EXAMINING THE RIGHT TO LEGAL REPRESENTATION AT
PUBLIC EXPENSE: A CASE FOR KENYA

LLM Dissertation in Partial Fulfillment of the requirements for the award of
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DECEMBER, 2017
DECLARATION

I, OSINO GEORGE OSANDA, do hereby declare that this thesis is my original work and has not been submitted and is not currently being submitted for an award of a degree in any other University.

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GEORGE OSANDA OSINO.

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DATE

This Dissertation has been submitted for examination with my approval as a University supervisor.

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MRS. FLORENCE SIMBIRI- JAOKO

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DATE
DEDICATION

This work is dedicated to all the people out there seeking justice from our courts but who cannot afford to hire lawyers.
ACKNOWLEDGEMENT

First and foremost, I thank God for giving me the strength to carry on throughout this entire project.

Secondly, I appreciate my supervisor, Mrs Florence Simbiri – Jaoko, for the immense support and guidance throughout my project. I thank her for the numerous corrections and reviews.

My family has also been very supportive throughout the period of research. I am grateful for their cooperation and understanding. Similarly, my friends and classmates have been very supportive and I am extremely thankful.
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<td>UNDHR</td>
<td>Universal Declaration for Human Rights</td>
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<td>ICCPR</td>
<td>International Covenant for Civil and Political Rights</td>
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<tr>
<td>UNCHR</td>
<td>United Nations Commission on Human Rights</td>
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<td>ACHPR</td>
<td>African Charter on Human and People’s Rights</td>
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<td>NALEAP</td>
<td>National Legal Aid and Awareness Programme</td>
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<td>CLAN</td>
<td>Children Legal Aid Network</td>
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<td>LASA</td>
<td>Legal Aid South Africa</td>
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<td>LASPOA</td>
<td>Legal Aid, Sentencing and Punishment of Offenders Act</td>
</tr>
<tr>
<td>NGO</td>
<td>Non Governmental Organisation</td>
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<td>CBO</td>
<td>Community Based Organisation</td>
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Griffins V Illinois (1956) 351 U.S. 12

John Sakwa Versus Director of Public Prosecution and 2 Others (Petition No. 318 of 2011, High Court at Nairobi)

Parel V Alabama 287 U.S (1932)

Pett v. Greyhound Racing Association (1968) 2 All E.R 545

Powell v. Alabama (1932) 287 U.S. 45

Pinto V Trinidad and Tobago Case No. 232 of 1987

Reg. v. Rowbotham (1988) 41 CCC (3d) at pp 65-66

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CONVENTIONS
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CHAPTER ONE
1.0 INTRODUCTION

This study examines the right to legal representation as enshrined in Article 50 (2) h of the Constitution of Kenya 2010. Article 50 (2) h provides that every accused person has the right to a fair trial, which includes the right to have an advocate assigned to him by the State and at State expense if substantial injustice would otherwise result. It further provides that this right has to be explained to the accused person promptly. This paper aims to critically analyse the adequacy and effectiveness of the law that is in existence to protect this right. The study is limited to the application of this right in criminal cases only.

In Kenya, many people are not able to afford legal services. This has a negative impact on access to justice. Lord Denning affirmed the essence of this right in *Pett v. Greyhound Racing Association*.¹ He stated as follows:

“...It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it everyday...”

Similarly, Atsiaya Mongoi Marcos discusses the co-relation between the right to legal representation and access to justice.² He states that justice is a very important aspect of a democratic country. He acknowledges that even though Kenya is a fairly democratic country, justice has not been afforded to indigent persons who cannot afford lawyers.³ He further argues that this right is associated with the concept of fair trial. According to him, majority of Kenyans

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¹ (1968) 2 All E.R 545
³ Ibid
cannot afford to hire lawyers due to their poor social and economic conditions. Lawyers charge expensively for their services and can only be hired by those who are well endowed financially. This means that it is only the rich people in the society who can access justice.\(^4\)

The drafters of the Constitution, in their wisdom, decided to include Article 50 (2) h in the Constitution. This provision was deliberately inserted in the Constitution in order to avail lawyers to persons who cannot pay, and especially where there is a likelihood of substantial injustice. This constitutional provision can be contrasted to Section 77 (2) d of the 1963 Kenyan Constitution. It provided that an accused person was permitted to represent himself in Court either in person or through a legal representative chosen by him. However, Sub-section (14) provided that Section 77 (2) should not be interpreted to mean that an accused person was owed a duty by the state for provision of free legal representation. There is a clear difference between the 1963 Constitution and the 2010 Kenyan Constitution.

Over the years, the High Court of Kenya has administered a state brief system where pro bono lawyers are paid on the basis of the cases done. There are called upon to act whenever there is need to represent accused persons especially in capital offenses. The effectiveness of this system has however been challenged by a few scholars. Jill Cottrell, for example, observes some inconsistencies in the application of legal aid to capital offences. She argues that for many years, it has been the position that those charged with murder are given legal representation by the state at public expense while those charged with robbery with violence are not assisted. Her main point of contention is that these two offenses are handled differently yet the consequences of conviction for both are the same. Jill takes issue with Judges who are reluctant to expand the benefit of legal aid even after the passage of the Constitution of Kenya 2010. She however acknowledges that a legal framework should be established to operationalise the Constitution.\(^5\)

Cotrell’s argument is clearly illustrated by the case of John Sakwa Versus Director of Public Prosecution and 2 Others.\(^6\) The petitioner had been charged with robbery with violence at a lower court. His contention at the High Court was that he did not get a fair hearing because he

\(^4\) Ibid
\(^6\) Petition No. 318 of 2011, High Court at Nairobi, January 18, 2013
had not been afforded a lawyer during the trial. Despite the fact that it was a capital offence, the court declined his Appeal.

The state has enacted the Legal Aid Act of 2016. This new Act is meant to operationalise Article 50 (2) h of the 2010 Constitution. The main objective of this study is to interrogate the contents of the Act to test its compliance with the Constitution. Other objectives include examining the progress made by the government in putting up the necessary administrative and institutional mechanisms to facilitate the provision of legal aid.

In this paper, the author argues that this right requires a critical, analytical and a practical approach in order to effect it. The Constitution does not operate in a vacuum. It operates within a social, economic and political space. Realistically speaking, it is impractical to expect the government to provide every accused person with the right to counsel under the current economic context.

### 1.1 STATEMENT OF THE PROBLEM

The major problem has been the lack of a comprehensive policy and legislative framework to implement and operationalise Article 50(2) h of the Constitution. The Legal Aid Act of 2016 was enacted recently. The enactment of the Act came six years after the promulgation of the Constitution. The Act had been pending in Parliament since 2012. Numerous judicial and legislative changes that may have occurred since then necessitate the need to scrutinize the Act to ensure that it reflects the changes and conforms to the times. Moreover, there exists a gap in terms of the regulations and guidelines that are meant to operationalise the Act.

The second problem has been the question of implementation of the right to legal representation. One of the challenges the Courts have had to deal with is the question of whether the right to legal representation needs to be effected immediately or whether it should be effected progressively. Two contrasting positions have been held by the Courts as shown below.

First, the Court was invited to grapple with the question of implementation in the case of **David Njoroge Macharia V Republic.** 7 The Appellant had moved to the Court of Appeal to challenge the decision of the High Court. The accused person argued that the judges erred in confirming a

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7 Criminal Appeal No. 497 Of 2007
conviction that had been passed by a lower Court. His main argument was that he was not afforded legal representation at both the trial stage and during the appeal in the High Court. The appellant argued that it was his right to be afforded legal representation. He argued that the Kenyan system was adversarial in nature and failure to be represented was prejudicial to his case. Consequently, he argued that it was important to level the ground between the prosecution and an accused person.

The question before court was whether every accused person was entitled to legal representation. The court had to balance between the interests of the accused persons with the reality of the state resources. The lawyer representing the appellant argued that the appellant was taken through a trial procedure without the benefit of being afforded representation. He further argued that the offence in question was very serious since it attracted a death penalty. The court acknowledged this right in one of those that are universally recognized. It emphasized that the presence of a lawyer is very important because he or she understands the necessary laws, procedures and an ability to relate them to facts. It held in favour of the Appellant.

The court concluded the Macharia Case by stating that it was aware of the financial implication of the decision hence it ordered the decision to be served both to the Attorney General, Law Reform Commission, Minister in charge of Justice and the Commission for the Implementation of the Constitution (CIC).

The case of John Sakwa Versus Director of Public Prosecution and 2 Others raised similar issues. The court was requested to determine whether the state was obligated to avail a lawyer to represent the person who had been charged with robbery with violence. The Court was invited to interpret Article 50(2) h of the Constitution. The main issue was whether Article 50(2) h was supposed to apply automatically upon enactment of the Constitution or whether the state was required to first put in place a legislative framework.

The petitioner argued that this right was supposed to be applied immediately due to the need for justice. The respondent, however, argued that they could not implement Article 50 (2) h without legislation to guide the process. They argued that the Article should be interpreted progressively.

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8 Ibid
9 Petition No. 318 of 2011, High Court at Nairobi, January 18, 2013.
The respondents cited Article 261 and the Fifth Schedule of the Constitution which provide that the provisions of Article 50 are to be implemented in the course of 4 to 5 years. The state also argued that Article 50 (2) h had a huge financial impact which had not been budgeted for. According to the state, implementation of Article 50(2) h required planning and budgeting.

The court upheld the respondent’s arguments. It held that the state should be allowed time to put in place the necessary policy and legal framework. It held that for as long as the state was making progress towards realization of this right, then that is all that mattered. The Court was of the view that this right should be viewed vis a vis the economic realities of the country.

In light of the above decisions, this paper looks into whether the state has put effective policy and legislative measures in place towards the full realization and implementation of Article 50 (2) h.10

1.2 JUSTIFICATION OF THE STUDY

This study is important as it comes at a time when the state recently enacted the Legal Aid Act 2016. The study puts the Legal Aid Act of 2016 to test. It interrogates whether the constitutional threshold has been met by the Act.

The study is also important as it assesses the progress made by the government in implementing the right to legal representation. The study comes at a time when the Courts are grappling with the question of whether the right is to be implemented progressively or immediately. The study sheds light on the experiences from other jurisdiction. The comparative study in chapter four will provide ideas on good practice from which Kenya can learn. Lastly, the study is important because it offers an insight as to why many accused persons are still not represented in court despite the provisions of the Constitution and the Act.

1.3 OBJECTIVES OF THE STUDY

The main objectives of this study are;

i. To examine whether Legal Aid Act, 2016 gives effect to the letter and the spirit of Article 50 (2) h of the 2010 Kenyan Constitution.

10 The Constitution of Kenya 2010
ii. To establish whether the government has made efforts to facilitate the implementation of the right to legal aid as required by Article 50 (2) h Constitution.

iii. To establish the eligibility criteria used in providing legal aid to accused persons in the United Kingdom and South Africa.

1.4 RESEARCH QUESTIONS
The following questions are up for interrogation in this study.

i. Does the Legal Aid Act of 2016 give effect to the letter and the spirit of Article 50 (2) h?

ii. Has the government made efforts towards the realisation of the right to legal representation in Kenya?

iii. What eligibility criteria is used in the UK and South Africa in providing legal aid to accused persons?

1.5 HYPOTHESIS OF THE STUDY
This study puts to test the following assumptions;

i. The Legal Aid Act of 2016, in its current state, does not effectively operationalise Article 50 (2) h of the Constitution of Kenya 2010.

ii. The government has not shown enough goodwill for the achievement, realisation and implementation of the right to legal aid as envisaged by Article 50 (2) h Constitution of Kenya 2010.

iii. The eligibility criteria used in providing legal aid to accused persons in the UK and SA is the ‘means and merit’ test.

1.6 THEORETICAL FRAMEWORK
The right to legal representation is founded on well-known principles, doctrines and concepts. These principles are inter-related. The principles include access to justice, right to fair trial, rule of law and equality before the law. In analysing the findings of this paper; the effectiveness or otherwise of the existing legal frameworks will be viewed from the lens of whether they satisfy the fundamental principles highlighted above. It is important to ensure that any legal framework developed do enhance the right to fair trial, rule of law, equality and justice.
The right to legal aid is premised on a very fundamental right i.e. the right to a fair trial. Madalyn K Wasilczuk, in his paper, posits that the right to counsel is fundamental in achieving fair trial. He argues that states recognise the importance of this right so as to ensure that the process is just, credible and transparent.\(^\text{11}\)

Similarly, in *S v Tyebela*,\(^\text{12}\) Milne JA held that any society that claims to be civilized must provide for the right to legal representation. According to Milne JA, it is only then that society can claim to have achieved the concept of fair trial. He sees the right to legal representation as a fundamental tenet to fair trial. This sentiment was also emphasized by the decision of Justice Sutherland in *Powell v Alabama*.\(^\text{13}\) Tatyana V. Hudoykina and Svetlana G Evteeva posit that legal aid guarantees certain fundamental principles. Key amongst them is the idea of equality and that of a fair trial.\(^\text{14}\)

Consequently, in order for there to be fair trial, an indigent accused person thus need to be provided with a lawyer for his defence.

