intergovernmental relations mechanisms to promote sharing of

---

98 County Government of Mombasa, *Annual Development Plan 2020/1* (County Treasury, 2019) 21 http://www.mombasaassembly.go.ke/wp-content/uploads/2020/05/Mombasa-ADP-2020-21-Final.pdf. accessed 9 December 2020.

99 Lilongwe Declaration, Para 5.

experiences and consolidating common positions on policy and legislative matters.[100] In this regard, it is laudable that the County Attorneys have established a forum under the coordination of the Council of Governors.[101]

CONCLUSION

This paper sought to interrogate the role of county governments in provision of legal aid with a view to establishing a legal basis on the same. The paper has found for concurrency arising from application of the Bill of Rights and its binding effect on both levels of government. Concurrency is further justified from a utilitarian theoretical standpoint, as necessary for giving effect to obligations of County governments towards the poor and vulnerable who direly need justice services but may be denied due to delays in rolling of the NLAS. Using a governance approach to analysis of right to access to justice, County governments have an obligation to provide legal aid to promote participation of communities in their own governance and local affairs.

The establishment of the Mombasa County Legal Aid Center as a partnership between CGM and HURIA, The Centre is among the first of its kind the Country provides opportunity to pilot the idea of the Counties play an active role in legal aid provision. However, some key challenges have emerged relating to regulation, financing, independence and sustainability of establishment and operations of county legal aid units. Prospects for entrenching the role of Counties in legal aid provisions nevertheless exist and therefore County Attorneys have opportunities to cement and enlarge their nascent mandate in a manner that upholds public interest.

---

[100] Intergovernmental Relations Act Cap 5G, s 13 empowers the Intergovernmental Technical Relations Committee and Cabinet Secretaries to establish sectoral working groups, bringing together both levels on government on sectoral issues.

[101] See Nehemiah Okwembah, 'County attorneys in office legally, lobby tells activitsts' The Standard, 18 November 2020 edition https://www.standardmedia.co.ke/nairobi/article/2001394275/county-attorneys-in-office-legally-lobby-tells-activists accessed 9 December 2020.

Access to Justice and Institutionalization of Traditional Dispute Resolution Mechanisms: Lessons from South Africa

Alvin Kosgei* and Robert Mutembei*

ABSTRACT

This paper focuses on the institutionalization of Traditional Dispute Resolution Mechanisms (TDRMs). Based on the theory of decolonization, the paper argues that proper implementation of the imperatives under Article 159 (2)(c) and 67(2)(f) of the constitution requires a coherent and cogent policy to guide institutionalization of TDRMs. The paper analyzes the recently launched Alternative justice Systems Policy and finds that it does not robustly identify the strategies that would be useful in the process entrenching TDRMs as a viable justice system. To plug this gap, the paper looks to South Africa's Traditional Leaders and Governance Act which is one of the most robust sui generis frameworks in the post-colonial world providing for express institutionalization of TDRMs for dispute resolution and governance. The Paper concludes by highlighting the lessons that policy makers can utilize to develop a coherent process for institutionalization of TDRMs.

Key words: Access to justice, traditional dispute resolution, Kenya, South Africa, Reforms

BACKGROUND

One of the significant challenges facing policy makers as far as Traditional Dispute Resolution Mechanisms (TDRMs) are concerned is the question of proper institutionalization. Institutionalization refers to the process of mainstreaming the TDRMs into the current justice system.[1] It entails all the steps taken in embedding the said TDRMs into the identifiable dispute

* Mr. Kosgei; Partner, Head of Dispute Resolution, KMK Africa Law Advocates.
* Mr. Mutembei; Lecturer at Egerton University, Faculty of Law.

1 Kariuki Francis, "African Traditional Justice Systems," KMCO <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf > accessed 12 May 2021.

resolution mechanisms and defining the bounds, the process of facilitation and identifying the people and institutions responsible for implementation and oversight. Beyond the act of recognition in the law, institutionalization encompasses the very act of practical establishment of the TDRMs and engendering public awareness and validation.

There is no question that current constitutional, legislative and policy framework encourages the use of TDRMs as one of the alternative dispute resolution (ADR) mechanisms. Article 159 (2) (c) Constitution is explicit in enjoining the courts to implement the utilization of ADR to help realize the right of access to justice under article 48 and to reduce backlogs. It provides that (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles…(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3). On the other hand, Article 67 establishes the National Land Commission and provides that among other functions, the Commission shall encourage the application of traditional dispute resolution mechanisms in land conflicts.

Furthermore, other pieces of legislation such as the Community Land Act No 27 of 2016 and the Protection of Traditional Knowledge and Cultural Expressions Act, 2016 explicitly provide that TDRMs ought to be used as one of the available ADR mechanisms. It is therefore beyond peradventure that the legal framework demands, as much as possible, that traditional justice systems be utilized to resolve appropriate disputes. At the heart of the quest to recognize and support TDRMs is the realization of the limitations of the formal justice system.[2] These limitations as read with the obligation placed on the state by the Constitution to facilitate access to justice rationalize the relatively recent pronounced role of TDRMs in the legal and policy framework. Recently, the Alternative Justice Systems (AJS) Policy was launched to guide new legislation and realignment of the existing legal framework.[3] The said policy focuses on alternative justice systems wholesomely including the use of government administration officers, autonomous institutions such as the Chartered Institute of Arbitrators and Community Based Justice Systems run by civil society organizations. The Policy identifies four categories of AJS to

2 Pimentel, David. "Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law." Harvard International Review (2010): 32:2,32.

3 UN Office on Drugs & Crime, Partners welcome the move to mainstream alternative justice systems in Kenya (UNDOC, 3 Sept 2020) < https://www.unodc.org/unodc/en/press/releases/2020/September/welcome-alternative-justice-systems-in-kenya.html > accessed 12 May 2021.

wit: autonomous institutions, autonomous third-party institutions, court annexed institutions and regulated AJS institutions. It also identifies the issues that need to be addressed including capacity building, training, record keeping and financial support.

Autonomous AJS institutions per the policy are community run systems of dispute resolution which fully rely on the customs of the communities. The baseline policy mentions as examples the Manyatta of the Rendille, Maslah in Garissa, and the Kipkellion AJS project among others.[4] However, the proper models for actual implementation and institutionalization of the TDRMs are not provided for in the law and policy. In fact, the only available guidance in this respect is found in Article 159 (3) which provides that TDRMs are still subject to the repugnancy clause. This is to say that they can only be used if they are not repugnant to justice and morality. It is further provided that the TDRMs must not contravene the Bill of Rights, the constitution or any written law. However, even the repugnancy clause only states the bounds beyond which TDRMs cannot extend.

In the implementation praxis, matters such as the rights of women and children amid presumed patriarchy; the perceived contradiction between fundamental rights and freedoms and enforcement of customary law; and the philosophical dilemma of formalization of the informal become pronounced.[5] Furthermore for purposes of compliance and institutional stability, the capacity of the members of the "tribunals" to adjudicate and align their decisions with the law, the practice and procedures to be used, keeping of records, facilities to be used, public awareness, remuneration of the members of the tribunal and linkages with the formal justice system through appeal or review are matters that a proper institutional framework must address.[6]

---

4 'Alternative Justice Systems Baseline Policy and Policy Framework – The Judiciary of Kenya' <https://www.judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/> accessed 14 May 2021.

5 Kariuki, Francis. 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology.' Alternative Dispute Resolution (2007): 163.

6 Kariuki, F. "Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR'CIArb: Broadening Access to Justice through ADR 30 Years On, Mombasa, 7-8 August 2014."(2017) <http://kmco.co.ke/wp-content/uploads/2018/08/download1352184239.pdf> accessed 12 May 2021.

This paper makes proposals for the institutionalization of TDRMs relying on experiences from South Africa. In these post-colonial countries, there is a continuing form of pluralism. Native norms have been recognized and are being mainstreamed through formalization. Furthermore, the institutional framework affecting the traditional communities in both countries has been modified to accommodate alternative systems of dispute resolution and adjudication.

In the case of South Africa, the Traditional Leadership & Governance Framework Act provides an ensample of a legal regime wherein traditional systems of governance and by extension dispute resolution have been institutionalized.[7] With the more comprehensive understanding of access to justice as philosophically encompassing the ease with which persons can make use of the law, such approaches offer valuable examples that we can emulate in the institutionalization of TDRMs.

After introducing the subject, Part II of this paper shall discuss the conceptual framework for institutionalization of TDRMs. The conceptual framework shall serve to justify the need to have a clear-cut institutional framework for Traditional Dispute Resolution Mechanisms. To do this, attention shall be drawn to the dominant premises resorted to in supporting institutionalization of TDRMS and the weaknesses in such premises. Part III shall focus on the linkages between TDRMs and access to justice. It shall review the experiences where TDRMs have been used in Kenya, specifically in the northern frontier to resolve disputes and in peace initiatives. Part IV shall assess the recently launched AJS Policy and thereafter identify the key issues that a proper institutional framework must address to engender effective dispute resolution and consequently, access to justice. These shall include matters of practice and procedure, composition of "tribunals," participation of women and the youth, constitutional compliance, funding, facilities and appeal processes. Part V shall be a comparative study of the relevant regime in South Africa. It is based on the comparative studies that the paper shall draw lessons and experiences that can guide the process of institutionalization. Part VI shall make conclusions and recommendations based on the preceding sections.

7 Act No 41 of 2013.

CONCEPTUAL FRAMEWORK

This research heavily relies on the theory of decolonization as one of the theoretical justifications for legitimization of Traditional Dispute Resolution Mechanisms (TDRM). On the other hand, as far as language is concerned, this research views the term traditional to be similar to what is termed as custom in public international law. These two form the intellectual basis for the legitimization of TDRM and the quest to utilize them as a necessary tool for the resolution of disputes.

DECOLONIZATION

The post-colony and the new strands of decolonization

Decolonization, at the semantics level refers to the act of withdrawal by a colonial government from direct involvement in the governance of a colony.[8] However, recently there has been renewed interest by scholars in the theory of decolonization. This interest is evidenced in renewed campaigns such as 'Rhodes must fall' to emergent literature by scholars such as Mbembe, Ngugi, Tuiwahi Smith & Shiva.[9] Attention has been drawn to matters such as education, economics, language and research methodologies as is discussed in the ensuing paragraphs. The fundamental thread in the research material that has emanated from these initiatives has been the belief that decolonization did not end with the political independence of former colonies. It has been argued that colonial governments did entrench systems of oppression through language, the law, cultures, education and research methodologies that have served to continue the legacy of the colonial masters years after they left these countries.[10] For this reason, there is a noticeable pursuit of a narrative of development that is delinked from the relatively recent past of subjugation and oppression.

---

8 Olivier Bert, 'Decolonisation, identity, neo-colonialism and power' (2019) 20:1 Phronimon 1-18.

9 San Telmo Museoa, *Vandana Shiva | Ecofeminism and the Decolonization of Women, Nature and the Future* (2020) <https://www.youtube.com/watch?v=hVbbov9Rfjg> accessed 12 May 2021.

10 Gideon S Were, 'Cultural Renaissance and National Development: Some Reflections on the Kenyan Cultural Problem' (1982) 12 Journal of Eastern African Research & Development 1.

Mbembe argues that Africa, in any sociological discourse is still viewed as "the other" in comparison with the west.[11] He argues that the African has often been dehumanized by being compared to the European counterpart and his value lost and ignored as being worthless of and no consequence.[12] This is exactly what has been the case with the treatment of customary law by formal law from the onset of colonization to date.[13] On the other hand, Ngugi Wa Thiongo trains his attention on the question of language as a carriage for culture. He argues that the use of foreign languages has resulted in erosion of our culture and facilitated the continued treatment of African customs as being inferior. He states thus:

> …. Imperialism continues to control the economy, politics and cultures of Africa. But on the other hand, pitted against it, are the ceaseless struggles of the African people to liberate their economy, politics and culture from that Euro-American based stranglehold to usher in a new era of communal self-regulation and self-determination. (Emphasis supplied)

On her part, Tuiwahi- Smith argues that the indigenous person in Australia is the most researched person.[14] She however notes that the attitudes of this indigenous person to research is not positive as the methodologies used are biased and do not enable them to tell their story as they should. She vouches for the urgent need to decolonize research methodologies.

Decolonization and Customary Law

There is an increasing acknowledgement of the legitimacy of non- state justice systems around the globe.[15] This has necessitated legal reform in the

---

11 Mbembe Achille, *On the postcolony*. (Vol. 41, Univ of California Press 2001) and Mbembe Achille, 'Decolonizing knowledge and the question of the archive.' (2015) <https://wiser.wits.ac.za/system/files/Achille%20Mbembe%20-%20Decolonizing%20Knowledge%20and%20the%20Question%20of%20the%20Archive.pdf> accessed 12 May 2021.

12 Mbembe Achille (n 13)

13 See cases such as R v. Amkeyo (1952) 19 E.A.C.A, Lolkilite ole Ndinoni v. Netwala ole Nebele1 [1952] 19 EACA, Re Ruenji 8 [1977]KLR and Re Ogola [1978]KLR.

14 Smith, Linda Tuhiwai. *Decolonizing methodologies: Research and indigenous peoples*. (London, Zed Books Ltd; 2013).

15 Kariuki, Francis. 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology.' (2018) KMCO. <https://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/535-

area of dispute resolution and has resulted in the acknowledgment of Alternative Justice Systems including TDRMs.[16] At the core of the reform of the legal system to accommodate TDRMs as a legitimate alternative to the formal justice system is the need to recognize customary law as a legitimate source of law. Customary institutional arrangements for resolution of disputes rely on the body of customary law to delineate rights and determine the obligations of different individuals.

In post-colonial countries, indigenous institutional arrangements were uprooted to make room for the colonial legal systems. [17]To legitimize the transplant of legal norms, colonial regimes had to brand customary law as backward and undeserving of recognition. Moreover, a more robust assessment of the inclusion of the repugnancy clause was the racist ideology that the colonized and their customs were a contaminating threat to the superiority of the white settler societies. [18] According to Okoth, customary tenure systems faced a century of mutilation but continued to be resilient.[19]

According to Migai, this neglect has continued to present day and policy makers must act in order to rescue them from neglect.[20] In any event, research has shown that what was deemed backward may now be necessary for sustainable development.[21] However, African legal and institutional

community-customary-and-traditional-justice-systems-in-kenya-reflecting-on-and-exploring-the-appropriate-terminology/file > accessed 14 May 2021.

16 Miranda Forsyth, 'A Typology of Relationships between State and Non-State Justice Systems' (2007) 39 The Journal of Legal Pluralism and Unofficial Law 67.

17 Watson A, *Legal Transplants: An Approach to Comparative Law* (Edinburg, Edinburg University Press 1993), Generally, the author argues that legal transplants usually occur from more powerful to less powerful societies. This is what happened on the conquest of the colonial states.

18 Demian Melissa, 'On the repugnance of customary law' (2014) 56.2 Comparative Studies in Society and History 508-536.

19 Okoth-Ogendo, 'The tragic African commons: A century of expropriation, suppression and subversion-keynote address delivered at a work-shop on Public Interest Law and Community-Based Property Rights.' (2005): 1-4. <https://media.africaportal.org/documents/OP_24.pdf > accessed 21 May 2020.

20 See generally Migai A, *Rescuing indigenous tenure from the ghetto of neglect : inalienability and the protection of customary land rights in Kenya* (Nairobi Acts Press 2001)

21 Bromley D and Cernea M 'the Management of Common Property Natural Resources: Some Conceptual and Operational Fallacies' (1989) World Bank Discussion Paper no 57. They observe as follows: Resource degradation in developing countries while incorrectly attributed intrinsically to common property systems actually originates in the dissolution of local level institutional

structures were just different and not necessarily backward and inimical to the pursuit of liberty and individual happiness.[22] Furthermore, Benkler illustrates how the communal approach that is the mainstay of customary law is being successfully applied to software development.[23]

It is important to note, for the purpose of this research, that this approach is still alive and needs to be checked. According to Shiva, there are new areas where subjugation and suppression finds expression. According to her, this has already found expression in the laws on plant genetic resources and specifically plant breeder's rights. She states as follows:[24]

> The assumption of empty lands, *terra nullius*, is now being expanded to 'empty life,' seeds and medicinal plants ... [and this] same logic is being used to appropriate biodiversity from the original owners and innovators by defining their seeds, medicinal plants, and medical knowledge as nature, as non-science, and treating tools of genetic engineering as the yardstick of "improvement."

It emerges from the foregoing that decolonization cannot be complete without a mental shift with respect to customary law and its institutions[25]. The treatment of customary law backward and by extension TDRMs is not empirical and as of necessity, this approach and attitude must change. If the post colonies do not realize the benefits of their own customs developed over years of use, they will always be subjected to the repugnancy clause to the detriment of the post-colonial countries. The requirement, therefore, to use TDRMs is an opportunity presented to the Kenyan people to continue to legitimize traditional norms for the benefit of the people.

---

arrangements whose purpose was to give rise to resource use patterns that were Sustainable.

22 See generally, Lugard F, The dual mandate in British tropical Africa, 5ed, Frank Cass & Co, 1965, 7 who states thus: [t]ask of civilization to put an end to slavery, to establish courts of law, to inculcate in the natives a sense of individual responsibility, of liberty, of justice, and to teach their rulers how to apply these principles; above all, to see to it that the system of education should be such as to produce happiness and progress.

23 Benkler Yochai, 'Peer production, the commons, and the future of the firm.' (2017) 15.2 Strategic Organization 264-274 <https://journals.sagepub.com/doi/full/10.1177/1476127016652606# > accessed 12 May 2021.

24 Shiva Vandana, *Monocultures of the mind: Perspectives on biodiversity and biotechnology* (Palgrave Macmillan 1993).

25 Modibo Ocran, 'The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa' (2006) 39 Akron Law Review 465.

The semantics of "custom" and "traditional"

In order to complete the acceptance of what is termed traditional, at the semantics level, it must be appreciated that there is really no difference between what Public International Law terms customs and what the colonial regime called traditional. Tradition is defined as a belief or acceptable behaviour passed down from one generation to the other. On the other hand, custom in Public International Law refers evidence of general conduct that has been practiced for long and by reason of wide acceptance has become law.[26]

However, what has been traditional to the indigenous groups and the inhabitants of the post colonies has not received similar acceptance in the law. This paper is premised on the understanding that the acceptance of the utility of the customs of the West as capable of forming part of international law must be extended to "tradition." This shift is necessary in order to legitimize the said customs which in a manner similar to custom in international law have proved utility and held societies together for many generations. It is under this understanding of the similitude in import of "custom" and "tradition" that will complete the quest to complete the journey of reimagining the role of customary institutions and structures.

The Dynamism of Customary Law

This Paper also appreciates the fact that custom is dynamic.[27] In the same way that custom in international law has been dynamic, customary law and TDRMs by extension have adapted to the changing times.[28] It is arguable that some of the modifications have been engendered by the legal transplants that established a parallel justice system competing with the formal justice system. Other than the dynamism, induced or otherwise, customary justice systems may vary from one community to another in terms of eligibility for

[26] As was held by the ICJ in Germany v Denmark and the Netherlands [1969] ICJ 1, custom must fulfill two requirements. That is the conduct must have been practiced widely and that there must be general acceptance or opinion by the international community that the conduct is now binding and a necessary rule of law.

[27] Buluma Bwire, 'Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example' (2019) 9 Societies 17.

[28] Lucien Huyse and Mark Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (International IDEA 2008).

appointment, applicable rules, mandate and powers.[29] Owing to this dynamism, this paper makes proposals that are facilitative but standard-setting at the same time. It shall address the concerns that must be addressed for compliance with the constitutional minimum standards. Consequently, a flexible and modified approach to Article 159 (3) (b) that is facilitative and not prohibitory must be applied in the ultimate Lego-policy outlook. Kariuki stresses this point and states thus:

> "In conclusion, jurisprudence from the courts before 2010 show that they have treated African customary law as inferior to statutory laws in the juridical order of legal norms… There is therefore a need for a change of mindset and perceptions amongst judges, lawyers and the wider citizenry towards customary law if traditional justice systems are to contribute to enhanced access to justice for communities in Kenya."[30]

It is encouraging to see that courts are already adopting this newfound approach. The classic example is the case of *R v. Mohamed Abdow Mohamed* where the court agreed with the learned prosecutor to drop murder charges on account of the request by the families involved to pursue Somali customs (*Xeer*).[31] The said customs allowed the family of the accused to compensate the family of the deceased in the form of camels, goats and performed rituals. This is what has traditionally been termed as blood money.[32] The court allowed the application for utilization of TDRM under Article 159(2), (c) by the prosecution to withdraw the case with the leave of court.

Similarly, in *R v. Lenaas Lenchura*,[33] the court sentenced the accused person as per the customary law of the Samburu. The accused who had stabbed the deceased because of a conflict over water was sentenced to a five year suspended sentence requiring him to pay compensation by way of a camel.

---

29 Alternative Justice Systems Baseline Policy and Policy Framework (n 4) Para 40 pp. 12-17. Examples of the AJS referred to in the policy include *Maslah* in Garissa, *Manyatta* in Marsabit, *Ebharasa* in Migori (Abakuria) the *Baraza* in Narok.

30 Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems available at https://www.coursehero.com/fille/79907305/Customary-Lawpdf/accessed 12 March 2021.

31 [2013] eKLR.

32 HF Morris, 'The Award of Blood Money in East African Manslaughter Cases' (1974) 18 Journal of African Law 104.

33 Criminal Case No.19 of 2011.

The court considered the application by counsel for suspended sentence on the ground that water was a scarce resource in Samburu and could easily cause conflict. There are other cases where the court has had to grapple with the public interest in condemning accused persons to jail as per formal law or to apply restorative justice under customary law.[34]

Access to Justice and Traditional Dispute Resolution Mechanisms

Access to justice is a right enshrined under Article 48 of the Constitution of Kenya. This right entails the citizenry to require the state to put measures in place to facilitate the process of access of justice. The realization that it is not possible for all disagreements to be determined by the court led to the command under Article 159 (2) (c) requiring courts to support the use of ADR. Furthermore, owing to the ambiguity of land disputes, Article 67(2)(f) requires the National Land Commission to encourage the utilization of TDRMs to assist in resolving land disputes. Article 48 provides thus:

> "The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

The judiciary has, under the new constitutional order, tried to enhance the reach of formal courts by establishing many court stations across the country. As at the time of retirement of David Maraga as Chief Justice, there were 43 High Court stations and 21 new Magistrates Courts.[35] However, this is no mean fete and may take many years for the citizens of the country to be able to access formal courts. For this reason, TDRMs can easily plug the gap in light of the policy shift. As indicated earlier, most of these communities have their own structures and systems for resolution of disputes which are

---

[34] See *Republic v Abdulahi Noor Mohamed* (alias Arab) [2016] eKLR (Justice Lesiit dismissed an application for referral of the murder trial to TDRM since it came late after hearing and also because of the public interest in capital offences); on the other hand in *Republic v Musili Ivia & another* [2017] eKLR, Dulu J allowed an application for discontinuation of the murder trial for among other reasons the absence of witnesses and on account of the imperative by the Constitution to promote ADR including amicable settlement. Both families had approached the learned prosecutor and the court was informed that parties had determined to settle the matter in accordance with Kamba customs.

[35] Judiciary, "CJ gazettes four new High Courts**"** Judiciary 18 September 2020 <https://www.judiciary.go.ke/cj-gazettes-four-new-high-courts/> accessed 12 May 2021.

accessible.[36] As indicated by Chopra in her study of Traditional Justice systems in Northern Kenya, it is the inaccessibility of the courts that sometimes forces the residents of such remote areas to look for alternatives.[37] On the other hand, Mbobu conceptualizes access to justice to mean the ease with which the citizens can make use of the law.[38] In regulating intra-communal interactions, the inhabitants of the remote areas may be more willing to resort to their customs and institutional enforcement structures as opposed to formal law and courts. The Justice Needs Survey of 2017 revealed that close to 90% of disagreements are resolved though alternatives to the formal justice system.[39] In any event, they may not even understand the rights and duties that are found in formal law. This being the case, the notion of justice and governance that is readily available, useful and understood would be the customs and by extension the TDRMs. By extension, these predicable rules of ordering conduct, in as far as they do not violate formal law, can assist government to bring sustainable development to those areas.

Importantly, legal aid initiatives such as the one being undertaken by UNDP under the *Amkeni Wakenya* project can assist in the realization of access to justice by empowering the communities to be able to resolve prevalent disputes.[40] As argued elsewhere in this paper, CSOs in collaboration with state agencies and the communities can come together for research, capacity building and sensitization. In such for a solution, the communities can be made aware of the need to make use of TDRMs and the possible steps that can be taken to help realize the goal of access to justice.

---

36 Ngugi M, Reflections on Access to Justice Through Alternative Dispute Resolution Mechanisms in a Globalized Society, In Chartered Institute of Arbitrators Kenya, *Alternative Dispute Resolution*, Vol. 2 No 1 2014 pp. 247-249.

37 Chopra, T (December 2008) *Building Informal Justice Systems in Northern Kenya*(Paper done in the Auspices of World Bank on the need for Justice systems sensitive to the needs of the people).

38 Kyalo Mbobu, 'Enhancing Access to Justice in Kenya Through ADR: Towards the Global Platform; in chartered Institute of Arbitrators Kenya,' (2014) Vol. 2 No.1 Alternative Dispute Resolution..

39 Hague Institute for Innovation of Law, Justice Needs and Satisfaction in Kenya 2017 <https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf> accessed 12 May 2021.

40 UNDP, *Amkeni Wakenya*: Towards Human Rights-Centered and Transformational Governance in Kenya: Empowering Civil Society for Change, *UNDP*, <https://www.ke.undp.org/content/kenya/en/home/operations/projects/democratic_governance/amkeni-wakenya--empowering-civil-society-for-change.html> accessed 12 May 2021.

THE RECENTLY LAUNCHED AJS POLICY

Under a project spearheaded by the Judiciary, the national Alternative justice Systems (AJS) Policy was launched recently together with the accompanying Baseline Policy. The Baseline policy identifies four categories of AJS to wit: autonomous AJS institutions, Third Party Institution Annexed AJS, Court annexed AJS and regulated AJS institutions. The Policy notes that since AJS is the lived reality of a majority of Kenyans, it is an effective tool for the realization of the right of access to justice.[41] Critically, the policy sees the use AJS as an opportunity to reimagine and re-legitimize the State by bringing it closer to the people and enhancing their participation in governance.[42] It also sees it as an opportunity to reclaim ossified traditions as being rational.

The strategic intervention areas in the policy are recognition of AJS and determination of the nature of cases AJS can hear, strengthening the process of selection, election, appointment and removal of AJS practitioners, development of Procedures & Customary Law jurisprudence, facilitating effective intermediary interventions and strengthening Resource Allocation.

Generally, the policy identifies some of the components that are central to the quest to institutionalize TDRMs. It must be noted that this paper focuses on the first category of AJS being the completely autonomous AJS systems that are fully run by the communities. It is noteworthy that the policy discourages the use of the state regulated AJS and used the example of the Land Disputes Tribunal to show that such AJS mechanisms can actually water down the policy direction intended by the constitution. The policy states as follows:[43]

> "The Judiciary shall formally recognize Alternative Justice Systems as an access to justice tool and widen the scope of AJS for the provision of the full spectrum of access to justice while ensuring that there are safeguards that will recognize the rights of individuals who seek redress."

---

41 AJS Policy. Para 2.2.3 (a).

42 Compare with Young L , Kipkorir S, Land, Livelihoods and Identities: Inter-Community Conflicts in Eastern Africa (London, Minority Rights Group International; 2011) <http://www.minorityrights.org/download.php@id=1076 > accessed 12 May 2021.The authors argue that allowing the communities too use their traditional justice systems and the state facilitating this use can help resolve the feeling that government does not reach certain areas. As a matter of fact, certain marginalized groups feel as though they are the victims of incomplete state hood.

43 Para 5.1.

Admittedly, the policy identifies the areas of concern in the institutionalization of TDRM. As indicated earlier, TDRMs fall under the first category recognized by the policy. That is autonomous AJS systems that are fully controlled by the communities. As it stands, the government has no role in the determination of the rules applicable, tribunal members, mandate and enforcement with respect to TDRMs. However, since it is the obligation of the government to ensure that citizens access justice and that the justice system is compliant with the set constitutional norms, it would be imperative for the government to participate in the institutionalization of these TDRMs. However, this involvement is to the extent of provisions of resources to the communities and facilitating them to autonomously undertake the process of establishment of their TDRMs.

COMPARATIVE ANALYSIS

This section of the paper studies the legal regime of South Africa that is relevant to TDRMs. It must be noted that these countries like Kenya have a colonial past where traditional systems were ignored. However, like Kenya, the traditional systems of ownership of land, interactions, governance and dispute resolution were resilient in the face of subjugation. It is on the basis of the lessons drawn from these regimes that this paper shall make recommendations in furtherance of the objective of the AJS policy.

South Africa is one of the hot spots of the new wave of decolonization that focuses on matters beyond political independence to education, economics and cultural decolonization.[44]In the area of education for instance, Mbembe did an analysis of decolonizing knowledge in the context of the Rhodes Must fall movement.[45] Importantly, this research also focuses on the linkages between decolonization and "Africanization" in South Africa.[46] In policy, South Africa has made great strides in supporting traditional institutions of ownership and governance. As far as traditional land tenure is concerned, the

---

44 Mbembe Achille, *Out of the Dark Night* (Columbia University Press 2021), see also, Chigudu Simukai, 'Rhodes Must Fall in Oxford: a critical testimony.' (2020) 12:3 Critical African Studies 302-312.

45 Mbembe Achille, Decolonizing knowledge and the Question of the Archive, University of Witwatersrand <https://wiser.wits.ac.za/system/files/Achille%20Mbembe%20-%20Decolonizing%20Knowledge%20and%20the%20Question%20of%20the%20Archive.pdf > accessed 12 May 2021.

46 Achille Joseph Mbembe, 'Decolonizing the University: New Directions' (2016) 15 Arts and Humanities in Higher Education 29.

Community Land Rights Act illustrates the policy shift. The process of its enactment was however impugned in *Tongoane and Others v Minister of Agriculture and Land Affairs and Others.*[47]

From the foregoing, it emerges that the acceptance of traditional systems and customs is an issue that South Africa has grappled with. For the purpose of this paper, the focus shall be on the relevant legal innovations that have been made to legitimize and institutionalize traditional justice systems. For this purpose, this part reviews the Traditional Leadership and Governance Act which law institutionalizes traditional justice.

The Traditional Leadership and Governance Act, No.41 of 2003

This Act applies to communities that are recognized as traditional and led by traditional leaders as per Article 212 of the Constitution of South Africa.[48] The Constitution recognizes traditional leaders as a fundamental aspect of the lived experiences of the South African People. The traditional leaders are required to handle matters that affect the community and provide a first level or layer of governance.[49] For this reason, it provides for recognition under Article 211 and that courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Under Section 2, a community is recognized as being traditional if it is subject to a system of traditional leadership and it observes a system of customary law. It is the responsibility of the premier of a province in consultation with the provincial house of traditional leaders, to recognize a community as being traditional.[50] The recognition is made public by means of a publication in the Gazette. The applicable law is that of the province which must be enacted in compliance with the constitution and this national legislation.

---

47 (CCT100/09) [2010] ZACC 10. The challenge against the constitutionality of the statute had been considered earlier in *Richtersveld Community v Alexkor 2001(3) SA 1293(LCC).*

48 Const of South Africa 1996 Revd 2012.

49 Cons of SA, Article 211(2), traditional leaders are required to observe customary law in exercising power over the people they govern.

50 Traditional Leadership and Governance Framework Act No.41 of 2003 Section 2 (2)(a).

Importantly, the Act requires the traditional community to transform customary law to conform with the Act and the bill of rights.[51] This is an important addition to the legislation since it enjoins the leaders of a traditional community to ensure that their institutions, including the laws, are compliant with the bill of rights. This will ensure that the marginalized are not silenced and the leaders do not resort to dictatorship. The rights particularly mentioned by the Act include prevention of unfair discrimination, promotion of equality and gender representation in traditional leadership.

Upon recognition, the community, whatever the category,[52] is required to establish a council. The council shall be consist of a number of members to be determined by the provincial premier in consultation with the provincial house and published in the Gazette. At least a third of these shall be women. The other requirements for the council per the legislation are:[53]

> That the term of members of the council shall be 5 years, The council shall consist of the senior members of the community, To the extent possible, shall be determined in accordance with the customs of the community, The traditional leader (or king/queen where applicable) of the Community shall be an ex -officio member of the council and shall assist in the appointment of the senior members.[54], Other than the appointed members, there shall also be members of the council who shall be elected.

As far as dispute resolution is concerned, Chapter Six of the Act outlines the procedures that are applicable. Where there is a dispute between the members of the community, the same shall be resolved within the leadership of the community. Furthermore, the traditional institution concerned is the one charged with the resolution of such a controversy or dispute. Under the Act, whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a

---

51 Constitution of South Africa Article 2(3).

52 The Act recognizes that community may have their own systems of governance such as kingships/queenships or principal traditional communities. These are provided for under Sections 2A and 2B.

53 Traditional Leadership and Governance Act No.41 of 2003.

54 Where the traditional community is run as a kingdom, it shall be the queen or the queen who shall be in charge of the appointment as the ex officio member of the council. A kingship is viewed as a cluster of traditional communities that recognize a king or queen. In this case, the Kingship council shall have 60 % of the members selected by the King/queen whereas 40% shall be elected by an electoral college consisting of all the traditional leaders. The same applies for traditional principal councils in the case of traditional principal communities.

matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.

Where the dispute cannot be resolved, it is referred to the relevant provincial house of traditional leadership. It is expected that such a house shall have its own rules and procedures in keeping with the provincial legislation. It is only where such a dispute cannot be resolved by the provincial house that it is referred to the Commission established under Section 22. The Commission is referred to as the Commission on Traditional Leadership Disputes and Customs. The Commission is required to carry out its mandate in a manner that is fair, objective and impartial. The national department responsible for matters of traditional communities is required to provide financial and administrative support to the commission.[55] The Commission is granted the power to investigate and make recommendations regarding a relevant dispute. It appears that the role of the Commission is to really act as an appellate body over customary disputes on leadership appointment, compliance with the Act and any historical claims by traditional communities. In terms of procedure, a person bringing a dispute is required to provide the commission with all the necessary facts to enable the Commission to make a decision.[56] The commission may refuse to take up a matter if the person bringing the issue does not bring sufficient information to enable the commission to make a decision.[57] The Commission is bound to consider and apply the customary law of the community as they applied to the dispute as it arose.

Under Section 26, a decision of the Commission is to be conveyed to the relevant authority within two weeks. The relevant body shall make a decision on the recommendation within 60 days. Where the decision is contrary to the recommendation of the Commission the body making such a decision is under obligation to provide written reasons why the decision is different.

It is notable that South African Government has recognized the role of traditional governance structures. It has gone ahead to provide mechanisms of support and has ensured that they comply with some of the express

55 Traditional Leadership and Governance Act No.41 of 2003, Section 24B.
56 Traditional Leadership and Governance Act No.41 of 2003, Section 25 (2) (b).
57 Traditional Leadership and Governance Act No.41 of 2003, Section 25 (2)(c).

dictates of the constitution such as he gender parity requirement. Furthermore, it allows the traditional leadership to determine their own disputes unless they touch on an excluded subject matter. This case study therefore offers good insight on some of the challenges we will have to grapple with here in Kenya as we attempt to streamline and facilitate TDRMs without interfering with their inherent character and autonomous nature.

POLICY ACTION AREAS FOR TDRMs

From the case of South Africa, there is evidence that it is possible to take bold policy steps to institutionalize TDRMs. This will help enhance their stature as a cogent and coherent system of dispute resolution. However, it is important to be mindful of the need to avoid extreme formalization that renders the pursuit of better alternatives to formal justice fruitless. This part makes proposals informed by the conceptual framework espoused and the experiences teased from the Comparative experience. The Lego-policy steps to take shall be:

1. The need for a TDRM Specific Policy

Before legislation, it will be necessary to commission the development of a policy that is focused on TDRMs. As indicated earlier, TDRMs fall under the Autonomous AJS typology identified by the recently launched AJS policy. However, it can be seen that the policy casts a wide net by attempting to find a middle ground for all the policies. It would be more efficacious to have a specific policy that provides for the principles, proposed institutional framework, role of county government, appointment and financing of TDRM sittings.

2. Recognition of traditional leadership and dispute resolution structures

The policy and subsequent laws must provide for an express method of recognition of traditional communities and their institutional structures. This must be done in consultation with the communities in order to avoid state interference with the autochthonous autonomous indigenous systems. It is noteworthy that most traditional leadership structures doubled up as the dispute resolution institutions. As seen from the TLGA, the process of recognizing traditional societies shall encompass among other thing: self-consciousness of the community as being a traditional community, evidence from the history of the community, the existence of traditional institutions in accordance to customary law and a formal process of re cognition by the

formal political leadership. It is the provincial house under the TLGA that is given the mandate to undertake recognition.

It is the county government that is closer to the people. Under the Protection of Traditional Knowledge and Cultural Expressions Act, the county government is mandated to collect and develop a catalogue of traditional knowledge and cultural expressions. In the same way, the county government is better placed to identify and trace the history of its Community. In any event, Schedule 4 of the Constitution grants the County government the mandate to regulate cultural activities.[58]

3. Compliance with formal law & the repugnancy clause

This is one of the sticky areas with respect to recognition and institutionalization of TDRMs. Based on the conceptual framework adopted, it is necessary for traditional justice systems to be recognized as legitimate systems. In any event, it is the human right of these traditional communities under both municipal and international law to have their culture recognized. Where formal law interferes too much, the very customs we seek to legitimize are mutilated. For this reason, it is proposed that any intended policy and legal regime lays down the standard meant for promotion of TDRMs. Furthermore, it is proposed that the repugnancy clause be interpreted in a more progressive and facilitative manner as opposed to the hitherto restrictive approach adopted before the 2010 constitution.

From the comparative study and the progress made by the courts in Kenya, the restorative nature of traditional justice is not necessarily repugnant. Consequently, it is proposed that the intended regime allows for the full application of customary law and justice save for the need to comply with the following:

> At least a third of the membership of an adjudicative tribunal must be women, There be a representation of other marginalized and special interest groups in the tribunal, Other than the determination of the membership by the traditional leader of the community, at least 40 percent of the members be elected by the community through a secret ballot for a term not exceeding five years. This term could also apply to the appointees of the traditionally recognized leader to ensure that as many members of the community as possible are involved in governance.

[58] Constitution of Kenya 2010, Schedule 4 Paragraph 4.

4. Role of the County Government

As indicated, the county government can be tasked with the role of recognition of traditional communities and justice regimes under a county legislation. As explained earlier, this is rationalized by the proximity of the county government to the peoples and the division of roles under Schedule 4 of the Constitution. The magistrate's courts can give the role of over sighting compliance with the law since the TDRMs are part of the Judicial function of dispute resolution under the 2010 Constitution. The officials can liaise with the Judiciary and CSOs to enhance the viability of these systems in delivering accessible justice to the people.

5. National Traditional Justice Authority

Under the envisioned legal regime, there could be established an authority with the specific mandate of over sighting the traditional justice structures in the communities. This authority can play a facilitative role through research, comparative studies, lobbying for government and donor support, annual assessment of progress and compliance with the constitution, review of compliance by the judiciary among other things. In case of disputes as to the recognition of the communities by the county government, the Authority shall have appellate jurisdiction which can only be appealable to the High Court on matters of law. The Authority will be composed of the following:

> A representative of the Judiciary as the Chairperson, An appointee of the Cabinet Secretary in charge of cultural matters, An appointee of the Cabinet Secretary in charge of Treasury, An appointee of the Council of governors, An representative of the Law Society of Kenya, Four Persons appointed by the Cabinet Secretary in charge of culture with demonstrable experience in customary law and traditional justice.

6. Financial provisions

Traditional justice systems have internal mechanisms for rewarding leaders and persons seating to adjudicate maters based on customary law. However, the county governments can be mandated to provide administrative and financial support to the traditional communities in setting up infrastructure and providing nominal allowances to the members of such tribunals. Training and keeping of records where necessary can also be facilitated by the County Governments.

7. Legislation

To effectuate the provisions herein, it is proposed that a separate legislation, akin to South Africa's TLGA be enacted to specifically address the needs of

traditional justice system. This legislation ought to merely provide for recognition, linkages with the formal justice system and the role of national government in funding and facilitation.

CONCLUSION

In sum, this paper finds that it is possible to institutionalize TDRMs without necessarily interfering with their essential intent. The examples drawn from South Africa present a unique chance to take governance closer to the people and to enhance the developmental need of access to justice in the post colonies. Admittedly, this task is great and may require substantial resource allocation. However, generally, TDRMs have their own way of compensating the elders involved. In any event, the benefits, based on the conceptual framework adopted are great. If structure is introduced to the manner in which the 90% of cases that do not get to court are handled, the government may just find that TDRMs may be the answer to the great task of fulfilling the requirements of Article 48 of the 2010 Constitution.

Role of Alternative Justice Systems (AJS) in Securing Women's Land Rights in Kenya: towards resilience

Brendah Cece Achungo*

ABSTRACT

Land is a key economic and livelihood resource for women who have been and continue to be responsible for the bulk of agricultural production in Africa. Currently, most poor women, most of whom depend on land for their livelihoods are either landless or have limited and insecure rights to land. Pandemics like COVID-19, climate risks and changing land-use patterns have further exacerbated risks women continue facing with regards to their tenure rights. Once access to land which is often a core social safety net, is lost many women find it very difficult to pick up from where they had left off in their livelihoods and any other smallholder investments on land, consequently increasing their vulnerability. Many women in the global south look beyond economics and the productive use of land as fundamental. Here, land is also held for personhood, being and cultural identity. Making use and access to land pivotal points in any debates on tenure security as land is generally held for the communal good.

Generally, secure tenure is elemental in building community resilience allowing people to plan ahead and invest in context-specific adaptive measures. A key element of these adaptive measures depends on communities' and in this context women's agency, the assets available to them, and the prevailing institutional, political and economic context.

There is greater support to ensure access to justice for women in Kenya particularly facing greater tenure uncertainties due to poverty, prevailing cultural norms, and changing climatic contexts. Sharp focus continues to fall on the gender neutrality of the very robust regulatory framework and institutional context that exist in Kenya post-2010. This is also matched by the very progressive global land agenda alive to the continued challenges that rural

* UNDP Kenya.

women face. However, in the face of land conflicts, women continue to be denied fair and judicious process attributable to challenges experienced in accessing justice. The general perception in Kenya is that the judicial system is too expensive, takes too long, and is physically inaccessible due to great distance and antagonistic for the poor and marginalized let alone for poor rural womenfolk. Additionally, the system is not alive to the elaborate social capital that exists at communal levels and that are continuing to be necessary for promoting peaceful coexistence among members of the community.

As described, the existing alternative dispute resolution mechanisms present at the community level remain an attractive dispute resolution tool in settling emerging and persistent land disputes amicably at the community level. As originally conceived, Alternative Justice Systems (AJS) were part of a well-structured, time-proven social system geared towards settling communal conflicts, reconciliation, and improvement of social relationships. Alternative Dispute Resolutions (ADR) methods, processes and regulations are deeply rooted in the customs and traditions of communities where they were found. Ultimately, AJS systems were in place "to restore a balance, to settle the conflict and eliminate disputes", thus an acceptable way of and the first step in solving land disputes at the community level.

As such, this paper examines three major questions: - i) How land conflicts between different land users affect rural women's tenure security and ability to build resilience? ii) How women engage with different customary/ informal/ alternative justice institutions in solving these land conflicts? iii) What would be the key role of these alternative justice systems in land dispute resolutions to secure women's land rights within the new legal and policy framework?

Keywords: Alternative justice systems, access to justice, women, land rights.

INTRODUCTION

Kenya has robust and progressive policy and legislative frameworks protecting land and natural resource rights of the citizens. This can be

attributed to the very difficult colonial and post-colonial history Kenya has and continues to face in relation to protection of land and environment rights. However, there has been progress in strengthening the promotion and protection of women's land rights through laws and policy reform in Kenya, but for many across the country, the reality remains that justice is still out of reach. According to Women Land Rights (WLR) scholars, this can be related to the gender neutrality of these robust frameworks while others argue that discriminatory practices and traditions which continue to deny women direct access and ownership of land.

Global data shows that women average 15 percent of agricultural land holders and make up an estimated 43 percent of the agricultural labor force. Additionally, more than 50 percent of women engage in agricultural related production.[1] With climate risks and changing land-use patterns further posing as threats to women's tenure security, there has been tacit exclusion of women in key decision-making processes relating to land.

This is within a space where land is not only held for economic reasons and its productivity, but tenure is also based on cultural identity and personhood. Land provides a sense of belonging and is also held for personhood, being and cultural identity. Many Kenyan societies have common rights to land, where communal rights override individual rights, which are subsumed to the overall communal good. Making use and access to land pivotal points in any debates on tenure security as land is generally held for the communal good.

In community-based property systems, customary systems are usually managed by customary institutions e.g., land or village chief, traditional headman or council of elders. These institutions play a key role in dispute resolution at community level not only on land and natural resources but also are key referral pathways where justice is sought and rely on either accessibility or economics. Historically, existing alternative dispute resolution (ADR) mechanisms present at community level remains an

[1] Billings, L., Meinzen-Dick, R. and Mueller, V (2014) Research Brief May 2014, No. 20. IFPRI: Washington; SOFA (2014) The State of Food and Agriculture Report of 2014. FAO: Rome. Available on http://www.fao.org/3/a-i4040e.pdf. Accessed on 27/12/2019; FAO (2011). Governing Land for Women and Men Gender and Voluntary Guidelines on Responsible Governance of Tenure of Land and other Natural Resources. Land Tenure Working Paper 19; FAO (2018) Realizing women's rights to land in the law: A guide for reporting on SDG indicator 5.a.2 FAO: Rome

attractive dispute resolution tool in settling emerging and persistent land and natural resource disputes amicably at the community level. Women often have little decision-making power within their family and may be unable to contest violations of their rights through customary institutions. Even when women's land rights are protected under statutory laws, they may face multiple barriers to claiming and protecting these rights within their communities.

Problem Statement and Research Questions

There has been a continued amplification of the demands to support access to justice for women in Kenya particularly facing greater tenure uncertainties due to poverty, prevailing cultural norms, changing climatic contexts and lack of political support to implement the very robust regulatory framework and institutional context that exist in Kenya post 2010. The Constitution, new land and legal aid laws, policies and institutions have found life in the new dispensation to support secure tenure rights for individuals while also being gender neutral at best. This is also matched by the very progressive global land agenda alive to the continued obstacles rural women face in trying to protect their interests on land they utilize or occupy. However, in the face of land conflicts, women, and in particular widows continue to be subjected to greater tenure uncertainties upon bereavement. Further, they are denied fair and judicious processes attributable to challenges experienced in accessing justice. As described, the existing ADR mechanisms employed in conflict resolution by the alternative justice systems present at community level remain attractive more so in poor households. The formal system is often perceived to take longer, to be very expensive and difficult for poor women to navigate.

Considering the foregoing, this study sought to answer the following questions: How land conflicts between different land users affect rural women's tenure security and ability to build resilience? How women engage with different customary/ informal/ alternative justice institutions in solving these land conflicts? What would be the key role of these alternative justice systems in land dispute resolutions to secure women's land rights within the new legal and policy framework?

Theoretical Framework

The study was guided by the Conflict Theory as propagated by Friedrich Engels in 1848, where society is defined by a struggle for dominance among social groups that compete for scarce resources. In the context of resource conflict through a gender lens, conflict theory argues that gender, a social construct is best understood as men attempting to maintain power and privilege to the detriment of women. Therefore, men can be perceived as the dominant group and women as the subordinate group. While certain gender roles may have been appropriate in a hunter-gatherer society, conflict theorists argue that the only reason these roles persist is because the dominant group naturally works to maintain their power and status.

Proponents of the theory posit that the conflict between men and women brought on the universal suffrage movement marking down the process of social change. Engels draws similarities in the relationship between men and women as one between owner-worker, where one would easily relate by land ownership for women being far less while the investments made on land being greater[2]. Engel's suggestion that women had less power than men in the household can also be judged upon a greater dependency on them for wages. Women's critical role in managing land and natural resources to sustain households and communities is clearly evidence by data, yet their lack of tenure undermines their ability to own, manage, use, and conserve these resources and to provide for themselves and their families. Women's limited title to land property and inheritance often means less access to agricultural extension services and credit and translates into reduced access to water and food[3]. The limitation has a greater impact on the outcomes of the choice of dispute resolution mechanisms that can also support if not strengthen their tenure claims.

Contemporary conflict theorists propose that when women become wage earners, they gain power in the family structure and create more democratic arrangements in the home, although they may still carry most of the domestic burden.

---

2 Lumen Learning- Sociological Perspectives on Gender Stratification accessed available at https://courses.lumenlearning.com/boundless-sociology/chapter/sociological-perspectives-on-gender-stratification accessed 19 November 2019

3 Nyikuri, Elvis (2006) WOMEN, LAND, AND RESOURCE CONFLICTS Policy Implications and Interventions in Kenya. Nairobi: Acts Press

However, the pluralist nature of laws can be an impediment where it is unlikely that one would have the knowledge to apply relevant laws while also these can facilitate flexibility to allow individuals to maneuver tenure claims.

The study majorly has relied secondary sources of data employing a review of published and unpublished material including journals and theses and working papers to gather background information to the study. A systematic search process to assess the available high-quality evidence on the perception of women land rights and secure tenure in the context of a developing nation, alternative justice systems and their proposition within the national frameworks, and effects of strengthening AJS to secure WLR. The paper evaluates the strength of causal link between definitions of tenure and the choices of justice mechanisms where conflict has arisen. Despite this being a systemic review, evidence has been provided on the scale of the problem and how civil society actors are already providing platforms for poor women to engage with AJS mechanisms and the results of these interventions where they are found. Finally, the review synthesizes evidence from other access to justice interventions that clearly defined the role and expectations of AJS to bring out the different entry points where these systems can be supportive in providing secure tenure for poor rural women.

Gender Inequalities, challenges and implications

Gender inequality in access to and control over land related productive resources is closely related to women's poverty and exclusion. Access to land and land tenure security are critical dimensions of rural livelihoods and determine rural wealth and rural poverty. Therefore, securing women's land rights is not only important for gender equality, but also critical for economic and social development. When women spend less time and resources resolving disputes around land ownership and access, they are more likely to invest these resources into production[4]. Additionally, the literature reviewed for this paper points to a positive impact in guaranteeing women's land rights. This would enhance women's incentive to invest in land, including suitable and friendly farming technologies, improvement of family

[4] Nyikuri, Elvis (2006) WOMEN, LAND, AND RESOURCE CONFLICTS Policy Implications and Interventions in Kenya. Nairobi: Acts Press; Slavchevska, V., Campos A., Brunelli C., and Doss C. (2016) Beyond Ownership: Women's and Men's Land Rights in Sub Saharan Africa (Food and Agriculture Organization of the United Nations) (University of Oxford; CGIAR Program on Policies, Institutions and Markets)

incomes and general health of the families with greater conservation of water and soil.

Gender inequality ensures that women have lower decision-making power over land than men in the home. Decisions in question include those over when and how to farm, which crops to plant, purchase and use of farm inputs, hiring decisions and use of proceeds from land related activities. However, gender inequality in decision-making also extends to women participating in community decision-making structures and processes with greater implications for women holding positions of influence in community structures and in government. Research points to the fact that including women in political decision-making leads to more effective governance. This is because the presence of women in governance institutions brings greater diversity and different perspectives to governance processes.[5]

Generally, secure tenure is an essential element in building community resilience allowing people to plan and invest in context-specific adaptive measures.[6] A key element of these adaptive measures depends on communities' and, in this context, women's agency, the assets available to them, and the prevailing institutional, political and economic context.

Customary Tenure and Women Land Rights

The commodification and marketization of land and with these, privatization of tenure have been considered as an avenue to improving individual tenure security. However, the reality which has emerged is that despite the many challenges and limitations of customary tenure systems, these systems remain central to the identity of many people, groups and communities. In

---

5 Kipuri, Naomi and Andrew Ridgewell (2008) A Double Bind: The Exclusion of Pastoralist Women in the East and Horn of Africa Minority Rights Group International: London; Bunge E., Mbaya, S., Atananga J., Cadispoti B., Msoti B. and, Mugehera L. (2018) Women's land rights in Africa: Does implementation match policy? Oxfam, PLAAS and PROPAC available at https://www.conftool.org/africalandconference2019/index.php?page=browseSessions&print=head&doprint=yes&form_session=21&metadata=hide&presentations=show. Accessed 12 January 2020

6 Rajabifard, A., Potts K., Torhonen M., Barra A. and Justiniano I. (2018) Improving Resilience and Resilience Impact of National Land and Geospatial Systems available at https://www.taylorfrancis.com/chapters/oa-edit/10.1201/9780429290626-5/leveraging-national-land-geospatial-systems-improved-disaster-resilience-abbas-rajabifard-katie-potts-mika-petteri-torhonen-federico-barra-ivelisse-justiniano accessed 12 January 2020

addition, there is considerable sentiment in support for customary systems based on the belief that customary systems embody important principles concerned with social security, equity, and ecological balance. The underlying notion that privatizing tenure (and enhancing tenure security) was the answer to the improving on-farm investment and productivity is now known to be overly simplistic. In fact, titling programmes are now known to be often accompanied by negative consequences for the poor.[7]

Various countries, Kenya being one of these, have passed laws that make it possible for rural communities to register their lands as a single legal entity and act as decentralized land administration and management bodies. These laws have the power to protect community lands according to customary paradigms and boundaries, including all family land, forests, grazing lands, water bodies, and other common areas critical to community survival.

Access to Justice as a challenge to secure tenure and WLR

Article 48 of the constitution provides that…the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice…thereby setting the ground for compliance by all duty bearers in the continuum of justice.

Poverty has been identified as a major impediment to accessing justice in Kenya. It is the poor who suffer most from the effects of weak and insensitive legal and judicial systems. The perception of Kenyan judicial system is that it is too expensive, takes too long to realize 'justice' which in of itself is a human right[8]. Further courts are physically inaccessible due to great distance and antagonistic for the poor and marginalized let alone for poor rural womenfolk. Additionally, the system is not alive to the elaborate social capital that exists at communal levels and that are continuously

[7] FAO (2002) Land tenure and rural development. FAO Land Tenure Studies available at http://ftp.fao.org/docrep/fao/005/y4307E/y4307E00.pdf accessed 12 January 2020

[8] Muigua (2018) Improving Access to Justice: Legislative and Administrative Reforms under the Constitution, available at http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf, accessed 12 January 2020

necessary for promoting social harmony within the community[9]. Women are more vulnerable to violations and abuse due to their economic status hence unable to access any form of justice because every step in the entry of the justice system has a cost at time very prohibitive.

Admittedly, ignorance and lack of knowledge of land laws is also a major impediment for marginalized groups in the quest to access justice. Women's ignorance of their land rights and other land governance information is a significant area of concern for WLR actors. Knowledge among women is stronger in areas where women's empowerment programs are implemented by CSOs. For instance, women's active agency on land is stronger close to major cities where women can access information from frequent contact with development projects and in areas where agricultural and development projects are implemented. It has been observed by PLEAD supported projects in Uasin Gishu County that during the various community meetings, men generally dominate these forums while in areas perceived to be urban with well-established empowerment programmes' women find spaces to be part of the conversation. As a mitigation strategy, these projects include creating awareness of laws and rights guaranteed under the very robust Bill of Rights in the Kenyan Constitution. Additionally, CHRM and CSO Network have been supporting legal aid in effect towards operationalizing the Legal Aid Act 2016[10].

Towards addressing the challenges discussed above, the Legal Aid Act 2016 was enacted to facilitate access to justice giving effect to art.48 of the constitution. The act provides for the establishment of the National Legal Aid Service and provision of legal aid including legal education and awareness, advice, and legal representation. Under the Amkeni PLEAD strategy, civil society actors are provided with grants and have increasingly stepped in to offer the much-needed support to fill the gap in legal service provision, with the aim of empowering marginalized groups and individuals to exercise their legal rights. Generally, legal aid support in Kenya has been offered through community volunteers trained as paralegals with very basic legal training to offer free legal advice and education within their own communities and

---

9 Okero (2019, unpublished)- Concept note on the Operationalization of the Legal Aid Act 2016: Which Way Forward For Alternative Dispute Resolution Mechanisms

10 PLEAD brochure available at https://www.ke.undp.org/content/dam/kenya/docs/AmkeniWakenya/PLEAD%20Brochure.pdf

report issues of violations where these are rampant. There are though efforts to regulate the environment in which community paralegals operate without making demands on academic qualifications from them. As by their very nature, community paralegals are volunteers offering to support their families and neighbors without charging for the support.

Community paralegals also support the free legal clinics offered by CSOs, law schools and the Law Society of Kenya. These clinics cover a myriad of issues and structured in an ad hoc nature despite a well-intended regulatory framework existing. Clinics are facilitated by advocates and law students bringing the much-needed support to communities without necessarily charging the cost to them. The constitution, being much alive to the informal communal justice systems that operate in our society, broadens the available mechanisms in the justice system by encouraging the utilization of formal and informal justice mechanisms thus in Article 159 (2) envisages the underlying principles for the exercise of judicial authority in Kenya which include promotion of ADR and TDR mechanisms. These systems offer alternatives and are of importance in administering justice and solving disputes at the community level.

Hence, the Hon. former Chief Justice Justice Dr. Willy Mutunga on 10th March 2016 *gazetted* the Taskforce on Informal Justice Systems mandated to develop a policy to mainstream into the formal justice system traditional, informal justice systems and other informal mechanisms used to access to justice in Kenya (AJST Taskforce).[11] The AJST Taskforce have convened stakeholders and AJS practitioners in various forums and collected feedback from different communities in Kenya and have developed policy on AJS, the Alternative Justise Systems Baseline Policy. The policy addresses an obligations framework- rights framework to essentially providing for the roles of the AJS and standardization of the procedures for AJS to match what is provided under the law. It is hoped that this should also provide for the much-required resources for operations.

[11] Alternative Justice Systems Framework Policy 2020 The Judiciary of Kenya, pg. 1 also available online at https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf accessed 8 December 2020

National Regulatory and Institutional Frameworks supporting Women Land Rights in Kenya

The Constitution of Kenya (2010) provides a supreme establishment in providing for individual land rights as provided under Article 40 which guarantees equitable access to land, security of land rights and fair compensation on undocumented land acquired for public interest setting the tone for Chapter 5 (on Land and Environment) of the constitution which provides for the principles of the 2009 National Land Policy. The constitution provides all citizens including women with the opportunity to access, beneficially occupy and use land. This includes the Land Registration Act (2012) which has elaborate provisions relating to co-tenancy and partition. Generally, there is a greater recognition of marginalization of women including in the land sector plan for 2012 -2017.

Public participation is a requirement under the 2010 Constitution and in the land sector laws. The County Governments Act of 2012 on devolved governance highlights the centrality of citizen participation; in it recognizing participation women. However, fails to follow through on this by organizing/ enforcing platforms for women's participation.

The constitution proposes the use of affirmative action initiatives to reverse the negative impact of historically locking out women and other marginalized demographics from governance through the Art 81 (b). However, an operational framework is yet to be provided for in elective governance thus providing fair representation for women within which would provide for gender parity especially in key decision-making institutions both legislative and executive.

The Succession Act of provides that a woman, whether married or unmarried has the same capacity to make a will as does a male, and that upon the death of that person, his/her property passes to a person/s of his/her choice. Literature provides to jurisprudence necessary to implement the statute. Under Matrimonial Property Act of 2013, a woman has the same right as her spouse to dispose of property.

WLR under the Community Land Act 2016

The passing of the Community Land Act in 2016 provides an unprecedented security of tenure for women living under communal/ collective land regimes guaranteeing equal treatment as landowners and right holders. The Act

includes the requirements for at least two thirds of a community to consent to conversion/transfer of community land for large scale land-based investments (LSLBI). The Act also stipulates that communities should only enter agreements with investors based on free and open consultations resulting in agreements between communities and investors. Agreements should make provisions for stakeholder consultation and community involvement. The Act provides for the formation of a community land management committee to take responsibility for the running of the day-to-day functions land management and administration of the community land on behalf of the community members. Most significantly with respect to WLR, the Act specifies that the committee should be voted in considering gender parity.

Alternative Justice Systems and Alternative Disputes Resolutions

Alternative Justice Systems (AJS) are mechanisms of solving disputes or/and conflicts between conflicting parties informally and come in different forms including the autonomous AJS which is defined to be traditional, indigenous, and unique to communities and environments where they are found. The court annexed AJS is through a referral system between the court, court users' committees (CuCs), the AJS processes and other stakeholders such as the Director of Public Prosecutions (ODPP), the Probation Office and Children's Office. These are linked to the court's systems and case management actors. A third form exists as the third party AJS mechanism, which can be in the form of desired state-sanctioned institutions like chiefs, the police, probation officers, child welfare officers, or non-state-related institutions like religious leaders, social groups, non-governmental organizations, and community justice centers.