In order to achieve the concept of fair trial, the principle of equality before the law must be upheld. Each and every litigant before the courts should be treated equally without discrimination of whatever kind. Equality before the law is one of the most important pillars of our democracy. It is enshrined in Article 27 of the 2010 Constitution. It provides that everyone is equal before the law and that everyone should be subjected to the equal protection and benefit of the law. Hersch Lauterpacht considers equality before the law as the most important right amongst the right of man.\(^\text{15}\)

No one should be denied justice because he or she is poor and cannot afford a lawyer. This was illustrated by the decision of the Supreme Court of the United States in *Griffin v Illinois*\(^\text{16}\) where

\(^\text{12}\) 27 271989 2 SA 22
\(^\text{13}\) (1932) 287 US 45
\(^\text{14}\) Tatyana V Hudoykina and Svetlana G Evteeva, ‘The Free Qualified Legal Aid in Russia: Theoretical and Practical Problems’ (2013) 6 Journal of Siberian Federal University Humanities & Social Sciences 1 11-17
\(^\text{15}\) International Bill of the Rights of Man (1945) at 115
\(^\text{16}\) (1956) 351 US 12
Justice Black stated that if justice in a country is dependent on one’s financial muscles, then that creates anarchy where justice can even be bought.

From the above discussion, it can be concluded that an indigent accused person should enjoy the benefits and protections offered by law.

One of the other fundamental principles is the rule of law. The state, in dealing with its citizens, should uphold the rule of law. Respect for the rule of law also entails affording indigent persons the benefits and protections offered by law. The government should develop programmes and policies that facilitate the provision of the right to counsel.

Johann Kriegler examines the correlation between this right and the rule of law. He takes a position that is similarly shared by Adedokun A Adeyemi. Both are of the view that in a mature democracy, one which upholds the rule of law, people are able to access justice equally regardless of their societal economic status. Adedokun A Adeyemi posits that it is critical for all persons to access legal representation especially in cases where a person is facing a potential jail term or where a person’s property is at stake.

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems affirm the need for a fair criminal justice system. It recognizes the concept of fair trial as very vital in protecting the right of accused persons.

The rights to fair trial, equality and observance of the rule of law have a direct impact on access to justice. Peet Bekker looks at the right to legal representation in South Africa. He states that

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19 Approved on 20 December 2012
indigent people are able to access justice if they are given legal representation. John Wuol Makec states that the Court processes are usually complex and are never easily understood by indigent persons. Lawyers do assist the members of the public to navigate through the seemingly complex court procedures.

Justice can be described as fairness, objectivity, neutrality, righteousness and equality. John Rawls discusses the concept of justice. He presents two very important principles: Individuals are supposed to enjoy equal liberties and that there should be equal opportunities availed to all regardless of socio-economic class. There is a nexus between all these fundamental principles in enhancing access to justice.

1.7 LITERATURE REVIEW

A number of scholars have written about the right to legal representation. Different scholars look at this right from different perspectives. Some do refer to it as the right to legal aid. Others do refer to it as the right to legal assistance. Despite efforts by different scholars to interrogate the right to legal representation, there still remains a huge gap in knowledge. The right to legal representation has various dynamics. Some of its various elements and aspects are yet to be explored.

Reginald Heber Smith examines the concept of justice for the poor and how it has been elusive. He discusses about equal protection by the law. He says that equal access and protection of the law is important in so many ways. If there is no equal access to law, then poor people are robbed of their means of protection which is the law. His argument is synonymous to my study. In Kenya, even though our Constitution is clear on equal access to law, some people are said to be more equal than others by virtue of their ability to afford lawyers while those who are poor find it difficult to access the law. Reginald however fails to offer solutions to the problem. He does

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22 John Rawls, A Theory of Justice ( Belknap Press 1972)

23 Reginald Heber,Justice and the Poor (Newyork : The carriage Foundation 1919)
not enumerate measures that will lead to equal access to the law. This study seeks to come up with specific recommendations that will improve access to lawyers by indigent persons.

**Madalyn K. Wasilczuk** argues that the promulgation of the Constitution of Kenya 2010 brought in a change in the state’s obligation towards criminal defendants. She is of the view that Article 50 (2) h was deliberately inserted to obligate the state to avail lawyers to accused persons. She notes that under the Independence Constitution, there was no obligation on the state to avail lawyers to indigent accused persons. This line of argument is similar to the author’s view in this paper. The mischief of introducing Article 50 (2) h was in order to cure the problem of non-representation. However, Madalyn fails to explain whether Article 50 (2) h is adequate as it is or whether there is need for a legislative framework to operationalise it. This paper makes a case for the need for an operational framework to give effect Article 50 (2) h of the Constitution.

**Cyril Yavatsa Kubai** discusses the “substantive injustice test”\(^{24}\) as provided for by Article 50 (2) h. He argues that the term ‘substantive injustice’ leaves much of its interpretation at the discretion of the Court. He posits that different courts will interpret it differently. Consequently, he states that ambiguity will result. In his opinion, the Constitution ought to have been clearer. In this paper, the author acknowledges that the term “substantive injustice” was meant to give room for discretionarial interpretation by judicial officers so as not to lock out deserving cases from getting legal assistance. The author, however, argues that there is need to develop specific legislation to elaborate on the term ‘substantive injustice.’

**Atsiaya Mongoi Marcos** looks at the notion of justice vis a vis the right to legal representation. He examines the idea of equality before the law. He posits that in Kenya, most accused persons cannot afford to hire lawyers. He makes a comparison on the fate of indigent accused persons before court and that of the well resourced prosecutors. There is a huge imbalance leading to injustice. Her assertions are well shared with that of the author in this paper. Atsiaya however fails to offer the much-needed solutions in her article\(^ {25}\). This study aims to provide solutions. It

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recommends establishment of a framework of legal aid. It also advocates for effective implementation of the legal aid framework.

Puskarova looks at the concept of justice in Europe and how it could be made affordable, quality and efficient. He sympathizes with what poor people face whenever they encounter the legal systems. He states that poor people encounter a lot of challenges. They are not in a position to benefit from the application of the law for many reasons. This paper similarly argues that accused persons feel intimidated by the court processes and language. However, whereas Puskarova focuses on Europe as his case study, this paper focuses on Kenya.

Robert Herman, Eric single and John Boston examine the idea of counsels for the poor. They posit that the constitutionalism of the right to legal counsel began in 1933 in the Supreme Court decision of Powell versus Alabama. This was a case where some black youths were charged with the rape of two white women. All the seven defendants were illiterate, out of state residents and without friends or relatives in the area. They were not given any opportunity to get help from their families in obtaining counsel. The US Supreme court reversed the conviction as having been unconstitutionally obtained due to inadequate representation.

Deborah L Rhode examines the concept of access to justice. He argues that the presence of a lawyer not only helps in preventing unreasonable decisions, but that it also creates an environment where respect for human dignity is upheld. In this paper, the author argues that some of the benefits of being represented are that lawyers protect the fundamental rights of accused persons thereby enhancing the respect for human dignity. This is hardly attained without representation.

1.8 RESEARCH METHODOLOGY

This study will rely on secondary sources which include published books, scholarly journals, articles, reports, policy and legal documents, statutes, treaties and conventions. The author will

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26 Puskarova , I., Access to Justice and the Judiciary :Towards New European Standards of Affordability, Quality and Efficiency on Civil Litigation (Metro 2009) Page 45
27 287 U.S (1932)
carry out mainly a desk top based research. The research is mainly qualitative. It entails a keen analysis of the scholarly articles and papers that have examine this concept.

1.9 CHAPTER BREAKDOWN

Chapter One will focus on the Introduction. It will generally comprise my research proposal which will include the background information, Statement of the problem, Justification for the Study, Objectives, Research Questions, Theoretical Underpinning, Research Methodology, Literature Review and Chapter Breakdown.

Chapter Two will focus on the historical development and evolution of this right.

Chapter three focuses on the legislative framework. It examines the Constitutional provisions, International Conventions and their applicability. It will also examine the role that has been played so far by the Government, the Non-Governmental Organisation, the Law Society of Kenya and others in the fulfillment of this right.

Chapter four is comparative analysis. The author seeks to find out what the position is in other countries and probably suggest good practice that can be learnt. He will examine how this right has been implemented in other jurisdictions.

Chapter five is on recommendation and conclusion.
CHAPTER TWO:

HISTORICAL DEVELOPMENTS AND EVOLUTION OF THE RIGHT TO LEGAL REPRESENTATION AT PUBLIC EXPENSE

2.0 INTRODUCTION

The previous Chapter provided a foundation and an operational framework on which the research on the right to legal representation at public expense could be carried forward. This chapter looks at the historical evolution of the right to legal representation at public expense, and largely in western democracies. It gives the readers a contextual understanding of how this right has been conceptualized, interpreted and applied over years. It looks at its development from a period where accused persons were not allowed legal representation especially for felony cases, to one where the government could not prevent one from paying a lawyer to represent him or her. Lastly, it considers the period where the government is obligated to provide an attorney in certain circumstances. The focus here is the historical background of earliest jurisdictions and not a comparative study.

This right mainly evolved from the western part of the world. Its development will be discussed in three contexts. The first context is the period of common law traditions in England. Secondly, the study focuses on the American Colonial period, Revolutionary period and the period between 1789 and 1791 (the period of formulation and adoption of the Constitution and the Bill of Rights in America). Lastly, this study focuses on the Period of adoption of the Sixth Amendment to the landmark decision of *Gideon Versus Wainwright*.

The chapter concludes by focusing on the evolution of this right in the Kenyan context with emphasis on legal and policy developments before and after the Constitution.
2.1 COMMON LAW TRADITIONS IN ENGLAND

Originally, in England under the common law, only those charged with misdemeanors had the right to pay for their own legal representation. People who had committed serious crimes had no right of representation by counsel. The Monarch feared that lawyers would prevent successful prosecution and punishment of those charged with serious offences which threatened the existence of the state. Those charged with murder, robbery with violence, rape or treason were not allowed the assistance of counsel. The government argued that it would not be wise to afford such accused persons the assistance of counsel for purposes of self-preservation and existence of the state. This was a period where the institution of the monarch and the state was under constant threat. The government was always battling for its own survival. Suppression of dissent was thus seen as key.

Over time, the monarchy became more stable. The threats to the existence of the state reduced. This coupled with a change in the community’s perception of what is fair trial made public opinion to change in favour of availing counsel to accused persons. The common law system was adversarial in nature and thus the reason why indigent person charged with felony crimes needed to be afforded lawyers. The courts began softening their stand on the right to legal representation.

Consequently, Parliament enacted the Treason Act of 1695. The adoption of the Treason Act was a momentous shift from the traditional common law restrictive position. The Act accorded accused persons the right to legal representation for those who were charged with treason and were able to pay. The state was not obligated to provide and pay a counsel for an accused person. The next part looks at a different context i.e Colonial America.

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31 ibid

2.2 A DEPARTURE FROM THE BRITISH COMMON LAW RULE IN COLONIAL AMERICA

The context herein shifts from that of traditional Britain to Colonial America. It is important to understand the period in which these legal developments were taking place. The Americans were colonized by the British. During the period extending into the late 18th Century, the US underwent a period of decolonization, breaking away from its former colonial power. Various acts of decolonization were taking place. Specifically, the various states of the US were declaring independence from Britain.

Previously, colonies in America were applying the traditional common law principle of denying counsel to those accused of serious offences. However, after the declaration of independence, the position began to change. Colonies slowly departed from the idea of denying counsels to accused persons charged with serious offence. For example, the Delaware Declaration of 1776 stated explicitly that every man has a right to be accorded counsel. The Maryland Constitution of 1776 stated that all criminals had the right to be allowed counsel.

However, during this period and with all the rapid developments in the law, the exact meaning of this right was still yet to be tested. It was originally understood as the right to pay counsel of their choice to help in criminal cases. The main idea at this stage was whether persons accused of any type of offense were entitled to legal representation of their choice. It was not meant to imply that the government should provide assistance of counsel to indigent persons.

The period between 1789 and 1791 also witnessed various developments in the United States. Most of the states in the U.S had already accepted and recognised this right. It was fundamental to the concept fair trial. This period also witnessed several developments that led to the inclusion of the right to legal representation into the constitution through the Sixth Amendment. The Bill of Rights was ratified in 1791 giving effect to the amendments of the Constitution.

34 Ibid
36 Ibid
The Sixth Amendment provided that an accused person should be afforded assistance of counsel for his defence.\textsuperscript{37} After the Constitution and the Bill of Rights were enacted in 1791, the next major development that occurred in relation to this right was the adoption of the Fourteenth Amendment in 1868. This is the provision on due process. It safeguarded people from being deprived of their property, liberty or life unfairly. It was also interpreted to include providing legal representation as well.\textsuperscript{38}

2.3 A HISTORIC OVERVIEW OF THE UNITED STATES SUPREME COURT’S CONCEPTUALISATION OF THE RIGHT TO COUNSEL

John Vile, a legal scholar, asserts that originally this right meant that one had the right to pay a counsel for his defence.\textsuperscript{39} There was no absolute entitlement neither was there an obligation placed upon the government to afford indigent persons with counsel. Over time, the right evolved from one where the government could not curtail legal representation to one where the government had an obligation to provide an attorney in any matter where one faces a potential jail term.\textsuperscript{40}

There are many cases that elucidate the thinking of the Court over time. One of the earliest decisions that expanded the right to legal representation was that of Powell versus Alabama.\textsuperscript{41} Nine African American youths had been charged with rape, a capital offence. They were not afforded with the assistance of a counsel. Upon conviction and sentencing, they appealed to the Supreme Court. It was one of the most significant cases before the court. The Supreme Court gae a background of the history of this right. It reviewed the restrictive common law English rules. It recognised the obligation of the state in providing attorneys where indigent persons couldn’t afford to hire lawyers.

\textsuperscript{37} U.S. Constitution, Amendment VI.
\textsuperscript{38} ibid
\textsuperscript{40} Erik Randall, ‘The Sixth Amendment and the Right to an Attorney’. Available at <http://historyforfree.com/2013/08/13/the-sixth-amendment-and-the-right-to-an-attorney/> accessed on 20\textsuperscript{th} February 2016
\textsuperscript{41} (1932) 287 U.S. 45
In 1938, the Supreme Court was again invited to address similar issues in the case of *Johnston v. Zerbst*.$^{42}$ Two accused persons were charged with felonious uttering and passing of counterfeit 20-dollar federal reserves. They were charged, convicted and sentenced. They had been unable to hire lawyers to assist in their defence. The Supreme Court interpreted this right to assistance of counsel to apply to all accused of federal crimes unless they waived such rights.

A few years after Johnston, the case of *Betts v. Brady*.$^{43}$ was decided. This was a petition from a Circuit Court in Maryland to the Supreme Court. The petitioner had been indicted for robbery by the Circuit Court. He was indigent and unable to afford a lawyer. The Circuit Court had refused to compel the state to afford him a lawyer. The issue before court was whether he was entitled to a lawyer. The Supreme Court ruled in favour of the court in Maryland stating that it did not recognise the right to legal representation at public expense as mandatory.

This ruling temporarily negated the major developments that had been made over the years. The Court ruled that only those charged with capital offences were entitled to free legal counsel. Those charged with non-capital crimes could only be afforded this right under special circumstances.

However, the above decision did not last long since it was overturned soon thereafter by the decision in *Gideon v. Wainwright*.$^{44}$ In this case, the accused person was charged with breaking into a pool room with the intention of committing a misdemeanor. He was initially charged in a court in the state of Florida. He made a request to the court to be availed a lawyer. He was not given a lawyer. It was the reasoning of the Court, while making its decision, that the founders of the Constitution intended every accused person to be provided with an opportunity to defend themselves. The Court held that state courts should avail attorneys to indigent persons who could not afford to pay. The Court observed that the right to an attorney was very important. It is a necessity and not a luxury. The court observed that in systems that are adversarial in nature, when one is taken to court and he or she is not represented, there is no assurance of a fair trial.

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42 (1938) 304 U.S. 458  
43 (1942) 316 US 455  
process. The reassurance can only be there once such a person is provided with free legal representation.

Most recently, the Supreme Court has had to deal with the issue of the right to legal representation in *Argersinger v. Hamlin*. Jon Argesinger was a poor person who had been charged with the offence of carrying a concealed weapon. This offence was a misdemeanor in Florida. He was not afforded the assistance of counsel. He was convicted and jailed. The Supreme Court was of the view that the right to counsel needs to be extended to misdemeanors. The court stated that the assistance is available so long as one is accused of a crime that could potentially result to a jail term regardless of whether the case was a felony or a misdemeanor, state or federal. To date, this has remained the most common understanding of the right to counsel in America. This interpretation has been supported by most legal scholars. For example, Jon Mosher reiterates that the right to counsel means that if one is charged with a crime for which he or she faces a potential jail term, then he or she must be provided with a lawyer to aid in defence. Where a person cannot afford a lawyer, then the government must avail a competent lawyer at the expense of the public. The next part shifts focus to the Kenyan context.

### 2.4 HISTORICAL CONTEXT OF LEGAL AID IN KENYA

The High Court has overtime administered a state brief system where pro bono lawyers are paid on a need by need basis to represent indigent persons charged with murder. Questions have always been raised as to why the same services are not extended to indigent persons charged with robbery with violence. Jill Cottrell observes some inconsistencies in the application of legal aid to capital offences. She points out a concern with regard to the differential in treatment for persons charged with murder as compared to those charged with robbery with violence. According to her, the High Court has for a long period of time availed free legal representation to persons charged with murder whereas those charged with robbery with violence have not

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46 (1972) 407 U.S 25
49 Available at <https://jaysikuku.wordpress.com/2014/07/04/right-to-legal-representation-under-the-2010-constitution-is-it-an-absolute-right/> accessed 24 April 2015
benefited despite the fact that both offences are capital in nature. This disparity could partly be attributed to the fact that the offence of murder has always been tried at the High Court while that of robbery with violence has been dealt with by the lower courts.\textsuperscript{50}

The case of \textit{David Njoroge Macharia V Republic}\textsuperscript{51} provides a good illustration to the above discussion. This was an appeal from the High Court to the Court of Appeal. The appeal was against a conviction of robbery with violence. The Appellant had moved to the Court of Appeal to challenge the decision of the High Court. The accused person argued that the judges erred in confirming a conviction that had been passed by a lower Court. Both the lower Court and the High Court took the view that there was no obligation on the part of the government to avail a lawyer to the Appellant. He argued that it was a constitutional right. The Court of Appeal acknowledged the importance of legal representation. It held that a lawyer has the legal knowledge needed to prepare a good defence. He also has knowledge on the rules of criminal procedure. The court further stated that absence of a lawyer meant that an accused person won’t get an opportunity to adequately challenge the evidence he is confronted with.

Under the Old Constitution, the right to legal representation was provided for under Section 77(2)\textsuperscript{52}. It provided that an accused person was permitted to represent himself in Court either in person or through a legal representative chosen by him. Section 77 (14) further provided that Section 77 (2) should not be interpreted to mean that the state will offer legal representation at any cost. Under the previous Constitution, the state did not have an obligation to facilitate the provision of this right.

The drafters of the 2010 Constitution realised that poor people in the society were not accessing justice in the Kenyan Courts. Navigating through the criminal procedure was a challenge especially without a lawyer. Access to lawyers, in Kenya, had mainly depended on the ability to pay. The Constitution of Kenya 2010 came in to give this right a new lease of life. Article 50 (2) h puts the state to task. It tasks the state with the obligation to provide lawyers especially where substantial injustice would otherwise result. It provides that every accused person has the right to

\textsuperscript{50} Jill Cottrell, ‘Legal Aid: New Hope or False Dawn?’ 2016 Katiba Institute <http://www.katibainstitute.org/legal-aid-new-hope-or-false-dawn/> accessed 12\textsuperscript{th} August 2016
\textsuperscript{51} Criminal Appeal No. 497 Of 2007
\textsuperscript{52} The Constitution of Kenya 1963
a fair trial, which includes the right to have an advocate assigned to him by the State and at the State expense. The right to legal representation as enshrined in various international legal instruments that Kenya has either ratified or adopted also applies by dint of Article 2(5) and 2(6).

Despite the enactment of the Constitution and the inclusion of Article 50 (2) h, the absence of specific legislation overtime had led the courts to grapple with two contrasting positions as will be demonstrated by cases. The question is whether the right to legal representation should be implemented immediately or progressively. The case of John Sakwa versus Director of Public Prosecution and 2 others\(^{53}\) shed some light on this discussion.

The case of John Sakwa versus Director of Public Prosecution and 2 Others\(^{54}\) was a matter before the High Court. It diverged from the decision in the Macharia case (discussed above). The court was faced with a difficult question of trying to ascertain the intention of the drafters of the Constitution in interpreting Article 50(2) h. The court was to determine whether this right was to be implemented immediately or progressively. The petitioner argued that this right was vital in achieving a fair trial as guaranteed by the Constitution of Kenya 2010. The respondents, on the other hand, argued that the government was in the process of putting in place the necessary measures, policy and legal framework to operationalise Article 50 (2) h. The court was in agreement with the respondents that the state should first put the necessary policy and legal framework. Consequently, it held that the right should be implemented progressively.

### 2.5 CONCLUSION

It is prudent to conclude by stating that the right to counsel has evolved over a long period of time. It is now recognised in many jurisdictions as fundamental to the concept of fair trial. Different jurisdictions are at different stages of its recognition and implementation. It can be argued that Kenya has made significant steps. This right is enshrined in the Constitution of Kenya 2010. It has also been operationalised by the Legal Aid Act of 2016. It has also been achieved through progressive judicial decisions. The next chapter examines the adequacy and efficiency of the legislative, policy and institutional framework that govern the right to legal representation at public expense in Kenya.

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\(^{53}\) Petition No. 318 of 2011, High Court at Nairobi, January 18, 2013.

\(^{54}\) Petition No. 318 of 2011, High Court at Nairobi, January 18, 2013.
CHAPTER THREE:
AN EXAMINATION OF THE LEGAL, INSTITUTIONAL AND POLICY FRAMEWORK REGULATING THE RIGHT TO ASSISTANCE OF COUNSEL AT PUBLIC EXPENSE IN KENYA

3.0 BACKGROUND

In the previous chapter, the author discussed the historical evolution of the right to assistance of counsel at public expense. This chapter examines the legal, policy and institutional framework. This chapter begins by an introduction which basically gives an overview of its contents. It then looks at the local legislation relating to this right. It later on interrogates the international legal instruments that have enshrined the right to legal representation.

The Legal Aid Act, 2016 is the main piece of legislation under scrutiny. This study seeks to look into the provisions of the Act and test its compliance against Article 50 (2) h of the Constitution of Kenya 2010. Article 50 (2) h affirms the concept of fair trial. It asserts that the right to legal representation is fundamental in fulfilling the concept of fair trial. It obligates the state to provide counsel in cases where substantial injustice would otherwise result. It is important to examine whether the Act operationalises the Constitution as envisaged. Further, this chapter analyses the Act in comparison to best practices.

This chapter also evaluates the progress made by the government in putting up the necessary administrative and institutional measures required to implement Article 50 (2) h. Further, it examines whether the state has developed effective policy measures towards the full realisation of this right.

3.1 THE LEGISLATIVE FRAMEWORK IN KENYA
3.1.1 The Constitution of Kenya 2010

Its preamble recognises some values that are key in the lives of Kenyans. Some of those values and which are related to our study are equality, social justice and the rule of law. Article 27 emphasizes on the importance of equality. It asserts the fact that all people are equally recognized in the face of the law. It also asserts the fact that all people should enjoy the benefits and protection provided by the law.\(^5\)

Article 50 (2) h enshrines the right to counsel at public expense. This provision guarantees accused persons fair trial. It provides that this also includes the right to have an advocate provided by the state. This is especially in cases where an accused person is indigent and cannot hire a lawyer yet there is a likelihood of substantial injustice occurring.

The concept of legal aid is secured by various other constitutional provisions. Article 10 advocates for values such as social justice. Legal aid enables people of the lower social class to access justice regardless of their social status. It also leads to equality before the law as provided for in Article 27.