AJS is provided for in the current constitutional framework under Articles 1, 3 (1), 11, 20, 27, 50 and Article 159. The constitution under article 159, states that; "(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles- (c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3) .... ". Even with recognition by the law and preference on accessibility by many Kenyans, the use of AJS remains limited as an option to seek legal redress.[12] The law also limits application of AJS whereas the mechanism;

[12] Mbote P.K and Migai Akech (2011) Kenya Justice Sector and the Rule of Law: A review by AfriMAP and the Open Society Initiative for Eastern Africa. Nairobi:

"(a) contravenes the Bill of Rights; or application *(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law. "*

The methods used in the AJS processes include mediation, negotiation, and wherever possible reconciliation. Through AJS employ of ADR, the conflicting parties are brought together to dialogue and agree on a voluntary basis to forge a way forward. In its traditional sense, traditional AJS processes centralized 'restoration' a tool of meeting societal needs and desires.

Mbote and Akech note that ADR, and particularly mediation, reflects customary jurisprudence and under customary law conflict resolution was people driven and a consensual process involving a party, usually an elder, who acted as a mediator.[13] Thus, in this way, ADR mechanisms allow for the society to participate in making of decisions affecting them.

Historically, AJS mechanisms were part of a well-structured, time-proven social system geared towards settling communal conflicts, reconciliation and improvement of social relationships. The tools employed in the dispute resolution are deeply rooted in the customs and traditions of communities where they were found. Ultimately, AJS systems were in place "to restore a balance, to settle conflict and eliminate disputes", thus an acceptable way of and the first step in solving land disputes at community level.

ADR has greatly been recognized in the Legal Aid Act of 2016, as part of a pluralistic system of justice where both customary systems and statutory laws can be applied to offer flexibility. Considering the provisions of articles 11, 19, 27, 40, 48 and 159(2) (c) as they relate to access to justice in all aspects of formal and informal justice and article 159(2) (c) of the Kenyan Constitution on the alternative forms of dispute resolution including traditional justice systems which is yet to be operationalized as envisaged in the Legal Aid Act 2016. This recognition coupled with the NLC Act 2012 which lays out the functions of the National Land Commission among others… to encourage the application of traditional dispute resolution mechanisms in settling land conflicts; encourage settling land disputes

---

Open Society Initiative for East Africa; Muigua (2015) Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework. UON: Nairobi.

13 Ibid

within communities. This is informed by the fact that informal land systems continue to exist alongside statutory systems. However, there have been arguments around their protection of women land rights. Although accessible and perhaps timely, thus able to secure important rights for women invisible under formal law, informal systems have been pointed to containing beliefs and practices that marginalize women and can conspire to severely limit their enjoyment of secure tenure.

As such to…*provide for the settlement of certain civil disputes by conciliation, mediation, and traditional dispute resolution mechanism; to set out the guiding principles applicable*…the paper hopes to provide a reframing of the role of AJS in settling land conflicts that disadvantage women by way of sharing the experiences of civil society partners and demonstrating usefulness of the advantages of AJS mechanisms towards this.

Overview of State and CSO efforts to enhance access to justice for poor and marginalized groups

Access to justice for women to secure their use, access and control over land is necessary due to the unprecedented pressures over land and natural resources springing conflict over communal, public, and private land. The weak tenure held by most women and threatened usufruct rights over productive land and natural resources coupled with severe climatic change threatening women's' smallholder investments on land in particular agricultural land.

The state has been engaged in developing policies and programmes to address issues relating to legal aid and access to justice based on constitutional imperative as well as legislative mandate. While institutionalising these efforts through NLAS to facilitate, provide and coordinate legal aid in Kenya, the government is also pursuing various strategies laid out in its policy initiatives crucial in shaping the direction of legal aid efforts in the country. One of the key lessons learnt by NLAS predecessor, the National Legal Aid and Awareness Programme (NALEAP) is that integration of ADR and AJS mechanisms that helped shape up the development of the Legal Aid Act and the Policy and planning for future legal aid services.

Civil society is increasingly stepping in to fill the wide gap in legal service provision, with the aim of empowering marginalized groups and individuals to exercise their legal rights. CSOs have covered access to justice to secure tenure for women withmost recent efforts from CSOs include implementing access to justice initiatives targeting WLR and tenure security, organising and training of community paralegals to support social/ and community justice systems to create awareness all of which aim to operationalize the Legal Aid Act and improve this space for marginalised communities.

Evidence and Experiences from PLEAD CSOs on WLR and working with AJS

PLEAD CSO projects have interacted more with cases reported by women and their communities on matters of succession, dispossession of widows and orphans in Kisumu and Uasin Gishu counties. The projects' strategy in engaging with the local AJS structures in settling general disputes involves developing the capacity of the local AJS systems to enhance their grasp of law, gender, justice and human rights to improve their understanding of conflicts brought before them thus improve the outcomes where women would otherwise be unfairly treated.

In Kisumu County, CSO Network has been working on to ease the justice burden for the vulnerable groups especially women, PWD and youth. With a tripartite partnership established to include the Network, LSK Kisumu chapter and Women Concern Centre, the project focus is within the Kisumu west, Kisumu East and Kisumu central sub counties.

In 2019, three of the community meetings hosted by the Network with 100 participants per meeting realized an average of 20 participants seeking support on land related matters with due interventions from the local Administration officers (Chiefs), Elders, in laws or the living Patriarch in their families. The complainants hoped to resolve the reported tenure issues within their community. Out of the 104 matters reported in the legal aid clinics, the network handled over 37 cases of succession only within its first year of implementation of the project. An analysis of the cases points to centrality of the discussion and challenges faced by women in to secure their tenure rights.

Many of the women seeking support attribute their land needs to the security access, use and ownership provides them and their children,

shelter, dignity, access to food and therefore income. For instance, a woman seems to be guaranteed access to land if her male partner is alive, it suddenly lost when the relationship somehow becomes strained and where polygamy is practices and wives become relegated. Sometimes the conduct towards the wife (ves), has an impact on how she will be treated post loss of spouse. It is perhaps also for this reason, that the succession laws were passed in Kenyan to protect women in such circumstances and provide for equitable distribution of resources.

Under the CHRM's *Uadilifu Mashinani* project, the CSO offers alternative dispute resolution to conflicts through the local council of elders *Kipgaa*. Members are provided with skills on mediation, referral mechanisms to enable them handle disputes by being gender responsive, apply relevant laws in a pluralistic legal environment and observe internationally acceptable standards in resolving disputes. As an organization CHRM continues to enlighten the *Kipgaa* on potential repugnancy of traditions and impressing the need to institutionalize changes to enable women get justice beyond the life of the project.

Through several trainings and sensitization forums that CHRM has hosted in its target areas, women have come forward seeking legal aid and assistance. A majority of the matters brought forward include, succession and their inheritance matter on land and other marital property, children maintenance cases and access to justice for children in conflict with the law. It is their work on access to justice for widows that has been widely and positively received in the county of Uasin Gishu. Four training sessions on WLR, succession and self-representation resulted into many of the participants seeking legal aid support through the lean legal team of the CSO. Thus, as mediation is in the community-based organization's DNA, the team sought to apply ADR in their tenure claims. Others are being supported through the self-representation process in court where community paralegals have been instrumental in supporting development of briefs and handholding women to pursue their land rights through the formal system.

The trained community paralegals and law students engaged from Moi University have attended mediations handled by *Kipgaa* Elders and document these proceedings to be filed by the CSO. The sessions are closer and often more accessible to poor and disadvantaged people compared to courts while they address the collective interests at stake in disputes; encourage public participation and consultation; they emphasis on reconciliation and restoring social harmony to the aggrieved party(ies). The

procedures involved do not require legal representation and process is voluntary.

Roles of AJS in securing WLR and providing tenure security

Determining applicability of AJS in securing women's land rights and providing tenure security

As a matter of priority, the state's interest in civil law is to provide a mechanism for dispute settlement while in criminal matters the state is interested in protecting the public interest and ensuring that persons who commit crimes are punished accordingly for the sake of security and order in the society.

The benefits analysis theory allows an analysis of the tangible benefits of AJS over formal mechanisms where AJS mechanisms demonstrate more advantages being that the costs involved in seeking redress are comparably minimal to formal courts systems. Further, being that AJS mechanisms can be found within the communities and environments of litigants, there is greater ease of access. The formalities for AJS proceedings are minimal and may also encourage ease of access to witness. Conflicts managed by AJS systems may be managed and resolved within a short period of time and provided that the process is of negotiations between disputants, the result thus is more of reconciliation than an absolute winner and loser.

The underlying difference between formal and informal/AJS mechanisms related to the intended result is the case of AJS is restorative justice. The emphasis is placed on healing the injuries resulting from the offence. As parties in a conflict may often continue living in the same community, AJS should build on the tight–knight and inter-dependent social setting. The AJS mechanisms are thus built with a view of reconciliation; focused on social integration and reconstruction.

The practice in other African countries such as Mozambique, Ethiopia and Rwanda, is determination of jurisdiction based on gravity of the offence and the subsequent punishment.[14] For instance, in Mozambique, the Community

[14] Luc Huyse Mark Salter 2008 eds Traditional Justice and Reconciliation after Violent Conflict Learning from African Experiences International Institute for Democracy and Electoral Assistance. See also UNDP (2016) Human Rights and Alternative Justice Systems in Africa available at https://www.ohchr.org/sites/default/files/Documents/Publications/HR_PUB_16_

Courts Law of 1992, grants jurisdiction to the community courts to hear minor criminal & and civil disputes while in the case of Ethiopia, though AJS mechanisms generally handle matters of land use, property rights cases and domestic disputes, customary mediations will sometimes be sought out in cases of rape and homicide.

In Rwanda, the community-based courts offered a blending of local conflict resolutions with modern punitive legal system to deliver justice for the country's 1994 Genocide. These courts tried approximately over 1.2 million cases[15] leaving behind a mixed legacy of sorts. Some Rwandans celebrate their participation in and timely resolutions of the process. They also attribute the process to 'helping them better understand what happened in the darkest period of their countries history.'

Back in Kenya, Courts have also acknowledged the essence of AJS as a useful tool in the reduction of backlog in the Courts. Most recently, at Meru Law Courts during the Judiciary open day the Judicial Officers urged the members of the public to employ AJS mechanisms to deal with petty offences to ease the backlog in the courts. The Presiding Judge, Justice Alfred Mabeya, indicated that Meru High Court had 7000 pending cases while the lower courts had 6000 pending cases. He called upon involvement of the clergy in mediating in succession and family-related matters relieving the backlog in the court registries[16].

In the face of rapid urbanization in Kenya, the appetite for land has had impact on particularly women, and especially widows, who have had to bear the brunt of losing land through family authorization. The demand and attraction of prices being offered has witnessed internal conflict rise within family units with women fighting to retain their land, pitted against her only family. To retain the family cohesion, despite this conflict, most women have reached out to civil society actors where possible, and this is escalated

---

2_HR_and_Traditional_Justice_Systems_in_Africa.pdf accessed 8 November 2019

15 HRW 2011 Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts. Accessed on https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts.

16 Wainaina Ndung'u (2017) Meru courts grapple with backlog of 25,000 cases *Standard Newspaper* 3rd March 2017 accessed on https://www.standardmedia.co.ke/kenya/article/2001231320/meru-courts-grapple-with-backlog-of-25-000-cases accessed 8 November 2019

to the formal justice processes. These are perceived to be non-personal, unfair, biased, discrimination or long delay in settling the manner. The longer the process takes, the more urgent they become and at some point, compromise is made, and disadvantaged women settle despite losing their land to unscrupulous individuals in their communities.

Some of the disadvantages of the AJS mechanisms include the disregard for basic human rights; application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made. Other challenges include lack of recognition and empowerment of elders both legally and by the government, inadequate security and protection and negative attitudes towards elders by the community, illiteracy and lack of modern technology, gender imbalance in the composition of the committees and lack of awareness by the public on their human rights, AJS/ADR. These obstacles can be addressed effectively through putting in place an effective legislation to nurture trust from women and thus subscription to these informal mechanisms since the advantages may very well overshadow their disadvantages.[17]

Recommendations to infuse Constitutional values into AJS to securing WLR

If ADR is to be seen to provide justice and it can, then its promptness needs to be addressed. Questions about bias, discrimination and credibility of the process need to be looked at from the perspective of who is in charge. At community level, most actors in these structures, can sometimes be the kith and kin and for women which may introduce perception of biases. Where ones; views are known about question of land, women and inheritance, their position of power in decision making can also translate into loss for women pushing for protection of their and children's interest in the ownership of land.

AJS, in protecting the rights of women and security of tenure where communal land is concerned, must take into consideration the tenure and its implications on women, in particular widows, their life interests and

[17] Muigua (2015) Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework. UON: Nairobi

dependent children. Once a woman has moved into the home, the land is named after her children that in the minds of everyone in that home signified permanency. It is this permanency that AJS must protect at all costs because it does not cease in the event of death of the male partner. If these informal systems are to be relied upon the historical tenure accounts of land in contention and any decisions reached need to be documented.

There is really no question about the cultural significance of women once married and their entitlement. What needs to be interrogated is to what extent the legal systems and cultural systems for justice can be exploited to benefit one over the other. This question can be addressed by looking at the law, which is significantly observant of the reality on the grounds, on matters of cultural land and therefore able to fully protect women. However, in the absence of guidelines, all the different ADR structures, whether it is Peace, Police Committee, Chiefs, Elders, Faith Based Organization, Court Users Committee or CSOs, the lack of standards and guidelines, means there is no clear approach to use, and one will find a case was finalized and perhaps another similar case was settled but the compromise in one case, will be different from another and therefore the response to the outcome of the case differs too. There is need for awareness creation around land issues with a focus on strengthening understanding on the intrinsic value of land as means of settling communal land conflict. The cultural role and importance of women in the home should be documented and evidence adduced to continue building gender responsive defense. This will help to harmonize understanding of how to handle cases of women and land as a key factor in arriving at decisions. To help this along, having conversations around the cultural value of land for certain communities and therefore the entitlements need to be protected, because of the emergency demands for women to prove that they deserve to own their land.

CONCLUSION

Enhancing the ability of women to access justice is essential to further gender inequality and discrimination, and for furthering development and human security. Women's empowerment in every aspect of their lives is reliant upon systems of law and justice that work for women. When women's rights are protected through effective justice systems, pathways are created for inclusion and lifting women out of poverty.

Strong institutions are necessary to foster an environment conducive to sound policy, cooperation, and innovation. Thus, institutionalization of AJS is imperative in managing justice though at small scale within the domestic environment where women can thrive. Equity in managing key collective and communal land-based resources, as such better returns to investment, and building resilience to shocks depend upon effective and well-functioning institutions.

There is a need for further collaboration between CSOs, AJS and other willing partners to proactively engage in the draft AJS policy and ADR Bill thus creating an elaborate to support WLR and broadly Access to justice in communities. One strategy Amkeni has employed is by strengthening cross-fertilization of tools, knowledge and practices through the Quarterly Learning Platforms organized for participation by the PLEAD and other partners. This platform allows partners to share experiences and to identify areas in which they could collaborate and build synergies with each other along priority actions and project implementations.

Legal Aid as a Human Right

Prof Tom Ojienda, SC*

Although access to the courts has long been recognised as a constitutional right, there was – until relatively recently – no constitutional right to the provision of legal assistance at public expense if one could not afford a lawyer, although from time to time statutory or quasi-statutory arrangements provided some form of help. Sir Henry Brooke[1]

ABSTRACT

A comprehensive legal aid package covers legal advice and consultation, legal representation, legal assistance, and legal education and access to legal information at State expense. This article considers the concept of legal aid as a human right, by examining the human rights perspective of the legal and policy framework on legal aid in Kenya. Neither the Constitution nor statute is expressive that legal aid is a human right. The concept of legal aid as a human right can, however, be gleaned from the Bill of Rights under Chapter Four of the Constitution of Kenya, 2010. This article interrogates the legal aid scheme in Kenya to ascertain whether it is effective and beneficial to the consumers of legal aid who do not have access to the resources necessary to access the justice they need and fervently long for, seek after and hope for. The article ponders on the concept of equal access to legal aid and its applicability in Kenya, and makes legal and policy reform proposals towards improving the legal aid framework in Kenya, especially the codification of legal aid as a human right.

Keywords: Legal aid; human rights; Kenya; equal access to justice; legal reform.

* LLD (UNISA), LLM (King's College), LLB (UoN); Associate Professor of Public Law, Moi University School of Law.

1 Sir Henry Brooke, 'The History of Legal Aid: 1945-2010' (2017) Bach Commission on Access to Justice: Appendix 6 <https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf> accessed 24 November 2020.

INTRODUCTION

A comprehensive legal aid package covers legal advice and consultation, legal representation, legal assistance, and legal education and access to legal information at State expense.[2] Kenya has both national and international obligations as concerns the provision of legal aid and access to justice for the indigent, the marginalised, and the vulnerable individuals and communities in Kenya, such as the poor, children, women and minority and marginalised communities. This article considers the concept of legal aid as a human right, by examining the human rights perspective of the legal and policy framework on legal aid provision in Kenya.

First, the article considers the theoretical and practical aspects of the present legal and policy framework on legal aid in Kenya embodied in the Constitution of Kenya, 2010 (hereinafter the Constitution or CoK 2010), the National Legal Aid and Awareness Policy, 2015 (hereinafter the Legal Aid Policy or NLAAP), the Legal Aid Act, 2016 (hereinafter the Legal Aid Act or LAA 2016), the Civil Procedure Act[3] and the Civil Procedure Rules, 2010 (hereinafter the Civil Procedure Rules). Neither the Constitution nor statute expressly provides legal aid as a human right in Kenya. The concept of legal aid as a human right can, however, be gleaned from the Bill of Rights under Chapter Four of the Constitution. Legal aid is a matter of human rights, social justice, access to justice, fair hearing, equity, inclusiveness, equality, non-discrimination, preservation of human dignity, and the protection of minority and marginalised communities. Given that legal aid is tied to social justice and the dignity of individuals and communities, the absence of free legal aid could necessitate non-conventional and self-help means to resolve disputes.

To be effective and beneficial, certainty is imperative as concerns the legal aid framework in Kenya—for civil and criminal matters and those that are neither civil nor criminal, such as constitutional petitions, family matters, and judicial review proceedings. The legal aid framework also has to be readily available and comprehensible to the consumers of legal aid in Kenya who do not have access to the resources necessary to access the justice they need and fervently long for, seek after and hope for. To be poor and illiterate should not be a bar to access justice, hence the need for free legal aid at State

---

2 Simon Rice, 'A Human Right to Legal Aid' in The Danish Institute of Human Rights, *A Human Right to Legal Aid* (Danish Institute for Human Rights 2010) 15-26, 16 <http://sutyajnik.ru/documents/3751.pdf> accessed 20 October 2020.

3 Cap 21, Laws of Kenya.

expense and devoid of State excuses of financial and administrative inability and failure of the consumers of legal aid to ask for legal aid.[4]

Second, the paper considers the concept of equal access to legal aid in light of the right of equality and freedom from discrimination and the principle that 'justice shall be done to all, irrespective of status' embodied in articles 27 and 159(2)(a) of the Constitution, respectively. Finally, the article makes recommendations to improve the legal aid framework in Kenya. These entail the codification of legal aid as a human right and the effective implementation of relevant laws to make the entirety of legal aid a reality in Kenya, that is, legal advice and consultation, legal representation, legal assistance, and legal education and access to legal information.

Legal and Policy Framework on Legal Aid in Kenya

This part of the article looks at the legal and policy framework on legal aid in Kenya as depicted in the Constitution, the Legal Aid Act, the Civil Procedure Act, the Civil Procedure Rules and relevant case law.

Legal Aid under the Constitution

The Constitution is the supreme law of the land[5] and embodies the Bill of Rights containing human rights and fundamental freedoms under its chapter four. However, the Constitution is not expressive that legal aid is a human right. Regardless, the Constitution's stance on the concept of legal aid as a human right can be gathered from provisions in the Bill of Rights. Since legal aid is a matter of social justice and the preservation of human dignity, the need to protect legal aid as a human right is founded on article 19(2) of the Constitution, which provides the core basis for recognising and protecting human rights and fundamental freedoms. According to the article, human rights and fundamental freedoms are recognised and protected in order to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

---

4 See e.g., the remarks of Indian Judge P N Bhagwati J quoted in Dr G Mallikarjun, 'Legal Aid in India and the Judicial Contribution' (2013) 7(1) NALSAR Law Review, 234-241, 235 <http://www.commonlii.org/in/journals/NALSARLawRw/2013/13.pdf> accessed 21 October 2020.

5 CoK, art 2.

On that note, article 10(2)(b) of the Constitution recognizes human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalised as part of our national values and principles of governance. Moreover, article 28 of the Constitution protects the right to human dignity, whereby every person has inherent dignity and the right to have that dignity respected and protected.

Besides, legal aid is also about access to justice. Article 48 of the Constitution guarantees the right of access to justice and obligates the State to ensure access to justice for all persons and that if any fees are charged, the same should be reasonable and should not impede access to justice. Similarly, article 50(2)(g) of the Constitution guarantees to every accused person the right to a fair trial, including the right to choose, and be represented by, an advocate, and to be informed of such right promptly. Further, article 50(2)(h) of the Constitution guarantees to every accused person the right to legal aid, that is, the right 'to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.'[6]

Legal Aid under the Legal Aid Act

NLAAP paved way for the enactment of the Legal Aid Act.[7] Like the Constitution, the Act is not expressive that legal aid is a human right. Nonetheless, the preamble of the Act boasts of giving effect to articles 19(2), 48, and 50(2)(g) and (h) of the Constitution. The Act outlines the legal and institutional framework for the provision of legal aid in Kenya, with the main purpose of promoting access to justice at State expense, to persons who qualify and in respect of specified areas of law.[8] The Act establishes the National Legal Aid Service (NLAS or the Service),[9] the Board of Service (the NLAS Board),[10] and the Legal Aid Fund,[11] to ensure provision, access and

6 Case law in respect of article 50(2)(h) of the Constitution is covered under part 3 of this paper on equal access to legal aid in Kenya.

7 The Legal Aid Act was assented to on 22 April 2016 and came into force on 10 May 2016.

8 LAA 2016, s 3. The Act aims for an affordable, accessible, sustainable, credible and accountable legal aid scheme. The Act also aims to promote legal awareness, support community legal services by funding justice advisory centers, legal education and legal research, and promote alternative dispute resolution methods.

9 LAA 2016, s 5.

10 LAA 2016, s 9.

11 LAA 2016, s 29.

funding of the legal aid scheme in Kenya. The legal aid scheme under the Act is administered by NLAS,[12] a successor to the National Legal Aid and Awareness Programme (NALEAP).

The launch of the National Action Plan on Legal Aid 2017-2022 (NAP) followed the enactment of the Legal Aid Act. The eight strategic objectives of NAP entail:[13] to strengthen the framework for policies, laws and administrative processes that will ensure sustainable and quality access to justice for all;[14] to provide quality, effective and timely legal assistance, advice and representation for the poor, marginalized and vulnerable;[15] to enhance access to justice through legal aid and awareness;[16] to promote and institutionalise the paralegal approach in access to justice;[17] to promote the use of alternative

12 LAA 2016, s 7.

13 National Action Plan on Legal Aid, p 26-36.

14 This is to be done by implementing the normative framework on legal aid under the Legal Aid Act and NLAAP, eliminating impediments to access to justice through legal literacy, establishing partnerships with legal aid providers, and collaboration and cooperation with legal aid providers.

15 This is to be achieved by: rolling out National Legal Aid and Awareness schemes; determining the most suitable model(s) for implementing a sustainable national legal aid and awareness scheme to determine eligibility criteria for legal aid using objective standards, such as the means test, merit test and any other relevant considerations; forming strategic partnerships with the private sector, Civil Society Organisations (CSOs), Community-Based Organisations (CBOs), Non-governmental Organisations (NGOs) and other non-State entities to undertake legal aid; and integrating legal awareness and legal aid into existing community initiatives and government-run social services such as health, probation and children services and so on.

16 This is to be achieved by: developing disseminating and implementing national legal aid advocacy, communication and social mobilization strategy at all levels; conducting formative and periodic assessments on the status of legal aid and awareness in the general population; advocating for the OAG/DOJ and other key government offices to develop, translate and publish a simplified version of the Constitution and other legislation into Kiswahili and other local languages; developing a Self-Representation Manual training citizen to face trial with confidence and knowledge of the law; capacity building for service providers on legal aid and awareness, including communication and advocacy skills; promoting measures to ensure the indigent access justice at all levels; establishing Community Legal Aid Centers; and legal aid open days marked nationally and in all counties

17 This is to happen by: developing clear accreditation, certification and licensing system for paralegals; working together with current service providers to strengthen existing training for paralegals; assisting relevant agencies and service providers to develop syllabi and curricula for the training of paralegals; establishing a training system for paralegals; and setting up criteria for admission for training as well as standards for qualification as paralegals to ensure quality.

and traditional dispute resolution mechanisms (ADR and TDR mechanisms);[18] to establish an implementation, monitoring, regulatory and support framework;[19] to allot fiscal, human and technical resources for legal aid and awareness services in Kenya;[20] and to undertake research to ensure evidence-based initiatives.[21] The extent to which the eight strategic objectives of NAP have been achieved so far is open to debate in view of the funding challenge at NLAS.[22]

The legal aid scheme envisaged under the Constitution and the Legal Aid Act is not inclined to court processes only, but is also supportive of the incorporation of ADR and TDR assistance. At the centre of the provision of

---

18 By: developing of syllabi and curricula for trainers; carrying out research on ADR and traditional justice systems; documenting best practices in ADR; establishing or strengthening existing training for ADR practitioners; establishing training for traditional justice leaders; undertaking research, documenting and disseminating information on ADR and traditional dispute resolution (TDR) systems; developing a data collection tool to monitor and evaluate usage of ADR; establishing and strengthening strategic partnerships with reputable research institutions or organisations and academia on ADR, TDR and access to justice; and documenting best practices and sharing information and experiences.

19 By: establishing training and accreditation systems for legal aid providers; setting up systems for quality assurance to ensure the quality of services; developing clear accreditation for legal aid service providers; developing systems and mechanisms for data collection, analysis and dissemination to inform programming; developing procedures and policies that are universally acceptable for monitoring and evaluation; and establishing or strengthening existing tools or mechanism for monitoring and evaluation.

20 By: developing fund-raising strategies; pursuing government appropriations through annual budgets; developing proposals and submitting to development partners for funding; building the capacity of staff, implementing partners and relevant legal aid actors; undertaking research to support the delivery of quality services; developing competency and skills for support staff; building partnerships with legal aid actors to improve access; investing in technology to support the administration of grants, high-quality recording and storage of case management; developing campaign and communication strategies using social media, print and electronic media.

21 By: developing research tools; undertaking evidence-based research to inform legal aid programme interventions; promoting documentation of best practices; undertaking needs assessment to identify the needs of the vulnerable, poor and marginalized populations in terms of programme interventions; promoting innovative approaches to legal aid and awareness; building partnerships with research-oriented institutions and other relevant legal aid actors; and allocating and dedicating sufficient financial resources to research activities.

22 See e.g., Law Society of Kenya, Annual Report 2019, pp 74-77 <https://lsk.or.ke/Downloads/LSK%20Annual%20Report%202019%20Final-%208th%20July%202020.pdf> accessed 12 November 2020.

free legal aid at State expense is the necessity to further access to justice. In that sense, ADR and TDR mechanisms, envisaged under articles 159(2)(c) and (3) of the Constitution and sections 2 and 39 of the Legal Aid Act,[23] are equally significant in enhancing access to justice and the rule of law.[24] Legal aid services to facilitate the use of ADR and TDR mechanisms are therefore welcome to further the ends of justice.

The Pauper Briefs Regime

The pauper briefs regime in Kenya preceded the legal aid scheme under the Legal Aid Act. The pauper briefs regime, in respect of civil claims, is clouded with a lot of uncertainty. Orders 33 and 44 of the Civil Procedure Rules provide the rules applicable to pauper suits and pauper appeals, respectively.

Order 33 of the Rules applies to any civil suit sought to be instituted by a pauper; pauper suits or suits in *forma pauperis*.[25] Filing a pauper suit is not automatic as one must first seek and obtain the leave of court to file a suit as a pauper. An application for leave to sue as a pauper must contain the particulars usually required of pleadings and must be accompanied with a statement that the pauper is unable to pay the fee prescribed in such suit, and the documents must be signed accordingly.[26] Once the application is ascertained to be in proper form and duly presented, the court has the discretion to decide whether or not to examine the applicant or his authorised agent regarding the merits of the claim and the property of the applicant.[27]

The court has the power to reject the application on the face of it, if: it is not properly framed or presented; the applicant is not a pauper; the applicant has within the two months immediately preceding the presentation of the application, disposed of any property fraudulently to further his application; the applicant's allegations do not show a cause of action; or the applicant has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such

---

23 The settling of disputes through negotiation, mediation, arbitration, conciliation and informal dispute resolution mechanisms, other than through the court process or litigation.

24 Recently, in August 2020, the Judiciary launched the Alternative Justice Systems Baseline Policy and Framework Policy.

25 Civil Procedure Rules (CPR), Ord 33, r 1(1) & (r 1(2) defines a pauper as a person who is not possessed of sufficient means to enable him or her pay the fee prescribed by law for the institution of any suit.)

26 CPR Ord 33, r 2.

27 CPR Ord 33, r 4.

subject-matter.[28] Where the court sees no reason to reject the application on the face of it, it fixes a day for hearing the application and issues a ten-day notice to the opposing party.[29] The hearing is meant to receive evidence regarding the pauperism of the applicant and any evidence which may be adduced to disprove the claim of pauperism.

At the hearing, the court will examine any witnesses produced by either party, and may examine the applicant or his authorised agent and then make a memorandum of the substance of their evidence.[30] The court shall also hear any argument which the parties may desire to offer in respect of the grounds for rejecting such applications as provided under order 33, rule 5 highlighted above.[31] Thereafter, the court will decide whether to allow or refuse the application.[32]

Accordingly, the institution of a pauper suit must be properly qualified as the court must first ascertain one's state of pauperism. The court's order refusing the application will be a bar to any subsequent application by the applicant for leave to sue as a pauper in respect of the same right to sue.[33] Nonetheless, the applicant is free to institute a civil suit in the ordinary manner in respect of such right to sue. But, he or she must first pay any costs incurred by the Government and the opposite party in opposing his application for leave to sue as a pauper.[34] Such law and practice, however, is against the right of access to justice and the concept of legal aid as a human right as it is tantamount to punishment for a failed pauper application, especially in the absence of fraud on the part of the applicant.