The term ‘substantial injustice’ in Article 50 (2) h gives room for discretional interpretation by judicial officers to ensure that deserving applicants are not locked out on eligibility. However, it is important to develop a detailed legislation that enumerates circumstances or factors that may lead to ‘substantial injustice.’ A more detailed legislation will provide a sense of clarity and precision.

3.1.2 The Legal Aid Act, 2016

Recently, Parliament enacted the Legal Aid Act, 2016. This is a milestone development especially in light of the history of the concept of legal representation in Kenya. The enactment of the Act was necessary to address certain challenges that had bedevilled the criminal justice system. The main challenge, over time, had been the absence of a comprehensive legislative and policy framework to govern the legal aid scheme. Prior to its enactment, there was no political will to initiate and implement legal aid programmes. There were no funds allocated for purposes of facilitating the probono scheme. Despite demand of legal aid services, there were no

\(^{55}\) Article 27(1)
coordination efforts by the government and various stakeholders. It is important to examine the Act and see whether it conclusively addresses these issues. Even though it may not be possible to test its effectiveness and efficiency before its implementation, it is possible to scrutinise its provisions in order to establish whether or not it is well suited to actualise this right.

3.1.2.1 History of the Legal Aid Act 2016

Meaningful steps in developing this framework began in the late 90’s. In 1998, stakeholders meeting comprising government officials and civil society organisations gathered to establish a framework that would govern legal aid. Most importantly was considering the various models of legal aid that best suited Kenya. This meeting gave way to the publication of the Legal Education and Aid Programme Report in 2001.

The Report was acted upon in 2005. In 2007, the National Steering Committee for NALEAP was formulated. Subsequently, in 2010, the Task Force for Judicial Reform came up with a report that recommended the formation of a legal and policy framework on legal aid. The formation of NALEAP paved way for development of the Legal Aid Bill 2011. The initial draft Legal Aid Bill was developed by the National Legal Aid and Awareness Programme (NALEAP). There were contributions from the International Commission of Jurist, Kituo cha Sheria and the Kenya Law. It was then forwarded to the Attorney General and later to Parliament where it was enacted.

3.1.2.2 An Analysis of the Legal Aid Act 2016

58 NALEAP, _Baseline Survey on Status of Legal Aid in Kenya_, (Lead researcher Ruth Aura Odhiambo) Commissioned by the Ministry of Justice National Cohesion and Constitutional Affairs with the Support of GIZ (unpublished, on file with Department of Justice). See also _Base Line Survey on Community-Based Legal Assistance Schemes Partnerships - (LASPS)_ (Nairobi: FIDA, 2012), which reported that focus group discussions estimated that only about 20% of women were able to access legal assistance (p.40.).
The main reason why the Act was enacted was in order to operationalise to Article 48 and Article 50(2) h. According to the preamble, it aims to establish a legislative framework to offer affordable legal aid services and access to justice.

In examining the adequacy and effectiveness of this law, it is important to put it to test. First, does its content meet the basic constitutional threshold? Secondly, how does it measure against regional and international best standards?

Regionally, the Lilongwe Plan of Action and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa have been hailed and recognised as best practice by the African Commission of Human and Peoples Rights. The declaration was adopted by 21 African states in 2004. This Declaration tasks member of the African Union with providing the right to legal representation to its citizens. The declaration lays emphasis on the provision of this right at each and every stage of the judicial system.

The Lilongwe Declaration is not per se binding to the member states. However, despite its non-binding nature, the Lilongwe Declaration and Plan of Action contains certain parameters agreed upon as best standards and whose threshold the Legal Aid Act should meet if it is to fully give effect to the letter, spirit and intent of Article 50 (2) h.

In 2006, the Lilongwe Declaration was adopted by the ACHPR. The Commission called upon its member states to consider the Lilongwe Principles while preparing their respective local laws. Consequently, the Lilongwe declaration has a firm footing in the ACHPR.

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60 Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa Lilongwe, Malawi November 22-24, 2004 128 delegates from 26 countries including 21 African countries met between 22-24 November 2004 in Lilongwe, Malawi, to discuss legal aid services in the criminal justice systems in Africa. Ministers of State, judges, lawyers, prison commissioners, academics, international, regional, and national non-governmental organizations attended the conference. The three days of deliberations produced the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa.


62 ibid

63 ACHPR/Res.100(XXXX)06: Resolution on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System. Available at<http://old.achpr.org/english/resolutions/resolution105_en.htm> accessed on 5th September 2017
Most recently, the United Nations adopted the UN Legal Aid Principles and Guidelines on Access to Legal Aid in Criminal Justice. These Principles were affirmed and recognized on 20th December 2012 at the UN General Assembly meeting. These guidelines are to be applied by all member states. The guidelines provide guidance to member states while formulating their local laws. According to the UN Guidelines, states should develop legal aid systems that are accessible, credible and sustainable. Specifically, the guidelines provide that accused persons who are confronted with death penalties or potential jail terms should be afforded legal aid. Further, it states that it is the responsibility of the states to provide legal representation to indigent persons and therefore state resources should be directed to fund legal aid. The guidelines emphasize the need to avail lawyers in the various stages of the criminal justice system. The Principles underscore the fact that legal aid is not only needed during the trial but all through the judicial process.

The first part of the examination entails comparing the Legal Aid Act 2016 to the Constitutional provisions and the Principles in the Lilongwe Declaration. The second part of the examination entails analysing the Act thematically. The author shall examine specific provisions such as: Objective of the Act, Establishment of the National Legal Aid Service, Application Process, Accreditation Process, Legal Aid Fund, Quality of Legal Aid etc. The examination will specifically entail a critique of these provisions and a comparison to best practices. It will also involve identifying loopholes and giving recommendations on how the Act can be improved for the benefit of indigent persons.

**3.1.2.2.1 A Critique of the Legal Aid Act in comparison to the Constitution of Kenya 2010**

Article 50 (2) h enshrines the right to counsel at public expense. This provision guarantees accused persons fair trial. It provides that this also includes the right to have an advocate provided by the state. This is especially in cases where an accused person is indigent and cannot hire a lawyer yet there is a likelihood of substantial injustice occurring. The main test for the Act is to enumerate situations where substantial injustice is likely to result as envisaged by the

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64 United Nation Legal Aid Principles and Guidelines on access to Legal Aid. Available at [https://www.unodc.org/documents/justice-and-prison reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf](https://www.unodc.org/documents/justice-and-prison reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf) accessed on 5th September 2017
Constitution of Kenya 2010. The Act should also provide for the eligibility criteria. The enactment of the Act is very commendable. It has however not been operationalised.

Section 36 of the Legal Aid Act of 2016 provides that legal aid is available to indigent person who reside in Kenya and are; a citizen of Kenya, child, refugee, victim of human trafficking, internally displaced or stateless person. The court must be satisfied of the importance and the serious nature of the case in order to provide legal representation to an individual. Further, according to the Act, legal aid is provided where the case attracts public interest and where denial of representation would lead to substantial injustice. One should also satisfy the service that he or she is incapable of meeting the costs of legal services.

In considering what amounts to ‘substantial injustice’, the Act should be amended to include the following additional factors:

i) The complexity of the cases;
ii) The potential sentence upon conviction; and
iii) The seriousness of the crime;

i) **Complexity of a Case**

There are certain factors that will be considered in determining the complexity of a case. One of the most important factors is the nature of the offence. Certain offences are complex in nature. These cases usually raise serious legal and factual issues which require a good understanding of the facts and the law. For example, offences which are white collar in nature. White collar crimes are those that are induced by monetary incentives but have no element of violence.

In determining whether or not a case is complex, it is important to look at the subject matter of the case. Criminal proceedings that are complex in nature are usually not understood by the accused persons. Consequently, in such cases, if legal representation is not provided to the accused person, his or her right to fair hearing can be compromised. It is important that an accused person understands the nature of charges he or she is facing. This is important for purposes of preparing a defence. Complex cases usually have either of the following characteristics:

i) They are white collar in nature e.g. fraud;
ii) They involve multiple charges;

iii) They are likely to attract harsh penalty;

iv) They may involve the use of a foreign language and hence the need for a translator or interpreter;

v) They may involve an accused person who is highly illiterate and who can hardly comprehend the trial process.

vi) They may involve voluminous documentary evidence;

vii) They may involve expert witnesses; and

viii) They may involve the use, application and interpretation of technology.

A case could be complex in nature due to language barrier. In some situations, the presence of an interpreter or translator does not necessarily help. In the midst of the translation, facts or issues of law may be misunderstood. An accused person may not effectively mount a defence where there is language barrier. A lawyer is needed to guard against such miscarriage of justice.

The European Court of Human Rights (ECtHR) (discussed substantively in chapter three) has, overtime, provided a rich jurisprudence on various elements of the right to legal representation. Case law emanating from the court has enriched the right to legal representation. Though it does not directly apply to Kenya, we can borrow a lot of principles emanating from this Court.

The ECtHR has affirmed the position that where there exist language barrier, it is the duty of the state to provide a lawyer at public expense. A good exposition was in Biba vs Greece. This case involved an undocumented immigrant. He was convicted in Greece. The language barrier prevented him from filing and an Appeal in Greece. He could not afford a lawyer. He had not been provided with legal representation. The ECtHR held that Article 6 (3) had been violated. Article 6(3) provide for the right to counsel.

ii) **Seriousness of the Offence and a Potential Sentence**

In most serious cases, the accused person usually faces a potential jail term. It is in the interest of justice that where the liberty of an individual is at stake, legal aid should be afforded. The presence of a lawyer is important in order to mount an effective defence. A lawyer has a good command of the law and a good understanding of the facts.

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65 ECHR 25771/03
There are a number of decisions emanating from the ECtHR which affirm the position that legal aid should be availed where a person's liberty is at stake. This position is well illustrated in the case of Benham vs United Kingdom.66 This is a case where the accused person had been charged with tax default. He could not afford legal representation. His plea for legal assistance was ignored by the trial court. He was convicted and sentenced for the offence.67 The Court held that legal aid should be provided where an accused person faces a potential jail term. The Court also noted that it did not matter the potential length of sentence an accused person was facing. It also stated that even if an accused person was facing one day in prison, that by itself should prompt the conscience of the Court to require that legal representation be availed.

3.1.2.2 Analysis of the Legal Aid Act 2016 vis-a-vis the Lilongwe Plan of Action

The Lilongwe Plan of Action68 was adopted in 2004. It was adopted by states at the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System. The meeting brought together representatives from 26 countries, 21 of which were African nations. The meeting was attended by stakeholders in the criminal justice system across the African Continent. The stakeholders included judges, lawyers, prison officials, academicians and representatives from various organizations. There are seven key provisions of the declaration that any government which is developing its legal aid legislation should consider. These are:

a) Recognizing, acknowledging, facilitating and enhancing the right to legal representation in the legal systems;

b) Sensitizing criminal justice stakeholders about legal aid;

c) Providing legal assistance at various sections in the criminal justice process;

d) Recognizing non-formal ways of resolving conflicts;

e) Diversifying legal aid delivery systems;

f) Encouraging lawyers to take up pro bono matters; and

g) Guaranteeing sustainable funding of legal aid.

66 (ECHR) 22 EHRR 293
67 Available at <http://swarb.co.uk/benham-v-united- kingdom-echr-8-feb-1995/> accessed on 3rd May 2017
68 The document was addressed to governments and criminal justice practitioners, criminologists, academics, development partners as well as non-governmental organizations, community based organizations and faith based groups active in this area. It is meant to be a source of inspiration for concrete actions.
The stakeholders at the function developed the Lilongwe Plan of Action which entails specific and concrete measures that should be taken into consideration while developing the legal aid framework. The Lilongwe Plan of Action provides that any proposed legislation should promote the right of everyone to get the most basic advise of legal nature, get assistance on matters to do with the justice system and lastly, education. Legislation should also create an institution of legal that it is independent in nature. Legislation should ensure that legal aid is afforded to accused person throughout the judicial process. It should not be limited to the trial stages only. Legislation should also provide for the role of none state actors in providing legal aid. Legislation should also diversify legal aid service provider. Legislation should establish mechanisms to guarantee quality legal aid services. This should be achieved through proper monitoring and evaluation techniques. Lastly, legislation should establish a proper funding scheme to guarantee its sustainability.\(^6\)

It is important to examine whether the Legal Aid Act of 2016 took into consideration the provisions proposed by the Lilongwe Declaration and Plan of Action. There is also a need to identify gaps and make suggestions that would improve the contents of Act. It is further important to examine certain thematic aspects of Legal Aid Act 2016 and whether they conform to the standards set by the Lilongwe Declaration and Plan of Action.

i) The National Legal Aid Service (NLAS)

The Lilongwe Declaration and Plan of Action require that legislation should establish an independent national legal aid institution. The National Legal Aid Service is established under Section 5 of the Act. This is the proposed body responsible for providing and coordinating the delivery of legal aid.\(^7\) It is tasked with the mandate of establishing and administering a national legal aid scheme that can be assessed by all, fostering efficiency, guaranteeing its sustainability, reliability and making it to be accountable.\(^8\)

The National Legal Aid Scheme is not necessarily the body that will avail lawyers to represent indigent persons. Its main function includes accrediting and approving institutions that intend to offer legal aid services. It also coordinates the various institutions that provide legal aid services.