Conversely, where the court grants leave to institute a pauper suit, the application will be deemed the pleading in the suit, and the suit will proceed like any other civil suit instituted in the ordinary manner. In contrast, however,

---

28 CPR Ord 33, r 5.

29 CPR Ord 33, r 6. See e.g. *James Ewatan Ekeno v Equity Bank (Kenya) Limited)* [2017] eKLR, HC (Nairobi) Civ Div, Misc Appli No 545 of 2016 <http://kenyalaw.org/caselaw/cases/view/131361> accessed 21 November 2020.

30 CPR Ord 33, r 7(1).

31 CPR Ord 33, r 7(2).

32 CPR Ord 33, r 7(3). See e.g. *James Ewatan Ekeno v Equity Bank (K) Ltd* [2018] eKLR, High Court at Nairobi, Civil Division, Misc Appli No. 545 of 2016 <http://kenyalaw.org/caselaw/cases/view/161855> accessed 21 November 2020.

33 CPR Ord 33, r 14.

34 ibid.

the plaintiff or applicant will not be liable to pay any court fees.[35] Moreover, the costs of an application for leave to sue as a pauper and of an inquiry into the pauperism of the would-be plaintiff will be costs in the suit.[36]

Nonetheless, the plaintiff may still cease being regarded as a pauper in the course of the suit, following an application by the defendant and upon issuance of a seven-day written notice to the plaintiff. The court will order the plaintiff to be dispaupered if: he is guilty of vexatious or improper conduct in the course of the suit; it appears that his means are such that he ought not to continue to sue as a pauper; or he has entered into any agreement, with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.[37] As such, the state of pauperism of the plaintiff must be consistent until the civil suit is heard and determined. The plaintiff must equally watch his or her conduct in the course of the suit lest he or she be dispaupered.

Where the plaintiff succeeds, the court fees that would have been paid by the plaintiff will be the first charge on the subject-matter of the suit and will be recovered from any party ordered by the decree to so pay.[38] Should the plaintiff fail in the suit or is dispaupered or the suit is withdrawn or dismissed because the plaintiff did not appear when the suit was called for hearing, the court will order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.[39] In any case, whether the plaintiff succeeds or not, the Government has a right at any time to apply to the court for an order for the payment of court fees accordingly.[40]

It is noteworthy that the pauper briefs regime in respect of civil suits applies not only to plaintiffs, but also to defendants. If a defendant alleges inability to pay court fees, he or she is at liberty to apply to the court.[41] Upon such application, the Registrar will inquire into the defendant's claim of pauperism. If the Registrar is satisfied on oath that the claim is true, the Registrar will record the result of the investigation and a statement of the proportion of any of the fees which the defendant is able to pay and only such amount will be

35 CPR Ord 33, r 8.
36 CPR Ord 33, r 15.
37 CPR Ord 33, r 9.
38 CPR Ord 33, rr 10, 13 and 17.
39 CPR Ord 33, r 11.
40 CPR Ord 33, r 12, and Civil Procedure Act, Cap. 21, Laws of Kenya, s 34.
41 CPR Ord 33, r 16.

paid by the defendant. If the registrar is not satisfied of the defendant's claim of pauperism, he or she will certify the defendant's application as such and advise the defendant as to the fees payable by him or her. The defendant can appeal the Registrar's decision to a judge in chambers.

Similarly, to institute a pauper appeal one must obtain the leave of the court, per section 79F of the Civil Procedure Act. Pursuant to order 44 of the Rules, an application to appeal as a pauper is subject to the provisions relating to pauper suits under order 33 of the Rules, as applicable.[42]A person who wishes to appeal as a pauper must present an application for leave together with a memorandum of appeal. An inquiry into pauperism will only be undertaken by the High Court or under the orders of the High Court by the court from whose decision the appeal is preferred, for applicants who did not sue or appeal as paupers already, unless such inquiry is necessary in the case of applicants already certified as paupers.[43] The court making the inquiry into pauperism may allow or refuse the application to institute a pauper appeal accordingly. Therefore, in this case too, the would-be litigant's pauperism must be qualified before one can be allowed to appeal as a pauper.

In view of the foregoing, it is clear that under the pauper briefs regime, the Government has to recover the court fees that would have been paid by the pauper litigant, from the parties to the suit one way or another. Such recovery of court fees mars the State expense dimension of free legal aid provision. The legal aid scheme under the pauper briefs regime is also limited in so far as it only covers the court fees applicable to the suit. In that case, it is presumed that the pauper litigants will represent themselves before the court from the time of applying for leave to sue or appeal as paupers and during the trial of the suit or appeal. That is a sad state of affairs owing to the legal intricacies involved in filing for leave to sue or appeal as paupers in the first place and defeats the concept of legal aid as a human right.

Moreover, the success of an application for leave to sue or to appeal as a pauper is not guaranteed.[44] For instance, in a recent case, *Jason Nyabuto*

---

42 CPR Ord 44, r 1.

43 CPR Ord 44, r 2.

44 See e.g. *Isaac N Ondieki v The Ministry of Information & Broadcasting Public Service Commission* [2000] eKLR, CA (Nairobi) Civ Appl No l16 of 2000 (the Court of Appeal considered the fact that the intended suit was time barred and refused to grant the applicant leave to appeal, as a pauper, the High Court's decision refusing his application to institute the suit as a pauper).

Kembero v Safaricom Company Ltd & another,[45] the High Court dismissed an application to institute a pauper suit stating that the applicant's claim of special damages of Kshs 191,519.00 together with damages for breach of contract did not qualify the applicant as a pauper.[46]

The International and Regional Framework on Legal Aid as a Human Right as Pertains to Kenya

The international framework on legal aid is contained in the legal instruments of the United Nations (UN) and other relevant international organisations, in both soft and hard law. Kenya is a signatory and party to some of these instruments, hence its international obligations in that regard, and by virtue of articles 2(5) and (6) of the Constitution.[47] Kenya's international human rights obligations are three-fold, in terms of the obligation to respect, protect and fulfil the human rights provided for in the various international legal instruments.[48]

Kenya is a State Party to the International Covenant on Civil and Political Rights, 1966 (ICCPR).[49] ICCPR embodies civil and political rights, some of which have implications on the concept of legal aid as a human right. Article 14 of ICCPR provides for the right to a fair trial, which includes the minimum rights guaranteed in respect of criminal proceedings and which apply equally to all persons. ICCPR advocates for self-representation, legal representation

---

45 [2020] eKLR, HC (Nairobi) Commercial and Tax Div, Misc Appli No 213 of 2019.

46 ibid, paras 10-13.

47 Articles 2(5) and (6) of the Constitution of Kenya, 2010 provide that the general rules of international law form part of the law of Kenya and any treaty or convention ratified by Kenya also forms part of the law of Kenya under the Constitution. See also Treaty Making and Ratification Act, 2012 (Act No. 45 of 2012) <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2045%20of%202012> accessed 12 November 2020, which gives effect to Article 2(6) of the Constitution of Kenya, 2010 and sets out the procedure for the making and ratification of treaties in Kenya.

48 See generally, Kenya Human Rights Commission, 'Kenya's Regional and International Human Rights Obligations' <https://www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/126-kenya-s-regional-and-international-human-rights-obligations/file.html> accessed 25 November 2020.

49 (Adopted 16 December 1966, entered into force 23 March 1976) 999 U.N.T.S. 171 (ICCPR) <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> accessed 12 November 2020. Kenya ratified ICCPR on 1 May 1972.

through an advocate of one's choosing, and assigned legal representation in the interests of justice, with or without pay.[50] Self-representation is subject to one's ability to defend themselves in person and depends on their physical, professional and economic ability. Legal representation through an advocate of one's choosing is equally dependent on one's economic ability. Assigned legal representation, however, is mandatory legal representation of an accused person because the interests of justice demand so. Assigned legal representation is only free and without payment by an accused person only where the interests of justice demand for such legal representation but the accused person is without sufficient means to pay for the attendant costs.

As a result, the mandatory obligation on ICCPR States Parties to provide free legal aid is only tied to criminal cases where the interests of justice so demand but the accused person does not have sufficient means to afford legal representation. In all other cases, and by virtue of Article 14(1) of ICCPR[51] and the right to an effective remedy under Article 2(3) of ICCPR, States Parties are merely encouraged to provide free legal aid to those who cannot afford the costs of legal representation.[52] Even so, the UN Human Rights

---

50 ICCPR, art 14(3)(d).

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

52 UN Human Rights Committee (90th Session, 2007, Geneva) 'General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial' para 10 <https://digitallibrary.un.org/record/606075?ln=en> accessed 12 November 2020. In *Henry v Trinidad and Tobago*, Human Rights Committee, Communication No. 752/1997, U.N. Doc. CCPR/C/64/D/752/1997 (3 November 1998) para 7.6 <http://www.worldcourts.com/hrc/eng/decisions/1998.11.03_Henry_v_Trinidad_and_Tobago.htm> accessed 12 November 2020, the Human Rights Committee stated, 'In this particular case, the issue which the author wished to bring in the constitutional motion was the question of whether his execution, the conditions of his detention or the length of his stay on death row amounted to cruel punishment. The Committee considers that, although article 14, paragraph 1, does not expressly require States parties to provide legal aid outside the context of the criminal trial, it does create an obligation for States to ensure to all persons equal access to courts and tribunals. The Committee considers that in the specific circumstances of the author's case, taking into account that he was in detention on death row, that he had no possibility to present a constitutional motion in person, and that the subject of the constitutional motion was the constitutionality of his execution, that is, directly affected his right to life, the State party should have taken measures to allow the author access to court, for instance through

Committee[53] acknowledges the importance of legal representation to litigants as 'the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.'[54]

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012,[55] a soft law, also have implications on the concept of legal aid as a human right, particularly in the context of criminal justice. The Principles and Guidelines are inclusive of all persons usually implicated in the criminal justice process, that is, persons detained, arrested, imprisoned, suspected, accused of, or charged with a criminal offence, and victims and witnesses in the criminal justice process. Under the Principles and Guidelines, legal aid in the nature of legal advice, assistance and representation is to be provided at no cost, for those persons without sufficient means or when the interests of justice so require.[56] Legal aid also includes the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.

In that regard, the Principles and Guidelines entail, *inter alia*, non-discrimination in the provision of legal aid to ensure equal access to legal aid by all the vulnerable groups, right to information on the availability of and how to obtain legal aid and the effect of waiving such right, the right to early access to legal aid at the pre-trial stage, and access to legal aid during trial and post-trial.[57] Being soft law though, the Principles and Guidelines are merely

---

the provision of legal aid. The State party's failure to do so, was therefore in violation of article 14, paragraph 1.'

53 See ICCPR, pt IV. See also Optional Protocol to the International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 U.N.T.S. 171 <https://www.ohchr.org/en/professionalinterest/pages/opccpr1.aspx> accessed 12 November 2020; Kenya is neither a signatory nor a State Party to the Protocol.

54 UN Human Rights Committee, General Comment No 32, para 10.

55 United Nations, Resolution Adopted by the General Assembly on the Report of the Third Committee (2013) A/67/458 <https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf> accessed 12 November 2020. (Hereinafter, Principles and Guidelines).

56 ibid, para 8.

57 See also UN Model Law on Legal Aid in Criminal Justice Systems with Commentaries <https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf> accessed 12 November 2020.

persuasive and also limited in their application as they only apply in respect of the criminal justice system.

The regional legal frameworks also have implications on the concept of legal aid as a human right to the extent that they have endeavoured to provide for free legal representation before courts and tribunals, in furtherance of the right to fair trial and the right of access to justice. Kenya is a Member State of the African Union (AU)[58] and is a State Party to the African Charter on Human and Peoples' Rights (Banjul Charter).[59] Though the Banjul Charter is not expressive about the right to free legal aid, the same can be read into some of the provisions of the Charter relevant to the right to a fair trial and access to justice, such as Article 5, 6, 7(1) and 26.[60] Pursuant to the said Articles of the Banjul Charter, the African Commission on Human and Peoples' Rights (ACHPR) adopted the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, 2003.[61] The Principles and Guidelines are merely persuasive.

Principle G of the Principles and Guidelines provides for access to lawyers and legal services. Principle H provides for legal aid and legal assistance in that, 'the accused or a party to a civil case has a right to have legal assistance

---

58 See Constitutive Act of the African Union (adopted 1 July 2000) <https://www.achpr.org/public/Document/file/English/au_act_2000_eng.pdf> accessed 12 November 2020.

59 (Adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (Banjul Charter) <https://www.achpr.org/public/Document/file/English/banjul_charter.pdf> accessed 12 November 2020.

60 Article 5 of the Banjul provides that, 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'; Article 6 provides that, 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained'; Article 7(1) provides in part that, 'Every individual shall have the right to have his cause heard. This comprises: (…) (c) the right to defense, including the right to be defended by counsel of his choice'; and Article 26 provides that, 'States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.'

61 See The African Commission on Human and Peoples' Rights <https://www.achpr.org/legalinstruments/detail?id=38> accessed 13 November 2020.

assigned to him or her in any case where the interests of justice so requires, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.' The interests of justice in criminal matters are to be determined by considering the seriousness of the offence and the severity of the sentence. On the other hand, in civil cases the interests of justice are to be determined by considering the complexity of the case and the ability of the party to adequately represent himself or herself, the rights that are affected and the likely impact of the outcome of the case on the wider community. However, the interests of justice always require legal assistance for an accused in a capital offense case, even as concerns an appeal, executive clemency, commutation of sentence, amnesty or pardon for conviction and sentence for the capital offence.

Moreover, a person may challenge the choice of the court-appointed lawyer since they retain the right to an effective defence or representation and the right to choose their own legal representative at all stages of the case. To ensure quality legal aid provision and the competence of the court-appointed lawyer, the lawyer appointed must be qualified to represent and defend the accused or a party to a civil case; have the necessary training and experience corresponding to the nature and seriousness of the matter; be free to exercise his or her professional judgement in a professional manner free of influence of the State or the appointing judicial body; advocate in favour of the person represented; and be sufficiently compensated to ensure adequate and effective representation. Among the roles of the professional associations of lawyers is to ensure that legal representation is provided to a person without any payment by him or her, if legal assistance is not provided by the mandated body in important or serious human rights cases. Trained and qualified paralegals could also provide basic legal assistance in rural areas.

Under Principle N (2), the accused has the right to counsel. Basically, the accused has the right to defend him or herself in person or through legal assistance of his or her own choosing, including during preliminary investigations, administrative detention, trial and appeal proceedings. In any case the mandated body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available.

The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and the Lilongwe Plan of Action for Accessing Legal Aid in the Criminal Justice System in Africa, which entails provisions towards the

implementation of the Declaration, also offer a broad concept of legal aid in the context of criminal justice.[62]

From the above, the international and regional frameworks on legal aid fall short of expressly providing a sweeping human right to free legal aid at State expense. Qualifications such as the interests of justice and inability to afford the costs of legal assistance and access to justice, though reasonable in view of tight State economies and budgets, are hindrances to the recognition of legal aid as a self-standing human right.

Equal Access to Legal Aid in Kenya

For legal aid to be truly effective and beneficial as a human right, it must adopt the character of inherence that is typical of all human rights. Inherence makes the quality of human rights equal to all human beings. Applied to legal aid, this translates to equal access to legal aid *for all people* in need of legal aid and *for all areas of law*. To further the principle of equal access to free legal aid at State expense in Kenya, this article advances the slogan, *legal aid for all people and for all areas of law.* It does not necessarily mean that access to justice becomes free for all and sundry, rather, the measures used to sift those deserving of free legal aid at State expense should aim towards equality, by eliminating the socio-economic and political barriers to accessing justice.

The concept of equal access to free legal aid at State expense can be drawn from the Constitution itself. Article 159(2)(a) of the Constitution obliges courts and tribunals to ensure that they exercise judicial authority in a manner that ensures that justice is done to all, irrespective of status. In addition, article 27 of the Constitution guarantees the right to equality and freedom from discrimination, whereby every person is equal before the law and has the right to equal protection and equal benefit of the law,[63] and is entitled to the full and equal enjoyment of all rights and fundamental freedoms.[64]

Moreover, there are guiding principles geared towards equality and non-discrimination that also apply to NLAS in the fulfilment of its statutory

[62] See'Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System' (*Africa Criminal Justice Reform (ACJR)*) <https://acjr.org.za/resource-centre/Lilongwe_declaration_2004.pdf/view> accessed 13 November 2020.
[63] Constitution of Kenya, 2010 (CoK 2010), art 27(1).
[64] CoK 2010, art 27(2).

mandate.[65] One, as a public body, NLAS is bound by the national values and principles of governance[66] and the values and principles of public service,[67] embodied in the Constitution. NLAS is also to be guided by the principles of impartiality, gender equality, gender equity, inclusiveness, non-discrimination, protection of marginalized groups, the rules of natural justice, and the provisions of treaties ratified by Kenya pertaining to the provision of legal aid[68] such as the ICCPR provisions abovementioned. The application of the principles is imperative if equality in the provision of free legal aid services at State expense is to be achieved.

Generally, however, a number of criteria are used in assessing legal aid needs before granting access, usually because of the limited resources availed by the State. Such criteria include, the inability to self-represent, the inability to afford legal representation; the nature and import of the rights implicated in any given case; the impact, legal or otherwise, of the case; the complexity of the issues involved in a given case; and the chances of success in any given case. As such, persons eligible for legal aid and the areas of law amenable to legal aid vary across jurisdictions depending on the resources availed to the legal aid scheme by the State.

In Kenya, article 50(2)(h) of the Constitution restricts access to the right to legal representation at State expense to cases where *'substantial injustice would otherwise result'.* However, the Constitution does not define what *'substantial injustice'* entails, hence leaving access to the right to legal representation at State expense to the discretion of the courts and actors within the legal aid scheme. In *David Macharia Njoroge v. Republic*,[69] the Court of Appeal interpreted article 50(2)(h) of the Constitution to mean that State funded legal representation is a right in instances where *'substantial*

---

65 LAA 2016, s 4.

66 Under article 10 of the Constitution, the national values and principles of governance include the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalised, good governance, integrity, transparency, accountability, and sustainable development.

67 Under article 232 of the Constitution, the values and principles of public service entail efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; accountability for administrative acts; transparency and provision to the public of timely, accurate information; and representation of Kenya's diverse communities.

68 See Constitution of Kenya, 2010, arts 2(5) and (6).

69 [2011] eKLR, CA (Nairobi) Cri App No 497 of 2007.

injustice would otherwise result',[70] but the Court singled out and gave special treatment to cases involving capital offences stating that, '[I]n addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.'[71] The view of the Court of Appeal creates two limbs of access to free legal aid at State expense, an absolute and automatic right in cases involving capital offences, and cases where one has to qualify that substantial injustice would otherwise result.

In *Thomas Alugha Ndegwa v Republic*,[72] however, the Court of Appeal was categorical that the right to legal representation at State expense is a fundamental human right ('the provision of legal aid is a constitutional, legal and human right') that is core to the right to a fair trial, but it is not an absolute right as it is subject to reasonable limitations.[73] The Appellant in this case was undergoing a second appeal following a conviction for the offence of defilement by the Chief Magistrate Court and a mandatory sentence for life imprisonment, which was upheld by the High Court during his first appeal. The Appellant was unrepresented at both the lower court and the High Court. He applied to the Court of Appeal to assign him legal representation at State expense at this second appeal as he was unable to retain his own counsel because of financial constraints. The Court of Appeal therefore had to determine whether the Appellant was entitled to receive legal aid at State expense.

The Court of Appeal found that since the Appellant was serving a life sentence, substantial injustice could result if he was not represented. In spite of that finding, the Court of Appeal did not assign the Appellant legal representation at State expense, as he had requested. Rather, the Court of Appeal went on to state that the Appellant was eligible to make an application for legal aid to NLAS under section 41 of the Legal Aid Act, and thereafter, NLAS 'may at its discretion grant legal aid to the applicant subject to such

---

70 According to the Court of Appeal (*David Macharia Murage v Republic* [2011] eKLR, p 14), the right to fair hearing under article 50 of the Constitution ensures that any accused person, regardless of the gravity of their crime, may receive legal representation by a court appointed lawyer, if their circumstances necessitate so, for example, in cases involving complex issues of fact or law, where disabilities or language difficulties prevent an accused from effectively conducting their own defence, or where public interest demands that the accused is provided with legal aid because of the nature of the offence involved.

71 David Macharia Murage v Republic (n 70) p 15.

72 [2016] eKLR, CA (Nairobi) Cr App No 2 of 2004.

73 Thomas Alugha Ndegwa v Republic (n 72) paras 16 and 21.

terms and conditions, as the Service considers appropriate.'[74] This is indicative of a double process (a legal aid eligibility assessment by both the court and NLAS) that is contra the right of access to justice and the concept of legal aid as a human right.

The inhumanity of a double legal aid eligibility assessment, by both the courts and NLAS, is reinforced by section 43 of the Legal Aid Act and there is need to amend the section to make a legal aid eligibility assessment by the court sufficient in itself whenever a court is faced with an unrepresented person and it finds that the provision of legal representation at State expense is required in the interest of justice. A further legal aid assessment by NLAS would thus be uncalled for in that case. However, the High Court, in *Shaban Juma v Republic,*[75] was of the view that legal aid eligibility assessment is better left to NLAS when it stated as follows:

> Even though the courts have been given power to inform the Service to provide legal aid to an accused person, everything points to the fact that the onus of assessing whether an accused person is entitled to legal aid belongs to the Service. Any attempts by the court to determine whether an applicant is deserving of legal aid will require the applicant to submit certain information to court and such information may be prejudicial to the applicant's case. The court is also expected, without the benefit of any evidence, to form an opinion as to whether an applicant's case is likely to succeed. The constitutional requirement for provision of legal aid in certain cases is not unique to Kenya. South Africa which has a similar constitutional provision has deemed it fit to leave the assessment of eligibility for legal aid to the body created by statute for that

---

74 Thomas Alugha Ndegwa v Republic (n 72) para 21.

75 [2016] eKLR, HC (Busia) Misc Appl No 28 of 2016. (The Applicant applied orally in Court to be provided with counsel at State expense, to represent him in his constitutional petition as he was unable to prosecute the petition because he did not understand the law. At the time of the application, the Applicant was detained at the President's pleasure, following his conviction by the magistrate's court for the offence of robbery with violence contrary to section 296(2) of the Penal Code (Cap 63). He appealed to both the High Court and the Court of Appeal against his conviction but both appeals were rejected. However, the Court of Appeal substituted the death sentence imposed on the Applicant with an order directing that he be detained at the President's pleasure, after a finding that he had committed the offence as a minor and that the death sentence imposed was unlawful. Counsel for the State supported the application for legal aid on grounds that the petition raised questions of infringement of fundamental rights and that lack of legal representation could occasion substantial injustice to the Applicant.)

> purpose – see Legal Aid Board v the State & 2 others, Supreme Court of Appeal of South Africa Case No. 363 of 2009.[76]

Basically, the High Court's position was that courts should defer to the legal aid eligibility assessment by NLAS. But, that is still problematic in view of section 43(6) of the Legal Aid Act, in that, lack of legal representation does not bar the court from continuing the legal proceedings against a person who may otherwise be eligible of free legal aid at State expense. In *Shaban Juma v Republic*, the High Court dismissed the oral application for legal aid made to the court and indicated that it would not look into whether the Applicant was indigent nor whether substantial injustice will be occasioned to him if he is not given legal aid because doing so would be tantamount to usurping NLAS' statutory mandate.[77] The Applicant was, therefore, to choose whether he preferred to proceed without legal representation or to have the hearing and determination of the petition suspended pending the outcome of an application for legal aid to be made to NLAS.[78]

The Supreme Court has also had occasion to interpret the right to legal representation at the State's expense as provided under article 50(2)(h) of the Constitution. In *Republic v. Karisa Chengo & 2 Others*,[79] the Supreme Court was of the view that, '[T]he right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.'[80] The Supreme Court however emphasized that per the provision, '[T]his particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".[81] The Supreme Court went on to elaborate on the constitutional subjection of the provision of free legal aid at State expense to the occurrence of substantial injustice, but without isolating any particular offence as the Court of Appeal did in *David Macharia Njoroge v. Republic*. The Supreme Court thus construed the phrase *'if substantial injustice would otherwise result"* in general terms and stated that:

> [T]here will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. (…) [I]n determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of

---

76 Shaban Juma v Republic (n 75) para 9 (See also para 12 of the decision).
77 Shaban Juma v Republic (n 75), para 14.
78 Shaban Juma v Republic (n 75), para 16.
79 [2017] eKLR, SC Pet No 5 of 2015.
80 Republic v. Karisa Chengo & 2 Others (n 79) para 88.
81 ibid.

> the Legal Aid Act, various other factors which include: (i) the seriousness of the offence; (ii) the severity of the sentence; (iii) the ability of the accused person to pay for his own legal representation; (iv) whether the accused is a minor; (v) the literacy of the accused; (vi) the complexity of the charge against the accused.[82]

The Legal Aid Act, adopts a sweeping definition of legal aid—it includes legal advice, legal representation, legal assistance,[83] legal awareness creation,[84] and law reform engagement and advocacy work on behalf of affected individuals, groups and communities.[85] Nonetheless, the provision of legal aid under the Act is not automatic, but must be qualified.[86] There are parameters that one must meet to qualify for legal aid at State expense.[87] Also, not all areas of law are amenable to legal aid at State expense. Currently, NLAS provides legal aid services in civil, criminal, children,[88] constitutional and public interest matters, or any other matter that it approves.[89] However, legal aid services are not available in respect of tax, recovery of debt, bankruptcy and insolvency matters, civil cases for a company, corporation, trust, public institution, civil society, non-governmental organisation or other artificial persons, and defamation suits.[90] In criminal matters, legal aid is available to those held in lawful custody[91] and those presented to court.[92]

---

82 Republic v. Karisa Chengo & 2 Others (n 79) para 94.

83 Legal assistance entails giving consumers of legal aid assistance in resolving disputes by alternative dispute resolution, drafting of relevant pleadings and documents and effecting service in relation to any legal proceedings, and reaching or giving effect to any out-of-court settlement.

84 By providing legal information and law-related education.

85 LAA 2016, s 2.

86 See LAA 2016, s 35(3); NLAS determines the legal needs of indigent persons and disadvantaged communities in Kenya, establishes priorities for the areas of law and the types of cases and proceedings for which it will provide legal aid services, and formulates policies for the kind of legal aid services to be provided in the different areas of law, types of cases and proceedings.

87 LAA 2016, s 35(1).

88 See LAA 2016, s 43(3) (whenever a child who is unrepresented is brought before a court in proceedings under the Children Act, 2011 (Act No 8 of 2011) or any other written law, the court can order NLAS to provide legal representation for the child).

89 LAA 2016, s 35(2).

90 LAA 2016, s 37.

91 LAA 2016, s 42 (it is an offence to wilfully obstruct a person in lawful custody from accessing legal aid).

92 LAA 2016, s 43. Under section 43(1) of the Legal Aid Act, where an unrepresented accused is presented to court, the court is to promptly inform the

Kenyan citizens, children, refugees, victims of human trafficking, internally displaced persons, and stateless persons only qualify for legal aid services if they are indigent[93] and are resident in Kenya.[94] Moreover, NLAS must be satisfied that; the expected benefits justify the cost of the proceedings; resources are available to meet the cost of the legal aid services sought; present and future demands require that legal aid services be provided; the nature, seriousness and importance of the proceedings to the individual justify the provision of free legal aid at State expense; the subject claim has a probability of success; the conduct of the person seeking legal aid services warrants the assistance sought; the proceedings involve a matter in the public interest; the person is likely to suffer a loss of rights and other damages if not represented in the proceedings; the complexity of the proceedings, such as cross-examination of expert witnesses; there are third party interests necessitating that the person be represented; the denial of legal aid would result in substantial injustice to the applicant; or there is any other reasonable ground that justifies the grant of legal aid.[95]

In fulfilling its statutory mandate, NLAS is required to balance cost-effectiveness and efficiency to provide high quality legal services within the available financial resources.[96] However, NLAS is merely a financial sponsor to the aided person(s),[97] and cannot interfere with the ensuing advocate-client relationship and privilege, nor the rights or liabilities of any other parties to any proceedings, nor the exercise of discretion by courts or tribunals in respect of the matter.[98]

Essentially, the legal aid scheme in Kenya appears wide in terms of the legal aid services provided but narrow in terms of the persons and the areas of law covered. In addition, the legal aid scheme in Kenya gives too much

accused of his or her right to legal representation, if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her, and inform NLAS to provide legal aid to the accused.

93 ibid, s 2 defines an 'indigent person' as a person who cannot afford to pay for legal services.

94 LAA 2016, s 36(1).

95 LAA 2016, s 36(4).

96 LAA 2016, s 35(4).

97 According to section 2 of the Legal Aid Act, 2016, an aided person is a person who is granted legal aid under the Act, including a person who is granted legal aid on an interim basis and a person whose grant of legal aid has been withdrawn under section 52 of the Act.

98 LAA 2016, s 35(5).

discretionary power to NLAS and as such is unclear and uncertain as to when one is actually guaranteed access to free legal aid services at State expense at all times. For instance, though legal aid services cover criminal matters, whenever accused persons are presented to court, section 43(6) of the Act acts as a drawback as it provides that the lack of legal representation will not be a bar to the continuation of proceedings against a person. Moreover, appeals against the decisions of NLAS are to be made to the High Court within thirty days of the decision.[99] This is a drawback on the legal aid scheme in Kenya as litigation on eligibility and qualification for free legal aid at State expense is contra the very core of the concept of equal access to free legal aid at State expense, and the concept of legal aid as a human right.

Proposals to Improve the Legal Aid Framework in Kenya

Codification of legal aid as a human right in Kenya is key. Both the Constitution and statute, especially the Legal Aid Act, have to be expressive that legal aid is a human right. This calls for necessary amendments to the Constitution, especially under chapter four of the Constitution, the Legal Aid Act, and civil and criminal procedure statutes.

Effective implementation of the legal and policy framework on legal aid in Kenya is also important if the entirety of legal aid is to be a reality in Kenya. The aim is to ensure that the legal and policy framework on legal aid is certain, readily available and comprehensible to those in need of legal aid. Ensuring equal access to legal aid is also imperative by reducing the discretionary power of NLAS towards certainty of the criteria for eligibility for legal aid.

Sufficient State funding of the legal aid scheme in Kenya is equally of necessity. Part V of the Legal Aid Act establishes and makes provision for the management and workings of the Legal Aid Fund. The Fund is managed by NLAS.[100] Currently, the Fund comprises: moneys allocated to NLAS by Parliament for its purposes; grants, gifts, donations, loans or other endowments given to NLAS; and moneys from any other lawful source.[101] The Legal Aid Fund is applied to cater to the expenses incurred by NLAS pursuant to the Legal Aid Act, including: expenses incurred in the representation of persons granted legal aid; remuneration of legal aid providers for services rendered and expenses incurred in providing services; and expenses of the

99 LAA 2016, s 55.
100 LAA 2016, s 29(1).
101 LAA 2016, s 29(2).

operations of NLAS as approved by NLAS Board.[102] The effectiveness of NLAS in ensuring the provision of quality legal aid is in part dependent on the funds and resources availed to it. The budgetary allocation to NLAS is therefore something worth looking into. Apart from State funding of free legal aid, access to justice endeavours also attract international donors. A good example is the Programme for Legal Empowerment and Aid Delivery in Kenya (PLEAD), which is funded by the European Union at EUR 34, 150, 000 (KES 4, 288, 000,000).[103]

It is also necessary to ensure that there is equal access to free legal aid at State expense in Kenya. This article advances the slogan, *legal aid for all people and for all areas of law*. Looking at the legal aid scheme in Kenya, the slogan seems rather ambitious in view of the budgetary caps on legal aid services and the restrictive criteria for eligibility for legal aid services at State expense. Despite such limitations, the legal aid scheme in Kenya should aim for equal access to free legal aid at State expense, by ensuring that the eligibility criteria put in place does not produce inequality because of too much discretionary power employed by NLAS.

Empowering consumers of free legal aid in Kenya is of necessity. Legal awareness programmes and public outreach campaigns to educate the would-be consumers of legal aid on their legal rights and the legal and policy framework on legal aid in Kenya is imperative. It is meaningless to have in place a beautiful legal and policy framework on legal aid and the public is unaware of it and neither is it accessible and available to the consumers of legal aid. A legal awareness day or week every other month or a walk-in office would go a long way in that regard.

Public and private sector collaboration is also highly recommended. A proper referral framework within the legal aid stakeholders' network, both public and

---

[102] LAA 2016, s 30. (Under section 32(2) of the Act, other annual expenses of NLAS include: salaries, allowances and other charges for members of the NLAS Board and staff of the NLAS; pensions, gratuities and other charges in respect of benefits payable out of the funds of the NLAS; proper maintenance of the buildings and grounds of the NLAS; maintenance, repair and replacement of equipment and other property of the NLAS; funding of training, research and development activities of the NLAS; and creation of funds to meet future or contingent liabilities of NLAS).

[103] See UNODC <https://www.unodc.org/easternafrica/en/programme-launched-to-improve-access-to-justice-through-kenyas-judiciary.html> accessed 17 November 2020.

private sector actors, is necessary to better address the legal aid needs of the public through targeted and specialised expertise.

Finally, the quality of legal aid services must be guaranteed. The quality of legal aid services provided to the consumers of legal aid is very much dependent on the quality, competence and expertise of the advocates that are available, ready and committed to provide legal aid to the recipients of legal aid. Obtaining such advocates depends on the applicable remuneration scheme, subject to the Advocates Act[104] and the Advocates Remuneration Order.[105] The 1945 Rushcliffe Committee Report in the UK said of the involvement of lawyers in legal aid services and their remuneration for the legal aid services rendered:[106]

> [T]hat it would be impossible to expect any extension of gratuitous professional services, particularly as there appears to be a consensus of opinion that the great increase in legislation and the growing complexity of modern life have created a situation in which increasing numbers of people must have recourse to professional legal assistance. It follows that a service which was at best somewhat patchy has become totally inadequate and that this condition will become worse. If all members of the community are to secure the legal assistance they require, barristers and solicitors cannot be expected in future to provide that assistance to a considerable section as a voluntary service.

Seventy-five years later, the sentiments of the Rushcliffe Committee cannot be any truer, especially as concerns the provision of legal aid services by advocates in Kenya. In addition, under Principle 6 of the United Nations Basic Principles on the Role of Lawyers,[107] in all cases in which the interests of

---

104 Cap 16, Laws of Kenya <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2016> accessed 27 November 2020.

105 See Kenya Law <http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=CAP.%2016> accessed 27 November 2020.

106 Theobald Mathew, 'Legal Aid and Legal Advice in England and Wales: The Rushcliffe Committee Report' (1946) 7(1) The Howard Journal of Criminal Justice, 39-44 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2311.1946.tb01072.x> accessed 25 November 2020.

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

justice so require, any person who does not have a lawyer is entitled to have assigned to them a lawyer of experience and competence commensurate with the nature of the offence, to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

Closer home, Principle H of the African Commission on Human and Peoples' Rights' Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, 2003 provides that lawyers who offer legal assistance in the context of legal aid services should be: qualified to represent and defend the person represented; have the necessary training and experience corresponding to the nature and seriousness of the matter; free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body; advocate in favour of the person represented; and be sufficiently compensated to provide an incentive to accord the person represented adequate and effective representation.

Accordingly, State-funded legal aid services, though free, must be of the quality that will guarantee to the beneficiaries of legal aid access to justice in its truest sense; that is, provision of quality legal services by competent and committed advocates. Free legal aid services should not translate into diluted professional legal services. As such, the public funds availed for legal aid services must take into account the remuneration to be paid to the advocates enlisted in the legal aid scheme. Take for example the 2016 Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services where advocates who enlist for pro bono services are to be paid an all-inclusive amount of Kshs 30,000.[108] Similarly, section 75(4) of the Legal Aid Act states that the scale of fees determined by NLAS will be less than the legal fee applicable to persons not aided by NLAS.

CONCLUSION

The national and international legal instruments considered in this paper have not been clear and expressive of legal aid as a human right. The right to free legal aid at State expense is marred with considerations of State economics and the politics thereof which then feed into the situation where States fall

<https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx> accessed 23 November 2020.

[108] See Kenya Gazette Notice No 370 of 2016 <http://kenyalaw.org/kl/index.php?id=6006> accessed 25 November 2020.

short of declaring legal aid as a human right in all its forms. States impose tests and means to sieve persons who are eligible for free legal aid, the extent of the State's contribution to the costs of access to justice and the kinds of legal services covered, including the areas of law for which legal aid is available.

That said, even if legal aid were recognized as a human right, access to the right would still be dependent on whether the said right is an absolute right or not and as a non-absolute right, whether its realisation is immediate or progressive. However, the human rights nature of legal aid is hard to ignore because of its unbreakable attachment to human dignity. Legal aid in Kenya would work best if expressly recognized as a human right under both the Constitution and Statute and in that regard, as a human right creating immediate and mandatory obligation on the State to provide and fund free legal aid to the indigent. This calls for a necessary amendment to the Constitution, especially in chapter four, the Legal Aid Act and civil and criminal procedure statutes. Civil and criminal matters and matters that are neither civil nor criminal, such as constitutional petitions, judicial review proceedings and family matters, would thus be amenable to free legal aid at State expense as a matter of human right. In the meantime, any sieving measures or tests applicable in the determination of eligibility for free legal aid at State expense should not further inhumanity.

Enhancing Access to Justice through Regulation of Paralegal Education and Training in Kenya

Moses Muchiri†

Abstract

Access to Justice is a fundamental imperative within the Constitution of Kenya, 2010 and also under Kenya's economic development blueprints notably Vision 2030. However, practical realities on the ground reveal a dissonance of expectations between the intended beneficiaries of access to justice and stakeholders and actors in the legal and justice sector. Despite the annual increase in the number of Advocates admitted to the Kenyan Bar and corresponding increase of legal education providers, these incremental numbers have not done much to bridge the gap of access to justice in Kenya. Paralegal services and training in Kenya are fragmented and unregulated. Mainstreaming paralegal education and training and regulation of paralegal education providers is a critical component in designing a systematic and sustainable national access to justice framework. Conceptually, these standards must retain flexibility to spur innovation in design and implementation of paralegal education and training programmes. Ensuring convergence of expectations by stakeholders is imperative in developing the envisaged regulations.

Keywords: Access to justice, paralegalism, regulations, paralegal education, training, paralegal services, challenges and opportunities.

INTRODUCTION

In its broadest meaning, access to justice includes access to fair and equitable laws, access to education and public information, access to law and related procedures, access to courts, tribunals and alternative dispute

† Advocate of High Court, Kenya, Senior Quality Assurance, Licensing and Compliance Officer, Council of Legal Education Kenya moses.muchiri@daad-alumni.de.

resolution mechanisms and fair administration of justice.[1] Paralegalism is a key facilitator of access to justice as conceived in Sustainable Development Goal 16 in particular SDG 16.3 which calls on countries to 'promote the rule of law at the national and international levels and ensure equal access to justice for all.'[2] Paralegalism cuts across all six thematic areas of the National Legal Aid Policy ('NALEAP').Yet the role of paralegals in access to justice in Kenya is highly underrated because paralegals work in the periphery of the legal sector mostly informally in that they work directly within communities, prisons, police stations offering direct and informal legal assistance to indigents. They are not visible in the way mainstream actors and institutions in the formal justice sector are.[3]

PROBLEM STATEMENT

Paralegal services are unregulated, unstructured, uncoordinated and chronically underfunded.[4] This holds true for paralegal education and training. The history of paralegalism in Kenya and the key role played by CSO's in recruiting, training and deployment of paralegals is well documented.[5] Currently, training of paralegals is largely undertaken by CSOs and predominantly focuses on enabling access to courts, procedural aspects of

---

1 Jedidah Wakonyo Waruhiu and John Justice Odhiambo Otieno, 'Access to Justice: The Paralegal Approach' in Yash Pal Ghai and Jill Cottrell Ghai (eds) *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press 2014) 185.

2 See https://www.un.org/sustainabledevelopment/peace-justice/>. accessed 20 April 2021.

3 'Justice Needs and Satisfaction in Kenya 2017', Hill available at <https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf> accessed 18 May 2020. See 'Access to Justice for Africa's Marginalized: Impediments and Opportunities in Eleven Countries' A Baseline Report by the Kenyan and Swedish Sections of the International Commission of Jurists, African Human Rights and Access to Justice Program (2009).

4 Jedidah Wakonyo Waruhiu and John Justice Odhiambo Otieno, 'Access to Justice: The Paralegal Approach' in Yash Pal Ghai and Jill Cottrell Ghai (eds) *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press 2014) 198.

5 Abigail H. Moy, 'Kenya's Community-Based Paralegals: A Tradition of Grassroots Legal Activism' in Vivek Maru and Varun Gauri (eds), *Community Paralegals and the Pursuit of Justice* (Cambridge University Press 2018). See also, Caroline Amondi, 'Legal Aid in Kenya: Building a Fort for Wanjiku' in Yash Pal Ghai & Jill Cottrell Ghai (eds) *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press 2014) 205.

law, advocacy and community mobilization skills and may last from as little as five days to a few months.[6] The training is combined with practical skills training through exposure visits to communities, courts, prisons and police stations for legal aid clinics and civic education.[7] CSOs engaged in training of paralegals currently follow the curriculum developed by the Paralegal Support Network (PASUNE) launched in 2002.

Only one formal legal education provider, the Kenya School of Law (KSL) has developed a programme at diploma level for training of paralegals styled 'Diploma in Law (Paralegal) Studies. The Diploma in Law (Paralegal) programme is envisaged to 'bridge the existing gap in a middle cadre to support legal professionals at the practicing Bar, the corporate world and government institutions.'[8] Yet the overwhelming majority of persons who graduate with the Diploma in Law (Paralegal) studies use this qualification as an entry point to the Bachelor of Law LL.B Degree Programme. Unfortunately, the current regulatory framework makes no provision for paralegal education and training let along provide guidelines on quality standards in paralegal education and training.

PURPOSE, OBJECTIVES AND SIGNIFICANCE OF THE STUDY

This paper interrogates the value of paralegal education and training programmes in enhancing access to justice and explores possible regulatory and policy interventions for paralegal education and training. The paper argues that promoting paralegalism through carefully tuned minimalistic regulatory policy in paralegal education and training will significantly mitigate the root causes of inequalities brought about by inaccessibility to justice in Kenya and act as a catalyst for innovative paralegal education programmes and training.

---

6 Jedidah Wakonyo Waruhiu and John Justice Odhiambo Otieno, 'Access to Justice: The Paralegal Approach' in Yash Pal Ghai and Jill Cottrell Ghai (eds) *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press 2014) 187.

7 Ibid, 188.

8 https://www.ksl.ac.ke/paralegal-studies/. accessed 20 April 2021.

THEORETICAL PREMISE

This paper leverages on the theory of legal empowerment which involves 'equipping people with the knowledge, confidence and skills to realize their rights'[9] to support the argument that effective regulation can enhance paralegal education and training and empower paralegal education providers resultantly enhancing access to justice. Legal empowerment has been defined as 'strengthening the capacity of all people to exercise their rights, either as individuals or as members of a community. It's about ensuring that law is not confined to books or courtrooms, but rather is available and meaningful to ordinary people.'[10] Legal empowerment has four pillars: access to justice and the rule of law, property rights, labour rights and business rights.[11]

---

9 International Development Law Organization, https://www.idlo.int/what-we-do/access-justice/legal-empowerment?page=17&field_status_value=3. accessed 20 April 2021.

10 Open Society Justice initiative, (2012) 'Legal Empowerment: An integrated approach to justice and development' Draft Working Paper, < https://www.justiceinitiative.org/uploads/149596ab-d845-4882-935d-04e99021642c/lep-working-paper-20120701.pdf>. accessed 20 April 2021. See also UN Commission on the Legal Empowerment of the Poor, 'The Four Pillars of Legal Empowerment' (2008), in Making the Law Work for Everyone Vol. I, Commission on Legal Empowerment of the Poor and United Nations Development Programme, New York, pp. 25-42.

11 Ibid. See also, Stephen Golub, 'What is Legal Empowerment? An Introduction' in *Legal Empowerment Working Papers* (2010), International Development Law Organization < https://www.files.ethz.ch/isn/138100/Golub_Introduction.pdf> accessed 20 April 2021; Stephen Golub, 'Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative' (2003) Carnegie Endowment Working Papers, Rule of Law Series Democracy and Rule of Law Project, Working Paper Number 41 https://carnegieendowment.org/files/wp41.pdf. accessed 20 April 2021; Laura Goodwin and Vivek Maru, 'What do we know about legal empowerment? Mapping the Evidence' (2014) Namati Working Papers < https://namati.org/wp-content/uploads/2014/05/Evidence-Review2.pdf>. accessed 20 April 2021; Tiernan Mennen, 'The Mystery of Legal Empowerment: Livelihood and Community Justice in Bolivia'(2010), International Development Law Organization, Paper No. 6 < https://www.files.ethz.ch/isn/137052/Mystery_LEP.pdf>. accessed 20 April 2021.

Role of Clinical Legal Programmes in Enhancing Access to Justice

Clinical legal education is the study of law through real or simulated casework. It is a blended delivery methodology which blends traditional case-method with practical aspects to enable students participate in legal situations be involved in the law in action and reflect on their experiences. The clinical approach to legal education is based on the appreciation that Schools of Law must do more to prepare law students for practice by embellishing mainstream legal education curricula particularly at the undergraduate level with aspects of practical training in law.[12] This means trying to achieve a balance between the traditional theoretical based learning approaches and experiential based learning methods and requires re-training teachers of law or engaging professional practicing lawyers as adjunct faculty all of which have significant cost implications. Although opinions may differ on the extent to which practical training should be embedded in law school curricula, or even whether law schools have the capacity to undertake practical training and how they ought to provide it, blending the doctrinal and clinical perspectives is indisputably beneficial.

The inculcation of clinical legal education represents a steady departure from the established model of legal curricula pedagogy in Kenya which has for decades been heavily steeped in theoretical approaches and a formidable transition towards experiential learning and skills building learning.[13] Of the eighteen legal education providers which offer various legal education programmes ranging from Diploma in Law, Bachelor and Master in Law programmes in Kenya, 85% have inculcated various versions of clinical legal programmes within their curricula.[14] One provider, Kenyatta University School of Law, has gone further and identified clinical legal education as its niche area. Egerton University School of Law has embellished its undergraduate Bachelor of Law Degree programme with an extensive clinical programme

12 See Kenya Institute for Public Policy Research and Analysis Report, 'Factors Influencing Students' Performance in the Kenyan Bar Examination and Proposed Interventions' (2019) https://www.ksl.ac.ke/e-resources/. accessed 20 December 2020 paragraph 334.

13 Stephen Wizner and Jane Aiken, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 Fordham L. Rev. 997 https://ir.lawnet.fordham.edu/flr/vol73/iss3/11. accessed 14 April 2021.

14 See http://cle.or.ke/institutional-licensing-status-2/>.

which involves students and faculty in providing clinical services to the communities in the Nakuru County catchment area. Adoption and implementation clinical legal education varies significantly between legal education providers and resultantly, implementation of clinical legal education in Kenya is marked by inconsistency and incoherence in conceptualization and implementation. These gaps have accentuated the challenges of using clinical legal education as a springboard for paralegal education and training.

The lack of regulatory oversight or framework for clinical legal education is in large part the cause for the unstructured implementation of clinical legal education programmes in Kenya. Indeed clinical legal education is not recognized in the Legal Education Act, 2012.[15] There is only one instance where clinical programmes are explicitly mentioned and that is as one of the mandatory ten (10) courses prescribed for post-graduate professional diploma programmes.[16] Ironically, the Council of Legal Education has been requiring legal education institutions to include clinical legal education in legal education curricula at the undergraduate Bachelors level. However, this requirement is not prescribed as a requirement for approval of legal education programmes.

Because different Schools of Law have different capabilities in terms of capacity and resources at their disposal, the lack of standards in this area means law schools have unfettered discretion to determine how, where, when and to what extent to deploy clinical legal education. Moreover, clinical legal education has been applied restrictively as blended learning delivery methodology within limited course offerings rather than as a comprehensive clinical programme cutting across the entire curriculum. These are some of the reasons why clinical legal education is not harmonized in Kenya. Thus while aspects of clinical legal education have become partly entrenched in law school course offerings, this has often been achieved without clear implementation structures and devoid of regulatory guidance. Schools of Law have also provided little information to enable a clear appreciation of the impact, if any, achieved by clinical legal education programmes in enhancing access to justice.

---

15 Legal Education Act, 2012, Second Schedule.
16 Ibid.

Scaling Up Clinical Legal Education to Promote Paralegalism

The Council of Legal Education's approach to mainstreaming any semblance of paralegal education and training in legal education providers has been limited to emphasis on clinical legal education. However, clinicalism and paralegalism are not synonymous despite being interdependent. Moreover, the requirement for legal education providers to mainstream clinical legal education is not even a regulatory requirement. Regrettably, this demonstrates that clinical legal education and training is momentarily not a policy priority.

There is however an increasing realization that legal education providers and specifically Schools of Law must do more to design their law programmes especially at the undergraduate level to equip law students with a broad range of clinical legal skills that would enable them give back to the society either as paralegals or supervisors of paralegals. However, in order to optimize clinical legal education, reliance cannot and must not be retained or reserved entirely on Schools of Law to train paralegals for several reasons. *First*, training of paralegals is not within the scope of the aims and goals of a majority of legal education institutions in Kenya. *Secondly*, clinical legal education is an additional responsibility for Schools of Law in Kenya which requires incentives considering the preponderant costs of training academic staff and students in clinical legal education aspects and the overall costs of maintaining clinical programmes. *Thirdly*, a significant number of legal education curricula embed clinical aspects as delivery methods. This limitation in the conceptualization of clinical education limits the potential impact and role of clinical legal studies as a platform for skills building and legal aid.

Although ideally clinical legal education ought to be embedded throughout all aspects of undergraduate legal study at the University level, the goal of undergraduate legal studies, particularly at the Bachelor level is to propagate widespread knowledge of substantive and procedural law. For most Universities and Schools of Law, this traditional approach represents the widespread understanding on pedagogy and andragogy. Introducing a requirement for Schools of Law to include clinical learning at whatever level in their curricula would require a renewed perspective in curriculum design and delivery methodology. This is because in stark contrast to the traditional lecture method which is the main mode of dispensing legal knowledge currently obtaining in a vast majority of Schools in Kenya today, clinical legal studies require a method of delivery akin to the apprentice-style of learning ideally through practical sessions such as legal clinics, mooting and courses

that 'train students for multiple roles as advocates and counsellors, negotiators and problems-solvers.'[17]

Two conflicts reveal how clinical legal education is evolving and shaping experiential learning in legal education in Kenya. *First*, clinical programmes are burdened by having to fulfill and serve two competing expectations: internally they are expected to focus on students' practical development as lawyers and at the same time externally they are expected to ameliorate the unmet legal needs of indigent communities. These roles often conflict because both interests compete for scarce resources forcing Schools of Law to rationalize.[18] *Secondly*, clinical programmes in most Schools of Law in Kenya are designed in a manner that leans towards emphasis more on meeting internal expectations. Fitting clinical programmes within legal education curricula creates tension between clinical and 'doctrinal' pedagogy methodology. This conflict could be resolved by establishing School of Law clinics as separate and independent legal education programmes with different compensation, faculty status and teaching responsibilities.[19]

The Legal Aid Act, 2016 ('LAA') envisages regulation and accreditation of clinicalism at two levels, Legal aid programmes and legal aid providers. Schools of Law legal aid programmes fall within the definition of 'legal aid clinic' in the LAA which is defined as 'a law clinic accredited by the [National Legal Aid] Service or offered by an accredited legal aid provider.'[20] Indeed one of the functions of the National Legal Aid Service (NLAS) is to develop programs for legal aid education and the training and certification of paralegals in consultation with the Council of Legal Education.[21] In regard to legal aid providers, Schools of Law are one of the six categories of legal aid providers under the LAA. The Act vests NLAS with the function to 'promote

---

17 Willy Mutunga, 'A New Bench-Bar Relationship: the Vision of the 2010 Constitution of Kenya' in Yash Pal Ghai and Jill Cottrell Ghai (eds) *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press 2014) 59.

18 Margaret Drew and Andrew P. Morriss, 'Clinical Legal Education & Access to Justice: Conflicts, Interests and Evolution' (2013) Faculty Publications. Paper 96 http://scholarship.law.umassd.edu/fac_pubs/96. accessed 20 April 2021.

19 Ibid.

20 Legal Aid Act, No. 6 of 2016, Laws of Kenya, section 2.

21 Ibid section 7(1)(h).

and supervise the establishment and working of legal aid services in universities, colleges and other institutions.'[22]

The LAA vests a special consultative role on the Council of Legal Education in terms of developing programs for legal aid education and the training and certification of paralegals. Yet 'accredited legal aid providers' and 'paralegal education & training providers' are not synonymous.[23] NLAS has the exclusive role to accredit legal aid providers whereas CLE has the mandate to approve institutions offering paralegal education and training.[24] These roles are statutory and are summarized as follows (table):

Council of Legal Education (CLE)	**National Legal Aid Service (NLAS)**
• Approve paralegal education & training **providers**. Element of accreditation. (*s.2 defn. of 'paralegal')*; • Develop standards for paralegal education & training **programmes** in consultation with NLAS (*s.7(1)(h)LAA*); • Research: Identify core knowledge and skills competencies which are essential foundations to the ideal paralegal.	• Accredit legal aid providers (*s.2 defn. of 'paralegal' and s.7(1)(h)LAA*); • Program development: in consultation with CLE, develop programs for legal aid education and the training and certification of paralegals (*s.7(1)(h)LAA*); • Certify paralegals. Element of registration? (*s.7(1)(h)LAA*).

NLAS accredits Legal Aid Providers while CLE approves Paralegal Education and Training Providers. However, development of paralegal education and training programmes is a shared function between NLAS and CLE. LAA envisages collaboration between NLAS and CLE to conduct research to establish appropriate standards of education and training suitable for paralegals at different levels.

---

22 Ibid section 7(1)(i).
23 Ibid section 2.
24 Ibid section 2 within the definition of 'paralegal.'

I. Conceptualizing Regulation for Paralegal Education

Section 2, Legal Aid Act, 2016 defines a paralegal to mean '*a person* ***employed*** *by the [National Legal Aid] Service or an accredited legal aid provider who has* ***completed a training course in the relevant field of study in an institution approved by the Council of Legal Education****.*'[25] This definition sets a high standard as to the person that can qualify as a paralegal but at the same time raises questions as to its appropriateness. The definition introduces two critical qualifications for paralegals, the first being employment either at NLAS or an accredited legal aid provider and the second is training. The use of the word 'employed' as a requirement is highly restrictive in that it excludes persons who may have the necessary experience but are not employed either by NLAS or an accredited legal provider or persons who may have the relevant training but are offer paralegal services including legal aid voluntarily. Moreover, the Act requires paralegals to be trained in a relevant field of study in an institution accredited by the Council of Legal Education ('CLE'). The training requirement is commendable as it allows the Council of Legal Education in conjunction with NLAS to define standards on what could be deemed 'relevant field of study' as well as set standards for accreditation of institutions offering that training.

The LAA envisages a specific type of paralegal and sets a high bar/ threshold as to the person that can be considered to be a 'paralegal.' Any regulatory intervention, necessary as it might be, must distinguish between categories of paralegals and consider the issue whether to limit the scope of regulation to those paralegals who meet the criteria envisaged by the LAA or enlarge the scope of potential regulation to include both formal paralegals as well as community paralegals. This could have very significant implication on access to justice particularly for indigent marginalized communities.

Admittedly, a rigid regulatory regime is necessary and has achieved tremendous benefits for legal education at the university level. Robust quality

---

[25] This definition is similar to the current American Bar Association's definition of paralegal adopted by the ABA's House of Delegates in February 2020 as follows: 'A paralegal is a person, qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible.'
See https://www.americanbar.org/groups/paralegals/professioninformation/current_aba_definition_of_legal_assistant_paralegal/ accessed 28th May 2020.

assurance standards coupled with strict requirements for compliance is beginning to yield positive impact on the quality of legal education programmes and law graduates in Kenya. Importantly, legal education at the University level is gradually shifting legal education in Kenya away from the culture of routine ritualistic compliance towards a culture where ownership of quality standards in legal education is divested from regulatory agencies and mainstreamed by legal education providers. Regulatory agencies must however be cautious to avoid approaching paralegal education in the same lens as they would formal university legal education to avoid mechanical regulatory interventions which are heavily steeped in academic nuance and lacking in practical significance.

A. Paralegal Education and the Legal Profession

The Judiciary's initiatives to enhance access to justice in Kenya have included increasing the number of judicial officers that is judges and magistrates, building more courts and mobile courts in marginalized areas and importantly, introduction of court annexed mediation and introduction of the Small Claims Courts.[26] Laudable as these efforts are, they cannot alone fulfil the unmet legal needs of the poor without the direct involvement and participation of lawyers. Indeed these efforts do not meet the four pillars of legal empowerment. The importance of the role of lawyers in promoting legal aid and access to justice is partially recognized by the Law Society of Kenya which provides a framework for recognizing and awarding Continuous Professional Development (CPD) points for *pro bono* legal aid services rendered by lawyers.[27] However, *pro bono* remains an under-prioritized area. The Law Society, in its 2012-2016 strategic plan, set a performance objective of engaging 600 Kenyan lawyers in pro bono legal services by 2016. The Law Society's 2017-2021 Strategic Plan however does not mention this and so it is unclear whether or not this target was achieved. Non-inclusion of *pro bono* legal services in the Law Society's current strategic plan reveals the

---

[26] See for instance Chapters 2, 7 and 8 of the Kenya Judiciary's, '*State of the Judiciary and the Administration of Justice 2018-2019 Annual Report (SOJAR)*' available at https://www.judiciary.go.ke/resources/reports/ accessed 2nd December 2020.

[27] Regulation 11 of the *Advocates (Continuing Professional Development) Rules, LN 43 of 2014* provides that states that regular or *pro bono* legal work is not an approved CPD activity except for legal work that is for the purposes of the Legal Aid Program and for which the Continuing Professional Development Committee of the Law Society of Kenya shall determine how many units an advocate may accrue in a CPD year for that work.

shifting priorities, expectations and low prioritization of *pro bono* legal aid services in the strategies of the Society. Moreover, enhancing legal aid and access to justice is not simply a matter of increasing the number of lawyers enrolled to the Bar as it is now apparently clear that despite the increase in numbers of lawyers, indigent Kenyans are still unable to access basic legal services.

There is currently very little data indicating the percentage of lawyers providing *pro bono* legal aid services in Kenya and therefore we are unable to understand the impact those services have achieved on the Kenyan public. At best, *pro bono* services are rendered in an isolated, sporadic and discretionally at the behest of willing law firms and lawyers. These efforts lack overall coordination either strategically or operationally. At a strategic level, there are no targeted focal areas to act as a launch pad for *pro bono* services. Operationally, the Law Society of Kenya has tried its best to organize annual legal aid weeks in select venues coordinated at Branch level and these have been well received, but are sporadic and not institutionalized. This has resulted in institutional inefficiency to tackle the large-scale challenges and inequalities in access to justice.

Insofar as the legal profession's involvement in legal education particularly at the level of paralegal training, there is unfortunately little to report on. Not only is there little data on the level of uptake of legal aid services by the Bar, but the information available reveals that legal aid services rank towards the bottom end in the list of priorities of lawyers. Legal aid services are mostly one-off activities taken up by the willing subject to availability and provided the activities do not have a substantial bearing on costs. While many lawyers are involved in formal legal education and training at the University and vocational level (at the Kenya School of Law) and even beyond through continual training of pupils, formal paralegals (court clerks, conveyancing clerks, commercial law clerks and so on) few lawyers are involved in the training of community level paralegals. This is partly attributable to the fact that not many lawyers are connected to the Civil Society Organizations in Kenya which provide programmatic training for paralegals. There is need to establish and maintain a database pool of lawyers available for engagement in educating and training community paralegals. The database could perhaps be maintained and regularly reviewed by the LSK and NLAS.

To encourage uptake by lawyers in the work of legal aid services including paralegal education and training, there is need for strategic re-conceptualization of *pro bono* services including linking developing paralegal

education and training programmes as part of the *pro bono* services. Through development of a points-based system for lawyers participating in paralegal education and training, a range of incentives could be awarded such as pro rata rebates on annual practicing certificate renewal fees, Continuing Professional Development (CPD) points, Legal Aid Service awards and commendations. Strategic linkage between LSK, the Judiciary, NLAS and the community of Civil Society Organizations involved in legal aid work through paralegalism would be of tremendous value to institutionalize cooperation for legal aid and access to justice through paralegal education and training.