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\(^{6}\) Ibid \\
\(^{7}\) Ibid, Section 7 \\
\(^{8}\) Ibid
According to the Lilongwe Declaration, an independent institution is preferred because of the need to discharge its mandate without any form of undue interference. A legal aid institution must not directions on it should operate from any other institution. It should not be intimidated into making decisions it does not intend to. It can only be under minimal direction necessary for intergovernmental agencies cooperation. In establishing whether or not the board of NLAS is independent, it is important to examine its composition, appointing authority, and lastly the person to whom the board reports.

Section 9 of the Act provides the composition of the Board. The Board comprises of a Judge of the High Court, Director of Public Prosecution, two principal secretaries responsible for legal aid and finance, Attorney General, LSK representative, and the representative of Kenya National Commission on Human Rights. Other members are nominees of National Council of Persons with Disabilities, religious organisations and paralegal organisations. The Board strikes a balance between maintaining some level of cooperation with the government while at the same time preserving its independence.

Section 9 of the Legal Aid Act provides that board members are to be appointed by the Cabinet Secretary to whom they also report. Section 83 further provides that after each financial year, and within a period of three months, the Board should submit Reports detailing how the organization has carried out its activities and implemented its programmes.

Notwithstanding the need by the board to account to relevant authorities, internal mechanisms should be set up in order to facilitate internal checks and monitors. This will prevent the potential abuse of authority and the likely interference with the independence of the board. Section 23 states that the board shall not be subject to the direction or control of any person or authority in the performance of its function. It may only be subject to such control in so far as is necessary for conducting its administrative function.

   ii) The Application Process under the Act: Accessibility and Availability of legal aid

The Lilongwe Plan of Action provides that any proposed legislation should promote the right of everyone to get access to the most basic advise of legal nature, get assistance on matters to do with the justice system and lastly, education various aspects of the law. It is important to test
whether the Act avails legal aid services to those who need it. The application process is provided for under Section 41 of Legal Aid Act. An applicant should provide his personal details and contact address, nature of legal aid sought and any other information as provided by the regulations.

Courts in Kenya are mandated by Section 43 of the Act to be proactive in notifying unrepresented persons of the availability of legal aid services. This section places upon the court the duty of ensuring that an accused person is informed especially where substantial injustice is likely to result. It is important to create awareness of availability of legal aid.

The decision of the NLAS as to whether one has qualified for legal aid should be communicated within a period of 48 hrs. This is in accordance with Section 44 (3). This provision seems untenable and impractical bearing in mind the time it takes to vet an applicant to establish his financial status. The Act should be amended to extend time for considering such an application.73

Section 49 of the Act gives a platform and an opportunity for review by an individual who is aggrieved by the outcome of the Application. On such an application, the NLAS may relook at its decision and any conditions imposed.

It is important that the application process be made simpler so that it can be easily understood by indigent persons. In prescribing regulation to guide the process, the Cabinet Secretary should not complicate the process. This is because most of the accused persons are poor and illiterate.

With regards to the question of accessibility, there is need for guidelines stipulating measures that will ensure that most people can access the legal aid service available. Barendtch Murits examines accessibility of legal aid in East Africa. He notes that for there to be easy accessibility of legal aid, then three areas need to be streamlined. He posits that accessibility depends on:74

a) Criteria of eligibility

b) Geographical accessibility

c) Information and Education.

According to Murits, the criteria used to select beneficiaries must be crafted in a way that ensures only the most deserving and needy gets legal aid. These criteria must ensure that the application process is fair and accessible to all. Murits further posits that every person should be able to easily access legal aid information. Legal service providers should use means such as Radios, TVs and News Papers to reach as many people as possible.\(^75\)

iii) **Quality of Legal Aid**

The Legal Aid Act of 2016 does not effectively address the issue of quality of the services offered by legal aid lawyers. The quality of service offered to indigent person should be of concern to the stakeholders. Legal aid is not only a matter of availing lawyers to indigent persons but also monitoring and evaluating the quality of representation.

One way of ensuring that quality service is being afforded to indigent persons is by employing effective monitoring and evaluation techniques. Currently, the Act has not put into place effective monitoring mechanisms. Regulation should be developed that would provide for ways of monitoring and evaluating the accredited institutions offering legal aid as well as the individual lawyers offering the service.

There is need for guidelines stipulating measures that will ensure quality services are provided. Additionally, compulsory training for lawyers offering legal aid is important for purposes of enhancing their skills. Individual lawyer’s performance should be monitored and evaluated. Seminars and workshops should also be organized as frequently as possible to assist in building capacities and improving on the skill and knowledge of lawyers.\(^76\)


In determining the quality of service, it’s important to gauge the level of client satisfaction. Indigent accused persons should be required to provide feedback on the level of satisfaction with the service offered. Legal aid service providers should make reports detailing the cases that they have handled. The reports should be presented to the National Legal Aid Service so that assessment can be carried out. Lawyers offering legal aid services should be required to abide by the code of ethics and conduct. 77

A state appointed counsel should have adequate time to prepare for a case. The lawyer should be accorded enough time and resources in order to effectively and readily prepare to counter the prosecution’s narative. This position was affirmed and well-articulated in Bogumil v Portugal. 78

An accused person was charged with drug trafficking. During the preliminary stages of the trial, a relatively young lawyer was assigned to assist him. Subsequently, and because of the nature of the offences he had been charged with, a relatively older lawyer was appointed by the Court to assist him. However, three days to the trial, the lawyer withdrew from the case. A new lawyer came on record five hours before trial. The trial Court did not adjourn the proceedings to allow the new lawyer to prepare. The trial court convicted him of the offence of trafficking. The European Court of Human Rights (ECtHR) found that his right to legal representation had been violated.

One fundamental question that always surface in the legal aid discourse is whether the right to legal representation entails the right to choose a lawyer of one’s preference. However desirable that an accused person should be afforded a lawyer of his or her choice, the reality, especially in Kenya, do not allow. Due to the challenge of constrained resources, it may not be possible to conveniently avail an accused person a lawyer of his choice. That notwithstanding, the state should aim to provide a competent qualified lawyer at all times.

iv) Legal Aid Funding under the Act

The Lilongwe Declaration requires that governments guarantee sustainable funding of institutions established to provide legal aid. Funding legal aid schemes have always been a challenge. Most organizations rely on donor funds which does not suffice. Funds are necessary in

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77 Ibid
78 ECtHR 35228/03
order to implement the activities of the service. In Kenya, Section 29 of the Legal Aid Act 2016 establishes the Legal Aid Fund. This fund comprises of money allocated by the National Assembly, money received from donations, grants and bequests from other sources. Despite the efforts of the Act to diversify the scope from which funds can be obtained, there is still need for more funding so as to expand this right to cover more indigent persons.

**iv) Role of Non-State Actors under the Act**

The Lilongwe Declaration acknowledges that the state alone cannot cater for the demand of legal services. It provides that legislation should diversify legal aid service providers to include NGOs, CBOs, faith-based groups and university law clinics. The state should strengthen the capacity of other organizations. These organizations will support the state in reaching out and offering legal aid to as many indigent persons as possible. The state should also step up its coordination role. The state should bring together different legal aid service providers such as university clinics, nongovernmental organization, religious organizations, paralegal organizations etc. Previously, there has been lack of coordination in the legal aid sector. This has negatively impacted the efforts by the state to provide legal representation to as many indigents as possible. Coordination between various agencies enhances sharing of information. It leads to exchange of ideas. It is also an opportunity for resource mobilization.

The Act attempts to widen the scope in terms of defining a ‘legal service provider.’ Section 2 of the Legal Aid Act defines a ‘legal aid service provider’ to include an advocate conducting pro bono, a paralegal, a law firm, a public benefit organization or faith based organization accredited to provide legal aid, a university legal clinic or an agency of the state accredited under the Act to provide legal aid.

**v) Accreditation of Legal Aid Providers**

Section 56 of the Legal Aid Act provides for the accreditation of Legal Aid Service providers, any organization that intends to provide legal aid services must first apply and acquire accreditation and approval from the National Legal Aid Service. The service is mandated, under Section 57, to develop guidelines that will guide the accreditation process.

**3.1.3 The Children’s Act**

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79 Chapter 141 of Laws of Kenya
Children are entitled to free legal aid whenever in conflict with the law. They are considered to be vulnerable and thus they need protection. As for children in Kenya, they are covered by Section 77 (1) of the Act. Section 77 (1) mandates courts to order for legal representation whenever children are involved and especially where they do not have representation of their own. Further, Section 186 (b) obliges the government to offer legal representation to children who have violated the law if they are unable to obtain it.

3.2 INSTITUTIONAL FRAMEWORK IN KENYA

3.2.1 National Legal Aid and Awareness Programme (NALEAP)

This programme was launched in 2008. The programme was launched by the Ministry of Justice, National Cohesion and Constitutional Affairs. At the time of its launch, the programme was hailed as a step towards the institutionalisation of the right to legal representation. Especially due to a realisation that most indigent persons could not access justice due to the lack of a structure in place. The programme was launched prior to the promulgation of the Constitution. Its history is discussed in the previous chapter. It was rolled out as a pilot project in various parts of the country which include Nairobi, Mombasa, Kisumu and Eldoret.

NALEAP is made up of the national steering committee, the secretariat, and pilot project steering committees. The national steering committee has representatives from different institutions. These institutions are the Ministry of Justice, Law Society of Kenya (LSK), Public Universities, International Commission of Jurists (ICJ) Kenya, State Law Office, Federation of Women Lawyers (FIDA) Kenya, Prisons, Police, Kenya National Commission on Human Rights (KNCHR), Probation and After Care Services Children’s departments, Judiciary, Paralegal Workers Association and three representatives from the civil society.

NALEAP facilitates the development of programmes that are meant to enhance access to justice by those who cannot afford to hire lawyers. It was tasked with recommending policy and legislative reforms that would lead to the establishment of a policy and institutional framework. Further, the steering committee coordinates various institutions that offer legal aid.

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81 ibid
82 Ibid
83 ibid
As previously indicated, NALEAP was established pursuant to a government report that was prepared by stakeholders following the meeting of 2001. Though NALEAP was formed to institutionalise the provision of legal representation in Kenya, it hasn’t quite fully succeed in fulfilling this mandate. There are quite a number of reasons that explains this failure. Most importantly, NALEAP was itself not founded on firm legislation. The thinking at the time of its conception was that it was meant to spearhead the process of developing legal aid structures, institutions and legislation. The change to NLAS after the passage of the Constitution was due to the need to revitalize the whole institutional framework of NALEAP.

Most of the functions and responsibilities that are currently assigned to the National Legal Aid Services (NLAS) are to a large extent similar to those that had been assigned to NALEAP. Ideally, one may argue, there was no major need for the change of name to NLAS. Both NALEAP and NLAS, as established, were not meant to provide legal aid services. Rather, they were meant to source for lawyers from private practice and other independent organizations. The model in Kenya, as distinct from various other jurisdictions, is that of contracting legal aid services to individual lawyers and other organizations. Kenya has not adopted the Public Defender model. A Public Defender model comprises of state funded institutions that employ lawyers on a full-time basis for purposes of providing legal aid. For example, in some of the states of the U.S, Public Defenders are government employees whose job entail challenging prosecutions by government’s agencies.

3.2.2 Challenges Faced by NALEAP

NALEAP has faced several challenges. Its implementation has not been smooth. Since its inception, the programme has just remained but a pilot project. It has been implemented in limited geographical areas. The programme has not been expanded to other towns and rural areas. This is attributed to limited resources.

84 National Legal Aid Programme (NALEAP) <http://www.statelaw.go.ke/national-legal-aid-service/> accessed on 5th September 2017

The lack of a legislative and policy framework to govern the scheme has also contributed to its failure. Its legal foundation is weak. The operational and legislative structures are not clearly defined.\textsuperscript{86}

Another challenge has been convincing lawyers to take up pro bono cases. Lawyers are usually less motivated to take up pro bono matters because they are poorly facilitated. They are not provided with adequate resources for purposes of case preparation. LSK should provide logistical and material support to lawyers who take up pro bono matters.\textsuperscript{87}

The next part looks at the regional and international laws.

\section*{3.3 THE RIGHT TO LEGAL REPRESENTATION AS ENSHRINED IN THE INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENT}

Kenya recognises international law by dint of Article 2 (5) and Article 2(6) of the 2010 Kenyan Constitution. Conventions and Treaties that are ratified by Kenya become domestic law. Generally speaking, the right to legal representation has not been expressly referred to in many international instruments. Rather, it is associated with the concept of free and fair trial.

The Bill of Rights in the Constitution of Kenya 2010 borrows heavily from the international instruments. Specifically, the rights to legal representation and fair trial are provided. Some of the international instruments that have directly or indirectly enshrined the right to legal representation include:

\subsection*{3.3.1 The Universal Declaration of Human Rights (UDHR) 1948}

The Universal Declaration of Human Rights was adopted by United Nation General Assembly through a Resolution in 1948.\textsuperscript{88} The declaration has its origins and genesis from the 2\textsuperscript{nd} World War period. It captures the rights, will, hopes, intentions and aspirations of the human kind. Human kinds are entitled to these inherent right just by virtue of being. They are not conferred by states by virtue of citizenship. They exist as a matter of right. These rights have been codified and captured in various legislation, laws and treaties.

\begin{itemize}
\item \textsuperscript{86} ibid
\item \textsuperscript{87} ibid
\item \textsuperscript{88} UN General Assembly Resolution 217 A (III) on the 10 December 1948.
\end{itemize}
The right to counsel can be inferred from Article 10 which provides for the concept of fair trial. Every accused person should be subjected to a fair trial. He or she should be given an opportunity to defend him or herself. An accused person has a right to a public hearing before an institution that is independent, impartial and free from bias. An accused person should be given an opportunity to confront his accusers.89

Further, Article 11(1) of the declaration provides as follows:

> ‘Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.’

Article 11(1) of the UDHR is similar to Article 50 (2) a of the Constitution of Kenya 2010. Both Articles do give meaning to the doctrine of presumption of innocence until proven guilty in a competent tribunal.

Despite being hailed as one of the most progressive human rights instruments in recent times, scholars such as Davidson and Catherine Morris have criticized the UDHR for lacking a progressive provision. According to both scholars, the UDHR does not have an elaborate and a specific provision on the right to legal representation at public expense. This seems to be a fair criticism of the instrument. Article 11 (1) of UDHR is broad and somewhat vague. There is no express provision on the right to counsel at public expense. Article 11 (1) of the UDHR appears shallow especially when contrasted to Article 14 of the International Covenant on Civil and Political Rights (ICCPR) of 1966. Article 14 of ICCPR is more comprehensive and detailed. It provides as follows:

> (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests

89 Ibid
of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

3.3.2 The International Covenant on Civil and Political Rights 1966

The ICCPR was duly recognised and affirmed by United Nations General Assembly on the 16th of December 1966. It is a key international human rights treaty. The treaty safeguards rights of member states that are political and civil in nature. Kenya ratified the ICCPR in 1972.

The covenant has an elaborate provision on the right to counsel. Article 14 (3) (b) places a duty on the government to provide indigent persons with adequate time and facilities so that they can prepare their defence and face their accusers. It also affirms the position that an indigent person has a right to talk to a lawyer of his or her own choice. According to Article 14 (3) d, an indigent person should be present at his trial. He should be given an opportunity to defend himself or through a lawyer provided to him where justice demands so.

3.3.3 The African Charter on Human and Peoples Rights 1981

This is a regional instrument. The Instrument is tasked with upholding human rights in Africa. It was adopted in the year 1981 as a result of lobbying by various groups which included non-governmental organisations, churches, civil societies etc. It was however entered into force in 1986. This Charter is applicable to Kenya by virtue of its ratification in 1992. Article 7(1) provides for the right of accused persons to confront their accusers with the aid of lawyers of their choice. Article 50 (2) g of the 2010 Constitution similarly provides that accused persons have a right to get a lawyer of their choice.

3.3.4 The Convention on the Rights of the Child (CRC)


91 UN Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial (August 23, 2007), UN Doc. CCPR/C/GC/32, para. 3.

The Convention on the Rights of the Child\textsuperscript{93} was adopted in recognition of the fact that children require special protection by the law. It was adopted in the year 1989 but came into effect in 1990. Kenya ratified the Convention in 1990.\textsuperscript{94} The right to legal representation is provided for in Article 40 (2) of the Convention. It states that children need direct and prompt information of the charges against them.\textsuperscript{95} It further provides that the government should avail lawyers to assist children in the prosecution or defence of their case.

In Kenya, the same provision is domesticated by Section 77 (1) of the Children’s Act. Whenever a child appears in court and he or she is not represented, it is the duty of the Court to order that the state avails legal representation to such children.

3.3.5 The European Convention of Human Rights

This Convention was established in 1950. The Convention largely borrowed most of its provisions from the UDHR Though it is not directly applicable to Kenya, we can borrow a lot of principles emanating from its Court. The Convention aims to facilitate and enhance the realisation and implementation of human rights in Europe.\textsuperscript{96} Article 6 (3) of the European Convention of Human Rights provides as follows:

3. Everyone charged with a criminal offence has the following minimum rights:
   c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

The European Convention of Human Rights establishes the European Court of Human Rights (ECtHR). The Court has, overtime, provided a rich jurisprudence on various elements of the right to legal representation. Case law emanating from the court has enriched the right to legal representation. A number of cases are discussed in this study.

3.4 CONCLUSION

\textsuperscript{93} The Convention on the Rights of the Child, CRC, Adopted by the General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990. Article 37:
\textsuperscript{94} The First 20 Member States to ratify the UN Convention on the Rights of the Child. Available at <http://www.un.org/en/documents/index.html> accessed 1\textsuperscript{st} November 2015
\textsuperscript{95} Ibid
\textsuperscript{96} Available at <http://www.coe.int/en/web/tirana/european-court-of-human-rights> accessed on 3\textsuperscript{rd} May 2017
In conclusion, it is important to state that there is hope. The enactment of the Legal Aid Act 2016 changes the ball game. The expectation is that it will bring positive improvements on the legal aid landscape in Kenya. The proposed improvements to the Act, if made, will enhance its compliance with Article 50 (2) h. In Kenya, though, the main challenge is usually not the lack of laws, but implementing the existing laws. Stephen Golub posits that it takes a well-intentioned government to strengthen legal aid system. It remains to be seen whether the provisions of the recently enacted Legal Aid Act of 2016 will be implemented fully. The next chapter is on comparative study.

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97 Stephen Golub, ‘The Importance of Aid in Legal Reform’ in ‘Access to Justice and Beyond- Making the Rule of Law a Reality’ Penal Reform International and the Bluhm Legal Clinic of the Northwestern University School of Law Chicago, Illinois
CHAPTER FOUR:
A COMPARATIVE ANALYSIS OF THE UNITED KINGDOM AND SOUTH AFRICA

4.0 INTRODUCTION
Certain countries have managed to effectively develop their legal aid systems. Two good examples are South Africa and the United Kingdom. There are a number of reasons for selecting these two jurisdictions.

First, South Africa has made tremendous progress in the realisation of the right to assistance of counsel in comparison to most other African states. Secondly, its legal system, like Kenya, has an element of common law. It therefore offers a good legal basis for the comparison. Third, South Africa has a very robust legal framework on human rights. The Constitution of Kenya 2010 borrows heavily from the South African Constitution. It therefore offers a comparative study that Kenya can relate. In determining who qualifies for legal aid, South Africa applies an eligibility criterion known as the ‘means and merit’ test. This criterion will be discussed in-depth in this chapter. This chapter will examine the legislation, policies and practices in South Africa with a view to identifying lessons that could be applied in Kenya.

Like South Africa, the UK offers a good comparative study. Its legal aid system is very comprehensive and well organized. Secondly, Kenya has a common law tradition background. Most of its statute laws are derived from the English common law. Both countries share a common legal background which provides a good legal basis for comparison. Third, legal aid in the UK is provided in each and every stage of the judicial process. A legal aid lawyer is provided from the investigation stage to the stage of conviction or acquittal. In interrogating the right to counsel in UK, the author will look at certain thematic areas of legal aid; specifically, its legal framework and the resultant institutions. The study will interrogate the UK’s legal aid funding
mechanisms. Further, it will analyse the eligibility criteria used in qualifying for legal aid. The study also focuses on how the UK has managed to enforce and implement this right.

There are various thematic elements that will be examined in these three jurisdictions. They include:

a) Constitutional and Legislative Frameworks
b) Institutional Framework
c) Legal Aid Funding
d) Models of Legal Aid
e) Eligibility and Accessibility of Legal Aid
f) Lessons to be learnt from each Jurisdiction.

4.1 CONSTITUTIONAL PROVISIONS OF THE RIGHT TO ASSISTANCE OF COUNSEL AT PUBLIC EXPENSE IN SOUTH AFRICA, UNITED KINGDOM AND KENYA

**South Africa**

The South African Constitution of 1996 has very progressive and expansive provisions on human rights. The Constitution of Kenya 2010 borrowed heavily from the South African Constitution, especially in reference to its Bill of Rights which is widely praised as progressive. Both Constitutions are heavily premised on respecting and promoting the rights of man. The right to legal representation is just an example of these rights as expanded in the Constitution of Kenya 2010.

The **South African Constitution of 1996** is founded on the principle values of the dignity of man, attainment of equality and the obligation of the state to observe and uphold the freedoms and human rights. Every South African should enjoy the protection and benefit of the law equally regardless of the status in the society. This is secured by Section 9 of the Constitution. Where substantive injustice may occur, children must be represented in court by lawyers. Section 28 provides that the state should provide legal assistance to all children brought before court in cases that attract public interest.

The most relevant provision is Section 35 (3) f-g. Section 35(3) secures the right to fair trial for each and every accused person. Specifically, the Section provides that one has a right of choice
with regard to legal representation. According to the provision, indigent persons need to be told of the fundamental right to have representation by a competent lawyer provided by the state if they cannot afford one. Where substantial injustice is likely to occur, then an accused person should be assigned a lawyer by the state at its expense.

**Kenya**

Article 50 (2) h of the 2010 Constitution is a replica of Section 35 of the South African Constitution. Article 50 (2) h obligates the state to provide legal aid to every accused person if substantial injustice is likely to be occasioned. The term ‘substantial injustice’ is incorporated in both Constitutions. The author has argued in chapter one and chapter three that the term ‘substantial injustice’ should be backed up by a legislative framework that properly elaborates its meaning.

**United Kingdom**

The UK has an unwritten Constitution. The right to legal aid is enshrined in its Acts of Parliament.

From the above discussion, one can conclude that enshrining the right to representation in a country’s Constitution is an important step to actualising it. The next part looks at the statutory frameworks in the chosen jurisdictions.

### 4.2 STATUTORY FRAMEWORK AND LEGISLATIVE PROVISIONS OF THE RIGHT TO LEGAL REPRESENTATION IN S.A, U.K AND KENYA

**South Africa**

Before passage and coming into effect of the 1996 Constitution, this right was available to indigent persons pursuant to the Legal Aid Act 1969.\(^{98}\) It established the Legal Aid Agency whose main objective was to provide legal aid to indigent persons at state’s expense.\(^{99}\) The Act had established the South African Legal Aid Board. It was later on renamed to Legal Aid South

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\(^{98}\) No.22 of 1969

\(^{99}\) Section 3 of the Legal Aid Act 22 of 1969
Africa (LASA). The 1969 Act was later on refined to Legal Aid South Africa Act no 39 of 2014.\(^\text{100}\)

There are various pieces of legislations in South Africa with direct and indirect expressions on the right to legal representation. They include:

a) The Legal Aid Act No 39 of 2014
b) The Criminal Procedure Act No 51 of 1977
c) The Child Justice Act 38 of 2005
d) The Divorce Act No 70 of 1979

The Legal Aid South Africa Act no 39, of 2014 establishes Legal Aid South Africa. LASA renders free representation to indigent persons. It gives legal advice to those who cannot afford it.\(^\text{101}\) LASA is also mandated to develop guidelines that facilitate its operation. In 2009, the Board developed the Legal Aid Guide to operationalise the Act.\(^\text{102}\)

The Criminal Procedure Act of 1977 also contains a provision on the right to legal representation. Section 73 provides that indigent people who are arrested should be given legal representation and legal advice. It further mandates the court to inform them of the right to be represented by a lawyer of their preference and choice. Sometimes, where an accused person cannot afford legal representation, the court needs to be proactive in informing the indigent person of the importance of having the assistance of counsel in a case.