B. Mitigating Challenges, Risks and Gains in Regulating Paralegal Education and Training

Very few institutions are currently running training programmes specifically for training paralegals in Kenya. The Paralegal Support Network (PASUNE) in conjunction with the Legal Resources Foundation stands out on this aspect as they have developed a comprehensive curriculum for training paralegals and they are the only institution that has achieved this. The PASUNE paralegal training programme is designed to train paralegals who mainly provide legal aid services at community level, police stations and court stations. As such, the PASUNE Paralegal Training Programme is community-centric which distinguishes the delivery methods employed in the programme from those used in conventional training methodologies by institutions of higher learning such as Universities, Colleges and other tertiary education providers.

Although the Council of Legal Education has not presently licensed any paralegal training programme, the PASUNE programme offers Council a unique opportunity to support PASUNE's objective of improving and enhancing access to justice across the country. It is necessary to re-think the extent to which the existing regulatory framework for licensing of legal education providers as outlined in the Legal Education (Accreditation) Regulations, 2016 fit the unique characteristics of paralegal education programmes which blend both informal and formal methodologies.

C. Considerations in developing a quality assurance standards for paralegal education and training programs

There is need for comprehensive regulatory intervention and more importantly, development of standards that prescribe the technical, behavioral and core competencies desired as outcomes. The standards must differentiate between levels or categories of paralegals, and establish a

framework for ethical conduct and possible career progression pathways for paralegals. This section discusses some of the salient policy issues which must be considered in the envisaged regulatory framework.

1. Quality Assurance Standards

Quality assurance processes are often viewed by academic staff and bureaucratic governance administration as opaque and confusing especially when those processes and standards are introduced externally by sector regulators. Confusion may also exist when enthusiasm for the program exceeds enthusiasm towards quality assurance standards and processes. Although there is a strong value proposition in regulating paralegal education and training, a minimalist regulatory approach is recommended with emphasis on standards rather than rules. In recognizing the need for appropriate and effective regulatory oversight and standards, which is achievable, there is need for a shift in mindset to avoid overly pedantic ritualistic and regimented regulatory approaches. This will ensure education of paralegals in legal aid and access to justice remains unfettered by regulation itself. The issue of quality assurance standards in paralegal education and training must be addressed regardless of the source of the education and training. This also holds true both for clinical legal education and programmes housed within higher education institutions as well as CSOs and NGOs offering paralegal education and training programmes. Paralegal education and training providers have a primary responsibility to ensure their programmes offer high quality of education and training that students achieve the desired and required standards and modes of assessment are appropriate, rigorous and fair. This must be the focus of any conceived regulatory standards.

2. Learning Outcomes and Core competencies

Developing standards in paralegal education and training must be guided by clearly defined core competencies and harmonized, uniform criteria on common foundational knowledge competencies and essential skills for paralegals. Development of sills should be the primary focus and learning outcomes should be based on clearly mapped skills development and emphasis on ethics. To ensure consistency of learning experience, learning outcomes should be accurately defined at the inception so as to provide clear focus for the paralegal education and training programmes. This will address some of the issues associated with consistency of experience, which are often raised when introducing or reviewing education and training programmes.

3. Assessment Methods/ Modes

There must be a suitable quality assurance standard on assessment methods. Paralegal education and training programmes should avail opportunities to provide students with feedback on their progress during and at the end of each module.

4. Partnerships and Collaborations

Partnerships are particularly vital to activate and leverage synergies which translate long term strategy into actionable paralegal education and training programmes. The challenges and problems facing access to justice and the role of paralegal education and training in ameliorating those challenges cannot be easily solved by any one single actor unilaterally. Cooperation between different actors leverages resources, know-how and strategies and maximizes impact through economies of scale which cannot be achieved through unilateral action.

5. Differentiating between formal and community paralegals

The PASUNE paralegal training programme trains paralegals operating at community level, in police stations and court stations to offer essential legal aid services. The PASUNE Paralegal Training Programme is community-centric which distinguishes the delivery methods employed in the programme from those used in conventional institutions of higher learning such as Universities and Colleges. The envisaged regulatory standards must differentiate between two categories of paralegals:

(i) **Community paralegals**: The *Kampala Declaration on Community Paralegals* (2012) recognizes that community paralegals have been active in Africa at least since the 1950s and through their diverse efforts they 'have empowered people in many parts of Africa to equitably resolve conflicts; to seek protection from violence; to navigate the criminal justice system; to exercise rights over land and natural resources; to access essential services like health care and education; to hold private firms accountable; and to participate in the economy on fair terms.'[28] They operate mainly at community level, police stations and court stations and offer rudimentary legal aid services and are supervised by and attached to legal aid institutions normally CSOs on a

[28] Kampala Declaration On Community Paralegals (2012) https://namati.org/kampala-declaration/ accessed 20 April 2021.

voluntary basis. This category of paralegals is the main focus of the PASUNE paralegal training programme.

(ii) **Formal paralegals**: These category of paralegals pass through a formal legal education and training programme such as for instance the Diploma in Law (Paralegal Studies) programme of the Kenya School of Law. They are employed in various professional and technical capacities such as Legal Assistants, Court Clerks, Registrars, Land Registry Clerks and Law Firm Clerks. In some jurisdictions, these paralegals are organized as a profession and are required to obtain certification.

While it is possible to have a single reference point for paralegal education and training for both community level and formal paralegals, the applicable standards and rules should differentiate the scope of training and outcomes envisaged.

6. Funding for Clinical Legal Education and Paralegal Education and Training

Funding paralegal education and training programmes is currently with the support of donor partners. Considering the importance of access to justice, a strong case can be made to fund paralegal education and training programmes through the legal aid fund established under sections 29 and 30 of the Legal Aid Act, 2016.

7. Common curriculum or core competencies

The PASUNE curriculum is widely used as the blueprint for paralegal education and training programmes by most organizations in Kenya. Whether this is by default for lack of better alternatives or a deliberate result to avoid duplicating the PASUNE curriculum is unknown. There are two possible regulatory directions; first, regulation could conceive a uniform, harmonized '*one-size fits all*' curriculum to paralegal education and training. This could mean adopting the PASUNE curriculum for adoption by all providers of paralegal education and training of community paralegals. The second approach would be to prescribe common foundational knowledge, skills and competencies and create room for paralegal education and training providers to incorporate those competencies and skills outcomes in their tailor made programs. To create room for innovation, the second approach is the preferred option as it will ensure that focus remains on harmonizing basic quality standards across all providers while creating room for innovation by

providers to develop tailor-made *sui generis* paralegal education and training programmes.

8. Continuing research, monitoring & review

The need to ensure continued learning and keep abreast on best practices in regulation and accreditation of paralegal education and training is important. There is need for continued research on best ways to anchor access to justice through paralegal education and training. Benchmarking best practice in regulation of paralegal legal education and training will provide add value in terms of assessing the *scale* and *value* of the contribution of paralegal education and training programmes to access to justice in a wider policy and practice context. This will also provide data on the *impact* of paralegal education and training on access to justice. Entrenching regular monitoring and review of existing paralegal education and training programmes will ensure these programmes remain on track in achieving desired learning outcomes and maintain quality standards.

CONCLUSION

Mitigating the regulatory gap in paralegal education and training is useful to enhance access to justice and requires collaboration and cooperation between all stakeholders the legal and justice sector. However, bridging the access to justice gap through regulation of paralegal education and training is only one part of the much needed intervention. On the flip side, there are no standards or regulatory framework for clinical legal education programmes offered. Robust regulatory intervention must provide a comprehensive framework that includes clinical legal education as well as paralegal education and training. The focus of regulation should be to entrench appropriate quality assurance standards in a minimalistic and non-obtrusive manner. These standards should be developed in collaboration with stakeholders in particular organizations already running similar programmes. In this sense, ownership for setting standards in both clinical and paralegal education and training should be stakeholder driven as opposed to sector regulator driven. Keeping regulatory intervention to a bare minimum is vital to encourage innovation in clinical legal education and paralegal education and training. Excessive and intrusive regulation at this level may stifle creativity and impose unrealistic standards on these programmes leading to inefficiencies and opportunity costs on realizing the goal of enhancing legal aid and access to justice. Compliance with regulatory standards is a continuous iterative process. Aware of the risks of over-regulation, the challenge is for sector regulators,

NLAS and CLE, to develop the appropriate mix of regulatory guidelines, avoid overly prescriptive regulatory requirements and focus instead on where value counts, quality standardization of paralegal education and training programmes.

Child Lives Matter Too: Prioritising the Realisation of the Right to Legal Aid for Children in Conflict with the Law

Dr. Sara Kinyanjui Muringa*

ABSTRACT

The Constitution of Kenya of 2010 entrenches child rights that had been previously articulated in the Children Act of 2001. This paper interrogates the scope of the right to legal aid and the extent to which it has protected and fulfilled. While there have been reforms in the child justice system towards the fulfilment of child rights, the right to legal aid for children is yet to be fully realised a decade after the promulgation of the Constitution. The paper argues that the retributive philosophy historically underpinning the criminal justice system subliminally relegates the rights of children in conflict with the law. Within this context, legal aid for children in conflict with the law has not been prioritised. Making a case for a whole system approach, the paper proposes a focus on the paradigm shift in the child justice system as a starting point towards enhancing legal aid for children. A practical and tailor made model for sustainable legal aid services for children is proposed.

Keywords: *Access to justice, legal aid services, children, human rights, criminal justice, system reforms*

INTRODUCTION

Historically, the criminal justice in Kenya was grounded within retributive values hence largely geared towards achieving punitive objectives. Similarly, the child justice system[1], commonly referred to as the juvenile justice system, developed from a similar premise. However, in the last two decades, a gradual paradigm shift is evident, with restorative justice being organically

* LLD Leicester, LLM Warwick, LLB University of Nairobi, Director, University of Nairobi Mombasa Campus & Senior Lecturer, UoN Mombasa School of Law.

1 The Committee on the Rights of the Child General Comment No. 24 (2019) on Children's Rights in the Child Justice System encourages the use of the term 'child justice system'.

infused in the child justice system. Notably, the Children Act of 2001 signalled this shift and provided a wide range of interventions for child offenders geared towards rehabilitating children and addressing the root causes of offending.[2] It further outlawed terminology that is inconsistent with the rehabilitation process of children. The Act directs that in place of the words 'sentence' and 'conviction', 'order' and 'finding of guilt' are to be used respectively.[3] Requiring courts to provide a child-friendly environment also depicts the shift.[4]

However, in spite of this organic shift, undertones of the wider criminal justice system continue to impact the child justice system. In particular, the lack of focus and inadequate facilitation towards the implementation of the right to legal aid for child offenders, just as is the case for adult offenders, remains an issue of concern. The vulnerability and lack of agency of children in conflict with the law exacerbates injustices arising from the lack of legal representation.

The term legal aid, as defined by the Legal Aid Act, and indeed as now conceptualised globally, encompasses diverse forms of legal services including guidance on legal matters and legal representation.[5] It also includes initiatives to create awareness on legal matters as well as legal advocacy.[6] The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems includes "legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes" as components of legal aid.[7] This paper focuses on the legal representation of children in conflict with the law at no cost or at subsidised cost and equipping children to participate effectively in court proceedings.

Against this background, the first part of this paper sets out the conceptual underpinnings that inform the right to legal aid for children. In the second part, it discusses the international and domestic legal framework guaranteeing the right to legal aid for children. The implementation of the right to legal aid for children in conflict with the law in Kenya is interrogated in the third part. In

2 Section 191.
3 Section 189.
4 Section 188.
5 Legal Aid Act 2016, s.2; Simon Rice, *Reasoning a Human Right to Legal Aid* (Sydney Law School 2017) 4.
6 Ibid.
7 The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013) Paragraph 8.

conclusion, the paper examines ways in which legal aid for children can be enhanced, taking into account the contextual realities.

Conceptual Framework for the Right to Legal Aid for Children in Kenya

Legal aid is premised on fundamental tenets of criminal justice. Accused persons are presumed to be innocent until proven guilty beyond reasonable doubt.[8] The trial, through which guilt or innocence is proved, is a legal process which requires a grasp of both procedural and substantive law. Without legal knowledge, accused persons are therefore disadvantaged and ill equipped to challenge prosecutors who are legal professionals. The inequality between prosecutors and children in conflict with the law, is not only obvious but is a travesty of criminal justice.[9] It undermines the very essence of justice which requires parties to engage on an equal footing. Thus, the presumption of innocence, which places the onus on the State to prove the allegations and presupposes a capacity to challenge those allegations, is undermined. The lack of legal knowledge is further compounded by the vulnerability of children hence impacting both the extent and quality of children's participation in the criminal proceedings.[10] This obvious inequality informs international and domestic law which recognises the right to legal aid for all children who are unable to secure legal services.

The lack of legal aid is further considered an impediment to accessing justice.[11] Legal aid empowers disadvantaged individuals to obtain just outcomes from court processes. Without legal representation in an adversarial system, justice cannot be guaranteed. Failure to provide free legal

---

8 International Covenant on Civil and Political Rights, art. 14(2); Convention on the Rights of the Child, art. 40(2) (b) (i) Constitution of Kenya, art. 50(2)(a); Stephen Nguli Mulili v Republic Court of Appeal at Nairobi Criminal Appeal No. 90 of 2013; [2014] eKLR; DPP v Woolmington (1935) UKHL 1.

9 Madalyn K. Wasilczuk, "Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense," (2012) International Law and Politics 291, 318.

10 Ann Amadi, 'Need for Partnership to Expand Legal Aid' (10 December 2020) < https://www.judiciary.go.ke/need-to-partner-to-expand-legal-aid-crj- amadi/ > accessed 15 February 2021.

11 Open Society Justice Initiative, *Legal Aid in Europe: Minimum Requirement Under International Law*, (OSJI 2015) 4.

aid also perpetuates indirect discrimination on the basis of status as indigent accused persons are disadvantaged in court proceedings.[12]

A further tenet of a fair trial, which is linked to the presumption of innocence, is the expeditious conclusion of trials. Trials are often delayed due to factors such as unavailability of witnesses or delayed forensic reports. In such instances, a child who is unrepresented is unlikely to successfully challenge delays. As discussed in the third part, delay in trials of children in conflict with the law remains a matter of concern in Kenya.

An overriding consideration when dealing with children is their best interests. The concept of best interests of the child is recognised in both international and domestic law.[13] This concept requires consideration of individual circumstances relating to a child and making decisions or taking actions that will benefit the child. Within the context of a criminal trial, the best interests of a child demand optimal participation of the child which occurs at two levels. First, being in an adversarial context, accused persons are required to follow proceedings and challenge arguments as well as evidence submitted by the prosecutors. Ultimately the best interests of the child require that justice is met, that is, innocent children acquitted and those found guilty subjected to the most appropriate orders. As the accused person's participation has a bearing on the outcome, the extent and nature of participation of a child is therefore critical. At the second level is a personal engagement with the court for their welfare to be taken into account throughout the trial. For instance, the courtroom environment should be conducive enough to enable children to express their views, needs and concerns. Legal representation is necessary for children to participate effectively on the first level. In addition, children often lack the confidence to engage on the second level and require support.

Rehabilitation and reintegration of child offenders are increasingly being embraced as the overall objectives of child justice systems. Typically, rehabilitation and reintegration are associated with the interventions undertaken upon a finding of guilt. However, they operate in a continuum, and the entire process through which a child is subjected to, impacts on these goals. The lack of legal representation and support, hence bewilderment and

---

12 Kristel Juriloo, 'Free Legal Aid - A Human Right' (2015) 33 Nordic J Hum Rats 206.

13 Convention on the Rights of the Child, art.3; African Charter on the Rights and Welfare of a Child, art.4; Constitution of Kenya, art.53(2); Children Act, s.4

uncertainty during trial, amongst other challenges, may contribute to hardening of children and cause long term damage to them.[14] This hardening and damage impacts on subsequent rehabilitative interventions imposed.
The underlying values and rationalities of a criminal justice system are reflected in the practices. In the same vein, the inertia in provision of legal aid services for children is sustained by certain conditions and rationalities. Thus the paper engages in a foucauldian approach[15], which involves unearthing these conditions and rationalities that support the failure to provide adequate legal aid services in spite of a robust legal framework. As noted, the retributive foundations of the criminal justice system in Kenya have largely informed the practices. Whilst the tenets[16] of a fair trial, including the right to legal aid are recognised by the Constitution, the implementation is not optimal as discussed in the third part. The delayed full operationalization of the legal aid framework as envisaged by the Legal Aid Act casts doubt on the prioritisation of matters relating to the criminal justice system. Further, while restorative justice values are gradually being incorporated in the criminal justice system, opposing practices such as overutilization of custodial interventions suggest that retributive values still inform the system.[17] In a justice system largely informed by retributive philosophy, the right to legal aid, while acknowledged is not prioritised. Embracing of restorative justice values and a focus on rehabilitation would thus provide impetus for the realisation of the right to legal aid. Therefore, entrenchment of legal aid in the criminal justice system ought not to be conceptualised as an isolated objective. Rather, a system approach, involving all agencies in the criminal justice system, with a view to steering the system away from a retributive end is more strategic. With a complete paradigm shift, legal aid would be prioritised as a necessary and urgent component of criminal justice.

In the Constitution's preamble, a commitment to 'nurturing and protecting the well-being of the individual, the family, communities and the nation' is affirmed. This commitment embodies the value of care. This concept is

---

14 UNDP, *Legal Aid Service Provision A Guide on Programming in Africa* (UNDP, 2016) 83.

15 Michel Foucault, 'Questions of Method' in Burchell, G. Gordon C., and Miller, P. (eds.) *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991) 75.

16 National Council on the Administration of Justice, *Criminal Justice System in Kenya: An Audit* (NCAJ, LRF and RODI 2016) 76; Sarah Kinyanjui, *An Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya*, (UNODC, 2021) 27.

17 The Judiciary, *Report of the Judiciary Taskforce on Sentencing* (2016) 10.

distinguished from ethics of care as espoused by philosophers such as Carol Gilligan.[18] While not a legal concept, the value of care provides a lens through which the obligations of the child justice system can be defined. With particular reference to child offenders, the value of care demands not only procedural and substantive justice but also attention to the welfare of children. As discussed, subjecting children in conflict with the law to a legal contest in which they are unequally matched with prosecutors is by no means a nurturing environment. Further, in the absence of legal support and/or advice on the court proceedings, they may lack the confidence to articulate matters affecting their well-being. Moreover, having a legal representative or legal assistance may address some injustices experienced by children such as unduly long pre-trial detention and finding of guilt owing to self-incrimination.[19]

Scope of the Right to Legal Aid: International and Domestic Legal Framework

The right to legal aid is recognised in a range of international and domestic legal instruments. Pursuant to articles 2(6) of the Constitution of Kenya, treaties ratified by Kenya have the force of law. Further, international 'soft law' bears persuasive authority and informs domestic law. At the international level, the right to legal aid is articulated in the International Covenant on Civil and Political Rights (ICCPR). Article 14(3) (d) of the ICCPR not only recognises the right to legal assistance but requires that it be provided at no cost for indigent accused persons, where justice considerations would so dictate. The Human Rights Committee guided that legal assistance is necessary for accused persons to participate effectively.[20] The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules) require States to permit accused persons in custody to apply for free legal aid and for legal advisers to have access to them.[21]

With specific reference to children, the Convention on the Rights of the Child not only articulates the right to legal assistance for children but also requires access be provided promptly.[22] It also specifically requires that this assistance

18 'Carol Gilligan' (*Care Ethicists*, 16 July 2011) < https://ethicsofcare.org/carol-gilligan/> accessed 20 January 2021.
19 Madalyn K. Wasilczuk, "Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense," (2012) International Law and Politics 291, 317.
20 Human Rights Committee General Comment No. 32 (2007), para 10.
21 Rule 93.
22 Article 37(d).

is provided in the 'preparation and presentation of a defence'.[23] This wording is reiterated in the African Charter on the Rights and Welfare of the Child.[24] The Committee on the Rights of the Child guides that legal assistance is not restricted to the assistance offered by legal counsel but can also be provided by paralegal professionals.[25] The Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context requires States recognises the right to legal counsel for children charged with terrorism related offences.[26]

The United Nations Model Strategies and Practical Measure on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice highlights the right to legal aid 'during police interrogation and while in police detention'.[27] During trial, the scope of the right to legal assistance extends to provision of adequate time and resources to facilitate communication with legal counsel.[28] The Committee on the Rights of the Child has further guided that the confidentiality of the communication between a child and the person offering legal assistance must be guaranteed.[29] The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa of 2014 reiterates governments' obligation to fund and provide mechanisms for access to legal aid especially for women and children.[30]

At the domestic level, the Constitution specifically provides for a State assigned advocate, 'if substantial injustice would otherwise result'.[31] The substantial injustice criteria introduces a subjective test for a state sponsored advocate to be assigned and jurisprudence is developing on the interpretation and application of this test. The Supreme Court in *Karisa Chengo and others v R* [32] that the likelihood of substantial injustice occurring extends beyond capital cases. In line with this reasoning, the Court of Appeal in *Thomas Alugha Ndegwa v Republic*[33] held that substantial injustice would have

---

23 Article 40(2) (b) (ii).
24 Article 17 (2) (c) (ii).
25 Committee on the Rights of the Child No. 10 (2007), paras 49 and 50.
26 Good practice 5.
27 Principle 34(f).
28 International Convention on Civil and Political Rights, article 14(3) (b); Committee on the Rights of the Child No. 10 (2007), para 50.
29 Committee on the Rights of the Child No. 10 (2007), para 50.
30 Para 1.
31 Article 50(2) (h).
32 Supreme Court Petition No. 5 of 2015; [2017] eKLR.
33 Court of Appeal at Nairobi Criminal Appeal (Application) No. 2 of 2014; [2016] eKLR.

occurred if the accused person who had been convicted of defilement and serving a life sentence was not assigned an advocate by the State.

Noting that the Legal Aid Act did not define substantial injustice, the Supreme Court in the *Karisa Chengo*[34] case, outlined factors to be considered in the substantial injustice test. These factors are: seriousness of the offence; severity of the sentence; ability of the accused person to pay for his own legal representation; whether the accused is a minor; literacy of the accused and the complexity of the charge against the accused. When considering the age factor, statutory provisions are instructive. The Legal Aid Act provides that where a child is unrepresented the court may 'order the Service to provide legal representation for the child'.[35] Thus, from this provision, state provided legal representation for children is discretionary.

On the other hand, the Children Act provides that the State *shall* (emphasis added) provide 'assistance in the preparation and presentation of a defence' for children unable to obtain legal assistance.[36] The Children Act adopts the language of the Convention of the Rights of the Child, that is, provision of assistance.[37]As noted, the Committee on the Rights of the Child guides that the wording 'legal assistance' is not limited to the legal representation by a lawyer.[38] The Constitution on the other hand specifically sets out the right to have a State assigned advocate in cases that meet the 'substantial injustice' test.[39]

The two provisions are not contradictory and would suggest that over and above the constitutional requirement, legal assistance is required for all children who are unable to secure legal representation. If this approach is taken, there is need, therefore, for strategic direction on the scope of the assistance and modalities for implementation. The other approach which requires judicial interpretation would be that the spirit of the Children Act, suggests that children fall in the category that would suffer substantial injustice if unrepresented.

34 Supreme Court Petition No. 5 of 2015; [2017] eKLR.
35 Section 43(3).
36 Section 186(b).
37 Article 37(d).
38 Committee on the Rights of the Child No. 10 (2007), paras 49 and 50.
39 Constitution of Kenya, Article 50(2) (h).

The High Court in *Terry Goreti Wasike & Another v Republic* [40] was of the view that the wording "if he is unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence" in the Children Act is rather ambiguous. The court pointed out that the provision does not clearly indicate the nature of assistance to be offered. It noted that, nevertheless, in view of the intent of the Act to domesticate the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, then the assistance could be construed to be legal. More fundamentally in this case, the court was of the view that the case met the constitutional threshold thus warranting a State assigned advocate.

A key component of the right to legal aid is that accused persons must be informed of it. Article 50(2) (h) of the Constitution requires that an accused person be informed promptly of the right to a State assigned advocate in cases where the constitutional threshold is met. This mirrors the requirement in the International Covenant on Civil and Political Rights which requires that accused persons are informed of the right to legal assistance where they are unable to secure it themselves.[41]

While the right to legal aid is guaranteed within the context of fair trial guarantees, the need for legal aid should also be seen in the context of developments in the criminal justice system. Cases are increasingly being disposed of, out of court. Of particular relevance are diversion processes and plea bargaining. In both the ODPP Diversion Policy[42] and the ODPP Plea Bargaining Policy[43], the role of legal representatives is articulated. However, with respect to children, there is need to provide for legal assistance when they do not have legal representatives. Like the court processes, plea agreement negotiations and diversion processes are legal in nature and children would require legal assistance.

Implementation of the Right to Legal Aid for Children in Kenya

In spite of a robust international and domestic legal framework for provision of legal aid in Kenya, the right is yet to be fully realised. The Legal Aid Act established the National Legal Aid Service to manage the legal aid scheme

40 High Court of Kenya at Bungoma Criminal Appeal No.86 & 87 of 2009; [2013] eKLR.
41 Article 14(3) (d).
42 Clause 37.
43 Clause 3(b).

and coordinate legal aid services amongst other functions.[44] The Service, still its nascent stages, is yet to optimise the operation of the national legal aid scheme.

With respect to children, legal aid is critical owing to the reasons advanced in this paper. However, research reveals that in practice, State assigned legal representation is only provided for children charged with murder. This has a grave impact as many children cannot afford legal representation. Legal aid for children in conflict with the law in Kenya remains inadequate.[45] During a research commissioned by the Department of Children Services in 2018 and 2019, the majority of children interviewed did not have legal representation.[46] Further the NCAJ Report identified lack of legal aid as one of the factors contributing to undue delays in children's criminal trials.[47]

As discussed in this paper, the courtroom environment may be daunting for many children and their participation is further hampered by lack of legal knowledge. During the Department of Children's Services research, child respondents admitted to facing difficulties in participating in court proceedings. This was largely attributed to their failure to understand legal proceedings and lack of guidance on what to expect in court as well as well how to conduct themselves while in court.[48] Thus, other than lack of legal representation, there exists a gap in the provision of legal assistance, in the broad sense. Preparation of children for court proceedings is vital even when an advocate has been engaged.

---

44 Section 7.

45 Emma Akinyi Okok, 'The need for legal representation for children in conflict with the law: An African perspective' (29 May 2018) < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiKocS5pd7xAhVP3qQKHfdKDncQFnoECAUQAA&url=https%3A%2F%2F2018.justicewithchildren.org%2Fwp-content%2Fuploads%2F2018%2F04%2FEMMA-AKINYI-OKOK-PRESENTATION-ROOM-IX-29.05.18.pdf&usg=AOvVaw3Ad0t8i5IdQIyeMraJq1Di> accessed 3 March 2021.

46 Sarah Kinyanjui, *An Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya*, (UNODC, 2021).

47 Sheila Wamahiu et al, *Status Report on Children in the Justice System in Kenya* (NCAJ 2019) 32 https://ncaj.go.ke/wp-content/uploads/2019/11/NCAJ-Report-Digital-Version.pdf accessed 10 October 2020.

48 Sarah Kinyanjui, *An Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya*, (UNODC, 2021) 19.

While the contribution of advocates appointed by the State to represent children must be appreciated, there are instances where advocates contribute to delays in trials. The respondents in the Department of Children's Services assessment revealed various challenges experienced by children who had been assigned advocates by the State. First, trials are sometimes delayed by the absence of advocates and there is often lack of commitment on the part of stated appointed advocates.[49] In light of the courts' workload a single adjournment may have a significant impact in a child's case. For instance, in High Court in Nakuru Criminal Case No. 37 of 2017, the child was held in custody four years. The case was adjourned for ten times, two being due to the unavailability of the advocate. In a context where hearing dates are staggered, those two adjournments occasioned by an advocate contributed to the unreasonable delay in the trial. Second, often, children do not have adequate contact with their advocates. The inadequate contact is in some cases attributed to long distances between remand homes and the court station. In other cases, it is occasioned by lack of commitment on the part of advocates assigned the cases.

Fourth, even with an advocate assigned to them, children are not psychologically and otherwise prepared for the court proceedings. Fifth, having an advocate in some cases robs children of their personal agency. The research revealed that in some courts, children are denied audience if there is an advocate on record.[50] This amounts to a violation of the right of children to participate in their proceedings. The Committee on the Rights of the Child emphasised that being represented by counsel does not take away the right of children to participate in person.[51]

In some stations, non-state actors have been providing remedial services in response to lack of adequate legal aid for children. For instance, in Nakuru, under the auspices of Rift Valley Law Society, an advocate is employed on a full time basis to represent children. In some cases, the advocate secures assistance from other advocates who take on matters pro-bono. However, the

---

49 Emma Akinyi Okok, 'The Need for Legal Representation for Children in Conflict with the Law: An African Perspective' (29 May 2018) 7 < https://2018.justicewithchildren.org/wp-content/uploads/2018/04/EMMA-AKINYI-OKOK-PRESENTATION-ROOM-IX-29.05.pdf >18 accessed 3 March 2021; Sarah Kinyanjui, *An Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya*, (UNODC, 2021) 19.

50 Ibid.

51 Committee on the Rights of the Child General Comment No. 10 (2007), para 44.

workload requires additional advocates on full time basis. Nevertheless, this scheme has benefitted many children. With the operationalization of the National Legal Aid Service in Nakuru, there are synergies being forged with the Rift Valley Law Society.[52]

Two decades after the enactment of the Children Act and one decade after the promulgation of the Constitution, the lack of legal aid for most accused children is concerning. It also reflects a lack of a focused attention and strategy towards ensuring provision of legal aid for all accused children in need. There is therefore need for a nuanced approach, while acknowledging financial constraints,[53] towards enhancing legal aid for children in Kenya.

Envisioning a Tailor-made Model for Legal Aid for Children in Kenya

As noted in part two, practices are influenced by underlying rationalities. The commitment to the full realisation of the right to legal aid for child offenders is to a large extent impeded by the retributive heritage of the criminal justice system in Kenya. The welfare of accused persons is therefore not prioritised when competing for limited resources alongside other interests. However, the organic paradigm shift is evident and it demands a more deliberate focus on reforming the child justice system to make it compatible with restorative and rehabilitative ends. Also, as noted, the value of care, embodied in the Constitution, resonates with the recognition of vulnerability of children hence mandatory provision of legal aid for children in conflict with the law. To achieve this, there is need for reforms in the child justice system.

A multi-pronged reform approach is proposed. First, the paradigm shift from a retributive approach should be buttressed in policy. In particular, the child justice system, requires an overarching multi-agency policy which articulates the overall goals and values of the system. This policy would then inform individual agencies to re-evaluate their practices. With respect to enhancing legal aid for children, each agency would play a role in achieving the overarching goal. For instance, police officers, and children officers - both field and remand home officers- would proactively inform accused children of this right in compliance with the Legal Aid Act.[54] Where not provided legal

52 Sarah Kinyanjui, *Enhancing Child and Youth Justice: An Assessment of the Criminal Justice System in Kenya* (UNODC, 2021).