Lastly, Section 80 of the Child Justice Act of 2010 provides that children must be provided legal representation in criminal proceedings.

United Kingdom

The law that governs legal aid in the United Kingdom is Legal Aid, Sentencing and Punishment of Offenders Act of 2012. LASPOA establishes the institution that is tasked with the obligation to offer legal aid services in UK. In UK, Prior to the enactment of LASPOA, there

\(^{102}\) Legal Aid South Africa, Legal Aid Guide 2009 11 ed (2009)
existed the **Access to Justice Act of 1999**. The Access to Justice Act created the Legal Service Commission, which was empowered to establish the Criminal Defence Service. The service afforded legal representation to indigent persons throughout the investigation process and the trial process.  

**Kenya**  
The law that governs legal aid in Kenya is the Legal Aid Act of 2016. This Act was recently enacted to operationalise Article 50 (2) h of the Constitution. It establishes the National Legal Aid Service (NLAS). This is the institution bestowed with the duty of administering and managing the legal aid in Kenya. Children are covered by virtue of Section 77 of the Children Act of 2001. This section guarantees children legal aid especially whenever there is a risk of substantial injustice.

From the above enumeration, it is clear that South Africa has an elaborate and more comprehensive legislative and institutional framework. These laws are meant to guard against the violation of this right. The next part looks at the legal aid institutions in these three jurisdictions.

**4.3 ESTABLISHMENT AND COMPOSITION OF THE LEGAL AID BOARD: A COMPARISON**

**South Africa**
The Legal Aid South Africa (LASA) is established by Section 3 of the Legal Aid South Africa Act No 39 of 2014. The Board of LASA is quite broad and diverse. It brings onboard representatives from the judiciary, advocate’s professional bodies, government department, an independent expert on legal aid and lastly six other members who are presidential appointees.  

David McQuoid-Mason examines the independence of the LASA Board in South Africa in relation to other governmental and non-governmental agencies. He states that when the board was first established, despite it being termed as ‘independent’, it comprised of many government officials. He further states that it was previously viewed to some extent as another arm of

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104 Legal Aid Act, Section 20 s 4(1) (g)
government. However, efforts were made to rid it that too close association with the government. This was achieved by bringing on to the board academics, clerics and members of the public.105

**Kenya**

Similarly, in Kenya, Section 9 of the Legal Aid Act of 2016 establishes the National Legal Aid Service (NLAS). The board of the Service is mandated to administer and manage legal aid services in Kenya. Similar to that of South Africa, the Act proposes a broad and diverse agency too. It draws representation from the government, judiciary, community based organisations, religious groups, civil societies etc. Out of the twelve members of the board, there are five government representatives. This amounts to heavy government representation. In order to guarantee independence, there is need to reduce the number of government officials as previously argued in chapter three.

**4.4 FUNDING OF LEGAL AID**

**Legal Aid Funding in South Africa**

The government of South Africa recognizes its obligation to fund activities of the Board. David Mc Quoid – Mason states that legal aid in South Africa has a budgetary allocation which is drawn from the Treasury. The agency is sustainably funded.106

**Legal Aid Funding in United Kingdom**

In the UK, legal aid funding is not a problem at all. Measures have been put in place to guarantee sustainability of the legal aid funding. Funding is provided for in each and every stage of the trial. Funding is availed from the investigation stage to the trial stage. The state has employed lawyers who take up pro bono matters. They are paid very well.107 This acts as an incentive for them to take up pro bono matters. Furthermore, as opposed to Kenya, the people of UK appreciate the to avail lawyers to indigent persons in the administration of justice. This understanding translates to the political will.108

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105 ibid
106 David Mc Quoid-Mason, *Some Reflections on the Impact of the Constitution on Legal Aid In South Africa 1994-2014*
107 LASPOA, Section 27
Legal Aid Funding in Kenya

Previously, there were no sustainable funds allocated for legal aid. Section 29 of the Legal Aid Act established the legal aid fund. As carried out in the UK, funding needs to be availed at each and every stage of the judicial process.

4.5 ELIGIBILITY, APPLICATION PROCESS AND ACCESSIBILITY OF LEGAL AID

South Africa

In determining who should be assisted with counsel, South Africa uses the ‘means test’. It is prescribed in the Legal Aid Guide of 2009. Eligible applicants should be earning not more than R 5 000 for single persons whereas a total of R 5 500 for married couples. Further, the case must be one that will result to substantial injustice if legal assistance is not provided.\(^{109}\)

United Kingdom

In the UK, eligibility criteria are provided for in Section 17 of LASPOA. According to subsection 1(a), the relevant authorities must consider the individual’s financial resources and the interest of justice to be served. In deciding what the interest of justice consists of, certain factors must be taken into consideration. They include:\(^{110}\)

a) Whether the liberty, property or livelihood of an accused person is at stake;
b) In cases that raise substantial questions of law;
c) The complex nature of the trial process and the ability of an individual charged to understand the process;
d) In cases where complex issues are being interrogated; and

Accused persons below the age of 18 are entitled to automatic representation. Representation does not cover those who are able to meet their financial obligations to lawyers.\(^{111}\)

The court may also be invited upon to rule on whether an individual qualifies for legal aid.\(^{112}\)

When an individual qualifies for legal aid, he or she is given a wide variety of choices of service

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\(^{109}\) Legal Aid South Africa Legal Aid Guide 2009 11 ed (2009) paras 5.1.4 and 5.1.5.
\(^{110}\) LASPOA ,Section 17(2)
\(^{111}\) Ibid.
\(^{112}\) Ibid, Section 19
providers from which to choose from. This can be contrasted to the Kenya situation where, in most situations, the accused persons have no choice of the lawyer.

**Kenya**

Kenya is yet to develop specific guidelines especially on the financial threshold of applicants. According to Section 36 of the Legal Aid Act of 2016, the service is available to indigent person who reside in Kenya and are; a citizen of Kenya, child, refugee, victim of human trafficking, internally displaced or stateless person. Further, the court must be satisfied that; the proceedings are serious enough for such expense; is of public interest and where failure to provide legal aid would likely lead to a miscarriage of justice. One should satisfy the service that he or she is incapable of meeting the costs of legal services. There is need to develop specific guidelines to operationalise Section 36 of the Legal Aid Act of 2016.

**South Africa**

With regard to accessibility of legal aid, Legal Aid South Africa leverages on the use of technology. It established call centre services with lawyers on call. The calling services are free with LASA bearing the cost of the service. It also established web contacts which enable clients to get legal aid services online. LASA also uses short messaging services to contact clients. Lastly, it has harnessed the power of social media to reach as many people as possible. Kenya is yet to harness the power of social media to boost accessibility. Kenya is experiencing technology growth and it will be prudent to take advantage of this information tool in creating awareness about legal aid.

**United Kingdom**

Legal aid in the UK is available and accessible at each stage of the proceeding. Section 13 of LASPOA makes provision for representation at the initial stages of a judicial process. Assistance starts from the point where an accused person is held in custody. The accused is initially offered legal assistance at the point of arrest and interrogation while at the custody of the police. It further states that this decision must be made in the interest of justice. Subsequently, before an

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113 Ibid, Section 27
4.6 MODELS EMPLOYED TO OFFER LEGAL REPRESENTATION IN SOUTH AFRICA, UNITED KINGDOM AND KENYA

South Africa

David Mc Quoid-Mason has done a keen analysis of legal aid models in South Africa. He looks at Legal Aid South Africa (LASA) and the methods it has employed in achieving its mandate. He states that the most commonly employed method in delivering legal aid is the public defender system.\(^{115}\) In Kenya, the commonly employed method has been legal aid through judicial referral to private lawyers.

According to David Mc Quoid-Mason, university students in South Africa assist in tasks such as preparation of documents, carrying out research and advising clients.\(^{116}\) Most university law clinics in South Africa are independently funded. They are run by the students themselves. Students either work in those clinics or are assigned to other partnership organisations as volunteers.\(^{117}\) A number of universities in Kenya do run law clinics too, though not as vibrant as South Africa. A good example is the Students Association for Legal Aid and Research (SALAR) of the University of Nairobi. It is an organisation which offers advice of a legal nature to accused persons but with the guidance of mainstream organisations. It has partnered with mainstream legal aid providers such as NALEAP, Kituo cha Sheria and Kenya Human Rights Commission. Moi University Legal Aid Clinic (MULAC) is also engaged in assisting indigent clients. Students in these organisations do undergo basic trainings which equip them with advocate client

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\(^{117}\) David McQuoid-Mason, *The Organisation, Administration and Funding of Legal Aid Clinics in South Africa* (1986) 1 NULSR 189, 193
engagement skills. These law clinics do not operate on their own. They have collaborated with mainstream legal aid service providers. They are called upon by the mainstream organisations whenever there are legal clinics. For example, Kituo cha Sheria conducts legal aid on Tuesdays and Thursdays. On these two days of the week, they invite law students to assist in advising the clients under their guidance.

Just like Kenya, South Africa too has various public interest organisations which assist indigent clients. One good example is the Legal Resource Centre (LRC) which was established in 1979. This organisation represents the poor and the marginalised. It does not receive state funding, neither does it charge fees. These organisations receive funding from donor organisations. Similarly, Non Governmental Organisations in Kenya are in the fore front in offering legal aid services. They depend on donor funding to facilitate their activities. Some of them include the Kenya Human Rights Commission (KHRC), CRADLE, Children Legal Aid Network (CLAN), Kituo cha Sheria and FIDA Kenya.

The UK has employed various models to deliver legal aid. The UK encourages lawyers in private practice to offer pro bono services. Citizen Service Bureaux and law centres have also been established to offer legal services at the grass roots. Organisations in the UK must however have authorization from the Legal Aid Agency before providing legal aid services.118

4.7 LESSONS THAT KENYA CAN LEARN FROM THE UK AND SOUTH AFRICA

First and foremost, Kenya needs to develop comprehensive regulations and guidelines to operationalise the Act. The regulations and guidelines will expound on the Act by giving specific details on how to operationalise legal aid. Both South Africa and the UK have comprehensive legal aid frameworks and that explains why their systems are very efficient. The Legal Aid Act needs improvements to march up the systems in UK and SA. Specific guidelines are needed to provide for eligibility criteria. Further, guidelines are needed to facilitate for accessibility of legal aid. There is also need for guidelines to provide for specific procedures on the Application process.

118 United Kingdom Citizen Advice
In determining specific eligibility criteria, the UK offers quite a useful guide. Further, the means and merit test practiced in South Africa should be adopted. Kenya should set a financial cap for prospective candidates. In determining who should be afforded legal aid, the law should provide for considerations such as; the consequence of the decision to an accused person, substantial questions of law that do arise, and the ability of an accused person to understand criminal proceedings. The law should however be made flexible to give discretion for the court to consider other circumstances. The law should not be too restrictive and rigid. The concept of legal aid in Kenya is still under exploration and therefore the law ought to give room for judicial discretion in case there are unforeseen situations that deserve legal aid.

In pursuit of quality legal aid, Kenya can borrow from the monitoring and evaluation techniques used in South Africa. LASA has developed comprehensive monitoring and intervention programmes. It conducts targeted recruiting to get the best talent. It also introduced extensive legal aid training and development programmes. It developed mentoring, coaching and support programmes. It set up online research and discussion forums for lawyers to help build capacities. Lastly, it conducts quality monitoring reviews periodically.\(^\text{119}\)

Whereas the perception in Kenya is that legal aid should only be afforded at the trial stage, the UK offers legal aid throughout the criminal proceedings. Funds have been allocated at each stage of the trial. This provision should be adopted in Kenya too. There is need to specifically provide in the Act that legal aid shall be offered in each stage of the proceeding beginning from the Police Station.

The government has no option but to avail funds meant for legal aid. The Legal Aid Fund is established by Section 29 of the Act. It however requires political goodwill and fidelity to the law for its implementation.

Kenya, like the UK, should devise mechanisms which allow an eligible accused person to have a wide variety of choices of legal service providers from which he or she can choose. In certain cases, it might be in the interest of justice that an accused person is provided for with a lawyer of his or her own choice.