53 As acknowledged in *Terry Goreti Wasike & Another v Republic* High Court of Kenya at Bungoma Criminal Appeal No.86 & 87 of 2009; [2013] eKLR.

54 Section 42(2) (1).

representation as of course, children, being well informed of their right to legal representation, would be empowered to engage the court. In line with the Legal Aid Act, courts would then robustly exercise their mandate to refer cases involving children to the National Legal Aid Service for allocation of advocates.[55] This legal aid continuum requires deliberate and consistent action by these child justice agencies.

As noted in part two, legal aid extends beyond legal representation and includes diverse forms of legal assistance such as equipping accused children to participate optimally in court. With respect to legal representation, to harness the contribution of non-state actors, there is need for structured partnerships with the National Legal Aid Service. There is also need to promote pro bono services, especially legal representation of children in conflict with the law. This could be done through incentives such as CPD points for pro bono matters or including pro bono service as a consideration in opportunities offered through the Law Society of Kenya.

Non-state actors involved in provision of legal aid include law schools, the Law Society of Kenya and its chapters as well, non-governmental organisations and paralegals. With a steady pool of law students and lecturers, law schools, in particular, bear immense potential which remains untapped.[56] For sustainability of the national legal aid scheme, an extensive database of pro bono lawyers is necessary to support the scheme and there is therefore need for deliberate nurturing of pro bono values amongst lawyers. In this regard, legal education should be tailored to inculcate these values in law students and the establishment of legal aid clinics in law schools should be encouraged. Through these clinics, a consistent framework for legal assistance for children would be established. These clinics would also nurture a pro bono culture amongst law graduates who would then serve as pro bono advocates in the long run.

While in detention pending trial, children are placed under the care of children's officers managing remand homes. It is therefore strategic to equip such officers with knowledge on the rights of children in conflict with the law and on criminal proceedings. With such knowledge, they would be able to support children facing trials. For instance, they can prepare children for the

[55] UNDP, Legal Aid Service Provision a Guide on Programming in Africa (UNDP, 2016) 13; The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa 2014, para 7.

courtroom environment through mock courts or conversations on court proceedings. They would also be empowered to identify lapses in the proceedings such as unreasonable delays and convey the same to the court either directly or through the Court Users Committees.

The lack of adequate legal aid for children continues to undermine criminal justice. As discussed, the organic paradigm shift from a retributive to a restorative and responsive child justice system resonates with an effective and mandatory legal aid system for children. Further, interventions that are responsive to the needs of children in conflict with the law such as the need for legal aid, reflect the value of care embodied in the Constitution. It therefore behoves the National Legal Aid Service and other stakeholders in the child justice system to embark on a joint strategy towards the full realisation of the right to legal aid.

This paper however argues that embarking on legal aid initiatives as a standalone objective is tantamount to storing new wine in old wineskins. Legal aid initiatives will gain impetus from a coherent joint child justice policy to be implemented by all the child justice agencies. Thus, the needed reforms and initiatives will move from an organic paradigm shift to a deliberate visionary strategy. In particular, the strategy should reiterate a commitment to rehabilitation as the end goal for children in conflict with the law and, overall, restorative justice for children. These underlying rationalities demand a responsive approach which takes into account the needs of children, including legal aid as a tool for justice. In the absence of an expressly articulated shift in the underlying rationalities, legal aid for children will remain a non-priority alongside other competing interests. Informed by this child justice policy, each child justice agency is expected to play a role towards the enjoyment of the right to legal aid by children, as discussed in this paper.

A nuanced, tailor made approach for the provision of legal aid for children in conflict with the law in Kenya is necessary. The establishment of the National Legal Aid Service provides a coordinating framework for legal aid. However, a model which relies entirely on State funding for the National Legal Aid Service is bound to fail. Thus, partnership with non-state actors supporting or providing legal aid services is strategic as is articulated in the National Action Plan Legal Aid 2017-2022.[57] To this end, a well-structured network of

[57] 27; Virtual Interview with National Legal Aid Service Officer (Zoom, 14 July 2021).

legal aid service providers should be established with the National Legal Aid Service playing a coordinating role as envisaged by the Legal Aid Act.[58]

Ultimately, the full realisation of the right to legal aid for children can only be achieved through a multi-agency commitment and a changed lens through which criminal justice for children is viewed. Overall, effective legal aid would impact the duration and outcome of criminal trials. Unnecessary delays would be reduced and appropriate orders imposed on child offenders would reduce recidivism. Thus, in addition to meeting the overall goals of restorative justice, and rehabilitation as a facet, there are benefits to the criminal justice system which should incentivise a commitment to legal aid for children.

[58] Section 7(1) (g-o).

Monitoring and Evaluating Legal Aid Service Provisions: Gaps, Challenges and Opportunities

Dr. Ruth Aura*

ABSTRACT

The Constitution of Kenya 2010 guarantees everyone the right to access to justice. Legal aid services enable indigents to access justice through legal advice, representation and education at no cost. Monitoring and evaluation (M&E) of legal aid services is important to ensure the indigent access quality legal services. M&E entails collection of information from legal service providers by measuring objectives, impact on the community and efficiency of the service in assessing performance. It ensures services become accessible, efficient and credible. Although the Legal Aid Act mandates the National Legal Aid Service (NLAS) to monitor and evaluate the activities of legal service providers. NLAS launched the regulation and code of conduct for legal aid providers in July 2020. The framework though recent is deficient in elaborate framework and guideline for NLAS to observe and analyze critically the programs of the legal service providers that are useful to legal aid providers, donors and relevant stakeholders in creating stable and efficient programs. This paper interrogates challenges in M&E of legal aid service against the backdrop of the existing frameworks and how Egerton University Faculty of Law Legal Aid Project has worked around it. It examines other jurisdictions M&E frameworks, to ensure services provided across the country are harmonized. Through this, opportunities and lessons are identified that Kenya can learn from and borrow to strengthen the M&E frameworks. It probes mechanisms adopted by NLAS in developing an M&E framework for legal aid service provision. M&E gauges legal aid providers' performance, efficacy, efficiency and quality of access to justice. The regulations for M&E encourage legal aid providers in agenda setting, measuring outcomes and impact of services.

Key Words: Access to justice, indigent, legal aid service providers, quality service, M &E frameworks and legal aid, challenges and opportunities.

* Senior Lecturer and Dean, Faculty of Law, Egerton University.

INTRODUCTION

Legal aid is an essential measure for access to justice.[1] The justice system is complex and poses challenges to many people in the society, more so to the poor and marginalized group. Justice remains a mere spectre in absence of knowledge and resources.[2] Through Legal Aid, the intricacies of the justice system are simplified to the society making it easier to navigate the system by all and sundry. Every individual has a right to receive legal assistance that is effective and of the highest quality whether proffered for free or not.[3] Access to quality justice by the indigent persons is impossible. It is for this reason that states must have a legal aid system with adequate legislation on the same, sufficient financial and human resources.[4]

Many countries have embraced legal aid in their jurisdictions.[5] Some of them have gone ahead to have specific legislation addressing legal aid, and those that do not have legislations have constitutional provisions that promote access to justice and encourage states to provide legal aid to those unable to afford legal counsel, especially in capital offenses.[6] With time, a number of actors both private and public have joined the race for promoting access to justice for the poor and the marginalized.[7] Some of them are regulated by the statutes and others have internal regulations. A practice in service delivery is only effective where those who benefit from the service

---

1 United Nations development programme*, Access to justice practice Note* (2004); United Nations Office on Drugs Crimes Access to Justice: *Legal Defense and Legal Aid* (2006).

2 United Nations Office on Drugs and Crime: *Global Study on Legal Aid; Global Report*, 5.

3 African Commission on Human and People's Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003.

4 United Nations Office on Drugs and Crime, *Handbook on ensuring quality of legal aid services in criminal justice processes: Practical guidance and promising practices,* 2019.

5 The United Nations Office on Drugs and Crime (UNODC) and United Nations Development Programme (UNDP) published the *'Global Study on Legal Aid-Country Profile, 2016'* to provide the current state of legal aid in 49 countries around the World. In Sub-Saharan Africa, the Publication looked at 10 countries including Kenya and South Africa. This is a clear indicator of recognition of legal aid all around the world. .

6 Global Study on Legal Aid, Country Profiles. Available <https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/GSLA-Country_Profiles.pdf> accessed on 17 April 2021.

7 Legal Aid Systems and Supporting NGOs around the World. Available at <http://defensewiki.ibj.org/index.php/Legal_Aid_Systems_and_Supporting_NGOs_around_the_world> accessed on 17 April 2021.

can divulge whether the service has impacted their lives or not. Consequently, monitoring and evaluation becomes imperative in gauging the services offered.

A relevant, effective, timely, and credible monitoring and evaluation mechanism ensures access to justice for marginalized persons in the society by enabling governments, legal service providers and funders to assess whether their legal programs have achieved intended objectives; whether they have a sustainable impact on the society; whether the resources provided for the running of the programmes have been used efficiently to provide results, and the changes the stakeholders can implement in order to provide the most efficient and sustainable legal aid services.[8]

This article first identifies the role of monitoring and evaluation to all stake holders in the legal aid sector—the clients, legal aid providers, funders and government agencies. These include quality assurance, efficient use of limited resources and securing funding from private sources to boost impact in service delivery.

Legal Aid programme funders rely on monitoring and evaluation to ensure proper use of funds advanced to legal aid providers and to gauge the impact of legal services being offered. The paper discusses steps that a stakeholder can take to conduct an effective monitoring and evaluation of legal aid service programmes, that is, from the planning stage, undertaking a baseline study, implementation of the evaluation plant and submission of the monitoring and evaluation report.

In 2016, Parliament enacted the Legal Aid Act, No. 6 of 2016 to give effect to Articles 19 (2), 48 and 50 (2) (g) and (h) of the Constitution of Kenya, 2010 on access to justice. The Legal Aid Act established the National Legal Aid Service to establish and administer a national legal aid scheme that is among others, accessible, sustainable, credible and accountable.[9] Further, the National Legal Aid Service was established to coordinate, monitor and evaluate legal aid service providers in Kenya.[10] Besides the Legal Aid Act, there is also the National Action Plan on Legal Aid 2017-2022 (NAP) that

---

8 Gregg G. Van Ryzin and Marianne Engelman Lado, *Evaluating Systems for Delivering Legal Service to the Poor: Conceptual and Methodological Considerations* (67 Fordham L. Rev. 2553 1999).

9 Legal Aid Act No. 6 of 2016, sec 7 (1) (a).

10 Legal Aid Act 2016.

helps in guiding the government in rolling out the planned activities for legal aid as stipulated in the Legal Aid Act. NAP provides the activities to be undertaken, the responsible actors as well as the means of verifying the output that provide useful tools for measuring level of compliance or achievements.

The Legal Aid Act makes provisions on Regulations to be made to better effect the provisions of the Act.[11] The Regulations play a crucial role in monitoring and evaluating legal aid service providers.[12] The Legal Aid Act was enacted in 2016 while the Legal Aid (General) Regulations and Code of Conduct for Accredited Legal Aid Providers were made in 2020 and 2019 respectively. These regulations were introduced long after legal aid service providers were in operation and guided by their own rules and regulations, including, monitoring and regulation frameworks. This paper, therefore, seeks to interrogate the strengths and weaknesses of the monitoring and evaluation framework of Kenya's legal aid system. It looks at Egerton University Faculty of Law Legal Aid Project's (FOLLAP) monitoring and evaluation program and draw lessons from monitoring and evaluation systems in other jurisdictions.

It appraises the Standards for the Monitoring and Evaluation of Providers of Legal Aid Services for the Poor adopted in 1991 by the American Bar Association House of Delegates. These Standards provide guidelines for organizations that provide free legal services to use while conducting monitoring and evaluation. The paper relies on the OECD principles for evaluation of development assistance which provide important principles that should guide stakeholders in conducting monitoring and evaluation. Additionally, it provides for criteria to be used while evaluating legal aid programmes such as effectiveness, relevance, credibility, efficiency and sustainability. It is further guided by the National Action Plan on Legal Aid in principles on monitoring and evaluation planning.[13]

It also examines South Africa's, Sierra Leone's and Lithuania's state guaranteed legal monitoring and evaluation framework. The paper sums up by identifying opportunities available that Kenya can take to develop

---

11 Legal Aid Act 2016, s 86.

12 For instance, Section 57 (1) of the Legal Aid Act 2016 provides that the Service, through regulation, shall develop and adopt a criteria for accreditation of legal aid service providers.

13 National Action Plan Legal Aid 2017-2022 Kenya, *Towards Access to Justice for All. Office of the Attorney General and Department of Justice,* pg 39-41.

monitoring and evaluation guidelines relevant not only to the National Legal Aid Service, but also to other legal aid service providers, funders and other stakeholders that wish to conduct monitoring and evaluation of legal aid services. It concludes that effective monitoring and evaluation framework is important for legal service delivery.

This paper takes a textual analytical research approach. It relies on primary and secondary sources of information through desktop research. This is embodied in policy frameworks, legislations, reports, books, journals and articles and online resources. It also takes an experiential approach to research based on the work that FOLLAP does in context of monitoring and evaluation. FOLLAP has been in operation for one year and conducts monitoring and evaluation of its project to ensure efficient, effective, and sustainable delivery of legal aid services to the indigent. Therefore, data from the experiences of FOLLAP is a useful source of information for this paper.

Theoretical Framework

Every project sets a goal that it wants to achieve. For the goals to be achieved and project to remain focused on the goals you need parameters to ensure that things go as planned and this is where Monitoring and evaluation comes in.[14] Monitoring and evaluation enhances protection of the rights of individuals by ensuring that they receive quality legal services. It enhances accountability of legal service providers towards their clients and development of efficient, effective, credible and sustainable legal aid system. Additionally, it encourages participation of stakeholders in enhancing the quality and effectiveness of legal aid. This is the central argument in human rights-based approach, a conceptual framework which is adopted here for analysis. This approach empowers right-holders to claim and exercise their rights and to enhance the capacity of duty bearers who are obligated to respect, protect and promote human rights.[15] It is founded on the principle of participation where right-holders are entitled to participate

[14] Office of the Attorney General and Department of Justice, *National Action Plan, Legal Aid Act 2017*-2022 Kenya 39.

[15] United Nations Sustainable Development Group (UNSDG), *The Human Rights Based Approach to Development Cooperation Towards a Common Understanding among UN Agencies* 2003. Available at<https://unsdg.un.org/sites/default/files/6959The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf > accessed on 11 March 2021.

in decision-making process on issues that touch on their rights directly or indirectly, cultivating the culture of accountability on duty bearers.[16]

Access and participation by local people to decision making processes is considered to be fundamental to sustained development.[17] Participatory monitoring and evaluation involves all stakeholders in the monitoring and evaluation process.[18] Guijt and Gaventa, recognize participation as a key principle in monitoring and evaluation, that is, opening up the design of the process to include those most directly affected, and agreeing to analyze data together.[19] Participatory evaluation therefore contributes to greater relevance of the evaluation and to greater accuracy in evaluation findings.[20] Consequently, legal aid providers can learn from the findings and implement the lessons to ensure establishment of a sustainable and effective legal aid program.

Legal aid programmes are established and developed to improve access to justice that impacts positively on the lives of the marginalized. Development of legal aid programmes involve setting objectives and goals and the activities that the programme will undertake to achieve the said objectives and goals. Monitoring and evaluation is desirable for ensuring that programme is in tandem with the objectives and measure impact on its beneficiaries.

Programme theory describes how a programme will lead to results by providing logical description of how and why a programme's activities should lead to intended results.[21] Evaluation of a legal aid program that uses program theory identifies how the legal service providers understand the program works and immediate outcomes needs to be achieved for the

---

16 United Nations Sustainable Development Group, *The Human Rights Based Approach to Development Cooperation Towards a Common Understanding among UN Agencies* 2003.

17 Judi Aubel, *Participatory Program Evaluation: Involving Program Stakeholders in the Evaluation Process* (2nd Edition December 1999).

18 Better Evaluation, Participatory Evaluation <https://www.betterevaluation.org/en/plan/approach/participatory_evaluation> accessed on 16 April 2021.

19 Irene Guijt and John Gaventa, *Particpatory Monitoring and Evaluation: Learning from Change* (Institute of Development Studies, Issue 12, November 1998).

20 Judi Aubel (n 19).

21 Wilder Research, *Program Theory and logic models* (August 2009). Available at <https://www.evaluatod.org/assets/resources/evaluation-guides/logicmodel-8-09.pdf > accessed on 8th April, 2021.

program to work.[22] The program theory can be represented through a logical model that shows how one thing leads to another, like a flowchart.[23]

ROLE OF MONITORING AND EVALUATION

Monitoring is a continuous process which involves the collection, analysis and use of information for gauging performance, identifying challenges and assessing whether progress is being made towards achievement of the project goals.[24] Evaluation on the other hand is the objective assessment of an on-going or completed project in order to determine whether objectives have been achieved and whether the project is sustainable.[25] Effective monitoring and evaluation mechanisms enable stakeholders to obtain valuable data that indicates the impact of legal aid to indigent and enables them to identify problems and promptly address them.[26] It is important to all stakeholders in the legal aid sector as it provides crucial information for decision making and formulation of strategies that ensure efficient and sustainable provision of quality legal services.

Role of monitoring and evaluation to clients

It is the right of every individual to receive quality legal services. In this perspective, monitoring and evaluation of legal aid services will ensure that the legal services offered are of the required standard. It also establishes the efficacy and sustainability of the programme in addressing all the client's legal needs. Monitoring and Evaluation give the clients an opportunity to participate in the reviewing of the legal aid programme to establish whether their legal needs were addressed within reasonable time and efficiently so. Clients are given questionnaires to fill concerning their experiences with the legal aid program and whether they received the legal assistance they

---

22 Funnel S.C. and Rogers P.J., *Purposeful Program Theory: Effective Use of Theories of Change and Logical Models*, February, 2011. Available at https://media.wiley.com/product_data/excerpt/78/04704785/0470478578-124.pdf> accessed on 8 April 2021.

23 Wilder Research, *Program Theory and logic models* (August 2009).

24 Organization for Economic Co-operation and Development "Section 10: Monitoring and Evaluation", in The OECD-DAC *Handbook on Security System Reform: Supporting Security and Justice, OECD Publishing (*2011). Available at< https://dx.doi.org/10.1787/9789264027862-13-en> accessed on 10 March 2021

25 Ibid.

26 UNODC, *Handbook on Improving Access to Legal Aid in Africa, (*Criminal Justice Handbook Series 2011).

sought. Further, legal aid programmes take contact information of their clients to follow-up on the progress of their clients' matters.

Role of monitoring and evaluation to the legal service providers

For legal aid service providers to ensure quality legal service and to be accountable to their clients, there is a need for monitoring and evaluation of the programme. This is imperative as it is through monitoring and evaluation that one gets the feedback that helps in the next steps. The feedback determines the improvements and enhancements that need to be made, if such needs exist, thereby enhancing service delivery.

Efficiency of the legal aid programmes is enriched by monitoring and evaluation. Legal service providers must use the limited funds available to them to achieve their goals in the best way possible. One of the factors that has been identified to be compromising the efficacy of the legal aid programmes is lack of funds or inadequate funding from the government.[27] This essentially means that other sources outside government must be sought to fill in the existing funding gap for legal aid. In Kenya, non-state actors have stepped in to provide some of the needed funding to roll out the legal aid programmes. However, this does not mean that funding is always available and sufficient. Inadequate funding has forced legal aid providers to strain their existing resources for offering quality legal services to the marginalized. Strained resources and inadequate funds can compromise the quality of legal services and limit the numbers of people reached. Through evaluation, legal aid service providers can keep track of their performance and expenses thus enabling appropriate planning appropriately and proffer quality legal services as they demonstrate financial accountability.[28]

Institutions that run legal aid clinics such as University law schools have a duty to provide quality services to their clients as well as ensure their student receive the best clinical legal education. Monitoring and evaluation enables the supervisors to assess the activities of students and to find the best ways to train them appropriately.

---

[27] A debate in Parliament in March 2021 questioned why a Funding scheme established in 2016 by the Legal Act 2016 has not been operationalized by government to boost the legal aid kitty for purposes of rolling out legal aid activities.

[28] Gregg et al (n 8).

Role of monitoring and evaluation to funding institutions/donors

Monitoring and evaluation enables funders to assess performance and financial accountability of legal aid providers. This is to ensure that the funds given to them are properly used. Further, valuable information that dictates funders' continued involvement or not with the programme is provided for through monitoring and evaluation. For instance, the Board is required to prepare annual estimates of the revenue and expenditure of the Service at least three months before the commencement of the financial year.[29] The estimates can be more accurate if the Board has information concerning the functioning of the Service.

Role of monitoring and evaluation to the government

The governmental has role to ensure that services offered to its citizens meet the set-out standards. Legal services are not left behind in this standard control, thus monitoring and evaluation becomes imperative. Through it, the government can establish whether to formulate more policies to guide the entire legal aid programme or just to implement the already existing ones to enhance legal service delivery within the country. Principle 13 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems dictates that it is the responsibility of the states to put in place mechanisms to ensure that legal aid service providers have the education, training, skills, knowledge and competence in the provision of legal services.

In Kenya, the National Legal Aid Service (NLAS) ensures legal aid service providers have the skills and knowledge to provide legal services for purpose of quality assurance. While NLAS is the body created by the Legal Aid Act, 2016, to undertake this task, its capability is doubtful due to low staffing. NLAS relies on advocates to help execute most of its work as it is in its nascent stage and not fully equipped. Its efficacy in monitoring and evaluating legal aid service providers and their programmes is yet to be fully realized.

STEPS IN MONITORING AND EVALUATION

Nikartas and Limantė, defines evaluation as an external and independent assessment of the quality of legal aid using an objective criteria and

[29] Legal Aid Act 2016, sec 32(1).

methodology.[30] To impact the legal aid programmes, monitoring and evaluation must be effective and efficient by adopting requisite steps. The steps include identification of project objectives, stakeholders and participants and undertaking baseline surveys to establish conditions that existed before the project was conducted. Additionally, the project plan must be implemented by actualizing monitoring and evaluation process and finally, submitting a final evaluation report which includes the findings, conclusions and recommendations to the stakeholders for considerations.[31]

Planning the monitoring and evaluation project

Gregg *et al*[32]posit that funders and legal aid providers, consider conceptual options in undertaking monitoring and evaluation task. They assert that evaluators must address important questions such as who will be conducting the evaluation, and who are the stakeholders? Who constitute the users of the evaluation? What are the goals and objectives of the program? What is the program's working theory? To what extent will the evaluation focus on needs, processes, outcomes, or costs? And what comparisons or controls are available for purposes of analysis? Such questions help in identification of the best methods and form of monitoring and evaluation that can achieve objectives an effective evaluation.

Evaluation is mainly conducted by the government to ensure quality legal services and for planning purposes while on the other hand the funders undertake it to ensure legal service providers use the funds properly and within the budget line. Legal service providers also conduct self-evaluation to assess their performance and in line with their goals and objectives to ensure efficiency. Planning of the project must consider the users of the evaluation for its relevance[33] for example, an evaluation process by funders of a project ensures that the findings can be used by the funders for their intended objectives. Identification of the objectives and users of the evaluation can be undertaken by holding discussions and inviting stakeholders to comment on the proposed evaluation project and by directly

---

30 Simonas Nikartas and Agnė Limantė, (2018)*Tools and Criteria for Measuring Legal Aid Quality: Guidelines for EU Member States* available at https://www.jura.uni-frankfurt.de/75941968/qual-aid_evaluation-of-legal-aid-quality.pdf accessed on 11 March 2021

31 International Federation of Red Cross and Red Crescent Societies (IFRC), *Project/Programme Monitoring and Evaluation (M&E) Guide* 2011.

32 Gregg et al (n 8)

33 IFRC (n 31).

involving them in the planning process and throughout the evaluation project.[34]

Formulation of evaluation and monitoring questions is conducted in planning stage of the evaluation process, guided by the objectives.[35] Some of the questions include: Whether the legal aid program met the needs of the stakeholders and to what extent? Whether the project was cost effective? Did the resources cater for all the needs of the legal service providers? What was the impact of the program? Did the legal service providers have the necessary skills to conduct their activities? Is the impact of the program sustainable? What can be improved to make the program more sustainable and efficient?
The planning process involves the identification of the data and information to be collected including the most efficient way of collecting the data.[36] For example, identifying client interviews as a source of information for the evaluation process will enable the legal service providers to seek consent from clients to participate in the evaluation.

The ABA Standards for the Monitoring and Evaluation of Providers of Legal Services for the poor, 1991 provides that evaluation through analysis of records from legal aid providers should not disrupt its operations, therefore, by planning earlier, the review agencies can plan for efficient collection of data without causing any disruptions to the activities of the legal aid providers.

Tools and Techniques for Monitoring and Evaluation

Identification of tools and techniques that will be employed in monitoring and evaluation process takes place at the planning stage. The common tools for data collection are surveys, focus groups, and use of existing data collected by legal aid providers as they conduct their activities. The tools are discussed below:
Surveys involve conducting interviews or doing self-administered surveys. Surveys are important because they allow surveyors to have one on one

---

34 Gregg et al (n 8).

35 Legal Assistance for Economic Reform, *The Why, What and How of Monitoring and Evaluation: Guidance for Providers of International Pro Bono Legal Assistance* (Guidance Note 1). Available at <https://www.roleuk.org.uk/sites/default/files/files/Monitoring%20and%20evaluation%20guidance%20note%20for%20the%20pro%20bono%20community.pdf> accessed on 9 April 2021

36 Ibid.

talk with clients giving them the opportunity to ask more questions and study their demeanour, thereby increasing the chances of having honest response. Although client interviews provide valuable information based on their experiences, it is a tedious and time-consuming process in that, the interviewers must facilitate the meetings with the many clients the legal service providers have assisted for questioning. Additionally, clients may not possess sufficient legal knowledge for them to assess whether they received quality legal education.[37]

On the other hand, questionnaires enable the clients to give feedback on the service they received without having to physically appear before an interviewer. The questionnaires are given to clients once they have received legal assistance. However, questionnaires may not give accurate information, especially when the parties do not understand the questions asked hence possibility of not getting back the questionnaire is high.[38] Surveys are not only applicable to clients but also to other stakeholders such as court officers and legal practitioners to identify the performances of legal aid providers.[39] Surveying presents one of the best modes of data collection thus making the results of the monitoring and evaluation more credible.

Focus groups are a more economical way of collecting data from key stakeholders where the Focus hold regular meetings and explore specific issues.[40] It may discuss the experiences clients had during the legal aid project or legal aid providers can discuss their experiences while providing legal assistance to the clients. It also consists of groups of key stakeholders that establish regular meetings on a structural basis amongst professionals within the field. These meetings can be done on a regular basis to explore specific issues. The disadvantage of this method is that it may not meet the objectives of key stakeholders, government or funders who may require more detailed findings to make their conclusions and recommendations.[41]

Review of existing data model involves analysis of data that is already available to stakeholders making it time efficient and less costly compared with other forms of monitoring and evaluation. For instance, the Legal Aid

37 Nikartas and Limantė, (n 30)
38 Gregg et al (n 8).
39 UNODC, *Handbook on Improving Access to Legal Aid in Africa* (*Criminal* Justice Handbook Series 2011).
40 Ibid.
41 Gregg et al (n 8).

Act requires legal service providers to keep a record of their activities.[42] In Sierra Leone, the Legal Aid Board requires legal aid providers to fill out relevant forms available online at the end of every activity, thus enabling the Board to collect data conveniently.[43] Analysis of existing data collected regularly for a period indicates the trends and changes that have occurred as the legal aid providers conduct their activities. The disadvantage of this method is that the information collected may be inaccurate, incomplete, missing, or inconsistent thus compromising the quality of evaluation.[44] Its use should be complemented with other forms of data collection buttress evaluation [i]

To assess the performance of legal aid service providers, a specific criterion must be used by the monitors. The EU "Tools and Criteria for Measuring Legal Aid Quality" provides that in conducting individual assessment, the monitor may give the provider a score of one to five points with each score having an established criterion.[45] For instance, for an excellent score, there must be proper communication and advice tailored to each client's circumstance, correct and full advice given to the client, in-depth knowledge and use of skill to provide the client with the best outcome, among others. On the other hand, for a failure performance score, among others, the communication and advice given to the client is inadequate, cases are not conducted with reasonable skill and diligence and there is no meaningful service given to the client. Therefore, it is important to determine the criteria the legal service providers will be subjected to, for proper monitoring and evaluation to take place.

Conducting a baseline study

The OECD DAC[46] *Criteria for Evaluating Development Assistance* provides that while conducting a monitoring and evaluation, the parties must examine the impact of the legal aid program for example, to the legal aid seekers. To examine the impact of a service, the parties must first look at the conditions

42 Legal Aid Act 2016, sec 65.
43 UNODC (n 38).
44 Gregg et al (n 8).
45 Nikartas & Limantė (n 30)
46 Organization for Economic Co-operation and Developments, Development Assistance Committee. Evaluating Development Co-operation: Summary of Key Norms and Standards 2nd Edition June 2010 available at https://www.oecd.org/derec/keypublications/ accessed 9 April 2021

before the program was established. Conducting a baseline study involves the analysis of the initial conditions before the start of the legal aid programme, against which progress can be assessed or comparisons made with the conditions after the legal aid programme has been established.[47] An illustration is looking at the legal awareness of the group of people before they receive legal assistance and education from the legal aid providers and the situation after the programme has been established. This calls for proper record keeping of the programme for efficient conduct of baseline study.

Implementing the monitoring and evaluation plan

Once the planning process of the project is complete the actual monitoring and evaluation process can be conducted. Although, there are different methods of collecting data, the stakeholders have the option of choosing either or all the forms. While conducting the legal aid programmes, the ABA Standards require that the confidentiality of clients be maintained and places an obligation on the legal aid providers to provide data to the reviewing agencies in a form that does not breach confidentiality.[48] The parties analysing collected data should also put in place mechanisms to validate data to ensure the information is accurate.[49]

Submission of the Monitoring and Evaluation Report

Once data has been collected, parties that conducted the evaluation must submit to all the stakeholders the findings, conclusions, recommendations and actions to be taken by the relevant stakeholders.[50] The report must be relevant and useful and serve the specific purpose the evaluation intended; timely in that it should be available to the stakeholders when they require it, for example, the report should be available to the funders before they make decisions concerning assignment of funds to the legal aid providers;

---

47 International Federation of Red Cross and Red Crescent Societies, *Project/Programme Monitoring and Evaluation (M&E) Guide (*2011).