Lastly, Kenya, like South Africa, should harness the power of technology in creating awareness about legal aid. LASA has established call centers where indigent persons call and request for services. It also has a short text messaging system through which people communicate to the organization. It has a functional online website through which indigent persons can reach the legal aid service providers.

More lessons shall be recommended in the next chapter which is on Recommendation and Conclusion.

CHAPTER FIVE: RECOMMENDATION AND CONCLUSION

5.0 RECOMMENDATION

The legal aid landscape in Kenya has faced a lot of challenges. Most of these challenges have been highlighted and discussed in the previous chapters. In this chapter, the author purposes to recommend solutions while highlighting the anticipated challenges. This chapter incorporates lessons learnt and practices that could be adopted from other jurisdictions.

First and foremost, the government should realise that the right to assistance of counsel is a creation of the Constitution. The state must therefore realize its obligation under the Constitution. One of the main challenges of legal aid has been the lack of political good will from both the politicians and also the members of the public. The concept of legal aid has over time not been viewed with the seriousness it deserves. The state must recognise that legal aid is not only enshrined in the Constitution, it is now operationalised by the Legal Aid Act of 2016. It should therefore acknowledge its role and provide resources to enable establishment of the National Legal Aid Service (NLAS).

Moving forward, the Legal Aid Act should be implemented in phases. The first phase should entail the establishment of the National Legal Aid Service (NLAS). Currently, there is, in
existence, the National Legal Aid Programme (NALEAP). The existence of NALEAP paves way for a smooth transition. The foundational structures for NLAS are already in place. The NLAS should begin setting up its offices. The government should provide the resources needed to roll out its programmes. The challenge that is most likely to be phased in the transitional stage is resistance and non-cooperation from the other government agencies. The NLAS should strive to solve any dispute diplomatically i.e through mediation and negotiations.

The second phase should entail drafting regulations and guidelines under the Legal Aid Act of 2016. Regulations are necessary to operationalise and give effect to the Act. The specific regulations to be formulated include, but not limited to, the following: regulations setting out eligibility criteria (means and merit test), regulations setting out quality and standards of legal aid; regulations on the Legal Aid Fund; regulation on monitoring, reporting and evaluation; and the manual on training and capacity development for legal aid lawyers. The NLAS should thereafter develop a work plan setting out its programmes and activities for a specific period. Drafting regulations and guidelines is a technical process. The challenge in drafting regulations is that if wrongly done, there is a risk of watering down the provisions of Article 50 (2) h and the Legal Aid Act 2016. In order to ensure compliance with the law, the NLAS should engage the services of technical experts. It should also engage the stakeholders in developing these regulations.

The third phase entails setting up the Legal Aid Fund and providing a budgetary allocation for it. Funds should be allocated for administrative expenses, implementation of programmes and activities, facilitation of legal aid lawyers, creation of awareness and facilitating outreach programmes. Legal aid funding has for long time been a challenge. It is important that the NLAS diversify the funding base by bringing on board more partners. On matters of finances, there is always a challenge of misappropriation of funds. In order to avoid cases of misappropriating funds, specific guidelines providing for the way of handling funds should be developed. Very high standards should be demanded whenever one is handling the funds. Money set aside for legal aid should be spent in a cost-effective way. Cases of misappropriation should be dealt with severely. Heavy penalties should be imposed for offences relating to misappropriation of funds. Strict financial accounting and reporting standards should be applied. The guidelines should provide for internal and external auditing.
The NLAS should engage the various stakeholders as it seeks to develop capacity. It should reach out to government agencies, nongovernmental organisations, private institutions and development partners. It should build partnership with other like-minded organisations. It should facilitate the coordination and cooperation of legal aid service providers. The importance of reaching out is to enable exchange of ideas, sharing of information and resource mobilisation. Specifically, NLAS should engage the Kenya Police, Kenya Prisons, Attorney General, Office of the DPP, Directorate of Criminal Investigations and the Judiciary. These institutions handle accused persons in one way or the other. It is important that they are sensitized on the need for legal representation.

The state should diversify the kind of institution which do offer legal aid services. The state by itself cannot meet the huge legal aid demand. The demand for legal representation far surpasses the supply thus the need to bring everyone on board. In addition to civil societies, which for a long period of time have been actively involved, other players such as religious and community based organisations should step up their involvement. The government should develop guidelines for effective referral mechanisms from one legal aid provider to another.

The NLAS should partner with the university law clinics and undertake joint programmes. This will build the law clinics’ capacity and strengthen their ability to conduct legal aid. Established legal aid providers should offer comprehensive trainings to university law clinics. The established legal aid providers should monitor and supervise the activities of the university clinics. The main challenge faced by university law clinics is lack of resources. Sometimes students finance legal aid activities from their pockets. The clinics rarely receive financial support from the respective universities. The other challenge faced by these clinics is inadequate time to carry out their activities. Law students juggle between attending classes and conducting legal aid. The universities’ management should develop flexible programmes to give room for legal aid activities.

The Civil Society Organisation (CSO) should support the state in providing legal aid services. The main challenge experienced by CSOs is over reliance on donor funds. As a result of being heavily reliant on donor funds, their activities halt whenever there are no donations. The CSOs
should look for multiple sources of funds in order to carry out their activities more consistently and effectively.

Accused persons should have access to legal representation at each and every stage of the judicial process. In Kenya, the emphasis has been providing lawyers during the trial process only. This approach needs to change change. The criminal justice system begins from the point when an accused person is arrested, through out to investigations, trials and lastly, Sentencing. In fact, some would argue that legal aid is most important at the preliminary stages of the case. It is at these early stages that an accused person is most vulnerable. During the trial process, at least, there is the watchful eye of the Court. Rogue police officers usually employ various tactics to desperately obtain information from the accused persons. These tactics include intimidation, coercion, trickery and threats. These tactics result to confession, admission or even self incrimination. The absence of a lawyer at these early stages could be detrimental to an accused person. A lawyer is required to guard against such illegal behaviours. The challenge effecting this recommendation is that it requires huge amounts of resources. The solution would be to mobilise resources and to diversify the sources of funds.

The Courts should ensure that indigent persons are provided with legal aid. They are better placed to inform an accused person about the existence of this right. The Court should guard against ineffective representation. It should raise a red flag whenever it notes that poor services are being rendered. The judicial officers should exercise their discretion in directing the state to provide legal assistance whenever they deem fit. In jurisdictions such as Ireland, the judge has a legal obligation demand that an accused person be offered the assistance of counsel by the state especially if one faces a potential jail term. If an indigent person does not have the money to hire a lawyer, the judge must direct the state to provide a counsel. Judicial officers are better placed to consider the merits and the circumstances of an individual in making a decision whether a person qualifies for the right of assistance of counsel at public expense. The judicial officers should consider questions of means, merit and the interest of justice before making a finding on whether one is eligible for legal aid.

Lawyers who provide free legal aid are generally perceived to offer low quality service as a result of lack of motivation. Well thought out programmes should be put in place to enhance the nature and quality of services being offered by various legal aid service providers and individual lawyers. The NLAS should develop guidelines that stipulate the minimum quality standards expected of the service providers. It should also develop standardized training for lawyers. It should come up with a proper evaluation and monitoring mechanism for those who offer legal aid services.

The Law Society of Kenya (LSK) should provide incentives that will make lawyers pro active in taking up pro bono cases. For example, LSK should provide logistical and material support to lawyers who take up pro bono matters. It should also reward dedicated lawyers who frequently engage in pro bono work. The LSK should raise funds to facilitate lawyers who engage in pro bono.

In spite of the challenges that do face the legal aid sector, some members of the public do not even know of the existence of the current institution that do offer legal aid services. There is need to educate and create awareness on the legal aid options available to members of the public. The government should launch a national legal aid media campaign to reach out to the members of the public through television, radio and printed media. The government could as well come up with a ‘legal aid day’ for purposes of educating and raising awareness.

The Legal Aid Act should be amended to additionally include foreigners as potential beneficiaries of legal aid. As it stands currently, foreigners are not eligible to apply for legal aid. There should be no discrimination in providing legal aid. The laws of eligibility should apply uniformly to all applicants. Article 27 of the Constitution prohibits discrimination on any grounds. There are, however, situations which call for special considerations. There should be a deliberate effort to extend legal aid services to children, women and persons with disabilities.

In formulating a policy and a legal framework on the right to assistance of counsel a public expense, the focus need not to only be on enhancing accessibility of legal assistance to many people, but also on ensuring that quality legal aid is offered. So as to guarantee a quality service, there is need to ensure that the lawyers being recruited to offer legal aid service are highly qualified. The lawyers should be tested on their knowledge of the law. They should be tested on
their understanding of the criminal justice system. They should be interrogated on their interpretation and appreciation of facts. Their history of dealing with clients should also be examined. Lastly, their ethical code of conduct should also be examined.

Guidelines and regulations that specifically spell out the terms of engagement between a legal aid lawyer and indigent accused persons should be developed. This framework would enhance accountability and transparency in the manner in which a legal aid lawyer carries out his or her duties in relation to the client. The framework should contain provisions on accountability, client update, feedback mechanisms, client satisfaction, case preparation, reports etc. For example, a lawyer needs to update the indigent accused person on the progress of his or her case. The lawyer is supposed to prepare him or herself and also the accused person whenever there is a trial. He or she is supposed to prepare reports for purposes of reporting to the appointing authorities. It is important that whenever a lawyer assigned to an indigent accused person demonstrates lack of commitment, chronic absenteeism or fails to act in the interest of the accused person, the relevant authorities must replace the lawyer with a more competent lawyer. A state appointed counsel should have adequate time to prepare for a case. The lawyer should be given sufficient resources to prepare for the defence.

Regulations which provides for proper channels of raising complaints should be formulated. Aggrieved accused persons should have well laid out structures for raising complaints. They should have forums for complaining whenever they feel that they are being poorly represented. An accused person should have an opportunity to give feedback on the nature, quality or level of satisfaction with the service offered. The feedback obtained should be used in improving services rendered to them. Feed backs are important in informing actions and developing policies.

Political office holders and members of the public should adopt a favourable attitude towards legal aid. There has been a lack of political will to initiate and implement legal aid programmes. Legal aid is not viewed as a priority. This attitude explains the reason for the delay in enacting the Legal Aid Act of 2016. The idea of assisting perceived ‘criminals’ is viewed as a waste of resources. This attitude needs to change. Educational programmes should be developed to create awareness to members of the public.
The NLAS should be creative and innovative while developing its activities and programmes. It should strive to employ cost effective measures in going about its activities. It should embrace technology in advancing its outreach and educational programmes. NLAS should use electronic media and the internet to sensitize people about matters relating to legal representation.

The NLAS should develop vibrant outreach programmes. It should organize frequent tours to meet the people in order to effectively educate them on how to access legal aid. In certain jurisdictions such as the UK, legal aid is made available to social centres such as community health centers, hospitals, day care centers, community colleges and citizen’s advice bureau etc. Kenya should adopt such practices.

This issue of legal representation should not be viewed in isolation. It needs to be viewed closely with the broader concept of access to justice. Consequently, the Judiciary should continue with the reform agenda to enhance access to justice. The Judiciary should remain independent, efficient, fair and cost effective. It should strive to win the public confidence. An effective and efficient judicial system impacts positively on legal aid.

Legal aid should only be availed to those who need it most. People who can pay for legal representation should not be given legal assistance. This will ensure that many deserving cases are assisted.

5.1 CONCLUSION

In conclusion, generally the idea of providing legal aid for alleged ‘criminals’ has not been very popular in Kenya. This has translated into a lack of political will. However, the narrative is changing.

From this research, it can be concluded that Kenya has faced a lot of challenges in implementing the right to assistance of counsel at public expense. The major problem has been the lack of a policy and legislative framework. However, due to the enactment of the 2010 Constitution, the conversation about this right has changed. The state should realise that it has an obligation to develop policies and guidelines necessary for effecting this right. It is commendable that there is already the Legal Aid Act of 2016 in existence. The act should be amended to capture the proposals made in this study.
Even as we develop our own legal aid system, it is important to take into consideration the lessons learnt in the comparative study. As illustrated by the study, there is so much to borrow from South Africa and the United Kingdom. Both countries have a very reliable legal aid system sustained by comprehensive legislative frameworks.

In conclusion, there is more hope than despair. Kenya is on the right track. Yes, there are challenges, but a legislative and policy framework will help in addressing most of these challenges. Justice dictates that the Legal Aid Act of 2016 be improved as recommended and implemented fully.

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