48 American Bar Association Standards for the Monitoring and Evaluation of Providers of Legal Services for the Poor, standard 3.11 of 1991, 2002 edition available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_monitor_eval_providers_legal_svcs_to_poor.authcheckdam.pdf.

49 IFRC, *Project/Programme Monitoring and Evaluation (M&E) Guide,* 2011.

50 United Nations International Children's Emergency Fund (UNICEF), Programme Policy and Procedures Manual: Programme Operations, UNICEF, New York, Revised May 2003, pp. 109-120.

complete, that is, the report should provide all the necessary information for it to be useful to the stakeholders; reliable, that is, the information should be accurate; user-friendly where the stakeholders should be able to understand easily the information reported; consistent where the findings should be useful in making comparisons with past and future projects including recommendations; and cost-effective where the resources put into it should correspond to its relevance and use.

MONITORING AND EVALUATION FRAMEWORK IN KENYA

As discussed earlier, establishment of adequate and detailed legislation on legal aid ensures that the legal system of a state is stable and the legal aid services provided to indigent persons are of high quality to meet their needs.[51] Steps in monitoring and evaluation provides guideline for an effective process to ascertain impact of the project and whether it met its objectives. This section discusses how the steps are applied and anchored in Kenya through analysis of the legal instruments, both international and national frameworks for Legal Aid services.

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice System was adopted by the General Assembly on 20th December 2012 during the 60th plenary meeting, to guide the member states on the principles on which a legal aid system in criminal justice should be based on and the first dedicated to this causer. They recognize that provision of legal aid must be prompt and effective at all stages throughout the criminal justice process.[52] The Guidelines mandate member states to put mechanisms for ensuring that all legal aid service providers are competent to provide legal aid. The providers must possess education, training, skills and experience commensurate with the nature of their work.[53]

Guideline 11 requires states to establish a legal aid body/ authority to provide, administer, co-ordinate and monitor legal services to ensure effective implementation of nationwide legal aid schemes. The authority should have power to set the criteria and accreditation of legal aid providers,

---

51 UNODC, *Model Law on Legal Aid in Criminal Justice Systems with Commentaries* (2017). Available at <https://www.unodc.org/documents/justice-and-prison_reform/Legal_Aid/Model_Law_on_Legal_Aid.pdf> accessed on 10 March, 2021.

52 UN Principles and Guidelines on access to Legal Aid in the Criminal Justice System (2012) principle 7.

53 UN Guidelines (n 51), principle 13.

assessment of legal aid needs nationwide and the power to develop its own budget.

The Legal Aid Act places the responsibility of monitoring and evaluation of legal aid service providers on the National Legal Aid Service (NLAS). Section 7 of the Legal Aid Act sets out some of the functions of the Service on monitoring and evaluation such as supervising the establishment and working of legal aid services in universities, colleges and other institutions, evaluation of justice delivery centres and monitoring and evaluation of paralegals and other legal service providers and to give general directions for the proper implementation of legal aid programmes. Legal aid providers are required to keep proper records of activities conducted and legal representation of the persons aid which are subject to monitoring and evaluation by the Service.[54]

States have an obligation to put in place mechanisms that ensure that legal service aid providers possess the education, training, skills and experiences that are commensurate with the nature of their work.[55] In order to ensure clients receive quality legal assistance, the government enacted the Legal Aid Act that stipulates the accredited persons and organizations which can provide legal aid services.[56] The criteria for accreditation are provided in Part III of the Legal Aid (General) Regulations, 2020 as follows:

- **Paralegals:** must have completed a Council of Legal Education approved training for paralegals; employed or supervised by an advocate or accredited legal service providers; and is a member of a duly registered association of paralegals.
- **Advocates:** must be advocates of the High Court of Kenya and possess a valid annual practicing certificate. Law firms must be dully registered as a sole proprietorship, general or limited liability partnership and must have one or more advocates that qualify for accreditation.
- **Other organizations[57]:** must be accredited and must have adequate facilities and personnel qualified and must have in employment at least one advocate and paralegal who qualify for accreditation.

54 Legal Aid Act 2016, sec 65.
55 UNODC (n 50).
56 Legal Aid Act, sec 56.
57 Regulation 4 (a) of the Regulations requires the Organizations to be dully registered under Organizations as Public Benefit Organization Act, 2013 for Public Benefit Organizations; Non-Governmental Organizations Co-ordination

- **Universities and other institutions:** must be accredited by the Council of Legal Education to provide legal education or training and must have a full-time member of the faculty who is an advocate with seven years' experience to run the legal clinic.
- **State Agency:** must have in its employment at least one paralegal or advocate who qualifies for accreditation as legal service providers.

In addition to the Act[58], the NLAS developed a code of conduct[59] applicable to all legal aid providers. The aim of the code is to promote integrity, respect, confidentiality, accountability, public responsibility, and competency in provision of legal aid services.[60]It requires the legal aid providers to have the necessary skills and competency to provide quality legal services to their clients[61]and to discharge their duties consistently with the proper and efficient administration of justice.[62]

Further, the code of conduct provides for the duties of legal aid providers to various stakeholders—clients, court, legal professionals, and law enforcement agencies. An important aspect of the regulation that protects clients is the window that enables unsatisfied client to file a complaint with the Director. Thereafter, the Director is mandated to undertake investigations into the matter and make recommendations depending on the outcome of the process. Such recommendations are made to the Board of NLAS which may direct that the legal aid provider be retained in the register or their name be struck off.[63] This is a safety guard to clients and puts the service providers on notice to work diligently and uphold standards set by the regulator.

CHALLENGES IN KENYA'S MONITORING AND EVALUATION FRAMEWORK

Despite the existence of elaborate legal and policy framework on Legal Aid-Legal Aid Act, Legal Aid (General) Regulations, 2020 and the Legal Aid

---

Act, 1990 for Non-Governmental Organizations; and the Societies Act for a society.

58 Legal Aid Act.

59 Legal Notice No. 121, The Legal Aid Code of Conduct for Accredited Legal Aid Providers 2019

60 Ibid, para 2.

61 Ibid, para 4.

62 Ibid, para 11.

63 Ibid, para 17.

Code of Conduct for Accredited Legal Aid Providers effective monitoring and evaluation mechanism remains a challenge.

Legal Aid service providers have been in operation in Kenya long before the launch of the Legal Aid Guidelines in July 2020. Part III of the Legal Aid (General) Regulations[64] provide for the accreditation of the Legal Aid providers and as well as minimum qualifications for eligibility. Section 30(6) of the Regulations[65] states that accreditation takes effect on the date the legal service provider and the Legal Aid service shall sign the accreditation agreement.[66] However, Legal Aid providers that have been in operation before the regulations were adopted require more time to internalise and operationalize their activities in tandem with the new regulations. The providers operated in silos with no effective regulatory oversight with their own internal M&E guidelines. One would therefore say that it was difficult to have a uniform evaluation guideline as each has different mandate and vision.

National Legal Aid Service (NLAS) has been given the mandate to monitor the services provided by the legal aid providers. This obligation can be delegated to a professional body who must report to NLAS on their findings.[67] However, there are underlying issues. Firstly, the Regulations do not give the guidelines that the professional bodies must follow in conducting monitoring and evaluation such as, the reasonable notification to the legal aid providers of the intention to monitor their services. There is a regulator conceived in the legal Aid Act, NLAS, however, there is no effective regulatory oversight.

Secondly, there is no provision of specific time frame when the staff of the NLAS can evaluate the services of the legal aid providers. This may cause disruption to the operations of the legal aid providers who may not have adequate time to collaborate with NLAS thus affecting the quality of the evaluation. Thirdly, the Regulations do not provide for guidelines on confidentiality of client information as it requires the legal aid providers to give NLAS access to information on the aid seekers. They do not consider the monitoring and evaluation frameworks the existing legal aid providers may have or input of other stakeholders such as private funding institutions.

64 Legal Aid (General) Regulations of 2020 Pt III.
65 Legal Aid (General) Regulations 2020.
66 Ibid, sec 30(b).
67 Legal Notice (n 58), para 5.

Lastly, they do not specify the procedure that legal aid seekers can follow to submit their feedback to NLAS on the quality of services they received.

The framework does not provide general guidelines on how to conduct the monitoring and evaluation process such as the number of times for conduction, methodologies that the NLAS applies, input of funders, legal aid providers, clients and other stakeholders despite being critical to the process.

The framework does not provide for guidelines that legal aid providers can follow to self-evaluate yet this is essential for gauging the services being offered. It also requires legal aid providers to record information concerning the aid seekers, however, it does not provide for a uniform system of keeping records. Consequently, this may lead to inconsistency in information gathering during evaluation. Kenya needs to borrow from some good practice from Sierra Leone as will be discussed in next section where the Board requires legal aid providers to fill relevant forms online after every activity which is then used to monitor and evaluate legal aid providers.[68] The NLAS framework is limited to quality assurance, however, as discussed in the previous sections, monitoring and evaluation is also useful for decision making and enhancing service delivery by legal aid providers, among others. Therefore, NLAS should expand the scope of the monitoring and evaluation framework and include other purposes other than that of oversight.

Finally, the legal professional bodies which NLAS will monitor are required to provide a report. However, the Regulations do not state whether such report will be available to the legal aid service providers, nor the consequences of the evaluation, such as whether the report will provide recommendations that the legal aid providers are mandated to implement.

OPPORTUNITIES AVAILABLE FROM CROSS -JURISDICTIONAL PRACTICES

An effective monitoring and evaluation framework should be a practical tool for funders, planners and legal aid service providers to better learn from

[68] *UNODC Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes: Practical Guidance and Promising Practices* (Criminal Justice Handbook Series 2019) pg. 73

their work.[69] The UNODC/UNDP study revealed that number one priority of member states and experts was to improve the quality of legal aid services. It recommended global sharing of experiences, lessons learnt and good practices[70]. The existing frameworks for monitoring and evaluation of legal aid services provides opportunities for service providers, funders, clients and governments that can be borrowed and customized to the needs of all. NLAS need not reinvent the wheel but can tap on the existing frameworks in context and develop a more effective framework. Some the opportunities available is discussed in perspective of different institutions from other jurisdictions, such as Legal Aid South Africa, American Bar Association, and Development Assistance Committee of the OECD. FOLLAP's monitoring and evaluation practice is also highlighted just to demonstrate that M& E is desirable in legal aid and is doable to ensure that the programme remains on track.

Legal Aid South Africa

Legal Aid South Africa is a body established by the Legal Aid South Africa Act, No. 39 of 2014 to provide legal aid to those who cannot afford their own legal representation[71]. It has a comprehensive monitoring and evaluation program. The framework ensures legal service providers offer quality services and include recruitment of the best practitioners and establishment of extensive legal training and development.[72] Quality monitoring programmes such as regular file reviews, practitioner self-reviews, quality service reviews by Justice Centre managers, stake holder feedback, complaints monitoring and client satisfaction surveys have been established by the Legal Aid South Africa.[73] A computerized case management system is developed for monitoring and evaluation of productivity of Justice Centres by providing various relevant reports that are timely and up to date.[74]

Legal Quality Assurance Unit has been established by the Legal Aid South Africa to conduct independent assessments on the quality of services rendered by practitioners. This is done through assessment of files and

69 Suzie Forell and Hugh M. McDonald, *Evaluation of Legal Service Delivery: Challenges, Opportunities and Work towards a Framework,* (ILAG Conference June 2017).
70 UNODC/UNDP, *Global Study on Legal Aid* (2016)
71 Legal Aid South Africa *Strategic Plan* 2015-2020.
72 Legal Aid South Africa, *Country Report* (April 2017). 21.
73 Ibid.
74 Ibid.

court observations.[75] The Legal Quality Assurance Unit goes a step further in the monitoring and evaluation process by holding a feedback session with the practitioners after the court observations and file assessments.[76] This involves a discussion on the outcomes of the assessment or observation, the findings and corrective measures that the practitioner needs to be aware of and implement.[77] This, therefore, expands the role of monitoring and evaluation from quality assurance to enhancing competency and performance of legal practitioners as they conduct their activities.

Sierra Leone Legal Aid

Sierra Leone Legal Aid Board is a body established by the legal Aid Act No.6 of 2012 to provide legal aid services to those who cannot afford their own legal representation.[78] It is one of the first Board to have been established in low-income countries funded by government and supplemented by donors.[79] Sec 32 of the Act mandates the Board to monitor and evaluate the quality of legal representation in legal aid cases in accordance with prescribed procedures. This is further buttressed section 40(1)b of the Legal Aid Act which empowers the Board to make rules and regulations for procedures for monitoring and evaluating legal aid services.

The Board uses technology and internet for managing cases, delivering training, and assessing performance for every legal aid activity.[80] For instance, paralegals, lawyers and other staff of the Board use messaging application group to report their daily activities, support each other and discuss successes and challenges for supervision and educational purposes. The messaging group make work easy for the Board and ensure that the remote areas are accessible at a click of button and to make informed decisions on interventions. Monitoring paralegal work has been made easy through the same application as they are required to post their activities weekly to their supervisors for purposes of determining kind of

---

75 Legal Aid South Africa*, Legal Aid Manual*, (2017)51.
76 Ibid.
77 Ibid.
78 Section 2 Legal Aid Act No.6 of 2012, Sierra Leone.
79 Marcus Manuel and Clare Manuel, A report for People Centred Justice for all: A route to Scaling up access to justice advice and assistance in low-income countries April 2021 pg. 31
80 *UNODC Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes: Practical Guidance and Promising Practices* (Criminal Justice Handbook Series 2019) pg. 55

legal assistance is required to help plan their follow ups. It is also used to assess the quantity and quality of work the paralegals are undertaking which is important for programming interventions in a cost-effective manner. The information posted is crucial to those concerned such as the prisons and inmates that is drawn for the attention of the Ministry of Justice, Office of the Chief Justice, Ministry of Internal Affairs and Prisons authorities for their respective actions.

The board developed seventeen (17) forms that cover paralegals' work, and they are required to fill the respective form for every activity after completion.[81] Some of the activities include visits to the police stations, correctional centres, magistrates' courts, high court, local court, and informal courts such as paramount chiefs as well as remand homes. The forms are available online, lawyers, paralegals and other officers can fill the relevant form at the end of an activity and submit them online with very minimal costs. This is a good practice that enables accurate data collection which in turn helps keeping a service provider with up-to-date information on a regular basis feedback thus an avenue for determining what needs to be improved or changed in the programme.

The Board also uses focus group discussion with stakeholders that have established regular meetings on structural basis amongst professionals within the criminal justice system or field of criminal law. This method is used by the Board to assess people's understanding of the law and how the legal system works.[82] Such discussions are crucial for informing programme strategies and interventions. Despite progress, the Board notes that it faces constrains in its monitoring and evaluation processes[83] particularly inadequate resources.

Lithuania Legal Aid

Legal aid is state guaranteed vide statute VIII-1591 adopted in 2000[84]. Article 1 of VIII-1591 highlights purposes of legal aid as to enable persons to

81 UNODC (n 78) pg. 74
82 UNODC (n 78) pg. 73
83 This was highlighted the Executive Director Sierra Leone Legal Aid Board (Carlton-Hanciles) during her presentation on introduction of Legal Aid in Sierra Leone available at http://internationallegalaidgroup.org/images/miscdocs/South_Africa_2017_PowerPoints/compressed_PP_Introducing_Legal_Aid_in_Sierra_Leon.pdf accessed on 24 November 2020
84 Law No.VIII-1591 2000 (revised 16 April 2009 – No XI-223) available at

assert their rights and protect their legal interests. The services are fully paid for by the state and operates at two levels primary and secondary.[85]

Legal Aid Co-ordination Council ensures the implementation of the functions assigned to the Ministry of Justice in the field of state-guaranteed legal aid. The Council is a hybrid body with membership from representatives of the Committee on Legal Affairs and the Committee on Human Rights of the Seimas of the Republic of Lithuania, the Ministry of Justice, the Ministry of Finance, the Association of Local Authorities in Lithuania, the Lithuanian Bar, the Lithuanian Lawyers' Society, the Judicial Council, and other institutions and associations whose activities are related to the provision of state-guaranteed legal aid or the protection of human rights.[86]

The law stipulates institutions managing state-guaranteed legal aid as the government, the Ministry of Justice), municipal institutions, state-guaranteed legal aid services (the Services) and the Lithuanian Bar. Even though the government and the Ministry of Justice take an active policy making role in the legal aid system, the main actors in the structure are Services and the legal aid lawyers.[87] The provision of legal aid is a shared responsibility between the Services which compile the list of legal aid lawyers, and the authorities, which designate a defense lawyer in a criminal case. The verification of the quality of the activities of legal aid lawyers is done by the Bar, in accordance with the rules for assessment of the quality of legal aid approved by the Lithuanian Bar Association, as agreed with the Ministry of Justice.[88] The Service conducts annual surveys that include

---

https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.350869?jfwid=mmceokng5 accessed 23 April 2021

85 Article 2(2) & (3) Law No. VIII-1591 Primary legal aid entails provision of information and legal advice and preparation of documents while secondary legal aid is a state guaranteed assistance from a lawyer in judicial proceedings including drafting douments, conducting defenece and representing clients in court proceedings.

86 Ed Cape and Zaza Namoradze 2012 Effective Criminal Defence in Eastern Europe – Bulgaria, Georgia, Lithuania, Moldova & Ukraine available at https://www.osce.org/files/f/documents/2/1/124399.pdf accessed 20 April 2021

87 Ibid

88 Ed Cape and Zaza Namoradze, 2012 Effective Criminal Defence in Eastern Europe – Bulgaria, Georgia, Lithuania, Moldova & Ukraine pg. 247 available at https://www.osce.org/files/f/documents/2/1/124399.pdf accessed 20 April 2021, See also Article 10(2) of the Law No. VIII-1591 on State-Guaranteed Legal Aid, 2000 https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.350869?jfwid=mmceokng5 accessed 23 April 2021

Judges, prosecutors and police officers where the stakeholders are asked questions on their contact frequency with legal aid providers, how often the legal representatives postpone the hearing and how reasonable these requests are, and generally provide information concerning the quality of services provided by the legal aid providers.[89]

In summary, supervision of advocates providing legal aid is carried out by the Lithuanian Bar Association and the State-Guaranteed Legal Aid Service (SGLAS). It resolves beneficiaries' complaints regarding the actions of legal aid providers. The Bar Association has a general duty of supervising the advocates. The SGLAS is not empowered to supervise the quality of the service itself. Disciplinary measures against the lawyers are taken by the Bar Association.

American Bar Association (ABA) Standards for the Monitoring and Evaluation of Providers of Legal Services for the Poor

The Standards was adopted by the American Bar Association (ABA) House of Delegates in 1991 to provide guidance in the monitoring or evaluation of organizations providing free legal services in civil and criminal matters. The standards apply to all regardless of the type of services they provide, or criteria used in determining eligibility for the service.

The Standards recognize three forms of monitoring and evaluation: on-going informal interaction between funders and the legal aid providers; periodic review of reports and other information submitted by the service provider; and periodic on-site visits. The funders have the discretion of determining whether to review use of funds and the means to take.[90] Standard 1.4 provides that the reviewing agency should inform the legal aid provider of the purpose of the process like, performance evaluation to provide feedback

---

89 Christoph Burchard, Matthias Jahn, Sarah Zink, Simonas Nikartas, Agnė Limantė, Laurynas Totoraitis, Anželika Banevičienė, Diana Jarmalė, 2018 Practice Standards for Legal Aid Providers *Developed in the framework of the project: Enhancing the Quality of Legal Aid: General Standards for Different Countries pg.30, available at* https://teise.org/wp-content/uploads/2019/09/Qual-Aid_Practice-Standards_EN.pdf accessed 23 April 2021

90 Standards for the Monitoring and Evaluation of Providers of Legal Services for the Poor 1991, standard 1.3.

for improving services provided, or determination of programme's effectiveness and efficiency.

On-site monitoring and evaluation involve the analysis of the documents and records of the Legal Aid provider. Therefore, Standard 2.2 provides that the reviewing agency may access the necessary documents and records that are within the scope of its review such as to determine the use of funds by the legal aid providers. Since on-site evaluation involves visits to the legal aid providers, the reviewing agencies have a duty to give reasonable written notice of the intention that outlines the date, intended purpose, the scope of the visit and the criteria against which the service provider will be measured.[91] A key provision of the Standards is on interviews with current or former clients. Standard 3.8 requires the reviewing agency to notify the legal aid provider of their intention to interview clients, who in turn must inform the clients who may be interviewed on their rights including their rights to not be interviewed or the right to have a legal representative present while the interview is being conducted.

The Standards recognize the necessity of a preliminary and final monitoring report where the reviewing agency has the responsibility of preparing a written report which sets out the findings, conclusions and recommendation. The report is then submitted to the legal aid providers to comment and submit corrections or objections to the findings, conclusions, and recommendations. Thereafter, the reviewing agency submits the final report of their findings, conclusions, recommendations and responses of the legal aid providers to the report.[92] It is a useful tool for guiding funders and reviewing agencies as they conduct the monitoring and evaluation process. However, the Standards do not provide guidance on how to evaluate the approaches the reviewing agencies can take while planning and implementing the evaluation.[93]

It focuses on monitoring and evaluation by reviewing agencies which are mostly done by funders of legal aid providers and has not provided guidance on self-evaluation by the legal aid providers themselves.[94] While NLAS has the mandate of monitoring and evaluation on accredited legal aid providers

---

91 Ibid, standard 3.1.

92 Ibid (n 89), standard 4.2.

93 Gregg G. Van Ryzin and Marianne Engelman Lado, Evaluating *Systems for Delivering Legal Service to the Poor: Conceptual and Methodological Considerations.*

94 Ibid.

in Kenya, the ABA Standards do not provide guidelines for a state organization to conduct monitoring and review that can work on all the various legal aid providers.

The Development Assistance Committee of the OECD

The OECD[95] DAC members developed guiding principles to be used by Legal Aid Agencies and countries while developing their own monitoring and evaluation frameworks.[96] The Principles set out the following criteria to be used while evaluating programmes:[97]

Relevance— focuses on whether the programme is in line with the needs of the stakeholders –aid seekers, legal service providers, funders and government.

Coherence- examines whether the programme is compatible and complements other programmes in the country.

Effectiveness - whether the objectives of the programme were achieved.

Efficiency - assesses the extent, to which the programme achieved its objectives and results in the most cost-effective way and in a timely manner.

Impact- looks at the effect of the programme- positive or negative, direct or indirect, intended or not intended; and finally, its sustainability**.**

According to the DAC principles, evaluation process can only be successful if it is independent and impartial, transparent, useful to the stakeholders especially in decision making, and should involve the stakeholders throughout the evaluation process.[98] NLAS and other stakeholders should adopt the above principles while formulating its framework for Kenya's legal aid programme to be sustainable and relevant to the needs of indigent.

---

95 Organisation for Economic Co-operation and Development (OECD) is an international body where governments of member states work together to develop policies and find solutions to social, economic and environmental challenges.
Available at https://www.oecd.org/about/ accessed on 23 November 2020.

96 OECD, *DAC Principles for Evaluation of Development Assistance,* 1991. The DAC adopted a new set of evaluation criteria on 10th December 2019. Available at https://www.oecd.org/dac/evaluation/eval-criteria-global-consultation.htm , accessed on 23 November 2020.

97 OECD, *Evaluation Criteria* available at https://www.oecd.org/dac/evaluation/daccriteriaforevaluatingdevelopmentassistance.htm accessed on 23 November 2020.

98 OECD- *DAC Principles for Evaluation of Development Assistance* (1991).

Egerton University Faculty of Law Legal Aid Project (FOLLAP)

FOLLAP was launched in November 2019 in collaboration with European Union and UNDP-Amkeni Wakenya to facilitate and enhance access to justice for the indigent in Nakuru County. To ensure that the aid seekers receive relevant and quality services, FOLLAP conducts monitoring and evaluation of its programmes quarterly in two stages, the Stakeholders and the students' level. At the stakeholders' stage, they are brought on board to give their opinion on areas of strengths and areas that need improvement by the project, whilst the students give insight to the project at the grassroots levels for better service delivery.

FOLLAP provides contacts to their clients for follow-up purposes. The clients provide feedback on whether they were satisfied with the services received and whether those who were referred to FOLLAP partners received the legal assistance sought. [99] Partners such as the National Legal Aid Service-Nakuru, Gender Institute-Egerton University and the Rift Valley Law Society have assisted FOLLAP in boosting its monitoring and evaluation plan through focus discussions. As stakeholders, they have provided diverse ideas on areas of improvement to develop a more impactful legal aid program for the marginalized within Nakuru County.

The Project keeps a file every client seeking legal assistance from the Clinics. The file contains the client's information and feedback from the client on service rendered. Additionally, the area Chief is asked to fill a form (form D) to certify information recorded in the form is correct at the end of each activity during outreach. The form takes into account the number of people reached, the nature of cases handled and the cases that need urgent attention. The records are reviewed quarterly to establish cases that have been finalised and those that are pending. These provide crucial information concerning the efficiency or otherwise of their operations by monitoring the number of activities conducted by the project and assessing whether their objectives were met. The records also provide stakeholders with evidence that resources are used efficiently by the Project.

Through monitoring and evaluation, FOLLAP can determine the challenges and future indications and adjust towards developing a better strategy to overcome the challenges and aid effective implementation of the project.

[99] FOLLAP, Free Legal Appointment, available at https://follap.egerton.ac.ke/explore/appointment/ accessed on 12 March 2021.

Additionally, monitoring and evaluation has created an interactive system, for all stakeholders to be involved in decision making, making them part and parcel of FOLLAP bolstering its credibility in service delivery.

Application to the Kenyan monitoring and evaluation framework

From the discussion above, Kenya can enhance its monitoring and evaluation framework to be more relevant and applicable to NLAS and other relevant stakeholders. Some of the key features that Kenya can adopt include:

Record Keeping: The Legal Aid Act requires legal aid providers to keep client records.[100] This is a practice done by most legal aid providers in Kenya, for instance, FOLLAP provides contacts to their clients for follow-up purposes. Therefore, NLAS can use this practise as a monitoring and evaluation tool by developing a system that engages both legal aid seekers and legal aid providers to assess quality of the service assistance and determine if objectives met. In South African file assessment and data analysis is undertaken from a well-established computerized case management system. In Sierra Leone, the Board uses technology and internet for managing cases, delivering training, and assessing performance for every legal aid activity. NLAS can embrace technology and establish a computerized system where stakeholders can provide useful data on their operations for measuring their performance and quality of services offered. This is critical understanding the strengths and gaps in their operations and decision-making for better service provision.

Expanding the purpose of Monitoring and Evaluation: The discussions highlighted the purposes of monitoring and evaluation. While the Kenyan framework focuses on quality assurance, it has the opportunity of expanding this scope to the use of monitoring and evaluation for making financial decisions by the Legal Aid Fund as well as private funders of legal aid projects, measuring performance of legal services, and for ensuring compliance with the laws and regulations on legal aid, for example, on the qualifications of legal service providers among others. This can also be done by adopting the principles laid down by the OECD DAC members on the need for the framework to be useful to all the relevant stakeholders.

Engaging all the relevant stakeholders in the monitoring and evaluation process: Kenyan framework provides for monitoring and evaluation of legal aid providers and clients. However, key participants such as private funders

[100] Legal Aid Act, sec 65.

and judicial officers among others are not expressly provided for as in the case of Lithuania. In Lithuania, the State Guaranteed Legal Aid Service conducts annual surveys that include judges, prosecutors and police officers where the stakeholders are asked questions on their contact frequency with legal aid providers, how often the legal representatives postpone the hearing and how reasonable these requests are, and generally provide information concerning the quality of services provided by the legal aid providers.[101] In order to engage all the participants, the framework should also define the forms of monitoring and evaluation that can be used such as surveys, focus groups and use of existing data.

Defining the responsibilities of the relevant participants; The existing framework does not provide the role each participant in the monitoring and evaluation plays. The Guidelines should include the role of each participant in the monitoring and evaluation process, for instance, reviewing agency or party in charge of monitoring and evaluation to notify legal aid providers of conducting a credible process and submitting a report that is relevant and useful to all stake holders; and the responsibility of legal aid providers to keep proper records of their activities as well as ensuring client confidentiality as they provide relevant information to the monitors.

Stating the frequency of monitoring and evaluation; Although the ABA guidelines do not provide for a specific number of times monitors can conduct evaluation, it requires them to conduct the process at reasonable intervals to acquire relevant data without causing disruptions to the operations of the legal aid providers. The Kenyan framework should define the frequency of monitoring such as quarterly or annually. For this to be effective, the framework should provide for the collaboration of stakeholders in the monitoring and evaluation process.

Access to the monitoring and evaluation report and Implementation of recommendations; The Kenyan framework does not provide for the accessibility of the monitoring and evaluation report to all relevant stakeholders nor the actions that the legal aid providers need to take once monitoring and evaluation is conducted—whether it is mandatory for the legal aid providers to adopt the recommendations given because of M & E conducted on their services. It is imperative that the guidelines be amended to include the persons or groups that can access the report by the monitors on the evaluation process as well as provide how they can adopt the

[101] Christoph Burchard et al (n 88)

recommendations stated in the report. Although Kenya has an existing monitoring and evaluation framework, it lacks certain provisions that are essential in conducting an effective monitoring and evaluation process. Looking at existing practices internationally as well as nationally, it is possible to adopt and enhance the existing framework for it to not only be useful to NLAS but also other stakeholders in Kenya.

CONCLUSION

Monitoring and evaluation plays a critical role to legal aid service providers, clients, funders and government. This paper discussed M & E of legal aid programmes in Kenya by first identifying the role of M & E to various stakeholders such as clients, legal aid service providers, funders, and the government. It has demonstrated the importance of M & E of legal aid services in ensuring access to quality and efficient legal services, as assessing performance and prudent utilization of funds as well as decision making to stakeholders. A good M& E framework must identify conceptual and methodological issues both at planning and implementation stage as well as evaluation geared towards meeting the objectives of the project.

The paper appraised the Kenyan M & E framework by looking at the provisions of the Legal Aid Act as well as the Legal Aid (General) Regulations and Code of Conduct which addresses and places the M & E responsibility on the National Legal Aid Service. Through its appraisal, the framework is focused on quality assurance and requires organizations providing free legal services to have the requisite qualifications to be accredited to offer the services with limited guidelines on how to conduct M & E.

The paper identified best practices that Kenya can borrow from other jurisdictions to strengthen its quality assurance to the Service and other stakeholders. Such good practises are crucial for decision making and enhancing performance, efficiency and sustainability. Effective monitoring and evaluation framework is imperative for gauging the services.


DONEC
EGERTON UNIVERSITY


amkeni
waKENYA


UN
DP